

## The use of trusts in Jersey

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This memorandum has been prepared for the assistance of clients considering creating a trust in Jersey. It is intended to provide a summary of the main legal requirements and general principles applicable to the establishment and administration of trusts. It is not intended to be comprehensive in its scope and it is recommended that a client seek legal advice on any proposed transaction prior to taking steps to implement it.

This memorandum has been prepared on the basis of the law and practice as at September 2022.

### | Background

#### Jersey's constitutional position

Jersey does not form part of the United Kingdom but is a self-governing dependency of the British Crown. It is the largest of the Channel Islands and lies 15 miles off the north-west coast of France. By constitutional convention established over some 900 years the Island has complete autonomy in all matters of internal government, including taxation. The legal system is derived in part from the customary laws of Normandy but has been strongly influenced by English law and the Judicial Committee of the Privy Council remains the Island's ultimate court of appeal. Prior to the UK's departure from the European Union (the **EU**), the Island's relationship with the EU was set out in Protocol 3 of the UK's 1972 Accession Treaty. The Island's relationship is now enshrined in our membership of the UK-EU Trade and Cooperation Agreement (the '**TCA**'), which was reached prior to the end of the Transition Period on 31 December 2020.

#### Introduction to the trust concept

A trust is a legally binding arrangement whereby a person (known as a settlor) transfers assets to another person (known as a trustee) who is entrusted with legal title to the trust assets, not for his own benefit, but for the benefit of other persons (known as beneficiaries, who may include the settlor) or for a specified purpose.

The instructions from the settlor to the trustee as to the disposition of trust assets will normally be contained in a document called the trust instrument. This is for the benefit of all parties as it will ensure that the settlor, the trustee and the beneficiaries know precisely what their respective rights and duties are. The trust instrument will usually provide that the trustee has the power to manage the trust assets in accordance with the terms of the trust instrument and the strict duties imposed on the trustee under Jersey law.

In addition to the trust instrument it is also usual for a settlor to indicate to the trustee his wishes as to the management and disposition of the trust fund in the future in a less formal manner. His expression is often contained in a letter of wishes which, although not legally binding, will generally be considered by the trustee to be of persuasive effect when performing his duties and, for example, determining to make a distribution out of the trust fund.

While trusts have been established in Jersey for many years their operation is now governed by a modern, comprehensive statute entitled The Trusts (Jersey) Law 1984 (the '**Trusts Law**'). The Trusts Law provides that a trust exists, and will be enforced by the Jersey Courts, where a trustee holds or has vested in him assets for the benefit of a beneficiary, whether or not yet ascertained or in existence, or for a specified purpose. Article 54 of the Trusts Law confirms that the trust assets constitute a separate fund and do not form any part of the personal property of a trustee. The Trusts Law also imposes fiduciary duties on trustees, regulates the administration of trusts and provides rights of beneficiaries. For example, any beneficiary has a legal right to force a trustee to act in accordance with the terms of the trust instrument and the Trusts Law. Unlike the position in certain other offshore jurisdictions, a Jersey trust can be of unlimited duration. Jersey is a party to the International Hague Convention on the Law Applicable to Trusts and on their Recognition.

The performance of a trustee's duties will be enforced by the Royal Court of Jersey, if necessary, at the instigation of a beneficiary.

The Jersey Courts will seek to ensure that a trust established under Jersey law is administered by the trustee in accordance with the provisions of the trust instrument and the Trusts Law, thus providing a high degree of protection for both settlor and beneficiaries. The Royal Court of Jersey has an acknowledged proficiency in the law of trusts and the senior British judges who sit on the Court of Appeal in Jersey provide added assurance to settlors and beneficiaries that litigation, while unwelcome, will be decided upon justly, fairly and with an expertise that may be lacking in less sophisticated jurisdictions.

There is no register of trust documents under Jersey law and trust arrangements are not open to public view.

The Hague Convention on the Law Applicable to Trusts and on their Recognition has given further impetus to the expansion of trust services on the Island. Under this convention trusts

which have been duly constituted under the laws of Jersey must be recognised by the signatories to the convention. At present these include the following jurisdictions: the United Kingdom, France, Italy, Netherlands, Luxembourg, United States of America, Canada, Cyprus, China, Switzerland, Hong Kong, Liechtenstein, Panama, Malta, Monaco, San Marino and Australia.

## **The components of a trust**

### **The settlor**

Once a trust is created the settlor will have divested himself of legal ownership of the trust assets. The settlor may be a beneficiary and, in certain circumstances, he may also act as a co-trustee. The settlor may, also, retain a substantial degree of control over the trust, such as the power to direct or approve distributions or investments, the power to appoint and remove trustees and the power to revoke the trust. However, it is essential to the validity of a trust that the settlor actually dispossesses himself of the trust assets and he may not, for example, simultaneously be a sole trustee and a sole beneficiary.

### **The trustee**

Legal title to the trust assets is vested in the trustee under the obligations imposed by the trust and he is responsible for the administration of the trust. A trustee is required by Article 21 of the Trusts Law to act with due diligence, as would a prudent person, to the best of his ability and skill and must observe the utmost good faith. A trustee must exercise his powers solely for the benefit of the beneficiaries. The trust assets, however, constitute a separate fund and do not form any part of the trustee's own estate.

### **The beneficiaries**

The beneficiaries are the persons entitled to benefit from the assets held on trust. As stated above, the settlor may himself be one of the beneficiaries. In order for a trust to be valid there must generally be sufficient certainty as to the identity of the beneficiaries. An express power for the addition of further persons to the class of beneficiaries may be included in the trust instrument. The beneficiaries may enjoy equal or unequal benefits, as the trust instrument prescribes or, in the case of a discretionary trust, as the trustee may determine.

It is also possible to include in the trust instrument a power to exclude beneficiaries from future benefit.

### **The trust fund**

The assets constituting the trust fund may be of any type of movable or immovable property (other than land in Jersey). At any time after settlement on trust of the initial assets further assets may be added subject to any restrictions in the trust deed. Indeed, a common

arrangement is to establish a trust with a nominal initial amount and subsequently to add more substantial assets.

## The protector

It is not essential for the validity of a Jersey trust that there be any protector. However, in order to counterbalance the wide discretionary and fiduciary powers conferred on a trustee it is often found useful for the settlor to appoint a trusted friend or professional advisor (or even himself) to act as a protector of the trust. In such cases the consent of the protector will generally be required before the trustee may exercise certain strategic powers under the trust instrument.

In the case of *In the matter of the Piedmont and Riviera Trusts* [2021] JRC 248 the Royal Court in considering the role of the protector found that the "*paramount duty of a protector is to act in good faith in the best interests of the beneficiaries*" (i.e. to take a fiduciary role). Accordingly, a protector must "*have regard to relevant considerations, ignore irrelevant considerations and make a decision which a reasonable protector could arrive at; but he must reach his own decision*". In addition, the Royal Court found that a protector may be entitled to veto a decision of a trustee, even if that decision could be said to have been a rational decision (i.e. one which a Court would approve).

If a protector was to have a limited role of review in respect of a trustee's decision then the protector's role would be the same as the Court's which would in effect render the protector's role almost redundant. The decision confirms that the Jersey position does not follow the so-called "narrow view" of the protector role described in the Supreme Court of Bermuda case of *X Trusts* [2021] SC (Bva) 72 Civ.

On the protector's death, incapacity or resignation, his powers can be passed on to another person as successor protector.

## Forms of trusts

Various types of trust have been developed over time and the most appropriate structure for the settlement will depend on the settlor's particular circumstances and objectives. Some of the more common types of trust are described below.

### Fixed interest in possession trust

Under a fixed interest trust the principal beneficiary will normally be granted a vested interest in the income of the trust fund throughout his lifetime and the discretion of the trustee regarding the disposition of the trust fund will be limited. For example, the trust instrument may specify that the trustee is required to distribute all of the income of the trust fund to a particular individual during that person's lifetime and subsequently to distribute the capital of the trust fund in fixed proportions to named beneficiaries (such as the settlor's children).

## Discretionary trust

The discretionary trust provides maximum flexibility and is often the most efficient structure for both settlor and beneficiaries. Under the terms of a discretionary trust the trustee is given wide discretionary powers as to when, how much and to which beneficiaries he should distribute the income and capital of the trust. Such a form of trust is useful where at the time of creation of the trust the future needs of beneficiaries cannot be accurately determined. The beneficiaries are not regarded as having any direct legal rights over any particular portion of the trust fund but only a right to be considered to benefit when the trustee exercises his discretion.

## Revocable trusts

Although for tax and other reasons it is generally desirable for a trust to be constituted as an irrevocable settlement, in certain circumstances the settlor may require the additional comfort of knowing that he has retained the power to revoke the trust and enforce the return of the trust fund. Careful consideration requires to be given to the possible consequences of a revocable trust because under the jurisdiction of the settlor's domicile, residence or nationality, revocation may negate some of the expected benefits of creating the trust. Any of the above trusts (discretionary etc) may be made revocable.

## Charitable and non-charitable purpose trusts

Generally, in order for a trust to be valid there must be identifiable beneficiaries, who have a right to enforce the terms of the trust. A long held exception to this general rule has permitted trusts to be established in favour of charitable purposes. In such instances it is the Attorney General who is tasked with the role of enforcing the trustee's duties and obligations. However, an amendment to the Trusts Law permits the creation and enforcement of non-charitable purpose trusts, ie, trusts in which property is held by trustees on trust to carry out specific purposes which do not qualify as charitable purposes. This type of trust is often simply referred to as a "purpose trust". All the usual rules for Jersey trusts apply save in two respects. First, the trust deed must set out the particular purpose or purposes for which the trust has been established. Second, the trust instrument must provide for a person whose duty it is to enforce the trust in relation to its non-charitable purposes. This person is called the "enforcer" and must be a person different from the trustee or trustees. Although an enforcer may be likened to a protector, the role of an enforcer is essentially quite different. Non-charitable purpose trusts enable purposes which are not charitable in the strict sense but are, or may be, philanthropic or beneficial in a wider sense, to be fulfilled. However, important commercial advantages may also be obtained by the use of such trusts.

## Reservation of powers

Although once a settlor creates a trust he is deemed to have divested himself of ownership of the trust assets, under Article 9A of the Trusts Law, a settlor may reserve for himself – or grant to

someone else - certain powers. This type of trust is often referred to as a "reserved power trust". Most commonly, settlors will wish to reserve powers in the area of investment. Other powers which can be reserved include the power to revoke, vary or amend the terms of a trust or any trusts or powers arising wholly or partly under it; to advance, appoint, pay or apply income or capital of the trust property or to give directions for the making of such advancement, appointment, payment or application; to appoint or remove any trustee, enforcer, protector or beneficiary; and to change the proper law of the trust.

## **Accumulation and maintenance trust**

An accumulation and maintenance trust is one where no beneficiary has a fixed entitlement to the benefits accruing to the trust for a certain period, during which time income is accumulated and becomes an accretion to capital. The persons who are ultimately entitled to the trust capital may thus benefit from the accumulation of capital. The trust instrument may give the trustee a discretionary power to make distributions amongst the beneficiaries up to a specific age for their education, maintenance and benefit and to provide thereafter for a designated share of the trust fund to be distributed to each child on attaining a specified age. An accumulation and maintenance trust may be particularly appropriate where the settlor wishes to benefit a group of children, for example, his grandchildren.

## **Practical applications of Jersey trusts**

In essence a trust is a legal device, first developed under English law, under which legal ownership of assets is vested in a trustee whilst the enjoyment of the trust fund is preserved for the benefit of the beneficiaries on terms determined by the settlor.

The range of uses to which a trust may be employed is still being developed but flexibility and confidentiality are the principal advantages which a trust has over other legal forms designed to hold, preserve and transmit wealth. The trust concept has proved to be enormously adaptable and is widely used in financial planning.

Such is the flexibility of a Jersey trust that it would be impracticable to define its potential, however, some typical applications are the following:

### **Preservation of wealth**

Trusts may be used to preserve the continuity of ownership of particular assets, such as a business, within a family. By vesting legal ownership of the assets in the trustee, the relevant individuals may be able to continue to benefit from the assets, whilst avoiding fragmentation of ownership amongst a large number of second and third generation beneficiaries. The use of a trust avoids, on the death of a beneficiary, the risk of a share of assets becoming owned outside the family, and thus enables settled assets to be preserved intact for the benefit of future generations.

## Forced heirship

Where a settlor disposes of assets during his lifetime by settling them on trust, the trust assets will not form any part of the settlor's estate upon his death. This may enable a settlor to avoid forced heirship rules which may be mandatory under the laws of his domicile, residence or nationality and which would otherwise dictate the persons to whom and proportions in which a settlor's estate will devolve. Article 9 of the Trusts Law provides that questions relating to the trust or transfers of property to it should be determined by the domestic law of Jersey (excluding Jersey's own conflicts of laws rules and *légitime* rules) and that no consideration should be given to any rule of foreign law. More specifically, Article 9(2) states that the court should ignore foreign law claims based on, firstly, a lack of recognition of the trust, secondly, infringement of forced heirship rules and thirdly, a personal relationship with the settlor, for instance, such as husband and wife. Article 9(4) states that foreign judgements with respect to trusts shall not be enforceable to the extent they are inconsistent with the principles set out in Article 9. The combination of these rules can also help protect the trust assets from matrimonial claims against a beneficiary.

## Succession planning

The effect of a trust is to divest the settlor of ownership of the settled assets. Accordingly, upon the death of a settlor there will be no need to obtain a grant of probate or similar formalities in order to deal with the trust fund. A trust, therefore, provides an efficient vehicle for the transfer of beneficial ownership interests on the death of a settlor. Further, because the interests of a beneficiary under a discretionary trust will not constitute a separate asset under Jersey law, a trust structure may assist in the avoidance of stamp duty or inheritance taxes which would otherwise be payable on the death of a beneficiary. In addition, a trust can be used to hold shares in a company owning immovable property situated outside Jersey, rather than directly in the real property itself, with the effect of transforming characterisation of an interest from immovable to movable, which can present attractive opportunities for tax and financial planning. A trust may also be used to protect financially unsophisticated beneficiaries and to make financial provisions for the improvident.

## Asset protection

Historically trusts have been established for the principal purpose of protecting assets from risk. In a modern context, trusts may be employed to hold assets in a secure and stable political environment. Trusts play a major role in financial planning for individuals, families and companies and are apt to serve as a shield to help protect assets against the potential future liabilities of a settlor or beneficiary, such as punitive taxation or financial claims (including, in some situations, those arising from divorce). Using a Jersey trust, specifically, in this context may be particularly beneficial due to the rules outlined above.

The use of a trust in conjunction with an underlying company can be used to convert an onshore asset into an offshore one and to interpose an additional layer of confidentiality in a chain of ownership. The use of the trust and company combination may also enable trust assets to be held in a jurisdiction which does not recognise the trust concept. Such an arrangement may be attractive to a lender for the purpose of obtaining security against assets. Trusts can also safeguard assets against strategic risks, such as confiscation or expropriation by the State in the country of the Settlor's domicile, residence or nationality. As a further protection, a modern trust instrument can provide for the proper law of settlement to be moved to another jurisdiction in the event of political or strategic emergency in the country of the trustee's residence.

## Commercial trusts

The variety of means to which a trust may be put in the commercial context has only been partly realised. Jersey trusts have been used for the following commercial purposes:

1. as a unit trust for the collective investment of capital;
2. in Eurobond issues, the interests of investors may be regulated pursuant to the terms of a debenture trust deed;
3. in off-balance sheet transactions, the share capital of an "orphan" special purpose vehicle will typically be held by a trustee under the terms of a charitable trust or non-charitable purpose trust;
4. in an inter-creditor agreement, the rights of one creditor group may be subordinated to the rights of other creditors and regulated under the terms of a subordination trust forming part of the overall security package;
5. asset securitisation schemes have been structured to provide for mortgages and receivables to be held pursuant to the terms of a trust; and
6. employee share option and executive incentive schemes (as well as regular pension schemes) will benefit from being established in a politically stable, fiscally neutral jurisdiction.

## Taxation

Where all of the beneficiaries are resident outside Jersey a Jersey trust will be exempt from assessment both in respect of Jersey income tax on income arising outside the Island and income on bank deposit interest arising inside Jersey. For practical purposes, therefore, the trustee may make distributions out of a trust fund established in Jersey without any withholding or deduction for income tax. There are no inheritance, wealth, gift or capital gains taxes levied in Jersey nor is there any stamp duty, value added tax or equivalent forms of indirect taxation charged on the creation or transfer of assets to a trust.



However, in some circumstances there may be taxes arising in another jurisdiction on the transfer of assets into a trust, or distributions out of it, so where necessary appropriate tax advice should be sought.

## Charitable and Philanthropic purposes

Private charitable or philanthropic structures using either exclusively charitable trusts or non-charitable purpose trusts for a wide variety of philanthropic purposes are often attractive to settlors with a personal interest in philanthropy. In addition, such trusts often complement larger structures which have been established for wealth preservation and succession planning purposes and are often viewed as a way of involving and bringing together the different branches of high net worth families in a joined purpose outside the family's principal business or investment activities."

## Creation of a trust

It is preferable for a trust to be created by the execution of a formal written instrument so that all parties will know exactly what their respective rights and duties are. The Trusts Law does, however, permit a trust to come into existence by oral declaration or by conduct. Trusts created in writing may be either a settlement signed by both the settlor and the trustee, or by a declaration of trust signed by the trustee alone. Following execution of the trust instrument a trust will come into existence upon settlement of the initial property, which may be supplemented later. Ogier is able to assist with preparation of all of the appropriate documentation.

## Trust formation services offered by Ogier

In connection with the formation of trusts we are able to provide the following services:

- advice and liaison with professional advisers in other jurisdictions in order to recommend the most practical and efficient structure to achieve the settlor's objectives;
- preparation of the trust instrument, letters of wishes and drafting constitutional documents of underlying companies to hold the trust assets;
- preparation and review of documentation relating to commercial transactions underlying the trust; and
- assistance to the settlor in the choice of a trustee for a Jersey trust and the preparation and review of all documentation to provide for the proper administration and operation of the trust and underlying companies.

Should you wish to proceed with the establishment of a Jersey trust please contact us,

## About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

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