serlespeak
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Charitable trusts as public documents

THE HIGH COURT HAS FOR THE FIRST TIME CHARACTERISED THE CONSTITUTIONS OF REGISTERED CHARITIES AS PUBLIC DOCUMENTS, SO AS TO REDUCE THE WEIGHT ATTACHED TO PRIVATE, COLLATERAL DOCUMENTS IN THE PROCESS OF CONSTRUCTION. THIS WAS HELD TO FOLLOW FROM SECTIONS 35 AND 38(4), CHARITIES ACT 2011, BY WHICH COPIES OF SUCH CONSTITUTIONS ARE TO BE PROVIDED TO AND MADE OPEN TO PUBLIC INSPECTION BY THE CHARITY COMMISSION.

In the recent case of *The Trustees of the Celestial Church of Christ, Edward Street Parish (a charity) v Lawson* [2017] EWHC 97 (Ch), proceedings were brought in a dispute about a religious unincorporated association, registered as a charity. The association was a parish of the worldwide Celestial Church of Christ. The Celestial Church, founded in 1947, had always had as its ultimate spiritual head a Pastor, though in the 21st century a number of individuals vied for the status. The Celestial Church had a written constitution dating from 1980.

The parish itself also had a written constitution which was drafted and adopted in 2006. The interpretation of the parish's constitution was at the heart of the dispute in the charity.

The registered charity trustees brought a claim, seeking injunctive and declaratory relief against a Mr Lawson, who they claimed had been removed as a trustee, member, or employee, of the parish. It was uncontroversial that Mr Lawson had originally been appointed as the "Shepherd in Charge" (broadly, spiritual leader) of the parish in 2011. The claimants sought to confirm his removal as such, to prevent him from passing off his and his associates' activities as those of the parish, and to prevent his entry into or use of the parish church. Mr Lawson counterclaimed that he remained the parish Shepherd and a charity trustee.

The Judge, HHJ Hodge QC (sitting as a High Court Judge), held that Mr Lawson had been effectively removed from his responsibilities or ought to be pursuant to the court's inherent jurisdiction.

Mr Lawson's Counsel had argued that on a true construction of the parish constitution in context the Pastor had ultimate authority to appoint or remove the Shepherd of the parish, so that the parish could not by itself remove its Shepherd. It was said, for example, that the worldwide constitution made clear that the representative of a Pastor – here the Shepherd – was the Pastor's appointee.

The Judge rejected this argument, holding (among other things) that the provisions of the worldwide constitution could not be allowed to affect the interpretation of the parish constitution: [29]. In doing so, he applied the decision of the Court of Appeal in *Cherry Tree Investments Ltd v Landmain Ltd* [2013] Ch 305. There the court had decided that little weight could be attached in the interpretation of a registered legal charge to a contemporaneous facility agreement which was kept off the register of title. Although the worldwide constitution was not inadmissible, as in *Cherry Tree* the weight to be accorded to a document that was not publicly available was very limited given the public interest in ensuring that a publicly accessible register constituted a comprehensive record of all material documents.

This judgment is to be welcomed in its promotion of clarity and transparency in the affairs of charities. It rightly recognises the way in which new trustees and donors may become involved in a charity without the benefit of information which is only privately accessible. It brings registered charities generally under the same principle as has for a long time applied to companies, including charitable companies: see *Helena Housing Ltd v Revenue and Customs Commissioners* [2011] STC 1037 at [18] – [19]; affirmed without comment on this point: [2012] 4 All ER 111.

Presumably, the principle will also be applicable prospectively upon a body's application for registration as a charity, so as to avoid discrepancy between the meaning given to the document by the Commission and its meaning once it has been registered.

JONATHAN FOWLES is an editor of *Tudor on Charities*, 10th ed. (*Sweet & Maxwell, 2015*), and frequently advises charities in contentious and non-contentious matters.

I am pleased to introduce this new edition of Serlespeak, on wills, probate, and charities. In our lead article, James Brightwell and I consider the effect of recent cases on problems of the representation of an estate in litigation where the deceased died domiciled abroad. The three topics in this edition are brought together subsequently in Constance McDonnell's article on the important, recent Supreme Court judgment in *Ilott v The Blue Cross*. Later in the edition, Richard Wilson QC examines another recent case, this time in the Chancery Division, which highlights the usefulness to beneficiaries of a claim for an account against trustees and personal representatives. Finally, in the law of charities, Will Henderson discusses the bases on which charitable funds raised on an appeal may be held by the recipient charity, and Jonathan Fowles analyses a recent judgment with significant implications for the interpretation of charities' constitutions. **Dakis Hagen QC**

Probate in international litigation

SEVERAL RECENT DECISIONS HAVE HIGHLIGHTED SOME OF THE ISSUES THAT CAN ARISE WHERE THOSE CLAIMING THROUGH A DECEASED PERSON ARE PARTIES TO PROCEEDINGS IN A PLACE OTHER THAN THE PLACE WHERE THE DECEASED WAS DOMICILED.

Many deceased claimants die domiciled in jurisdictions where the concept of probate does not exist. In some such jurisdictions, property vests in heirs automatically on death in fixed shares. Given that English law applies the law of the domicile to questions of succession, does that mean that heirs benefiting from forced and automatic heirship can sue in England on the claims of the deceased without first obtaining a grant?

In *High Commissioner for Pakistan v National Westminster Bank* [2015] EWHC 3052 (Ch), a person claiming to be an heir of a person who died domiciled in Hyderabad (the late 7th Nizam of Hyderabad) argued that he was entitled to make a direct claim against a fund alleged by him to have been owned by the Nizam immediately before his death. This was on the basis that under the law of the deceased's domicile there was no concept of an estate and thus a claim could be made directly by an heir, in whom the assets vested automatically. Henderson J held that this was not so, and that, while the English law of succession looks to the law of the deceased's domicile, the procedural law of administration of assets in England is governed by English law, such that a personal representative must be appointed

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before a claim can be pursued in relation to assets situated here. A grant of administration was made to an independent solicitor under section 116 of the Senior Courts Act 1981, limited to the hostile proceedings already on foot and *ad colligenda bona*, thus avoiding the question of who would be the most appropriate heir to whom a grant should be made.

The Court of Session also confirmed in *Shenken v Phoenix Life Ltd* [2015] CSOH 96 that in Scotland a grant of representation is needed for those claiming in right of a foreign-domiciled deceased to pursue a claim to local assets. The court cited a little-known statutory provision, section 11 of the Revenue Act 1884, which is to this effect (a provision which continues to apply also in England and Wales).

A similar point arose in *Meerza v Al Baho* [2015] EWHC 3154 (Ch), where a person entitled on the death of a Kuwaiti-domiciled deceased commenced proceedings in England without first obtaining a grant of representation. It was held (following the Court of Appeal in *Milburn-Snell v Evans* [2012] 1 WLR 41) that the claimant did not have standing to sue without having obtained letters of administration. However, Peter Smith J held that the failure to obtain a grant before commencing proceedings was a defect capable of remedy under CPR Part 3 and that the failure to obtain a grant was a technical failure which, on the facts, the court should remedy by applying the overriding objective and permitting the claim to continue. This (perhaps surprising) decision was not followed in the later case of *Kimathi v Foreign and Commonwealth Office (No.2)* [2017] 1 WLR 1081, where Stewart J held that a claim brought in the name of a deceased person was a nullity, which defect could not be cured.

A decision of the BVI Commercial Court, *Liao Chen Toh v Laio Hwang Hsiang*, 2 July 2013, gives some guidance on the appropriate test when there is a dispute as to whom a grant should be made, and where the deceased died out of the jurisdiction. The court held that rule 30 of the UK Non-Contentious Probate Rules applies in the BVI (in order to fill a lacuna in the local procedural rules), and that it does not fix an order of priority but, rather, gives a wide discretion to appoint among those willing and able to act.

In Bermuda, in *Re the Estate of D*, 22 June 2016, an application for a grant of letters of administration was again made in relation to the estate of a person who had been domiciled out of the jurisdiction, and as in the *High Commissioner of Pakistan* case so that other proceedings could be pursued. It was common ground that a grant should be made such that the applicant could pursue his claim in Bermuda, but there was opposition to an unlimited grant. Kawaley CJ applied principles derived from English case law, that where a person entitled to apply for a general grant applies for such a general grant, a limited grant will be made only in exceptional circumstances and/or where the justice of the case requires it. On the facts, the argument of those opposing an unlimited grant was rejected, it being held that they were seeking to limit the scope of the grant seemingly for their own interests, and that those interests were contrary to those of the estate with which the application was concerned.

These authorities should focus minds on the need at an early stage in proceedings to constitute a personal representative for the estate or the heirs of any foreign-domiciled party who is deceased, and to ensure that the most appropriate person and the most appropriate form of grant are chosen.

DAKIS HAGEN QC and JAMES BRIGHTWELL both appeared as counsel in *High Commissioner for Pakistan v Natwest*. James Brightwell also appeared in *Re the Estate of D*.

Shining a spotlight on family provision

NEARLY 80 YEARS SINCE THE FIRST FAMILY PROVISION LEGISLATION CAME INTO FORCE IN THIS JURISDICTION, AND 10 YEARS AFTER HEATHER ILOTT ISSUED HER CLAIM AGAINST THE ESTATE OF HER MOTHER MELITA JACKSON, 7 JUSTICES OF THE SUPREME COURT FINALLY HAD THE OPPORTUNITY TO GRAPPLE WITH THE DIFFICULTIES OF CLAIMS UNDER THE INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975 IN THE LANDMARK CASE OF *ILOTT v THE BLUE CROSS* [2017] UKSC 17.

Mrs Ilott was the estranged daughter of the testatrix, who had given her estate to three national charities and left clear instructions that any post-death claim by her daughter was to be resisted. Mrs Ilott succeeded, however, at first instance in 2007 and was awarded £50,000 out of her mother's £486,000 estate. In making that award the judge took into account Mrs Ilott's meagre financial circumstances. She and her husband were raising five children almost entirely in reliance upon state benefits. Their lifestyle was extremely modest: their home (which they rented from a housing association) was in need of repair, they had never had a holiday and they could not afford to replace worn-out household goods.

In 2015, the Court of Appeal replaced the £50,000 award with a lump sum of £143,000 to enable Mrs Ilott to buy her home under the right-to-buy scheme, plus an option to take a further £20,000. The charities appealed.

In March 2017 judgment was given by Lord Hughes, with whom the other 6 JJSC agreed. The charities' appeal was allowed, and the £50,000 award restored, principally because the criticisms made by the Court of Appeal about the trial judge's reasoning were rejected. At the same time, the Supreme Court accepted that the factors for a judge to take into consideration would be *"highly individual"* in every claim under the 1975 Act, and that an appellate court should be very slow to interfere in a value judgment made by a trial judge (this case was said to be *"unusual"*).

One feature of the judgment which has attracted considerable commentary is Lord Hughes' emphasis on a testator's testamentary wishes, saying that they do not cease to be of weight just because a claimant has demonstrated a need for maintenance, but have to be considered as part of the circumstances of the case. It remains to be seen how this factor will play out in future cases, particularly where wishes

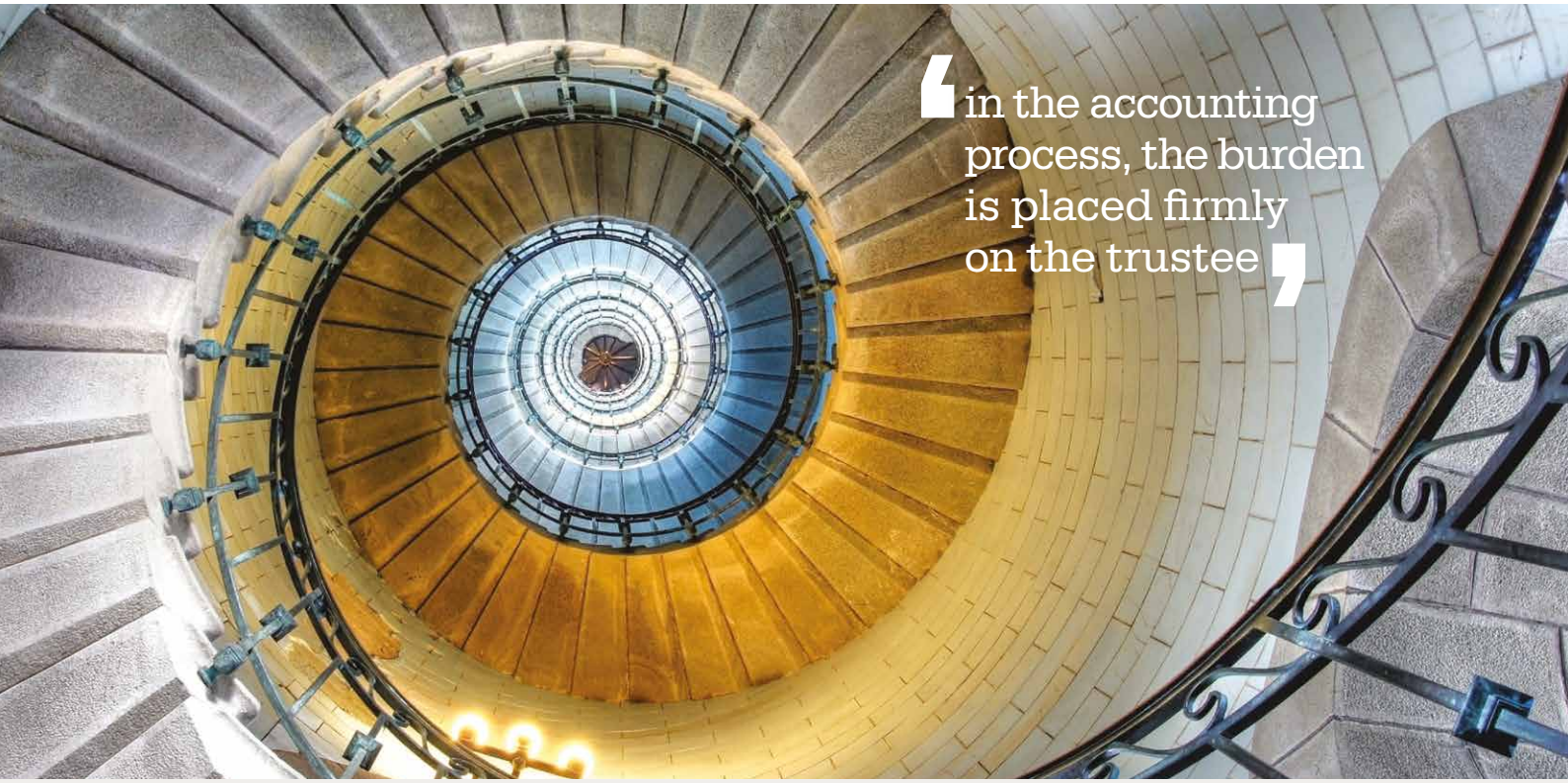
expressed in a will are out of date, were based upon inaccurate information or were about to be updated, or indeed where there was no will.

It is also striking that Lord Hughes said that in many claims by adult children under the 1975 Act, the claimant would need to be able to prove that they have a *"moral claim"*.

Lord Hughes referred briefly to the position of charities as defendants, noting that charities depend heavily on testamentary bequests for their work. It remains to be seen whether judges will interpret his comments as implying that the court should lean in favour of preserving gifts to charities.

The Supreme Court unanimously recognized that there was an extensive range of legitimate outcomes in this case, from dismissal of the claim on the basis of the long estrangement between mother and daughter to an award of a life interest in a sum to enable the claimant to buy her home. Such uncertainty as to outcome, which is a feature of many 1975 Act claims, simply underlines the importance of careful handling of such cases and the importance of exploring ADR at the appropriate stage.

CONSTANCE MCDONNELL was junior counsel for the respondent in *Ilott v The Blue Cross*.



Claims for an account: a surprisingly effective weapon?

THE MOST BASIC DUTY OF A TRUSTEE OR PERSONAL REPRESENTATIVE IS TO ACCOUNT FOR HIS OR HER STEWARDSHIP OF THE ASSETS UNDER HIS OR HER CONTROL.

This basic principle is long-established and in the case of personal representatives is enshrined in statute by section 25(1)(b) of the Administration of Estates Act 1925. The recent decision of Chief Master Marsh in *Henchley v Thompson* [2017] EWHC 225 (Ch) provides guidance as to the circumstances in which the court will order an account to be provided, the form the account should take and the costs consequences for a trustee or personal representative who fails to comply with this basic duty.

The case related to two *inter vivos* family settlements established in 1960. The defendant had been purportedly appointed as trustee of both settlements. Eventually, it was discovered that the appointment as trustee of one of the settlements was invalid, thereby making the defendant a trustee *de son tort*. At the time of the hearing, the trust deed of the other settlement had not been provided, but after the draft judgment had been provided, the defendant produced a copy which he had obtained from a beneficiary.

A number of beneficiaries brought a claim for an account because no trust accounts had been provided by the defendant for the entirety of his trusteeship of either trust. He asserted that financial statements had been provided for a period during the 1980s and 1990s for one of the trusts, and that that trust appeared to have terminated in the 1990s. His case was also that he had provided all the information that he could. He therefore opposed the application.

The court held that whilst an account is an equitable remedy and therefore discretionary, the circumstances in which it will decline to order an account are extremely rare. In relation to one of the trusts, the court was satisfied that no further information would be forthcoming and therefore no purpose would be served by ordering an account. In relation to the other (in

respect of which financial statements had previously been provided) the court ordered an account, stressing that a full trust account involves the trustee providing a full narrative of his dealings with trust assets, showing all assets being added and removed from the trust. Financial statements will not ordinarily show, for example, what appointments have been made by trustees and therefore providing them will not discharge an obligation to account.

The defendant had defended the claim robustly, choosing to expend significant resources on his defence rather than providing the information sought. The court considered this approach to have been sufficiently out of ‘the norm’ to justify an order for costs on an indemnity basis, with no reduction for the failure to obtain an order for an account in respect of one of the trusts. In addition, the defendant was ordered to meet the costs of providing the account personally.

The case shows the considerable risk that a trustee or personal representative exposes himself to by not being ready to provide accounts to beneficiaries and the strict way in which the court will enforce the obligation. An application for an account provides an effective way for a beneficiary to obtain redress from an uncooperative trustee, being a claim that will only be successfully resisted in exceptional circumstances. Moreover, in the accounting process, the burden is placed firmly on the trustee: he is accountable for a trust asset unless and until he can show that it has validly ceased to be a trust asset by reason of, for example, a valid appointment or a sale (in which case he is accountable for the proceeds). If the beneficiary does not accept the accuracy of the account, CPR Part 40 provides a mechanism for challenging its contents. Therefore, in a situation where a beneficiary suspects improper dealings with assets, obtaining an order for a common account will often be a far better means of obtaining redress than pleading a full-blown breach of trust claim from the outset.

RICHARD WILSON QC and James Weale appeared for the claimants in *Henchley v Thompson.*

The obligations applicable to funds raised by charities by way of appeals

FUNDS RAISED BY AN EXISTING CHARITY MAY EITHER BECOME HELD AS PART OF THE CHARITY'S GENERAL ASSETS OR THEY MAY BE HELD ON SO-CALLED "SPECIAL" TRUSTS FOR PARTICULAR PURPOSES OF THE CHARITY.

The distinction is important because for so long as an asset is held on "special" trusts it will not be available for use for other purposes of the charity and separate accounts will need to be kept in respect of the special trust. The distinction is also important where the particular purposes fail. Issues may then arise as to whether the funds raised are held by the charity for its general purposes; whether there is a resulting trust for the donors; whether the funds pass to the Crown as *bona vacantia*; whether there was a general charitable intention so as to enable a cy-près application of the funds to be made; and whether the provisions of sections 63 – 65 Charities Act 2011 as to unknown or disclaiming donors apply.

A donation will be held for the purposes intended by the donor. That intention should be ascertained by reference to the terms on which the donor made his gift to the recipient; construed against the factual background known to the donor. Broadly there are three classes of gift to a charity:

(1) A gift to the charity which can be used for the general purposes of the charity.

(2) A gift on trust for a specific purpose which is different from, and typically narrower than, the general purposes of the charity, and which the charity can properly accept. Trusts of this nature are frequently called "special trusts" and the funds held on them are called "restricted funds".

(3) A gift may be made on terms, express or implied, which give the recipient authority to declare the trusts applicable to the gift. This kind of case is an interesting topic in itself – see *AG v Mathieson* [1907] 2 Ch 383 as recently applied by the Supreme Court in *Khaira v Shergill* [2014] UKSC 33, [2015] AC 359; but it will rarely arise where the recipient is acting as the representative of an existing charity with a written constitution.

Where a reason is given for a gift to a charity it is often difficult to decide whether a special trust is imposed. Two early 20th century cases illustrate the distinction.

In *Re University of London Medical Sciences Institute Fund* [1909] 2 Ch 1 the University issued an appeal for the founding of an Institute of Medical Sciences. Ultimately the University was not in a position to carry out the proposed scheme. The University did not contend that the funds belonged to it beneficially. Its decision to return the lifetime gifts to the donors was endorsed by the Court of Appeal.

In *Re Church Army* (1906) 75 LJ Ch 467 the Church Army made an appeal for funds for the completion of a new headquarters. The Court of Appeal held that the property purchased with the funds could be sold or mortgaged and the proceeds could be used for the general purposes of the charity. On the facts it rejected the argument that because the property was acquired with donations given for the specific purpose of purchasing the headquarters the property was impressed with a particular or special trust for requiring the headquarters to be retained.

In conclusion, the risk of possible future disputes can best be minimised by making it clear in the documents seen by potential donors and in particular in the documents whereby they effect their gifts, whether or not, even if the motive is to further a particular project, the charity is to have power to apply the donation for some other purpose of the charity.

WILL HENDERSON is Junior Counsel to the Treasury in Charity Matters and an editor of *Tudor on Charities*, 10th ed. (*Sweet & Maxwell, 2015*).

Chambers news

People
We are delighted to welcome Rupert Reed QC and James Brightwell to Serle Court, who join us as new tenants from Wilberforce Chambers and New Square Chambers respectively. We are also pleased to welcome back Jonathan Adkin QC who re-joined chambers earlier this year from Fountain Court, and to congratulate Dakis Hagen on taking silk.

Conferences and seminars
We have sponsored a number of forums and conferences this year including the IBC International Trust & Private Client Forums in Jersey and Guernsey, the Transcontinental Trusts: International Forum in Bermuda and the C5 Fraud, Asset Tracing and Recovery Asia Conference in Hong Kong, with teams of speakers and delegates from Serle Court attending each event.

We hosted a successful half-day Trusts and Commercial Litigation Conference in Jersey on 15 June with speakers including Richard Wilson QC, Will Henderson, Kathryn Purkis, Timothy Collingwood, James Brightwell, Matthew Morrison, Sophie Holcombe, Jonathan McDonagh, Zahler Bryan and Amy Proferes.

We have conducted a series of in-house seminars during 2017, covering core areas of our work and important cases. Philip Marshall QC and James Mather delivered a joint seminar with Enyo Law on the Court of Appeal findings in *Avonwick Holdings v Shlosberg*; and following the judgment of the Supreme Court in *Ilott v The Blue Cross*, Constance McDonnell led a team including Andrew Francis, Jonathan Fowles, Zahler Bryan, Amy Proferes and Oliver Jones, to deliver a seminar on the implications of the decision. We hosted a seminar on property law featuring Andrew Francis, Tom Braithwaite, Jonathan Fowles and Amy Proferes; and John Machell QC and Jennifer Haywood led a seminar on forfeiture of LLP and partnership profit shares and the decision in *Hosking*. A seminar on the unfair prejudice remedy for minority shareholders was conducted by Daniel Lightman QC and Timothy Collingwood.

Thank you to all of our clients who attended these events and gave such positive feedback.

Andrew Francis, Andrew Bruce and Amy Proferes will represent Serle Court at a roadshow in Southampton on 4 July, covering property law matters; and the second Serle Court International Trusts and Commercial Litigation Conference will take place in New York on 13 November, where over 25 speakers from Serle Court will be joined on panels by guest speakers from around the world.

Directories
The Chambers Global 2017 guide has been published and Serle Court has again been recommended as a set in four practice areas: Dispute Resolution: Commercial Chancery; Offshore; Dispute Resolution: Commercial; and Restructuring/ Insolvency. Members of chambers also received 48 individual recommendations across six different practice areas.

The Who's Who Legal: UK Bar 2017 guide was published and five members of Serle Court were listed as "Most Highly Regarded" Silks and Juniors: Daniel Lightman QC for Company & Partnership; Justin Higgo for Civil Fraud; Frank Hinks QC and Dakis Hagen QC for Private Client; and Beverly-Ann Rogers for Mediation. We also received 25 individual recommendations for members listed as "Experts" in the guide.

LinkedIn
We have 4 discussion groups on LinkedIn to enable Serle Court members and clients to discuss topical issues in Partnership and LLP Law, Fraud and Asset Tracing, Contentious Trusts and Probate, and Competition Law; please join us.

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