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# New Guernsey trusts law Briefing

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On 17 March 2008, a brand new Guernsey trusts law came into force, providing new opportunities for the fiduciary sector in Guernsey and better protection for both settlors and trustees. The new Law should take Guernsey forward into a new era in trust business and act as a solid platform for further success.

While the Trusts (Guernsey) Law, 2007 is a new piece of legislation and replaces the whole of the existing Trusts (Guernsey) Law, 1989 and all amendments thereto, it will not be unfamiliar to those in the trusts industry. The new Law is a consolidation of the existing 1989 law together with the new innovations highlighted below.

## **New opportunities**

Guernsey trusts law will now allow, with unlimited duration:

- trusts for private beneficiaries;
- trusts for charitable purposes;
- trusts for non-charitable purposes; and
- hybrid trusts for beneficiaries and non-charitable purposes concurrently or consecutively.

## Perpetual or "dynasty" trusts

A Guernsey trust can now be established for an unlimited period. Many other jurisdictions impose a maximum trust period after which the trust must terminate. In Guernsey, prior to 17 March 2008, this period was 100 years, unless the trust was wholly and exclusively charitable, in which case it could be perpetual.

A trust created for beneficiaries under the 1989 trusts law regime will still be limited to 100 years, but, unless the trust instrument expressly provides otherwise, an appointment from the trust fund can be made to a new trust of unlimited duration. We would be happy to advise on the documents required to effect this change.

Advisors to high net worth families should consider carefully the use of a perpetual Guernsey trust where the family wishes to ensure benefit is preserved for

many generations of descendants.

Our new suite of private trust precedents (with over 2,000 variations) allow for longer trust periods flexibly to accommodate each settlor's intentions as they evolve over the changing circumstances of family life.

## Purpose trusts

For the first time, Guernsey law will permit the creation of non-charitable purpose trusts. Purpose trusts can have a number of useful applications both in a commercial context and for the more traditional private client business conducted in Guernsey, typically with the purpose of holding a specified asset or assets.

- In securitisation and finance transactions, a Guernsey purpose trust could be used instead of a charitable trust to hold the shares in an "orphan" special purpose vehicle.
- Purpose trusts can be used by entrepreneurial individuals to provide for the welfare of future generations where they want to ensure that, after their death, their businesses are not fragmented or sold. In a traditional trust for beneficiaries, it is always possible for adult beneficiaries to agree to wind up the trust and sell the business.
- Another potential use of purposes trusts is to own the shares in a private trust company incorporated with the sole function of acting as trustee of one of a suite of family trusts.

Where a non-charitable purpose trust is created under the new law, the trust instrument must provide for the appointment of an "enforcer" of the purpose, separate from the trustee. In a non-purpose trust, the beneficiaries can require the trustee to adhere to the terms of the trust. The idea of an enforcer is to provide a similar role in respect of purpose trusts and ensure the trustee is accountable for its actions.

## Trusts of Guernsey real estate

The new law clarifies that a trust can be created directly over Guernsey real estate. Previously, there was doubt as to whether such a trust was valid.

## **Better protection for settlors**

### Reserved powers

The new law addresses the concerns of some settlors, particularly those who have had success as entrepreneurs and those who wish to protect “family crown jewel companies”, who find their continued vision of strategic wealth building does not sit easily with conferring wide discretionary investment powers on trustees who are bound by duties of prudent and conservative trusteeship (i.e. diversification, limited leverage etc). Such settlors may wish to retain certain limited controls over assets to which they are effectively divesting themselves of title by gifting them to a trust.

To resolve this tension between entrepreneurial vision and traditional duty the new law adds a commercially powerful new section (15) providing that the validity of a Guernsey trust is not prejudiced by the settlor reserving all or any of the following powers (or conferring such powers upon a nominated trusted third party e.g. a protector):

- to amend or revoke the terms of the trust in whole or part;
- to advance, appoint, pay or apply the income or capital of the trust;
- to act as a director of a company wholly or partly owned by the trust;
- to hire or fire a director of a company wholly or partly owned by the trust;
- to give binding directions to the trustee to purchase, retain, sell, manage, lend or charge any of the assets of a Guernsey trust;
- to hire or fire any trustee, enforcer, protector or beneficiary;
- to hire or fire an investment manager, investment adviser or other professional;
- to change the proper law of the trust; and
- to restrict any trustee power by making the consent of the settlor or a third party a condition precedent to the use of such power.

Tax and legal advice should be sought on a case by case basis to ensure that, on the creation of each new trust, the accumulation of reserved powers is not so significant as to amount to a failure to divest the settlor of the beneficial interest in the property added to the trust.

We are very experienced in drafting these forms of trust and are able to assist in this regard from a legal perspective. We also recommend that expert tax advice is sought in all relevant jurisdictions.

### Asset protection

There has been an increasing tendency for foreign courts to purport to vary trusts governed by the laws of other jurisdictions, particularly in relation to matrimonial matters. The new law confirms that no Guernsey trust may be rendered void by reason that it avoids or defeats a claim under foreign matrimonial or civil partnership laws or forced heirship laws.

The new law enhances the defence of a Guernsey trust against foreign court and foreign law based attacks based on:

- the capacity of the settlor;
- the validity, interpretation or effect of the trust or disposition or any variation thereof;
- the administration of the trust, including the functions, appointment and removal of trustees and enforcers; and
- the existence and extent of any functions in respect of the trust, including powers of variation, revocation and appointment and the validity of exercise of any such function.

It achieves this by barring the application of all foreign laws to the determination of any of these issues.

It is recommended that the assets of the trust are, so far as possible, Guernsey situs to guard against a foreign court order attaching directly against property in its jurisdiction.

## **Better protection for trustees**

### Liability of corporate trustees

The new law has abolished the controversial provision of the 1989 law which provided for directors (and other persons occupying the position of director by whatever name called) of Guernsey or foreign trust companies of every Guernsey law trust to be liable as personal guarantors in the event of a breach of trust by the corporate trustee. A director or former director will not be liable in respect of any past breach, except to the extent of any award of damages prior to the new law coming into force.

One of the concerns over this provision was that it put the brakes on the establishment in Guernsey of private trust companies (PTCs) for high value bespoke architecture wealth structures where family members wished to act on the board of the PTC. With the new law this is no longer a concern.

#### Indemnity and lien for retiring trustees

The new law should improve the sometimes tense process by which a trustee retires and a replacement trustee is appointed, by introducing three new measures:

- the creation of a non-possessory lien in favour of the retiring trustee over trust assets (save for real property) in the hands of the new trustee, for those liabilities in respect of which the retiring trustee would properly have had recourse to the trust assets;
- limiting the retiring trustee's right to indemnity to that which he would have been entitled had he remained a trustee; and
- allowing former trustees to enforce an indemnity given in their favour, even if not a party to the indemnity.

The intention is that the new provisions will reduce reliance on contractual chains of indemnities and the often lengthy negotiation process between outgoing and incoming trustees.

#### Rights of beneficiaries to information

The new law will permit trusts to be drafted in such a way as to exclude beneficiaries' rights to information. Moreover, a trustee is specifically not obliged to disclose a letter of wishes. However, beneficiaries can apply to the Royal Court of Guernsey for an order requiring the provision of information or, in certain circumstances, a letter of wishes.

The reasons for these provisions are that often knowledge of entitlement under a trust can be detrimental to beneficiaries. For example, where a beneficiary is in primary, secondary or tertiary education, knowledge of entitlement of monies may not serve the best interests of that beneficiary. Further examples supporting this change include the exclusion of rights under employee benefit schemes where those benefiting under such schemes should expect details of their individual entitlements to remain private.

#### Limitation periods and ADR

The limitation period for bringing actions for breach of trust is clarified at three years from the date the claimant first became aware of the breach. A new provision in respect of minor and unborn beneficiaries means that knowledge of the guardian is now imputed to the beneficiary and an absolute limitation period of 18 years from the breach is applied.

The use of alternative dispute resolution is promoted by the new law. Unborn and minor beneficiaries are bound by the result of any arbitration or mediation as long as their interests are represented.

#### Powers of attorney

Powers of attorney can now be given by trustees for up to three years, and no limit will apply in respect of powers of attorney given as part of any arrangement for the subordination of debts or to confer security over trust property.

These are selected highlights only of the impressive and wide ranging changes made by the new law and we would encourage anyone who is interested in hearing more about the amendments to contact us for a place on our upcoming seminar on the new law.

For free access to the full text of the new law, including a comparison showing changes from the 1989 law, please visit Mourant's website [www.mourant.com](http://www.mourant.com) and follow the links Mourant du Feu & Jeune then Trusts or go directly to [www.mourant.com/trusts](http://www.mourant.com/trusts).

This briefing can only provide a general review of the new exciting changes. Legal advice should be taken with regard to individual circumstances. If you have any queries regarding the information in this briefing or wish to discuss how we can help with your Guernsey or Jersey trust law needs please contact:

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