

Collas Crill explains... Establishing a Guernsey trust

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What is a trust?

Section 1 of The Trusts (Guernsey) Law, 2007, as amended (the "**Law**") states that:

*"A trust exists if a person (a "**trustee**") holds or has vested in him, or is deeded to hold or have vested in him, property which does not form or which has ceased to form part of his own estate for the benefit of another person (a "**beneficiary**") whether or not yet ascertained or in existence, and/or for any purpose, other than a purpose for the benefit of the trustee".*

How to create a Guernsey trust

The Law provides that a trust may be created:

- by oral declaration;
- by an instrument in writing;
- by conduct; or
- in any other manner whatsoever.

The Law is very permissive in relation to the creation of a Guernsey trust. In fact, section 6(5) of the Law expressly states that: "*No technical expressions are needed for the creation of a trust*". Therefore, in theory, a Guernsey trust can be created on the back of a napkin and without even mentioning the words "trust" or "trustee" (subject to certain formalities being met, discussed below). However, in practice, trusts are commonly created by written trust instrument.

Note that sections 6(2) and 6(3) of the Law confirm that both 'unit trusts' and 'trusts of real property situated in Guernsey' "*may be created only by an instrument in writing*" (i.e. in a trust instrument).

What can be held in a trust

The Law is liberal in regard to what 'property' can be held in a Guernsey trust. Section 7 of the Law states that: "*Any property may be held on trust*".

It is clear from the definition of "property" in the Law, that a Guernsey trust can hold a wide variety of tangible and intangible assets which can include cash, real estate, securities, chattels, intellectual property rights, rights to recover a debt and more.

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Formalities of creating a trust

One of the most important rules of English trust law also applies under Guernsey Law. This rule is known as "The Three Certainties" - these being:

1. certainty of **words** or the **intention** to create a trust;
2. certainty of **subject matter** (the trust fund or trust property); and
3. certainty of **objects** (the beneficiaries of the trust).

Although the three certainties are not expressly referenced in the Law, all must exist in order to create a valid Guernsey trust.

Certainty of intention is probably the most 'high-profile' of the three certainties and the 'certainty' that is most discussed in trust commentary and literature. It is very likely that one of the first trust cases that most junior trust practitioners learn is the case of *Abdul Rahman v Chase Bank (CI) Trust Co Ltd [1991] JLR 103*. In this case, the concept of a 'sham trust' was discussed. In broad terms, it was established that any settlor must show clear evidence of their intention to create a trust and relinquish 'dominion and control' of the trust assets to the trustee in order to establish a valid trust. Without this certainty of intention to create a trust, a trust could be held out to be a sham which could have significant implications for any settlor.

When creating a new trust it is important to establish the separation of legal and beneficial ownership of trust property and the separation of the enjoyment of the trust property from the control of the trust property in order to ensure that a trust is unlikely to be challenged on the grounds of being a sham. Modern offshore reserved powers legislation (section 15 of the Law, for example) does now allow a settlor the ability to reserve or grant (to himself or some other person) certain significant and wide ranging powers. However, consideration must always be given to the appropriateness and scope of these powers to ensure it could not be argued that the settlor has retained too much power, interest or control over the trust property so as not to have properly divested him/herself of it (thus calling the trust's validity into question).

Certainty of subject matter (trust property) and objects (the beneficiaries) are much more straightforward to evidence. As mentioned below, a well drafted trust instrument will cover these two certainties and will quickly establish the same beyond any reasonable doubt.

The trust instrument

The most common method of establishing a trust is "*by an instrument in writing*". This will normally take the form of either:

- (1) a declaration of trust (with just a trustee being party); or
- (2) a settlement of trust (with both the trustee and the settlor being party).

For the purposes of this note, we refer to both 'declarations of trust' and 'settlements of trust' as "trust instruments".

Previous generations of trust practitioners would have advised that a 'declaration of trust' provided more privacy for the settlor, as they were not named in the instrument. However, modern AML/CFT regulation and tax reporting requirements such as the

Common Reporting Standard and the US FATCA have all but removed any previous privacy advantage provided by a declaration of trust. The choice between a declaration or a settlement of trust is now mainly driven by the preference of a settlor.

Trust instruments are the most popular method of establishing a trust in the context of a professional trust relationship. Any professional trustee will want a clear and certain understanding of their various rights, powers, duties and obligations before entering into any fiduciary relationship. This can be provided by a well drafted trust instrument. As well as naming the key parties to the trust, a trust instrument should set out: (1) the dispositive powers; and (2) the administrative powers that apply to any trust.

The dispositive powers include the powers granted to a trustee (or possibly another party) to apply trust property for the benefit of the beneficiaries (or the purpose, if in relation to a purpose trust). These powers can be vested in the trustee in its total unfettered control/discretion or they can be subject to certain conditions such as consents from other parties (i.e. a settlor or a protector).

The administrative powers, although at first seemingly less important than the powers in relation applying the trust fund (mentioned above), are just as important to clarify in order to ensure the smooth operation and administration of any trust.

Typical administrative powers include:

- the power to appoint new or replacement trustees;
- the trustee's (and protector's) charging provisions;
- the trustee's indemnity and other exoneration provisions;
- the trustee's power to invest;
- the trustee's power to lend and give guarantees; and
- the trustee's power to delegate.

The above list is by no means intended to be exhaustive and a modern Guernsey law trust instrument will set out a number of additional key administrative powers.

Conclusion

The Guernsey Law creates a modern, permissive and flexible trust regime which can be utilised by trust practitioners for a number of purposes, including (but not limited to) asset protection and succession planning. Although the creation of a Guernsey trust is in principle a relatively straightforward process, care should always be taken in order to ensure that any duties, powers, rights and obligations are correctly translated into a trust instrument to ensure the settlor's objectives for the trust are met.

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