

## 1. Trust law

- (a) The Guernsey Financial Services Commission (“GFSC”) has published revised Guidance Notes on the Prevention of Money Laundering and Countering the Financing of Terrorism which update compliance procedures in Guernsey. In particular, financial services businesses will be expected to carry out their own verification procedures and not rely on verification provided by recognised intermediaries. There is also increased due diligence in respect of trusts, settlors and beneficiaries.

The disclosure of both trust documents and information to a discretionary beneficiary by a Trustee under Section 22 of the Trusts (Guernsey) Law 1989 as amended (“the Trust Law”) was considered in *Stuart Hutcheson v Spread Trustee Company Limited as Trustees of the Peter Acatos No 2 Settlement*. The Court of Appeal decided that a discretionary beneficiary had a right to see documents of the trust and to receive information regarding the trust assets.

- (b) Guernsey is about to enact the Public Trustee (Bailiwick of Guernsey) Law which provides for the creation of the office of the Public Trustee. His functions will include acting as trustee where a trust has no trustee lawfully able to act or where it is necessary or desirable for him so to act for the purpose of preserving the trust assets or otherwise in the interests of the beneficiaries of the trust or for the protection or enhancement of the reputation of the Bailiwick of Guernsey. This would include, for example, a situation in which a trustee has been refused a licence to act as trustee by the GFSC pursuant to the Regulation of Fiduciaries, Administration of Businesses and Company Directors, Etc. (Bailiwick of Guernsey) Law, 2000 (“the Fiduciaries Law”).
- (c) The basis is set out in the Trusts Law. Under that law the Court has jurisdiction in respect of a Guernsey Trust (of which the proper law is the law of Guernsey) or a foreign trust if the trustee of the trust is resident in Guernsey, or

any property which is situate or administered in Guernsey, or the terms of which provide that the Guernsey Court is to have jurisdiction.

## 2. Anti-money laundering and anti-terrorist provisions

- (a) Guernsey has the backing of the FATF and in February 2002 was described as already being close to complete adherence to the 40 recommendations of the FATF.
- (b) All trustees are required to be licensed under the Fiduciaries Law, and are under a duty to observe the Guidance Notes produced by the GFSC. There is no requirement to make any official report or filing when a trust is established or on any change in trustees.

## 3. What Measures are there to combat the abuse of trusts to procure the concealment of assets?

The Guidance Notes provide for the proper verification and identification of the settlor and principal beneficiaries.

## 4. Asset protection trusts

- (a) None. Under Section 71(1) of the Guernsey Trust Law of 1989 as amended (“the Trust Law”) there is no period of limitation or prescription which reduces the period within which claims from creditors in other jurisdictions can be brought against a trustee or to recover from the trustee trust property or its proceeds.
- (b) Under Section 11(2) of the Trust Law, the court can declare a trust to be invalid and unenforceable to the extent that it was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty.
- (c) There has been no ruling on this by the Guernsey Court. It is believed that this would not be an exception.



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## 5. Sham

- (a) Section 11A(1)(b) of the Trust Law provides that the settlor shall be deemed to have had the capacity to create the trust ... if he had capacity to do so under Guernsey law, or the law of his domicile or nationality or the proper law of the transfer or disposition. Where the settlor retains control of the trust assets there is no special protection and the trust may be deemed a sham.
- (b) Under Section 11(2)(a) a trust would be invalid and unenforceable if it purported to do anything contrary to the law of Guernsey or under Section 11(2)(d) if the court declares that it was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty. If found to be a sham there would usually be a resulting trust, as set out in Section 11(5).

## 6. Forced heirship

Yes - Section 11A of the Trust Law provides “neither the trust nor the transfer or disposition is invalidated by any foreign rule of forced heirship or by reason for the fact that the concept of trusts is unknown to or not admitted by the law of a jurisdiction other than Guernsey”.

## 7. Protectors

No specific provisions. Section 28 of the Trust Law provides: “The terms of a trust may require a trustee to consult or obtain the consent of another person before exercising any function”. Such a person shall not be considered to be a trustee by being so consulted or giving or refusing such consent. Whether a protector as such has any fiduciary duty under Guernsey law remains undecided.

## 8. Purpose trusts

A trust which has no beneficiary or is not created for a charitable purpose is invalid. A trust can, however, be created and used for commercial activities providing those activities involve the use of trust assets for the benefit of beneficiaries.

## 9. Tracing of trust assets

Trust property which has been dealt with in breach of trust, or property into which it has been converted, can be followed and recovered unless:

- (a) it is no longer identifiable; or
- (b) it is in the hands of a bona fide purchaser for value without notice of the breach of trust or someone else who derived title through such a purchaser.

## 10. Attacking trusts

- (a) Actions against individual trustees under Section 70 of the Trust Law were considered in *Cross v Benitrust*. The Court of Appeal decided that the directors of a trust company do not owe a fiduciary duty to the beneficiaries of a trust of which their company is a corporate trustee.
- (b) None.

## 11. Foundations

Guernsey has no provision for the creation of foundations. Guernsey courts would probably recognise a foreign foundation if its creation conforms with the proper law (ie, the express or implied proper law or the law with which it has its

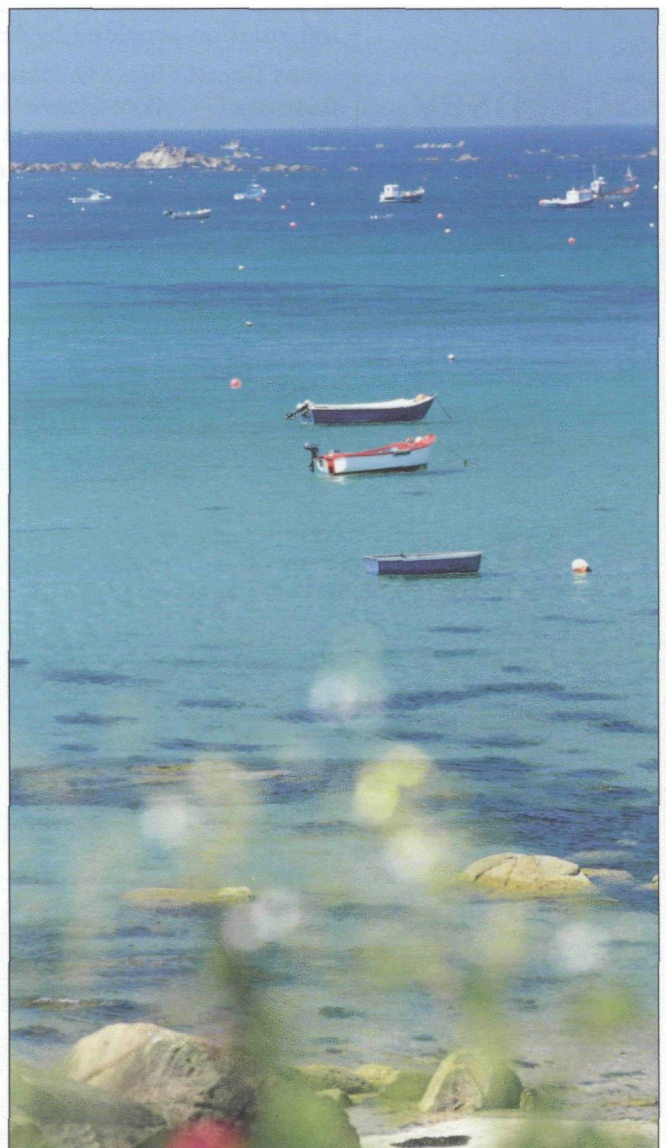


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closest or most real connection). The legal nature of a foundation would, as a matter of Guernsey law, be defined by its proper law.

## 12. Conflict

There is no specific legislative provision for migration of trusts (only of companies). But the Trust Law states that “the terms of a trust may provide for the proper law of the trust to be changed from the law of Guernsey to the law of another jurisdiction”. (Section 46 (1)). A foreign trust which changed its proper law to be that of Guernsey would become a “Guernsey Trust” under Guernsey law.

The Hague Convention has been ratified. The Hague Convention was referred to in the judgment of the Court of Appeal in July 2002 in the judgment of *Stewart Hutchinson v Spread Trustee Company Limited as Trustees of the Peter Acatos No. 2 Settlement*.

## 13. Succession

Under Guernsey law both irrevocable and revocable settlements can be created. The law provides that if a trust is revoked in whole or in part the trustees hold the trust property which is the subject of the revocation, in trust for the settlor absolutely or if he is dead, for his personal representatives. For many years, if an

interest were retained by the settlor, the trust could fall foul of the rule “donner et retenir ne vaut”. This is no longer so. However the settlor must transfer the property to the trustees and the trust must be properly constituted. Any retained life interest must be clearly defined. In the event that a settlor is establishing an inter vivos trust to substantially take the place of a Will Trust or Codicil to a Will it is prudent for the form of execution of the deed to follow the rules in respect of Wills. In Guernsey the requirement would be for the deed to be witnessed by two non-benefiting individuals rather than the single witness normally required.

#### 14. Trustees' powers of Investment

There are no restrictions at present. The States Advisory and Finance Committee may provide by order that the trustees may only invest trust property in the securities and investments prescribed by the order. But the terms of a trust may exclude the provisions of such an order or authorise trustees to invest in securities and investments other than those prescribed by such order. No such order has been made. There is no equivalent of the English Trustee Investment Act 1961.

#### 15. Trading trusts

A trustee, in a transaction affecting a trust, must inform the third party that he is acting as a trustee in order that any claim by that third party is limited to trust assets under Guernsey Law. If a trustee fails to inform a third party that he is acting as a trustee (and the third party is otherwise unaware of the fact) he will incur personal liability. A trustee will usually be protected by limited liability if trading through a company. He may be exempted by the terms of the trust from the duty to involve himself in the management of the company, although such an exemption would not necessarily allow the trustee to abandon his duty to preserve the trust fund unless the effects of Section 19(b) of the Trust Law (the trustees duty to preserve and enhance the trust fund) have been specifically excluded by the trust deed.

#### 16. Taxation

- (i) Under Guernsey Tax Law, no.
- (ii) Yes. Where a settlor resident in Guernsey is also a beneficiary or if the trust is not irrevocable.
- (iii) Yes. A beneficiary resident in Guernsey is taxable on income to which he is entitled under the terms of trust even if not distributed to him.
- (iv) No (except for the conveyance of Guernsey real estate).
- (v) There have been no significant developments in Guernsey.

#### 17. e-commerce

The Electronic Transactions (Exemptions) Order 2001 exempted the creation, execution, variation, revocation or enforcement of a declaration of trust from Sections 1 to 5 and 8 of the Electronic Transactions (Guernsey) Law 2000. Such documents must therefore be executed in written form.

#### 18. OECD, FATF, and FSF

What is the status of your jurisdiction under the criteria put forward by these bodies?

OECD

- (a) (i) Yes (March 2002)
- (ii) -

- (b) (i) Yes
- (ii) -
- (c) (i) Guernsey is currently awaiting a report from
- (ii) the IMF
- (iii)

#### 19. Counter-terrorism

The GFSC has updated the guidance notes for the prevention of money laundering and countering the financing of terrorism during the course of 2002. Guernsey has enacted the Terrorism and Crime (Bailiwick of Guernsey) Law, 2002 to strengthen the Bailiwick's power to combat terrorism. The updated guidance notes have been issued in recognition that the finance sector in Guernsey, as elsewhere, is exposed to the risks of assisting in laundering the proceeds of criminal activity and involvement in the financing of terrorism.

#### 20. Regulation and administration of trust companies

The Fiduciaries Law which came into effect on 1st April 2001 now regulates all entities (including individuals) that provide trustee and company administration services. Codes of Practice governing Directors, Trustees and Corporate Service Providers have been put in place.

Yes, by the GFSC. All those involved in providing fiduciary services, trusteeship services and corporate services must be licensed by the GFSC. Two types of licence are available: a full fiduciary licence for businesses, or an individual fiduciary licence. The GFSC publishes lists of those entities and individuals who have been licensed and whose licenses are pending.