Collas Crill's Jersey trust update

November 2017

Whilst the Jersey Royal Court has been comparatively quiet for trust practitioners over the last few months, there has been plenty happening in the wider community which touches upon trust structures, with much of this activity originating from the UK.

Following the general election, the UK Government recently published the Finance Bill 2017 – 2019. The bill includes previously announced provisions amending the deemed domicile rules for income tax, and capital gains tax and inheritance tax on residential property owned indirectly by non-UK domiciled individuals, with some minor concessions reflecting the delay in the legislation becoming law. The new rules will be effective from 6 April 2017.

The EU's Fourth Anti-Money Laundering Directive was implemented in the UK on 26 June 2017 and an overview of how this can affect Jersey trustees is featured below. Also, the Criminal Finances Act 2017 came into force in September 2017 and we deal with this more fully in this update.

Closer to home, we have been busy advising trustees who find themselves subject to requests for disclosure and submission to the jurisdiction of foreign divorce courts.

To submit or not to submit, that is the question

A recent Guernsey case involved a husband and wife who were going through a divorce in England. The trust in question was a funded unapproved retirement benefits scheme (or FURBS) and the wife sought to join the trustee into the family proceedings for the purposes of disclosure. Offshore trustees can be faced with a dilemma if they are asked to take part in the overseas proceedings – or what is termed "submit to the jurisdiction" of the foreign court. The Guernsey court cited, with approval, a line of Jersey case law dealing with this topic. Here is a recent article from Dionne Gilbert and Nick Marshall looking at this complex area and examining this case.

Trusts and public policy

Recently, the Royal Court had to weigh up firmly held personal views of the settlor of two trusts and public policy considerations in the context of an application to vary two trusts. The court had to balance the policy argument (and the benefit to the trust industry) that it should enforce the views of settlors against that, that the court should reflect society's acceptance of there being no discrimination against those born out of wedlock or those of same sex sexual orientation.

A summary of the main aspects of the case can be found here.

KEY TAKEAWAY: The court was concerned with those who had beneficial interests and not those who settled them. In this case the settlor was no longer a beneficiary. Another justification for the decision was the acceptance that policy follows the law as a whole, and Jersey had reflected in its laws, for example, an acceptance of same sex relationships and the equality of illegitimate children in rights of succession. It shows that the court is alive to changes in familial relationships and changing social values.

Trust with no trustee, only a custodian

Another recent case, *In the Matter of the Representation of RBC Trustees (Guernsey) Limited [2017]JRC135*, involved an employee benefit trust with around 180 employees which was governed by the law of England and Wales of which there was a Guernsey trustee which was administered in Jersey. The trust instrument provided that a sole trustee could retire on giving 30 days' notice to the employer, an Isle of Man company, but that where it was the sole trustee, the employer had to appoint a replacement having effect from the effective date of the retirement. The trustee had certain concerns and gave notice of its retirement and also notified the beneficiaries of this. Despite this, the employer did not appoint a new trustee and was eventually struck off. The trustee obtained the advice of English counsel which indicated that the relevant clause contemplated a situation in which there may be no trustee. The former trustee continued to hold the trust assets as custodian, but could not effect any transactions in relation to employees of the employer company.

As a replacement trustee could not be found, the former trustee indicated its willingness to be reappointed, and sought the consent of the Royal Court. The court found that the former trustee was nevertheless acting as a trustee (albeit not of the trust), as it still held all the trust assets, and it therefore had jurisdiction to make an order in respect of it, namely, for the former trustee to be reappointed as trustee of the trust.

KEY TAKEAWAY: Although the facts of the case are quite specific, and the trust was one governed by the law of England and Wales, the case is noteworthy since the court has accepted that the original trust continued without a trustee to which the trustee could be reappointed.

More registers

From 26 June 2017, the UK now requires most trustees to maintain a register of “beneficial owners” in relation to the trusts which they administer. The requirement originates from the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

As far as offshore trustees are concerned, trusts will be caught by the registration/reporting requirements of the regulations if they are or become liable to pay any UK tax. This includes not only UK income tax, but also capital gains tax, inheritance tax, stamp duty land tax, and stamp duty reserve tax. Trusts can fall into, and out of, the duty to register each year depending on their tax situation. Also, if UK tax obligations are incurred only at the level of an underlying company, then the trust will not (currently) be subject to the registration/reporting requirements.

For those trusts captured by the regulations, trustees must:

(a) maintain accurate and up-to-date records of the “beneficial owners” and “potential beneficiaries” of the trust and

(b) report the relevant information to HMRC by 31 January 2018 or, if not yet subject to UK taxes, by 31 January following the first tax year in which a UK tax charge arises.

“Beneficial owners” are defined to include the settlor, trustees, beneficiaries (even if only discretionary) and any individual with control over the trust (which includes any person with power to appoint or remove trustees or power to veto trust distributions e.g. a protector). A “potential beneficiary” is someone “referred to as a potential beneficiary in a document from the settlor relating to the trust such as a letter of wishes”. If a trust has a class of beneficiaries, not all of whom have been determined, then it will not be necessary to report all of the above information. Instead, trustees will need to provide a description of the class of persons who are entitled to benefit from the trust. Trustees will also be required to provide general information on the nature of the trust. This includes its name, the date on which it was established, a statement of accounts describing the assets and their values, the country where it is resident for tax purposes, the place where it is administered and a contact address.

HMRC has set up the online Trust Registration Service (TRS) which replaces the 41G (Trust) paper form. HMRC recently announced that trusts which have incurred a liability to income tax or capital gains tax for the first time in the tax year 2016 to 2017 will need to complete registration on the TRS by no later than 5 January 2018 (extended from 5 October 2017 and subsequently 5 December 2017).

KEY TAKEAWAY: Whilst the register which HMRC will maintain will (presently) only be available to UK law enforcement agencies, and will not be available to the public, the nature of the obligations will inevitably lead to unease among certain clients, particularly the disclosure of a statement of assets. Trustees will need to assess their trusts and collate the necessary information to comply with these regulations, and a failure to comply can lead to criminal sanctions.

More offences; more procedures

Just as the UK Bribery Act 2010 had an element of extra-territoriality, so too has the Criminal Finances Act 2017, which came into force in September 2017.

The Act creates two new corporate offences:

- Failure to prevent facilitation of domestic tax evasion offences
- Failure to prevent facilitation of overseas tax evasion offences

The key elements of both offences are the same, although there are additional requirements for an overseas offence. These are:

1. Criminal tax evasion by a taxpayer
2. Criminal facilitation of tax evasion by an "*associated person*" of a “*relevant body*”
3. Failure by the relevant body to prevent its associated person from committing the criminal facilitation

A "*relevant body*" is a body corporate or partnership, wherever incorporated or formed. The definition of an "associated person" i.e. associated with the relevant body is wide and covers employees, agents and “*any other person who performs services for or on behalf of*” the relevant body.

The additional elements to be established for the offence of failure to prevent the facilitation of overseas tax evasion are:

- The relevant body must have a sufficient connection to the UK either by establishment, carrying on a part of its business in the UK or conduct constituting part of the offence taking place in the UK
- The conduct of the taxpayer and the associated person must be criminal under both UK law and the law of the jurisdiction where the tax evasion occurs.

The only defence available to a relevant body is if it can demonstrate that:

(a) It had "*such prevention procedures as it was reasonable in all the circumstances to expect*" to prevent its associated persons from committing a facilitation offence and

(b) It was "*not reasonable in all the circumstances to expect*" the company to have any prevention procedures in place.

KEY TAKEAWAY: As with the "adequate procedures" defence to the corporate offence in section 7 of the Bribery Act 2010, service providers will need to adopt a risk-based approach to managing risk including reviewing the services provided by third parties in the UK to offshore structures.

Pension reminder

Trustees of Jersey occupational pension schemes will recall the extensive changes which were made in 2015. These changes included certain transitional arrangements which will come to an end on 31 December 2017.

From 1 January 2015, each multi-jurisdictional pension scheme established in Jersey was required to seek the approval of the Comptroller for both its Jersey and non-Jersey members (under articles 131 and 131A respectively of the Income Tax (Jersey) Law 1961). Already existing schemes had automatic approval for a 2 year period for their sections dealing with non-Jersey members. After 31 December 2017, these schemes will also need to seek the approval of the Comptroller for their non-Jersey members.

KEY TAKEAWAY: Relevant trustees should review the date their multi-jurisdictional schemes were established to see whether the approval of the Comptroller is required for the non-Jersey members section.

For more information please contact:

Kellyann Ozouf

Partner // Jersey

t:+44 (0) 1534 601736 // e:kellyann.ozouf@collascrill.com