



#5sblaw

# 5 Stone Buildings

**TAX: How to keep your clients out of court and what to do if you get there**

**21 February 2018**

**at**

**Prince Philip House  
3 Carlton Terrace  
London SW1 5DG**

**[www.5sblaw.com](http://www.5sblaw.com)**

***2.5 hours***

**8.30 am      Registration and breakfast**

9.15 am      **Introduction – Christopher Tidmarsh QC**

9.20 am      **Public Law Challenges in the Tax Arena**

*Amanda Hardy QC*

9.50 am      **Film Schemes – not a Romantic Comedy**

*Ruth Hughes*

10.20 am     **Discovery Assessments**

*Sam Chandler*

10.50 am     **Coffee Break**

11.20 am     **Trusts Tax 2018**

*Oliver Marre*

11.50 am     **Correcting Tax Mistakes**

*Christopher Tidmarsh QC*

12.30 pm     **Close**

**Christopher Tidmarsh QC** has a wide-ranging Chancery practice. He has considerable experience of contentious and non-contentious aspects of the administration of trusts both on and offshore. His practice includes rectification and setting aside for mistake, variation of trusts, removal of trustees/personal representatives, challenging and defending probate (capacity, want of knowledge and approval), proprietary estoppel, breach of trust claims, trust aspects of divorce proceedings, advice on tax issues, advice on administration and drafting. He recently acted in *ADS v DSM* (a statutory will appeal).

**Amanda Hardy QC** Amanda has appeared this year in the Supreme Court, the High Court and the First Tier Tribunal and has been involved in litigation in many areas of direct and indirect tax, including trusts and offshore trusts (appearing in the High Court in 5 recent separate applications to vary extremely substantial trusts and in relation to the effect of Double Tax Treaty provisions on trust arrangements). Her advisory private client work focuses on offshore trusts, residence and domicile issues, divorce and pensions tax. She has written the second edition of Tolley's Statutory Residence Text (published December 2017).

**Ruth Hughes** is on the Treasury B Panel and is involved in some of the largest, most complicated and interesting tax avoidance cases presently being litigated including the *Ingenious* film scheme litigation and ground-breaking Business Premises Renovation Allowance cases. She is able to bring both technical skill, strong managerial skills and extensive litigation experience to her cases. In relation to her chancery practice her written and oral advocacy has been described by the Court of Appeal as exemplary.

**Sam Chandler** is on the Treasury C Panel and maintains a busy Chancery practice in all areas of chambers' work. He regularly appears in the county courts, the High Court, the Court of Protection and the Tax Tribunals (both the FTT and the UT), both as a sole advocate and as junior counsel. He has also gained substantial experience in non-contentious Chancery work, including advising and drafting around complex issues relating to trusts and estates and their taxation.

**Oliver Marre** has a practice encompassing all areas of tax law, both contentious and non-contentious. He appears in courts and tribunals at all levels. As well as his broad general revenue advisory work and litigation, Oliver provides advice in the context of trusts disputes, mediations, in cases before the Family Division (including complex or HNW divorce cases) and in relation to the taxation of charities and charitable donors.

*These notes are intended as an aid to stimulate debate: delegates must take expert advice before taking or refraining from any action on the basis of these*

*notes and the speaker can accept no responsibility or liability for any action or omission taken by delegates based on the information in these notes or the lectures.*

# 5 Stone Buildings

## **Public Law Challenges in the Tax Arena**

**Amanda Hardy QC**

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**Public Law Challenges in the Tax Arena**

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**Introduction**

- 42 applications in 2014, 76 in 2015 and 90 in 2016.
- When is JR relevant?
- What is the procedure?
- What are grounds for judicial review?
- Some recent judicial review cases -
  - HMRC publications
  - Challenges to FNs and APNs
  - The power to assess
- Judicial review challenges to HMRC's exercise of powers are increasing.

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## TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p> <p>16 February 2018 Amanda Hardy QC</p> <h3>When is JR relevant?</h3> <ul style="list-style-type: none"><li>• For most tax matters there are appeal procedures set out in law that enable disputes between the taxpayer and HMRC to be settled. But in some cases there is no right of appeal to the tribunal against HMRC actions.</li><li>• This is mainly where the decision made is in relation to a discretionary matter, for example a decision on whether a late claim should be accepted, or the application of Extra-Statutory Concessions.</li><li>• Where there is no statutory right of appeal a taxpayer may turn to judicial review to take the dispute forward, for example where the tribunal has refused a late appeal.</li></ul> <p>www.gsblaw.co.uk <b>3</b></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p>16 February 2018 Amanda Hardy QC</p> <h3>When is JR relevant?</h3> <ul style="list-style-type: none"><li>• JR may also look at HMRC decisions where the dispute is not about whether the decision is technically correct but where a taxpayer claims that they were misdirected and in consequence suffered disadvantage, for example that a return is wrong because they relied on incorrect advice received from HMRC.</li><li>• JR may also be considered where the taxpayer believes that an HMRC officer has not listened properly to their representations or has acted in a way that appears to be unfair.</li><li>• The Court of Appeal has recently reaffirmed, the existence of a statutory right of appeal will preclude JR save in exceptional circumstances: <i>Glencore Energy UK Ltd v HMRC</i> [2017] Civ 1716.</li></ul> <p>www.gsblaw.co.uk <b>4</b></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p><b>5 Stone Buildings</b></p> <p>10 February 2018 Amanda Hardy QC</p> <h3>Procedure</h3> <ul style="list-style-type: none"><li>• JR of tax cases may be referred to and carried out by the Upper Tribunal. Decisions of the UT have the same effect as if the review had been carried out by the High Court (England and Wales), the Court of Session (Scotland) or the Court of Appeal (Northern Ireland).</li><li>• In all cases except those involving JR of the First-tier Tribunal's own procedures, an initial application must be made to the relevant High Court or the Court of Session, who will consider whether it is appropriate to refer the case for a decision by the UT.</li><li>• If a party wishes a judicial review of the First-tier Tribunal's procedures they should apply directly to the Upper Tribunal.</li></ul> <p>www.gsblaw.co.uk <b>5</b></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p>10 February 2018 Amanda Hardy QC</p> <h3>Procedure – pre-action letter</h3> <ul style="list-style-type: none"><li>• The leave of the court must be obtained before a claim for JR can be made (except in Scotland). In England and Wales, before any application for permission to begin proceedings is made, the person who is thinking of taking action against a public body should normally send a 'pre-action letter' to that body.</li><li>• The purpose of the pre-action letter is to identify the issues in dispute and to establish whether litigation can be avoided.</li><li>• The public body must reply to the pre-action letter (usually within 14 days).</li></ul> <p>www.gsblaw.co.uk <b>6</b></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>



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<p><b>5 Stone Buildings</b></p> <p>15 February 2018 Amanda Hardy QC</p> <h3>Procedure – permission to appeal</h3> <ul style="list-style-type: none"><li>• The taxpayer must then apply to the High Court for permission to bring JR proceedings within 3 months of the date of the decision the application relates to.</li><li>• The High Court will decide the application for permission and may transfer the judicial review to the UT or it may decide the case itself.</li><li>• The application must state: the taxpayer's name and address; the name and address of their representative (if any) and any other interested parties; an address where documents can be sent to them; details of the decision being challenged, including the date, reference and identity of the decision maker; a statement that the application is to bring JR proceedings; the outcome they are seeking; the facts and grounds of their case.</li></ul> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> 7</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p>15 February 2018 Amanda Hardy QC</p> <h3>Procedure – permission to appeal</h3> <ul style="list-style-type: none"><li>• The taxpayer must also send a copy of any written record of the decision, and copies of any other documents which the High Court/UT or any other party need to understand the application.</li><li>• The taxpayer may apply for an extension to the time limit, but must give reasons why they did not apply within the time limit.</li><li>• The High Court/UT will send a copy of the application and any documents to all interested parties.</li></ul> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> 8</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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**Procedure – permission to appeal**

- Any party who receives a copy of the application and wants to take part must write to the High Court/UT to acknowledge that the application has been served within 21 days of the date the High Court/UT sent the copy to them.
- The acknowledgement must state whether they intend to oppose the application for permission and, their grounds for support or opposition; the name and address of anyone not named in the application that they think is an interested party.
- If they do not send an acknowledgement they may not take part in the application for permission. They can take part in subsequent proceedings if permission is given.

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**Procedure - appeal**

- The High Court will write to all interested parties to tell them whether it gives permission to bring JR proceedings. If the High Court refuses permission it will also give reasons for refusing and details of any limitations or conditions imposed.
- If the High Court has refused an application without a hearing, or allows an application with conditions, the party applying for permission can write and apply for the decision to be reconsidered at a hearing. They must apply for the decision to be reconsidered within 14 days of the date the High Court/Upper Tribunal sent them its decision.
- Where permission has been granted, the person who wishes to bring a case for JR must provide detailed grounds in support of their case to the High Court in writing within 35 days after the High Court/Upper Tribunal granted permission.

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<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">15 February 2018 Amanda Hardy QC</p> <h3>Procedure - appeal</h3> <ul style="list-style-type: none"> <li>The party who applied for permission can only rely on the grounds given in their application unless the High Court/UT gives them permission to include other grounds.</li> <li>Both the party applying for permission and the party opposing it may provide evidence and make representations at any hearing. Other parties can also provide evidence or make representations but must apply to the High Court/UT for permission to do so.</li> <li>Each party to the proceedings, and any other person permitted, may produce evidence (except at the application for permission hearing): make representations at any hearing they are entitled to attend, and make written representations relating to a decision to be made without a hearing.</li> <li>The hearing and decision will follow the same procedure as other hearings by the High Court / Court of Session/UT. The Court/UT can award costs in judicial review proceedings.</li> </ul> <p>www.gsblaw.co.uk <span style="float: right;">11</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">15 February 2018 Amanda Hardy QC</p> <h3>Grounds</h3> <ul style="list-style-type: none"> <li>Lord Diplock outlined 3 grounds upon which the courts will quash a decision in <i>C.S.U. v Minister for Civil Service</i> [1985] 1 AC 374 at p. 410 as follows:             <ul style="list-style-type: none"> <li><i>illegality</i>: which occurs if the decision-maker fails to 'understand correctly the law that regulates his decision-making power'. For example, because he has misconstrued a statutory provision or failed to take account of a consideration which he is expressly or implicitly required to take into account or takes account of considerations which are irrelevant.</li> <li><i>procedural impropriety</i>: which occurs if the decision fails to comply with an express procedural requirement or a procedural requirement which is implied by the rules of natural justice. It may, for example, be a breach of natural justice for HMRC to seek to exercise discretionary powers without first giving the taxpayer an opportunity to make representations.</li> <li><i>irrationality</i>: the decision is so unreasonable that no reasonable body could reach it.</li> </ul> </li> </ul> <p>www.gsblaw.co.uk <span style="float: right;">12</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">15 February 2018 Amanda Hardy QC</p> <p><b>Grounds</b></p> <ul style="list-style-type: none"> <li>In the tax context the courts quash decisions where there has been '<i>unfairness amounting to an abuse of power</i>'. The courts will not interfere in a decision merely because it is harsh and therefore appears unfair. It is only in those cases where the decision is entirely unreasonable or HMRC have acted in such a way that the decision can be regarded as an unfair abuse of power that the courts will interfere.</li> <li>In <i>R v IR Commrs ex parte Unilever</i> [1996] STC 681, Unilever successfully argued that HMRC's past conduct in allowing loss relief claims made it unfair for them to refuse relief on the basis that there had been a failure to make a proper claim within the statutory time limit. No express representation was made to the taxpayer but HMRC's past conduct was held to make its refusal of the claim unfair and unlawful.</li> </ul> <p>www.gsblaw.co.uk <span style="float: right;">13</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">15 February 2018 Amanda Hardy QC</p> <p><b>Grounds</b></p> <ul style="list-style-type: none"> <li>A number of applications have related to HMRC's failure to act in accordance with representations made to taxpayers. These representations might be generally published statements of practice or made to specific taxpayers.</li> <li>In <i>R v IR Commrs ex parte Matrix Securities Ltd</i> [1994] STC 481 and <i>R v IR Commrs ex parte MFK Underwriting Agencies Ltd</i> [1989] STC 873 it was accepted that it could be an unfair abuse of power for HMRC to depart from guidance or informal clearances given to individual taxpayers if they are expressed in terms which the taxpayer could reasonably expect to rely upon and are not subject to any relevant caveats including where the taxpayer receives a ruling that does not reflect the correct application of the law.</li> </ul> <p>www.gsblaw.co.uk <span style="float: right;">14</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">15 February 2018 Amanda Hardy QC</p> <p><b>Grounds</b></p> <ul style="list-style-type: none"> <li>The two primary conditions set out in MFK, which must be satisfied, are:             <ul style="list-style-type: none"> <li>the taxpayer has put all his cards face upwards on the table (which includes providing full details of the specific transaction for which he seeks HMRC's ruling); and</li> <li>the ruling relied upon must be clear, unambiguous and devoid of relevant qualification.</li> </ul> </li> <li>These are not easy conditions to satisfy.</li> </ul> <p>www.gsblaw.co.uk <span style="float: right;">15</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">15 February 2018 Amanda Hardy QC</p> <p><b>Recent JR Cases – HMRC publications</b></p> <ul style="list-style-type: none"> <li>This approach was held to apply to HMRC publications in <i>R (on the application of Davies) v HMRC</i>; <i>R (on the application of Gaines-Cooper) v HMRC</i> [2011] STC 2249 at [28] and [29]. Lord Wilson applying Moses LJ in the Court of Appeal [2010] STC 860 at [12];</li> <li><i>The importance of the extent to which thousands of taxpayers may rely upon guidance, of great significance as to how they will manage their lives, cannot be doubted. It goes to the heart of the relationship between the Revenue and taxpayer. It is trite to recall that it is for the Revenue to determine the best way of facilitating collection of the tax it is under a statutory obligation to collect. But it should not be forgotten that the Revenue itself has long acknowledged that the best way is by encouraging co-operation between the Revenue and the public.</i></li> </ul> <p>www.gsblaw.co.uk <span style="float: right;">16</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p><b>5 Stone Buildings</b></p> <p>15 February 2018 Amanda Hardy QC</p> <h3>Recent JR Cases – HMRC publications</h3> <ul style="list-style-type: none"><li>• <i>Co-operation requires fair dealing by the Revenue, and frank and open dealing by the public. Of course the Revenue may refuse to give guidance and re-create a situation in which the taxpayers and their advisers are left to trawl through the authorities to find a case analogous to their own, or, if they are fortunate, a statement of principle applicable to their circumstances. But since 1973, in a field fraught with borderline cases relating to an enormous variety of circumstances, the Revenue has chosen to confer what presumably it regarded as a benefit on taxpayers who wished to know whether they were likely to be treated as resident or not.</i></li><li>• SC ultimately held IR 20 was not “clear and unambiguous” and did not cover the taxpayers situation.</li></ul> <p>www.gsblaw.co.uk <b>17</b></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p>15 February 2018 Amanda Hardy QC</p> <h3>Recent JR Cases – HMRC publications</h3> <ul style="list-style-type: none"><li>• Similarly in <i>Samarkand Film Partnership No.3 v HMRC</i> [2017] STC 926 the public law issue turned on whether certain passages of the Business Income Manual covered the situation. Henderson LJ:</li><li>• <i>Although it is now well established that the doctrine of legitimate expectation in public law can extend to substantive as well as procedural expectations, and can in an appropriate case prevent a public body, including HMRC, from applying the law correctly where to do so would frustrate the claimant’s expectation, experience shows that the cases where such a claim has succeeded, at any rate in the field of taxation, are relatively few and far between. This is in my view hardly surprising. There is a strong public interest in the imposition of taxation in accordance with the law, and so that no individual taxpayer, or group of taxpayers, is unfairly advantaged at the expense of other taxpayers.</i></li></ul> <p>www.gsblaw.co.uk <b>18</b></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">15 February 2018 Amanda Hardy QC</p> <p><b>Recent JR Cases – HMRC publications</b></p> <ul style="list-style-type: none"> <li>• <i>There is also a real public interest in the Revenue making known the general approach which it will adopt, and the practice which it will normally follow, in specific areas. The publication of the BIM is a good example of this principle in operation. But there are likely to be few cases where a taxpayer can plausibly claim that a representation made in general material of this nature is so clear and unqualified that the taxpayer is entitled to rely on it and to be taxed otherwise than in accordance with the law.</i></li> <li>• He ultimately concluded that such representations as were present in the BIM were subject to the caveat that they would not apply in the case of tax avoidance, and that this prevented a legitimate expectation from arising.</li> </ul> <p>www.gsblaw.co.uk <span style="float: right;">19</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">15 February 2018 Amanda Hardy QC</p> <p><b>Recent JR Cases – HMRC publications</b></p> <ul style="list-style-type: none"> <li>• The decision of the Court of Appeal in <i>R (on the application of Hely-Hutchinson) v Revenue and Customs Commissioners</i> [2017] STC 2048 turned on the circumstances when HMRC guidance can be relied on.</li> <li>• HMRC issued guidance in 2003 (on which the taxpayer relied) and then in 2009, reversing its position. HMRC refused the taxpayer's claim by applying the 2009 guidance.</li> <li>• The taxpayer succeeded in the High Court, but lost in the Court of Appeal. Arden LJ recognising that the taxpayer had a legitimate expectation but in considering whether it was legal to frustrate it held:</li> </ul> <p>www.gsblaw.co.uk <span style="float: right;">20</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">15 February 2018 Amanda Hardy QC</p> <p><b>Recent JR Cases – HMRC publications</b></p> <ul style="list-style-type: none"> <li>...it is well established that it is open to a public body to change a policy if it has acted under a mistake. The decision whether or not to do so is not reviewed for its compatibility in the public interest: the question is whether or not there has been sufficient unfairness to prevent correction of the mistake. It is clear from the authorities that the unfairness has to reach a very high level: see, in particular, the holding of Simon Brown LJ in Unilever where he held that it was not enough that the change of course by the public body was "mere unfairness" or conduct which was "a bit rich". It had to be outrageously or conspicuously unfair.</li> </ul> <p>www.gsblaw.co.uk <span style="float: right;">21</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">15 February 2018 Amanda Hardy QC</p> <p><b>Recent JR Cases – HMRC publications</b></p> <ul style="list-style-type: none"> <li>High bar. The CA ultimately held that HMRC was open to change its policy with good reason and while consistency was desirable (other taxpayers had not had enquiries opened and has been treated differently) a public body was no bound to maintain a mistaken position.</li> <li>Two more appeals before the CA (heard in December) <i>City Shoes</i> and <i>Veolia</i>.</li> <li><i>R (on the application of City Shoes Wholesale Ltd) v HMRC</i> [2016] EWHC 107 (Admin). the High Court rejected an application for judicial review of HMRC's refusal to grant the nine claimants, all of whom had operated employee benefit trusts (EBTs), the full benefits of the Liechtenstein disclosure facility (LDF) on the basis that their applications were never registered and therefore they had no legitimate expectation to receive full benefit of the LDF, and there had been no abuse of power or error of law by HMRC.</li> </ul> <p>www.gsblaw.co.uk <span style="float: right;">22</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>



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 <p style="text-align: right;"><small>16 February 2018 Amanda Hardy QC</small></p> <p><b>Recent JR Cases – HMRC publications</b></p> <ul style="list-style-type: none"> <li>• <i>R (on the application of Veolia ES Landfill Limited, Veolia ES Cleanaway (UK) Limited) v HMRC</i> [2016] EWHC 1880 (Admin).</li> <li>• Mr Justice Nugee dismissed claims for judicial review brought by the Veolia and Viridor group of companies in relation to HMRC's demands for very substantial payments of landfill tax. The claims were brought on the basis that Revenue and Customs Brief 58/08 dated 22 December 2008 gave rise to a legitimate expectation that such demands would not be made. Other major landfill site operators have similar claims which have been stayed. Mr Justice Nugee accepted the case advanced by HMRC that the Brief did not give rise to any material legitimate expectation. He also accepted their argument that the Veolia companies had not been the victim of unequal treatment, relative to their competitors.</li> <li>• Watch this space!</li> </ul> <p><small>www.gsblaw.co.uk</small> <span style="float: right;"><b>23</b></span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
 <p style="text-align: right;"><small>16 February 2018 Amanda Hardy QC</small></p> <p><b>Recent JR Cases – FNs and APNs</b></p> <ul style="list-style-type: none"> <li>• A number of recent public law challenges have concerned APN's.</li> <li>• <i>The Queen on the application of Rowe and ors v The Commissioners for Her Majesty's Revenue and Customs</i> [2017] EWCA Civ 2105 and <i>The Queen on the application of Vital Nut Co Limited and Ors v The Commissioners for Her Majesty's Revenue &amp; Customs</i> [2017] EWCA Civ 2105 - CA.</li> <li>• <i>The Queen on the application of Walapu v The Commissioners for Her Majesty's Revenue &amp; Customs</i> (stayed behind Rowe).</li> <li>• <i>The Queen on the application of Dickinson &amp; Ors v Her Majesty's Revenue and Customs</i> (awaiting permission to appeal to CA).</li> </ul> <p><small>www.gsblaw.co.uk</small> <span style="float: right;"><b>24</b></span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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**Rowe and Vital Nut**

- In *Rowe*, the applicants had participated in film partnership schemes established by Ingenious Media PLC. The schemes were disclosed under DOTAS.
- It was claimed that the partnerships of which the applicants were members carried on a trade and had sustained losses in the trade and that each applicant's share of losses could make claims (as they had done) to set that share against income of the current or a prior tax year or to carry it forward against specified profits of a later year.
- In *Vital Nut* contributions were made by a company to an offshore trust which qualified as an EFURBS. The dispute was whether the contributions were immediately deductible in computing taxable profits for corporation tax purposes or whether immediately deductibility was denied on account the employee benefit contribution rules.

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**Rowe and Vital Nut**

- The claimants grounds were that the decision to issue APNs was:
  1. unreasonable, disproportionate or otherwise unfair;
  2. beyond the powers conferred by statute;
  3. contrary to the principles of natural justice;
  4. unlawful, in that there was no tax due or payable;
  5. in breach of article 1 of the First Protocol (A1P1) (and article 6);
  6. not in accordance with the 'designated officer' requirements contained in the legislation.

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**TAX: How to keep your clients out of court and what to do if you get there**

<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">15 February 2018 Amanda Hardy QC</p> <p><b>Rowe and Vital Nut: Grounds 1 and 2</b></p> <p>Heard together, judgment 12/12/2017. Leading judgments were given by Arden LJ (grounds 1 to 4) and McCombe LJ (grounds 5 and 6), with Thirwell LJ. Court summarised arguments:</p> <ol style="list-style-type: none"> <li>i. It was not part of the statutory purpose for APNs/PPNs to be issued to taxpayers who had engaged in tax avoidance before the legislation was passed.</li> <li>ii. The 'designated officer' issuing the notices must be satisfied that the arrangements are not effective.</li> <li>iii. HMRC's 'policy' for issuing APNs/PPNs does not take into account all relevant factors.</li> <li>iv. The statutory provisions were not retrospective in their effect.</li> <li>v. The issuance of the notices was perverse, particularly in light of the fact that delay in progressing the appeals/enquiries was HMRC's fault.</li> </ol> <p>www.gsblaw.co.uk <span style="float: right;">27</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">15 February 2018 Amanda Hardy QC</p> <p><b>Rowe and Vital Nut: Grounds 1 and 2</b></p> <p>With regard to (i), CA agreed with the High Court, holding that the notices could be issued to taxpayers utilising schemes prior to the legislation coming into effect. The claimants' arguments that the intention of the legislation was to deter future (and not historic) use of tax avoidance failed. The court stated that the legislation was also intended to apply to the 'stringing out' of appeals. It did, however, comment that in construing the legislation, the court required clear statutory language in order to depart from convention. Arden LJ said (helpfully) (at para 150):</p> <p><i>Although I do not consider that the service of a PPN on Mr Rowe was outside the statutory purpose of the new regime or precluded by it, I consider that the breadth of the powers contained in this regime call for caution.</i></p> <p>www.gsblaw.co.uk <span style="float: right;">28</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

## TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">15 February 2018 Amanda Hardy QC</p> <p><b>Rowe and Vital Nut: Grounds 1 and 2</b></p> <ul style="list-style-type: none"> <li><i>In a case such as Mr Rowe's, if the provisions of the FA 2014 are applied without limitation, the result may be that Parliament imposes a disadvantage on citizen A in order to deter citizens B, C, D, E and F from acting in a similar way. That is on the face of it a remarkable result. In principle, it is possible for Parliament to impose such an obligation, but the court will expect the legislation to be expressed in clear language if it is to achieve that effect. I approach the issues of statutory interpretation arising on this appeal on that basis.</i></li> <li>The court concluded that it was the clear intention of Parliament to deter the use of tax avoidance schemes through the use of this legislation; and the notices issued to the claimants were within the scope of that statutory purpose.</li> </ul> <p>www.gsblaw.co.uk <span style="float: right;">29</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">15 February 2018 Amanda Hardy QC</p> <p><b>Rowe and Vital Nut: Grounds 1 and 2</b></p> <ul style="list-style-type: none"> <li>Although HMRC was ultimately successful in relation to (ii), the CA did not agree with the High Court on this issue. HMRC's case on this point was that the duty of the designated officer was not to determine the effectiveness of the underlying scheme, unless it was 'obvious' that the scheme achieved the intended fiscal consequences. Claimants' case was that the onus should not be on the taxpayer to establish the effectiveness of an arrangement after an APN/PPN had been issued. The court agreed with the claimants. Arden LJ said (at para [51]):</li> </ul> <p>www.gsblaw.co.uk <span style="float: right;">30</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

TAX: How to keep your clients out of court and what to do if you get there

**5 Stone Buildings**

15 February 2018  
Amanda Hardy QC

**Rowe and Vital Nut: Grounds 1 and 2**

- The courts are entitled to approach these unusual powers on the basis that (unless the legislation clearly provides the contrary) Parliament would not confer power to serve an APN/PPN unless there were reasonable grounds for concluding that the tax would ultimately be found to be payable. That would result in APNs/PPNs only being capable of being used in a proportionate manner when the interests of the state and of the taxpayers involved are fairly balanced. The contrary proposition would involve allowing the state arbitrarily to deprive individuals of their property, even only in anticipation of an obligation that has not yet become complete in law.*

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**5 Stone Buildings**

15 February 2018  
Amanda Hardy QC

**Rowe and Vital Nut: Grounds 1 and 2**

- The court was of the view that the test propounded by Charles J was more generous to HMRC than the statutory language permitted.
- The statutory language requires the designated officer to be positively satisfied on the information he then has that the arrangements in question are not effective.
- This is because FA 2014 s 220(3) requires the designated officer positively to determine, to the best of his information and belief, 'the denied advantage'. Arden LJ said (at para 167):

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## TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p> <p>15 February 2018 Amanda Hardy QC</p> <h3>Rowe and Vital Nut: Grounds 1 and 2</h3> <ul style="list-style-type: none"><li>As I see it, Parliament has taken the view that the new powers to exact accelerated payments should only be available if the designated officer forms the view that the tax scheme does not work having diligently weighed up to the appropriate extent all the information available and not before, and the designated officer has no reason to doubt that information... I appreciate that this interpretation makes the legislation less easy for HMRC to operate but that is not a reason for departing from the statute's meaning as I understand it to be. It can, moreover, equally be said that it is difficult to see why Parliament would have legislated for the interpolation of a designated officer, a senior officer of HMRC, if it was not intended that HMRC should have to take a view on effectiveness.</li></ul> <p>www.gsblaw.co.uk 33</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p>15 February 2018 Amanda Hardy QC</p> <h3>Rowe and Vital Nut: Grounds 1 and 2</h3> <ul style="list-style-type: none"><li>On point (iii), the court found in favour of HMRC. HMRC's policy is to issue APNs/PPNs in virtually all cases where they consider the conditions, referred to in FA 2014 s 219 and Sch 32 para 3, to be satisfied. The claimants argued that such a policy fettered HMRC's discretion and was unfair.</li><li>The court, however, found that the authorities supported HMRC's view and it was open to them to formulate and apply such a general policy.</li><li>The court commented that the threshold for defeating the issuance of the notices on such grounds would be extremely high.</li></ul> <p>www.gsblaw.co.uk 34</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

## TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">16 February 2018 Amanda Hardy QC</p> <p><b>Rowe and Vital Nut: Grounds 1 and 2</b></p> <ul style="list-style-type: none"> <li>• With regard to (iv), the claimants argued that the APN regime retrospectively removed legal entitlements that taxpayers who had participated in DOTAS arrangements had at the relevant time.</li> <li>• HMRC argued that Parliament had clearly intended the legislation to apply to arrangements which had been utilised prior to the enactment of FA 2014.</li> <li>• The court agreed with HMRC and the first instance judges, and confirmed that the APN regime can be applied to arrangements entered into before the legislation came into force.</li> </ul> <p><a href="http://www.gsblaw.co.uk">www.gsblaw.co.uk</a> <span style="float: right;">35</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">16 February 2018 Amanda Hardy QC</p> <p><b>Rowe and Vital Nut: Grounds 1 and 2</b></p> <ul style="list-style-type: none"> <li>• As to (v), the claimants relied on the well-known natural justice principles which require HMRC to consider all relevant factors and act fairly in the exercise of its powers.</li> <li>• The claimants argued that HMRC had failed to do so in this case, for example, by failing to take into account the fact that the delay in determining the tax appeals was largely the fault of HMRC and not the taxpayers. Likewise, HMRC was said to not have considered whether issuing the notices would cause financial hardship to the recipients of the notices. HMRC's position was that it has a hardship policy which enables taxpayers who have received an APN/PPN to contact HMRC with a view to agreeing a 'time to pay' arrangement, if they cannot pay without incurring financial hardship.</li> </ul> <p><a href="http://www.gsblaw.co.uk">www.gsblaw.co.uk</a> <span style="float: right;">36</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

## TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p> <p>15 February 2018 Amanda Hardy QC</p> <h3>Rowe and Vital Nut: Grounds 1 and 2</h3> <ul style="list-style-type: none"><li>CA held HMRC's application of its hardship policy may not be sufficient as a means of safeguarding taxpayers' rights. Arden LJ said (at para [91]): <i>HMRC may be dealing with individual taxpayers on whom an APN/PPN may have a draconian effect. Some may be wealthy taxpayers but others may have to sell their homes or make decisions about involvement in that business and about that financial expenditure which may turn out to have been unnecessary if the scheme in question is effective ... In deciding whether to issue or confirm an APN/PPN, HMRC may, in performance of their duty to act fairly, have to take into consideration that there is a significant failure rate (20%), and that taxpayers should not be required to comply with APNs/PPNs where the result would be arbitrary or oppressive, as where a taxpayer is forced to sell his home and is not given enough time to do so in a way that will produce a good price or leave him with an acceptable alternative.</i></li></ul> <p>www.gsblaw.co.uk <span style="float: right;">37</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p>15 February 2018 Amanda Hardy QC</p> <h3>Rowe and Vital Nut: Ground 3</h3> <ul style="list-style-type: none"><li>HMRC duty of fairness is satisfied as a taxpayer has the right to make representations in relation to any APN/PPN issued. Claimants: HMRC should have explained the basis of their liability before issuing the notices. The CA agreed with claimants.</li><li>Consistent with its view in relation to the designated officer, the CA held that HMRC is obliged to form a view on the arrangements in question. CA concluded on the facts, the claimants were aware of HMRC's views in relation to the underlying arrangements and the basis of their liability.</li><li>HMRC referred to the fact that it had published a number of 'Spotlights' in which its views on the tax consequences of the arrangements in question were set out. CA satisfied this met requirement that recipients must be informed of HMRC's view on the tax treatment of the arrangements they have entered into and the basis of any alleged liability.</li></ul> <p>www.gsblaw.co.uk <span style="float: right;">38</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>



## TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p> <p>10 February 2018 Amanda Hardy QC</p> <p><b>Rowe and Vital Nut: Ground 4</b></p> <ul style="list-style-type: none"> <li>The claimants argued that HMRC was unable to assess them to tax as it had failed to utilise the correct statutory procedure in time. It was argued that enquiry time limits exist for a reason: namely, to provide some finality to taxpayers.</li> <li>In <i>Rowe</i> standalone carry-back claims were made and it was argued that an enquiry into such claims had to be made. Distinguishable on its facts from the taxpayers' cases in <i>Cotter v HMRC</i> [2013] 1 WLR 3514 and <i>R (oao De Silva and Another) v HMRC</i> [2017] UKSC 74; see CA in <i>R (oao Derry) v HMRC</i> [2017] EWCA Civ 435.</li> </ul> <p>www.gsblaw.co.uk <span style="float: right;">39</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p>10 February 2018 Amanda Hardy QC</p> <p><b>Rowe and Vital Nut: Ground 4</b></p> <ul style="list-style-type: none"> <li>HMRC submitted that, even if Mr Rowe's claim was a standalone claim, HMRC could still enquire into it by means of a deemed TMA 1970 s 12AC(6) enquiry into the partnership return. The court said that the facts in the claimants' cases could not be distinguished from those in <i>De Silva</i> and, relying on the Supreme Court's judgment in <i>De Silva</i>, rejected the claimants' argument.</li> <li>When HMRC commenced an enquiry into the return of the partnership for the loss year, this operated as a deemed enquiry into Mr Rowe's tax return, including the statement of his share of the relevant loss for the same period. Accordingly, the court held that HMRC did not have to open any other enquiry into the standalone claim for relief.</li> </ul> <p>www.gsblaw.co.uk <span style="float: right;">40</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

**TAX: How to keep your clients out of court and what to do if you get there**

**5 Stone Buildings**

16 February, 2018  
Amanda Hardy QC

**Rowe and Vital Nut: Ground 5**

- In arguing that the issuance of APNs/PPNs infringed the claimants' rights under A1P1, 3 issues arose:
  1. Is the article engaged at all by interfering with the 'peaceful enjoyment of .. possessions'?
  2. If so, is the interference 'provided for by law'?
  3. Is the interference proportionate?
- The court, agreeing with the High Court below, held that the claimants' rights under A1P1 were not infringed.

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**5 Stone Buildings**

16 February, 2018  
Amanda Hardy QC

**Rowe and Vital Nut: Ground 5**

- The court did disagree with the view expressed by Simler J in Rowe in relation to the applicability of *Kopecný v Slovakia* (2005) 41 EHRR 43. In *Kopecný* the applicant was claiming a right in money and, therefore, his claim was not a 'possession' for A1P1 purposes. Lord Justice McCombe said (at paras 168, 169):
- *Under the APN/PPN procedures, it [the state] simply has a money claim conferred on it by legislation, in anticipation of a possible future tax liability which may or may not be established. It makes no claim whatsoever to the money as tax. The appellants' money remains their money. It is to turn the matter around 180 degrees to say that it is the appellants who only have a claim to keep their money because of the demand made by the state to deprive them of it... It is difficult to see how the state's statutory claim prevents the cash being a "possession" of the appellants.*

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TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p> <p>15 February 2015 Amanda Hardy QC</p> <p><b>Rowe and Vital Nut: Ground 5</b></p> <ul style="list-style-type: none"><li>Disagreed with Simler J's on applicability of <i>APVCO 19 Ltd v HM Treasury</i> [2015] EWCA Civ 648.</li><li>CA concluded even if A1P1 was engaged, the interference was provided for by law and was a proportionate one in all the circumstances, given the legislative objective to eliminate tax avoidance.</li><li>Similarly, the interference was determined to be not truly retrospective, given that the taxpayers knew that they may have to pay amounts back to HMRC at some future date, if arrangements found to be ineffective.</li><li>Article 6 challenge: It did not wish to extend the <i>Ferrazzini</i> principle further than was necessary. Confirmed that APNs/PPNs are not a claim to tax, but the availability of the procedure for making representations against the issuance of notices, together with the availability of judicial review, provided sufficient safeguards to satisfy the requirements of article 6.</li></ul> <p>www.gsblaw.co.uk 43</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p>15 February 2015 Amanda Hardy QC</p> <p><b>Rowe and Vital Nut: Ground 6</b></p> <ul style="list-style-type: none"><li>McCombe LJ, agreeing with Arden LJ, confirmed that the first instance decisions incorrectly reversed the burden of proof with regard to the designated officer requirement; [220]: <i>I would add that I cannot see that the statutory requirement of a "designated officer" should mean that that officer should be a mere cipher. He/she must be there to exercise a function and to shoulder responsibility. Otherwise, the statutory requirement of a designated officer would serve no purpose.</i></li><li>McCombe LJ not satisfied that the designated officer had formed an independent view in the instant cases. But, relying on Senior Courts Act 1981 s 31(2A), decided even if HMRC had applied the correct statutory procedure before issuing the notices, it would likely have arrived at the same conclusion and, therefore, the notices should be allowed to stand.</li></ul> <p>www.gsblaw.co.uk 44</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

**TAX: How to keep your clients out of court and what to do if you get there**

<p><b>5 Stone Buildings</b></p> <p>15 February 2015 Amanda Hardy QC</p> <p><b>Rowe and Vital Nut: analysis</b></p> <ul style="list-style-type: none"> <li>• A number of interesting arguments were not put, for example, were there "chosen arrangements" for Condition B and were the chosen arrangements DOTAS arrangements.</li> <li>• Helpful clarification in relation to statutory requirements in FA 2014 must be satisfied before HMRC can issue an APN/PPN.</li> <li>• For the purposes of FA 2014 s 220(3) and Sch 32 para 4(2), the designated officer must reasonably conclude on the information available to him that the underlying arrangements are ineffective and that the tax claimed will ultimately be found to be payable and taxpayer on notice.</li> <li>• It is important that taxpayers who receive such notices carefully consider whether all necessary statutory conditions referred to in the legislation have been satisfied.</li> <li>• Comments of the court in relation to financial hardship also important.</li> <li>• Is a GAAR opinion the future?</li> </ul> <p>www.gsblaw.co.uk <span style="float: right;">45</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p>15 February 2015 Amanda Hardy QC</p> <p><b>Rowe and Vital Nut: analysis</b></p> <ul style="list-style-type: none"> <li>• A number of interesting arguments were not put, for example, were there "chosen arrangements" for Condition B and were the chosen arrangements DOTAS arrangements.</li> <li>• Helpful clarification in relation to statutory requirements in FA 2014 must be satisfied before HMRC can issue an APN/PPN.</li> <li>• For the purposes of FA 2014 s 220(3) and Sch 32 para 4(2), the designated officer must reasonably conclude on the information available to him that the underlying arrangements are ineffective and that the tax claimed will ultimately be found to be payable and taxpayer on notice.</li> <li>• It is important that taxpayers who receive such notices carefully consider whether all necessary statutory conditions referred to in the legislation have been satisfied.</li> <li>• Comments of the court in relation to financial hardship also important.</li> <li>• Is a GAAR opinion the future?</li> </ul> <p>www.gsblaw.co.uk <span style="float: right;">46</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

## TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">16 February 2018 Amanda Hardy QC</p> <h3>Carlton</h3> <ul style="list-style-type: none"><li>• <i>R (On the Application of Marcus Carlton and others) v HMRC</i> [2018] EWHC 130. Whipple J considered 2 grounds not addressed in <i>Rowe</i> and <i>Vital Nut</i> and effect those decisions.</li><li>• Taxpayers members of LLPs invested in commercial property to take advantage of business premises renovation allowances.</li><li>• Grounds were (1) partnerships commercial in nature and did not constitute tax avoidance so application of APN legislation unreasonable and/or an abuse of power and (2) HMRC's decision to issue PPNs <i>ultra vires</i> because the statutory conditions not met on the facts.</li><li>• Whipple J held issue PPNs lawful.</li><li>• Taxpayer raised argument that Condition B not satisfied: not tax advantage purpose: HMRC: objective test - whether advantage results: Whipple J agreed.</li></ul> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> <span style="float: right;">47</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">16 February 2018 Amanda Hardy QC</p> <h3>Carlton</h3> <ul style="list-style-type: none"><li>• Whipple J also held Condition B met on the facts of the case as partnership statements reduced by qualifying expenditure and that results in a tax advantage. Even if wrong, objective test and only requires tax avoidance one of the main purposes "<i>the existence of a coincident commercial purpose would not be fatal</i>."</li><li>• Whipple J held that the arrangements were DOTAS arrangements, notified and notifiable. Taxpayer argued investment for commercial purposes, HMRC loss schemes within Hallmark 6 in Regulation 12.</li><li>• Taxpayer sought to raise designated officer point after <i>Rowe</i>: Whipple J held not open to them, the evidence not challenged or pleaded, not asked permission to deal with.</li></ul> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> <span style="float: right;">48</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

## TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p> <p>15 February 2018 Amanda Hardy QC</p> <h3>Power to assess</h3> <ul style="list-style-type: none"><li>• A number of JR cases brought relating to this area.</li><li>• <i>R (Archer) v HMRC</i> [2017] STC 1037. Challenge by JR against closure notices which did not state the amount of tax due.</li><li>• Jay J accepted that the closure notices were defective as they failed to state the amount of tax due, they nevertheless gave rise to an appealable decision under section 31(1)(b) TMA 1970.</li><li>• On such an appeal, the FTT could cure the defects in the closure notice using its powers to save errors in section 114 TMA 1970. Accordingly, the correct course was to appeal the decision rather than to bring a judicial review.</li></ul> <p>www.gsblaw.co.uk <span style="float: right;">49</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p>15 February 2018 Amanda Hardy QC</p> <h3>Power to assess</h3> <ul style="list-style-type: none"><li>• Similar procedural point in <i>Glencore Energy UK Ltd v HMRC</i> [2017] EWCA Civ 1716 which concerns diverted profits tax.</li><li>• Essential complaint was that the statutory review and appeal procedure was not a suitable alternative remedy as it would see the appellant company out of its money for some considerable period of time.</li><li>• Judicial review was refused, on grounds that it is "a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective... To allow judicial review to intrude alongside the appeal regime risks disrupting the smooth collection of tax and the efficient functioning of the appeal procedures in a way which is not warranted by the need to protect the fundamental interests of the taxpayer."</li></ul> <p>www.gsblaw.co.uk <span style="float: right;">50</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

## TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p> <p>16 February 2018 Amanda Hardy QC</p> <h3>Finally</h3> <ul style="list-style-type: none"><li>• <i>Emmanuel Onillon</i> [2018] UKFTT 33 (TC) – FN - the onus is on HMRC to demonstrate that the conditions for issuing a Penalty for failing to comply with the Follower Notice are satisfied and to demonstrate that the penalty amount has been correctly calculated. The onus is on the Appellant to demonstrate that it was reasonable in all the circumstances not to take corrective action and to demonstrate that he has not been given an adequate reduction for co-operation pursuant to s210 FA 2014. The standard of proof is the civil standard being the balance of probabilities. On the facts reasonable.</li><li>• <i>Knibbs v HMRC</i> [2018] EWHC 136 (Ch) HMRC successfully strike out JR claims for carry back losses post <i>De Silva</i>. Warren J leaves open fascinating question as to HMRC's right to restitution where they have already made payment.</li></ul> <p>www.gsblaw.co.uk 51</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p>16 February 2018 Amanda Hardy QC</p> <h3>Disclaimer</h3> <ul style="list-style-type: none"><li>• <b>DISCLAIMER:</b> Neither these notes nor the talk based on them nor anything said in the discussion session constitute legal advice. They are simply an expression of the speaker's views, put forward for consideration and discussion. No action should be taken or refrained from in reliance on them but independent professional advice should be taken in every case. Neither the speaker nor 5 Stone Buildings accepts any legal responsibility for them.</li></ul> <p>www.gsblaw.co.uk 52</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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# 5 Stone Buildings


**Film Schemes – not  
Romantic Comedy**

**Ruth Hughes**

**TAX: How to keep your clients out of court and what to do if you get there**

<p style="text-align: center;"><b>Film Schemes</b></p> <p style="text-align: center;"><u>NOT</u> a romantic comedy</p> <p style="text-align: center;">Best Supporting Actress: Miss Ruth Hughes</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>Cases – currently in post-production</p> <ul style="list-style-type: none"> <li>• <i>Eclipse</i> 35 [2015] EWCA Civ 95</li> <li>• <i>Degorce</i> [2017] EWCA Civ 1427</li> <li>• <i>Samarkand</i> [2017] EWCA Civ 77</li> <li>• <i>R (De Silva)</i> [2017] UKSC 74</li> <li>• <i>Icebreaker: Take That v Tax Man, Icebreaker 2 (the return of Icebreaker), Icebreakers, Icebreaker disintegrated</i></li> <li>• <i>Ingenious</i> [2016] UKFTT 521 (TC)</li> </ul>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p>What is the only comparable film to Avatar?</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>The Smurfs!</p> 	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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# 5 Stone Buildings

**Discovery Assessments**

**Sam Chandler**

**TAX: How to keep your clients out of court and what to do if you get there**



5 Stone Buildings

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**Discovery assessments**

*Clark v HMRC [2017] UKFTT 392*

Sam Chandler

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21 February 2018  
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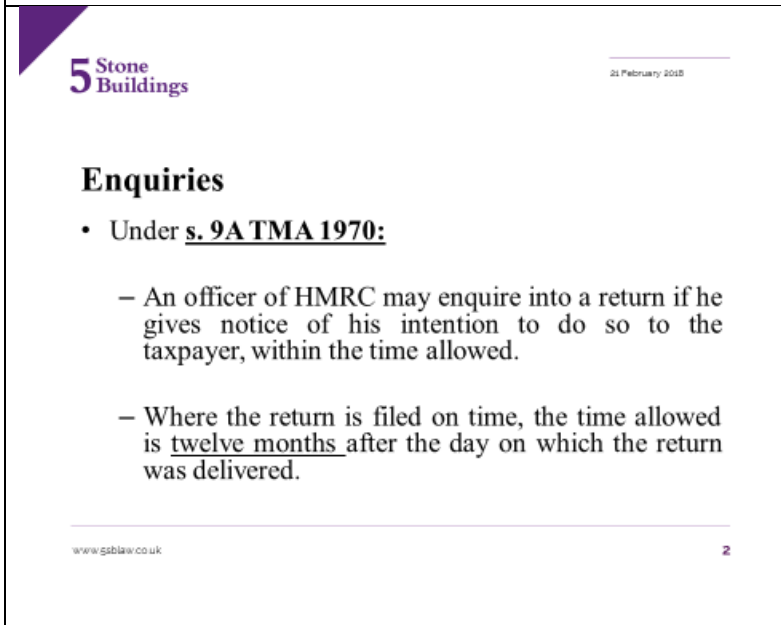
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**Enquiries**

- Under **s. 9A TMA 1970**:
  - An officer of HMRC may enquire into a return if he gives notice of his intention to do so to the taxpayer, within the time allowed.
  - Where the return is filed on time, the time allowed is twelve months after the day on which the return was delivered.

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**TAX: How to keep your clients out of court and what to do if you get there**

<p><b>5 Stone Buildings</b> <span style="float: right;">21 February 2018</span></p> <p><b>Under <u>s. 28A TMA 1970</u>:</b></p> <ul style="list-style-type: none"> <li>– An enquiry is completed where an officer informs the taxpayer, by way of a closure notice, that his enquiries have been completed.</li> <li>– The closure notice must state either that no amendment is required or make amendments required.</li> <li>– Amendments are effected by s. 9C TMA 1970, which allow the officer to make amendments where tax payable is, in his opinion, insufficient.</li> </ul> <p><small>www.gsbllaw.co.uk</small> <span style="float: right;">3</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b> <span style="float: right;">21 February 2018</span></p> <p><b>Applications under <u>s. 28A(4) TMA 1970</u>:</b></p> <p><i>“(4) A taxpayer may apply to the Tribunal for a direction requiring an officer of the Board to issue a partial or final closure notice within a specified period.</i></p> <p><i>(5) ...</i></p> <p><i>(6) The Tribunal shall give the direction applied for unless satisfied that there are reasonable grounds for not issuing a closure notice within a specified period”</i></p> <p><small>www.gsbllaw.co.uk</small> <span style="float: right;">4</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p><b>5 Stone Buildings</b> <span style="float: right;">21 February 2018</span></p> <ul style="list-style-type: none"> <li>• The provision is “a protection to the taxpayer, by giving it a procedure whereby, if it believes that an enquiry is being inappropriately protracted and pursued by the Revenue, it can bring the matter before the independent and specialist tribunal”. (see <i>D’Arcy v HMRC</i> [2006] STC (SCD) 543)</li> <li>• It is for HMRC to show reasonable grounds not to issue a closure notice (see <i>Eclipse Film Partners No 35 LLP v HMRC</i> [2009] STC (SCD))</li> </ul> <p><small>www.gsbllaw.co.uk</small> <span style="float: right;">5</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b> <span style="float: right;">21 February 2018</span></p> <p><b>Discovery assessments – s. 29 TMA 1970</b></p> <p>“If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment –</p> <ul style="list-style-type: none"> <li>(a) [income / capital gains that ought to have been assessed]</li> <li>(b) [an insufficient assessment]</li> <li>(c) [excessive relief]</li> </ul> <p><i>The officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax”</i></p> <p><small>www.gsbllaw.co.uk</small> <span style="float: right;">6</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p><b>5 Stone Buildings</b> <span style="float: right;">21 February 2018</span></p> <p><i>“There are statutory limitations as to the time at which the sufficiency or otherwise of the information must be judged. These provisions underline the finality of the self-assessment, a finality which is underlined by strict statutory control of the circumstances in which the Revenue may impose additional tax liabilities by way of amendment to the taxpayer’s return and assessment.”</i></p> <p><i>Tower McCashback LLP 1 v HMRC [2010] EWCA Civ 32 at [24]</i></p> <hr/> <p>www.gsbllaw.co.uk <span style="float: right;">7</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b> <span style="float: right;">21 February 2018</span></p> <p><b>Statutory limits</b></p> <p>Time limits: ss. 34, 36 TMA 1970</p> <p>Three important, further limitations:</p> <ol style="list-style-type: none"> <li>1. There has to be a “discovery”;</li> <li>2. No assessment where return made on the basis of practice generally prevailing: s. 29(2);</li> <li>3. Where return has been delivered, no assessment unless:             <ol style="list-style-type: none"> <li>(a) The insufficiency is brought about by careless or deliberate conduct: s. 29(4); <b>OR</b></li> <li>(b) The Officer could not have been expected to be aware of the potential loss of tax on the basis of information available: s. 29(5).</li> </ol> </li> </ol> <hr/> <p>www.gsbllaw.co.uk <span style="float: right;">8</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>



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<p><b>5 Stone Buildings</b> <span style="float: right;">21 February 2018</span></p> <p><b>Limitation One: A “discovery”</b></p> <p>See the Upper Tribunal decision in <i>HMRC v Charlton</i> [2013] STC 866</p> <p><i>“In our judgment, no new information, or fact or law is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion or correct of an oversight...”</i></p> <p><i>...If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment.”</i> [37]</p> <p><small>www.gstlaw.co.uk <span style="float: right;">9</span></small></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b> <span style="float: right;">21 February 2018</span></p> <p><b>Limitation Two: Practice generally prevailing</b></p> <p>Practice “<i>which is relatively long-established, readily ascertainable by interested parties, and accepted by HMRC and taxpayers alike</i>”</p> <p>Henderson J in <i>Revenue and Customs Comrs v Household Estate Agents Ltd</i> [2007] EWHC 1684 (Ch)</p> <p><small>www.gstlaw.co.uk <span style="float: right;">10</span></small></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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**Limitation Three: Taxpayer conduct / awareness**

Can only assess where:

- Insufficiency caused by careless or deliberate conduct (s. 29(4) – see *Anderson v HMRC* [2016] UKFTT 335 (TC));
- OR**
- Officer could not have been reasonably expected, on the basis of information made available before that time, to be aware of the situation (s. 29(5) – see *Charlton*)

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*Clark v HMRC* [2017] UKFTT 392

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graph LR; A[Suffolk Life] -- Transfer A --> B[Laversham Marketing Limited Pension Scheme]; B -- Transfer B --> C[Laversham Marketing Limited]
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*Clark v HMRC* [2017] UKFTT 392

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graph TD; A[Suffolk Life] -- Transfer A --> B[Laversham Marketing Limited Pension Scheme]; B -- Transfer B --> C[Laversham Marketing Limited];
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*Clark v HMRC* [2017] UKFTT 392

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graph TD; A[Suffolk Life] -- Transfer A --> B[Laversham Marketing Limited Pension Scheme]; B -- Transfer B --> C[Laversham Marketing Limited];
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<p><b>5 Stone Buildings</b></p> <p>21 February 2018</p> <p><i>Clark v HMRC</i> [2017] UKFTT 392</p> <p><i>"It cannot have been the intention of Parliament to confine the scope of the assessment to what was necessarily an imprecise and subjective, though objectively tenable, opinion of a particular officer likely to be relying on limited resources."</i> [30]</p> <p><i>"We consider that it is consistent with s 29, taken as a whole, for the scope of the assessment to be limited to a charge of the particular nature which is considered to have given rise to the loss of tax for a particular year of assessment, and which arises out of the factual matrix that is found to have been associated with the loss of tax that gave rise to the assessment on the basis of the officer's opinion"</i> [43]</p> <p>www.gsblaw.co.uk <b>15</b></p>	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>
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<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">21 February 2018</p> <hr/> <p><b>Practitioners' Checklist</b></p> <ol style="list-style-type: none"><li>1. Is it in time?</li><li>2. Has there been a discovery?</li><li>3. Is it stale?</li><li>4. Is the officer's assessment honest and reasonable?</li><li>5. Was the return made in accordance with generally prevailing practice?</li><li>6. If not, was the insufficiency caused by carelessness or deliberate conduct?</li><li>7. What about reasonable awareness?</li></ol> <hr/> <p>www.gsbllaw.co.uk <span style="float: right;">16</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">21 February 2018</p> <hr/> <p><b>Practitioners' Checklist</b></p> <p>If a new insufficiency emerges in the context of a pre-existing discovery assessment:</p> <ol style="list-style-type: none"><li>1. Is it a charge of the same nature?</li><li>2. Same factual matrix?</li><li>3. Within statutory limitations?</li></ol> <p>If answer to (1) and (2) is no, then HMRC will need to make a new discovery assessment. Are they in time to do so?</p> <hr/> <p>www.gsbllaw.co.uk <span style="float: right;">17</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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# 5 Stone Buildings

**Trusts Tax 2018**

**Oliver Marre**

## TAX: How to keep your clients out of court and what to do if you get there

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Trust tax

Oliver Marre

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15 February, 2018  
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Trusts

Is there a trust (at all)?

What are the terms?

When was it settled?

Who are the trustees?

Who is the settlor?

Who are the beneficiaries?

What tax treatment follows?

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## TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p> <p>Is there a trust?</p> <p>Sham?</p> <p>"Illusory trusts"?</p> <p>Bare trusts.</p> <p>Trusts with unfortunate trustees.</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p><b>SHAM!</b></p> <p>Sham trusts</p> <p>Diplock LJ in <i>Snook v London and West Riding Investments Ltd</i> [1967] 2 QB 787 at 802:</p> <p><i>"I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities ... that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."</i></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

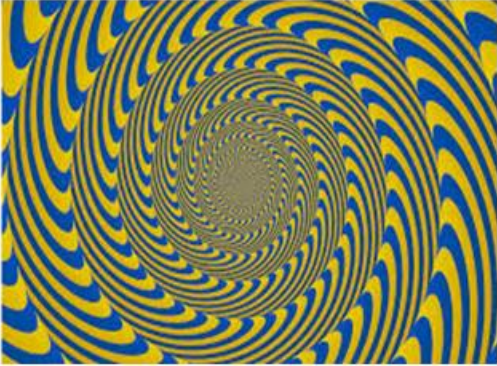
## TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">_____</p> <div style="text-align: center;">  </div> <p><b>Sham trusts</b></p> <p><u>Hitch v Stone</u> [2001] STC 214 (CA):</p> <p><i>"it is of the essence ... that the parties to a transaction intend to create one set of rights and obligations but do acts or enter into documents which they intend should give third parties, in this case the Revenue or the court, the appearance of creating different rights and obligations."</i></p> <p>See also <u>R v Quillan</u> [2015] EWCA Crim 538, [2015] 1 WLR 4673 for common intention.</p> <p>_____</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <p style="text-align: right;">_____</p> <div style="text-align: center;">  </div> <p><b>Sham trusts</b></p> <ul style="list-style-type: none"> <li>&gt; the settlor intends the assets to be held on terms different to those set out in the trust deed;</li> <li>&gt; the trustee also intends that or goes along with it recklessly;</li> <li>&gt; both parties intend to give a false impression.</li> </ul> <p>_____</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>



## TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p> <hr/> <h3>Sham trusts</h3> <p>Maybe ...</p> <ul style="list-style-type: none"><li>No disposal of the property for CGT</li><li>No transfer of value for IHT</li><li>No trustee responsibility for income tax</li></ul>  <hr/>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <hr/> <h3>"Illusory trusts"</h3> <p><u>Armitage v Nurse</u> [1997] EWCA Civ 1279, per Millett LJ:</p> <p><i>"there is an irreducible core of obligations owed by trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts."</i></p> <hr/>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p>5 Stone Buildings</p> <p><b>“Illusory trusts”</b></p> <p><u>JSC Mezhdunarodny Promyshlenny Bank &amp; Another v Sergei Viktorovich Pugachev &amp; Others</u> [2017] EWHC 2426 (Ch):</p> <p><i>“[167] ... when considering what powers a person actually has as a result of a trust deed, the court is entitled to construe the powers and duties as a whole and work out what is going on, as a matter of substance...when the deed is examined with care, what emerged is that in fact Mr Clayton had effectively retained the powers of ownership. [168] This conclusion is not the same thing as a finding of sham. The analysis is all concerned with what the effect of the deed truly is. It is not concerned with the subjective intentions of the parties to create a pretence to mislead.”</i></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>


## TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p> <h3>Bare trusts</h3> <p>Stated and intended.</p>  <p><small>www.gsbllaw.co.uk</small> <b>11</b></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <h3>Tax consequences</h3>  <ul style="list-style-type: none"><li>➤ Often no disposal for CGT</li><li>➤ Often no transfer of value for IHT</li><li>➤ Can be no trustee compliance duties, no trustee income tax, no trustee CGT, no 10 year charges under the relevant property regime.</li><li>➤ Can escape anti-avoidance provisions</li><li>➤ Will lose the "benefits" of trust taxation (including 2017 protections)</li><li>➤ Different qualifying criteria for e.g. BPR and entrepreneurs' relief for trust property.</li></ul> <p><small>www.gsbllaw.co.uk</small> <b>12</b></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

**TAX: How to keep your clients out of court and what to do if you get there**

<p><b>5 Stone Buildings</b></p> <hr/> <p><b>Unfortunate trustees</b></p> <p><i>Lee &amp; Bunter v HMRC</i> [2017] UKFTT 0279 (TC). Judge Bishopp:  <i>"it follows that I am satisfied that the decisions of real importance concerning the Settlements were taken in the UK and merely implemented in Mauritius, and that the POEM of the Settlements was therefore also in the UK."</i></p> <p>Consequences:</p> <ul style="list-style-type: none"> <li>➤ In this case, DTC did not apply.</li> <li>➤ Query who is the trustee/what considerations he has in mind/what the consequences are: void or voidable decisions? (<i>Turner v Turner</i> [1984] Ch 100; <i>Futter &amp; Anr v HMRC</i> [2013] UKSC 26.)</li> </ul> <hr/> <p><small>www.gstblaw.co.uk</small> <span style="float: right;"><b>13</b></span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <hr/> <p><b>Terms</b></p> <ul style="list-style-type: none"> <li>➤ What powers do the trustees have?</li> <li>➤ What is the tax effect (both immediate and longer-term) of exercising them?</li> <li>➤ E.g. Extending an interest in possession             <ul style="list-style-type: none"> <li>➤ Postpone CGT on end of interest</li> <li>➤ If pre-2006 interest, preserve non-relevant, property status</li> <li>➤ Avoid charge in diminution in transferor's estate (further IHT charge)</li> </ul> </li> </ul> <hr/> <p><small>www.gstblaw.co.uk</small> <span style="float: right;"><b>14</b></span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

## TAX: How to keep your clients out of court and what to do if you get there


<p><b>5 Stone Buildings</b></p> <hr/> <h3>When?</h3> <ul style="list-style-type: none"><li>➤ Pre- or post- 2006 trusts?</li><li>➤ Relevant property regime changed.</li></ul> <hr/> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> <span style="float: right;">15</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p>  <h3>Trustees</h3> <ul style="list-style-type: none"><li>• Residence?</li><li>• This can be determined by a mix of fact and statute.</li><li>• Post 2007 rules for IT/CGT:<ul style="list-style-type: none"><li>– Settlor resident/domiciled in the UK, all trustees must be resident outside the UK if the trust is to be non-resident.</li><li>– Settlor is non-resident and non-UK domiciled at the time he funds the trust only necessary that there is one non-resident trustee for the trust to be treated as non-resident.</li></ul></li><li>• IHT definition slightly different and piecemeal.</li></ul> <hr/> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> <span style="float: right;">16</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p><b>5 Stone Buildings</b></p> <hr/> <p><b>Trustees</b></p> <ul style="list-style-type: none"><li>• Residence of trustees of substantive settlements dictates much income and CGT treatment.</li><li>• Watch out for UK source income, UK real estate (especially, for now, residential property).</li><li>• N.b. That the trustees are a single and continuous body of people distinct from the trustees from time to time as a matter of statute for CGT and IT purposes. It is the resident of this person which is determined by the test. (S 69 TCGA 1992; s 474 ITA 2007.)</li></ul> <hr/> <p>www.gsbllaw.co.uk <span style="float: right;">17</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <hr/> <p><b>Trustees</b></p> <ul style="list-style-type: none"><li>• Specific relevance for some treaties.</li><li>• <i>Lee and Bunter</i> concerned Mauritius trustees.</li><li>• HMRC contended that the DTC could not apply because the "trust" is a body in Mauritius and the "trustees" are a body in the UK, so the same person is never subject to tax in both jurisdictions.</li><li>• Rejected by Judge Bishopp.</li></ul> <hr/> <p>www.gsbllaw.co.uk <span style="float: right;">18</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>



## TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p>  <h3>Settlors</h3> <ul style="list-style-type: none"><li>• Most settlements created by UK domiciliaries fall into the "relevant property regime".<ul style="list-style-type: none"><li>- inheritance tax charge on property in the settlement when the trust is created.</li><li>- tenth anniversary of the commencement of the settlement</li><li>- distribution of property out of trust.</li></ul></li><li>• Does the settlor retain an interest?<ul style="list-style-type: none"><li>- If so, ITTOIA settlement provisions during life and</li><li>- Possible gift with reservation of benefit and</li><li>- Watch TOAA provisions. (Motive defence? <i>Fisher?</i>)</li></ul></li></ul> <p><small>www.gsbllaw.co.uk</small> <b>19</b></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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<p></p> <p><b>Settlors</b></p> <ul style="list-style-type: none"><li>• Non domiciled settlor + non-UK situs assets = excluded property trust</li><li>• Escapes IHT.</li><li>• Watch:<ul style="list-style-type: none"><li>– Assets held: e.g. UK property holding structures. New IHT res prop transparency.</li><li>– Actual, historic and new deemed domicile provisions.</li></ul></li></ul> <p><small>www.gsbllaw.co.uk</small> <span style="float: right;"><b>20</b></span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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**IHT residential property transparency**



Interests in partnerships  
Loans to trusts  
Interests in partnerships  
Loans to companies?  
The TAAR

Trust  
|  
Holding Company  
|  
UK residence

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**5 Stone Buildings**

**Domicile/deemed domicile**

- Old law
  - General law domicile - residence & intention
  - IHT deemed domicile 15/17 years rule
- New law: Deemed domicile for IHT & IT
  - 15 year rule
  - Returning UK domicillaries of UK origin (formerly domiciled residents)

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## TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p> <hr/> <h3>Domicile/deemed domicile</h3>   <p><a href="http://www.gblaw.co.uk">www.gblaw.co.uk</a> <span style="float: right;">23</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <hr/> <h3>Barclay's Wealth: excluded property settlements</h3> <p><i>Barclay's Wealth Trustees (Jersey) Ltd and Michael Dreehan v HMRC</i> [2017] EWCA Civ 1512</p> <ul style="list-style-type: none"><li>• D was domiciled in Ireland but subsequently became deemed domiciled in the UK. Before he became a UK domiciliary:<ul style="list-style-type: none"><li>– In 2001, he settled a trust</li><li>– In 2003, he transferred shares in a UK company to the trustees</li></ul></li></ul> <p><a href="http://www.gblaw.co.uk">www.gblaw.co.uk</a> <span style="float: right;">24</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p><b>5 Stone Buildings</b></p> <hr/> <p><b>Barclay's Wealth</b></p> <ul style="list-style-type: none"> <li>• After D became a UK domiciliary:             <ul style="list-style-type: none"> <li>- Settled a new trust</li> <li>- The trustees of the 2001 Settlement transferred the shares to new trust. (The shares were deemed to remain in the 2001 Settlement for the purpose of the relevant property regime but were not excluded property, that would have required the new trust to have been made by a non-domiciled settlor.)</li> <li>- The trustees sold the shares.</li> <li>- The trustees transferred cash back to the 2001 Settlement. The trustees of the 2001 Settlement transferred cash into a Jersey bank account.</li> </ul> </li> </ul> <hr/> <p>www.gsblaw.co.uk <span style="float: right;">25</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <hr/> <p><b>Barclay's Wealth</b></p> <ul style="list-style-type: none"> <li>• Excluded property?</li> <li>• Settlor UK domiciled "at the time the settlement was made?"</li> <li>• CA said a settlement is a single settlement even if a number of transfers are made into the settlement.</li> <li>• D was not domiciled when he first made the 2001 Settlement.</li> <li>• The foreign assets were therefore not subject to the anniversary charge.</li> <li>• Not necessary to test the domicile of the settlor every time funds are transferred between excluded property trusts.</li> <li>• Can deemed domiciled settlors add property to pre-deeming excluded property settlements? Court of Appeal expressly refused to rule on that point.</li> </ul> <hr/> <p>www.gsblaw.co.uk <span style="float: right;">26</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

## TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p> <hr/> <h3>Trust "protections"</h3>  <p><i>"How want those protections?"</i> <i>Oh thank God. For a moment there I thought you were from the Inland Revenue."</i></p> <hr/> <p>www.gsbllaw.co.uk <span style="float: right;">27</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <hr/> <h3>Trust "protections"</h3> <ul style="list-style-type: none"><li>• As a result of the deemed domicile provisions, protections have been introduced in trust taxation for non-doms and those deemed domiciled under the long-term residence rule.</li><li>• Otherwise, ITTOIA and TOAA provisions would bite. These deem settlors with interests in trust property to be taxable on trust income.</li><li>• Otherwise, s 86 TCGA could apply to deem settlors taxable on trust gains.</li></ul> <hr/> <p>www.gsbllaw.co.uk <span style="float: right;">28</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

## TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p> <hr/> <h3>Trust "protections"</h3> <ul style="list-style-type: none"> <li>• When protected, the charge applies to benefits received from the trust, rather than income/gains in the trust.</li> <li>• This is subject to a number of anti-avoidance provisions, some still being legislated. (E.g. Onwards gifts, via people outside the charge.)</li> <li>• One area of concern is tainting. If the settlor adds to the trust once UK deemed domiciled, or adds value to the trust, then the whole trust property loses protection.</li> <li>• Tainting can include as little as a loan on un-commercial terms, but not failing to revoke.</li> </ul> <hr/> <p><small>www.gsbllaw.co.uk</small> <span style="float: right;">29</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <hr/> <h3>Matters on which we have barely touched</h3> <ul style="list-style-type: none"> <li>• PPR for trust residences: section 225 TCGA 1992.</li> <li>• Especially PPR for trust residences bearing in mind that since 2015 non-resident trustees have paid CGT on UK residential properties.</li> <li>• BPR/APR for trust property.</li> <li>• Entrepreneurs' relief for trust assets.</li> <li>• Section 142 and section 144 IHTA 1984 variations of and appointments from will trusts within 2 years of death.</li> <li>• S 260 TCGA 1992 hold over relief for gifts into trust.</li> </ul> <hr/> <p><small>www.gsbllaw.co.uk</small> <span style="float: right;">30</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

## TAX: How to keep your clients out of court and what to do if you get there

<p><b>5 Stone Buildings</b></p> <hr/> <h3>DOTAS</h3> <ul style="list-style-type: none"><li>• Section 306 of FA 2004 provides a power to prescribe in regulations the description of schemes that must be disclosed.</li><li>• Sections 308, 309 and 310 of FA 2004 require certain persons to provide information to HMRC about schemes falling within a hallmark.</li><li>• <a href="http://www.legislation.gov.uk/ukxi/2017/1172/made">http://www.legislation.gov.uk/ukxi/2017/1172/made</a></li></ul> <hr/> <p>www.5sblaw.co.uk <span style="float: right;">31</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b></p> <hr/> <h3>DOTAS</h3> <p>4.—(1) ...would be reasonable to expect an informed observer (having studied the arrangements and having regard to all relevant circumstances) to conclude that condition 1 and condition 2 are met.</p> <hr/> <p>www.5sblaw.co.uk <span style="float: right;">32</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>



## TAX: How to keep your clients out of court and what to do if you get there

### DOTAS

(2) Condition 1 is that the main purpose, or one of the main purposes, of the arrangements is to enable a person to obtain one or more of the following advantages in relation to inheritance tax (the "tax advantage")—

- (a) the avoidance or reduction of a relevant property entry charge;
- (b) the avoidance or reduction of a charge to inheritance tax under section 64, 65, 72 or 94 of IHTA 1984;
- (c) the avoidance or reduction of a charge to inheritance tax arising from the application of section 102, 102ZA, 102A or 102B of the Finance Act 1986(4) in circumstances where there is also no charge to income tax under Schedule 15 to the Finance Act 2004 (charge to income tax on benefits received by former owner of property);
- (d) a reduction in the value of a person's estate without giving rise to a chargeable transfer or potentially exempt transfer.


### DOTAS

(3) Condition 2 is that the arrangements involve one or more contrived or abnormal steps without which the tax advantage could not be obtained.

*"HMRC has shared draft guidance with stakeholders and is in the process of updating it to reflect their helpful and constructive feedback. The guidance will explain how the hallmark works, the conditions to be met for arrangements (or proposals for arrangements) to be notifiable, and the circumstances in which arrangements are excepted from disclosure. ...*

*The guidance will be published in good time before the hallmark comes into force on 1 April 2018."*

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<p></p> <p><b>DOTAS - grandfathering</b></p> <p>5—(1) Arrangements are excepted from being prescribed under regulation 3 if they—</p> <ul style="list-style-type: none"><li>(a) implement a proposal which has been implemented by related arrangements; and</li><li>(b) are substantially the same as the related arrangements.</li></ul> <p>(2) In this regulation "related arrangements" means arrangements which—</p> <ul style="list-style-type: none"><li>(a) were entered into before 1st April 2018; and</li><li>(b) at the time they were entered into, accorded with established practice of which HMRC had indicated their acceptance.</li></ul> <p><i>(Also, apply only to transactions post 1 April 2018)</i></p> <hr/> <p><small>www.gsblaw.co.uk</small> <span style="float: right;">35</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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# 5 Stone Buildings

**Correcting Tax Mistakes**

**Christopher Tidmarsh QC**

**TAX: How to keep your clients out of court and what to do if you get there**



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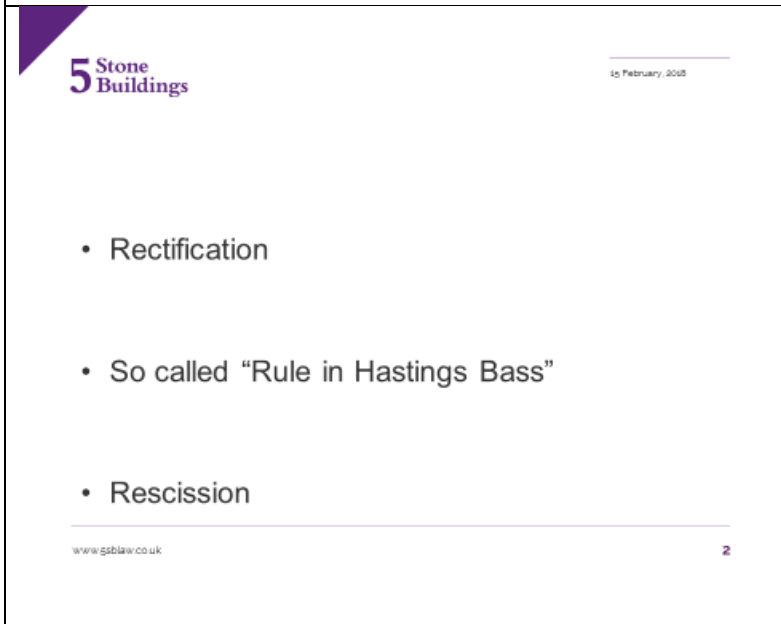
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## TAX: How to keep your clients out of court and what to do if you get there

<p> 15 February 2018</p> <h3>Rectification</h3> <ul style="list-style-type: none"><li>• strictest requirements</li><li>• results in the document being corrected from its inception.</li></ul> <hr/> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> 3</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p> 15 February 2018</p> <h3>The So Called Rule</h3> <ul style="list-style-type: none"><li>• Now of less importance</li><li>• rescission for mistake will in many cases be available with no obvious disadvantage.</li><li>• May be worth considering:<ul style="list-style-type: none"><li>– if Court might refuse to rescind for mistake because what was being done was aggressive tax avoidance.</li></ul></li></ul> <hr/> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> 4</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p><b>5 Stone Buildings</b> <span style="float: right;">15 February, 2008</span></p> <p><b>Rescission for Mistake</b></p> <p>May be available in circumstances where rectification is not possible</p> <p>Useful where:</p> <ul style="list-style-type: none"> <li>• the transaction would not be repeated (e.g. because a tax trap was overlooked); or</li> <li>• it is possible to obtain the desired treatment by repeating the transaction with the mistake corrected.</li> </ul> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> <span style="float: right;">5</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b> <span style="float: right;">15 February, 2008</span></p> <p><b>Rectification</b></p> <p>There must be a flaw in the written document: intention not consequences.</p> <p>The specific intention of the parties must be shown. Not sufficient to show that the parties did not intend what was recorded.</p> <p>There must be a real issue between the parties</p> <p>Do not have to show that the settlor intended particular wording – sufficient if intended particular effect.</p> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> <span style="float: right;">6</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

**TAX: How to keep your clients out of court and what to do if you get there**

<p><b>5 Stone Buildings</b> <span style="float: right;">15 February 2025</span></p> <p>Two principal types of mistake:</p> <p>(1) a mistake as to content of a document;</p> <ul style="list-style-type: none"> <li>• e.g. a missing clause</li> </ul> <p>(1) a mistake as to meaning</p> <ul style="list-style-type: none"> <li>• e.g. a term is deliberately included but the settlor misunderstands its meaning.</li> <li>• <b>Re Butlin</b> [1976] Ch 251</li> </ul> <hr/> <p>www.gsbllaw.co.uk <span style="float: right;">7</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b> <span style="float: right;">15 February 2025</span></p> <p><b>Tax Mistakes</b></p> <p><b>Pitt v Holt</b> [2013] 2 A.C. 108 (para.131) Lord Walker stated:</p> <p>'Rectification is a closely guarded remedy, strictly limited to some clearly established disparity between the words of a legal document, and the intentions of the parties to it. It is not concerned with consequences.'</p> <ul style="list-style-type: none"> <li>• Contrast <b>Gibbon v Mitchell</b> [1990] 1 WLR 1304</li> </ul> <hr/> <p>www.gsbllaw.co.uk <span style="float: right;">8</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

**TAX: How to keep your clients out of court and what to do if you get there**

<p><b>5 Stone Buildings</b> <span style="float: right;">15 February, 2008</span></p> <p><b>Situation 1</b></p> <p>Where there is a deliberate decision to include or omit a term and as a result the instrument does not achieve the desired tax result.</p> <p>S knew document meant but was mistaken about its tax consequences.</p> <p>Rectification will not be granted.</p> <p style="text-align: center;"><b>Allnut v Wilding</b> [2007] EWCA Civ 412 <b>Racal v Ashmore</b> [1995] STC 1151</p> <hr/> <p>www.gsblaw.co.uk <span style="float: right;">9</span></p>	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>
<p><b>5 Stone Buildings</b> <span style="float: right;">15 February, 2008</span></p> <p><b>Situation 2</b></p> <p>Where intention was to achieve a particular fiscal effect and S was advised that a term achieved that effect.</p> <p>No mistake about the terms.</p> <p>But those terms do not achieve the intention. There is a disparity between the S's intention and the wording of the document.</p> <hr/> <p>www.gsblaw.co.uk <span style="float: right;">10</span></p>	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>



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<p>5 Stone Buildings <span style="float: right;">15 February, 2018</span></p> <p><b>Wills v Gibbs</b> [2007] EWHC 3361 (Ch);</p> <p><b>Vaughan-Jones v Vaughan-Jones</b> [2015] EWHC 1086 (Ch).</p> <hr/> <p>www.gsbllaw.co.uk <span style="float: right;">11</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>5 Stone Buildings <span style="float: right;">15 February, 2018</span></p> <p><b>Martin v Nicholson</b> [2004] EWHC 2135 (Ch)</p> <p>S wanted to set up a nil rate band trust. S declared a trust of £200,000 (being the sum that she was advised was the nil rate band) but band had just been lowered to £154,000.</p> <p>Held: the intention was to create a trust of the nil rate band.</p> <hr/> <p>www.gsbllaw.co.uk <span style="float: right;">12</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p><b>5 Stone Buildings</b> <span style="float: right;">15 February 2018</span></p> <p><b>Lobler [2015] UKUT 152 (TCC).</b></p> <p>T invested in several insurance policies.</p> <p>Chose (without advice) partial surrender of the policies.</p> <p>T assessed for very large sum.</p> <p>Had T surrendered some of the policies completely, tax would have been much less.</p> <hr/> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> <span style="float: right;">13</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b> <span style="float: right;">15 February 2018</span></p> <p>FTT concluded that if rectification would be granted, the position should be assessed as if rectification had been granted.</p> <ul style="list-style-type: none"> <li>• Held that rectification (to substitute complete surrender for some policies) would be granted</li> <li>• because the tax consequences were such that the effect of the partial surrenders was entirely different from what T believed they would be.</li> </ul> <hr/> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> <span style="float: right;">14</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>


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<p><b>5 Stone Buildings</b> <span style="float: right;">15 February 2008</span></p> <p><b>Key points</b></p> <ul style="list-style-type: none"><li>• Will it be sufficient to show only one person's (S's) intention?</li><li>• Was the mistake about the contents of the document or as to meaning?</li><li>• The evidence must be strong.</li></ul> <p><small>www.gsbllaw.co.uk</small> <span style="float: right;">15</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b> <span style="float: right;">15 February 2008</span></p> <p>What evidence is available to show the requisite intention?</p> <ul style="list-style-type: none"><li>– If necessary to show only S's intention, he can adduce evidence of his subjective intention</li><li>– Better if some objective evidence can be adduced, e.g. instructions to solicitors, attendance notes, other documents etc.</li></ul> <p><small>www.gsbllaw.co.uk</small> <span style="float: right;">16</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>



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<p><b>5 Stone Buildings</b></p> <p>10 February, 2018</p> <ul style="list-style-type: none"><li>• Can the requisite intention be demonstrated - is this a case where it is necessary to show an intention to execute a document that conformed with specific requirements of tax legislation?</li><li>• Take care to distinguish this from cases where the intention was to execute the document as it stands and the mistake was about the tax consequences.</li></ul> <p>www.gsblaw.co.uk <b>17</b></p>	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>
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## TAX: How to keep your clients out of court and what to do if you get there

<p> 15 February 2008</p> <ul style="list-style-type: none"><li>• Is there an issue between the parties (e.g. S and the trustees).</li><li>• Notify HMRC and ask if they wish to be joined as parties.</li><li>• Be very careful before trying to correct mistakes out of Court – if you do so it may be too late to rectify (if that is needed).</li></ul> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> 18</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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<p> 15 February 2018</p> <p><b>The so called rule in Hastings Bass.</b></p> <p>Once popular "get out of jail free" card.</p> <p>The Court was thought to be able to set aside a transaction if trustees had failed to take into account all relevant circumstances (or taken into account irrelevant ones) and they would (or might) have done something different had they acted properly.</p> <p>Position reassessed in <b>Pitt v Holt</b> [2013] 2 AC 108 and the rule was restated.</p> <hr/> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> 19</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p> 15 February 2018</p> <p>In outline: transaction can be set aside where trustees have failed to take into account relevant considerations – including tax - (or omitted to take into account irrelevant ones) but only if they were as a result in breach of duty.</p> <p>NB that in Jersey and Bermuda the position is different as legislation has the effect that there is no need to prove a breach of duty.</p> <hr/> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> 20</p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p>5 Stone Buildings <span style="float: right;">15 February 2008</span></p> <hr/> <h3>Rescission</h3> <p>A Court may set aside a transaction if there has been:</p> <ol style="list-style-type: none"><li>(1) a mistake that caused the transaction; and</li> <li>(2) the <i>donor</i> made a mistake that was so grave that it would be unconscionable for the <i>donee</i> to retain the property.</li></ol> <p>If there is no issue between the parties, generally relief will be refused because the second requirement will not be satisfied.</p> <hr/> <p>www.gsbllaw.co.uk <span style="float: right;">21</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>5 Stone Buildings <span style="float: right;">15 February 2008</span></p> <hr/> <p>The mistake can be about:</p> <ul style="list-style-type: none"><li>• the legal character or nature of the transaction, or</li> <li>• as to some matter of fact or law (e.g. tax) which was basic to the transaction.</li></ul> <hr/> <p>www.gsbllaw.co.uk <span style="float: right;">22</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p><b>5 Stone Buildings</b> <span style="float: right;">15 February 2008</span></p> <p><b>Incorrect conscious mistake</b></p> <p>This where someone makes a gift because he consciously but wrongly believes something to be true. That is sufficient.</p> <p><b>Incorrect tacit assumption</b></p> <p>This is where someone makes a gift on the mistaken assumption that something is true. That is sufficient.</p> <hr/> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> <span style="float: right;">23</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b> <span style="float: right;">15 February 2008</span></p> <p><b>Misprediction</b></p> <p>This is where someone makes a gift in the hope or expectation that something would happen. This is insufficient.</p> <p><b>Causative ignorance</b></p> <p>This is where someone makes a gift without a belief or assumption about a fact and who would not have made the gift had he been told about the fact. That is insufficient.</p> <hr/> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> <span style="float: right;">24</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>



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<p><b>5 Stone Buildings</b> <span style="float: right;">15 February, 2018</span></p> <p><b>Generally</b></p> <p>It does not matter that the mistake is due to carelessness (unless S deliberately took the risk of being wrong).</p> <p>The mistake need not be known to the donee.</p> <p>A mistake about tax consequences is suffices if sufficiently serious.</p> <hr/> <p><a href="http://www.5stonebuildings.co.uk">www.5stonebuildings.co.uk</a> <span style="float: right;">25</span></p>	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>
<p><b>5 Stone Buildings</b> <span style="float: right;">15 February, 2018</span></p> <p><b>Pitt</b></p> <p>In some cases of artificial tax avoidance the court might think it right to refuse relief, either on the ground that such claimants, acting on supposedly expert advice, must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on grounds of public policy:</p> <p>Not adopted as yet</p> <ul style="list-style-type: none"> <li>• <b>Van de Merwe</b> [2016] EWHC 790 (Ch);</li> <li>• <b>Kennedy v Kennedy</b> [2014] EWHC 4129 (Ch);</li> <li>• <b>Strathmullen</b> [2014] JRC 58;</li> <li>• <b>Schroder Cayman Trust Co Ltd v Schroder Trust AG</b> [2015] 18 ITEL.R.</li> </ul> <hr/> <p><a href="http://www.5stonebuildings.co.uk">www.5stonebuildings.co.uk</a> <span style="float: right;">26</span></p>	<p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p> <p>-----</p>

TAX: How to keep your clients out of court and what to do if you get there

<p>5 Stone Buildings <span style="float: right;">15 February 2018</span></p> <p>Mistake must be donor's</p> <p>Must be unconscionable for the donee to retain the property.</p> <hr/> <p>www.gsbllaw.co.uk <span style="float: right;">27</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>5 Stone Buildings <span style="float: right;">15 February 2018</span></p> <p><b>Gresh v RBC Trust Co [Guernsey 6/2016].</b></p> <p>G member of a pension plan administered in Guernsey G advised that any lump sum distribution made to him would be tax-free provided not remitted to him in the UK. G requested and received a lump sum distribution. Advice wrong. Payment not set aside. Not unconscionable for G to keep it. Only G adversely affected. No evidence that adverse consequences for anyone else.</p> <hr/> <p>www.gsbllaw.co.uk <span style="float: right;">28</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p><b>5 Stone Buildings</b> <span style="float: right;">15 February 2018</span></p> <p><b>Key considerations</b></p> <ul style="list-style-type: none"> <li>• What was the mistake?</li> <li>• Was it a conscious mistake or an unconscious one?</li> <li>• If an unconscious one was it a tacit assumption? (e.g. where client assumed that a deed would have no adverse tax consequences).</li> <li>• What did the client assume about the consequences?</li> </ul> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> <span style="float: right;">29</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p><b>5 Stone Buildings</b> <span style="float: right;">15 February 2018</span></p> <ul style="list-style-type: none"> <li>• Subjective evidence from S may be adduced. Is there any other evidence of a tacit assumption?</li> <li>• What are the ramifications of the mistake for S? Are they sufficiently grave to secure rescission?</li> <li>• If there are not direct ramifications for S, are there indirect ramifications for S? (e.g. Donee suffers tax charge and trustees feel obliged to make that good and so reduce trust fund for other beneficiaries.)</li> </ul> <p><a href="http://www.gsbllaw.co.uk">www.gsbllaw.co.uk</a> <span style="float: right;">30</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p><b>5 Stone Buildings</b> <span style="float: right;">10 February 2008</span></p> <p><b>Procedure for Rectification and Rescission</b></p> <ul style="list-style-type: none"><li>• Should notify HMRC</li><li>• Generally application under Part 8</li><li>• Will need to lodge with statement(s) setting out all the evidence</li><li>• Need to have one Defendant at least.</li><li>• It may be necessary for all the beneficiaries of a trust to be represented – can the trustees represent all of them or do they require separate representation, do different classes require separate representation?</li><li>• Consideration may need to be given to representing minors and unborns.</li></ul> <p><small>www.5sblaw.co.uk</small> <span style="float: right;">31</span></p>	<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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