

TRUST PARTIES EXPLAINED

While Trusts have been in existence since medieval times, they tend to be less well understood than corporate structures and some of the terminology used can be confusing for those who are not dealing with them on a regular basis. It is fair to say that even for individuals who may have been involved with corporate structures throughout their working lives, the creation of or involvement with more than one trust is rare.

With the above in mind, this note endeavours to cast some light on the most common parties and terminologies related to a Trust.

TRUST

Starting first with what a Trust is not. A Trust is not a legal entity. Unlike a company, partnership or foundation, a Trust has no legal personality and cannot take or defend legal action itself.

A Trust is an arrangement between parties whereby a **Settlor** passes ownership and control of certain of his assets to a **Trustee** who agrees to hold them in accordance with the powers and duties set out in the **Trust Instrument** for the ultimate benefit of the **Beneficiaries**. A Trust, like a contract, creates legally binding rights and obligations.

Most trusts are created for the benefit of a person or persons, although it is also possible for trusts to be formed to fulfil a defined purpose, either charitable or noncharitable. Our separate note on Purpose Trusts explains this concept further.

A Trust is capable of being created verbally or as a result of certain actions, but is most commonly created in writing for the avoidance of future doubt.

Trusts may be fully flexible with the Trustees granted discretion to manage the Trust Fund and decide when to pass benefits to the Beneficiaries. Or they may be completely restrictive, with the Trustees bound to act in a certain specified manner, effectively acting as no more than a nominee or custodian of the assets. Between these two extremes, the Trust can incorporate a mixture of discretion and fixed terms as is deemed appropriate at the time of creation.

Finally, a Trust can be created during the lifetime of the Settlor (“inter vivos”) or following his death as a result of conditions set out in his Will.

TRUSTEE

Anyone can potentially be the Trustee of a Trust although the duties and care needed are such that great care should be taken should a non-professional trustee be considering accepting such a role. Most international financial centres will have professional fiduciary service providers (such as Guernsey Trust Company) who will undertake the duties of a Trustee.

The Trustee will become the legal owner of the assets of the Trust and the Settlor should be fully comfortable that he is giving away ownership to the Trustee and will not (subject to any retained powers afforded to him by the Trust Instrument) have any ongoing rights of ownership.

It is the Trustee who will bear the responsibility of maintaining the Trust Fund, including such matters as insuring property against damage, entering into contracts or agreements with third parties and appointing bankers, investment managers and other such service providers.

The Trustee owes a fiduciary duty to the Beneficiaries of a Trust - not to the Settlor (although it is possible for the Settlor to be a Beneficiary as well). If a Trustee does not act in good faith or in accordance with the terms of the Trust, it is the Beneficiaries who have the right of action against them.

Any trustee undertaking such activities by way of a business from Guernsey is required to hold a fiduciary license as issued by the Guernsey Financial Services Commission.

SETTLOR

A Settlor is a term used for any person who transfers (“settles”) ownership of assets to the Trustee of a Trust. A Trust can have more than one Settlor and this can be common where assets previously under joint ownership are to be settled.

So long as the Trust Instrument contains the power for the Trustees to accept further assets to be settled at a future date, additional Settlers can arise.

The Settlor will have owned the assets put into the Trust immediately beforehand and must have

the ability to transfer them freely, lawfully and without encumbrance.

The first Settlor will normally be a signatory to the Trust Instrument, although this is not an absolute requirement. A sale of an asset to a Trust for fair value does not constitute a settlement of an asset and does not constitute the selling party as a Settlor.

In the absence of any reserved powers in favour of the Settlor, once he has passed the assets to the Trustees, his role comes to an end (unless he is also a beneficiary). Under The Trusts (Guernsey) Law, 2007 there is a statutory exception in so far as the Settlor has an automatic right to request information as to the state and amount of the Trust Property at any time.

BENEFICIARIES

The Beneficiaries of a Trust are those persons whom the Settlor intends to ultimately benefit from the use or enjoyment of the Trust Fund, either by receipt of income arising from the Trust Fund or by partial or total transfer of the Trust Fund to them at a future date.

Beneficiaries are referred to in law as the “Objects” of the Trust.

Beneficiaries can be named in the original Trust Instrument either directly or by reference to a specified Class (for example “The children and remoter descendants of the Settlor”). This Class must not be too broad or difficult to define. A Class described as “any friends of the Settlor” would probably fail on the grounds of a lack of certainty as to who might fit into this Class.

In addition, if the Trust Instrument allows it, further beneficiaries can be added at a future date. This power is normally exercised by the Trustee but may require consent of the Settlor or Protector.

Beneficiaries have certain legal entitlements to information about the Trust, including a right to be informed that they are beneficiaries, to receive copies of the Trust accounts and Trust Instrument. It is possible for the Trust Instrument to restrict or fetter these rights to a certain extent, although this can be overturned by successful application to the Royal Court in the case of a Trust created under or governed by Guernsey Law.

Beneficiaries may be granted an absolute right to income or capital or the Trustees can be given full or partial discretion to apply income or capital as they deem appropriate to the circumstances of the beneficiaries as a whole.

PROTECTOR

Not all trusts have a protector. Some contain the necessary powers to appoint one but do not actually do so at the time of creation, others do not allow for one at all. Protectors are sometimes referred to under other terms including Enforcers (for Purpose Trusts), Councillors or Council Members (in cases where more than one individual is appointed).

The Protector's role is to oversee the actions of the Trustee and ensure that they act within the powers afforded them by the Trust Instrument and the Governing Law and that they do not abuse or neglect any of their duties to the Beneficiaries.

The manner and extent to which the Protector is to be involved will be stipulated within the Trust Instrument. Certain actions may be initiated by the Protector and forced upon the Trustee ("active powers") or, alternatively, he may have the power to veto certain intended actions of the Trustee by withholding his consent ("passive powers").

A Protector can be an attractive option for a Settlor who is considering creating a Trust but who has no previous relationship with the prospective trustee. In such a circumstance the existence of a Protector (who may be the Settlor himself, a trusted colleague or advisor or a family member) can bridge the gap between the Settlor and the Trustee and provide additional comfort.

EXCLUDED PARTIES

On occasion it may be necessary or beneficial to make it expressly clear that certain individuals cannot derive benefit from the Trust. This can be for fiscal reasons or to exclude persons who somehow contravene the Settlor's beliefs, whether ethical or otherwise.

Examples of exclusions for non-fiscal reasons could include religious practices, lifestyle choices or financial solvency.

If a person is named as an Excluded Person then they are unable to be given any benefit from the Trust Fund, including any use of property at less than commercial terms and receipt of non-commercial loans.

It is also possible for a Beneficiary to disclaim any future benefits from the Trust should he so wish.

TRUST INSTRUMENT

This is the original document entered into, normally by the Settlor and the original Trustee. It governs the terms under which the Trustee will act and how they must organise the Trust Fund for the beneficiaries. Typical features will include:

- Name of the Trust
- Identity of the original Trust Fund
- Who the beneficiaries are
- Details of any excluded parties
- Identity of the original Trustee
- Protector powers
- A Trustee Remuneration clause
- Indemnities given to trustees
- Procedure for changing trustee
- The legal jurisdiction of the trust
- The maximum term for which the Trust is to remain in force
- Whether the Trust is revocable or irrevocable

TRUST FUND

Quite simply, at any one time, the assets settled into and still owned by the Trust, or any replacement assets purchased and any income earned and not distributed or used to pay the Trust's expenses.

Often referred to in law as the "Corpus" of the Trust or the "Subject".

CONCLUSION

The above explanations will hopefully have demystified some of the common terminologies and parties to a Trust.

What this doesn't tell us is whether or not the creation of a trust is suitable for you or your client. Every case must be looked at in isolation and the costs weighed up against the likely benefits.

Should you wish to discuss a specific potential case or for further information on trusts in general, please contact us as below or via your normal Guernsey Trust Company or Collas Crill representative.

Martin Porter

Director

t: +44 (0)1481 700550

e: martin.porter@gtc.gg

Coryn Le Clerc

Director

t: +44 (0)1481 700550

e: coryn.leclerc@gtc.gg



▶ **guernsey trust company limited** Glatigny Court, PO Box 140, Glatigny Esplanade, St Peter Port, Guernsey GY1 4EW
 ▶ t: +44 (0)1481 700550 f: +44 (0)1481 727102 e: inbox@gtc.gg w: gtc.gg ▶ Registration number: 18666 ▶ Owned by Collas Crill