

# Asset protection trusts – why the recent interest?

Insights - 24/01/2022

## Background

So what precisely is an asset protection trust and what is it, over and above a normal trust that an asset protection trust is seeking to achieve? This paper considers these issues from a Jersey law perspective and fundamentally asks the question to what extent a Jersey trust, once established, will protect assets from creditor claims.

By way of background a trust exists under Jersey law where a person holds or has vested in him property for the benefit of another person known as a beneficiary (Article 2 of the Trusts (Jersey) Law 1984, as amended (TJL)). To this end a trust is a tripartite relationship between trustee, property and beneficiary which is consistent with the definition of a trust in most common law trust jurisdictions (to include the Dubai International Financial Centre) and the Hague Convention on the law applicable to trusts and on their recognition.

Of course at the heart of any trust is the requirement for the trustee to safeguard trust assets. A trustee of a Jersey law trust has clear fiduciary duties in Article 21 of the TJL to act with due diligence, as would a prudent person, to the best of his ability and skill and to observe the utmost good faith. The draftsman of the TJL clearly had in mind the ordinary prudent man of business test in formulating a trustee's duty of care as a matter of Jersey law. In terms of investment, subject to the terms of the trust, to further preserve and enhance the value of the trust property. It follows that a trustee plainly has duties and responsibilities with regard to trust property in their care.

## What is an asset protection trust?

It is fair to say that the term "asset protection trust" has developed as an informal description of a trust the primary purpose of which is to safeguard trust assets from claims made by creditors and others usually against the settlor or beneficiaries of a trust.

Jersey law does not have express asset protection legislation in the same way that other jurisdictions have adopted express legislation in this area. Other international financial centres to include Anguilla, the Bahamas, the Cayman Islands, the Cook Islands and Nevis, amongst others, have brought into force debtor friendly legislation and could, on this basis, be described as "asset protection jurisdictions". The focus of this debtor friendly legislation, sometimes referred to as "fraudulent transfer legislation", is to restrict a creditor's ability to recover property held within a trust settled under its laws. Indeed the almost entire exclusion of rights of future creditors in much of this legislation has led to widespread debate and criticism from the international community.

In Jersey the issue of express asset protection legislation has been considered by working parties over the years and broadly speaking one of the conclusions reached is that on the basis that Jersey already has modern and robust trust and insolvency legislation (which include several concepts which have derived from English law, including provisions relating to transactions at an under value and preferences conferred by a person before his bankruptcy), express asset protection legislation is not required. The Jersey law position on asset protection is a substantive academic subject in its own right and requires a review of Jersey trust and insolvency legislation as well as consideration of the conflict of law and comity position.

### **Who are the creditors and other claimants?**

Of course trusts have long been established by settlors to protect assets from potential creditors or claimants and the concept of an asset protection trust is nothing new. The rationale being to settle a trust to protect the trust assets from claims commenced against the trust's settlor or beneficiaries. The potential creditor or claimant class is a wide one. For example creditors might include breach of contract or negligence claims from persons with whom the settlor transacted business (perhaps transactions of a high risk nature). Alternatively, forced heirship claims could be made by members of the settlor's family or the executor of the settlor's estate or claims could follow from a trustee in bankruptcy in connection with the administration of an insolvent settlor's estate. Claims could also be made by a former spouse based on divorce or pursuant to community of property rules. These examples are not exhaustive.

### **What has changed in recent times?**

What has changed significantly in recent times is the global political risk landscape. This remains particularly unsettled. In these times of political instability and uncertainty clients and their professional advisors want advice on asset protection and specifically, to what extent a Jersey trust, once established, will protect assets from creditor claims, be these foreign states or otherwise.

It is clear that political risk is a global issue but what are clients really concerned about here? At one end of the spectrum, this might be governments or those with absolute power expropriating

private assets for public use. Alternatively, the circumstances may be less extreme (e.g. radical politics resulting in a material change in fiscal policy) but nonetheless requiring a careful analysis to find the correct structuring solution to mitigate risk.

Political risk is one of the motivating factors in much of the private wealth structuring we see today. This is a global phenomenon. It impacts upon clients, in differing degrees, from all over the world to include Europe, the Middle East, the Far East and Latin America amongst others. From a Jersey perspective we have seen a significant number of new structures being established primarily to address these issues and concerns. In addition the restructuring of existing structures to make them more robust (e.g. this could be as simple as establishing a trust to hold the shares in a family investment company rather than the shares being held directly). So what does a Jersey trust have to offer by way of asset protection?

### **Asset protection as a matter of Jersey law**

The following is a brief summary of the position which is a substantive academic subject in its own right.

#### **Trust issues:**

As a general rule, once assets are settled into trust they will only be available to creditors of the settlor if some procedure exists to enable the transfer into trust to be set aside; or, to the extent (if at all) that the settlor is entitled to receive benefit or call for distributions from the trust. For example, if the settlor retains a power of revocation over the trust, this is a power which, on the settlor's insolvency, might become exercisable by his trustee in bankruptcy. Accordingly, the general rule is that trust assets are not available to creditors. However, this general rule will not apply if the arrangement by which the original trust was settled was not a valid trust (see Article 11 of the TJJ which confirms certain circumstances when a trust will be invalid) or where the trust is a sham or where the settlor lacked capacity. The general rule also won't apply to any transfer which is incomplete or formally invalid or where the transfer is testamentary in nature and the settlor is still alive.

Of course Jersey's firewall legislation in Article 9 of the TJJ provides further protection to a Jersey trust to minimise the impact of any rules of foreign law upon the creation or operation of a trust governed by Jersey law.

#### **General insolvency provisions:**

As a starting point no insolvency procedure governed by Jersey law could be initiated in Jersey against a settlor resident outside of Jersey given that Jersey's insolvency legislation applies only to persons who are or have been resident on the island or who have carried on business on the island.

There is jurisdiction in domestic Jersey law to set aside preferences and transactions at an undervalue made within a given period of bankruptcy. Clearly this is unlikely to be relevant for a settlor resident outside of Jersey.

### **Constructive trusts / tracing claims:**

The general rule is also unlikely to apply in the case of fraud where, *inter alia*, a constructive trust might be interposed or tracing claim upheld. If a trust is set up as a fraud the Royal Court is likely to assist as it made clear *In re Esteem* 2002 JLR 53. In this judgment the Royal Court confirmed that tracing forms part of Jersey law where there is an underlying proprietary interest on the part of the claimant. A proprietary right can be established if there is a fraud giving rise to a constructive trust so that the proceeds are traceable and recoverable in equity or there is a payment by mistake (e.g. a double payment), resulting in it being unconscionable to continue to hold it or if a payment is made for a specific purpose which is not fulfilled so that the recipient holds the money on trust.

### **Comity / conflict of law:**

The principles of comity confer a wide jurisdiction upon the Royal Court to assist foreign courts of friendly jurisdictions. For example there have been many instances of trustees in bankruptcy or similar persons having authority to administer a foreign bankruptcy applying to the Royal Court for assistance in realising assets. Ordinarily assistance will be given and whether such a claim is successful will likely depend upon whether the claimant is able to establish a vitiating cause of action.

Whilst the principles of comity confer a wide jurisdiction the Royal Court has expressly recognised the application of Article 9 of TJL (i.e. the firewall provisions) when it comes to determining key issues on Jersey trusts. The leading judgment here is the case of *Mubarak v Mubarak* [2008] JRC 136 which concerned long running and bitter divorce proceedings. The Royal Court made it clear that it could not enforce a judgment of the Family Division of the English High Court which varied or altered a Jersey trust under the UK Matrimonial Causes Act 1973. In short the Royal Court confirmed that matters relating to a Jersey trust must be determined by Jersey law as specified in Article 9. The wording of Article 9 has since been improved by further amendments to the TJL.

### **Solvency of settlor / Pauline action**

The general rule will further not apply where a transaction has been entered into by a debtor purely to defeat his existing creditors or anticipated known creditors where that debtor is insolvent at the time or the transaction subsequently renders the debtor insolvent. The Royal Court in *Re Esteem* recognised a cause of action founded on the Roman law concept of a Pauline action in these circumstances. The Roman law concept was founded to assist a claim by a creditor against a third party to rescind any transfer of property

made to the third party by the debtor done to frustrate enforcement of the creditor's debt.

## **Sanctity of a trust recognised by Royal Court**

In contrast, where the rationale for a trust or further accretions to a trust fund of a trust is legitimate and not designed to defeat known or anticipated known creditors (e.g. the preservation of wealth and estate planning) the Royal Court has made it very clear that it will uphold the sanctity of the trust arrangement. The Royal Court confirmed, in *Mackinnon v The Regent Trust Company and Ors* 2004 JLR 477

*"An overriding consideration (one of public policy) is that persons dealing with trustees should be entitled to rely upon the sanctity and validity of a trust instrument, subject to any established cause of action."*

## **Conclusion**

Accordingly, the effect of a trust settled under Jersey law when the settlor is clearly solvent and for legitimate purposes may be to preserve assets and make them harder or impossible for creditors to realise them going forward. This is, in my view, a strong factor as to why Jersey has felt it unnecessary to introduce express asset-protection legislation.

In terms of the recent interest in the asset protection afforded by a Jersey trust the current turbulent political climate would suggest that deep seated fears over radical politics, the seizure of assets by political means and nation state sovereignty look set to continue. In these circumstances clients and their advisers will no doubt continue to analyse where and how they want to structure their assets. Fundamentally, from a Jersey law perspective, provided the settlor is solvent and there is no other established and vitiating cause of action, the Royal Court has made it very clear that it will uphold the sanctity of a trust.

*This article first appeared in STEP Journal.*

## **About Ogier**

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

## **Disclaimer**

This client briefing has been prepared for clients and professional associates of Ogier. The

information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under [Legal Notice](#)

## Meet the Author



[James Campbell](#)

Partner

[Jersey](#)

E: [james.campbell@ogier.com](mailto:james.campbell@ogier.com)

T: [+44 1534 514230](tel:+441534514230)

## Related Services

[Private Wealth](#)

[Legal](#)

## Related Sectors

[Trusts Advisory Group](#)