

Jersey as a Base for Trust Operations

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A jurisdiction intending to join the growing number of offshore trust locations proceeds by equipping itself with appropriate legislation probably adapted, with a few modifications, from the currently most fashionable and flexible international tax exemption and trust laws. It then employs a PR company to promote its legislation and facilities.

In Jersey it didn't happen like this at all; Jersey's position as a self governing possession of the English crown dates back to the Middle Ages; its frontier location between England and France ensured that whilst never part of France, local property rights based on Norman-French law were recognised by the English authorities in order to ensure the loyalty of their remote Jersey subjects.

Jersey thus became a largely forgotten fragment of the Victorian British empire - but one with specific cultural and legal links with Continental Europe.

It is ironic that some of the least important parts of the Victorian overseas Empire became its most prosperous 20th century remnants: Jersey, Cayman and, above all, Hong Kong. To this day, whilst the Falkland Islands, much bigger but with a fraction of its population and economic importance, rates a full Governor, Jersey has only a Lieutenant Governor.

Jersey's origin as an offshore centre, specifically a trust centre, dates to the Victorian Empire. Many retiring imperialists preferred the beauty, lower taxes and milder climate of Jersey to returning to mainland Britain.

Between the wars their example was followed by a number of wealthy Englishmen. Firms of chartered accountants and the larger Jersey law practices were established at this time to serve the needs of these well off immigrants; my own firm being formed in Jersey as Blackstones Barton & Mayhew in 1921.

This pattern reasserted itself after the second world war. My firm's best known Jersey trust company, The Regent Trust Company Limited, was incorporated in 1961. The connections with the retreating Empire remained, as Jersey was within the area of Sterling Exchange Control. In this post war period the private client skills of local professionals, built up in serving the needs of wealthy Jersey residents, were first applied to structures (involving Jersey companies and trusts) established for non-Jersey resident individuals and corporate groups.

The history of Jersey's trust business is therefore the exact reverse of that of modern planned trust and tax havens, which enact trust legislation first and then try to attract trust business. Jersey had trusts and trust business before the legislation, principally the Trusts (Jersey) Law 1984, which recognised and clarified, but did not codify, the law relating to Jersey proper law trusts.

This historical context helps to explain the unique combination of advantages enjoyed by Jersey as a trust location, specifically:-

- People
- Experience
- Continuity
- Courts
- Location
- Legal environment

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The development of Jersey as an offshore financial centre began in the Victorian era and prospered by accumulating experience and knowledge. How the progress has benefited Jersey as a trust jurisdiction is examined in this article.

Dealing with each in turn:-

PEOPLE

Jersey has its own well respected bar. There are three local law firms each with over 75 staff and partners, as well as a number of smaller and medium sized firms.

All the big firms of accountants have offices here. My own firm has 18 partners and 240 employees in Jersey which makes it by far the largest Ernst & Young office in a pure tax haven location. Coopers & Lybrand/Abacus's Jersey office is bigger still, making it one of largest employers in the island.

In very few circumstances do the distinctions between legislation in one trust tax haven and another make the difference between the success and failure of offshore arrangements - what matters is the quality of the offshore professionals particularly where they are acting as executors, trustees or directors. Do they understand the

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arrangements? Will they add value to the planning? Do they understand how such arrangements are affected by legislation and practice in the relevant onshore locations? Will an onshore court be convinced that the offshore individuals are appropriate persons to have been appointed to these offices?

EXPERIENCE

Jersey has been in the trust and private client business for a long time. My firm has provided trustees for some families since it was established in Jersey in the 1920's. There is no better way of learning how the complexities of trust law apply to the realities of international business and society than having been there before. Trustees learn by experience and their mistakes.

The same applies to tax planning - it is very rare to come across original ideas. Professionals can, however, appear cleverer than they are by adapting ideas and techniques used in planning for one jurisdiction, and perhaps subsequently legislated against there, to the circumstances of another jurisdiction.

CONTINUITY

Trustee and private client business should be for the long term. Jersey trusts have a maximum trust period of 100 years - charitable trusts longer. Knowledge of family circumstances and the planning and tax history of particular trusts can be critical in ensuring the success of offshore arrangements and that trustees continue to enjoy the confidence of the beneficiaries for whom they are acting. However good permanent files and databases of trusts may be, they can never replace personal knowledge.

Such knowledge and continuity of service is much more likely in Jersey, where virtually all trust professionals (certainly in the larger accounting and law practices) are permanent residents, than in the modern "planned" trust jurisdictions which, at least initially, have to rely in part on expatriate staff. In due course their intention will be to replace them with local professionals once they are properly trained and experienced in trust matters.

In fact, those who have been at the trust business longest and who have the largest number of client trusts are also likely to have the most developed systems of trust accounting records, permanent files and databases.

COURTS

Trust difficulties seldom arise whilst the settlor remains alive and the trusteeship continues to be dealt with by "that nice senior partner" who was involved initially in the establishment of the offshore trust. The problems are for the next generation of trustees and beneficiaries. Hence the coming wave of offshore trust litigation.

In coping with these problems, the attitude of the courts is critical. Will they favour foreign beneficiaries or local fiduciaries? The position of the Jersey Courts is clear. In a number of cases (including *West v Lazards* 1993 JLR 165 and *Midland Bank Trust Corporation v Federated Pension Services Ltd* 1995 - unreported) they

have bent over backwards to favour the interest of beneficiaries. (**Editors note:** see other articles in this issue.)

The advantages described above are primarily those of being one of the first in the race; over time it will be possible, although difficult, for competition to catch up.

LOCATION

For a tax haven Jersey has a uniquely central location within the world economy, being within an hour's flying time of both London and Paris. It is true that flights to Jersey are often delayed due to fog, principally because both the Island and its airport's runway are too short for a fully automatic landing system, yet in truth this is a fairly small inconvenience, certainly by the standards of tax havens, which, almost by definition, are to be found in remote locations.

LEGAL ENVIRONMENT

The Jersey trust is very much the English trust of Chancery, but established in a legal system based in a quite different tradition, that of Norman-French property law. Initially this created certain difficulties. Did the customary law principle of "*donner et retenir ne vaut*" apply to Jersey trusts, and if so in what circumstances? Was Jersey private international law on the capacity of donors and settlors closer to the English or civil law model?

Overall it has been a huge advantage. By having a foot in both camps, Jersey practitioners are sensitive to the conflicts and contrasts between common and civil law systems - epitomised in the difficulty civil law systems, including tax systems, have in coping with trusts.

My first practical exposure to these issues was in advising common law domiciliaries, Americans, English and South Africans taking up residence in France and Italy. It soon became apparent that they applied in reverse to civil law nationals, Germans, Dutch, French and Swiss taking up residence in the UK and Ireland as non-domiciliaries.

Legal and tax systems are like languages. Once you can manage some essential basics in your first two or three, the next four or five become easier. Thus familiarity in dealing with European civil law domiciliaries can be applied in advising civil law domiciliaries from Latin America.

ESTABLISHING A TRUST BUSINESS IN JERSEY

Success in the trust business is, above all, dependent on knowledge - of trust law, accounting and administration, of foreign languages and legal languages, tax systems and property law.

Overseas firms and institutions wishing to associate themselves with the success of Jersey's private wealth business by establishing Jersey trust business are faced with two types of barriers to entry. Firstly there are the administrative barriers which the Jersey authorities apply to control those who may do business, particularly financial business, in the Island and secondly

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there are the market barriers to being able to attract the right quality of experienced and knowledgeable professionals and, having attracted them, to being able to retain them.

CUBICLE TRUST COMPANIES

By overseas institutions establishing a Jersey cubicle trust company rather than attempting to create a stand alone trust operation *ab initio*, both the administrative and market barriers to the entry to the Jersey trust market are reduced. Cubicle trust companies are typically set up using the corporate name and logo of the sponsoring firm or institution to provide trustees for trusts established for their clients. Such clients may thus receive a seamless service without becoming aware that the cubicle trust company is, in fact, hosted by an existing Jersey practice.

The Jersey professionals benefit from an extension of their client base and the overseas group by being able to apply the knowledge, experience and systems of their Jersey hosts.

The following are typical conditions set by the Jersey authorities, for the establishment of a cubicle trust company:-

- A suitable sponsoring group and Jersey host
- Outline three year business plan
- Parent company guarantee of the obligations of its cubicle trust company subsidiary
- Board membership by Jersey resident individuals with clear trust experience

Cubicles are particularly appropriate for European or Arabic banks who are originally from jurisdictions having little knowledge of trusts and limited experience in international succession planning, but whose clients increasingly demand such skills.

Cubicles potentially become profitable for the sponsoring institution at a lower level of activity than would a stand alone operation - perhaps with 20 or 30 client trusts as compared to 200 or 300

for a stand alone trust company - if it is to have the appropriate checks and balances required for modern fiduciaries. Clearly in due course the cubicle can be converted into a stand alone operation.

SUMMARY

Jersey enjoys a unique combination of advantages as a base for trust operations. Some of them are as a result of being one of the first in the market and others, such as its location and its background in both common and civil law, are extremely difficult to replicate.

Advantage in the trust business, like other contemporary businesses, is increasingly with those with knowledge. Experience in planning for beneficiaries from one jurisdiction can be applied in providing solutions for beneficiaries from another jurisdiction. By establishing a Jersey cubicle trust company, banks and financial institutions from non-trust jurisdictions can overcome the barriers to entry into the trust business and tap into the knowledge and experience of Jersey trust practitioners.

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Case Note

TRUST OR POWER?

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The question was, in other words, whether the beneficiary's interest in one third of the appointed fund contingently on obtaining 21 was an interest under the settlement or interest under the appointment. If it was an interest under the settlement, the interest was acquired under the age of 18; if under the appointment it was at the age of 21.

The judge's common sense approach was that the appointment was the relevant interest. Before that appointment the beneficiary had no relevant interest to which Section 31 of the 1925 Act could attach. Under the settlement alone the beneficiary had no relevant interest. The judge admitted that without the settlement the appointment could not have been made. To that extent the interest was one under the settlement. But the appointment was the instrument under which the beneficiary's interest arose and to which it

directly owed its' existence. Before the commissioners the tax payer had successfully argued that the beneficiary acquired the interest under the original trust upon which the majority was only obtained at the age of 21. The court allowed the appeal of the Revenue.

*Begg-McBrearty (Inspector of Taxes)
against Stilwell, Times Law Report
March 15th.*

John Goldsworth