Welcome to the Summer 2017 edition of our newsletter

The year continues to bring big changes to the political landscape with the recent general election result. As the dust settles and formal Brexit negotiations begin, we will continue to keep you updated with legal, financial and international developments. The Government’s planned probate fees increase was brought to a screeching halt, but only after we had worked tirelessly to ensure all probate applications were completed in anticipation of the proposed May deadline. Despite the short notice period, our commitment to our clients’ needs was paramount and we were pleased to complete all to our high standards.

The much-anticipated Finance Act 2017 (due to come into force from 6 April 2017) has been halted in progress through Parliament with the vast majority not being enacted. This means that as matters stand the changes to the taxation of non-doms (please get in touch if you would like to read our booklet with full details) have not materialised. However, before too much jubilation, it is expected that the contents of the draft Finance Bill will be re-scheduled for parliamentary approval fairly shortly after the general election and with little or no substantive amendment – watch this space.

Team news

We are delighted to announce that Hetty Maher has been promoted to the partnership. Hetty joined the Tax and Private Client team in 2011 and specialises in onshore tax and private client business. She is the principal contact for many of our longstanding clients, families and trusts, and also provides advice on charity matters.

Claudia Whibley has joined the Private Client team as an Associate Solicitor. Claudia is an experienced advisor on all areas of private wealth, tax, and trusts, estate and succession planning.

We have also strengthened our Property service with the appointment of a four-strong team focusing on the sale, purchase and management of residential and commercial real estate. You can read their professional profiles on page 10.

In this issue, we cover:

- The Supreme Court judgment in Ilott v Blue Cross & Others
- Relocating as a single parent
- The importance of notifying landlords of disrepair
- Whether EEA nationals should apply for residence documents
- Landlords discriminating against tenants under ‘right to rent’
- An update to the Residence Nil Rate Band (RNRB)

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

As always, if you would like to discuss any matters we would be pleased to hear from you.
Supreme Court unanimously allows the charities’ appeal in Ilott v The Blue Cross & Others

The controversial and fascinating case of Ilott v The Blue Cross & Others concluded on 15 March 2017 with the Supreme Court unanimously ruling in favour of the animal charities in a daughter’s claim under the Inheritance (Provision for Family and Dependants) Act 1975.

Background

The claimant, Heather Ilott, was originally awarded £50,000 at first instance after she challenged her mother’s will under the Act. Mrs Ilott had been estranged from her mother after leaving home aged 17 and was excluded from her mother’s will in favour of three animal charities: the Blue Cross, the RSPCA and the RSPB.

Mrs Ilott appealed to the Court of Appeal on the grounds that £50,000 was too low and would unfairly deprive her of means-tested benefits. The Court of Appeal allowed her appeal and awarded her £143,000 to buy the rented home she lived in and an additional £20,000 income, structured so as to preserve her state benefits. The charities appealed against this decision.

The Supreme Court’s decision strengthens the right to testamentary freedom and will be a welcome result for charities.

The Supreme Court’s landmark decision offers helpful guidance on how to determine ‘reasonable financial provision’ where a claimant is an adult child with financial independence.

The Supreme Court was asked to consider whether the Court of Appeal:

1. Was wrong to set aside the £50,000 awarded at first instance
2. Erred in its approach to maintenance
3. Was wrong to structure an award so as to allow Mrs Ilott to retain her state benefits
4. Erred in its application of the balancing act required under the Act

On 15 March 2017, in what many will see as a major victory for charities, the Supreme Court unanimously allowed the charities’ appeal and reinstated the original decision to award Mrs Ilott £50,000.

A testator’s chosen beneficiaries do not have to justify their entitlement either by need or expectation of benefit.

The Supreme Court gave the following reasons for its decision that £50,000 represented reasonable financial provision for Mrs Ilott:

1. The concept of maintenance ‘cannot extend to any or every thing which it would be desirable for the claimant to have. It must import provision to meet the everyday expenses of living.’ The Supreme Court stressed the importance of restricting awards to adult children to ‘maintenance’, which is distinct from providing legacies and certainly does not mean providing for all of the applicant’s needs.
2. ‘Need is a necessary but not a sufficient condition for an order.’ Even though Mrs Ilott could demonstrate a need for maintenance due to her strained financial circumstances, her needs must be balanced against her mother’s wishes and other factors in Section 3 of the Act.
3. ‘The circumstances of the relationship between the deceased and the claimant may affect what is the just order to make.’ A long period of estrangement was the reason the mother did not include her daughter in her will. Whilst that meant there was a failure to make reasonable financial provision for Mrs Ilott, what constitutes a reasonable provision will be ‘coloured by the nature of the relationship between mother and daughter.’

4. A testator’s chosen beneficiaries do not have to justify their entitlement either by need or expectation of benefit. This judgment can be seen as a major victory for charities generally. The Supreme Court acknowledged the reliance of charities on the legacies they receive in wills and made particular reference to the fact that Mrs Ilott’s mother had no connection with the charities during her lifetime. In spite of this, the Supreme Court ruled that the charities represented ‘her freely made and considered choice of beneficiciaries’, and as such her will should be carried out.

5. £50,000 constitutes a reasonable award as it would allow Mrs Ilott to purchase essential household items and improve her standard of living. If she spent enough, she could leave behind a sum small enough not to affect her state benefits.

6. Awarding appreciating capital goes beyond the scope of maintenance. The Supreme Court made it clear that if housing is to be included as maintenance, it is more likely that this provision will be made by way of a life interest rather than by a capital sum.

In Lady Hale’s supplementary judgment, she remarked upon the ‘unsatisfactory’ state of the present laws on inheritance and called for stronger ‘guidance as to the factors to be taken into account in deciding whether an adult child is deserving or undeserving of reasonable maintenance.’

What could this ruling mean?

The Supreme Court’s decision strengthens the right to testamentary freedom and will be a welcome result for charities, many of which rely heavily on the legacies they receive in wills. However, this ruling could make it harder for adult children to challenge a parent’s will if they have not been left with what they deem to be a reasonable provision. We may also see further guidance being issued on what constitutes maintenance and reasonable financial provision after Supreme Court judges were critical of the current legislation and guidance.

This case is a classic example of the need for expert advice when you are dealing with your will and succession planning.

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Relocating within the UK as a single parent

If a single parent wants to relocate within the UK, they do not require the consent of either the other parent or the court. If, however, one parent opposes the other’s plans to relocate, either parent could make an application to the court.

The parent wishing to move would apply for a specific issue order and the parent wishing for the other to stay would apply for a prohibited steps order (prohibiting them from moving) or a Child Arrangements Order (setting out terms of residence and contact).

Below is a short summary of the relevant case law and the principles the court must apply in determining both internal (i.e. within the UK) and external (i.e. international) relocation cases.

If you wish to make or oppose an application of this nature then we can help, from providing the initial advice, guiding you through the Court process and presenting your case in the strongest possible way.

Welfare of the child

Historically, internal relocation cases and external relocation cases had been kept separate and courts appeared to approach them differently, but the Court of Appeal has made it clear in the case of Re C that there is no difference in the basic approach between the two. The decision in either type of case hinges ultimately on the welfare of the child, as this is the court’s paramount consideration and the governing principle in these types of cases.

The wishes, feelings and interests of the parents and the likely impact of the decision on each of them are of great importance, but only in the context of evaluating and determining the welfare of the child.

Exceptional circumstances

Despite the court appearing to suggest that a relocation request would be refused only where there were exceptional circumstances in a separate case, the court in the case of Re C confirmed that there is no rule that moving a child within the UK could only be prevented in exceptional cases. Whilst a court would be resistant to prevent a parent from exercising their choice as to where to live in the UK unless the child’s welfare required it, that was not because of an exceptionality rule, but because the welfare analysis led to the conclusion.

Important factors

In either type of relocation case, a judge is likely to find helpful some or all of the considerations referred to in Payne v Payne, but not as a prescriptive blueprint, rather and merely guidance as to the sort of factors which might need to be weighed in the balance when determining which decision would better serve the welfare of the child. Guidance from Payne will help to identify the likely important factors, but will not be applied rigidly.

The following considerations were raised in Payne:

- Pose the question: is the mother’s application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child’s life? Then ask, is the mother’s application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests, refusal will inevitably follow.
- If, however, the application passes these tests then there must be a careful appraisal of the father’s opposition:
  - Is it motivated by genuine concern for the future of the child’s welfare or is it driven by some ulterior motive?
  - What would be the extent of the detriment to him and his future relationship with the child were the application granted?
  - To what extent would that be offset by extension of the child’s relationships with the maternal family and homeland?

What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?

The outcome of the second and third appraisals must then be brought into an overtaking review of the child’s welfare as the paramount consideration.

In Payne v Payne the judge was careful not to diminish the importance that the court has consistently attached to the emotional and psychological wellbeing of the primary carer and it was confirmed that, in any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor.

Welfare of the primary carer

In the case of Re C, the mother wished to move from London to Cumbria with her 10 year old child. The judge accepted that if the mother was forced to stay in London she would feel deeply unhappy and he found that her feelings were likely to have a serious and very harmful impact on the child.

He considered that the relationship between the child and the father was sufficiently well-established to continue as it was, even if the quantum of contact changed and that the parents’ relationship would inevitably deteriorate if the mother was unable to move. The mother was permitted to move to Cumbria and it was the child’s (and the mother’s in so far as they were relevant) best interest that dictated the outcome.

Landlords discriminating against tenants under the ‘right to rent’ scheme

A recent report has demonstrated that the Government’s controversial ‘right to rent’ scheme is discriminating against potential tenants. The Joint Council for the Welfare of Immigrants (JCWI) found that over half of landlords surveyed admitted that the new right to rent rules would make them less likely to let their property to foreign nationals.

What is the right to rent scheme?

It is the checks that landlords must carry out to ensure a prospective tenant has the right to rent in the UK and was introduced as part of the Government’s attempt to control immigration by preventing people who are in the UK unlawfully from accessing key services such as housing and came into force in England from February 2016.

The scheme requires landlords of residential properties to check the status of prospective tenants to ascertain whether the tenant has the right to be living in the UK. Landlords can be fined up to £3,000 for failing to comply with the legal checks and also face criminal sanctions including imprisonment.

What should landlords do?

Landlords must ensure they are familiar with their legal obligations about how to carry out the right to rent checks. Failure to get the checks right will prove to be expensive and possibly a criminal act. Failure to apply the checks fairly and without discrimination will also give rise to claims for discrimination with compensation awards of up to £30,000. It is vital therefore that landlords are fully aware of their legal obligations to avoid a civil penalty, criminal sanctions and to avoid allegations and claims of discrimination.

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The importance of notifying landlords of disrepair

It is unusual for the higher courts to consider s11 of the Landlord and Tenant Act 1985 (s11) but the last year has seen a significant decision by the Supreme Court, albeit one which is bad news for residential tenants.

S11 sets out an implied repairing obligation for all tenancies for a term of less than seven years. Landlords must ‘keep in repair the structure and exterior of the property’ (in the absence of a rare exclusion by court order).

The case of Edwards v Kumarasamy concerned a property let on a long lease to Mr Kumarasamy. There was a car park, which contained dustbins, and a paved area between it and the front door, over which Mr Kumarasamy had a right of way. The freeholder agreed to maintain the common parts but would only be liable for a breach of this covenant if given notice of any defect.

Mr Kumarasamy granted an assured shorthold tenancy (AST) of one flat to Mr Edwards. He was on the path to the dustbins when he tripped and fell, injuring his hand and knee, and sued his landlord. The question was whether the paved area fell under the landlord’s repairing obligations in the lease.

The Supreme Court considered that the ‘exterior of the property’ should be given its ordinary meaning and too wide a meaning should not be given to a landlord’s obligations. The exterior of a building stops at its outside walls and does not extend to rights of way attaching to the property.

Was it relevant that Mr Kumarasamy had not noticed the uneven paving stones? Are landlords obliged to repair the common parts of a building within their control if they are not on notice of the disrepair?

The court confirmed that notice is required, in the absence of express provisions to the contrary. Mr Kumarasamy’s right to walk the path became Mr Edwards’ under the AST. The tenant had the best opportunity to spot the disrepair despite the landlord’s right to inspect the flat.

The case confirms the need for tenants to give their landlords notice of any defects before accidents occur in order to be able to hold them liable.

Residence documents: To apply or not to apply

We are currently receiving lots of queries from EEA nationals asking about the need to apply for residence documents, and in particular documents certifying permanent residence.

Permanent residence is an automatic right, but it does not automatically provide the EEA national with a physical document. For this document, you need to apply to the Home Office for:

- Registration card or certificate – if you have lived in the UK for less than five years
- Permanent residence document – if you have lived in the UK for five years or more

Yes, the application is 85 pages long, but in reality only a few sections are applicable to each applicant.

Do I need to apply?

It is not mandatory for an EEA national to hold documentation certifying residence or permanent residence in the UK, but we think that anyone who is planning to remain in the UK should apply. It makes sense to obtain a document which confirms your residence or settled status. Holders of these documents will avoid questioning by immigration control upon returning to the UK after traveling, and avoid delays when seeking employment. And if this doesn’t convince you, the fact that the application fee is still only £65 might.

One of the most important reasons to apply for this document is the potential end of free movement rights and likelihood that the Home Office will introduce a policy under which EEA nationals will be required to apply for identification documenting their right to remain in the UK.

We are currently receiving lots of queries from EEA nationals asking about the need to apply for residence documents.

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It is expected that once the UK replaces the European Regulations (which currently govern applications for EEA registration certificates and cards), the Home Office will impose higher application fees. And, at the moment, one of the cheapest applications for leave to remain under the Immigration Rules (rather than EEA Regulations) is £811.
Residence Nil Rate Band (RNRB) – Key points to remember

The Residence Nil Rate Band (RNRB) came into force on 6 April 2017. Here we set out a summary of important points to note.

We have written a comprehensive guide available on www.rlb-law.com and can post you a booklet upon request; please email hayley.dove@rlb-law.com.

What is RNRB?

RNRB is available for deaths on or after 6 April 2017 when a residence or an interest in a property is ‘closely inherited’.

‘Closely inherited’

- Closely inherited means that it must pass to a lineal descendant or to a spouse of a lineal descendant (including a spouse of a pre-deceased lineal descendant provided that the surviving spouse has not remarried).
- A lineal descendant includes children, grandchildren, step-children, foster children, children under a special guardianship order and adopted children (and the lineal descendants of all aforementioned).
- Lineal descendant does not include nieces or nephews or wider family members.
- Inherited means disposed of by will, under an intestacy or otherwise by survivorship.
- A deed of variation could be used to vary the position post death to ensure that the RNRB is available as this can be read back for all IHT purposes under s142 of the Inheritance Tax Act 1984.

‘Residence’

- Residence or an interest in a residence left to some settlements will be treated as inherited, these settlements are immediate post-death interest trusts, disabled person’s trusts or bereaved minor trusts. A discretionary trust will not qualify even if all of the potential discretionary beneficiaries are lineal descendants.
- A relevant property trust will not qualify but it would be possible to make an appointment from the trust within two years and to read this appointment back into the Will for IHT purposes.
- The appointment mechanism could be used to appoint a residence to a lineal descendant or to create a qualifying immediate post-death interest trust.
- A residence is a property (‘dwelling’) which has been the residence of the deceased at some time during their period of ownership, it need not be the deceased’s ‘main’ residence nor is there a requirement that they are resident for the whole period of the ownership of the property.
- The property need not be situated in the UK.
- A buy-to-let property would not qualify as it will not have ever been the residence of the deceased.
- A dwelling is any land occupied with its garden and grounds but excludes any woodland which is subject to a deferral election.

RNRB available

- The enhanced RNRB will be £100,000 for April 2017/18.
- The RNRB will rise by £25,000 per year until April 2020/21
- From April 2021 the RNRB will increase in line with the Consumer Price Index
- The RNRB is capped at the value of the deceased’s residential interest.
- If there is more than one property then the personal representatives of the deceased must nominate which property the RNRB will apply to.
- Debt charged on the property are deducted for IHT purposes and will therefore reduce the value of the property.

‘Taper threshold’

- There is a taper threshold (currently £2 million) whereby the RNRB is reduced by £1 for every £2 which exceeds the taper threshold. This threshold will increase in line with the Consumer Price Index from 2021/22. If your estate is likely to exceed this threshold then consider making lifetime gifts to reduce the estate below this threshold.
- It is advisable to avoid aggregating spouses’ estates so that they exceed the threshold. Consider the use of nil rate band discretionary trusts or passing the estate to others.
- The value of the estate is the estate immediately before death after the deduction of liabilities but before the deduction of any reliefs or exemptions.
- Gifts made during the lifetime of the deceased are not included in the value of the estate when considering the taper threshold.

Transferable RNRB

- When a person dies and they have not used their RNRB then this can be transferred to the surviving spouse.
- The RNRB can be transferred even if the first to die did not have any property.
- The transfer of the unused RNRB must be claimed.
- The RNRB is only available on death and cannot be claimed for lifetime transfers.
- If a property was given away and the deceased retained a benefit in the property then this gift with a reservation of benefit would form part of the deceased estate and if the gift was to a lineal descendant then the RNRB can be claimed.

Downsizing

- It may be possible to rely on the downsizing provisions inserted by the Finance Act 2016 if a person has disposed of their property or moved to a less valuable one. The downsizing calculations are complex and advice should be sought and anyone who is downsizing should keep paperwork and records.
- For downsizing the total chargeable estate passing on death must be greater than the value of any residential property once owned and property must be closely inherited. The downsizing that can be claimed is capped at the value of the closely inherited property.
- Downsizing cannot be claimed on gift of a residence that creates a reservation of benefit.

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E.
Welcome new joiners

Claudia Whibley

Claudia joins our Tax and Private Client team as an Associate in our London office.
Claudia offers expert advice to both UK-based and international clients, including families, individuals, trustees and business owners, on all private wealth matters, including tax, trust, estate and succession planning in the UK and on cross-border issues.

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Property team

A team of three partners, Ping Leung, Philip Vickers and Hei Leung, and consultant Martin Standen, have joined our Property team
The team adds to our considerable expertise in acting for wealthy overseas individuals, investors, trust companies and private banks on all aspects of residential and commercial real estate portfolios, and bring a strong client following in South Asia, the Far East and China. Ping and Hei are fluent in both Cantonese and Mandarin.

Ping, Philip and Martin were all previously partners at Veale Wasborough Vizards in its London office.

W. www.rlb-law.com/people/property

Settlement agreements: What are the tax implications?

What is a settlement agreement?
Settlement agreements, once signed by the employer and employee, allow both parties a clean break from the employment relationship. In most circumstances, the employee will agree to waive the right to bring claims against the employer in return for a sum of money.

Sejal Raja, Head of Employment, provides a summary of whether the payments made under a settlement agreement can be paid tax-free.

1. Salary/benefits/holiday pay
All payments made for salary, benefits and holiday pay are subject to tax and National Insurance deductions. This is because these payments are made pursuant to the contract of employment.

2. Payment in lieu of notice
This will depend on the terms of the employment contract. If the contract specifically allows for a payment in lieu of notice then it is a contractual payment, so tax and National Insurance should be deducted. However, if the contract is silent as to whether the employment can be terminated by making a payment in lieu of notice then up to £30,000 may be paid tax-free. The former employee should take care where the employer usually makes payments in lieu of notice; in these circumstances HMRC may deduct tax and National Insurance.

3. Redundancy payments
Redundancy payments can be paid tax-free up to £30,000.

4. Pension payments
Any payments that are made directly into a pension scheme will be treated separately and will not be subject to tax.

5. Restrictive covenants and confidentiality obligations
It is common to include a clause in the settlement agreement that employees will comply with their obligations of confidentiality, re-confirm any restrictive covenants that may be included in the contract of employment or introduce new restrictive covenants. To ensure that these clauses are enforceable there must be consideration, which can be anything between £100-£500. This payment is taxable and liable to National Insurance contributions.

6. Injury to feelings
Where claims for discrimination are made and settled, any payments that are attributable to injury to feelings will not be taxable. However, care should be taken to ensure that the appropriate level of injury to feelings has been assessed appropriately.

7. Payment for disability or injury
If a payment is made because somebody is disabled or injured, it can be tax-free. It must, however, state that it relates to the fact of the injury or disability and not any other consequential effect of loss of earnings.

8. Legal costs
Usually an employer will pay the employee’s legal costs. This does not count towards the £30,000 exemption as long as it is solely for the purposes of taking advice on the termination of employment.

If you have any questions or would like us to review a settlement agreement, please get in touch.

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Our services

In addition to our tax and private client services, we offer a complete legal service across business, regulatory and not-for-profit sectors. To find out more about any of our services listed here, please get in touch.

- Business Services
- Charity
- Commercial Litigation
- Corporate
- Employment
- Family
- Health and Social Care
- Immigration
- Intellectual Property
- Professional Discipline and Regulation
- Property
- Property Litigation
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RadcliffesLeBrasseur is 'an established practice with a dynamic offering and very impressive levels of service'.

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