Funding the Future

Jersey's sham trusts: what Philip Ozouf denies and Mont...

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Much of the fury in Jersey as a result of the comments made by Deputy Montfort Tadier has focussed on the issue of sham trusts.

Senator Philip Ozouf says there are no sham trust in Jersey. He is simply, and straightforwardly, wrong. I made clear in 2006, right at the start of the history of this blog, that what would in English law be considered sham trusts were made legal in Jersey in that year. At the time I said it was vital to understand just what a trust is:

Trusts are an instrument normally only available in Anglo Saxon common law. Wikipedia describes a trust as:

"a relationship in which a person or entity (the trustee) holds legal title to certain property (the trust property) but is bound by a fiduciary duty to exercise that legal control for the benefit of one or more individuals or organizations (the beneficiary), who hold "beneficial" or "equitable" title"

I summarised that like this:

To put it another way, one person says to a second "please look after this asset for me, but when doing so make sure (for example) that the income goes to this third person during their life and when they die the remaining property goes to another, fourth person". All trusts are meant to incorporate this split of roles, responsibilities and entitlements. If they did not then there would be no need for a trust. The property would be owned absolutely by one person for their own benefit.

It's really important that this be understood. A person has to give property away for a trust to exist. If they don't give it away then there's a mere nominee arrangement or blind trust. They have their role (e.g. when politicians are in office and do not want, and are not able, to manage their investments without conflicts of interest) but they have no tax effect, so are not the issue we're looking at in Jersey. I stress, if an asset is not given away there is no trust.

And the trustee must be wholly independent of the person (called the settlor) who gives

the asset away. If not then the asset has, again, not been given away so there is no trust as there is no trustee.

And last, whoever benefits from the assets it cannot be the settlor, or again they haven't given them away and there is no trust.

In any case where the assets aren't given away by the settlor, or where the trustees don't really manage the assets and the settlor does, or where the settlor can benefit from the trust there's either a nominee arrangement or, if it's represented that there is a rust, then there's a sham. Now a sham is, at it's kindest, a charade. To put it another way, it can easily be a fraud and that will always be the case if something is represented to be a trust when in practice it is no such thing but the advantages of a trust are secured none the less.

That's a long introduction, but it's vital, because in 2006 Jersey made legal trusts with reserved powers. *As local law firm Appleby says:*

A reserved powers trust allows a third party to the trust (usually but not necessarily the settlor or other instigator of the trust) to retain certain powers in respect of the trust. These powers may deal with any aspect of the trust, ranging from how the trusts' assets are invested through to who may benefit from the trust and in what circumstances. Trusts of this type offer a flexibility which appeals to many prospective settlors, although in each case care will need to be taken to ensure that the reservation of any particular power or powers does not give rise to any adverse tax consequences.

Another local trust company says of the powers that may be reserved that they include:

- To add, remove or exclude beneficiaries

- To appoint or remove a trustee, enforcer or protector

- To revoke, vary or amend the terms of the trust deed

- To advance, appoint, pay or apply income or capital of the trust property or to give directions for the making of them

- To give investment directions — binding directions to the trustee in connection with the purchase, retention, sale, management, lending, pledging or charging of the trust property or the exercise of any powers or rights arising from such property

- To appoint or remove a director of any company wholly or partly owned by the trust

- To appoint or remove an investment manager or investment adviser

- To change the proper law of the trust

- To restrict the exercise of any powers or discretions of a trustee by requiring that they shall only be exercisable with the consent of the settlor or any other person as may be specified in the terms of the trust

To put it another way, there is nothing the settlor cannot do. They can do anything from revoke the trust (that is claim all the assets back, meaning that the trust is cancelled), which is not an often advertised feature but which is clearly allowed (*see here*), *to sacking all trustees, naming themselves as the beneficiary, move the trust to another jurisdiction and make all trustee decisions.*

Now as this second trust firm says, in their defence:

Reserved powers trusts are popular with settlors for whom the primary objectives of the trust are neither mitigating tax nor asset protection.

And they add:

Onshore legal and tax rules may limit the nature and extent of the powers that can be reserved by a settlor before they compromise or negate the advantages of a reserved powers trust. As such it is essential that onshore tax, legal and risk mitigation advice is taken by the settlor prior to the establishment of the trust.

But the point is, that as this wording makes clear, Jersey permits what it calls a trust something that is blatantly not a trust in the law of countries like the UK - or France, come to that. Such trusts are shams, and in my opinion when the trustees know that they can be replaced at any time, can have their discretion over-ruled and can have the beneficiaries changes at a moment's notice, or simply see the trust be moved to another jurisdiction, then whatever they wish to say of their role it seems to be that of a pure nominee, whatever is claimed. Indeed, when Trident Trust say the attractions of the arrangement are that:

The advantages of a settlor reserved powers trust include:

- The settlor is able to retain a level of control that allows him or her to provide direction in investment and administration decisions

- The settlor is able to eliminate his or her concerns over transferring full control to institutional trustees

I think it must be concluded that it is known that such arrangements disenfranchise the trustee.

Now, if this were never to be used to abuse tax that would be fine. And I am sure that happens so I am casting no aspersions against anyone for creating such a trust or managing it.

But with the best will in the world, such an arrangement could easily be abused. That's especially likely when there is no trust register of any sort in Jersey, and so the existence of any trust, its management arrangements and what it actually does has to be disclosed to no one on the island. The possibility that in that case even a local trustee could be abused by their client and the trust that they notionally manage on behalf of their client who has reserved powers for themselves might facilitate fraud must exist.

This abuse is *what I drew attention to in 2006. And when I did so a strange thing happened. Out of the blue an email exchange between Jersey politicians and civil servants arrived at the Observer newspaper, and was then shared with me. The whole exchange is here. What was very apparent from this exchange was that Jersey knew that their trusts were being abused at that time (and that's not so long ago). It was said that:*

I imagine that a large number of wealthy people all over the world (including Jersey) do just the thing you fear in your e-mail - place assets in trusts in another jurisdiction, define themselves as excluded persons for the time they are resident in a specific jurisdiction, have assets returned to them when they cease to be resident in that jurisdiction, and then receive all the gains/rolled-up income tax free.

So Jersey knew it was being used for sham trusts in 2006. And rather than stop it, as I noted at the time it was said in the email exchange that:

The changes to the Trusts Law are intended to give statutory certainty to a practice that is already widely carried out. Currently, it is common for assets such as shares in a family company to be placed in trust, but for the settlor to wish to retain control over how the company is operated. Or an investment portfolio may be placed in trust, but the settlor may wish to manage the investments.

In other words, rather than seeking to stop the tax evasion that was going on, Jersey was seeking to endorse it.

No wonder Malcolm Campbell (then Comptroller of income tax in Jersey) said to the Observer that there was nothing in the proposed changes that would 'make tax avoidance or evasion more likely than under the present statute.' I'm sure that was true. What Jersey was seeking to do was to pass statute that endorsed the evasion that it knew was already taking place. Indeed, as one participant in the emails said:

'What [these new laws] will do is allow Jersey to compete more effectively for international work'.

As another said

'*As Jersey is squarely pitching itself at the expert/sophisticated/ultra-high net worth end of the market, we need settlor reserved powers in order to offer an attractive product to*

international clients.'

To put it another way (as the quote in the Observer makes clear) Jersey knew its clients would, and had been, evading anyway so it passed law to allow that to happen, legally, within Jersey.

And Jersey did not stop there as when it came to create a law permitting foundations it repeated the trick, in 2009. As *I have noted on this blog, an article in the Jersey & Guernsey Law Review from 2010 by Filippo Noseda discussed The Foundations (Jersey) Law 2009 under the title 'A Civilian Perspective: Not so plain vanilla and possibly a tad wacky' and concluded:*

From a civilian perspective, the policy statement that a [Jersey] foundation may accord more control to the creator of the structure than a trust appears quite bewildering, given the amount of powers that a settlor of an ordinary Jersey trust may retain for himself under art 9A of the Trusts (Jersey) Law 1984 (2007 revision) without turning it into a sham or nomineeship.

and:

Even without any prior knowledge of foundation law principles, it is difficult to imagine a wealth management structure under which the founder may retain more powers than those described under art 9A TJL without exposing such a structure to an attack based on sham.

In other words, even in the local learned legal press it has been suggested that the arrangements I have described can be considered either a sham or nominee arrangements - and foundation law is even more open to abuse. It's not just me saying so.

So, to come back to the debate between Monfort Tadier and Philip Ozouf, Ozouf has said this on his blog about sham trusts:

Sham trusts are illegal and would be struck down by the courts. He fails to say that Jersey, unlike most European countries regulates all Trust companies in Jersey. The regulator would expect licensed providers not to administer sham trusts

He makes much of this point - indeed, it seems to become almost the heart of the issue *in this television interview between the two. Well, with respect Philip, what's a sham in Jersey is not a sham elsewhere. And that's the whole point of this, and why Tadier is right and Ozouf is completely wrong.*

What Ozouf is playing is sophistry. Of course there are no sham trusts in Jersey: that's because Jersey knowingly legalised the sham in 2006, as the correspondence disclosed then revealed. But that does not mean that these trusts are not shams according to the laws of other jurisdictions as, in fairness, the local lawyers

and trust companies point out. They are shams in the UK, and elsewhere. Even the local legal journal recognises that. But Ozouf, playing strictly by the rules of the Jersey goldfish bowl where, candidly, if it suited the local finance industry a law would be passed saying black is white and Ozouf would argue forever that this was then the case, denies this because he refuses, absolutely, to recognise what Tadier is saying, which is that when viewed from another jurisdiction there really is a sham.

And it is Ozouf who shows he does not know the reality of Jersey's finance industry in the process, although he repeatedly accuses Tadier of not doing so. Tadier is recognising that Jersey is "offshore". That means it exists to service clients from other places: the term has nothing to do with being an island. In that case it is the law of those other places and whether or not they think a Jersey trust is a sham or not that matters. Ozouf denies this and sticks rigidly to Jersey law, which as the 2006 correspondence shows, was passed to legitimise something that was very obviously illegitimate elsewhere and in the process let it continue in Jersey which could then claim it was well regulated, none the less.

Ozouf's claim on this issue is at best disingenuous. Tadier's is completely honest, and correct. Jersey allows sham trusts. It does so knowingly. Tadier was right to say so, because it is true. It is something it should stop doing. Ozouf should agree. Instead he condemned Tadier. It says a lot about Ozouf that he did so.