Reserved powers trusts – halcyon solution or recipe for conflict?

By Victoria Pratt, Senior Associate and Kim Paiva, Senior Associate

AO Hall

Introduction

1. This seminar paper is intended to supplement our session entitled "Reserved powers trusts – halcyon solution recipe for conflict?". As the title suggests the main purpose of this session is to consider whether a "reserved powers trust" is indeed the perfect solution for a settlor who wishes retain control over assets placed in trust or whether the reservation of powers has significant risks. By the end of the seminar and this paper it will be clear to readers that the answer is, to a large degree, dependant on the settlor's circumstances.

2. This paper and the seminar is not intended be exhaustive but is intended to be discursive in nature and highlight matters that should be considered by trustees and settlors alike when establishing reserved powers trusts.

3. The seminar and this paper is divided into the following parts:

   (a) **Part A:** A general overview of the issues surrounding reserved powers trusts and the international attitudes towards them;

   (b) **Part B:** The historical position in Guernsey and, where relevant[1], Jersey, prior to the introduction of section 15 of the Trusts (Guernsey) Law, 2007 (the "**TGL 2007**");

   (c) **Part C:** An overview of the reserved powers provisions in section 15 of the TGL 2007, and in particular, consideration and discussion of the types of powers that can be reserved by a settlor and the consequences under the TGL 2007 of for both settlors and trustees alike; and

[1] As AO Hall is a firm of Guernsey advocates this paper focuses on the position under Guernsey law.

(d) **Part D:** Discussion of recent cases relating to reserved powers trusts and particularly those pursuant to which the courts have "looked through" a valid trust and held that the settlor has control over the trust assets and/or the trust documentation along with a consideration of what these cases mean for settlors going forward.

PART A: Overview

Introduction and context

4. Reserved powers trusts have become very popular in established offshore jurisdictions and it is easy to see why. The idea of giving away, but retaining control over, the assets settled on trust has appeal for many settlors, including those who have grave concerns about handing over their hard earned fortunes to trustees in the name of better tax or estate planning. Settlors often want to reserve to themselves substantial control over the assets they have placed into trust even though they, in their capacity as settlors, ought as a general proposition to fall away from the trust after establishing it.

5. Many jurisdictions allow a settlor to both settle their assets into a trust while retaining certain powers over those assets or the administration of those assets but the question arises as to what happens if too many powers are reserved, particularly when the powers are retained by the settlor (and not at third party). What risk is there that the settled assets will still be treated as the settlor's? We consider this in detail in **Part D** of this paper.

6. Article 2 of the Hague Convention on Trusts[2] is very clear that as a matter of private international law, "*the reservation by the settlor of certain rights and powers ….[is]….not necessarily inconsistent with the existence of a trust*" and makes it clear that for there to be a trust "*assets [must] have been placed under the control of a trustee….*". So control does not of itself mean invalidity.

7. As alluded to above, while powers can be reserved to any third party, it is the reservation of powers to the settlor himself/herself that causes the greatest problems and concern in practice. If extensive powers are given to a third party then (assuming the third party is not a puppet of the settlor) the settlor will have clearly divested the settled assets so that the issue of settlor control does not arise. The reservation of extensive powers to a protector

[2] Hague Conference on Private International Law - Convention on the law applicable to trusts and on their recognition (concluded 1 July 1985)

might result in the protector being deemed a co-trustee but this is rather a different problem to the settlor being regarded as the owner of the trust assets.

8. Formerly there was much concern about settlor control in the context of sham trusts, but as discussed below the risks are now much reduced of a trust being deemed a sham.

9. For the reasons noted at the outset, clearly there is an appetite in settlors and potential settlors for reserved powers trusts. As we know in the competition between the offshore financial centres, very often if a rival jurisdiction enacts legislation to allow it to sell a new 'product' then its competitors may very well follow suit by enacting their own similar, though possibly a little improved, variation. The Cayman Islands, the British Virgin Islands, Jersey and Guernsey have all enacted reserved powers legislation in order to deal with previous structural problems in setting up a trust where the settlor retains extensive control over the trust assets.

10. Reserved powers trusts have proven reasonably popular in Guernsey but thankfully our experience has been (for the most part) that trustees see the limits of the uses of reserved powers trusts and have utilised them generally in trusts that are asset holding purpose trusts. Clearly a trustee of a more traditional discretionary trust may find the smooth administration of the trust substantially affected where there is a settlor with reserved powers. The administration of the trust needs to be carefully thought through prior to the creation of the trust to ensure that the trust documents are properly drafted, clearly setting out the respective obligations and liabilities particularly given the risks that we identify in this paper in the administration of these trusts. It is our experience that many of our fiduciary clients have found better ways of handling settlors' expectations, usually by having a good and sympathetic relationship with the settlor, rather than providing the settlor with formal reserved powers.

International attitudes to settlor reserved powers

11. England has not enacted reserved powers legislation of the sort found in offshore financial centres. It seems that the long standing position in England is that, although in theory once a trust has been established the settlor's involvement should fall away (in his capacity as settlor) there is nothing objectionable *per se* in the settlor reserving a degree of control over the trust. A very interesting remark was made by Mr Justice Hayton CCJ[3] when commenting

[3] Justice of the Caribbean Court of Justice, formerly Professor at Kings College London and responsible for a leading trust practitioner legal text "*Underhill & Hayton Law of Trust and Trustees*"

on the statutory reserved powers for settlors found in offshore centres that "*a lot of these developments, I think, would represent the position in English law if English tax considerations enabled one in England to create trusts as flexible as modern offshore trusts*"[4].

12. At a conference[5] recently organised by the Trust Law Committee (being an independent committee of academic and practising lawyers and judges), a great deal of thought was given as to how to improve the public and political perception of trusts given that trusts are so useful and play a very great role in common law jurisdictions. Again Justice Hayton CCJ was asked to give the closing comments at the end of Day One of the conference and he said "[o]*ne of the areas, however, where life becomes* [sic] *to look a little disreputable is when you look at some of the offshore jurisdictions and this is one of the problems if we are trying to 'clean up' trust law so to speak, because there is a pressure on these small offshore jurisdictions, particularly in the current economic climate, to try and make as much money as possible by having the snazziest, sexiest, best trust law in the world, which tends to mean they have to pander to settlors and have settlor-focused trusts, and perhaps also attract 'shysters' who want to avoid creditors*"[6].

13. While it seems in substantial parts of Europe[7] there is a growing acceptance of trusts this acceptance is based on the understanding of a traditional trust model. Switzerland finally ratified the Hague Trust Convention in 2007 after its great conservatism and suspicion of trusts started to decline. However the abolition of perpetuity/trust periods and the introduction of reserved powers, private trust companies and non-charitable purpose trusts are regarded as being far remote from the traditional Anglo-Saxon model on which the Hague Convention negotiations were predicated. "*Pursuit of trusts that can be aggressively tailored to the needs and desires of settlors, including an almost unfettered degree of control over the management and distribution of trust assets during the settlor's lifetime, creates an increasing risk that the courts, especially in non-trust jurisdictions, will become critical of and protective against such trusts in particular, and trusts more generally, throwing the baby out with the bath water. As suggested by two very recent Swiss cases, some courts will find within the provisions of the Hague Convention or without them the weapon to essentially*

[4] Trusts and Trustees Vol 19, No 3&4, April/May 2013 page 280
[5] "*The Future of Trusts*" held April 2012
[6] *Trusts and Trustees*, Vol 19, No. 3&4, April/May 2013, p310
[7] Particularly in Switzerland and Italy

disregard such trusts"[8]. So for the moment there is only suspicion and dislike of reserved powers trusts; if the attitude continues to deteriorate then we might see settlor-controlled offshore trusts that are perfectly compliant with their proper law under attack in the Swiss courts.

14. While reserved powers trusts can be properly set up under Guernsey law one must be aware that other, larger, jurisdictions are not looking with favour upon the idea of settlor controlled trusts. Instead, they see assets put in the hands of a trustee which are still controlled by the settlor and suspect that proper trust has not been created.

The reserved powers trust concept

15. Reserved powers trusts, also called "Settlor Directed Trusts" or other similar phrase, appear to be an anathema to the concept of the trust, suggesting that the trustee in holding the assets is purely the nominee of the settlor who exerts all the power. If there really is just a nominee arrangement with no real intention to set up a trust then no trust will be created at all. However in practice there usually is an intention to create a trust despite the reservation of substantial powers. If too many powers are reserved then, as a matter of English law (and probably of pre 2007 Guernsey law) then it is unlikely that a trust is created at all. The enactment of TGL 2007 changed this for Guernsey as we now have a statutory basis whereby a wide variety of substantial powers can be reserved to the settlor and yet a valid trust still be created[9].

16. With a proper discretionary trust it is clear that the settlor has relinquished all control over the eventual destination of the trust assets. He or she will have set out a class of potential recipients of the assets in the class of beneficiaries but will have often given the trustees the power to add to that class. However a discretionary trust will often not suit the settlor's purposes of desires and he or she is drawn to a reserved powers trust.

17. Going right back to basics, one has to consider what are the essentials of a trust (particularly in the context of the concept of a reserved powers trust). Any trust involves a bundle of core fiduciary duties (implied and expressed) along with ancillary powers (which may or may not be fiduciary powers). In exercising those ancillary powers the trustee will be guided by its fiduciary duties. Once a person takes on the office of trustee he from then on owes his duties to the beneficiaries, not to the settlor. So what are the core duties? The 'irreducible

[8] Luc Thévenoz, Professor at the Faculty of Law at the University of Geneva in *Trusts and Trustees*, Vol 19, No. 3&4, April/May 2013, p300

[9] See below, particularly the statutory position in Guernsey under s15 TGL 2007.

core of obligations' imposed on trustees are surprisingly limited. "*There is an irreducible core of obligations owed by trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence.* ***The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts****, but in my opinion it is sufficient*"[10] [emphasis added].

18. As noted later in **PART C** on section 15(3) of the TGL 2007, there are circumstances where the settlor can exercise a reserved power under the trust in such a way which requires the trustee to act in accordance with the settlor's directions which may not be in the best interests of beneficiaries as a whole. This is where the Guernsey position differs from the English law trust position noted above.

PART B: Former Position in the Channel Islands

Jersey

19. In Jersey there was a customary law maxim which called into question the extent to which a settlor could reserve control at all. The maxim was known as "*donner et retenir ne vaut*". This principle was considered in cases such as *Shamji* [11], *Rahman*[12] and *Esteem*[13]. Prior to *Esteem* it was suggested that the maxim could operate to invalidate trusts where the extent of a settlor's retained interest in the trust fund he created was sufficient that the settlor "*…retained control over the trust fund either of capital or income*." It was said[14] that the two principal matters concerned in the maxim were (a) that the settlor keeps something to himself which (b) he thereafter can freely dispose of without consulting anyone else or without the consent of any other person. In *Shamji* the court decided that merely asking someone to act in accordance with a reserved power did not break the maxim. It considered that the reality of the situation before it was that although the settlor has a reserved power, it was the trustee who took the action and if the trustee disagreed with how the settlor asked them to act then the trustee would seek the directions of the court. This should be contrasted against *Rahman* where the settlor retained a vast amount of involvement with

[10] *Armitage v Nurse* [1998] Ch 241
[11] *Johnson Matthey Bankers Ltd v Shamji* (1985-86) JLRN-26
[12] *Abdel Rahman v Chase Bank (C.I.) Trust Company Limited* [1991] JLR 103
[13] *In re Esteem Settlement* [2003] JRC 092
[14] In *Shamji*

and control over the trust. The Jersey court found that the trustee had failed in its duties and it had very little difficulty in deciding that the settlement was a sham in that it was made to appear contrary to what it in fact was. The court was clear that it would not uphold documents that were a fiction in the sense that they did not reflect the reality of the situation. Consequently the settlement was declared to be wholly invalid and of no effect.

20. *Esteem* considered the maxim further and in its judgment the Jersey court gave guidance as to when a trust would be deemed to be a sham due to settlor control. It concluded that the maxim was only breached if both the settlor and the trustee intend from the start that the trustee would to act as nominee or agent of the settlor rather than in accordance with the express terms of the trust deed because, in such a case, the settlor will have retained a power to dispose freely of the 'settled' assets. However if the settlor intended the sham but the trustee did not, then this would not break the maxim as the settlor had not in fact retained the power to freely dispose (as the trustee intended to act in accordance with the terms of the trust). If after the creation of the trust the trustee came to cede control to the settlor so that he thereafter had free power of disposal this would not infringe the maxim although it would amount to a breach of trust actionable by the beneficiaries.

Guernsey

21. The position in Guernsey differed. Section 74(5) of the Trusts (Guernsey) Law, 1989 ("**TGL 1989**") specifically stated that "*No transfer or disposition of property to a trust is invalidated by application of the principle of "donner et retenir ne vaut""* and this section is repeated in section 84(5) of our current TGL 2007. It is difficult to know what the position was prior to the 1989 as the TGL 1989 was not a simple codification of the previously existing customary law.

22. Jersey case law is highly persuasive in Guernsey and has substantial weight when the Guernsey court makes decisions. Even though the maxim was explicitly excluded by statute in Guernsey, there were limits on the extent to which a settlor could retain control and the Guernsey lawyers looked to English and Jersey positions for guidance. The Jersey court's comments on when a trust would and would not be a sham held and continue to hold considerable weight in Guernsey.

23. Accordingly, it should be borne in mind that whilst section 15 of the TGL 2007 specifically states that the reservation of powers under a trust is valid, if it is found that the settlor and

trustee never intended to create a valid trust in the first instance (as set out above), these can still be attacked on the grounds that the trust is a sham.

24. The purpose of this seminar, however, and in particular this paper, is intended to focus and highlight the considerations and risks for settlors and trustees alike in the context where a valid reserved powers trust has been created but is attacked on other grounds (see **PART D**) rather than to focus on the doctrine of sham.

PART C: Settlor's reserved powers under Guernsey statute

Background

25. In recognition of the fact that settlors and beneficiaries often wish to play an active role in the administration of their trusts, and in response to changes made to the laws of competitor jurisdictions[15], changes were proposed to TGL 1989 whereby certain powers could be reserved to the settlor (or another third party) without risk of the trust being challenged.

26. The statutory position in Guernsey changed with the enactment of TGL 2007 and more particularly the introduction of section 15 (see **Appendix 1** to this note for the full section). Section 15 was introduced at the suggestion of the working group that undertook a review of trust law in Guernsey in anticipation of the statutory changes. The working group's view, supported by representations it received, was that TGL 1989 ought to be amended along the lines of section 14 of the Cayman Islands Trust law (2001 Revision) "*so as to make it plain that the express reservation of any of the specified matters will not invalidate a trust, and that any exercise of the reserved powers absolves the trustees from any liability as a result of such exercise*"[16].

27. The Guernsey statute, like those of other offshore jurisdictions, protects the reserved powers trust on the basis that it contains reserved powers. It will not protect the reserved powers trust against other forms of attack, for example that the trust is in fact a sham.

Types of Powers under section 15(1)

[15] For example Cayman Islands, BVI and Jersey.
[16] "Review of Trust Law in Guernsey" Final report 14.03.06 by the working group established by the F.I.P.A.G,, Paragraph 13

28. The first part of section 15 expressly provides a lengthy list of the types of powers or interests that can be reserved to the settlor or to any other person[17]. These include:

(a) the power to revoke, vary or amend the trust including changing the proper law;

(b) the power to advance the trust fund or direct how the trustees are to advance it;

(c) to remove and appoint not only the directors of underlying companies owned by the trust and any investment managers/advisers of the trust but also the trustees of the trust;

(d) a power to direct the investment of the trust fund; and

(e) the familiar provisions whereby a trustee can only exercise certain of its powers with the consent of the settlor/another third party.

At the same time as exercising these powers the settlor can retain a beneficial interest in the trust property[18]. Section 15 explicitly states that any and **all** of such powers can be reserved or granted by the settlor.

Settlor with reserved powers is not under fiduciary obligation or considered a trustee under section 15

29. The reservation of the powers to the settlor will not impose any fiduciary duty on the settlor although the trust deed can provide otherwise. Section 15(2) provides that the settlor will not be a fiduciary (unless he chooses to be). It therefore allows the settlor to act in his own interests without regard to the interests of the beneficiaries or purposes of the trust. It is noteworthy that this is in contrast to, and conflicts with, section 32 TGL 2007 which deals with consultation by the trustees with other professional persons.

30. Section 32(2) provides that the terms of the trust may require the trustee to obtain the consent of another person before exercising any function. This covers the same ground as section 15(1)(h) which provides that the settlor can create a reserved power whereby the trustee's power to exercise any of its functions can only be so exercised with the consent of the settlor or another third party. However where this mechanism is put in place under section 15 then the settlor/third party giving the consent is not under a fiduciary duty (unless the trust provides otherwise). This should be contrasted with section 32 which says

[17] Section 15(1) TGL 2007
[18] Section 15(1)(i) TGL 2007

the opposite and that the settlor/third party is under a fiduciary duty, unless the terms of the trust provide otherwise. The section 32 position fits in with the general presumption that an office holder, the most frequent being a protector, is under a fiduciary duty when exercising his or her powers[19]. The practical solution to this problem has to be that when drafting the trust instrument one must carefully state whether or not the settlor (or third party giving the consent) is under a fiduciary duty.

31. Section 15 goes on to provide clarity as to the consequences of the settlor both reserving such powers and then going on to exercise them. The reservation and the subsequent exercise of the powers will not make the settlor a trustee, despite the settlor having the power to control to a very large degree what is to happen to the trust property, with the trustee itself having less capacity to direct what is to be done with the trust fund. So where the investments are held by a third party on behalf of the trustee, that third party can be obliged to follow the directions of the settlor without needing the trustee's consent or input. The trustee neither directly holds the trust fund nor is involved in the investment of the assets and yet the settlor is not regarded a a trustee nor is the trust invalidated. In such a situation the trustee will want to be comfortable that it is not liable for the consequences of the acts of the settlor (particularly if it results in a loss to the trust fund). The trustee will also want to know the extent to which they retain any duties to the beneficiaries in respect of the exercise by the settlor of his reserved powers.

Effect on trustees' duties and liabilities

32. Of great importance to most trustees is the confirmation found in section 15(2)(c) which states that the reservation and exercise of the reserved powers does not of itself make the trustee liable in respect of any consequential loss of trust property. This makes sense as otherwise there would potentially be a great deal of conflict between the trustee and the settlor as to the settlor's exercise of the reserved powers particularly where the trustee was in a fiduciary position but the settlor was not. Without this confirmation a prudent trustee would be monitoring the settlor's actions and if they were likely to cause a loss to the trust fund then the trustee would be heading off to the court to seek directions as to whether it ought to prevent the settlor taking the intended action/not act on the settlor's instructions. Without section 15(2)(c), if a trustee followed the settlor's directions (or failed to take steps to prevent the action) then it might have been liable to the beneficiaries for the loss to the

[19] See for example "*Trust Protectors*" by Andrew Holden (2011) Jordon Publishing Limited.

trust fund but on the other hand if it prevented the occurrence of the action wanted by the settlor then it could be liable for breach of trust; an impossible position.

33. This trustee position is further bolstered by section 15(3) which goes on to confirm that a trustee who acts in compliance with the valid exercise of a reserved power does not, by reason only of that compliance, commit a breach of trust. "Breach of trust" in this context is the statutory definition which is wider than simply disobeying the terms of the trust instrument. Breach of trust here means both breach of any duty imposed on the trustee by the terms of the trust and also any duties imposed on it by TGL 2007. The duties imposed on the trustee by TGL 2007 include the general duties imposed by section 22 which requires the trustee to observe the utmost good faith in the exercise of its functions and to act *en bon père de famille* exercising its powers only in the interest of the beneficiaries or the advancement of the charitable/non-charitable purposes (as the case may be).

34. So where a settlor decides to exercise his reserved power and gives a direction which is valid then the trustee has a duty to follow the direction. This duty cuts through the other duties to the beneficiaries, including the obligation to act in the interest of the beneficiaries. This is at odds with the core duty in English law which requires that the irreducible core of trustee obligations is to perform the trusts for the benefit of the beneficiaries[20]. This Guernsey position has not, to the best of our knowledge, been tested in the Guernsey courts.

35. The section 15(3) protection for trustees only applies where the exercise of the reserved powers by the settlor (or third party) is 'valid'. So when contemplating following the direction given by the settlor a trustee must carefully check the trust instrument to ensure that all the mechanics for the direction have been complied with (for example that the direction must have been given in writing and delivered by post or hand. In such a case a verbal or email instruction will not suffice). Similarly the familiar issues of settlor capacity will arise when dealing with an elderly or perhaps unwell settlor and the trustee must satisfy itself that the settlor has the necessary mental capacity to give the direction. The trustee should also check the trust deed has given it the specific power (for example the power to appoint an investment manager) to allow it to follow the direction given by the settlor.

Practical considerations for Trustees in relation to the reservation of particular powers under section 15(1): Settlor directed investment

[20] See paragraphs 17 and 18 above.

36. We all know that trustees must keep their powers under review[21] but what about where the settlor gives a direction to purchase assets but no more? In that case surely the trustee will retain any discretion to sell, not least because the settlor can also reserve to himself the power to direct a trustee to retain, so that if the settlor does not so direct (or has no power to direct retention) the trustee's power of sale remains live. If the power of sale remains live then the trustees must consider exercising that power even it if means essentially undermining the instruction given by the settlor.

37. TGL 2007 allows the settlor to reserve to himself the power to act as, or give directions as to the appointment or removal of, a director or another officer of any corporation wholly or partly owned as trust property. Careful drafting of the trust deed and of the constitutional documents of the underlying company will be needed if such power is to be retained by the settlor. It is all very well for the settlor to have the power to direct the trustees to remove the director(s) but in turn in order to fulfil that instruction the trustees need to have the power under the company's constitutional documents to effect that removal. Where a settlor directs the trustee to purchase shares in an existing company then there may not be scope to alter the articles of that company. Consequently the trustee could be in a difficult position of having received a direction to remove the director(s) but the trustee cannot effect that removal. This sort of problem should be addressed at the outset in the trust instrument itself.

38. A clause regularly seen where a settlor (or perhaps a member of a pension scheme) has the right to direct the investment of the trust fund states that the member can direct the trustee in the exercise of the powers of investment and that the trustees shall be bound by the direction of the settlor/member and shall not be under any duty to enquire if the direction is appropriate in the circumstances. This type of clause gives rise to a number or questions and risks:

(a) The trustees misunderstand the nature of the direction given, so that where the instruction was to buy the trustees understand it as being to retain, which it was not. Thus the trustees are left exposed if the value of the investment falls and the trustees have ignored the fact that they could and should have reinvested.

(b) The trustees understood the direction was only to buy and are aware that they have a duty to sell but are unsure as to when exactly to do so again. Again if the investment

[21] For example, *Re Hay's Settlement [1981] 3 All ER 786*

falls in value without any action being taken then the trustees could be said to be at fault.

(c) If the investment was evidently falling in value at the time the trustees were directed to buy it, should they have bought it at all? Careful examination of the terms of the trust would be needed as although the statutory position appears to be that the trustee would be protected if they followed the direction, this has not yet been tested in the Guernsey court.

(d) The direction is somehow invalidly given, perhaps because it is found to extend to a direction to the trustees to exercise a power that they do not have. If this were the case then the protection of section 15(3) would fall away.

(e) Where the trust is a pension (including a RATS or a QROPS) then there are limits as to types of investments and loans that are permissible. The trust deed should be drafted so that the settlor/member ought not to be able to give investment directions that are contrary to the permitted investments and loan regime. If the trustees followed a member's direction which involved engaging in a prohibited investment or loan arrangement then that act would put the approval of the whole fund (not just the individual member's pot) at risk.

39. The problems of settlor directed investments are well demonstrated by the uncertainty arising in the examples set out in **Appendix 2** to this note which we will discuss at the end of this session.

PART D: Risks to the settlor when creating a reserved powers trust

40. As we have seen above and as Paul Buckle will explain further in his talk following this, TGL 2007 has put in place fairly substantial protection so that a reserved powers trust will be protected and upheld by the Guernsey court as a valid trust.

41. However recent cases warrant consideration and discussion in the context of reserved powers trusts as they indicate circumstances in which the courts have held in favour of a third party that the documents or assets of the trust remain with the settlor rather than the trustees. In these cases that third party did not have to launch a full frontal attack on the validity of the trust itself. Two of the cases (*North Shore* and *Parissis*) concern simple discretionary trusts where there were no settlor reserved powers. However in these cases the respective settlors were regarded as retaining sufficient power over the trust

assets/documents to allow an order to be made against the them. Accordingly in cases where the settlor has reserved powers to himself it may well be that such an order would more easily be made against that settlor.

42. Three fairly recent English judgements, *North Shore Ventures Ltd v Anstead Holdings Inc*[22] ("***North Shore***"), *HMRC v Panos Parissis, Adrian Towland and Ian Harrison*[23] *("**Parissis**")* and *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd*[24] *("**TMSF**"),* "*demonstrate a genuine judicial appetite for testing, at the request of a third party who would like to get at the trust assets through the settlor, the true thickness of the veil between the settlor and his trust*"[25] and, in the case of *North Shore*, is "*a further example of the hardening of English judicial attitudes against those who are seen as using corporate and trust structures as devices to commit fraud or to avoid meeting their liabilities*"[26].

43. As a general note whilst *North Shore* and *Parissis* concerned discretionary trusts (rather than a reserved powers trust) the court's/ tribunal's focus was on settlor control or possession of the trust documentation for the purposes of disclosure to creditors. Taking these decisions with that in *TMSF*, the reservation of powers by a settlor may place the settlor in a position where he is deemed not only to control or have possession of the trust documents, but also to have powers considered tantamount to ownership of the underlying trust property.

44. We shall also consider *Re HHH Employee Trust and the B Sub-Trust*[27] ("***HHH EBT***") which is a Jersey case and looked at the obligations on settlors who have reserved fiduciary powers to themselves and how the settlor ought to then exercise those powers.

North Shore

45. In the case of *North Shore*, North Shore was owed the sum of $35m by Mr Formichev and Mr Peganov under a judgment debt obtained against Amstead Holdings Inc., a BVI company, which they had guaranteed.

46. At about the same time as demand was made for the debt in 2008, Mr Formichev and Mr Peganov settled discretionary family trusts in Nevis of which they were initially beneficiaries,

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[22] [2012] EWCA Civ 11, [2012 All Er (D) 89 (Jan)
[23] (TC01083) [2011] UKFTT 218 (TC)
[24] [2011] UKPC 17, [2012] WLR 1721
25 In relation to *North Shore* and *TMSF* in "The *Reserved Powers Trust: When might power be property?*" by Jonathan Russen QC in The Journal of International Tax, Trust and Corporate Planning 2013 Issue 3, Volume 20
[26]"'Puppet masters' beware" by Mark Hubbard QC in the Trusts and Estates Law & Tax Journal, April 2012 pages 14 to 16
[27] [2012] JRC 127B

but from which they were later excluded leaving their wives and children in the class. North Shore sought widespread disclosure of the trust documents as it suspected the settlors of deliberately placing the vast bulk of their wealth into trusts in the hope that by doing so the assets could not be recovered by creditors. North Shore relied upon Civil Procedure Rule ("**CPR**") 71.2(6) of the English courts which requires the production at court of documents under a person's "control". The court of first instance[28] found it very likely that that the settlors could obtain the documents if they wished, even though they were no longer beneficiaries of the trusts, so that the documents were in effect under their control.

47. The Court of Appeal agreed, noting that in the context of "control" for the CPRs "…..*a party has or has had a document in his control if – (a) it is or was in his physical possession; (b) he has or has had a right to possession of it; or (c) he has or has had a right to inspect or take copies of it".*[29] In determining whether documents in the physical possession of a third party were nonetheless in a litigant's control under the CPRs, the court had to have regard to "*the true nature of the relationship between the third party and the litigant*".[30]

48. In considering relationship between the settlors and the trustees, the Court of Appeal stated that "*the circumstances surrounding the appointment and behaviour of the trustees were undoubtedly suspicious. For a wealthy man (or in this case two wealthy men acting simultaneously) to make himself a pauper, with the genuine intention of disposing of his money down to his last dollar irrevocably and with no ability to control what was to happen to it, is an unlikely scenario. Family trusts are a well known possible device for trying to place assets ostensibly beyond the reach of creditors, and the timing of the simultaneous creation of trusts fits such a pattern"*[31]. Further the evidence "...*gave reasonable ground to infer that there was in truth some understanding or arrangement between the [settlors] and the trustees by which they were to shelter [the settlors'] assets, consistent with the [settlors'] real aim, and that the nature of that understanding and arrangement was such that the trustees would take whatever steps the [settlors] wished in the administration of the trusts*".[32] If that really was the true relationship between the settlors and the trustees then the court regarded the *"… documents in the physical possession of the trustees relating to the administration of the trust as documents in the [Appellants'] control*".

[28] [2010] EWHC 2648 (Ch)
[29] [2012] EWCA Civ 11 @ [3]
30 [2012] EWCA Civ 11 @ [40]
31 [2012] EWCA Civ 11 @ [38]
32 [2012] EWCA Civ 11 @ [38]

49. It is noteworthy that the disclosure was ordered on the basis of the rights that the settlors had as beneficiaries to obtain information about the trust (prior to their exclusion). Had the trusts been reserved powers trusts then the *Schmit v Rosewood* type considerations would not need to have been considered and perhaps a wider (and probably easier to obtain) application for disclosure of trust information would have been sought on the basis of such reservation of power. To anyone familiar with the Jersey *Esteem* case [33] the facts of *North Shore* appear to meet the criteria for establishing that the trusts were shams. However this argument was not the basis on which disclosure was ordered in *North Shore* and the trusts were not set aside on the basis that they were shams.

Parissis

50. Inn *Parissis*, a Guernsey trust company was trustee of three discretionary family trusts. The trusts were established under and continued to be governed by Guernsey law with the settlors being resident in the UK. HMRC required the settlors to produce a number of documents, including:

(a) the trust deed, a letter of wishes and correspondence between the settlor and trustee for the period since the trust was created for one of the trusts (these had already been provided to HMRC in respect of the other two trusts);

(b) correspondence and documentation at the time the trusts were created, accounts, bank statements for all three trusts; and

(c) accounts of an underlying company owned jointly by all three trusts[34].

51. The demand was made under section 20(1)(a) of the Taxes Management Act 1970 which empowered HMRC to require production of documents 'in the person's possession or power'. It was accepted by HMRC that the settlors may well not possess the missing documents but it argued that the documents were in the possession of the trust company and that the settlors had the power to obtain those missing documents from the trustee.

52. Very little information about the trusts appears to have been provided to HMRC but the first tier tribunal proved itself willing to accept that certain documents must be in existence (for example accounts for each of the trusts) on the basis that a professional trust company was involved and would have prepared such documents.

33 See PART B above.

[34] Or rather the shares were held by the trustees of each respective trust as part of the trust fund for that trust.

53. The trust deeds for two of the three trusts had been provided to HMRC and it was noted that section 26 TGL 1989 had been excluded in both of the provided trust deeds. Section 26(1) deals with the trustee's duty, upon written request of a settlor, to provide the settlor with full and accurate information as to the state and amount of the trust property. Section 26(1) can be excluded by the terms of the trust instrument but where it has been so excluded it is still possible for the settlor to make an application to the court for an order requiring such information to be provided. As we know such request would be considered in light of the principles set down in *Schmit v Rosewood*[35] and there is no guarantee that the court would grant the order in its entirety or even partially.

54. The tribunal looked at TGL 1989 and TGL 2007 but was not presented with any Guernsey expert evidence on how section 26 has been applied in the Guernsey courts.

55. The settlors argued that they did not have a legally enforceable right to any of the material sought by HMRC and that therefore the documents were not within their power. HMRC contended that the material must have in reality been in the settlors' power and if the settlors had asked the trustee to disclose the documents, even though they could not compel them to do so, the trustees would have acquiesced to the settlors' wishes and would have disclosed.

56. So the crux of the decision related to the meaning of 'power' – legal power and power in a practical sense - and the tribunal explored this. It concluded that in matters related to tax disclosure 'power' had the more relaxed practical meaning as suggested by HMRC, so that if in practical terms the settlors could obtain the documents, even if they did not have the legal right to obtain them, then for <u>tax disclosure purposes</u> the settlors were deemed to control the documents.

57. The tribunal noted that settlors had not even asked the trustee to produce the documents so on that basis they were fined. In relation to the trusts which excluded section 26 (so removing the duty on the trustee to hand over information as to the state and amount of the trust property to the settlor on request), had the settlors asked the trustees for the documents and the trustees refused disclosure then the tribunal said that there was no obligation on the settlors to then go to the considerable effort of seeking a court order to obtain the documents. They had discharged their obligation by simply asking for the documents.

[35] (Isle of Man) [2003] UKPC 26

58. Nothing in the judgment indicated that the Guernsey trustee had acted improperly or had been servile to the settlors. Rather the tribunal found it likely that "*a trustee would choose, in the spirit of trusteeship, to provide copies of them to the settlors and beneficiaries*"[36] and on that basis decided that the settlors had de facto power over the disclosure of the documents. There is no indication that the two disclosed trusts deeds contained any reserved powers and it would be unlikely that there were any reserved powers as the trusts were created prior to the enactment of TGL 2007. One has to expect that if the trusts did contain powers reserved to the settlor, even if it was not a right to obtain information, then HMRC's argument would have succeeded more easily. A settlor with reserved powers will usually expect/want to have unlimited access to trust information so if that had been the case here then the arguments about what constituted 'power' would probably not have arisen as the settlor probably would have had the right to simply demand the information and documents. Further the information about a trust that could be made available under section 26 is not comprehensive and letters of wishes and trustee deliberations would be unlikely to be disclosed. If the terms of the reserved powers trust enabled the settlor to be able to demand to see those further documents then so too might the settlor be required to produce them to HMRC.

TMSF

59. *TMSF* is a particularly interesting case as it was common ground at all times that the trusts were valid and duly constituted as a matter of Cayman Islands law. This was not an attack on the validity of the trusts; they were not being challenged. Instead it was the settlor's own powers that were under threat.

60. The facts of *TMSF* are quite 'clean' and fairly extreme. The claimant, TMSF, was established by the Turkish state to restructure and administer failed banks whose banking licences had been revoked. As part of the restructuring and administration process TMSF had acquired assets of two Turkish Banks, Bank Ekspres and Egebank. Under Turkish legislation, TMSF had authority to bring proceedings in its own name for the recovery of the losses sustained by the banks.

61. Mr Demirel was the controller of a group of companies which owned Egebank. TMSF claimed that at the time of its demise Egebank had accumulated losses of over US$1.2 billion, that investigations subsequently revealed that some US$490 million had been

[36] Paragraph 79 *Parissis*

misappropriated from Egebank by Mr Demirel, his family and associates, and approximately US$336 million had been misappropriated from other banks. In 2001 the Turkish courts gave judgment against Mr Demirel personally in the sum of US$30 million in respect of a right of action of Bank Ekspres against Mr Demirel for damages caused by allegedly fraudulent loan transactions.

62. TMSF learned that Mr Demirel had established two discretionary trusts in the Cayman Islands, with assets of around US$24 million. For practical purposes the beneficiaries of the trusts were Mr Demirel and his wife. Mr Demirel had a power of revocation of the trusts with the consequence that he could re-vest in himself an amount which would satisfy a very large proportion of the judgment debt.

63. TMSF sought the appointment of a receiver by way of "equitable execution" (under section 37 (1) of the Senior Courts Act 1981 (formerly called the Supreme Court Act 1981) as extended to and applied in the Cayman Islands by Cayman legislation) over Mr Demirel's power of revocation under the trusts with a view to that receiver then being able to exercise the power of revocation and get the assets out of the trusts.

64. The Court of first instance and the Cayman Court of Appeal both decided that they did not have authority to transfer the power of revocation to TMSF nor did they have the power to order Mr Demirel to exercise his power of revocation. Each of the Cayman courts said that it was unable to increase its own powers so as to be able to make such an order and instead such a power could only be given to it by legislation.

65. TMSF appealed to the Privy Council. The Privy Council is, of course, also Guernsey's ultimate court of appeal so we read all their judgments with particular interest. The Privy Council was asked to consider (a) if the power of revocation was sufficiently close to the notion of property to enable the courts to enable a receiver to be appointed over that right to revoke (to ensure that Mr Demirel had not put the assets beyond the reach of the creditor) and (b) if the court could order Mr Demirel to transfer or delegate the power of revocation to the receivers.

66. The Privy Council overturned the decisions of the Cayman courts and ordered that the settlor, Mr Demirel, should delegate his powers of revocation to the applicant and judgment creditor, TMSF. This would all TMSF to exercise the power and thus revoke the trust, with the effect that all of the trust assets would be returned to the receiver (TMSF).

67. In its judgment the Privy Council noted United States cases in which both creditors and trustees in bankruptcy have been able to reach trust assets that were subject to a power of revocation. It noted and was informed by the US position that "*the courts, as well as the legislatures, have concluded in a variety of contexts, that the assets of a revocable trust are, in fact, subject to the claims of the settlor's creditors, both during the settlor's life time and after the settlor's death, precisely because the settlor of a revocable trust necessarily retains the functional equivalent of ownership of the trust assets….The trend in the courts, as well, is to conclude that the settlor of a revocable trust should be treated as the virtual owner of the trust property, especially in so far as the rights of creditors are concerned*"[37]. Ultimately the Privy Council found the US authorities provided marginal assistance in deciding this case but it did note that the US authorities "*demonstrate the advantages of a realistic view of the revocable trust*".

68. It was noted that Mr Demirel's power of revocation was in no way a fiduciary power and that where the holder of a power of appointment owes no duty of trust or confidence to another person that power is capable of being delegated. This was a crucial point. Further where there was a completely general power in its widest sense (as was the case with Mr Demirel) that is tantamount to ownership. His powers of revocation were wide and unqualified so that Mr Demirel was regarded as having rights tantamount to ownership. As a consequence of the Privy Council's decision TMSF could get the assets out of the trusts. The Privy Council didn't find it necessary to decide if it had the power to make the settlor revoke the trust but indicated that if it had been required to decide then it might well have ordered him to do so.

69. It should be noted that the Privy Council was being asked to consider what was "ownership of property"solely for the purposes of the remedy of equitable execution. Its decision that the settlor's power to revoke was tantamount to ownership for the purposes of equitable execution does <u>not</u> mean that a settlor in this situation will be treated as the owner of the assets for all purposes.

70. The Privy Council came close to saying that, at least for the purposes of debt enforcement during a settlor's lifetime, a trust which includes a right of revocation in favour of the debtor/settlor is to be treated more like a living trust of the kind recognised in the USA. Therefore while the use of a revocable trust is an effective tool for succession planning it has

[37] *Scott & Ascher on Trusts*, 5th ed (2007) volume 3, section 15.4.2

a more precarious and uncertain status during the settlor's lifetime. Such a trust is not a sham, but instead may be reversed in favour of a creditor of the settlor..

71. The Privy Council also preferred the interests of the creditor to those of the beneficiaries (who are volunteers). It also noted that, although the class of beneficiaries included the settlor, his wife, issue and further issue, the settlor did not in fact have any children so, other than his wife, no third parties were prejudiced by the revocation of the trust.

72. It is not clear yet if there is any judicial enthusiasm to use *TMSF*. How would the Guernsey court deal with an application by a judgment creditor to obtain the assets of a Guernsey trust, like that made by *TMSF*? The Cayman Island legislation referred to in the case extended the scope of English legislation to the Cayman Islands. Such English legislation has not been extended to Guernsey so a simple like for like copying of *TMSF* would not happen. Could sections of the English Insolvency Act, which have been extended to Guernsey, be used instead to achieve a similar result? In principle it seems that it could be however would the 'firewall' provisions contained in section 14 TGL 2007 operate so as to prevent the undermining of the trust? Paul Buckle will look to answer these questions in his talk.

HHH EBT

73. A rare Channel Islands' decision on the obligations of settlors with reserved powers is the Jersey case of *HHH EBT*. The corporate settlor had created an employee benefit trust for its employees and had appointed an independent trustee company as trustee. The settlor had retained the power to appoint a protector, the power to appoint and remove trustees and, with the consent of the trustee, to amend the administrative provisions of the trust. The applicant, B, was a former employee of the settlor and had a sub-trust under the trust. B was unhappy with the trustee's and settlor's actions and his relationship with them deteriorated to the point where he brought proceedings against both the trustee and the settlor for disclosure of trust documents. It was clear that B was considering launching hostile litigation against the settlor and the trustee.

74. The Jersey court was asked to decide if, and to what extent, the settlor was under any obligation to make disclosure to B.

75. The parties accepted that the settlor's powers to appoint a protector and remove and appoint a trustee were fiduciary. The settlor argued that its power to amend the administrative terms of the trust, which required the trustee's consent, was not fiduciary. The court held that the settlor's power of amendment should be categorised as a "limited

power" and in deciding whether to propose amendments, the settlor was entitled to consider its own interests as employer provided that it also considered the reasonable expectations of the beneficiaries. The court noted that the trustee was under a fiduciary duty in giving its consent, and therefore would be concerned with the beneficiaries' interests.

76. While Article 29 of the Trusts (Jersey) Law 1984 conferred a right on beneficiaries to receive information from trustees the court noted that the definition of 'trustee' could not be extended to cover a settlor. In this case in no sense was the settlor a trustee despite its reservation of powers. We suggest that the Guernsey court would have come to the same conclusion on the basis of section 26 TGL 2007. The Jersey court noted that the court in Guernsey had applied the principles in *Schmit v Rosewood*[38] so as to be able to exercise the court's inherent jurisdiction to order disclosure from a protector. The Jersey court approved of this approach and accepted that if it is to properly supervise a trust then it needs to be able to supervise not just the trustee but anyone else having a fiduciary role within the trust; and this included a settlor with fiduciary powers. Alternatively it concluded that the Jersey court has the ability to make orders in relation to any person that 'has a connection to the trust'[39] (a similar provision is found in section 69(2)(iii) TGL 2007) and noted that it could have made an order on that basis.

77. The court decided that even though the settlor possessed information concerning the trust that did not of itself justify disclosure. However as the settlor had fiduciary obligations in relation to its reserved powers this gave rise to an obligation to account to beneficiaries in relation to those powers. Thus, on the basis that a trustee is in office and will be disclosing the documents, the extent of the settlor's obligation to disclose is restricted to the exercise of its fiduciary powers. The court commented that it would be undesirable if the reservation of powers by a settlor exposed them to the same onerous and wide disclosure obligations as are placed upon trustees. Consequently the settlor only had to account to B in relation to its reserved fiduciary powers and did not have to disclose any other documents that did not relate to those fiduciary powers.

78. The court also noted that disclosure of the same types of documentation was sought from the trustee as from the settlor and that the trustee would be the more usual source of such documentation. There was no good reason to require the settlor to provide that

[38] *Bathurst (Countess) v Kleinwort Benson (Channel Islands) Trustees Ltd* Guernsey Judgment 38/2004
[39] Article 51(2)(a)(iii) Trusts (Jersey) Law 1984

information where the beneficiary could, and should, seek the information from the trustee in the usual way. To order otherwise would be a waste of effort and costs.

79. B had also argued that, as the settlor had a power to remove the trustee, the settlor was under a duty to continuously monitor the activities of the trustee. The court disagreed and said that the obligation on the settlor was only to consider exercising its power of removal if it became aware of facts which necessitated such a change. Where the settlor had decided not to remove the trustee then the beneficiary was not entitled to disclosure of the reasons why the settlor had reached that decision.

What do these cases mean for settlors?

80. As we do not know quite how the Guernsey court would deal with a *North Shore*, *Parissis*, *TMSF* or *HHH EBT* type application we cannot give any conclusive thoughts but we can indicate what will now be areas of vulnerability for a settlor of a reserved powers trust.

81. Where there is potential litigation against a settlor then the claimant may very well seek a freezing injunction against the defendant settlor. When the freezing injunction is sought against a settlor who has a power of revocation, then should that settlor now be required to disclose the existence and value of the trust on the *TMSF* basis that his rights are tantamount to ownership? Similarly by virtue of keeping for himself the reserved powers this could expose the settlor to the argument that he has sufficient control over the trust documents held by the trustees to require him to give pre-trial disclosure of those trust documents (assuming that the trust or the assets are relevant to the litigation).

82. Any settlor with reserved powers who is involved with a divorce (particularly a divorce in the English courts) must expect the courts to closely examine the trust, and most particularly the likelihood of trust assets being made available to the settlor. The unfettered power of revocation over trust assets would surely be seen as an easy source of financial resources. The courts have already shown themselves willing to encourage trustees to make appointments to a wife[40] who is already a beneficiary so it is not difficult to foresee the courts embracing a *TMSF* style approach where the spouse with an unfettered power of revocation has easy access to the trust assets.

83. If the courts can deal with a settlor's powers against his will (as was the case in *TMSF*) might they also grant injunctions prior to any final judgment? It would be useful to a pursuing

[40] assuming the settlor is the husband

creditor if the settlor could be prevented from exercising any powers which might lead to the reduction in the value of the trust fund.

84. While *TMSF* focused only on the power of revocation the question immediately arises as to what other powers reserved to the settlor might similarly be within equitable reach. The power of appointment or the power to add beneficiaries would be of interest to a creditor if he could get himself added as a beneficiary and then assets appointed to him.

85. Where a settlor reserves to himself powers that are fiduciary in nature then he will be obliged to account to beneficiaries in relation to the exercise of those powers. Theoretically this could mean that on the basis of those fiduciary powers the settlor could be ordered to disclose trust documents to a beneficiary, but where the same application is being made in respect of a trustee then it is likely the disclosure obligation will remain with the trustee only.

Advising settlors in light of North Shore, Parissis, TMSF and HHH EBT

86. If a settlor has no issues with solvency and so is unlikely to face any creditor claims or is not going to be involved in divorce proceedings then the risks of a reserved powers trust are to a great degree reduced. However life being as it is, such things are rarely certain and a solvent and happily married settlor may not always be so.

87. The solutions to the above problems are not likely to be greeted with much cheer by a settlor who wants (or has) a reserved powers trust as the answers lie in cutting away at what attracted them to this type of trust in the first place; reducing the level of control and so making the assets less 'their' assets.

88. One of the key points focussed on in *TMSF* was that the settlor's power of revocation was not fiduciary. This enabled it to be delegated. Therefore making the settlor's powers fiduciary will certainly help reduce the scope for claims that the assets are the settlor's own and under his control. As noted earlier in this paper, section 15 TGL 2007 requires that if such a power is to be fiduciary then this needs to be expressly set out in the trust instrument. However it is hard to see how a power of revocation could ever be exercised in a fiduciary capacity.

89. Instead of reserving the powers to the settlor they could be reserved to a protector. The settlor could then adopt the more traditional stance of falling away from the trust after it had been created. However the reality of the situation would be examined so there is no

point in a settlor appointing his best mate or a puppet protector who will simply follow the settlor's requests. Again the protector's powers ought to be made subject to fiduciary duties and this will reduce the scope of the argument that the settlor is really still the controller behind the protector.

90. However where the reserved powers are declared to be fiduciary then the settlor may find himself in the position where he has to account to a beneficiary in respect of the exercise, or failure to exercise, those powers. The settlor does not need to shadow a trustee's every move but if he becomes aware of facts which suggest that his fiduciary powers should be used then the settlor must actively consider doing so. Further he may find that he has to disclose to a beneficiary any trust documentation that he holds in connection with exercising those reserved powers of a fiduciary nature.

91. Alternatively, the trust deed could limit the types of the powers reserved to the settlor with the settlor retaining only limited or fiduciary powers rather than non-fiduciary powers where he could benefit himself. Where the settlor retains the power to direct investments then those powers should be narrowed and should include a provision prohibiting self-dealing by the settlor. This would prevent him from using his powers so as to direct the trustees to, for example, make an uncommercial loan to him and would prevent him from requiring the trustees to buy his assets. Anything where a settlor could be involved with the disposal of the trust fund should be carefully considered if there is scope for the settlor to exercise his powers so as to benefit himself.

92. As an alternative to retaining the dynamic power itself, the settlor might be better off with a right of veto. The settlor could not force anything to happen, so could not be regarded as having retained control of the assets, however he could prevent things happening of which he disapproved.

93. Where a settlor has powers under an already existing reserved powers trust then thought should be given to releasing the settlor's powers. But this needs to be done with care so as to avoid later challenges to the release from any creditors or trustees in bankruptcy.

This note is only intended to give a summary and general overview of this area of law. It is not intended to be, nor does it constitute, legal advice and should not be relied upon as doing so. If you would like legal advice or more information in relation to the matters covered in this note or generally in relation to trust issues, please contact Paul Buckle, Vicky Pratt, Kim Paiva or Ewan Mackay on +44 (0)1481 723723, or by email paul.buckle@aohall.com, victoria.pratt@aohall.com; kim.paiva@aohall.com and ewan.mackay@aohall.com. Full contact details, are listed on our website at www.aohall.com.

Appendix 1

Section 15 of the Trusts (Guernsey) Law, 2007

Reservation or grant of certain powers does not invalidate trust.

15. (1) A trust is not invalidated by the reservation or grant by the settlor (whether to the settlor or to any other person) of all or any of the following powers or interests –

(a) a power to revoke, vary or amend the terms of the trust or any trusts or functions arising thereunder, in whole or in part,

(b) a power to advance, appoint, pay or apply the income or capital of the trust property or to give directions for the making of any such advancement, appointment, payment or application,

(c) a power to act as, or give directions as to the appointment or removal of, a director or other officer of any corporation wholly or partly owned as trust property,

(d) a power to give directions to the trustee in connection with the purchase, retention, sale, management, lending or charging of the trust property or the exercise of any function arising in respect of such property,

(e) a power to appoint or remove any trustee, enforcer, trust official or beneficiary,

(f) a power to appoint or remove any investment manager or investment adviser or any other professional person acting in relation to the affairs of the trust or holding any trust property,

(g) a power to change the proper law of the trust or the forum for the administration of the trust,

(h) a power to restrict the exercise of any function of a trustee by requiring that it may only be exercised with the consent of the settlor or any other person identified in the terms of the trust,

(i) a beneficial interest in the trust property.

(2) The reservation, grant or exercise of a power or interest referred to in subsection (1) does not –

(a) constitute the holder of the power or interest a trustee,

(b) subject to the terms of the trust, impose any fiduciary duty on the holder, or

(c) of itself render any trustee liable in respect of any loss to the trust property.

(3) A trustee who acts in compliance with the valid exercise of any power referred to in subsection (1) does not, by reason only of such compliance, act in breach of trust.

Appendix 2

Examples for discussion

Example1

A trustee, T is the sole trustee of a Guernsey law trust, which includes a term that "*The trustee shall on receiving a written request from the settlor to do so, acquire any shares in a quoted company selected by the settlor to be an investment of the Trust*." The settlor, S, writes to T asking T to purchase shares in company C, which T duly does relying on a valuation provided by S to substantiate the purchase price. Over the next two years, the shares in C steadily decline in value. Is T able to continue to hold the shares in C with immunity?

Example 2

A trustee, T, is the sole trustee of a Guernsey law trust, which includes a term that "*The trustee shall on receiving a written request from the settlor to do so, acquire any shares in a quoted company selected by the settlor to be an investment of the Trust."* The settlor, S, writes to T asking T to purchase shares in company N, Noddy Co, which T duly does, but without obtaining any valuation to substantiate the purchase price. T pays £100,000 for N, but it later emerges that its value was no more than £50,000, and over the next two years the shares in N continue to decline in value. Is T liable?

Example 3

A trustee, T, is the sole trustee of a Guernsey law trust, which includes a term that "*The trustee shall on receiving a written request from the settlor to do so, acquire and dispose of any shares in a quoted company selected by the settlor to be an investment of the Trust.*" The settlor, S, writes to T asking T to purchase shares in company X, which T duly does, obtaining T's own valuation to substantiate the purchase price. Later, S requests T to sell the shares in X, but at a time when the investment manager appointed by T advises T it should under no circumstances by selling. T takes the view that it should comply with S's direction and sells, but the manager's advice proves correct, as three months after the sale, the shares have trebled in value. Is T liable?