

Asset protection trusts in Gibraltar

By Moses J Ahahory, LL.B (Hons), Head of Trusts, Hassans, Gibraltar

In the current economic climate, wealthy individuals are vulnerable to third party attack on their assets, arising from circumstances such as political instability, marital breakdown, confiscatory taxes and, increasingly, successful professional negligence claims. Such individuals have recourse to asset protection trusts, a vehicle through which they can safeguard their wealth against future events.

In 1990, Gibraltar introduced several legislative changes to facilitate the constitution of asset protection trusts. This article examines the law and the advantages of an asset protection trust set up in Gibraltar.

Gibraltar's aim, in promoting the somewhat controversial use of the asset protection trust, was to establish a specific low-volume niche position, to introduce stringent restrictions both on those wishing to settle funds and those wishing to provide trusteeship. In this manner, Gibraltar has maintained close control over all activity related to asset protection trusts and, in so doing, has succeeded in exclusively attracting quality business in this field.

Why Gibraltar?

In contrast to other offshore jurisdictions such as the Cayman Islands, the Bahamas and the Cook Islands, Gibraltar's asset protection trust legislation falls under the remit of bankruptcy law, as opposed to the Fraudulent Conveyances Act 1571.

In most offshore jurisdictions, the effect of the fraudulent conveyancing laws regulating asset protection trusts depends largely on the particular statutory definition of the term "intent to defraud". In order to commence an action directly in such a jurisdiction, a creditor must satisfy a reasonably wide standard based on the statutory definition of the term intent to defraud in respect to the settlor's state of mind at the time when the trust was constituted. The creditor would be able to initiate proceedings directly in the offshore jurisdiction if he could show that, in accordance with the statutory definition of the term, the settlor intended to defraud at the point when the trust was constituted.

In comparison, the only direct action which can be commenced in the Gibraltar courts in relation to asset protection trusts is a bankruptcy proceeding, as the legislative provisions allowing for the establishment of asset protection trusts lie in the Bankruptcy Ordinance where, incidentally, the standard of intent to defraud is generally considered narrower and harder for the creditor to satisfy.

In order to commence bankruptcy proceedings in Gibraltar, it must be proved that the settlor is resident or domiciled in Gibraltar, or that an 'act of bankruptcy' was committed in Gibraltar. Due to company law provisions, individuals who

set up exempt companies cannot be resident in Gibraltar, and all properly constituted asset protection trusts will, as a rule of good practice, make use of the exempt company vehicle. As such, it would be almost impossible for a creditor to initiate bankruptcy proceedings in Gibraltar, as it would be extremely difficult to prove that the settlor is either resident or domiciled in Gibraltar. Equally, it would be very hard to demonstrate that an act of bankruptcy had been committed in Gibraltar.

Notwithstanding the high level of protection afforded to settlors, the setting up provision of asset protection trusts in Gibraltar has remained low volume, due to the stringent legislative requirements that must be met in order to establish such trusts.

The legislative framework

The legislative and regulatory base for Gibraltar asset protection trusts is comprised by the Bankruptcy Ordinance (as per the 1990 amendments) as well as the Bankruptcy (Register of Dispositions) Regulations. These regulations establish the strict parameters within which asset protection trusts may be constituted in Gibraltar.

Section 42A(1) of the Bankruptcy Ordinance sets out the criteria which must be satisfied by the settlor in order to make a Gibraltar asset protection trust invulnerable to attack by any creditor of the settlor. The criteria are as follows;

- the settlor must be an individual;
- the settlor must not be insolvent at the date of the disposition and must not become insolvent as a consequence of making the disposition; and
- the disposition must be registered in accordance with the requirements of the Bankruptcy (Register of Dispositions) Regulations.

All Gibraltar asset protection trusts must be recorded on the Register of Dispositions. In order to achieve registration, an application must be made to the Registrar, specifying:

"... Gibraltar's asset protection trust legislation falls under the remit of bankruptcy law ..."

"... the Bankruptcy Ordinance where ... the standard of intent to defraud is generally considered narrower and harder for the creditor to satisfy."

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- the name and address of the trustee;
- the name of the disposition;
- the date of making of the disposition and the duration thereof; and
- the country of ordinary residence of the settlor.

There is no obligation to provide details of the name of the settlor, or to provide details of the trust fund. These obligations have been omitted to ensure that there is no danger of loss of confidentiality.

The Bankruptcy (Register of Dispositions) Regulations do not only provide the procedural guidelines for the registration of asset protection trusts - they limit the scope for provision of trusteeship. As a precondition to the registration of asset protection trusts trustees must:

- be the sole corporate trustee of the disposition;
- be considered by the Financial and Development Secretary to have adequate financial and administrative resources to act as trustee of asset protection trusts;
- have obtained the prior written approval of the Financial and Development Secretary in relation to the forms of enquiry administered to the settlor; and
- have adequate professional indemnity insurance which must exceed at least £1,000,000.

Clearly, the purpose of the limitations imposed on those wishing to provide trustee services are a means through which it is ensured that all trusteeship provided in relation to asset protection trusts is of the highest standard.

In addition, the trustees must undertake that:

- the settlor has, to the satisfaction of the trustee, completed the forms of enquiry administered by the trustee;
- the trustee has completed all reasonable enquiries based on the information available on public record necessary to substantiate the information provided by the settlor in the forms of enquiry; and
- the trustee has obtained an affidavit of the settlor confirming that the settlor is not insolvent.

The importance of these undertakings is paramount - the extent to which trustees must fulfil these obligations is dealt with below.

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"... exhaustive enquiry and enhanced due diligence must be carried out by the trustees ..."

Trustees' undertakings and the obligation to carry out extensive due diligence

It has been emphatically emphasised that exhaustive enquiry and enhanced due diligence must be carried out by the trustees before such undertakings can be given. This was clearly highlighted in the case of *STG Valmet Trustees Ltd v Brennan & Others* (4 ITEL 337), where the settlor, an investment broker, faced substantial litigation against him from the New York Securities & Exchange Commission and a class action against him by aggrieved clients in the New York Court. On establishing asset protection trusts the settlor completed a questionnaire presented to him by STG Valmet Trustees Ltd. One of the questions put to him was as follows: "Are there to your knowledge any actions filed or threatened to be filed against you from any source, for damages?"

He answered: "Yes, various class action lawsuits. The settlor believes [these] are without merit and intends to defend. [SEC civil law suit filed in 1985]. Settlor believes it to be without merit and has or will continue to defend."

In addition, he swore a declaration of solvency:

"I am not aware of any action, cause or litigation of whatsoever type threatening or outstanding, contingent or pending against me or affecting any of my assets, and I do not have actual notice of any such claim or of facts or circumstances which may render me liable to any such claim."

The settlor subsequently was declared bankrupt, and his trustee in bankruptcy claimed orders setting aside the registration of the settlements and declarations that the settlements be set aside on the basis that they had been constituted fraudulently.

The Gibraltar High Court ruled that STG Valmet Trustees Ltd should:

- be authorised to defend the main action down to the completion of the discovery;
- be authorised to apply to strike out the main action; and
- be entitled to have its costs of the entire proceedings down to the close of discovery paid out of the settlement funds.

However, the Court of Appeal determined that:

- it was a matter of concern that the judge had authorised the trustee, in addition to maintaining the striking out application, to continue the defence of the action at the expense of the fund

down to the close of discovery;

- that orders that the trustee was to have his costs paid out of the trust fund should be made sparingly; and
- that it was surprising to discover that a trustee against whom a claim was made that the disposition of the entire fund was a fraud by the settlor, and that the trustee itself was privy to that fraud, had been awarded his costs in any event for any stage of the litigation.

Clearly, in this case, the settlor misrepresented the claims that were made against him. It was up to the trustee to make diligent enquiries as to the truth of his statements. It is important to note that rulings of this nature ensure that Gibraltar Trustees maintain the highest of standards in respect of asset protection trusts - not only is the legislation in force to adequately limit the remit of such trusts, but there is sufficient judicial control to guarantee that those providing trustee services are sufficiently policed and supervised.

Gibraltar asset protection trusts: an effective vehicle for the preservation of wealth?

It is evident that strong asset protection

legislation and the sound judicial framework that ensures its regulation make the Gibraltar asset protection trust a sturdy structure capable of withstanding third party claims, indeed, the paucity of litigation related to asset protection trusts in Gibraltar is evidence of this fact.

The limited and exclusive nature of asset protection trust services in Gibraltar is conducive to the highest standards of trusteeship and has certainly contributed to Gibraltar's reputation as a respectable and well-established offshore jurisdiction. In this niche area of the trust industry, the forecast for Gibraltar's future can only be bright.

Moses J Anahory

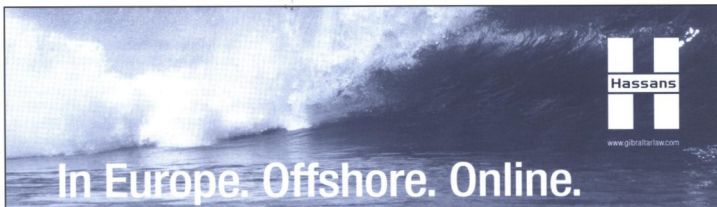
Head of Trusts
Hassans
57/63 Line Wall Road
Gibraltar

Tel: +350 79000
Fax: +350 77343

E-mail: moses.anahory@hassans.gi
www.gibraltarlaw.com

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