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The Trusts (Guernsey) Law 2007

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Guernsey is on course for a comprehensive update of its trusts law to ensure that it remains user friendly for the 21st Century. On 25 July 2007, the Trusts (Guernsey) Law, 2007 ("the Law") was approved by Guernsey's legislature and is expected to come into force in January 2008. The Law was drafted after significant consultation with the trusts sector. It will replace the existing Trusts (Guernsey) Law, 1989 ("the 1989 Law") in its entirety. The underlying objective is to ensure Guernsey remains attractive in an increasingly competitive market. The main changes are as follows.

Purpose trusts

The Law permits the establishment of so called purpose trusts for non-charitable purposes. Any (legal) purpose will be permissible and a valid trust can be created even though there is no ascertainable beneficiary. This is a significant variation from the long established principle of trusts law that requires the "three certainties" to be present in order for a trust to be valid - certainty of intention, of subject matter and of objects (i.e. there must be beneficiaries who are certain or capable of being rendered certain).

Purpose trusts facilitate the use of trusts for commercial transactions and offer increased flexibility when structuring complex commercial transactions. There are various potential commercial uses for trusts and reasons why a trust may be chosen over other entities, such as a company, in a commercial transaction but these are outside the scope of this article.

Reservation of powers

The Law expressly allows the reservation of certain powers by a settlor. Such powers include the power to advance, appoint or apply income or capital of trust property and give direction to the trustees in connection with the management of trust property.

Of course, while a trust that reserves a wide range of powers to the settlor will be recognised as valid in Guernsey, the reservation of powers may well open the trust up to accusations of sham in other jurisdictions.

Duration of trusts

The Law abolishes the 1989 Law's provision that restricts a trust's duration to 100 years. The change will not be retrospective but the contents of an existing trust could be transferred into a second trust, subject to the terms of the existing trust.

Liability of directors of corporate trustees

Section 70 of the 1989 Law provides that directors of corporate trustees may be deemed to be guarantors of the trustee in respect of any damages and costs awarded against the trustee for breach of trust. This provision clearly acted as a deterrent to new business entering Guernsey and has consequently been abolished.

Information to be given to beneficiaries

There have been significant developments in this area of trusts law since the 1989 Law came into force, including the now well known cases of *Stuart-Hutcheson v Spread Trustee Company Limited*, *Schmidt v Rosewood Trust Ltd* and *Wesley v Kleinwort Benson*. The general effect of these authorities is that the rights of beneficiaries to access trust information/ documents have increased.

The Law recognises that there may be very good reasons for denying beneficiaries access to information/documents, e.g. in the case of an employee benefit trust where privacy is paramount. It therefore clarifies the circumstances in which information may have to be given to beneficiaries and that the terms of the trust may expressly exclude the beneficiaries' right to such information, subject always to any order of the Court. The burden of proving the need for the information remains with the beneficiary.

Letters of wishes

The 1989 Law provided that, subject to a trust's terms or a court order, a trustee was not obliged to disclose documents which revealed the trustee's deliberations or reasons for any decisions and any material upon which such decisions were based. However, in *Wesley* the Court held that a letter of wishes did not reveal material upon which the decision of trustees was or might have been based and ordered its disclosure. The Law amends the position to make it plain that letters of wishes or documents which reveal the intention of the settlor or any beneficiary of the trust are preserved from disclosure, subject to the terms of the trust or any order of the Court.

Limitation period for breach of trust

The Law clarifies when an action for breach of trust must be brought by introducing an absolute long-stop date of 18 years from the date of breach, regardless of whether the beneficiary had actual knowledge or not. This clearly promotes certainty and is to be welcomed.

Exclusion of foreign law

The Law also introduces an exclusion of foreign law provision, which should address the concerns of the trust industry regarding the apparent willingness of the Family Division to ride rough-shod over the concept of trusts law in offshore jurisdictions and of the local courts to give effect to foreign judgments. Since *White v White* expounded the principle of equal division, the general approach to matrimonial cases has fundamentally altered. Much attention is now paid to identifying the assets of the marriage and offshore trusts are therefore of much greater interest to the Family Division. In numerous cases, the Family Division has either varied offshore trusts or held that the assets of a discretionary trust are the resources of a spouse, notwithstanding that there are numerous other beneficiaries and the trustee has no obligation to make any distribution to the spouse whatsoever.

Several offshore jurisdictions have legislated to exclude the operation of foreign laws, including Bermuda, Cayman and Jersey. Notwithstanding the intention of these provisions, subsequent case-law has raised serious questions as to how effective these provisions actually are. In *the B Trust*, Jersey's court considered Article 9 of Jersey's new trust law, which purports to protect Jersey trusts from attack by foreign jurisdictions, in the context of an application for directions brought by a trustee faced with an order of the Family Division that varied the trust. The Court sidestepped the issue of what Article 9 meant and held that it was inapplicable in circumstances where the Court was exercising its jurisdiction to give directions to a trustee. The Court therefore held that in the interests of comity, substantial effect should be given to the judgment of the Family Division.

The provisions of the Law are expressed in broader terms than Jersey's provisions and mirror similar legislation in Bermuda, where the courts have been more robust in their approach than Jersey's. It may therefore be that the provisions of the Law will have the effect that they were intended to. However, Guernsey's court usually considers Jersey authorities highly persuasive and is likely to co-operate with the courts of England and Wales unless it is absolutely clear that the legislature's intention is to the contrary. It therefore remains to be seen what level of protection the provisions of the Law will afford Guernsey trusts when the issue comes before the Court.

About the authors

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