

A matter of trust

Following the recent government consultation on transparency of land ownership involving trusts, private client lawyers share their views on the implications of the changes for advising clients



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On 27 December 2023, the Department for Levelling Up, Housing and Communities published a consultation on the transparency of land ownership involving trusts. The consultation, which closed on 21 February 2024, invited views on the subject and concentrated quite a few minds in a short space of time. It comes as no surprise for many private client lawyers who say the government has been considering improving the transparency of trust land ownership for some time.

Currently, various services and schemes provide information on the ownership of assets in the UK about trusts. In the consultation, the government explains why it wants to improve on these services. Land, it points out, is the most valuable asset in the UK economy and those who have an interest in it should be able to find out who owns, controls and benefits from it; but the use of trust structures helps prevent that. Greater transparency, the government believes, is in the public interest, would help address injustices like the shortage of housing and help tackle corruption and crime – what it calls the ‘three overriding principles’ underlying the consultation.

While its aims are admirable, the proposals for possible change in the consultation leave much to be determined in the future. Private client lawyers fear some options cited may unduly compromise the right to privacy and impose needless burdens on trustees and crucially, may not help the government achieve its overall goals.

Existing schemes

The oldest source of information on land ownership in England and Wales is His Majesty’s Land Registry, which records the legal owner of property but doesn’t reveal if the owner is a trustee. In recent years, three schemes addressing the transparency of the ownership of assets were introduced in the UK. The people with significant control (PSC) register was established by Companies House in 2016 and provides information on anyone who owns more than 25% of a private UK company, including trustees of trusts and anyone who has significant control or influence over them.

The following year, the trust registration service (TRS), held by His Majesty’s Revenue & Customs (HMRC), was introduced and created a register of the beneficial ownership of trusts with UK links and anyone who may have control over the trust, such as settlors and trustees. However, this information is only available to law enforcement agencies and those who apply for access to it who can demonstrate a legitimate interest in investigating possible money laundering or terrorist financing.

The Economic Crime Act 2022 and the Economic Crime and

Corporate Transparency Act 2023 (ECCTA) created the register of overseas entities (ROE), also at Companies House. The register supplies similar information to the PSC about overseas entities with interests in UK land and additional trust information when trusts are the registrable beneficial owners of the overseas body. This information too is only accessible by law enforcement agencies, although the government is planning to expand access to it by introducing regulations under the ECCTA.

The schemes, while useful, were created for purposes unrelated to land ownership and have resulted in what the government considers an ‘unacceptable gap’ in its transparency measures. “These are good initiatives but there are holes in them. The TRS, for example, doesn’t include information on the land the trust relates to and the ROE doesn’t always show you who really controls the land,” says Clare Breeze, partner and head of real estate at Macfarlanes. “There’s no one existing repository of information on land ownership that provides details on the trusts that hold land. Lawmakers have been focused on different aspects of transparency so now the government wants to mesh the schemes together in a more coherent way.”

Use of trusts

As the consultation notes, there are lots of different kinds of trusts that can be used for land ownership and by a variety of parties. “Trusts are often used by families for succession purposes. Bare trusts have been used for the ownership of residential property – often by high-profile people and for confidentiality reasons and by parents when land is bought for a minor or where a vulnerable person is involved,” Breeze explains. However, she says the use of companies for holding residential property has declined with the introduction of the ‘annual tax on enveloped dwellings’ payable by companies and some other entities on residential property valued at over £500,000. The use of offshore companies to mask ownership, money laundering or terrorist purposes has declined as the ROE has helped reveal the identity of the owner.

Commercial property, though, is frequently held in trust structures. Property funds often use trusts as they are a useful tool when there are multiple investors. “Pensions funds use trusts for land ownership as do limited partnerships as they’re not legal entities, so the general partner often holds any land as the trustee,” says Ronnie Myers, director of Burges Salmon. He cites the Jersey Property Unit Trust as one form of trust that has become popular for business property investment.

Consultation proposals

The consultation sought comment specifically on various options to improve the access to information about trusts held on the ROE. It also invited general views on how the ownership of land involving trusts can be made more transparent (see standout box on p10). But what do private client lawyers make of the options presented?

Greater transparency undoubtedly involves the government trying to strike the right balance between public interest and

the right to privacy which, it notes, is not always easy. One obvious and troubling consideration is the harm that could be caused to those affected by additional transparency. Wealthy individuals, for example, could be put at personal risk of intimidation or violence by public disclosures. Moreover, making everything available may mean not only ranking transparency above any right to privacy but could also be needless. Both Myers and Stuart Smyth, counsel of Maurice Turnor Gardner, point to the distinction between bare trusts and discretionary trusts. “Beneficiaries of discretionary trusts have no control over the land owned in the trust and they can involve large groups of people. How would the government’s aims be served by identifying them?” asks Smyth. “The HMRC and other law enforcement agencies already have access to the trust information under the existing schemes. The government has set out the principles on which it’s basing the need for increased transparency, but the proposals are unlikely to achieve those goals.”

Myers says it is probably a good idea to provide for greater transparency for bare trusts but not for discretionary trusts where the beneficiaries have only a potential interest in the land. “In Scotland, the Register of Persons Holding a Controlled Interest in Land ensures that anyone with a controlling interest in land must be reported to the registrar, but not those who don’t, like beneficiaries under a discretionary trust unless they have special powers. To me, that makes sense. A general duty to disclose all beneficiaries could be misleading,” he says.

Compliance and reporting

Given the government’s objectives, these practitioners believe that the scope of the current schemes is likely to change. Yet any change will mean clients affected will need advice. “The latest amendments to the ROE generated a huge amount of work for our clients who had to ensure they were compliant,” says Smyth. Since trustees must act in the best interests of the beneficiary they will need to consider carefully whether to make an application for the suppression of information that could be made public under any new scheme. Smyth is concerned too about the broader issue of the possible impact changes could have on the competitiveness of London as an investment location. “The City of London is a global market and it’s currently attractive to foreign investors for a number of reasons, some being security and certainty. If these measures are introduced, you could be chipping away at London’s appeal,” he says.

Myers fears the measures could add unnecessary complexity to the existing reporting systems. “In some cases, trustees may have to report on beneficiaries who have no vested interest in land. Some may not realise they must act to be compliant. We’d have to warn clients about any new reporting requirements, but many trustees may not be taking legal advice,” he says. On a very practical level, he wonders where any new information would be stored. “You’d be effectively creating a third register and it’s a question of who would administer it. The HM Land Registry would be the obvious choice, but they may not have the resources to do that.”

Breeze also fears that clients can be unaware of any additional

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A general duty to disclose all beneficiaries could be misleading

reporting duties when they arise. “When the scope of the TRS was expanded a few years ago some trustees didn’t know they needed to register and it was a compliance issue,” she says. Also, the extent to which a lawyer is duty-bound to alert a historic client of the need to meet additional reporting requirements can be a thorny issue. “If the client is a current client you can tell them in real time but if they’re not, it may not be practicable or possible to review all your old transactions,” Breeze says. She is also concerned about resulting or constructive trusts being captured in any new regime and believes the government will need to specifically define what trusts could be included in it. Currently, only certain kinds of express trusts have to supply information to the TRS but the government’s proposals may not be limited to those, she points out.

A serious issue too is how clients’ interests can best be served in future. Some clients, like trustee companies, sizeable property investment funds and pension funds will have to be more careful about how they structure land ownership, Breeze advises. “They may find that the structures they’ve already established or routinely use, may no longer be private or confidential or administratively efficient, and they’ll have to consider other ways of owning land to achieve confidentiality and an effective property ownership structure catering for multiple cross-jurisdictional investors.”

The Society of Trust and Estate Practitioners, and no doubt many other bodies, will have responded to the consultation and possibly some law firms too. There is sure to be plenty of work in store for private client lawyers when the government determines exactly how any increased transparency on land ownership involving trusts will be accomplished. It is hoped though, that the government’s aims – which are positive and laudable – can be achieved in a way that can satisfy the concerns of all those with an interest in land ownership.

Proposals for the treatment of information held on the ROE

- **Trust information is publicly available by default, except for protected information:** all trust information filed by an overseas body to be publicly available except for information suppressed under a successful protection application.
- **Partial information is made publicly available by default:** some information about trusts – but not all – to be made publicly available which could include the name and the date of creation of the trust, the name of the settlor and any interested persons, with information about beneficiaries remaining private subject to an application for access.
- **No change in public availability:** trust information to remain private subject to any additional transparency provided by proposed regulations under the ECCTA.

Proposals for the disclosure of information on general land-based trusts not associated with the ROE

- **Retaining existing practices relating to trust information access:** no change to practices relating to trust information.
- **Increased transparency of non-UK trusts that hold UK land:** extending the principles for transparency of information on the ROE to non-UK trusts that hold UK land.
- **Publishing the minimum information necessary to meet the three overriding principles and retaining current privacy practices:** some trust information would be made publicly available if the trust is involved in land ownership.
- **Publishing minimum information necessary to meet the three overriding principles and increasing access to further information through an expanded ‘legitimate interest’ test:** some information would be publicly available as in option three with the ability to gain access to private information on a trust if the applicant has a ‘legitimate interest’ in the information.
- **Publishing all information collected about trusts by default:** similar to option one for the ROE. Automatic public disclosure of all information about a trust of land but with the ability to suppress information from public view in certain circumstances and the possible exemption of certain information from public disclosure.

