

# CM SKYE

## CM Notes

## ISLE OF MAN TRUST LAW AN INTRODUCTION

### Introduction

This paper does not constitute or purport to constitute a definitive statement of the law of the Isle of Man or any other jurisdiction or any part or aspect thereof. This paper is intended purely as a general introduction to the subject and should not be relied on in any way whatever.

Before in any way acting upon any of the ideas proposals or suggestion contained in this paper, the reader should seek formal legal advice.

Further information on the concepts discussed is available on request.

### Definition of a Trust

Isle of Man Trust law has its origins in English Trust law, which developed in the Middle Ages. There is no complete definition of a trust in statute, since a trust is a relationship derived from human behaviour. The rules of 'Equity' as evolved in English law have been concerned only with the recognition and enforcement of that relationship. In English law, the system of Equity evolved as a parallel system to that of 'Common Law'. It is therefore entirely incorrect to describe a Trust as an entity derived from 'Common Law'.

A trust is a fiduciary relationship whereby one person (the 'Trustee') receives an asset from another person (the 'Settlor') to hold in his ownership and control for the use or benefit of a third person (the Beneficiary'), who has the right to enforce such beneficial interest through the Courts. The legal ownership is vested wholly in the Trustee, but the Beneficiary has an interest recognised in 'Equity' and thus described as an 'equitable' interest. There are many forms of trust, and many definitions. Indeed, no single definition of the trust has yet been written which is comprehensive and precise. It should not be confused with the concepts of bailment, agency, or debt and is fundamentally not contractual in character.

For the purpose of this outline, however we may note that a trust may be:

- a. Express or Non-express;
- b. Private or Public;
- c. Discretionary or Non-Discretionary.

An Express Trust is one created by the express and intentional declaration of a Settlor. This declaration is normally a written 'deed' (or 'indenture', as is the terminology in the USA), but may, in certain circumstances, be manifest by the behaviour of the parties concerned.

A Non-Express Trust is one that is created without any express intention to do so by a Settlor. Such a Trust is often termed an 'implied' trust. It may be:

- a. a presumed resulting trust;
- b. an automatic resulting trust;
- c. a constructive trust.

The difference between a private and public trust exists purely in relation to its purposes. For example, a Charitable Trust for a public charitable purpose is a Public Trust. Such Trusts in the Isle of Man must be registered, must file annual audited accounts, and are subject to supervision by Her Majesty's Attorney- General in the Isle of Man. A Public Trust is always an express trust.

A non-discretionary trust is where a trustee has no discretion as to which of a class of beneficiaries shall receive benefits, nor the amounts or timing of such benefits. In a discretionary trust the trustee has such discretion to a greater or lesser extent as the trust deed may determine.

A 'bare' trust is where a trustee holds property on trust for a single beneficiary absolutely. He has no power or discretion to do anything other than hold the property, and deliver it when requested to the beneficiary. A 'nominee' relationship is often a bare trust.

In the normal course of international taxation planning, the normal type of trust is a private express trust, either discretionary or non-discretionary.

However, it cannot be over-emphasised that trusts can come into existence without intention. For example:

"If one, not being a trustee and not having authority from a trustee, takes it upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, he may thereby make himself...a trustee of his own wrong - i.e. a trustee de son tort, or, as it is also termed, a constructive trustee." ((Mara v. Browne (1896) 1 ch, 199 at p.209 per A.L.Smith L.J.)

Agents who exceed their authority, will be 'trustees de son tort'

The proper law of the trust will normally be stated in the Trust Deed. It is important that there exists some nexus between the parties to the trust and the jurisdiction of the proper law. A trust being a matter 'in personam' and not 'in rem', the location of the parties concerned is all important.

The situs of administration of a trust will normally be that of the trustee. As such, if the situs of administration is in the Isle of Man, the Manx courts will have jurisdiction, irrespective of the proper law of the trust.

In the Trustee Act, 1961, Section 65(20) there is a definition of a 'Trust' for the purposes of that Act, but it is by no stretch of the imagination an all-embracing definition.

## **Sources of the Law of Trust**

The law of Trust is derived from the Rules of Equity, which evolved in England in the Middle Ages, and which, indeed, continues to evolve. Since a Trust is a form of human relationship, trust law, at

its heart, is concerned with recognition of that relationship, enforcing its provisions and providing remedies where there has been a breach of the relationship. Legislation has not been used to 'create' trust law, but to guide it and to check it when it threatened to evolve undesirable practices, or to clarify uncertainties.

The legislation that governs trusts in the Isle of Man is:

Trustee Act 1961;  
 Variations of Trust Act 1961;  
 Perpetuities and Accumulations Act 1968;  
 Powers of Attorney Act 1971;  
 Power of Attorney Act 1983;  
 Recognition of Trusts Act 1988;  
 Trusts Act 1995;  
 Purpose Trusts Act 1996;  
 Trustee Act 2001.

Other legislation which is relevant to trusts is as follows:

Settled Land Act 1891;  
 Settled Land Act 1983;  
 Public Charities Act 1922;  
 Charities Act 1962;  
 Charities Registration Act 1986;  
 Wills Act 1985.

The Trust Law of the Isle of Man is thus, with only a few minor exceptions, identical to that of England. In this context, it is worth quoting Glidewell, J.A. from *Frankland v. R* in 1980.

*"We have therefore had the task of .... considering ... what precisely is the application of English decisions to Manx law on which no previous decision of this Court has been cited to us and therefore, so far as we know, on which we are now establishing a Manx authority. The correct principle in our view is that decisions of the English courts, particularly the House of Lords and the Court of Appeal are persuasive in the Manx Courts but not binding. They should, however, generally be followed unless either there is some clear decision of a Manx Court to the contrary, or exceptionally, there is some local condition which would give good reason for not following the particular English decision."*

In these circumstances, observations in this outline will be necessarily general in character.

## **Elements of a trust**

As noted, a trust is not 'formed' as such, but comes into being as a result of the express or implied wish or actions of the Settlor. A 'trust' is essentially a human relationship between a Trust and beneficiaries relating to the disposition of the trust property. In any trust, there are certain essential component elements.

There must be:-

- a. A Settlor, sometimes also described as a 'Grantor' or a 'Trustor'. The Settlor is also referred to as a 'creator' or in the case of a trust set up upon death, a 'testator'. In any event, the Settlor

is the individual whose assets he has caused to be placed, given, granted or 'settled', into the trust or 'settlement'. It is possible for a person to be both Settlor and Trustee. In that case, a person would, by a declaration, declare that, henceforth, he declares certain assets of his own to be held on trust by him for a named beneficiary.

- b. A Trustee, being the recipient of the assets given by the Settlor.
- c. A Beneficiary, or 'Cestui Que Trust'. (but see the section on Purpose Trusts below)
- d. Trust Property. Since the Trust derives its existence from arrangements relating to property, it is impossible to establish any trust without Trust Property. The nature of the property is irrelevant.

It will be seen that the Settlor and the Trustee can be the same person. The Settlor can be a Beneficiary (indeed he can be the sole Beneficiary). But the Trustee cannot be the sole Beneficiary, though he can be one Beneficiary where there are also other persons being Beneficiaries.

It is not necessary, except in situations relating to land, for the terms of the Trust to be in writing. A Trust can exist without written documents, although where there is the slightest complexity or room for doubt, a Trust Deed is obviously essential as evidence.

Establishing a Trust Inter Vivos. An Inter-Vivos Trust is, as its name suggests, a Trust established between living persons. The Settlor, while alive settles the property on the Trustee.

Establishing a Trust by Will. A Trust can be set up on the decease of a Settlor. The Testator, as he is called in such a case, directs in his will that the Trust Property be taken from his estate and given to the Trustee to establish the Trust.

Because a Trust is not dependent upon a document in writing, or the existence of a contract, or upon any public registration procedure, the existence and validity of a trust is judged by reference to the criteria broadly described above.

The transfer of the Trust property to Trustees has the nature of a Gift. Since the conveyance of the property to the trustee is an essential part of the creation of a trust, a trust cannot come into existence until the trust property has been so conveyed, or, at least, the process of conveyance has been irrevocably commenced.

Once the trust is in existence, additional properties can be added to the Trust Property by additional settlements.

The maximum period for which a trust can exist is one hundred and fifty years. (see Trustee Act 2001, sec. 38) Alternatively, the maximum period can be, as set out in the old rules of equity, the duration of any relevant life or lives in being at the date of the trust deed, plus a further period of 21 years from the date of death of that life in being.

There is no statutory rule against accumulations in the Isle of Man, there being no equivalent legislation to the Accumulations Act 1800 of England.

## Trustees

A minor may not be a trustee as he is devoid of legal capacity.

A company may be a trustee, if so empowered by its constitution. The expression 'trust corporation' has specific meaning in Manx law. It means the Public Trustee under the English Public Trustee Act 1906, or a corporation appointed by the Court in any particular case to be trustee, or an Approved Trust Corporation which has been approved by the Court under the Judicature Amendment Act 1935. The principal benefit of such approval is that it enables the company to apply for probate and to act as Executor of Wills.

To be approved, the company has to meet certain minimum capitalisation rules. There are, however, many companies in the Isle of Man, some of which are substantial, which provide trustee services, but which because they do not handle executorships and have no need of the status, have not sought 'Approved Trust Corporation' status.

A Trustee may not be appointed against his will.

In trusts holding land, there may not be more than four trustees. In other trusts there is no such restriction, although where statutory power to appoint additional trustees is used, the maximum number is four. There may be only one trustee, but, for a trust holding land, if this is not a Trust Corporation (see above), there must be two trustees.

A trustee under a private express trust may be appointed by:-

- a. the Settlor
- b. a person given an express power to appoint in the trust deed.
- c. the Court
- d. under the provisions of the Trustee Act 1961, sec.35, which provides for the appointment of trustees where a trustee dies, or absents himself, or otherwise vacates his office.

Normally the initial trustee is appointed as part of the act of creating the trust. The Trustee will be a party to, and execute the trust deed. Once appointed, the trustee cannot be removed by the Settlor, unless the trust deed specifically so provides.

Where the deed gives power to a third party to appoint a trustee, he is called the 'Appointor'.

A trustee can remove his responsibility only in limited circumstances. The trust deed must provide for the trustee's retirement and replacement.

The Court has an inherent right to approve the retirement of a trustee just as it has the right to appoint a trustee.

A retiring trustee continues to be liable for breaches of trust committed during his trusteeship.

The Trustee Act 1961 provides for the retirement of a trustee, without being replaced, provided there remain sufficient trustees to act. It also provides for the appointment of trustees in place of retiring trustees.

Where a trustee dies, any remaining trustees continue without him. If he is the sole trustee, the deceased's legal representative will be responsible either as trustee, or for appointing new trustees, subject to the provisions of the trust deed.

A particular feature of section 35 of the Trustee Act 1961 should be noted:-

*'Where a trustee, either original or substituted ... remains out of the British Islands for more than twelve months ... then ...*

*a. the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or*

*b. if there is no such person, or no such person able or willing to act, then the surviving or continuing trustees or trustee for the time being ... may, by writing, appoint one or more other persons ... to be a trustee or trustees in the place of the trustee so ... remaining out of the British Islands ... as aforesaid.'*

The term 'British Islands' means the United Kingdom, the Isle of Man and the Channel Islands, but not the Republic of Ireland).

This means that a trustee, for example, in Switzerland could, if he failed to visit the British Islands for twelve months, be removed involuntarily.

## **Duties of a Trustee**

The duties of a trustee have evolved as the law of trusts has itself evolved. The duties are primarily determined by the trust deed itself. In addition, the Trustee Act 1961 and other legislation affects the duties of a trustee.

Within that framework, the trustee has an absolute duty to the beneficiaries of the trust, not only to them as a class, but also to act fairly and impartially as between them. It is an office of absolute faith, requiring a trustee to be entirely disinterested in his actions.

The trustee must with all diligence take possession of the trust assets and administer them strictly in conformity with the trust deed, statute and his fiduciary duty.

It is a principle of equity that a trustee is prohibited from deriving any direct or indirect personal profit or benefit from his office. The trust deed must, therefore, provide for a trustee's remuneration if he is to receive any remuneration or benefit whatsoever.

## **Powers and Discretions of Trustees**

The source of a trustee's powers and discretions may be the Trust Deed, a statute such as the Trustee Act 1961 or a Court Order.

The Trustee Act 1961 provides, subject to certain conditions:

- power of sale, or postpone sale;
- power to give receipts;
- power to compound liabilities;
- power to raise money by sale, mortgage, etc.;

power to insure;  
power to apply insurance monies;  
power to deposit documents etc. in safe custody;  
power to have assets valued and audited;  
power to employ agents;  
power to assign or convey property;  
power to delegate, while abroad;  
power to apply income for maintenance during a minority.

A discretion is derived from a power. Some powers give limited discretion to a trustee (e.g. where a fixed trust for the proceeds of a sale is coupled with a power of sale, the power must eventually be exercised. The discretion of the trustee relates to the timing of the sale). But some discretions are much more general. Such discretions are derived from powers given in the Trust Deed itself, while others are derived from statutory provisions.

The law of the Isle of Man in relation to the powers and discretions of a trustee is identical to that of England. So also is that of the power of discretion of a trustee.

The Trustee Act 2000 in England is mirrored by the Isle of Man Trustee Act 2001.

## **Expenses and remuneration**

A trustee will be entitled to remuneration only where the Trust Deed contains a clause specifically authorising it. Thus Trust Deeds normally contain such a clause.

Notwithstanding a remuneration clause, however, the trustee must still be careful in his charging practice, as beneficiaries can apply to the Court for the charges to be reviewed.

## **Beneficiaries**

The rights of a beneficiary will depend upon:

- a. the intention of the settlor of the trust;
- b. the type of interest/property conveyed to the trustee;
- c. the type of trust.

The rights of a beneficiary may be defined in many ways. In a Unit Trust, the rights are determined by units, representing proportionate interest in the settled property.

An interest in a fixed trust is assignable. A creditor of a beneficiary can enforce a valid claim against such an interest of the beneficiary in a fixed trust.

A beneficiary has the right to information from the trustee on the administration of the trust. With regard to the beneficiaries' rights to information, it is worth noting that *Schmidt v Rosewood*, which has been exciting everyone on this subject is an Isle of Man case. *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26.

It is not necessary for a settlor to obtain the consent of a prospective beneficiary, to establish a valid trust. However, a beneficiary can disclaim and renounce an interest.

A beneficiary has the right to seek injunctions and Court orders to compel a trustee to discharge his obligations, or otherwise to direct a trustee, or even to remove trustees and appoint new trustees.

Where a trustee has been in breach of trust, the Court will order the trustee to make restitution. The rule is that the trustee in breach of trust must restore to the trust what has been lost by the trust as a result of the breach.

A beneficiary who is absolutely entitled to the whole beneficial interest in a trust may terminate the trust at will, notwithstanding the opposition of the trustee, and the terms of the settlement.

### **Accounts and Investment Management**

The trustee must keep clear and accurate accounts and have these accounts available for inspection. He must be ready to give a beneficiary a full and proper explanation of the dealings of the trust.

Unless otherwise provided in the Trust Deed, the investment powers of the trustees are set out in the Trustee Act 1961. This states that a trustee may invest:

- a. in such investments, in such manner and subject to the same provisions and restrictions, as may be authorised by the law of England for the time being for the investment of trust funds;
- b. in stock etc. of the Isle of Man Government;
- c. in stock etc. guaranteed by the Isle of Man Government;
- d. in real security, including mortgages, in the Isle of Man;
- e. in any investment authorised under the law of the Isle of Man;
- f. in stock etc. issued by certain statutory Boards of the Isle of Man Government.

### **Taxation**

Trustees are taxpayers and are obliged to file tax returns when they are resident in the Isle of Man.

However, it may be noted that where the beneficiaries of a Manx trust are resident outside the Isle of Man and the income arises outside the Isle of Man (other than bank interest), the Assessor of Income Tax will 'look through' the trust and will not seek to assess it to Isle of Man income tax.

### **Liability of Third Parties and Beneficiaries**

Starting with the principle that a trustee cannot obtain any greater interest or rights in settled property than that which was enjoyed by the Settlor, it can be seen that where property with a defective title is settled on the trust, the title continues to be defective.

Property can be traced to all third parties, except a bona fide purchaser of legal estate.

## Variation and Termination

Unless specifically provided for in the Trust deed, the Deed as executed is binding and cannot be changed.

However, where all the parties concerned are in agreement - settlor, trustees and all the beneficiaries - it is difficult to see how an alteration could be challenged. But note that where there are minors, or as yet unborn beneficiaries, this option is not possible.

The courts have an inherent jurisdiction to approve alterations of the terms of a trust.

The exercise of this jurisdiction is very limited and usually relates only to the management of the trust. There are also certain statutory powers given to the courts relating to the variation of trusts.

The court will pay a great deal of attention, when considering a proposed variation, as to whether the variation will remain consistent with the original intentions of the settlor.

Once a trust has been validly constituted, the settlor no longer has any interest, and cannot revoke the settlement. However, a settlor could arrange for a specific power of revocation to be included in the Trust Deed, thereby making the trust revocable.

Alternatively, he could include himself as a beneficiary.

A trust may terminate for a number of reasons:

- a. it may fail at the outset, due to failure to meet the basic requirements of law, such as the rule against perpetuities, or because the trustee has never taken full control of the settled property;
- b. the exhaustion of the trust property will terminate the trust;
- c. the trust may terminate, having reached the end of its life;
- d. the trust may terminate as a result of premature action.

Trusts may prematurely terminate as a result of:-

- a. Revocations;
- b. the combining of the equitable interest of a sole beneficiary with the legal interest of the trustee. A trust cannot exist where the trustee and a sole beneficiary is the same person;
- c. where the beneficiaries are entitled to demand that the trust properties be paid to them at once, and do so demand.

The trustees continue to be bound by their fiduciary duty after a trust has terminated and during the winding up process. This will end only after all the property has been distributed and the beneficiaries have discharged the trustee from his duties.

## Foreign Trusts

Trusts validly established in a foreign jurisdiction are recognised. However, where a foreign trust has a local situs of administration, or other substantial connection with the Isle of Man, the courts have jurisdiction in enforcing and supervising the trust.

## Public Unit Trusts

Any Unit trust which has more than fifty named beneficiaries (participants) and which does not contain a prohibition in its Trust Deed against promoting itself to the general public is a collective investment scheme within the meaning of the Financial Supervision Act 1988, and is required to be licensed and supervised by the Financial Supervision Commission of the Isle of Man Government.

## Forced Heirship

Some jurisdictions have what are called 'forced heirship' provisions, whereby the assets of a deceased person must be divided as prescribed by law. This can create a conflict where the assets concerned have been settled on a trust. The Trusts Act 1995 resolves this conflict by stating that foreign 'forced heirship' provisions shall have no effect in regard to a Trust in the Isle of Man.

## Purpose Trusts

Trusts established for a purpose have always existed as Charitable trusts, where the enforcement function of the Beneficiary has been discharged by the H.M. Attorney General. The Purpose Trusts Act 1996 enables non-charitable Purpose Trusts to be established. They must have at least one 'designated' trustee in the Isle of Man, and there must be an independent Enforcer. Care needs to be taken with Purpose Trusts until litigation has determined a number of uncertainties, (e.g. the nature of the Enforcer's duties and to whom are they owed?; what is a proper purpose for a Purpose Trust?) .

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