

**CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED**

**ANTHONY J QUINN**

**24<sup>th</sup> September 2009**

**Budapest**

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

## JERSEY



Jersey, the largest of the Channel Islands, is one of the world's major international finance centres. The successful combination of stability and reliability has kept Jersey at the forefront of global finance for almost half a century. Government determination to encourage high quality business to the Island, and the support offered by the sophisticated and comprehensive infrastructure of laws and regulations, combine to promote investor confidence.

Jersey's status as a Crown Dependency gives the Island constitutional rights of self-government and judicial independence. This offers both businesses and investors the benefits of an independent international finance centre which is close to the United Kingdom and mainland Europe.

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

## Regulation



From a Regulatory standpoint Jersey is at the forefront of Offshore Financial Centres. The OECD has Jersey included on the 'White List' of jurisdictions that have substantially implemented the international agreed tax standard set by the OECD; this is in contrast to many jurisdictions that have either failed to implement such standards or have committed to them but have not yet done so. This month the findings of the IMF were published after their most recent review and Jersey received a comprehensive endorsement from the IMF which praised Jersey's high standards of regulation and supervision. The report, the 'Financial System Stability Assessment Update' states that Jersey is in the 'top division' in International Finance Centres including those in the G20 and EU.

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

## Regulation



To put this into perspective, where it is possible to make comparisons with other jurisdictions, Jersey is classed as being compliant with 44 of the 49 general FATF recommendations, compared to, for example, the United Kingdom (36) and Switzerland (33). All Financial businesses are regulated by the Jersey Financial Services Commission ('JFSC') who regularly visit the offices of Regulated businesses to ensure that all Regulations and Codes of Practice are being duly followed. The Courts however still retain a robust control over any enquiries into client affairs and they will not entertain fishing expeditions where any party, be it a Tax authority or a foreign Court, apply to investigate a person, company or a trust without sufficient evidence of illegal activities or serious fraud.

# **CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED**

**Common types of entity formed and administered in Jersey**

- **Jersey Discretionary Trust**
- **Jersey Limited Company**
- **Jersey Foundations**
- **Other forms of Entity**

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

- **Jersey Discretionary Trusts**

## What is a Trust?

- A trust is a legal obligation that comes into existence when an individual or other legal entity (known as the settlor) transfers the legal ownership of assets – which may be of almost any type – to another person or persons
- These are known as the trustees and the assets are held not for their own benefit but for the benefit of the beneficiaries who can be individuals or purposes, charitable or non-charitable.
- It is essential that the transfer is gratuitous otherwise the transaction takes on the characteristics of some other legal entity.
- A trust may therefore be defined as an equitable obligation which binds the trustees to hold and deal with the trust assets for the benefit of the beneficiaries in accordance with the terms of the trust.
- A trust can be formed by way of a Settlement signed by both the Settlor and the trustee or by a Declaration of Trust which is signed up solely by the trustee. Usually a Letter of Wishes will be provided by the Settlor or initiator to the trustee whilst these wishes are not binding on the trustees, they will usually be followed.

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

- **Advantages of a Trust**
- Estate Planning; By ceding the assets to a Trust, the Settlor no longer owns those assets and therefore they fall out of his/her estate for IHT and death duties/taxes
- There is no requirement to register a trust with any authority nor is a copy of the trust instrument available for public inspection; a trust remains a private agreement between the Settlor, the Trustees.
- There are no stamp duties or other fiscal charges payable on establishing a trust and the cost of forming a trust is not prohibitive as opposed to other more complex structures.
- The Courts remain robust in respect of investigations regarding trusts and therefore they remain private compared to companies and foundations. If an application is made to the Court then the merits of such an application are reviewed in depth before any case can be heard.

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

- **Disadvantages of a Trust**
- A number of jurisdictions do not accept the validity of a trust and treat any assets by way of a 'look through provision' and assess those assets and any income accumulated thereon as those of the Settlor or beneficiary depending on the specifics of the trust.
- A trust is not a separate legal personality and therefore does not own the assets within it. The assets are owned by the trustees.
- The uses of a trust are more restrictive than those of a company or Partnership as it is usually established for the longer term and not used as a trading vehicle.

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

- **Jersey Limited Companies**

Jersey Limited Companies are registered under the Companies (Jersey) Law 1991, as amended.

- All Jersey companies have a zero tax band including Jersey trading companies. The only exception to this rule is in respect of Financial Institutions and utilising companies which have a 10% and 20% tax band respectively.
- Jersey is outside the EU but in close proximity to the UK and Europe.
- Jersey Resident Co's ... qualify for exemption from UK taxation on UK trading profits under the terms of the UK/Jersey double tax treaty.
- Jersey Companies Can be fitted into structures with other jurisdictions utilising treaty rich double tax treaties to mitigate group taxation.
- Jersey directors are bona fide directors and not nominees, management and control is carried out in Jersey.

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

- **JERSEY FOUNDATIONS**

## **What is a Foundation?**

- A Foundation is best described as a combination of a corporation and a trust. It has separate legal personality, is able to hold its own assets, contract with third parties and sue and be sued in its own name and capacity, but does not have shareholders. The assets are held for the benefit of the beneficiaries and/or the charitable or non-chartered purposes.
- A Foundation is created when one or more persons or legal entities (Founders) formalise a Charter, which is registered with the Registrar at the JFSC, through which such founders undertake to make donations (Foundation Assets) for the benefit of beneficiaries or, or purpose however the Council owes its duty to the Foundation and not the beneficiaries. There is no duty to account, no rights of beneficiaries or collective action (Saunders v Vautier).
- Not only does the new law provide an alternative jurisdiction for potential clients to consider i.e. a jurisdiction highly rated by all the governing bodies, unlike other jurisdictions such as Panama or Liechtenstein , Jersey will not require a minimum level of capital as foundation assets.
- A Foundation's assets are managed by a Council.

# **CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED**

- **JERSEY FOUNDATIONS**

## **Similarities with a Trust**

- The Council consists of individuals or a body corporate, but must include a qualified person which is a person registered under the Financial Services (Jersey) Law 1998 to carry out trust company business. Equinox Trustees Limited is qualified in this respect.
- A Foundation is similar to a trust as assets are transferred or 'donated'. It can be revocable, (most trusts that we act as trustee for are irrevocable) and it may be unlimited in duration.
- A Guardian (similar to a protector or enforcer in trusts) must be appointed. Assets are protected from creditors of the Founders.
- It is usually created with the purpose of managing, preserving, administering or investing assets for the benefit of the Founder's close relatives, as well as to obtain confidentiality and fiscal benefits.

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

- **JERSEY FOUNDATIONS**

## **Differences between a Foundation and a Trust**

- A Foundation is required to be registered with the Public Registry (JFSC) and must pay an annual fee to the Registrar.
- Its Charter is a public document available for public inspection disclosing the name of at least one qualified person who is a member of the Council, and it does not exist until a written Charter is incorporated.
- It has separate legal personality and therefore is the owner of its own assets
- It must have a specified objective and although it has unlimited capacity it must operate within the confines of any specified objective.

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

- **JERSEY FOUNDATIONS**

## **Advantages & Disadvantages of Foundations over a Trust**

- A Foundation has separate legal personality which means a corporate veil exists and all liabilities remain corporate liabilities of the Foundation and not those of Council members or the Founders.
- A Foundation is accepted in many jurisdictions where trusts are not
- A Foundation cannot be broken and the beneficiaries are not required to know that they are beneficiaries need not know of their position i.e. more protective and secretive.
- A Founder can be both a Council member and a beneficiary and Guardian. Because the Foundation is incorporated it requires name approval by formal application with the Charter and therefore the costs are generally greater than those incurred on establishing a discretionary trust.
- Whilst the Council has unlimited capacity it must operate within the confines of its specified objects (which can be far reaching), whereas the trust proves itself to be a more flexible vehicle potentially providing unlimited capacity and discretion, provided that the transactions in the interests of the beneficiaries. A Foundation can be drafted to give total flexibility.

# **CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED**

- **JERSEY FOUNDATIONS**

## **Similarities between a Foundation and a Company**

- A Foundation must be registered at the Public Registry
- Assets are held in separate legal personality
- Council members must discharge similar duties to directors
- Mergers between two or more Foundations are permitted
- Foundations are capable of a summary winding up
- The Foundation's name must appear on stationary and publications
- Continuances in and out are permitted.

## **Differences between a Foundation and a Company**

- There are no owners, shareholders registers or issued share certificates of title, and the identity of Founders or beneficial ownership is not disclosed publicly in the Registry
- A Guardian (similar to a protector in trusts) must be appointed.
- The Foundation has a Council rather than a Board of Directors
- It must have Objects, these may be beneficiaries or purposes, or both.

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

- **JERSEY FOUNDATIONS**

## **Purposes of Foundations**

- With regard to companies, Foundations do not replace them, but compliment them and in many cases they are primarily used for charitable purposes, to serve as the owners of the companies i.e. the 'Holding Company' or 'Parent Company'. From a charitable perspective many such Foundations have been formed to carry out scientific, humanitarian, religious and philanthropic activities or to manage funds reserved for the same.
- To Administer employee benefits such as pensions and options
- To collect royalties and other types of returns
- To own and/or invest in shares, interests and stocks of private companies or other securities
- Many Foundations however are used for family and inheritance purposes in order to protect persons at a disadvantage due to minority or incapacity and therefore cannot manage their assets

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

- **JERSEY FOUNDATIONS**

## **Purposes of Foundations (cont.)**

- To protect against fragmentation and outside parties gaining control of a family business which has been passed down the generations
- To guarantee payment of sums of money or assets to members of one or more families for their requirements and manage bank accounts
- As a substitute for a will thereby circumventing complicated inheritance procedures, forced heir ship rules
- As a substitute for a pre-nuptial agreement
- To own real estate or valuable moveable property and protect such assets against excessive taxes for those who reside where the assets are located, and manage any specific asset protection plan
- **The Foundations (Jersey) Law does not require a Jersey Foundation's objectives to be non-profit making but it does provide that a Foundation cannot directly trade.**

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

- **OTHER ENTITIES – Jersey Cell Companies**

## **What is a Cell Company?**

- A cell company is a form of corporate body with separate legal personality that permits the assets and liabilities of a company to be segregated into different 'cells'.
- There are 2 types of Jersey Cell Company, a Protected Cell Company ('PCC') which is similar in structure to other jurisdictions, but potentially much more flexible, and an Incorporated Cell Company ('ICC') which is a new type of company, where each cell will have separate legal identity.
- The key distinction between PCC's and ICC's is that the 'Protected Cells' of a PCC do not have a legal identity from the cell company of which they form part, whereas the 'Incorporated Cells' of an ICC are each a company in their own right and hence have separate legal identity, albeit those cells form part of the ICC.
- For the purpose of the Companies Law, Incorporated Cells are actual companies and Protected Cells are treated as if they are companies. This has the advantage of giving certainty in the application of the Companies Law to each cell and consequent flexibility, in that virtually everything that can be done with or by a company is available to each individual cell.

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

- **OTHER ENTITIES – Jersey Cell Companies (cont.)**

## **Incorporation and Key Features of an ICC**

- Each cell is able to have a different type of capital e.g. par value limited or unlimited shares and shares by guarantee (or a combination of types).
- Cells have their own constitutional documents (although these will generally be largely identical to those of the Cell company), have the same Secretary (various secretarial functions required by statute must be carried out by the ICC) and Registered office of the Cell company, and have their own Register of Members.
- Although what can and cannot be done with an ICC is on the whole the same as with a PCC, it is intended that the ICC will be more robust where the segregation of assets and liabilities is in question i.e. insolvency situations in jurisdictions out of Jersey.
- The ICC is not intended to be the parent of the cell and generally the shares in that cell will be held by the 'intended' owner of the underlying cell assets
- As a cell of an ICC is a company, it deals with third parties in the same manner as a normal company.

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

- **OTHER ENTITIES – Jersey Cell Companies (cont.)**

## **Incorporation and Key Features**

- Unless the constitutional documents provide otherwise, creditors of a particular cell of a PCC only have a right of recourse to the assets of that cell, and non-cellular creditors of the PCC only have the right of recourse to the PCC's non cellular assets.
- A company can convert into an ICC, and vice-versa and a PCC can convert into an ICC, and vice-versa. Also a company can convert into a cell of either. There are many other possibilities re conversion and migration from other jurisdictions but these are subject to meeting the particular requirements of the Law.

## **Benefits of Jersey Cell Companies**

- Greater flexibility than offered elsewhere due to much wider restructuring provisions.
- No limitations on uses and ease of conversion from normal companies
- Ability to transfer cells between cell companies as well as cells being able to contract with other cells in the same company
- No Jersey administration or receivership provisions.

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

- **OTHER ENTITIES – Family Limited Partnerships**

## **Incorporation and Key Features**

- Unless the constitutional documents provide otherwise, creditors of a particular cell of a PCC only have a right of recourse to the assets of that cell, and non-cellular creditors of the PCC only have the right of recourse to the PCC's non cellular assets.
- A company can convert into an ICC, and vice-versa and a PCC can convert into an ICC, and vice-versa. Also a company can convert into a cell of either. There are many other possibilities re conversion and migration from other jurisdictions but these are subject to meeting the particular requirements of the Law.

## **Benefits of Jersey Cell Companies**

- Greater flexibility than offered elsewhere due to much wider restructuring provisions.
- No limitations on uses and ease of conversion from normal companies
- Ability to transfer cells between cell companies as well as cells being able to contract with other cells in the same company
- No Jersey administration or receivership provisions.

# **CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED**

- **OTHER ENTITIES – Family Limited Partnerships**

  - A solution? An FLP**

  - An FLP can provide some of the benefits of trusts or foundations
  - Based on Contract Law and not Trust Law
  - More familiar concepts than trusts or foundation
  - Senior family members can retain control of assets while giving away the beneficial ownership
  - For Continental European countries it has recognition and transparency
  - Fiscal discounts may be available

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

- **OTHER ENTITIES – Family Limited Partnerships**

- A solution? An FLP**

- Creature of Statute – Limited Partnerships (Jersey) Law 1994
    - A business structure designed to give investors in a partnership business limited liability if they are not active participators in the management of the business
    - Has at least one general partner and one limited partner – Article 3
    - Limited Partners are required to play no part in the management of the Partnership – Article 9
    - They are Registered at Companies House and have a Registered office in Jersey with the legal personality depending on jurisdiction.
    - Partnership Agreement provides for partners prescribed entitlements to income & capital drawings.

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

- **OTHER ENTITIES – Family Limited Partnerships**
  - General partner can retain control over investment
  - Restrictions on limited partners withdrawing capital
  - Fragmentation can provide fiscal discounts (in the UK for IHT approx 15%)
  - Limited partnerships are recognised in many more countries than trusts
  - Bankruptcy should not automatically be included as a trigger to disqualify a limited partner from his/her interest.
  - Cannot provide a trigger for divorce or misbehaviour (this would make the FLP look uncommercial)
  - Limited partner's interest would probably be viewed as assets available to him/her upon divorce in the English Courts
  - The underlying capital is illiquid so the spouse might only be able to claim the income from it.

# CLIVE TOMES & CO / EQUINOX TRUSTEES LIMITED

- **OTHER ENTITIES – Family Limited Partnerships**

- Unlike trusts, partnerships are almost universally recognised in civil and common law countries.
- Partnerships are not usually subject to anti-avoidance legislation in the same way as trusts
- Partnerships are usually regarded as tax transparent
- Limited partnerships are recognised in many more countries than trusts
- Mainland European residents could consider an FLP for estate planning rather than a trust or foundation.
- Ease of establishment and privacy
- Minimal filing requirements