

JERSEY TRUSTS

OCORIAN BRIEFING

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A "trust" is a legal arrangement which exists in many jurisdictions when one person (a "trustee") owns assets not for his own use and benefit but for the benefit of others (the "beneficiaries"). It is normal, but not essential, for a trust to be constituted in writing in the form of a "trust deed" or "trust instrument" which will set out the manner in which the beneficiaries can benefit from the trust, as well as the powers and duties which the trustees will have in administering the trust and its assets.

It is the separation of the legal ownership of the trust assets, which lies with the trustee, from the right to benefit from those assets, which lies with the beneficiaries, which is the crucial factor to an understanding of trusts. Very often, further confusion is created because the person (the "settlor") who transfers assets to the trustee does not appreciate that, in so doing, he loses all title and control over those assets, including control over how they are managed, unless he reserves specific powers in the trust deed. The nature and scope of such powers can often require careful legal advice if the trust is to achieve its intended purpose.

This briefing is intended to provide an introduction to clients and their advisers who are unfamiliar with the concept of trusts. As with most areas of law, trusts have given rise to a variety of terms and expressions which may initially be confusing and unclear. Some of these have already been referred to above, but are further explained below. Other expressions are introduced below:

"settlement": this term is synonymous with "trust". It can also be used to refer to the form of trust deed where both the settlor and the trustee are signatories. In this context, it is to be distinguished from the term "declaration of trust" which signifies a trust deed to which only the trustee is a party and which can therefore create an additional safeguard against disclosure of the identity of the settlor, where this is a concern, or can be used where it is inconvenient to require the settlor to sign the trust deed.

"trust fund": means simply the assets held by the trustee from time to time. Generally speaking, assets can be added to a trust fund at any time, including by a person who was not the original settlor. Any form of asset (other than Jersey land) can be held as part of the trust fund of a trust. Often, however, the "real" assets will be held in a private investment company the shares of which are held by the trustee and form the trust fund.

"Jersey trust": this term is defined in the Trusts (Jersey) Law 1984 (the "Trust Law") as a trust governed by Jersey law, and this is the sense in which the term is used in this briefing. Every trust must be governed by a particular system of law (known as the "proper law") since it gives rise to legally enforceable rights and duties which will be determined by the governing law. "trustee": this may be an individual or a company. In Jersey, there is no requirement for a corporate trustee to have particular status as a "trust corporation". A settlor must choose a trustee with care, to ensure as far as possible that the trustee will carry out the terms of the trust competently. A Jersey trust must have at least one trustee unless the terms of the trust require more than one trustee to act. Where there are more than one trustee, they must act unanimously unless majority decisions are permitted by the terms of the trust.

"settlor": as noted above, this is the person who causes the trust to be established by transferring the initial assets of the trust fund to the trustee. He, or others, may subsequently transfer further assets. Usually, but not necessarily, the transfer is by way of absolute gift. Unless the trust deed reserves powers to the settlor, he has no subsequent right to interfere in the running of the trust or to enforce the terms of the trust - these rights are vested solely in the beneficiaries and the courts. A settlor may, however, be a beneficiary of a trust.

"beneficiaries": there will usually be a "class" of beneficiaries who are eligible to benefit from a trust. The nature of their interest (whether they are entitled to benefit in a certain way, or must rely upon the trustee deciding to provide some benefit) will depend upon the nature of the trust and its terms. The beneficiaries are, however, entitled to expect the trustee to administer the trust for their benefit in accordance with the terms of the trust and the duties of trustees laid down by the Trust Law. For this reason, beneficiaries are entitled (if they so request) to copies of certain trust documents (including the trust deed) and to the accounts of the trust.

"protector": this is a person who can act as a fetter upon the way in which the trustees can exercise certain powers. Most commonly, a protector is given a power of veto over the exercise of particular powers contained in the trust deed. A protector

could also be given his own particular powers, such as the power to appoint trustees. As such, the protector is not a trustee, but he may have duties of a fiduciary nature. A protector is often a trusted personal adviser of the settlor, and this is one means by which a settlor may retain some assurance that a trust will be administered as he had intended.

"discretionary trust": this is a form of trust where the interests of the beneficiaries are not fixed, but depend upon the exercise by the trustee of some discretion or power in their favour. As such, it is the most flexible of all trusts and the most common form of Jersey trust. An advantage is that the individual circumstances and needs of each beneficiary can be considered at any time. A trust where the interests of beneficiaries are fixed is a "fixed" or "strict" trust.

"accumulation and maintenance trust": this form of trust has particular significance in the context of tax planning in the UK, for which purpose specialised drafting is required. In a more generalised context, it refers to a trust, usually created for the children or grandchildren of the settlor, where the trustees have powers during the minority of each beneficiary to pay income in a way beneficial to the upbringing or education of the beneficiary, and to accumulate income not so applied. On attaining a certain age, each beneficiary will become entitled to a particular share of the trust fund.

"protective trust": although rarely used, this term applies to a trust where the interest of a beneficiary will be reduced or terminated if the beneficiary attempts to assign his rights as a beneficiary or becomes subject to some form of compulsory assignment (such as a bankruptcy order). A more restricted regime of benefits, confined to essential maintenance of the beneficiary, then applies. The term must be distinguished from "asset protection trust", which can be used to refer to a trust established with a view to protecting trust assets, whether generally or from a specific event, such as a future bankruptcy.

"rule against perpetuities": this is another term of crucial importance under English law where it governs the period for which assets can be held in trust and there are additional rules which restrict the length of time for which trust income can be accumulated without being distributed to beneficiaries. For Jersey trusts, the rule has no

application. Since late 2006, a Jersey trust may exist for an indefinite period or for any stated fixed period

Reasons for a Jersey trust

Many of the purposes to which a trust can be put take advantage of the essential feature of a trust, viz. that, by transferring assets to trustees, for the benefit of chosen beneficiaries, a settlor loses control or ownership over those assets. A company cannot fulfil this purpose: although title to assets can be transferred to a company, the shares in the company will remain part of the settlor's estate for all purposes if he has any interest in those shares.

Some of the reasons for establishing a trust are as follows:

- **Avoidance of forced heirship requirements:** Many systems of law impose upon individuals a requirement that, on their death, they must leave a proportion of their assets to certain heirs. A trust can avoid this and, in the case of a Jersey trust, the Jersey courts will not entertain a claim to set aside any trust which is based upon forced heirship rights of a foreign jurisdiction
- **Protection against high taxation:** A trust may often be an effective tool in limiting or postponing the incidence of taxation upon the assets placed in trust. A Jersey trust, if it has no Jersey resident beneficiaries and no Jersey source income (other than bank interest), will not be subject to any taxation whatever in Jersey
- **Protection against exchange control or sequestration:** Many settlors resident in politically sensitive jurisdictions find that a trust, by removing assets from their ownership, can protect against the risk of assets being seized by political means or against restrictions imposed upon the transferability of assets.
- **Avoidance of estate duties and probate formalities:** Assets transferred into trust during a settlor's lifetime will not generally form part of his estate upon his death.
- **Continuity of ownership:** Often a settlor will wish to ensure that a particular asset will remain in the same ownership for the foreseeable future. Examples include shares in a family company or a valued heirloom.

- **Protection against profligacy:** Similarly, a settlor may be concerned that assets should not be released to his children until they have demonstrated a responsible and mature attitude. A trust can achieve this.

There are particular reasons for choosing a Jersey trust:

- **Confidentiality:** There is no register of Jersey trusts, nor any requirement that the existence of a Jersey trust be made known to any person other than those involved in its establishment.
- **Political stability:** Jersey is effectively selfgoverned, with the security of a long tradition of political stability and close links with the UK and Europe. – **Strong professional services:** The finance industry in Jersey is widely acknowledged as being among the most capable of all offshore jurisdictions. There is a high quality of services available both to act as trustee and to enable a trustee to seek financial, investment and legal advice.
- **Strong legal foundations:** The Trust Law has been used as a model for similar laws in other jurisdictions. There is a substantial body of judicial authority interpreting the Trust Law. The legal profession in Jersey is well experienced in advising in relation to trusts, and Bedell Cristin has always been in the forefront of this area.
- **Absence of local taxation:** As mentioned above, a Jersey trust with no Jersey resident beneficiaries and no Jersey source income (other than bank interest) will suffer no Jersey taxation.

Formation of a Jersey trust

The formation of a Jersey trust requires simply the execution of a trust deed by the parties and the receipt by the trustees of some property, which is often for convenience a nominal cash sum, upon which the trust can operate. Before this occurs, however, there will be additional matters to consider.

First, the intending settlor will wish to discuss the form of trust most suited to his requirements and the identity of the likely trustee. These discussions will usually involve the settlor and his professional advisers (including professional advisers in Jersey).

Often, the trustee will be chosen by reputation or by recommendation of the settlor's advisers. The form of trust required will be discussed with advisers in Jersey

The potential trustee will also want to satisfy himself that he understands the settlor's reasons for establishing the trust and that those reasons are bona fide. A settlor can therefore expect that a trustee will require satisfactory evidence to establish the identity of the settlor and all beneficiaries, confirmations as to the source of the assets to be transferred into trust and, where applicable, satisfactory evidence that the settlor has taken appropriate tax advice. These procedures are not merely for the protection of the trustee and to comply with regulatory requirements; they may also add to the security of the trust itself.

Finally, since it is likely that the settlor and the trustee will never have met, a personal meeting is to be encouraged to promote the good faith and reliance upon probity that is essential if the trust is to operate properly.

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