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The trusted solution in wealth structuring

The Trust (Guernsey) Law 2007

Guernsey has been recognised as a centre of excellence for the provision of trust services for many years. The Trust (Guernsey) Law 2007 ("TGL 2007") came into force on 17th March 2008 and introduced a number of new opportunities to ensure that Guernsey, as a jurisdiction, remains competitive and attractive to its international clientele.

TGL 2007 creates a legislative framework for trust management, and provides greater flexibility than had previously been available. Some of the main changes are explained below.

Perpetual trusts

Before the new law, trusts could only be created in Guernsey with a maximum perpetuity period of 100 years, which was a disadvantage compared to other international finance centres. TGL 2007 allows perpetual trusts to be created, although this cannot be applied retrospectively.

However, this does not prevent a trustee from appointing assets from an existing trust to a new perpetual trust, if the terms of the existing trust allow. Such an appointment will be valid even though the perpetual trust will remain in existence beyond the perpetuity period of the existing trust.

Perpetual trusts should be carefully considered when settlors wish to ensure that the trust property is preserved for the benefit of many generations of family members, rather than being limited to the previous 100 year limit. This can be particularly useful when tax considerations are involved.

Reserved powers trusts

Whilst the reservation of powers to parties who are not the trustee has always been possible, there was always the danger that, depending on the power or powers so reserved, doing so could affect the validity of a trust. TGL 2007 has removed the uncertainty and specifically permits the reservation of powers, and states that a trust will not be invalidated by reservation of all or any of the following powers:

- Revoke, vary or amend the terms of the trust in whole or in part
- Advance, appoint, pay or apply the capital or income of the trust property
- Act or give directions to appoint or remove a director or officer of a company owned by the trust
- Give directions to the trustee in connection with the purchase, retention, sale, management, lending or charging of trust property

- Appoint or remove any trustee, enforcer, trust official, or beneficiary
- Appoint or remove any investment manager or advisor acting in relation to the affairs of the trust or holding trust property
- Change the proper law or forum of administration of the trust
- Restrict the exercise of powers by the trustee by requiring the consent of the settlor or any other person identified in the trust deed

The reservation of any of these powers does not constitute the holder of the power as a trustee, and does not impose any fiduciary duty on the holder of the power unless specifically stated in the trust deed.

Care should be taken, as although the reservation of powers will not invalidate a trust under TGL 2007 and thus be recognised by the Guernsey courts, legislative or tax authorities in other jurisdictions may view them differently. It is therefore strongly recommended that tax and legal advice is taken before creating a reserved powers trust to ensure that it will be recognised in the applicable jurisdiction and thus meet its objectives.

It should also be noted that the reservation of powers does not mean that the trustees will abdicate any role. From a regulatory and anti-money laundering perspective, trustees will still need to maintain a watching brief.

Reserved powers trusts provide useful benefits to those who wish to retain an element of control of the trust property, or who may be more familiar with civil law arrangements, such as foundations, that do not recognise the legal distinction between beneficial and equitable ownership.

Non-charitable purpose trusts

Under the previous law, a trust had to have one or more beneficiaries, or be created for charitable purposes, for it to be valid. TGL 2007 now allows non-charitable purpose trusts to be created and be valid through the appointment of an enforcer.

The enforcer can be the settlor, an individual, or a company, whose fiduciary duty is to ensure that the trustee adheres to the terms of the trust. The enforcer must therefore be a completely separate party from the trustee, and who must monitor the trustee's actions in the management of the trust, and take action against the trustee where appropriate.

Non-charitable purpose trusts can be used for a variety of commercial and non-commercial arrangements, including holding property and private company shares.

Foreign law exclusion

As a direct response to input from trust practitioners, TGL 2007 includes provisions to exclude foreign law. As such, questions regarding the capacity of the settlor to create or settle assets on the trust will be subject to Guernsey law. Therefore, a trust will not be deemed to be invalid in Guernsey if it avoids or defeats the claims of another party under foreign matrimonial, civil partnership or heirship laws. It is thought that the provision in TGL 2007 is more robust than can be found in other jurisdictions, having learned the lessons from, for example, the equivalent legislation in Jersey.

Provision of information

It is acknowledged that there are sometimes very valid reasons for not providing beneficiaries with information concerning a trust, which are most common when the trust is discretionary in nature. TGL 2007 seeks to clarify those parties to whom a trustee should provide information, and further confirms that if the trustee has excluded this part of the law, then the party can seek redress from the Royal Court and prove the need for the information.

The future

Guernsey law continues to evolve and adapt to meet the changing needs and aspirations of international clients and their advisers. The trust concept is incredibly flexible, which is a significant reason for its success. For those who find the common law concepts on which the trusts are based a challenge, then Guernsey will soon be looking to enact its own foundations law, a structure that offers many of the features of a trust, but with a distinct legal personality and a structure that will be familiar to clients and advisers based in civil law jurisdictions.