What is a trust?

A trust involves the separation of the legal title, or ownership, of property from the right to benefit from that property. A trust is established by the transfer of legal title to property (known as the trust fund) by a person (known as the settlor) to another (referred to as the trustee) to be held for the benefit of one or more persons (known as beneficiaries) or for a particular purpose (whether charitable or non-charitable).

Types of Guernsey trust

Discretionary trusts

Perhaps the most commonly used type of trust, a discretionary trust gives the trustee the discretion as to how, when and how much of the trust fund should be applied for the benefit of the beneficiaries. The beneficiaries have no rights or entitlement as regards the distribution of the trust fund, having merely a hope that the trustee will exercise its discretion for their benefit. The settlor may give guidance, usually in the form of a letter of wishes, as to how he would like the trustee to exercise its discretion, but such guidance is not binding on the trustee.

Life interest trusts

With a life interest trust, one or more specified persons (known as the life tenant(s)) have a right to receive the income and/or capital of the trust fund during their lifetime. After the death of the life tenant, the trust will usually revert to being a discretionary trust for the benefit of other beneficiaries. This type of trust is commonly used where the settlor wishes to allow someone to remain in a property for their lifetime, but on the life tenant’s death, they would like the property to pass to other beneficiaries (either outright or in trust).

Purpose trusts

In Guernsey, trusts can be established for both charitable and non-charitable purposes, or a combination of both. Purpose trusts do not have beneficiaries, and instead have a purpose towards which the assets are applied. Where the purpose trust is non-charitable, an enforcer must be appointed. The enforcer has a fiduciary duty to enforce the purposes of the trust, thereby effectively holding the trustee to account. A charitable purpose trust does not require an enforcer as HM Procureur can enforce the terms of the trust.

Whilst the potential uses of a charitable purpose-trust are fairly self-explanatory, non-charitable purpose trusts have a number of potential uses both in a private and commercial context. Such uses include, amongst others:

• in securitisation and finance transactions, to hold the shares in an ‘orphan’ special purpose vehicle; and
• more generally, to hold shares in a private trust company.
Hybrid trusts

Guernsey law permits the establishment of hybrid trusts, which mix charitable and/or non-charitable purposes and/or beneficial trusts. An enforcer must be appointed to enforce the trust in relation to any non-charitable purposes. The trustee’s duty will be to administer a hybrid trust in the interests of the beneficiaries and in the furtherance of the purposes of the trust.

Protective trusts

A protective trust is a particular form of trust whereby the interest of a beneficiary will automatically terminate if that beneficiary attempts to dispose of his rights under the trust. Protective trusts are especially useful where a beneficiary is socially or financially vulnerable.

Advantages of the Guernsey trust

Guernsey is a leading international finance centre with a well established trusts industry. Guernsey trusts are governed by the Trusts (Guernsey) Law, 2007 (the Law), an advanced and modern piece of legislation which offers both flexibility and a high degree of protection for both settlors and trustees.

The Law positively expanded upon the previous legal framework in Guernsey, removing a number of historic limitations and restrictions contained in the previous trusts law. The result is that Guernsey now has a unique legal framework that both settlors and trustees find particularly advantageous when considering the jurisdiction in which to establish a trust. Some of these provisions are further detailed below.

Perpetual or ‘dynasty’ trusts

A Guernsey trust can be established for an unlimited duration. This is distinct from many other jurisdictions which impose a maximum trust period at the end of which the trust must terminate. The ability to create trusts of unlimited duration provides settlors with the option of preserving the benefit of their wealth for many generations of descendants.

Protection for settlors

Reservation of powers

The settlor of a Guernsey trust has the freedom to reserve a number of powers to himself or to others, often referred to as a protector, without prejudicing the validity of the trust. Examples of powers that may be reserved by a settlor include:

- the power to revoke or amend the terms of a trust in whole or in part;
- the power to advance, appoint, pay or apply the income or capital of a trust;
- the power to act as a director of a company wholly or partly owned by the trust;
- the power to give binding directions to the trustee to purchase, retain, sell, manage, lend or charge any assets of the trust;
- the power to appoint or remove any trustee, enforcer, protector, beneficiary, investment manager, investment adviser or other professional;
- the power to change the proper law of the trust; and
- the power 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 upon 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.

Asset protection

The Law prevents a Guernsey trust from being rendered void by reason that it avoids or defeats a claim under foreign matrimonial, civil partnership or forced heirship laws. The Law defends Guernsey trusts against attack by courts in foreign jurisdictions by ensuring that (subject to the terms of the trust) all questions arising in relation to a Guernsey trust or any disposition of property to or upon such a trust are to be determined in accordance with the law of Guernsey, without reference to the law of any other
jurisdiction. Therefore, the Guernsey courts will have exclusive jurisdiction to determine, for example, questions as to:

- 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 the exercise of any such function.

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

**Protection for trustees**

**Indemnity and lien for retiring trustees**

The Law includes the following measures in order to protect a retiring trustee:

- it provides for 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;
- it imposes a limit on the retiring trustee’s right to indemnity to that which he would have been entitled had he remained a trustee; and
- it provides that an indemnity given by a trustee or beneficiary to a retired trustee who is not a party or signatory of the indemnity can be enforced by such retired trustee (Section 43).

The above framework reduces reliance on contractual chains of indemnities and therefore assists to negate lengthy negotiations between outgoing and incoming trustees.

**Rights of beneficiaries to information**

Often, knowledge of entitlement under a trust can be detrimental to beneficiaries. For example, where a beneficiary is in education, knowledge of entitlement to monies may not serve the best interests of that beneficiary, or in the case of a pension scheme, the entitlement of one member should not be information available to other members. A trustee should therefore consider carefully whether information can and should be disclosed to beneficiaries.

The Law permits trusts to be drafted in such a way as to exclude beneficiaries’ rights to information. Furthermore, under the Law, a trustee is specifically not obliged to disclose the following:

- any document which reveals his deliberations as to how he should exercise his trustee functions;
- the reasons for any decision made in the exercise of those functions;
- any material upon which such a decision was or might have been based; and
- any letter of wishes.

However, it is important to note that a beneficiary can apply to the Royal Court of Guernsey for an order requiring the provision of the above information, and a trustee should exercise caution when refusing any such request for information. A beneficiary will also have certain rights to information as a matter of Guernsey customary law.

**Limitation periods and alternative dispute resolution (ADR)**

The limitation period for bringing actions for breach of trust is three years from the date the claimant first became aware of the breach, provided the claim is not based on fraud or conversion to the trustee’s own use. As regards minor and unborn beneficiaries, together with beneficiaries under a legal disability, knowledge of the guardian is now imputed to the beneficiary. As such, the action will be barred three years after whichever is the earlier of the beneficiary’s guardian having knowledge of the breach or the beneficiary’s ceasing to be a minor or under a disability. Furthermore, in any event, an action for breach of trust (unless based on fraud or conversion to his own use) is barred after 18 years from the date of the breach (Section 71).
A judgment in an action against a trustee founded on breach of trust is binding on all the beneficiaries of the trust so long as such beneficiaries were represented in the action (whether individually or as members of a class) or had notice of the action and a reasonable opportunity of being heard (Section 62).

The use of ADR is promoted by the Law. If permitted or directed by the trust instrument or authorised by the court, any dispute between the trustee and a beneficiary or otherwise may be referred to arbitration or mediation and, if resolved by such means, will bind all beneficiaries so long as they were either represented or had notice and a reasonable opportunity of being heard and, in the case of minors or unascertained beneficiaries, the mediator or arbitrator certifies such beneficiaries were independently represented (Section 63).

Powers of attorney

Finally, powers of attorney can 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.