

Trust Clinic: the semi contentious practitioner will see you now

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Over the last four decades, the trust industry in the Channel Islands has witnessed enormous growth and change, precipitating a corresponding evolution within the private wealth legal sector which has adapted to meet the increasingly complex needs of its clients.

The 1970s, 1980s and 1990s saw a surge in the number of trusts being established in Guernsey and Jersey as a result of an increase in the sophistication of international tax planning, the United Kingdom's exchange controls, and the migration of wealthy residents to the islands. At that early stage the lawyers servicing the growing body of trust companies tended to have broad, mixed practices, encompassing other legal disciplines such as corporate law, banking and litigation. However, as the industry grew, and as trusts evolved from simple vanilla vehicles to the more complex, bespoke structures that began to emerge in the 2000s, lawyers started to specialise, adapting their skills and expertise to meet the needs of the rapidly transforming market.

The islands are currently host to several hundred licensed fiduciary service providers, ranging from large internationals to independent boutique operations, while the private wealth vehicles they administer benefit individuals around the globe. While there are fewer new private wealth structures being established on a daily basis nowadays, those that are being set up today are generally of much higher value, and are significantly more complicated, than the trusts of past decades. The previously archetypal format of a simple trust holding a company is no longer predominant on the fiduciary scene; instead there are typically multiple entities within a given structure, with existing vehicles being used in novel ways. For example, there has been an increase in the use of private trust companies (PTCs) to act as trustee of one or more family trusts, while the Foundations (Guernsey) Law, 2012, which came into force in 2013, enabled the use of foundations as fully orphaned trust corporations (PTFs - where the foundation's sole purpose, like with a PTC, is to act as trustee of family trusts), allowing family members to be involved to a greater degree in the activities of the trustee (for example by sitting on the council). Further evolution in this space has seen clients exploring options such as using private protector companies

(held by purpose trusts and run by directors with the assistance of specialist advisors) as alternatives to the traditional protector committee.

The motivating factors behind such structures' creation have also changed, now tending increasingly towards succession planning, asset protection and privacy rather than tax strategising. A constant in this fast-moving market is the popularity of the Channel Islands as jurisdictions of choice, which is widely credited to their robust legislation, well-respected judicial frameworks, and decades' worth of case law, inspiring trust participants and advisers alike with confidence as to how the courts will apply and interpret the relevant laws. In April 2009, both Guernsey and Jersey were placed on the OECD's "White List" of approved jurisdictions in recognition of their adherence to the internationally agreed principles of transparency and co-operation for the exchange of tax related information. Their status as reputable jurisdictions is a further element which attracts settlors and founders to the islands.

As a consequence of these various developments, the legal profession has become significantly more niche; firms now characteristically have dedicated trust and foundation teams whose sole focus is the fiduciary market of the respective islands. The daily practice of private client lawyers has also changed as a result of the increasing emergence of "problem cases" which need addressing. The boom in trusts between the 1970s and the early 2000s means that there is now a mass of trusts where age-related issues are surfacing, for example as wealth is transferred between generations, as new generations of trust participants engage with trustees, as global financial troughs occur and as historic oversights are uncovered. These factors, as well as changes in the wealth landscape generally, are the reason for the spike in the number of semi contentious cases, which now form the core of modern trust practitioners' matter portfolios.

Given the shift in emphasis from setting up vanilla structures to dealing with bespoke complex drafting, the high incidence of trust problems and the evermore complex regulatory framework, it is becoming increasingly necessary for modern trusts lawyers to bridge the non-contentious and contentious specialisms. For example, it may be that a non-litigious court application is required, such as where the beneficiaries and trustees both want the same outcome (perhaps to correct a mistake, to enable the trustee to confer a particular benefit on beneficiaries by exercising a power not otherwise available to them, or to remove and replace a trustee whose directors have all resigned). Alternatively the matter may be more controversial, such as where the trustee is seeking the court's blessing with respect to a proposed action which is not supported by the beneficiaries. In the majority of such cases clients will be best served by a semi contentious trusts practitioner whose technical knowledge and expertise is complemented by an ability to apply a strategic and commercial approach so as to resolve disputes where possible. There will of course always be some cases in which it is entirely appropriate for a specialist civil litigator to take conduct of the matter; then often the best working model is for the relevant dispute resolution team to work alongside the private client team so as to ensure the most effective combination of expertise is achieved.

So what are the repercussions of this transformation of the private wealth legal sector? The trend towards increasingly high value, bespoke structures, coupled with the emergence of knotty historic problems amongst older trusts, means that the role of the semi contentious trust practitioner is indispensable in today's market. Given the movement towards all-encompassing regulation and the ever increasing sophistication of trust and foundation participants, it is likely that the demand for highly specialist lawyers, who bring with them a thorough understanding of the underlying legal principles and technicalities and who are able to adopt a flexible and agile approach to each issue as it arises, will continue to increase. It seems that there will be several consequences of this evolution: newly qualified private client lawyers will be trained so as to be adept at handling semi contentious issues; the divide between non-contentious trust teams and litigation teams will fade; more robust structures will be developed as a result of lessons having been learnt from past issues; and most importantly clients will be able to choose from a wider selection of legal advisers who are able to assist with every aspect of their fiduciary needs.

Partner Gavin Ferguson and senior associate Alice Bricogne are part of Ogier's Guernsey Private Client and Trusts team.

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