BOOK REVIEWS

T Pursall and M Guthrie, *Guernsey Trust Law*, Oxford: Hart Publishing, 2020, ISBN 9781509919307

1 Trust law is a strange thing. It has a mysterious past, a complex present and—in the present political climate—an unknowable future. Trust law in the Channel Islands is even stranger. Trust law is an archetypal product of the common law: anti-conceptual, pragmatic, casuistic. Yet the Channel Islands jurisdictions have civilian, idealistic foundations, albeit suffused with (nowadays distant) Scandinavian influence. How could the institution of the trust even be born into such a hostile environment, let alone thrive? Yet, thrive it has, enabling the Channel Islands to compete at the top end of the offshore finance market across the world.

2 The life of the trust in the Channel Islands has gone through several and, at least with the benefit of hindsight, eminently predictable phases. The first phase is that of an institution which does not get onto the radar screen of the legal system at all. At best it is a private transaction between individuals, perhaps from England or other places where the trust is well known and used on a daily basis. It only rarely lands on the desk of the local lawyer, who looks at the documents, scratches his head, says he can see nothing against public policy here, and pockets the fee. At this stage, the story is simply that of the secret life of the trust.

3 The next stage is when disputes break out, and the trust reaches the desk of the judge. The parties argue not about trust principles, but instead from *analogies* to be found in their own systems. And, of course, there always are analogies to be found. Every developed legal system meets the same kinds of problem, even if it does not always have the same kinds of solution. So civil law systems may not have trusts as such, but they have usufructs, fiduciary contracts, fiduciary substitutions, and so on. They perform similar roles to the trust, albeit in discrete, silo-centric circumstances.

4 But the protean nature of the trust, adaptable to every circumstance, wins out against these diversified, one-time use legal instruments. It is time for the next stage, when the lawyers, seeing the use of the trust to their clients, call for legislative intervention. Whilst it is hard for a legal system that is civilian in tooth and claw (such as France or Italy) to bring the Anglo-Saxon trust directly into its pantheon of hallowed legal institutions, the Channel Islands were in a much easier position.

5 They looked to Britain and the British government for trade and support and, more importantly, for military protection. In the 19th century they had a huge influx of retired and semi-retired English people (many of them from the marine or armed services), who expected to be able to use the same legal institutions that they had used back in England. Although the local professionals may have used their native tongue at home, in business they could, and did, use English just as easily (just like, say, the Cypriots or Maltese of today).

6 At first the natural market was that influx of English people, seeking to do in the Channel Islands what they could do in England. The *extension* was the people who stayed in England, but sent their money (or other assets) on an invigorating holiday to the Channel Islands. The further—and much more important—extension was to people in other parts of the world, most notably the United States of America. This last step was a harder nut to crack. Your average American attorney of the time wanted proof positive that the trust was going to work. Show me the written down law where it says it works. Or else.

7 The legislators saw the merits of the argument in economic terms. This is work we can do, we have a natural advantage, in being legally and fiscally independent of the United Kingdom, but we are close by, in their time zone, and we speak their language. We even have more sunshine. What is not to like? So legislation on trusts was introduced into the Channel Islands in the 1980s. The only wonder is that it took so long to achieve it.

8 After that, there is a period of reflection, in which each new offshore trust jurisdiction looks at its "product" and decides where to position itself in the world marketplace. There are those who are down in the cheerful, "pile it high, and sell it cheap" end of the market. There are others who position themselves at the top end of the marketplace, preferring not to attract the rather "iffy" creditor avoidance trusts (and worse). This usually ends with all jurisdictions trying to copy what they think are the best bits of other jurisdictions' existing trust laws. Nearly every offshore jurisdiction wants a complete set of medallions.

9 The next step in the process is the "respectable-isation" of the trust. It is made worthy of respect, not just by legislation (any fool offshore jurisdiction can do that, as we know), but by having *books* written about it, expounding it, discussing it, and even *criticising* it. Now you know that the trust has come of age. And, the icing on the cake, courses in local trust law begin to be taught to students.

10 There is one other feature of the trust world in the Channel Islands that I need to refer to. This is the liberalisation of the legal professions there, which has enabled interbailiwick law firms, and indeed

international offshore law firms to be created and to flourish. In the context of the Channel Islands, this has been an enormous step forward. There is no longer the temptation for lawyers in one bailiwick to criticise the trust law in the other. Indeed, if anything, the tendency is towards harmonisation.

11 I will not dwell on the first book to be written about Jersey trust law. At the outset, it was limited, it spent too much space and time on general matters (because there was nothing else for the general reader to refer to), and anyway the world has changed since it was written in the 1980s. It was the product of the era of desktop publishing. That work itself (under new authorship) has of course been improved out of all recognition since then, and is an established feature of offshore trust lawyers' libraries.

12 The most recent work on Guernsey trust law has leapt straight in at the posh end of the spectrum. It is based on an earlier work by the late, and sadly missed, Advocate St John Robilliard, but it is a completely new book. It is written by two partners in Advocate Robilliard's old firm. I may say at once that it is a splendid achievement, produced to a high professional standard by the publishers, and marks a coming-of-age of the Channel Islands law book. It is, of course, greatly assisted by the fact that there is now a valuable and comprehensive general work on the law of Guernsey, by Advocate Gordon Dawes, which relieves the authors of the necessity to explain much background material in relation to the Guernsey legal system.

13 In the new work, there are some 17 chapters, dealing with Foundation and Principles, Express Trusts, Trusts arising by Operation of Law, Taxation, Creation, Validity and Termination, Conflict of Laws, Trustees, Powers, Duties and Liabilities of Trustees, Beneficiaries, Protectors, Trust Investments, Introduction to Trust Litigation, Attacks on Trusts, Variation of Trusts, Remedial Applications to Court, Regulation of Fiduciaries, and The Public Trustee. In an appendix, there is the text of the Trusts (Guernsey) Law 2007.

14 Compared with a traditional English trust law textbook, these chapter headings signpost some pretty significant alterations of focus for a study of Guernsey trust law. We note the promotion of the study of taxation of the trust to a very early stage in the work (chapter 4), ahead of the creation of trusts, the identity of trustees, their duties and liabilities, and so on. Similarly, the conflict of laws is introduced early on, as befits the legal system of a small island, dependent as it is in this area on contacts with other legal systems. The insertion of a chapter on protectors, immediately after that on beneficiaries, is testament to the importance of that office in modern offshore trusts. Perhaps even more striking is the insertion of two chapters on trust litigation, one dealing

with trust litigation in general, and the other with attacks on trusts. No standard English trust law text would think of dealing with such things. But, in Rome, you do as the Romans do, and quite right too.

15 One of the many strengths of this work is its attention to detail. Propositions are supported by references in the footnotes to the relevant statutory or case law (including Jersey or sometimes English law), or discussions in articles or other textbooks. As to the latter, this is especially important in civilian systems, where "*la doctrine*" plays such a significant part. I applaud the fact that this work has both an international and a Channel Islands focus.

16 Another important aspect of this work is its constant reference to practicalities. This is not a theoretical work. It is a work for practitioners. And, whilst the authors do not always suggest answers to theoretical or practical problems, they do at least point out what those problems are. The elephant traps are signposted. Options are indicated.

17 There is a full and useful discussion of the question of disclosure of information to beneficiaries and third parties. This covers such topics as what documents beneficiaries are entitled to see, letters of wishes, data protection, and disclosure to domestic and foreign authorities. This is a reflection of the twin concerns felt in the modern world that trustees in offshore jurisdictions are too often both the Aunt Sally for complaints by beneficiaries and a desirable data resource for foreign fiscal authorities.

18 A further strength of this work is the chapter on the regulation of fiduciaries, which, even though it is rather short, contains an admirable introduction to the subject for trustees. This is followed by a chapter on the position of the Public Trustee in Guernsey, which office is unique in the Channel Islands. One of the problems with professional trust services is what happens when a professional trustee becomes incapable of performing the role any longer, whether through incapacity, insolvency, disqualification, or otherwise. In essence, this is a public service provided by the state, the circumstances where something untoward and unforeseen has occurred. It is an aspect of the state's support of the trust institution, and an additional safeguard for the foreign investor.

19 Without taking away from the significant achievement of the authors, there are a few points that could however have benefited from a little more attention. Some relate to conflicts points. One relates to the recognition of Guernsey purpose trusts. There appears not to be any discussion of the difficulties that might be involved in the recognition of a Guernsey purpose trust in any other jurisdiction, and especially when the purpose consists merely of holding shares in a corporate entity. Similarly, there is no discussion of the effects of a

change of the proper law of the trust, or the desirability (or otherwise) of any need for the draughtsman to consider a limit on the power to make such a change.

20 A further problem relates to foreign matrimonial proceedings. There is (helpfully) a section of the chapter on "attacks on trusts" which deals with this. But there is rather more that can be said. For instance, the section on letters of request is very short, and does little more than illustrate the existence of the jurisdiction. In the modern world, where there are an increasing number of cross-border divorces, and letters of request are increasingly common, more guidance on how this jurisdiction should operate would be welcome.

21 In this reviewer's opinion, one of the great advantages of Guernsey trust law at this time is its legislative provision (in s 63 of the 2007 Law) for the resolution of trust disputes by alternative means, including arbitration. Very few offshore trust laws legislate for this. The UK itself is woefully behind the curve. Yet this work is unfortunately very limited in its discussion of the usefulness, or indeed importance of this provision. It does not set out anything of the problems in this area that beset a traditional trust jurisdiction, such as England. It simply sets out the terms of the section, and leaves it at that.

22 However, there have been cases in practice where the proper law of a trust has been changed to Guernsey law, simply in order that the dispute could then be submitted to alternative dispute resolution in accordance with s 63. Once the dispute was resolved, it was then changed back to the original proper law, to continue with the life of the trust as it was before. Unfortunately, none of this is discussed. So long as other trust jurisdictions do not make similar provision, this is an important selling point for Guernsey trust law. There is far more to be made of it than is here supplied.

23 But these are modest points in the grand scheme of things. Overall, this is a valuable addition to any offshore trust lawyer's library, presented in a pleasingly professional format. The authors and publishers are to be congratulated on their achievement.

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M Dunlop, *Security Interests (Jersey) Law 2012*, Key Haven Publications Ltd, 2020

1 Advocate Dunlop's work entitled *Security Interests (Jersey) Law 2012* is a well-written and lucid volume that will prove a very

welcome tool for practitioners. It is a sizeable volume at 849 pages and is the more impressive an achievement for being written amid an active professional life. Advocate Dunlop has made a very valuable contribution to the relatively Spartan shelf of Jersey legal texts.

2 The book approaches the subject of the Security Interests (Jersey) Law 2012 ("the Law"), which (mostly) came into effect on 2 January 2014, in a deliberate and rigorous manner, setting out a useful overview of the Law in the opening chapter, followed by chapters which, arranged to mirror the order of the Law itself, cover each main topic of the Law. These include the new subjects for Jersey lawyers of attachment, perfection, taking free, and registration, of security interests in "intangible movable property".

3 The book is accordingly a most useful handbook for use alongside the Law. There is a certain amount of recitation of the statute, contributing to a deliberate style, but this also has the benefit of clarity of presentation, makes for a self-contained product that is user-friendly and provides all the raw material the reader needs to hand to make the most of the commentary and comparison. The table of cases is impressive, and the index is a well-organised access point for those not inclined—or without the time—to read from the front cover but who seek guidance on particular questions of the law on security over intangible movable property in Jersey. It is an easy-to-navigate volume, and if one were to look for ways to improve upon it, one would need to go to points of second-order, such as that the second edition could use paragraph numbering to allow more detailed cross-referencing. This would have the benefit of perhaps avoiding some of the (necessary) duplication that comes from a chapter-by-chapter approach: for example, a banker's right of combination of accounts is dealt with on pp 169, 185 and 219. Each is a useful mention, but paragraph numbering might have enabled economy by cross-referencing.

4 The extensive citation of case law and commentary will be helpful to those wishing to understand the lineage and likely application of provisions of the Law. An example is the demonstrably comprehensive way the writer has taken a deep dive into the law of jurisdictions whence the Law has drawn its influence, most notably from New Zealand and Canada. The writer has also included a discussion of interconnecting company law issues (such as transactions at an undervalue and voidable preferences (chapter 5)) and analysed relevant case and statute law from New Zealand and Canada as well as the UK.

5 There are a few areas in which more detail would have been welcome. On the Law's treatment of rights of set-off, art 8 states that the Law does not apply to: (i) "a lien, or other encumbrance or interest

in movable property, created by any other enactment or by the operation of any rule of law"; (ii) "a lien created by the articles of association of a company"; or (iii) "any right of set-off, netting, or combination of accounts". This much is rightly covered by the writer in chapter 3. This reader would have welcomed a view on the inevitable next question, *viz.* whether, and if so to what extent, a lien or set off right (beyond the specific limited cases that are addressed by arts 30A, 30B and 41 of the Law) can be trumped by a security interest under the Law created later in time. Similarly, Advocate Dunlop's views on what is meant by the words "or affect" that follow "not apply" in the opening words of art 8 would no doubt have been helpful. References to set-off in the index are sparing.

6 We would also have benefited from a discussion of who is a "successor" for the purposes of art 2, and of how the contents of art 4(a)(ii) about registered (non-negotiable) investment securities can be read as though there were an "and" inserted after the first part, at (A).[1]

7 As mentioned, *Security Interests (Jersey) Law 2012* is arranged into chapters that align with the arrangement of "Parts" in the Law, making it relatively simple to sit the writer's words alongside the Law itself. One particularly interesting (and valuable for a newcomer to the subject) treatment is chapter 3's summary of the nature of a security interest as used in the Law. The narrative review of a long list of different types of transaction set out in the Law as a rubric of what is and is not regarded as a security interest to which the Law applies is a useful place to start for a beginner to the subject wanting a relatively quick "in" to understanding the scope of the Law. Some might be surprised at the suggestion on p 136 that a hypothec might be a possessory security right, but we note that the suggestion is not the writer's alone.

8 Another curious aspect is the fact that whilst the subject of "general purview" (the principle of considering the knowledge and intent of the

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[1] Article 4(a)(ii) is as follows:

"This Law applies (subject to anything provided by or under Article 4A or 95 or by Schedule 2) only to the following—

(a)a security interest created, after Part 3 comes into force, in any of the following—

. . .

(ii) one or more directly-held non-negotiable investment securities listed on a register maintained—

(A) in Jersey,

(B) by a Jersey company, or

(C) by a Jersey individual . . ."

parties to personal or real security as at the time it was granted, when for example assessing a later proposed amendment to an underlying obligation for which that security was granted) is studied (in appreciable detail) by the writer (see p 770 onwards in chapter 14, "Transitional Provisions"[2]), the index does not have an entry under "purview" or "general purview". This seems an oversight given the principle's practical significance to those making decisions about when a need to "re-paper" security arises or indeed when a "security confirmation" is likely to be seen as a fresh grant of security (bringing with it all the questions around ensuring that it is attached and perfected)—all of which are covered with admirable aplomb. This index treatment could be easily rectified in a second edition. The general purview topic has been inextricably linked to discussions about the import of art 33 of the Law as well, and this is another area that could have been linked by cross-reference.

9 Another area of great practical significance on which the writer has deployed admirable rigour is the vexing subject of no-assignment clauses—where we would understand "assignment" as applying to dispositions more widely, including other grants of security—and the debate between those who advocate for the view that a no-assignment clause in a contract renders a purported assignment null and void, and those like Professor Sir Roy Goode who advocate a more nuanced interpretation (see chapter 6). Advocate Dunlop's views align with those of Professor Goode and the writer explores the subject thoroughly, arriving at a well-reasoned conclusion, and providing some useful judicial insight into the subject (see p 330 onwards, chapter 6).

10 Advocate Dunlop has similarly included admirable guidance on a number of other subjects, including: (i) a discourse on the treatment of investment securities and intermediaries (see chapter 2); (ii) an example/explanation of certain exclusions from the definition of "intermediary" (p 64); (iii) an exposition of when a trust arrangement is and is not to be construed as a security interest (p 143); (iv) a discussion around flawed assets (p 162); (v) overseas branch registers (p 181); and (vi) security over shares in CREST (p 183).

11 Similarly, we applaud his clear statement that the Law manifestly contemplates security being potentially validly created under foreign law over the types of collateral that are within the scope of the Law, per art 4(a). This at pp 230–232, and including treatment of art 12 ("Exclusive application of this Law"). Similarly (see p 108), that there

[2] Not "Traditional Provisions" as it is described in the table of contents.

is no need for a separate Jersey law security trust alongside an English law one that by its terms includes the Jersey law security.

12 One might presume respectfully to disagree with his views on some points (not least whether the word "ancillary" in an enforcement context can mean or include an "alternative" enforcement step, separate from appropriation or sale—for were it to do so, that would, to the mind of this reviewer, place undue stress on the completeness and coherence of the Law. Nonetheless, Advocate Dunlop has produced a highly commendable, even magisterial, work, enormous in scope and written almost entirely in an accessible, lucid style; and very well proof-read. It is highly recommended.

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