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ADVOCATES



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by Paul Richardson

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To: STEP Suisse Romande

Speaker: Paul Richardson in Geneva on Tuesday 4th March 2008 on behalf of Guernsey Finance

Trusts are increasingly used as the prevalent feature of international estate planning. Partly this is a result of the Hague Convention on the Recognition of Trusts giving trusts more publicity and making those in civil law jurisdictions more comfortable with them; partly it derives from the increasing international mobility of people who want trusts as a flexible and reliable means of holding assets and managing their disposition in lifetime and devolution on death.

Switzerland is, of course, a magnet for these potential trust clients, but Switzerland has a problem – no Swiss law of trusts. It follows that Swiss trustees and those coming through Swiss introducers need to find some suitable law to govern their trusts. Guernsey's law of trusts is an ideal governing law. Others clearly share that view because several Guernsey companies have a presence here in Geneva. They advise on the law of Guernsey and, where required, trusteeship.

The Hague Convention has been ratified not only by Switzerland but also by Guernsey (although not Alderney and Sark). It provides that you can choose any governing law for a trust that you wish, provided that the choice is not manifestly contrary to public policy. A choice of the law of Guernsey is very unlikely to be contrary to anyone's public policy.

The Trusts (Guernsey) Law 2007

The new law will come into force on 17th March 2008. Section 78 of the Law is retrospective – in other words, the new law will apply to trusts created before or after the commencement date.

The Guernsey law of trusts combines two elements: first a statutory element and secondly an element of equity. This combination is important because without it no law of trusts can be complete.

The Guernsey statutory law was until recently The Trusts (Guernsey) Law 1989 as amended from time to time. Now we have The Trusts (Guernsey) Law 2007, which provides one of the most modern legal frameworks for trusts in the world.

This new statutory law cannot however be complete – no statutory law can ever be complete. There will always be problems of interpretation and even no doubt gaps in a statutory law; hence the importance of the second element of equity; the Courts in Guernsey can look to the historic principles of English equity to aid interpretation and to fill gaps. This was confirmed by Guernsey's Court of Appeal in the case of *Hutcheson -v- Spread* (2002).

Key Features of The Trusts (Guernsey) Law 2007

The first key feature to which we draw your attention is of particular importance to those with a civil law background. Many such people have difficulty with English law albeit that England is the home of the trust concept and has a long history of trust law. The problem is that English law does not contain a statutory definition; the Guernsey Law does. It is:

"A trust exists if a person (a trustee) holds or has vested in him, or is deemed to hold or have vested in him, property which does not form, or which has ceased to form, part of his estate" –

- a. "For the benefit of another person (a beneficiary), whether or not yet ascertained or in existence"; and/or
 - b. "For any purpose, other than a purpose for the benefit only of the trustee".
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The second feature of the Guernsey law of trusts to which we particularly draw attention, is the repeal in the Law of 2007 of a provision in the previous law which concerned many trustees and potential trustees who were corporate. The Law of 1989 (S70) contained a provision which effectively meant that the directors of a trust company were guarantors of the performance by the company of its duties as trustee. This is repealed by the Law of 2007.

There is an exception, however, where proceedings were instituted against the trustee prior to the commencement of the Law.

The third point relates to accumulation and perpetuity. Under English law and laws based on it, there are restrictions on the extent to which trustees can accumulate income and on the duration of a trust. The Guernsey Law of 2007 contains no such restrictions for trusts created after the commencement date. For trusts created prior to the commencement date, then the relevant period is 100 years from the date of creation.

The fourth point relates to purpose trusts. Under the old law in Guernsey we could only have trusts for a purpose in limited circumstances – rather like the position in England where purpose trusts are only allowed for charities and in one or two anomalous situations. Now under Guernsey's Law of 2007 we can have purpose trusts in a general sense. To be valid, however, the purpose trust has to have created with it an enforcer. This is a person, be it living or corporate, who can be the settlor, but not the trustee, who has a fiduciary duty to enforce the purposes of the trust. Note also that the enforcer can be paid. This means that you can have a trust, the purpose of which is to own the shares in an underlying company and that company can, of course, be a private trust company. The main feature of such an arrangement is that the key part of the structure is corporate so making it more attractive to those from civil law jurisdictions who may be familiar with companies but may not be familiar with trusts.

While on the subject of companies, it is worth mentioning that there is no problem about having a trust holding the whole of the issued share capital of an underlying company and then having virtually all the activities that might otherwise be carried on through the trust in fact carried on by the company. Once again, many of those from a background of civil law may find this a more comfortable arrangement than having the trustees undertake all activity. In a case like this all the trustees do is receive dividends from the company and from those make distributions. You can, of course, have several underlying companies in order to separate one activity from another. Another use of a company is to provide a medium through which the trust can indirectly own immovable property. In other words trustees, instead of owning the immovable property itself, own shares in the company which in turn owns the immovable property. Through this kind of structure taxes like United Kingdom inheritance tax can be avoided by those who are not UK domiciled. The point is that direct ownership by trustees or an individual of UK immovable property leads to an exposure to UK inheritance tax.

The next point relates to confidentiality - many of those who create trusts, the settlors, want to have what they have done kept secret. The Guernsey Law of 2007 expressly recognises the fact that this may indeed be the case. You can have provisions in the trust instrument prohibiting or restricting the provision of information by the trustees to others concerned. Of course you can never completely guarantee secrecy, especially in this day and age of customer due diligence and so on. The law in Guernsey recognises this and provides that where the terms of the trust do prohibit or restrict the provision of information, then it is possible to apply to the Court for an order requiring the information to be given. In this case the burden of proof is on whoever is claiming that the information should be given and the claimant must show that that information is necessary for the proper disposal of any matter before the Court or for the protection of the interests of a beneficiary or for the proper administration or enforcement of the trust. This placing of the burden on the person making the application to Court should certainly help to ensure a degree of confidentiality. It is important to distinguish between two types of information referred to in the Law. There is access to full and accurate information regarding the state and amount of the trust property. In relation to this type of information an enforcer can obtain such information at all reasonable times merely by making a written request. However, a beneficiary, settlor, trust official or other like person has to satisfy the burden of proof referred to above. Secondly, in relation to the deliberations of trustees, and, for example, letters of wishes, anyone requiring this information has to satisfy the burden referred to above.

The seventh point relates to trustees' security. The new Guernsey trust law introduces the added security to trustees of a statutory non-possessionary lien over trust property, which offers an alternative to the 'chain' of indemnities commonly requested by outgoing trustees. Notably the lien continues after the trustee retires, regardless of whether the assets are held by a successor trustee or a beneficiary. The lien may apply irrespective of indemnities entered into by the parties, unless expressly waived. The only specific exceptions are that the lien does not attach to assets of real property, unidentifiable property, nor to any property transferred to a bona fide purchaser for value.

The eighth key feature relates to limitation periods during which a party may be able to bring a claim against a trustee. Under the 1989 trust law the rules relating to limitation are not as clear as they could be and can potentially be very long. Under the new 2007 Law, the limitation period during which a party will be able to bring a claim against a trustee will be 3 years from the date that the claimant first has knowledge of the breach giving rise to the claim. However, if the claimant is a minor or under a legal disability, 3 years from the earlier of the date the claimant ceases to be a minor or under a legal disability, or the date the claimant's guardian first has knowledge of the breach. There is, however, an absolute maximum of 18 years from the date of the breach but there is no limitation period for claims relating to a trustee's own fraud.

The next key feature about the new Law is that there is an express provision that the reservation to the settlor or a third party of extensive powers shall not invalidate the trust. Those powers can even include power to direct or actually to make distributions from the trust fund and, of course, absolve the trustees of any liability resulting from the valid exercise of such powers. The powers are extensive and are as follows:

1. to revoke, vary or amend the terms of the trust;
2. to deal with income or capital;
3. to appoint or remove directors of owned corporations;
4. to direct trustees to purchase assets;
5. to appoint or remove trustees, enforcers or trust officials, or indeed beneficiaries;
6. to appoint or remove investment managers;
7. to change the proper law of the trust;
8. to restrict the function of the trustees, for example to require consent before any particular power is exercised;
9. to deal with beneficial interests.

The final point to make is that there is now a much more flexible approach to the variation of trusts. Section 57 of the Law has maintained the power of the Court to vary on behalf of minors, unborn and unascertained beneficiaries, if such variations are for their benefit, although there is provision for any other person to apply for a variation under this section, with leave of the Court. Section 58 contains a new power, giving the Court jurisdiction to approve a particular transaction whenever the Court considers it expedient. There is a further general power to vary purpose trusts when the Court considers the variation to be expedient and consistent with the original intention of the settlor, although the Court can dispense with the latter consideration in particular circumstances.

These new provisions have to some extent followed those in the Cayman Islands where the well-known Star Trust provides a settlor with a considerable facility to retain control. These powers need to be approached with a degree of caution in all jurisdictions. After all the Hague Convention in its definition of a trust refers to the assets placed in trust being under control of the trustee. However, the Hague Convention does go on to say that the reservation of powers to a settlor shall not necessarily invalidate the trust. What I would say is this: if you have a settlor who wants to reserve extensive powers in a trust governed by the law of Guernsey and to take

advantage of the provision we have just mentioned, then it is very important that advice is taken from an expert in the law of Guernsey; there is nothing wrong with reserved powers as such; indeed that is the case under English law for that matter; however we think it is really a matter of degree and you need to be careful.

In summary, The Trusts (Guernsey) Law 2007 provides a very attractive choice of statutory framework and jurisdiction for trusts and trustees alike, as

1. it is a modern law – allows flexibility and increased protection for trustees, particularly with regard to the extended powers to vary;
2. permits the formation of trusts that have no time limit;
3. permits the valid establishment of non-charitable purpose trusts;
4. permits a trust-owned company to self-manage and hold real property, which may allow tax savings;
5. expressly permits a settlor to reserve certain powers and absolves trustees from liability in connection with the exercise of those powers therewith;
6. provides all trustees and former trustees with an automatic non-possessionary lien over trust property as security against liability;
7. removes the requirement for directors of a corporate trustee to act as guarantors in respect of liabilities arising from breach of trust proceedings;
8. clarifies the rules relating to limitation periods for breach of trust actions;
9. potentially allows greater confidentiality in relation to the identity of the settlor as a Court Order is required.

We conclude with a reference to Guernsey's trust law in a general sense. Its development over the last 60 years or so has been nothing short of phenomenal. From a somewhat reluctant Norman French base it has become a leader in its field combining a clear and very modern statutory framework with the historic principles of English equity and all this is backed up by the strong jurisprudence of the Court in Guernsey and the expertise of its legal and other professionals. Those professionals hope to build on the already sound relationship with you, our Swiss colleagues.

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