

The Future of the Anglo-Saxon Trust in the Age of Transparency

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The Development of the Anglo-Saxon Trust from Ye Olde Worlde to Brave New World

We have come a very, very, very long way from the original simple Anglo-Saxon trust concept. This involved a settlor transferring the intended trust property to a trustee for fixed beneficial interests, classically, for B for life, remainder in tail for B's eldest son. The trust property would be land occupied by B and, perhaps, extend to leasehold land producing rent that, unlike interest, did not involve problems with the usury laws. Later, when there were Government and other securities to invest in, the trustee's powers of investment were restricted to very safe investments. The settlor dropped out of the picture and the trustee-beneficiary relationship was the be-all and end-all.

Nowadays, the settlor-trustee relationship is at the heart of an exceptionally flexible discretionary trust, necessitating input from the settlor via exercising powers reserved to him and via a letter of wishes provided by him to guide the trustee and any protector. The protector is a person upon whom powers are conferred by a trust instrument when considered preferable for such a person, rather than the settlor, to have powers that otherwise would have been reserved to the settlor, with the advantage that such powers can continue to be exercised after the settlor's death. Offshore legislation enables there also to be a person designated as an "enforcer" or "supervisor" so that non-charitable private purpose trusts or mixed people and purpose trusts can be created without the need for any beneficiaries' rights to anchor the trust as an enforceable obligation. This enables a settlor or his controlled company to be not only a trustee or protector, but also an enforcer, while shares in a corporate trustee, protector or enforcer may be held by trustees of a purpose trust, or better still, a foundation.

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These flexible discretionary trusts, with powers of accumulation of income during a lengthy trust period, commence life with nominal property before the addition of significantly valuable assets. The trustees are conferred with exceptionally wide administrative powers of investment or application of capital and exceptionally wide distributive powers of appointment of income and/or capital amongst a wide range of potential beneficiaries. Indeed, black-hole trusts can be created e.g. on trust to accumulate income for 150 years and then to distribute the capital to the “Beneficiaries” defined as “the individual who shall have won the gold medal in the men’s 100 metres race at the Olympic Games held last before expiry of the 150 years (or his heirs) and such other persons then alive as the Trustee shall have selected from time to time in its absolute discretion.” The Trustee will be a corporate body with extensive powers to appoint income and capital at any time to any persons appointed by it to be Beneficiaries or to trustees on discretionary trusts for such Beneficiaries and their spouses, cohabitants and relatives. The Trustee will have power to remove any person earlier appointed to be a Beneficiary and may have power to acquire any assets, whether or not of a speculative nature, and to form companies to carry on any business or hold any trust assets. The Trustee will also be exempted from any liability for a breach of trust unless it was a dishonest breach. The Trustee will have power to replace itself with a trustee in another jurisdiction and to change the governing law of the trust to such jurisdiction.

The settlor can reserve to himself a wide range of powers e.g. to replace the Trustee with a new trustee, to revoke the trust wholly or partly, to act as discretionary portfolio manager, to act as managing director of a company owned as trust property by the Trustee, to appoint income or capital to Beneficiaries or to persons he appoints to be Beneficiaries, to remove persons from the class of Beneficiaries, to bring forward the date of expiry of the Trust Period, to amend the administrative or distributive provisions of the trust instrument, to withhold consent to the exercise of powers of the Trustee, to change the law governing the trust or the accounting currency of the trust. He can also confer such powers as he sees fit (other than a power of revocation) on a “Protector” instead of himself, but only after his death where those powers were exclusively reserved to himself in his lifetime. In case of duress perceived by the Trustee or Protector to be exercised

against the settlor in his home jurisdiction, the Trustee or Protector will be authorised to ignore any communication on behalf of the settlor. Often trust assets will be held by a custodian outside the Trustee's jurisdiction so that in case of duress perceived by the Protector to be exercised against the Trustee, the Protector can replace the Trustee with a new trustee resident outside the Trustee's jurisdiction without the need for the involvement of the replaced trustee.

Beneficiaries, who only have hopes that discretionary powers of appointment will, perhaps, from time to time be exercised in their favour, need to keep on good terms with the Trustee and can be deterred from taking legal action by a "no contest" clause in the trust instrument under which they forfeit their interest if they challenge the validity of the trust or the Trustee's conduct without having probable cause. Moreover, they can have great difficulties trying to find out whether or not the Trustee may have been guilty of a breach of trust. The Trustee's disclosure to a very limited number of Beneficiaries may be all that is required - or to an enforcer in the case of a private purpose trust benefiting persons.

Perpetuities and accumulations legislation in offshore States and in some "onshore" States has greatly extended the life of trusts by permitting trust periods of 150, 250, or 300 years or, even, unlimited trust periods. Other legislation has provided greater protection than permitted under the English traditional law of trusts, providing so-called "firewalls" against adverse claims. Thus, it has become more difficult to set aside gifts of assets into trusts that prejudice creditors' rights against the donor-settlor, requiring at the most extreme a creditor to bring the claim within one year of the gift and prove the object of prejudicing creditors beyond reasonable doubt. Complex legislation may also protect trust assets from attacks (i) by heirs of deceased settlors who claim that trustees need to make payments to them out of the trust funds to make up the amounts of their forced heirship entitlement, (ii) by settlors' spouses who claim community of property rights in respect of trust assets and (iii) by settlors' divorcing spouses who claim financial relief out of trust assets.

The Brave Bold New World Blitzed and Shell-shocked

The almost incredible flexibility of the private confidential trust concept, buttressed by offshore legislation, afforded colossal scope not just for avoiding the claims of creditors, heirs, spouses and tax authorities but also for exploitation by money-launderers and funders of criminal and terrorist activities. This has led to extensive, intrusive transparency requirements as to sources of trust property and as to the distribution of such property for beneficiaries or to further purposes. The intention is drastically to undermine and reduce crime and terrorism by attacking the money-laundered proceeds of crime, and to bolster tax receipts by attacking the proceeds of tax evasion and by combating unacceptable tax avoidance. This has been achieved by wide-ranging due diligence and reporting requirements generated by the OECD, the FATF, the G8, the G20, and the EU and recently by the USA's FATCA and the UK's son of FATCA², though this is to be replaced in 2017 by a Common Reporting Standard for Automatic Exchange of Financial Account Information ("CRS") that many offshore jurisdictions have agreed to adopt.

A Competent Authority Agreement ("CAA") is needed to implement the CRS and, no doubt, offshore jurisdictions will be careful in concluding such Agreement to check that data protection is satisfactory, after the two competent authorities have submitted to each other details of data transmission (including encryption) and of safeguards for personal data protection. For protection to be satisfactory it will need to be confirmed that adequate measures are in place to ensure full confidentiality except for restricted proper use by the relevant authority. This reciprocal approach is better than having automatic exchange of information under a Multilateral Competent Authority Agreement activating the OECD Multilateral Convention on Mutual Administrative Assistance in Tax matters.

² Comprising Inter Governmental Agreements with British Overseas Territories and the International Tax Compliance (Crown Dependencies and Gibraltar) Regulations 2014

Reality Checkpoint

Civil law countries have always been suspicious of the use of trusts, but have become increasingly suspicious of the exceptionally flexible trusts outlined above. As long ago as 1982 when I attended the first session in The Hague relating to the Trusts Convention, a civilian delegate at the “tour de table” presumed that many trusts were “bad trusts” as if trust lawyers operated under the slogan “Helping rogues be rogues”. He submitted that, somehow, the Convention should be restricted to “good trusts”. As it happens, the extensive transparency requirements mentioned above are designed to restrict trusts to “good trusts”, and it is notable that STEP’s new branded function is “Advising families across generations.”

This neatly encapsulates STEP’s role. There is a great need for the good management of a family’s wealth with the influence and happiness that that brings via the greater opportunities for family members. Family members also need protection if they happen to be spendthrifts, addicts, or severely mentally or physically handicapped, while with increasing longevity senile dementia is more of a possibility than before. It makes particular sense that once the patriarch or matriarch has transferred assets to trustees without doing this to avoid known creditors’ claims, then the assets are protected so far as practicable thereafter for the good of the family, regardless of family members’ debts or bankruptcies or divorces or forced heirship claims. Moreover, any need for a grant of probate on the death of the settlor is avoided in respect of property settled in the settlor’s lifetime. In some cases, but not so many nowadays, alleviation of tax can be significant, especially taking advantage of double tax conventions. On the other hand, some countries, like Denmark, fearful of the trust, deter its use by continuing to tax the resident settlor on the income of trust assets and by having tougher inheritance tax rates on heirs than if they had inherited assets directly.

In the absence of such strict tax deterrence, dealing with succession to a family business or the vast wealth generated by its sale is a particularly worthwhile function of a flexible trust, especially in keeping the business or the wealth together rather than having its ownership increasingly split by forced heirship claims over three or four generations,

Even in forced heirship jurisdictions there is growing acceptance that once forced heirs receive reasonable provision there ought not to be any need for them to inherit vast amounts that could de-rail their lives and lead to a short, selfish, “fast” life surrounded by grasping acquaintances.

Trusts may also protect assets from direct attack by divorcing spouses seeking financial relief in respect of a spouse beneficially interested under a foreign trust, especially where the claimant is in a claimant- friendly divorce jurisdiction, not contemplated at the time of the marriage. There can, however, be no protection from an indirect attack by a spouse where the court has found that the foreign trustees would be likely to provide the other spouse with a sum of \$x,000 if so requested and so treats this as an available resource of the other spouse in ordering significant financial relief against him³. At the other spouse’s request, the trustees will then transfer trust assets to that spouse for the upkeep of a reasonable standard of living, though normally applying to the local trust court for approval to protect themselves from possible claims by disgruntled beneficiaries.

Formerly, the confidential privacy afforded by an offshore trust could provide some protection for a settlor and his family against expropriation of property by his home government and against the possibility of kidnap attempts on family members. The latter may still be the case if financial data are duly kept confidentially secure, but the former position may be precarious. This will especially be the case if underlying trust assets are in the home jurisdiction, though even foreign assets may be repatriated by trustees taking account of physical pressure brought to bear upon the settlor, perhaps, rotting in a local jail. Little can be done in such extreme cases.

So far, the focus has been on dynastic family trusts, but vast funds are held on charitable trusts, while commercial and financial needs and expanding international economies have led trusts to be used in a remarkable number of scenarios. After all, the trust fund is a ring-fenced fund protected against the insolvency of the trustee and further

³ *Whaley v Whaley*[2011] EWCA Civ 617; *Kan Lai Kwan v Poon Lok Otto* [2014] HKFCA 65

protected by beneficiaries' proprietary rights in the traced product of trust property. The beneficial interests in property owned by the trustee can be "sliced and diced" as required by a variety of circumstances. Thus colossal amounts of tangible and intangible assets are held and will continue to be held for commercial or financial purposes e.g. collective investment schemes, pension trusts, employee share ownership trusts, custodian trusts in the securities markets, securitisation trusts, syndicated loan trusts, subordination trusts, trust accounts of client monies, retention funds in construction contracts, and sinking fund trusts to build up sums needed for a variety of purposes. These uses of trusts will continue to grow unaffected in the new age of transparency. It is dynastic family trusts that are most affected in this new age.

What can be done to encourage trusts to sustain and develop family wealth?

The trustee-settlor-beneficiary relations

As STEP recognises for its members, the key function of trusts is to sustain and develop family wealth across the family generations, so that families do not go from rags to riches to rags in three generations. It should not be too difficult to persuade entrepreneurs with a valuable business or investment portfolio representing the proceeds of sale of such a business that they ought to create a very flexible family discretionary trust, especially if a trustee has good testimonials from a satisfied settlor or his happy beneficiaries.

In offshore jurisdictions there are possibilities for a settlor to be closely involved as an enforcer or as running a private company that is trustee or a protector, while he can reserve extensive powers to himself, but he needs to ensure that he has not created a sham trust whereby he remains beneficial owner of the trust property. If he wants to keep the discretionary beneficiaries in the dark as much as possible, at least during his lifetime, there is much scope for this in most offshore jurisdictions and some scope even under a cleverly crafted English trust. The settlor may feel it right to restrict rights to information to beneficiaries over 25 years' old or prevent a beneficiary who has a parent who is a beneficiary from having rights to information, trusting the parent to act in the adult child's best interests in deciding how much information to pass on. It is the settlor's call but he

should, however, be advised how helpful it can be to keep the beneficiaries well informed of trust matters and to try to ensure that they appreciate their responsibilities to their family and society: “much is demanded of those to whom much has been given”. Where mega-wealth is involved, sub-trusts or separate trusts can be set up for branches of a family, so restricting beneficiaries’ rights to information to their own branch trusts, while a family office for all of them can be economically worthwhile and a cohesive factor.

A settlor’s letter of wishes plays a most significant role so most of his time in setting up a trust will be concerned with the content of such a letter. He may well arrange for the trustee to set up a family council as detailed in the letter to keep family members informed and to keep them happy by having an input in voting on some trust matters. They need to take pride in the family “brand” developing its wealth and influence for family and for philanthropic purposes.

Trust companies then need continuity of senior officials to develop a good relationship with the settlor and the beneficiaries, taking a paternalistic interest in the beneficiaries and providing efficient prompt services. Such officials need to be supported by well-trained staff.

Attractive useful trust laws

To attract new business or import trusts from other States, a State needs to have attractive laws enabling a flexible discretionary trust structure or sharia compliant trusts to be created by persons of whatever nationality and wherever resident, enabling problems in the running of the trust to be resolved efficiently and providing protection against unjustifiable attacks on the integrity of the trust fund. A State’s laws, however, have territorial restrictions and it must be recognised that if trust assets, like USA dollars held in a correspondent New York bank, or underlying assets, like assets owned by companies owned by trustees, are situated outside that State, then if a creditor, heir or spouse can invoke the jurisdiction of the foreign lex situs and freeze the assets there to await the outcome of a claim, the foreign court may ultimately ignore the trust State’s law.

The old *Hastings-Bass* rule was very attractive and useful for trustees and beneficiaries, especially where trustees had overlooked unfortunate tax consequences of the exercise of their equitable discretionary powers of appointment or advancement. The trustees could apply to the court to set aside their exercise of the power on the basis that they had done something which they would not have done but for ignoring a relevant consideration or taking account of an irrelevant consideration. This was so whether this was due to their own breach of duty in not properly informing themselves before coming to their decision or due to their duly qualified adviser having given them erroneous advice. In *Futter v HMRC*⁴, however, in dealing with cases involving the exercise of equitable distributive powers, the Supreme Court restricted the so-called *Hastings-Bass* rule to cases where the trustees' exercise of their discretionary powers had been in breach of their equitable duty.

Jersey in its Trusts (Amendment No 6) (Jersey) Law 2013 and Bermuda in its Trustee Amendment Act 2014, however, have enacted legislation to preserve the old *Hastings-Bass* rule so that it covers cases, whether the relevant event occurred before or after *Futter*, where the trustees duly took qualified advice but that advice was erroneous. They also made clear that the rule could cover trustee's exercises of legal powers in their internal dealings with underlying companies so as to borrow from such companies or procure the declaration of dividends from such companies.⁵ Indeed, they extended the rule to the exercise of legal powers of management and investment in relation to external third parties but not so that it can prejudice a purchaser for value in good faith without notice, so the consent of the relevant third party will normally be needed.⁶

Both Jersey and Bermuda, however, have confined their legislation to the case where a trustee "would not" have done what he did but for ignoring a relevant consideration or taking account of an irrelevant consideration. In *Futter* the Supreme

⁴ [2013] UKSC 26

⁵ *Re Howe Family Trust No 1 Trust* [2007] JRC 248, *Re Ta-Ming Wang Trust* [2010] CILR 541

⁶ *Cp Re Winton Investment Trust* [2007] JRC 206

Court refused to lay down when “would not” or “might not” ought to be the appropriate test. Behind this refusal by the court was consideration for the position of pension trustees in dealing with a beneficiary who had earned his rights to an early ill-health or disablement pension or with his alleged “cohabitant” with rights as such. To set aside a rejection of a claim by an employee or his cohabitant, should the claimant only need to establish that the trustees *might not* have refused the claim but for a failure to investigate their claims further? If such a pensions trust claim arises in Jersey or Bermuda will the courts hold the “would not” legislation to be comprehensive or might they hold that outside the legislation there remains scope for a “might not” test? Even then, will the rejection of the claim be set aside only when the trustees had acted in breach of their duty to be adequately informed or also when a duly qualified adviser delegate was responsible for the inadequate investigation e.g. as to the employee’s ill-health or disablement or the status of cohabitant of the employee before his death?

Jersey’s legislation also deals with when dispositions of settlors or trustees or other power-holders (whether or not subject to fiduciary duties) may be set aside for mistake. The Supreme Court in *Pitt v HMRC* had broadened the jurisdiction to set dispositions aside for mistake of law or fact to cover not just mistaken effects but also mistaken consequences where they are so grave as to make it unjust or unconscionable to refuse relief. It did, however, state⁷ that relief will not be granted to a disponent where “the circumstances are such as to show that he deliberately ran the risk, or must be taken to have run the risk, of being wrong.” A disponent cannot try and try again to avoid tax, running the risk of being wrong until he is successful. Nevertheless, offshore judges have been unimpressed by the UK’s tenderness for the Revenue’s interests. “Leviathan can look after itself” as a leading Jersey Judge stated⁸. Thus, it seems likely that offshore judges in applying Jersey’s legislation or the broad *Pitt* jurisdiction will in the case of complex tax-avoidance arrangements ignore any running of the risk arguments⁹ and hold that the mistake did not prevent the court setting aside the arrangements.

⁷ [2013] UKSC 26 at [114]

⁸ *Re R and the S Settlement* [2013] JRC 117 at [39]

⁹ E.g. *Re Representation of Boyd, Re the Strathmullan Trust* [2014] JRC 056

An important restriction in the law of mistake is that when the voidable disposition is set aside the property reverts to the mistaken settlor or trustee, who then has to start afresh in dealing with the property e.g. for the seven year period for potentially exempt transfers under the Inheritance Tax Act. Rectification has the advantage that the relevant instrument as rectified is retrospectively treated as effective from the date of the instrument, but the focus of English law is upon what the maker of the instrument intended to be the effective meaning of particular words so that the instrument is rectified to reflect the intended meaning at the date of execution of the instrument¹⁰. If the instrument as so rectified reflects a mistake as to consequences of such grave import that it would be unjust or unconscionable to refuse relief then nothing can be done but set aside the instrument to enable a new disposition to be made.

For future offshore reform, inspiration and assistance may be found in developing sections in the American Uniform Trust Code. Section 415 is headed “Reformation to correct mistakes” and states as follows. “The court may reform the terms of a trust, even if unambiguous, to conform to the settlor’s intention if it is proved by clear and convincing evidence that both the settlor’s intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.” Perhaps there might be added “The court may provide that the reform has retroactive effect” as found in the next section.

Section 416, headed “Modification to achieve settlor’s tax objectives”, states as follows. “To achieve the settlor’s tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor’s probable intention. The court may provide that the modification has retroactive effect.” This could be extended in offshore legislation to achieving the *trustee’s* objectives and modifying the terms of an appointment or advancement by the trustee.

A particularly useful law which other offshore jurisdictions might enact in clearer form is s 47 of the Bermuda Trustee Act 1975. It states “(1) Where any transaction

¹⁰ *Futter v HMRC* [2013] UKSC 26 at [131], *Giles v RNIB* [2014] EWHC 1373 (Ch) at [32]

affecting or concerning any property vested in trustees, is in the opinion of the court expedient, but the same cannot be affected by reason of the absence of any power for that purpose vested in the trustees by the instrument creating the trust, or by any provision of the law, the court may by order confer upon the trustees, whether generally or in any particular instance, the necessary power for the purpose, on such terms and subject to such provisions and conditions, if any, as the court may think fit..." Further, by subsection (4) "In this section, 'transaction' includes any sale, exchange, assurance, grant, lease, partition, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract or option, and any investment or application of capital, and any compromise or other dealing or arrangement."

The wording is an amalgam of the English Settled Land Act 1925 s 64¹¹ and Trustee Act 1925 s 57 so that unlike s 57, s 47 enables the Bermudian court¹² to vary beneficial provisions of a trust without the consent of an affected beneficiary and to grant powers of amendment to trustees without the need for any beneficiaries' consents. It also seems broad enough for the court to confer on a validly appointed trustee a power to validate the acts of invalidly appointed trustees (and so trustees de son tort) and to release them from any liability for such acts if they would not have amounted to breaches of trust if carried out by validly appointed trustees.

Indeed, Art 51 of the Trusts Jersey Law has been liberally construed¹³ as enabling ratification of acts of invalidly appointed trustees to "save the trust from the havoc that would be caused by any attempt to unscramble what was purportedly done by the trustee de son tort." A trustee may apply to the court for directions concerning how it should act in any matter concerning the trust "and the court may make such order, if any, as it thinks fit", in particular, "an order concerning (i)... the administration of a trust and (ii) the trustee of any trust, including an order relating to the exercise of any power or discretion or duty of the trustee, the appointment or removal of a trustee, the remuneration of a trustee."

¹¹ *Hambro v Duke of Marlborough* [1994] Ch 158

¹² See e.g., *GH and IJ v KL* [2010] Bda LR 86

¹³ *In the Matter of the D Retirement Benefit Trust* [2011] JRC 148

Offshore legislatures should thus consider enacting clearer legislation to help resolve problems arising from defective administration of trusts. Keeping applications to the court as simple and inexpensive as possible will also attract settlors.

In the case of breach of trust cases, to help resolve disputes it seems likely that more jurisdictions¹⁴ will enact legislation to enable the arbitration of trust disputes, with particular provisions to ensure that minors and unborn or unascertained beneficiaries will be bound by the arbitration award or even an agreement resulting from mediation.

Indeed, to encourage the migration of trusts to an offshore State to be governed by the attractive law of that State, it helps to have retroactive legislation, like that, for example, in Cayman¹⁵ and Jersey¹⁶, that requires many issues in respect of trusts for the time being governed by Cayman or Jersey law to be determined by domestic law without any reference to foreign law, while having other extensive “firewall protection” preventing enforcement of types of foreign judgments. This is fine so long as it is not possible for some third party to be able to attack any trust property or underlying trust property located in a mainland jurisdiction whose law would favour such third party.

An efficient legal system with reliable judges

Finally, where the jurisdiction of a State’s courts is invoked, whether for disciplinary or helpful paternalistic reasons, the case needs to be heard promptly and by a reliable judge, either having a sound knowledge of trust law or a fine analytical brain so that he or she can properly assess the strength of submissions of persuasive experienced counsel. This may require higher salaries to attract to a specialist court local Queen’s or Senior Counsel or such Counsel from elsewhere in the Commonwealth.

¹⁴ See Trusts (Guernsey) Law 2007 s 63, s 91A,B & C of Bahamas Trustee Act 1998 inserted by Trustee Amendment Act 2011

¹⁵ Trusts 2011 Revision s 90, *Re Goldentrust, Megerisi v Protec* Grand court No FSD 79 of 2012, 10 Dec 2012 (unrectifiable Liechtenstein trust became rectifiable after governing law changed to Cayman law)

¹⁶ S. 9 Trusts (Jersey) Law 1984 as amended by Trusts (Jersey) (Amendment No 5) Act 2012

Conclusion

In the light of a growing global economy, more wealth should be generated by entrepreneurs and investors that will need to be set aside for the benefit of successive family generations¹⁷. While there may occasionally be a problem over having reliable judges, though this could be avoided if arbitration could be used to resolve disputes, there are good reasons to believe that there is scope for sustainable development of trust business for family generations. This requires the development of good relations between the trustees, the settlor and the beneficiaries, the provision of efficient services from a well-trained staff and the development of attractive useful trust laws, firewall protection having already developed as far as it can properly be taken (and sometimes beyond, as in the Cook Islands). The extensive requirements for financial transparency and for diligently knowing settlors and beneficiaries should lead to the improved running of trusts, concentrating on producing income and gains falling to be duly taxed on appropriate persons and then to be used well to develop the wealth, influence and happiness of the settlor's well-educated family over many generations. There is a silver lining in the cloudy skies over offshore jurisdictions.

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¹⁷ For the huge significance of family businesses see 'Business in the blood', The Economist, New York, 1 Nov 2014