

## FIDUCIARY UPDATE

June 2010

### Introduction - Marcus Hinkley

It's hard to believe that I have been in Guernsey for 6 months now. I have arrived at a most interesting time for the future of the trust industry both within and outside Guernsey. Having spoken to many trust professionals both here and in London over the last 6 months I have developed a real sense for the concerns of trust companies and advisers as well as the areas of opportunity. The topical issues of today are certainly centred on macro changes in the trust industry outside of Guernsey, which are likely to affect the Bailiwick: the economic health of the EU, the conservative/lib dem government, the stability of Guernsey's traditional market, where new markets are developing, and what products Guernsey should be offering to capture the interests of these new markets.

Going forward, the content of these updates will be flavoured by my own personal experiences in the Caribbean and working in the management of an offshore trust company. I will develop a number of key themes which I consider important for the growth of our industry as well as providing technical updates on matters of day to day trust administration of concern to prudent trustees.

### Can you afford not to innovate?

The remarkable nature of trust law is that while steeped in tradition, it remains relevant through innovation.

The trust concept arose out of a need during the Crusades of the 12th and 13th centuries to protect the property of those returning from battle. While the adversaries have changed, innovation remains a cornerstone of our industry and it is widely recognised that the development of trusts now takes place offshore.

Developments in trust law occur because of changing markets, changing onshore laws, and the geographical shifting of wealth. Guernsey has always taken advantage of these changes, and, while traditionally it may have looked to England and Europe as its principal source of clients, it now must also look to other emerging markets.

To do so requires further thinking 'outside the box'. Fortunately, Guernsey has the tools to succeed. Our trust professionals are some of the best in the world, and we have a Trust law which is currently second to none, taking advantage of innovative solutions created by other jurisdictions but refined in our own way. These solutions are quite remarkable. Consider PTC's, reserved powers,

In order to retain our position in the competitive trust market, and make the most of our innovative legislation, we need to encourage an acute awareness of our clients' developing needs. While it is difficult to predict how laws will develop, monitoring global trends and having the flexibility to react quickly will enable us to tailor solutions accordingly. We should strive to develop new products and fresh approaches to meet these new requirements.

### Doing business in Russia

Joseph Stalin once said, "Trust is good, control is better". One has to say that the mindset of the Russian client has not moved far from this assertion. But despite the enormous toll which the financial crisis has recently had on Russian economy, the Russian client is becoming more and more a feature of private client business both in London and the Channel Islands.

It is fair to say, of course, that there remain impediments to a free flow of business between Guernsey and Russia, hardly unexpected given the turbulence of Russian history. Wishing to do business in Russia is not easy, and there remains a culture of administrative unpredictability, based on mutual favours and in some areas, corruption. While this naturally makes one circumspect, there is, without doubt, a large number of Russians who have amassed significant wealth who now operate legitimate businesses and who wish to protect their wealth through the traditionally western concepts of trusts. Indeed, for the great many wealthy Russians who have bought property in London, for example, seeking common law based solutions is appropriate. Factors driving the wealthy Russian include confidentiality, political risk, asset protection, access to international markets, tax mitigation, matrimonial and succession planning.

This is work that we in Guernsey should not overlook. Guernsey trust companies will need to appreciate, however, the cultural differences that exist when dealing with a Russian client are significant, which means that the traditional private client structures will need to be tailored to suit. Specialist advice is needed here and with experience in dealing with these types of clients, we are more than happy to assist, ranging from merely talking through the issues you might face when dealing with these clients, reviewing your client take on procedures, or advice on drafting or structuring.

**Case note: Pitt v Holt and Futter v Futter**

It is difficult to keep pace with the Hastings-Bass principle and its various adaptations. Its most recent applications were in the English cases of *Pitt v Holt* [2010] WLR (D) 2 and *Futter v Futter* [2010] EWHC 449

**Pitt v Holt**

Mr Pitt was severely injured in a road accident. He received £1.2m in damages and, following his wife being appointed his Receiver under the Mental Health Act (which the court held to be a fiduciary position) this sum was transferred to a discretionary settlement. Unfortunately, no one had considered the impact of - inheritance tax and on Mr Pitt's death the IHT problem arose. Mrs Pitt argued that the settlement should be set aside on two grounds:  
the *Hastings-Bass* jurisdiction; and/or

the equitable jurisdiction to set aside a voluntary disposition vitiated by mistake.

The Court held that the settlement could be set aside under the *Hastings-Bass* jurisdiction.

**Why is Pitt significant?**

As the court noted, there was no decided authority applying the *Hastings-Bass principle* to anyone other than trustees. However, the court said that a Receiver under the Mental Health Act was in a similar position to a trustee in key aspects - the Receiver had a fiduciary duty, exercisable for the benefit of another. The Court therefore applied *Hastings-Bass* and set aside the settlement.

Interestingly, the mistake argument was not accepted. In a principle which is now well founded, and discussed at some length by Mr Justice Norris in *Futter v Futter*, the principle of mistake and the *Hastings-Bass* principle, are quite separate principles and should not be confused, the later being based on an invalid exercise of a trustee's powers.

**Futter v Futter**

Mr Justice Norris's approach to this matter, which again was a case of a trustee exercising its discretion in circumstances which created an unexpected tax liability for its beneficiary, is very interesting. It seemed that while he was reluctant to apply the *Hastings-Bass* principle, he felt that as a first instance judge, he was compelled to follow established precedent.

Indeed, his reasoning for adopting the principle was expressed thoughtfully and in a manner which is difficult to find fault with. The lawyers at HMRC must be wondering how to approach these cases in light of this recent decision, which again dismissed arguments from the Revenue that the Rule had been taken to absurd lengths.

Importantly, the case highlights that the principle itself is now becoming well established, and if it is to be restricted in the future, it will need a superior court with a taste for the bold assertion that the development of the principle itself has diverted from its true course. The principle seems to have moved quite a distance from the often cited quote of Park J in *Breadner v Granville* Grossman [2001] 1 Ch 523 where he said "*it cannot be right that whenever trustees do something which they later regret and think that they ought not to have done, then they can say that they never did it in the first place*".

A full case note on *Futter v Futter* will be available on the Collas Day website shortly.

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