

OFFSHORE

Guernsey: trusts

The new Trusts Law should help Guernsey remain attractive in such a competitive market. **Christian Hay** and **Gareth Bell** talk us through the changes

Guernsey is on course for a comprehensive update of its trusts law. On 25 July 2007, the Trusts (Guernsey) Law 2007 was approved and should 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 in its entirety. The underlying objective is to ensure that Guernsey remains attractive in an increasingly competitive market, and there are a number of key changes.

Purpose trusts

The 2007 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 (ie 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.

Reservation of powers

The new law allows the reservation of certain powers by a settlor, including the power to advance, appoint or apply income or capital of trust property and give direction to the trustees on 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 up the trust to accusations of being a sham in other jurisdictions.

Duration of trusts

The 2007 law abolishes the 1989 law's restriction of a trust's duration to 100 years. The change will not be retrospective but the contents of an existing trust could be transferred to another trust, subject to the terms of the existing trust.

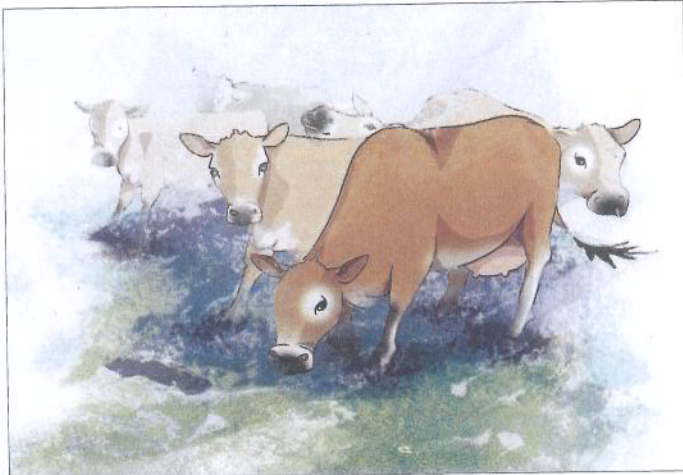
Liability of directors of corporate trustees

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 for beneficiaries

There have been significant developments in this area of trusts law since the 1989 law came into force, including the well-known cases of *Stuart-Hutchison v Spread Trustee Company* [2002], *Schmidt v Rosewood Trust* [2003] and *Wesley v Kleinwort Benson* [2004]. These cases have increased the rights of beneficiaries to access trust information/documents.

The 2007 law recognises that there may be very good reasons for denying beneficiaries access to information, for example 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 allows the terms of the trust to 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 trustee'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 2007 law makes 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 2007 law clarifies when a breach of trust action 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 2007 law introduces an exclusion of foreign law, which should address the trust industry's concerns regarding the Family Division's apparent willingness to ride rough-shod over the concept of trusts law in offshore jurisdictions and of local courts to give effect to foreign judgments.

Since *White v White* [2001] expounded the principle of equal division, the approach to matrimonial cases has altered. Much attention is now paid to identifying the marriage's assets and offshore trusts are 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, the Cayman Islands and Jersey. But subsequent case law has raised serious questions as to how effective these provisions actually are. In *B Trust* [2006], the court con-

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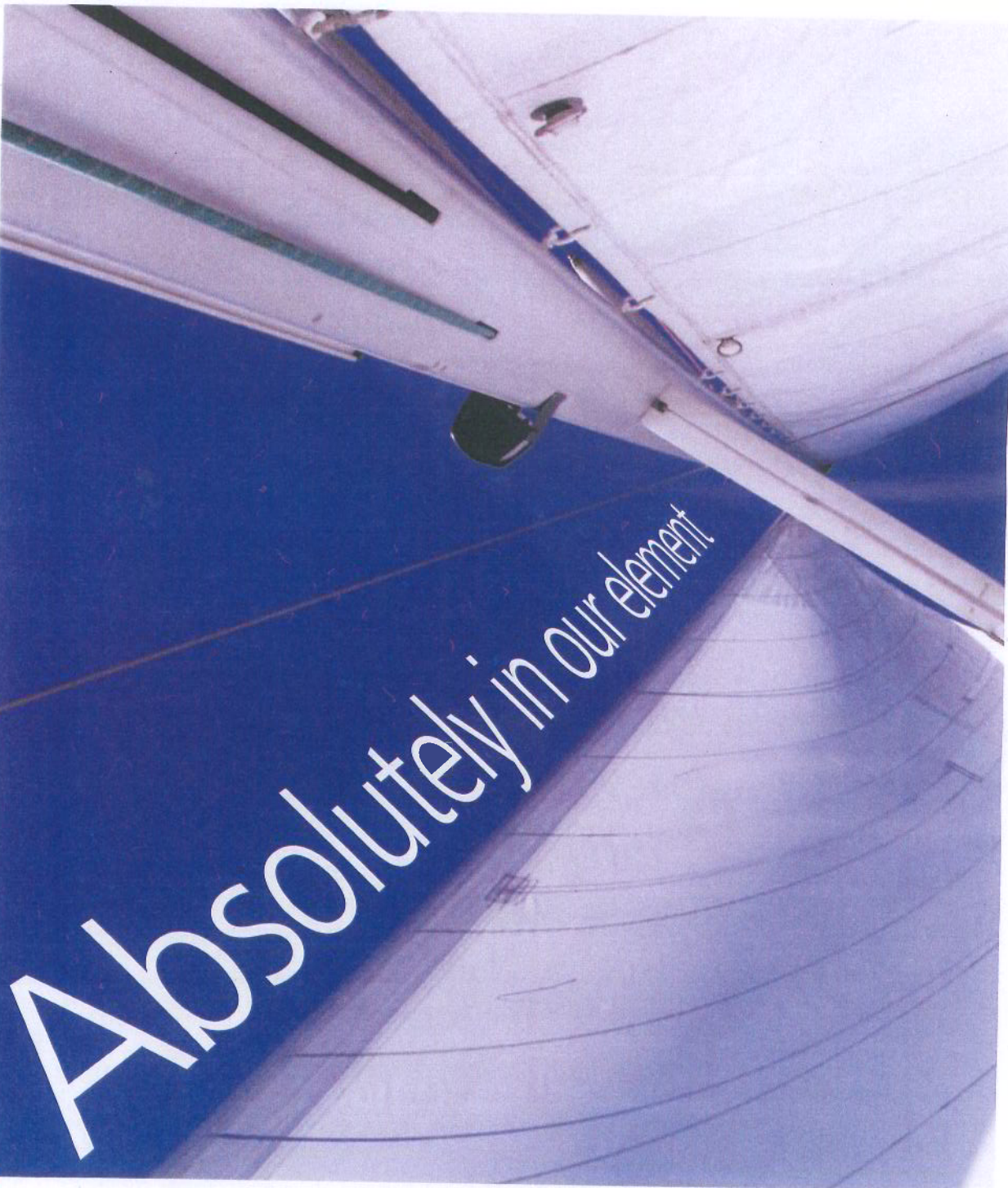
sidered Article 9 of Jersey's new trust law, which purports to protect Jersey trusts from attack by foreign jurisdictions, in the context of an application for directions brought by a trustee faced with an order of the Family Division that varied the trust. The court sidestepped the issue of what Article 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 Family Division's judgment.

The provisions of the 2007 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. It may therefore be that the 2007 law will have the effect that it was intended to. However, Guernsey's court usually considers Jersey authorities highly persuasive and is likely to cooperate 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 2007 law will afford Guernsey trusts when the issue comes before the court. ■

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