THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

EIGHTH EDITION

Editor
John Riches

THE LAWREVIEWS

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

EIGHTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in September 2019
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
John Riches

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Claire Ancell

SUBEDITOR
Neil Fanning

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-056-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

© 2019 Law Business Research Ltd

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

CHRISTIE'S

CONE MARSHALL LIMITED

CONYERS DILL & PEARMAN

DORDA RECHTSANWÄLTE GMBH

ELIAS NEOCLEOUS & CO LLC

ESTUDIO BECCAR VARELA

HANNAFORD TURNER LLP

HANNES SNELLMAN ATTORNEYS LTD

HASSANS INTERNATIONAL LAW FIRM

HAYNES AND BOONE, SC

HIGGS & JOHNSON

IQ EQ (ISLE OF MAN) LIMITED

LEE HISHAMMUDDIN ALLEN & GLEDHILL

LENZ & STAEHELIN

MAISTO E ASSOCIATI

MARXER & PARTNER RECHTSANWÄLTE

MCDERMOTT WILL & EMERY LLP

NAGASHIMA OHNO & TSUNEMATSU

NIJSDRAYE | ATTORNEYS AT LAW

O'SULLIVAN ESTATE LAWYERS LLP

P+P PÖLLATH + PARTNERS

PERCHSTONE GRAEYS LP

PERSPECTA TRUST LLC

POTAMITISVEKRIS

PRAXISIFM GROUP LIMITED

RECABARREN & ASOCIADOS

RETTER S.À.R.L.

RMW LAW LLP

RUSSELL-COOKE LLP

SOŁTYSIŃSKI KAWECKI & SZLĘZAK

SRS ADVOGADOS

STEP

STEPHENSON HARWOOD

SULLIVAN & CROMWELL LLP

TOGNETTI ADVOCACIA

UGGC AVOCATS

WITHERS LLP

WOLF THEISS

CONTENTS

PREFACE

In my foreword this year, I will focus on the continuing interest that is being devoted to the position of wealthy families and the markedly different approaches that prevail in Western Europe and the United States in terms of tax information exchange and anti-money laundering policy.

While public beneficial registers for companies will be introduced in the EU in the first quarter of 2020, the United States continues to pursue its own agenda where the primary focus of its anti-money laundering policy continues to be around financial institutions.

In broad terms, it is still accurate to say that the principal impetus for ongoing policy initiatives in this area is being driven by the EU, OECD and the Financial Action Task Force (FATF). This has been underlined by two important events in the past week or so as I finalise this foreword. Firstly, the decision of the UK Crown Dependencies[1] to voluntarily adopt public registers of beneficial ownership by 2023. Secondly, FATF's publication of its 2019 guidance for trust and corporate service providers (TCSPs) (the last version was published in 2008). I will return to both of these topics below but, in general terms, they underscore the sense of the 'transparency juggernaut' maintaining its momentum.

I will first deal with EU developments. The focus of activity here is the measures being introduced at Member State level to implement the Fourth and Fifth Anti-money Laundering Directives (4AMLD and 5AMLD, respectively). With some notable exceptions (including the UK, Malta Germany, Luxembourg, Portugal and Ireland), Member States have been quite slow to implement 4AMLD. In practice, implementation in other jurisdictions looks like it will be subsumed into the widened scope of 5AMLD.

So far as corporate registers are concerned, these are due to become public in the EU and wider EEA in early 2020 under 5AMLD (in the UK, the register was public from inception so the change here will be less marked). In the arena of trust registers, the scope of trusts that are within scope has been substantially expanded from those that generate tax consequences and those that are administered in the relevant jurisdiction. The Directive makes reference to 'express' trusts. There is significant uncertainty as to how this term will be construed as, on an expansive reading, it would require, in a UK context or co-ownership of land and joint bank accounts, to be reported. As a general proposition, trust registers are private and it would only be possible to gain access to the information on the beneficial owners of a trust where the applicant can demonstrate a legitimate interest.

It seems likely, from a consultation that has recently been launched by the UK government, that those seeking access to the trust register will have to demonstrate some

1 Jersey, Guernsey and the Isle of Man.

specific evidence of money laundering or terrorist financing activity to justify this. In essence, general 'fishing' expeditions by investigative journalists into the affairs of the wealthy will, hopefully, be discouraged.

Some curious features of the directive implementing 5AMLD have potentially wide-ranging consequences for trusts that are not regarded as resident in the EU or EEA. On a literal reading of the directive, it could be argued that such trusts will be required to register in circumstances where they have a business relationship with an obliged entity – this includes not only financial institutions but lawyers, accountants and other equivalent professionals. We will have to await the detailed regulations to see the final policy stance taken on this issue.

One other area where 5AMLD leads to a surprising outcome is in circumstances where a trust is deemed to control any company that is not incorporated within the EU or EEA. In these circumstances, the directive makes provision for public access to information about the trust; the logic here is that if the relevant company does not open up its information to public scrutiny then the trust that owns it should be disclosed instead. What is completely unclear at this stage is whether this will provide de facto public access to information about trusts that control non-EU or non-EEA companies or whether it will only afford such access in circumstances where the applicant already has detailed information about the relevant company or trust.

Another interesting issue that arises in Luxembourg, where a trust is the ultimate beneficial owner of a Luxembourg company, is that information about the settlor, beneficiaries, protectors and any other natural person exercising effective control will be publicly available on the corporate Register of Beneficial Owners from 31 August 2019. This is markedly different from the position under the UK Corporate register in the case of a trustee owner where the persons with significant control or 'PSC' rules look to those who control the trustee decisions alone rather than those who are beneficiaries of a trust.

The general scope of trust registers in the EU under 4AMLD is starting to become clearer. Following on from the UK and Malta, Ireland recently published its regulations at the end of January 2019. These regulations will, as noted, be potentially subject to material expansion once 5AMLD is implemented.

One general concept within 5AMLD is the proposal that trusts can be effectively passported; in other words, once the trust can evidence registration on one EU or EEA register, this will avoid the need for duplicate registrations. Whether this will result in any practical compliance gains or advantages remains to be seen. In terms of its scope, the information being provided on trusts in the centralised Beneficial Ownership Register will be restricted to information about individuals and will not address (as is the case with Common Reporting Standard (CRS)) asset values.

There are clear signs that the EU is intent upon exporting its concept of centralised trusts and corporate beneficial ownership registers to the rest of the world. Recent commentaries have suggested a move to a global standard in this regard by 2023. NGOs active in the transparency arena have started to advocate the creation of an overarching integrated global asset register for wealthy families although it is difficult to gauge policymakers' enthusiasm for such a radical step.

The position of the UK if Brexit finally happens is also interesting. The UK seems intent upon implementing 5AMLD and has shown no signs of losing its enthusiasm for expanding measures in this area along with its European neighbours. The UK has also been

putting pressure on both its crown dependencies (CDs) and overseas territories (OTs)[2] to adopt the EU's position on public beneficial ownership registers for companies.

Before the CD's announcement on 19 June 2019,[3] it seemed that the OTs were more likely to agree to the EU's position because of their constitutional status where the UK has a stronger formal say in how they make policy. What is interesting about the CD's position is, in the statement issued by the three Island Governments on 19 June, they describe a three-stage process as follows:

> *1. the interconnection of the islands' registers of beneficial ownership of companies with those within the EU for access by law enforcement authorities and Financial Intelligence Units;*
> *2. access for financial service businesses and certain other prescribed businesses for corporate due diligence purposes;*
> *3. public access aligned to the approach taken in the EU Directive.*

It seems obvious that the CD's collective approach here is to forestall criticism from the EU in particular by being seen to take the lead in moving to public access in a phased manner. The fact that public access is the last stage of this process is revealing. The willingness in interim stages to share information with the EU and obliged entities in the regulated sector may well be a model that other jurisdictions will consider following.

Whether the voluntary adoption of public registers of beneficial ownership for companies in the CDs will stimulate other jurisdictions to follow suit remains to be seen. There have been some indications that the UK and EU stance here is to promote a new global standard of public registers for companies by 2023 mentioned above. Given the UK's pronouncements here, it seems inevitable that the OTs will be forced to adopt equivalent measures to the CDs. It will be interesting to see whether other major offshore jurisdictions such as Switzerland and the Bahamas will react to these events.

As a different matter, the separate subject of establishing centralised trust registers outside the EU is bound to be raised as a parallel issue. This may take longer to surface than pressure to establish corporate registers, but seems bound to raise its head at some stage.

From a wider FATF perspective, the key development in 2019 is the publication in late June 2019 of updated guidance to non-financial services professionals. Three sets of parallel guidance to lawyers, accountants and TCSPs[4] have been issued. There has been a significant time gap since the previous edition, which was published in 2008.

One area where the new guidance will have an important impact in the context of TCSPs is in defining 'beneficial ownership'. In this regard, the new guidance follows an expansive view of what constitutes 'control' for the purpose of beneficial ownership akin to the approach taken in the UK Trust Register. This will be potentially significant going forward in considering who needs to be disclosed in the context of trust structures in governance terms. In particular, holding powers as a minority member of a group or a veto power with respect not only to the appointment and removal of trustees but also to the addition and removal of beneficiaries, for example, will be enough to render an individual as being characterised as a 'natural person exercising effective control'. This is potentially very significant because there

2 A wider group that includes Bermuda, British Virgin Isles ,the Cayman Islands and Gibraltar.

3 https://www.gov.je/News/2019/Pages/BeneficialOwnership.aspx.

4 https://www.fatf-gafi.org/publications/fatfgeneral/documents/public-consultation-guidance-tcsp.html.

has been no guidance offered by FATF since it published its 2012 recommendations on how to interpret this expression.

It is still very early to try and discern what the impact of the information flows triggered under CRS has been. For compliant structures, the provision of CRS information should only confirm what has already been disclosed by a taxpayer to domestic tax authorities. However, given the growing concerns being expressed by politicians on the 'inequality' theme, the assembling of information about asset holding positions of wealthy individuals may be the tool that is deployed in assessing the potential impact of future wealth or inheritance taxes where these are not currently employed.

There is also a potentially significant crossover from the FATF domain into CRS reporting. In particular, a broader concept of who may be regarded as a 'controller' in the anti-money laundering context is likely to be applied for CRS purposes in due course, given the express linkage that exists in CRS that directly imports FATF definitions of beneficial ownership into the concept of who may be reportable in a trust context as a 'controlling person'.[5] This could, in particular, lead specifically to the disclosure of family members who have more subtle or 'indirect' means of influence over a family trust structure.

One development in an aligned field worth mentioning is the rules on substance for entities incorporated in offshore jurisdictions. These substance rules have taken on an increased significance recently.

The EU Council has created a code of conduct for business taxation to limit the impact of low tax regimes. In 2017, it established a code of conduct group tasked with considering the measures on business tax within a number of non-EU jurisdictions.

In response to assessments undertaken by the EU, the affected jurisdictions (which include a number of the CDs and OTs) have introduced new rules requiring economic substance that will take effect in 2019.

These rules impact companies carrying on 'relevant activities'. The substance requirements have three principal components. These are to demonstrate, that within the jurisdiction, the company:

a is directed and managed;
b undertakes core income-generating activities; and
c has physical presence.

While these measures are primarily relevant in a base erosion and profit shifting (BEPS) context, they are indicative of wider trends in terms of being able to demonstrate the overall substance of these measures that are operated in offshore jurisdictions. This is of potentially greater significance to private wealth structures that may be seen as more passive than active.

There are nine relevant activities that cover banking, insurance, fund management and financing. One specific area includes the role of pure equity holding companies (PEHs). While supposedly aimed at private equity structures, it could conceivably impact a conventional holding company holding varied investments for a family trust.

At this early stage, there is no clear guidance that delineates the boundaries of what constitutes a PEH; what can be said is that family structures could find themselves impacted if the guidance is couched in wide terms.

5 See page 59 of OECD publication in commenting on meaning of 'controlling person' for CRS purposes.

There is no doubt that the increased cost and complexity of regulation is driving trends towards simpler structures with fewer layers and involving fewer jurisdictions. There appears to be a greater reluctance on the part of corporate service providers to offer a purely passive role as a registered office without any detailed understanding of the operation of the underlying entities themselves. This appears to be coupled with a trend towards re-domiciling entities into jurisdictions where substance can be demonstrated.

At the same time, an increasing awareness as to the implications of disclosure of beneficial ownership is also generating a more reflective view on the retention of control either by settlors or by beneficiaries or connected family members.

In summary, therefore, the theme of ever-greater levels of transparency and increased complexity of overlapping regulation continues. The dichotomy between Western Europe and the United States, in terms of their different approach to these issues, also remains very apparent to observers.

John Riches
RMW Law LLP
London
August 2019

Chapter 21

GUERNSEY

Keith Corbin, Mark Biddlecombe and Rachael Sanders[1]

I INTRODUCTION

Guernsey is part of the Bailiwick of Guernsey, within the Channel Islands. It is located 164 miles south-west of London and 27 miles from the Brittany coastline of France, with a population of 62,000 people. The other islands in the Bailiwick are Alderney, Sark, Herm, Jethou and Brecqhou.

Constitutionally, Guernsey is a dependency of the British Crown having its own parliament, the States of Deliberation, but is reliant upon the United Kingdom for foreign representation and defence. The States of Deliberation generally meets on a monthly basis and consists of 38 deputies elected in districts, plus two representatives from the States of Alderney, a presiding officer (the Bailiff, or the Deputy Bailiff in his or her absence) and two law officers of the Crown (being Her Majesty's Procureur (Attorney General) and Her Majesty's Comptroller (Solicitor General)). Other than the deputies, the appointments are made by the Crown. There are no political parties and Guernsey deputies are elected for a period of four years. The Bailiff is also the senior judge of the Bailiwick. The Queen also appoints a Lieutenant Governor, who is her personal representative in the Bailiwick.

Guernsey enjoys a unique relationship with the European Union, along with the two other Crown Dependencies, the Isle of Man and Jersey. Under the terms negotiated by the UK in 1971, Protocol 3 of the Treaty of Accession,[2] Guernsey is within the common customs territory of the community. This means that goods exported from Guernsey into the EU are not subject to the common customs tariff. For all other purposes, Guernsey is outside the EU, but EU directives, which are binding on Member States, may be brought into force in the Bailiwick by an ordinance passed by the States of Deliberation[3] if they are thought to be of value to the Bailiwick. Guernsey has a representative office in Brussels. Guernsey's Protocol 3 relationship with the EU will end when the UK leaves the EU. Guernsey's authorities are working closely with the UK government on the terms of the exit and the future relationship.

Guernsey law has its origins in Norman law, the Bailiwick having been part of the Duchy of Normandy since 993, but in 1204 gained the right to self-government after pleading allegiance to King John as he fought to maintain his territory in France.

The legal system has subsequently been increasingly influenced by English law, and the Guernsey courts will refer to case law from England and other common law jurisdictions, with the Privy Council being the highest court that may deal with Guernsey court matters.

---

1 Keith Corbin is executive chairman of Nerine Trust Company Limited. Mark Biddlecombe and Rachael Sanders are in-house legal counsel at PraxisIFM.

2 Treaty of Accession of the United Kingdom to the EEC signed 22 January 1972.

3 European Communities (Implementation) (Bailiwick of Guernsey) Law 1994.

Today, Guernsey is regarded as a pre-eminent international financial jurisdiction and a centre of excellence for wealth-planning matters. In addition, it has a long-standing reputation for political stability.

Guernsey's regulatory standards have received global recognition through a succession of reviews since 1997[4] and meeting international standards set by bodies such as the Financial Action Task Force and the IMF. The report into the most recent international assessment undertaken by MONEYVAL in 2014 was highly positive and found that Guernsey had surpassed the standards set in the equivalent IMF report on Guernsey in 2010. Guernsey has subsequently implemented harsher penalties for financial crime in line with recommendations in the MONEYVAL report.

The solid legal, political and regulatory platform is supported by a strong financial services infrastructure including international standard accountancy and law firms, a banking industry represented by leading international institutions, and other important support sectors such as insurance and investment management services.

Since the late 1960s, when financial institutions and professional advisers first began to recognise the potential for Guernsey as an international financial centre, Guernsey has pursued a conservative and long-term approach to its position as a financial centre, resulting in state-of-the-art financial legislation that has evolved to meet the demands of international ultra-high net worth individual (UHNWI) clients.

As a jurisdiction, it offers world-class expertise for international clients and their wealth planning needs, but is also attractive to UHNWI clients as a home. A simple, low-tax environment (see below) is underpinned by good transport links with the UK by air and sea, international telecommunication standards and high-quality education and public services.

II TAX

Guernsey's domestic budget is funded primarily by income tax receipts, supplemented by indirect taxes such as import duties on alcohol, tobacco and motor fuel. Property taxes are charged but at far lower rates than in many other countries.

i Individuals

Personal income tax is charged at a rate of 20 per cent on an individual's worldwide income. However, during a tax year persons who are 'resident' (spend at least 91 days in Guernsey) but are not 'solely resident' or 'principally resident' (broadly meaning they spend 182 days or more in Guernsey) may elect to pay income tax only on Guernsey-source income plus an annual 'standard' charge of £30,000 in respect of non-Guernsey source income.[5]

Guernsey-resident individuals may also elect to cap their income tax liability by paying £130,000 on non-Guernsey-source income or £260,000 on their worldwide income.

Guernsey does not levy:

a capital gains tax;
b inheritance tax;
c goods and services tax or value added tax; or
d wealth tax.

4 'Edwards' Report commissioned by UK Home Office 1997.

5 Section 5B of the Income Tax (Guernsey) Law 1975 and the Income Tax (Standard Charge) (Amendment) Regulations 2015.

ii Corporate

Companies do not generally pay income tax on their profits as the standard rate of company tax is zero per cent. However, income from financial services (e.g., from banking, fiduciary, insurance and compliance business) is subject to a 10 per cent rate, and income from certain other sources, including 'large retail business' and utility providers, is subject to a 20 per cent rate.

iii International agreements

Guernsey has a policy of meeting internationally accepted standards on tax transparency. As at 3 June 2019, Guernsey had signed 60 tax information exchange agreements (TIEAs) and double taxation agreements (DTAs) were in force with 25 countries.[6]

III SUCCESSION

Before the Inheritance (Guernsey) Law 2011 (the Inheritance Law) came into force on 2 April 2012, Guernsey's succession law retained aspects of its Norman law origins and testamentary freedom was limited in a way that would be familiar to its European neighbours. The Inheritance Law is now more in keeping with Guernsey's status as a pre-eminent trust jurisdiction.

Testamentary freedom and the rules on intestate succession vary according to whether or not the individual is domiciled in Guernsey, whether the estate consists of movable or immovable property and, in the case of immovable property, whether that property is situated in Guernsey or otherwise.

For wills executed from 2 April 2012, a Guernsey-domiciled settlor will have complete testamentary freedom. There are safeguards for family and dependants in that the Inheritance Law allows defined persons to apply to the court if they feel that they have not been reasonably provided for in the will.[7]

Where the individual is domiciled outside Guernsey, the law of their domicile will govern their estate in relation to realty outside Guernsey and all personal property. If that law includes forced heirship provisions, then those provisions will have effect.

Guernsey law will, however, apply in relation to any realty situated in Guernsey.

i Estate administration

When an individual dies leaving assets in their own name in Guernsey, their executor or personal representative will have to apply for a grant of probate (if there is a valid will in existence) or a grant of administration (where the deceased has died intestate). Assets held in joint names will generally pass to the survivor.

Unusually, the issue of a grant in Guernsey remains a matter for the Guernsey Ecclesiastical Court, a jurisdiction long since handed over to the civil courts on the mainland, although there are proposals to transfer jurisdiction for all probate matters to the Royal Court in the next year or so. In order to obtain the grant, the executor or administrator will generally

6 A list of TIEA and DTA partner countries is located at www.gov.gg/tiea and www.gov.gg/dta.

7 Inheritance (Guernsey) Law 2011, Section 4(2).

have to appear in person or be represented by their duly appointed attorney.[8] The exception to this is where the estate consists of Guernsey realty; this passes automatically on death to the lawful heirs, be that on intestacy or under the terms of a valid will.

ii Matrimonial issues

In matrimonial matters, Guernsey has modelled its approach on the equivalent legislation in the UK, and the court can be expected to take a similar approach in dealing with financial provision orders and the like. As a matter of principle, while Guernsey legislation recognises that pre- and post-nuptial contracts exist, the court retains a discretion to vary or ignore them as it sees fit, in much the same way as its English counterpart. With a growing acceptance in England that prenuptial contracts have a role in divorce proceedings, the expectation is that Guernsey will follow suit,[9] particularly when the parties are from a civil law tradition. If such a contract is recognised under the law of the testator's domicile, then clearly it will have an effect on dealing with their personalty and non-Guernsey realty.

From 2 May 2017, same-sex marriages have been permitted in Guernsey.[10] Guernsey does not permit same-sex civil partnerships, but does recognise certain overseas civil partnerships and registered overseas relationships.

Guernsey has long been an attractive destination for high net worth individuals looking for a place to live that is familiar, close to major markets and fiscally benign. Guernsey's modernised succession law, increased recognition of diversity, and a modern flexible approach to matrimonial assets will add to its attractiveness. In a political climate where tax rates in the major economies remain high and the attractiveness of the UK for high net worth non-domiciliaries continues to be eroded, Guernsey is well placed to benefit.

IV WEALTH STRUCTURING

Since the 1960s, Guernsey has demonstrated a willingness to adapt and innovate in order to meet the needs of an increasingly sophisticated and global market for wealth structuring, whether that be in its state-of-the-art trust law, its world-class collective investment regime or its continuously evolving company law.

Guernsey trust law was first codified in 1989, and then given a significant facelift in 2007, with further enhancements imminent. Since then, Guernsey has introduced a foundations law, an image rights registry (the first anywhere in the world) and an aircraft registry. It also continues to develop its company law for an increasingly international market. Guernsey's latest focus is on promoting itself as a leading jurisdiction for fintech and digital businesses.

Guernsey in 2019 is very much a first-rank international finance centre. The island has become a centre of excellence for fiduciary services, with access to first-rate law firms, accountants, banks and investment managers. The political system is stable, and the judiciary is extremely well versed in dealing with very complex and high-value commercial and fiduciary matters. In September 2017, after seven years of legal proceedings, a judgment running over 500 pages was handed down by the Royal Court in a case valued at well over £1

8 It is possible instead to arrange for a postal oath to be sworn before a notary public or the equivalent.

9 See, for example, *E v. E* (Royal Ct.), 2003–04 GLR N [22] where the issue was not about policy, but about the circumstances under which the contract was entered into.

10 The Same-Sex Marriage (Guernsey) Law 2016, (Commencement) Ordinance 2017.

billion, thought to be the biggest trial that took place across the Commonwealth in 2016.[11] The liquidators appealed, with the judgment in the appeal handed down by the Guernsey Court of Appeal in April 2019.[12]

While continuing to service institutions and advisers in London, Guernsey has a global significance. Service providers on the island have a distinct awareness and sensitivity to the needs of clients from very different cultures, with consumers of Guernsey fiduciary services coming from Asia, the Middle East, Eastern Europe and Latin America as much as from western European economies and the United Kingdom.

i Trusts

Guernsey trust law has developed from its English law roots to include features that are essential to meet the needs of this global client base, while retaining the fundamental characteristics of trust principles. As well as a growing body of precedent of its own, Guernsey can also look to other common law jurisdictions for guidance on legal principles, and with the Privy Council as its ultimate appellate court, has access to the leading judicial minds in the field. Guernsey's trust law has a number of features that are designed to provide solutions for its global audience. Examples of Guernsey's approach include the following.

Duration

Guernsey law does not have perpetuities and accumulations restrictions as evident on the mainland and allows for trusts of unlimited duration.

Purpose trusts

A Guernsey law trust can be established for charitable or non-charitable purposes. This can be particularly useful for structuring family businesses, commercial structures or in a private trust structure as discussed later in this chapter. An enforcer must be appointed to a purpose trust to hold the trustee accountable.

Reserved powers

One of the challenges that settlors face when they establish a trust is to play an ongoing role in the administration of the trust without compromising the benefits that it provides. Under Guernsey law, settlors can reserve to themselves, or to others, a wide range of powers such as powers to:

a revoke or vary the trust;
b appoint income or capital;
c direct investments;
d appoint or remove trustees and directors of underlying companies;
e change the proper law; and
f veto trustee decisions.

11 *Carlyle Capital Corporation Limited (in liquidation) and others v. Conway and others* (Royal Court, 4 September 2017).

12 *Carlyle Capital Corporation Limited (in liquidation) v. Conway and others* [2019] GRC 014.

Trustee liability

Trustees of a Guernsey trust have a wide range of duties under the law, including a duty (subject to the terms of the trust) to preserve and enhance the value of the trust, so far as is reasonable. There is also an overarching duty to act in the utmost good faith and '*en bon père de famille*'.[13] Trustee liability can be excluded under the terms of the trust, but not so as to exclude liability for fraud, wilful misconduct or gross negligence. The recent Privy Council decision on 23 April 2018 in *Investec v. Glenalla* [2018] UKPC 7 reaffirms that creditors of the trustee do not have direct recourse against trust assets, even if the trustee loses its right of indemnity against the trust assets (for example, if it has acted in breach of trust). This will give settlors of Guernsey trusts a great deal of comfort.

Claims for breach of trust must be brought within three years of the claimant becoming aware of the breach or they will be prescribed.[14] Prescription differs from limitation under English law in that it operates to extinguish a claim, rather than denying relief from the claim.

Dispute resolution

Guernsey has recognised that where breach-of-trust claims are made against trustees, it is important that any settlement reached between the parties outside the court room has legal and binding effect. The Trusts (Guernsey) Law 2007 (the 2007 Law) therefore provides, with appropriate safeguards, for claims settled under alternative dispute resolution to be binding against all beneficiaries of the trust, whether yet ascertained or in existence.[15]

ii Company law

Guernsey's company law continues to evolve, with the latest significant amendments set out in the Companies (Guernsey) Law 2008 (Amendment) Ordinance 2015, which came into effect on 3 September 2015.

Among the many changes introduced, is an ability for a Guernsey company to be incorporated with, or register, an alternative name expressed in non-Roman alphabet, characters or script. This was in response to demands from clients in East Asia and the Middle East. Other measures included provisions to align Guernsey's legislation with the UK's City Code on Takeovers and Mergers.

Given the number of Guernsey companies that list on the London Stock Exchange, there is a clear need for the company law to remain modern and flexible.

Incorporation in Guernsey is quick and easy with the use of Guernsey's online registry through licensed providers. A company can be incorporated within a day and, for a modest premium, in less than two hours.

In 1997, Guernsey was the first jurisdiction to introduce the concept of the protected cell company, with a further innovation in the shape of the incorporated cell company (ICC)

13 This is a customary law principle, particular to Guernsey's law. In trust law the Privy Council determined in *Spread Trustee Co Ltd v. Hutcheson* [2011] UKPC 13, that it was analogous to the English law prudent investor test.

14 The case of *Broadhead v. Spread Trustee Company Limited & Ors* (Guernsey Judgment 46/2014) determined that the clock starts to run once the claimant has enough information that would make any reasonable person begin to investigate whether there had been a breach of trust. They would see that a loss has been incurred, and have a sense that there was a real possibility (not a mere suspicion) that the loss had been caused by negligence on the part of the trustees.

15 Trusts (Guernsey) Law 2007, Section 63.

following in 2006. Both are attractive in collective investment and insurance situations, allowing segregation and insulation of assets as between cells in the company, with the principal difference being the need for cells in an ICC to be separately capitalised.

Guernsey law also provides for companies to be limited by guarantee, a facility that is particularly helpful in structures where there is a need for an orphan vehicle.

The recent case of *Carlyle Capital Corporation Limited (in liquidation) and others v. Conway and others* [2017] comprehensively considered the duties of directors of Guernsey companies and reaffirmed the duty of directors to act in the best interests of the company. This decision was recently upheld on appeal.[16]

iii Limited partnerships

Limited partnerships established under the Limited Partnerships (Guernsey) Law 1995 are widely used in Guernsey for collective investment schemes and in private family arrangements where the tax consequences of establishing a trust would be unattractive. They allow a separation between ownership of an asset – such as a family business – and its control. Partners have the ability to elect for the partnership to be a body corporate, with separate legal personality.

The limited partnership will generally be a look-through entity, made up of a general partner (often a corporate) and one or more limited partners. The general partner holds the assets of the partnership and they are under its control. The profits of the partnership are allocated to the partners under the terms of the partnership agreement, which is not publicly filed, allowing the terms to remain confidential to the partners.

Limited liability partnerships have been available since 2014, following the enactment of the Limited Liability Partnerships (Guernsey) Law 2013. A limited liability partnership may be a useful vehicle for authorised or unauthorised collective investment fund structures, or for professional firms looking to incorporate for the purposes of limited liability.

iv Foundations

While trusts remain very important for Guernsey, it is not always easy for civil law clients to embrace the concept. In civil law countries, including many of the emerging markets (Brazil, Russia and China to name but three), the foundation may be more familiar and easier to accept.

With these issues in mind, and with an eye on some of the lessons learned in neighbouring jurisdictions, the Foundations (Guernsey) Law 2012 came into force on 7 January 2013.

The foundation is in some ways a hybrid between a trust and a limited company (often referred to as an 'incorporated trust'). Like a company, the foundation has separate legal personality, a certificate of incorporation, a registered number and a Guernsey registered office. There is public certainty as to the foundation's existence – a foundation cannot fail if it has no assets – like a company it can be 're-capitalised' by an additional endowment.

A foundation is established under a charter, which has two parts: Part A is public and includes basic details of the foundation; Part B is maintained by the registrar but in strict confidence and will include a statement of the purpose of the foundation. This latter provision was included as a regulatory safeguard.

16 *Carlyle Capital Corporation Limited (in liquidation) v. Conway and others* [2019] GRC 014.

The other core document for the foundation is the rules. These are not registered and remain completely confidential between the founder and the council. The purpose of the rules is to set out how the foundation is going to operate.

All foundations must have a purpose, which may be charitable or non-charitable and can be drafted as widely as required. The foundation may also have beneficiaries, and if it does these can be enfranchised, with a right to information in respect of the foundation like a trust beneficiary, or disenfranchised, with no right to information.

Whenever there are disenfranchised beneficiaries, or if there is only a purpose, a guardian must be appointed with responsibility for holding the council to account.

Foundations are utilised as:

a part of a succession-planning structure for private families – be that a structure that includes a trust or as a substitute for a trust;

b vehicles for charitable donations; and

c orphan vehicles in corporate structuring, as opposed to using a purpose or charitable trust.

v Private trust company structures

As noted earlier, the 2007 Law includes provisions allowing the settlor to reserve a broad range of powers. This allows settlors a degree of control over trustee actions and decisions without compromising the fundamental validity of the trust.

For a number of reasons, this may not always be the preferred approach, and may not go far enough in terms of giving the family the degree of influence and control over trustee decisions that they would like to have.

The solution for many families is to establish a private trust company (PTC) under their control to act as trustee of trusts established only for the family. Guernsey allows such a company to act outside the regulatory licensing regime so long as the PTC does not receive any remuneration.

The PTC allows the family to influence and control the structure in a number of ways:

a The family can retain the ability to nominate directors of the PTC to sit alongside directors from the service provider and other professional advisers. These family nominated directors will often be members of the family.

b The trust can still include reserved powers, giving the settlor additional comfort in relation to key decisions.

c The settlor can provide the board of the PTC with guidance on an ad hoc basis or through a letter of wishes.

d The settlor or family can control the composition of the board of subsidiary companies held by the trust.

e The settlor or family can establish a set of rules dictating how the PTC should be run and how key decisions should be made through the drafting of the constitutive documents of the PTC alongside other documents, such as a family charter.

It is a lot easier for the family to change the composition of the board of directors of the PTC than it would be to remove and replace an independent trustee appointed in the more usual fashion.

When establishing a PTC structure, it is important that the family considers how the PTC should be owned. Traditionally, the PTC would be a company owned by a purpose trust. Alternatively, the PTC can be structured as a guarantee company, although care will

need to be taken in order to ensure issues in relation to succession to guarantee membership are considered. More recently, foundations have been used instead of the purpose trust to own the PTC. Alternatively, the PTC can simply be established as a foundation (known as a private trust foundation).

V REGULATION

Guernsey has been at the forefront of the regulating and licensing fiduciary service business. Alongside Jersey, it was the first jurisdiction to introduce legislation for the licensing of fiduciaries in 2000.[17]

Under the auspices of the Guernsey Financial Services Commission (GFSC), fiduciary, banking and insurance businesses in Guernsey are subject to a state-of-the-art regulatory regime. The GFSC operates a risk-based approach to regulation. Licensees are all risk-assessed and subject to regular visits from and reviews by the regulator.

All licensees are required to abide by core principles set out in the legislation, related rules, codes of practice and guidelines.

Guernsey has a comprehensive suite of legislation in relation to anti-money laundering (AML) and prevention of the financing of terrorism, in keeping with the highest levels found internationally. A principal function of the GFSC is to ensure that licensees adhere to the requirements of the legislation and there is a separate division dealing with financial crime and a further division focused on enforcement. The common theme of the 2017 and 2018 annual reports across all divisions of the GFSC was that licensees strengthen their controls against cybercrime, especially in relation to client data security.

The States of Guernsey is committed to ensuring that Guernsey is a centre of excellence for future digital technology, developing new and innovative businesses through research and development in sectors such as fintech, data storage and analytics, cybersecurity, institutional peer-to-peer lending, digital transactions, including blockchain, and wealth-management platforms. Of particular note is Guernsey's revised data-protection regime enacted in the Data Protection (Bailiwick of Guernsey) Law 2017 (which adopts the EU General Data Protection Regulation (GDPR) into local law). Under the new law, which came into effect on 25 May 2018, all individuals (not just those located in the EU as mandated by GDPR) whose data is processed in Guernsey will be subject to strengthened data-security protections.

Taken as a whole, the regulatory regime is a significant factor in Guernsey's status globally and explains why Guernsey has received such positive reviews from the likes of MONEYVAL.

As ever, the regulatory environment does not stand still and the GFSC is working on a number of initiatives, including revisions to the AML handbook and a comprehensive revision of the regulatory laws. In addition, Guernsey is also looking to reform its insolvency laws and legislation is in the process of being drafted.

Guernsey, like most other jurisdictions in the world, is also actively involved with the increased degree of reporting and sharing of information in response to the Foreign Account Tax Compliance Act and Common Reporting Standard. Guernsey will be playing its full part in the process of ensuring that its tax neutrality continues to operate in a way that is consistent with international law.

17 The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc., (Bailiwick of Guernsey) Law 2000.

Guernsey introduced its central register of beneficial ownership in relation to Guernsey entities on 15 August 2017. In contrast to the UK's company beneficial ownership register, which is publicly available and searchable, Guernsey's register is centrally maintained, but the information on it is not publicly available. Instead, it is only available to certain Guernsey regulatory and law enforcement bodies (who will be able to disseminate this information to their counterparts in other countries when requests for such assistance are received). This is in line with Guernsey's commitment to maintaining the privacy of clients of Guernsey businesses and promoting the security of their data.

VI OUTLOOK AND CONCLUSIONS

From its beginnings in the 1960s, Guernsey has emerged as a major player in international finance. It has moved with the times, adapting its approach and its legislation in order to meet the ever-changing demands of its international client base and a rapidly evolving global approach to economic and fiscal change.

With the increasing global tension between protecting the privacy of client data and disclosing who beneficially owns corporate vehicles, clearly Guernsey will need to continue to innovate in order to remain competitive while being recognised as a good global citizen. Its track record for over 50 years gives every reason for confidence that Guernsey is well placed to meet that challenge.

Appendix 1

ABOUT THE AUTHORS

KEITH CORBIN

PraxisIFM Group Limited

Keith Corbin ACIB, TEP has been involved in the international fiduciary services industry for over 45 years, during which time he has managed operations in a number of major international finance centres.

He is the executive chairman of the Nerine Group of Fiduciaries, which has offices in the BVI, Guernsey, Switzerland and Hong Kong. Following the acquisition of Nerine by PraxisIFM, Keith is looking forward to the two firms fully integrating, bringing a broader range of services to both Nerine and PraxisIFM clients, and has been appointed to the PraxisIFM Group Trust Executive Committee.

Keith also serves as independent director of public and private companies outside of the Nerine Group and these appointments include the chairmanship of board committees. He has also served as chairman or committee member of various industry bodies.

MARK BIDDLECOMBE

PraxisIFM Group Limited

Mark Biddlecombe LLB, ACIB, BSc, TEP has been involved in the fiduciary services industry since 1991. Qualified as a barrister and as a solicitor, and a full member of STEP, Mark has devoted his career to looking after the interests of high net worth individuals and families.

Mark has a broad international experience, and has worked in Jersey, Singapore and London, working for trust companies, law firms and accountants, giving him a broad perspective on the needs of the international private client.

Mark is group in-house legal counsel for PraxisIFM, and a director of Nerine's holding company. He is also a director of PraxisIFM Trustees Limited, and holds board positions on a select number of external boards.

RACHAEL SANDERS

PraxisIFM Group Limited

Rachael Sanders LLB, BCA qualified in New Zealand as a chartered accountant (now retired) as well as a barrister and solicitor, and has a wide range of experience in the New Zealand and Guernsey financial services industries.

As part of PraxisIFM's in-house legal counsel team she advises PraxisIFM in relation to client transactions as well as the many and varied changes in legislation whether in Guernsey or in other PraxisIFM operating jurisdictions.

POTAMITISVEKRIS

11 Omirou Street
10672 Athens
Greece
Tel: +30 210 338 0000
Fax: +30 210 338 0020
aspasia.malliou@potamitisvekris.com
maria.kilatou@potamitisvekris.com
www.potamitisvekris.com

ISBN 978-1-83862-056-1