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In Focus Supplement:

Next Gen

From ESG to mental health, and everything involving generational wealth

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Year in Review: Looking back and looking forward

INTRODUCTION

"For last year's words belong to last year's language. And next year's words await another voice." **T.S. Eliot**

2021 has continued to present new challenges due to the global pandemic. However, a new normal has started to form and the return to in-person events has allowed the Private Client Community to come together, re-connect with old and new contacts and we are so proud to have been part of that here at ThoughtLeaders4.

In this issue, we present to you a 'Year in Review', which discusses the most significant trends and cases over the past 12 months. This edition also features an In Focus supplement on 'Next Gen', which tackles topical trends such as ESG, mental health, and generational wealth.

Thank you to all of our authors, members, readers and Community Partners for their endless support and contribution. 2022 will no doubt bring new thoughts, ideas and trends, and we look forward to capturing new content and industry insight as we continue to navigate the legal maze.

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60-SECONDS WITH:

RICHARD JOYNT
HEAD OF FAMILY OFFICE
HIGHVERN

Q What would you be doing if you weren't in this profession?

A At various points over the last 30+ years I have toyed with being a University history professor, an opera singer or a writer of science fiction & fantasy. The latter is still a possibility one day!

Q What's the strangest, most exciting thing you have done in your career?

A The strangest was having to visit a client in Tobago whilst there on holiday – to my surprise he didn't live in a very nice area and a local dog bit me! The most exciting was being asked to visit another client on his superyacht in St Barths.

Q What is the easiest/hardest aspect of your job?

A I would say focusing on giving client service, as when it goes well and is appreciated it feels easy, but when the solution to the client's issue isn't apparent, I feel I'm letting the client down and that is hard to swallow.

Q If you could give one piece of advice to aspiring practitioners, what would it be?

A Be yourself, don't pretend you know about something when you don't, and be kind and patient with those around you. As a result people will find you a pleasure to work with and you will therefore have opportunity and success in your career.

Q What has been the most interesting case you have seen in 2021?

A I've recently started working with a meditech entrepreneur and am really enjoying finding out about the latest technological developments, and how valuable they become in such short spaces of time!

Q What do you think will be the most significant trend in your practice over the next 12 months?

A The transparency agenda – the media will continue to try to break down areas of confidentiality that were once seen as sacrosanct

Q If you could learn to do anything, what would it be?

A Drive a motor boat – I live in Jersey and it would be great to spend more time on the water that surrounds us! I talk about learning periodically, but never find the time….

Q What is the one thing you could not live without?

A My wife and children, although I suppose that's not a thing! My daughter would say I can't seem to be separated my sunglasses – I wear them all year round and they serve as a great eyemask when you want to sleep on a plane

Q If you could meet anyone, living or dead, who would you meet?

A Rossini. I love listening to opera and he was one of the most talented composers of all time, as well as being a bon viveur! By all accounts he always threw great parties.

Q What songs are included on the soundtrack to your life?

A "Mirrors" by Justin Timberlake and "Livin on the Ceiling" by Blancmange.

Q What does the perfect weekend look like?

A Time with family, walks to the local pub with the dog, some good food and a night in on the sofa. I'm definitely not a party animal!

Q Reflecting on 2021, what have you been most grateful for?

A My wife and children, my health, and the new job opportunity that I've just taken up at Highvern.

Supporting Durrell & Jersey Zoo

Jersey Zoo is the heartbeat of the Durrell Wildlife Conservation Trust. All of their conservation work around the globe is underpinned by the zoo. Despite their hardest efforts, the present pandemic is having a devastating effect on the income of Durrell.

When they wrote to inform us that their global conservation program and 61-year history of saving species and habitats from the brink of extinction was in real danger due to the financial impact of the pandemic on Jersey Zoo, we asked how we could help.

After discussions with Durrell, we are delighted that ARC is now the proud sponsor of their Blue Poison Dart Frogs display.

Find out more about the Durrell Wildlife Conservation Trust, their work and the frogs on their website **www.durrell.org**

The Blue Poison Dart Frog

(dendrobates tinctorius azureus)
Native to Suriname

The poison frogs of Central and South America are famous for their toxic secretions, used by native communities when hunting. The poisons are not made by the frogs themselves, but are taken up from their diet of invertebrates, which have in turn ingested plant chemicals. However, in captivity the poison decreases considerably in strength as the food chain needed to supply them with their raw materials does not exist.

The frogs' bright colours advertise their poisonous nature. The blue poison frog's pattern of black spots on a blue background is particularly striking and varies from individual to individual. After they metamorphose into tadpoles, the male carries the young on his back to a small pool, water trapped in a hole or a bromeliad, where they develop into frogs after 10-12 weeks.

With the world's amphibians in crisis, captive populations are vital to conservation efforts.

Extremely sensitive to environmental change, amphibians give us early warning of problems that might be due to global warming, pollution and so on. The blue poison frog, like many others, is threatened with extinction.

Durrell has successfully bred this species, and their biosecure facilities at the Trust's headquarters in Jersey will enable them to continue studying and breeding the blue poison dart frog and other threatened amphibians in captivity, developing techniques to help slow their decline.

OPENING PANDORA'S BOX

A 21ST CENTURY TAKE ON WEALTH

Authored by: Rosamond McDowell – Payne Hicks Beach

In Greek mythology, Pandora was the first woman on earth and received a gift from each of the gods, her name meaning "the one who bears all gifts". She was given a box that she might never open, full of misery and hardship, but also of hope. Curiosity got the better of her, and she opened the box, unleashing the evils inside, but also the hope (though in some versions of the myth, she shuts the box with hope still inside).

One has to ask why the offshore papers leaked to the Guardian and other media in October 2021 were dubbed the Pandora papers. Presumably because the recipients and publishers of the data contained in the papers believe them to contain a world of misery. Like the Offshore Leaks in 2013, the Swiss leaks in 2015 the Bahamas Leaks and the Panama Papers in 2016 and the Paradise Papers in 2017, wealthy individuals and families can no longer expect the ways in which they choose to structure their private affairs to be kept under wraps. An industry that has prided itself for generations for its discretion has been exposed to the winds and whims of the Zeitgeist that is firmly determined that the rich will pay tax, that planning to minimise tax is unethical avoidance, that avoidance borders on evasion, and that loopholes in the law that allow people legally to avoid paying tax must be plugged.

This moral stance amongst investigative journalists assumes, of course, that all governments abide by the same ethical code of conduct, that all tax receipts are spent by those governments on the causes of justice and right, and that those causes are agreed upon by all, that there are no grey areas, no abuses of power, and no corruption. Were those presuppositions all true, it might well be right for wealthy people to offer up taxes, greed, of course, being one of the seven deadly sins, a boundless desire for wordly things.

In Dante's Purgatory, the greedy end up bound face down on the ground.

Perhaps that is how those whose affairs have been exposed feel, unable to speak or to defend their right to have an alternative perspective on the taxing rights of governments, or their use of those funds.

Of course, it might be said of those who orchestrate leaks, that they are engaging in another of the seven deadly sins, envy; the desire to deprive others of what they have.

According to St. Thomas Aquinas, envy has three stages; first, attempting to lower another's reputation; secondly, joy at the misfortune of the person defamed, or grief at their prosperity; and thirdly hatred because "sorrow causes hatred".

Dante had envious people being punished by having their eyes sewn shut with wire because of their pleasure in seeing others brought low.

Whichever of the two deadly sins you consider the more despicable, it is beyond doubt that we live in an age where the wealthy appear to be "fair game" for exposure and censure, where their right to engage in legitimate tax planning is limited, not by law, but by the virtue signalling mob, where their right to defend themselves as having acted within the law and for motives beyond reproach is disregarded, and where acts of charity or generosity are ignored. Add to that a global pandemic and you have a heady mix of saints and sinners (often one and the same), at whom no fingers may be pointed, no matter what they do, whilst for those working in the offshore industry it might currently feel as though the hope in Pandora's box has most definitely been locked in.

What is remarkable is that those pointing fingers appear already to have had their eyes sewn shut with wire, having failed to notice various important matters. First, the overwhelming majority of the papers being leaked, at least in relation to UK residents, will relate to perfectly legitimate structures which are not only well within the bounds of the law, but have been positively encouraged by successive governments and the legislature, keen on encouraging expatriates to come to the UK with their wealth, entrepreneurial skills and energy - all sorely needed in our (offshore) island nation. Are they greedy? Possibly.

But they don't deserve to be censured for doing precisely what they have been invited to do.

Those who don't agree are perfectly entitled to vote in a government that will change the rules and send them home.

Secondly, there is a world of difference between secrecy and privacy. Scoundrels, money launderers and those who rapaciously take what does not belong to them will undoubtedly wish to keep their deeds and structures hidden and secret.   As such, they assuredly deserve to have their deeds exposed to the light and investigated thoroughly.

The right to privacy, on the other hand, is a fundamental human right, and deserves to be protected.

What is happening with these leaks is a flagrant breach of this right to privacy, no more honourable than phone hacking. Over the last ten years or so, information exchange and compulsory disclosure has been legislated for by governments globally. As a result, almost all of what is in the leaked papers will already be known to the relevant tax authorities, who do not need the help of journalists in doing their work. Whilst we might complain about the complexity and impenetrability of the disclosure forms, and the cost of completing them, no client, properly advised, will object to complying with such requirements, any more than they would object to having their bags checked at Heathrow airport. Having their private affairs exposed to journalists is another matter entirely, about which they are surely entitled to complain.

Thirdly, the trust industry is one that has, over the last 40 or 50 years, been refined in the fire, and emerged stronger.

Structures that were created in the 60s and 70s that have outlived their usefulness, or which anti-avoidance legislation has made uneconomic, have been gradually wound up.

Continuing or new structures are constantly being assessed for their usefulness. The Trust, that has somehow been tainted with an aura of shame by envious virtue signallers remains, at its most basic, an entirely altruistic concept, where one person holds assets, not for themselves, but for another. It is time we remembered that and reclaimed some pride in it. They say that curiosity killed the cat. I hope and believe the Trust and the trust industry will live on long after Pandora's curiosity has been put back in its box.

BEDELL CRISTIN

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eprivateclient Top Offshore Law Firms 2021

The Legal 500 United Kingdom TOP TIER 2021

GOVERNANCE AND LEGACY TOP AGENDA AS SECTOR LOOKS TO THE FUTURE

Authored by: Anne Baggesen - Suntera Global

While the global pandemic continued to create challenges in 2021, its impact has helped provide focus in the private client space with governance and legacy moving further up the agenda.

Those working with family offices know only too well the importance of a robust governance framework but, as we emerge from the trials of the last 18 months, setting down shared values to underpin that framework has taken on a deeper resonance.

Such values not only act to bind disparate branches of a family, but also protect a legacy for future generations.

And that legacy carries the potential to have a much wider positive impact; as urgency around protecting the environment gathers pace, values that incorporate environmental, social and governance (ESG) concerns have the power to be transformational with wealthy families, unconstrained by the same demands on returns as other investors, able to truly lead the way in sustainable finance.

Governance

There's no doubt that the notion of governance as a core component of a family structure is translating into action at practitioner level.

A report recently published by Jersey Finance and Wealthbriefing looking at sustainable family governance models in an evolving environment, for example, found that a clear majority (61%) of advisers believe that enterprising families should have a formal governance programme in place by the time they have £50 million in assets with a still substantial 28% putting the threshold at a far lower £20 million.

Aside from setting down practical rules, governance programmes are instrumental in supporting meaningful action in the wider world based on a family's most deeply held values. Creating a robust framework and articulating these values, however, can be challenging with research conducted by the Williams Group finding 10 per cent of breakdowns in transferring wealth resulted from a lack of purpose for the family's wealth.

Further the study concluded that without common values and a common mission few families stay together in the long term with this exacerbated by larger families with increasingly diverse financial interests.

So, how to go about consolidating differing values?

For a start, open communication is key with any set purpose developed via engagement across the entire family spectrum.

Professional advisers should also take this opportunity to talk about the value of wealth, how to manage it appropriately and what shared values are held. And, while these values must be unreservedly believed in, they must not inhibit an individual family member's ability to pursue their own interests.

Many sophisticated families have already become aware of such complexities but understand that having an over-arching set of values can bridge the gap between the founding and future generations, setting the scene for succession planning.

Legacy

Another element to bridging that gap is formalising how the management and ownership of a family's business empire and other assets should be transitioned. This is crucial in avoiding the confusion and conflict that can destroy not only financial value but family relations.

For this to be successful, however, once again, clear values must be set down as part of governance efforts - in fact, recent research by PwC affirmed that succession plans were more likely to be in place (41%) if family values had been formally set down (PwC, Global Family Business Survey 2021).

But what if the aspirations of different generations seem, on the face of it, divisive? One example would be where Millennials and Gen Z values tend towards climate change while baby boomers focus more on safeguarding investments and businesses.

Evidence shows these approaches needn't be mutually exclusive; sustainable equity funds and sustainable taxable bond funds outperformed their non-ESG peer equivalents by a median total return of 4.3% and 0.9% respectively in 2020 (Sustainable Funds Outperform Peers during 2020 Coronavirus, Morgan Stanley Institute for Sustainable Investing, 2021).

Indeed, having a variety of voices and attitudes within wealthy families can be a good thing, offering diversity of opinions and perspectives, avoiding 'group-think' and paving the way to a more comprehensive approach to ESG.

Expert consultation is key though and advisors able to keep lines of communication open between the various branches of a family and provide necessary guidance on how to proceed are paramount to the success of laying down the foundations for effective succession planning.

By underpinning governance with open lines of communication, families can ultimately safeguard a legacy that can be a force for good.

Future

As we look to the future, an integrated approach to governance will undoubtedly continue to dictate the direction of travel for families.

However, there are other forces shaping the landscape too. Events of the last year have also served, for example, to compound the importance of location when choosing a jurisdiction. Proximity to business interests, family lifestyle and the drive to cut down on airmiles have all risen in significance.

So too has resilience and reliability in digital connectivity. As a result, technology ecosystems and the cybersecurity implications of operating in a particular jurisdiction are now coming to the fore.

Depth of legal and ancillary expertise as well as a high-quality regulatory regime able to offer a range of asset holding structures, from foundations and partnerships to Family Investment Companies, also remain key requirements for families of considerable wealth.

As such, the importance of quality IFCs remains as vital to the global financial world as ever and those that focus on governance, security and transparency while offering stability, depth of experience and a sophisticated technological infrastructure – all on a sustainable basis – will be obvious choices.

For advisors, the focus will need to be on working with families according to their bespoke values and needs, listening to their objectives and helping them to frame their strategies in a world that prizes governance and sustainability.

60-SECONDS WITH:

NATASHA STOURTON PARTNER WITHERS

Q What would you be doing if you weren't in this profession?

A I'd be a dressmaker. My grandmother taught my mother to sew, and my mother taught me. There was always something being made in the house, whether it was an evening gown or a fancy-dress costume. I love the challenge of turning something flat into something 3D, working out the right fabric for the design considering stability and how you want it to hang, and the accuracy and attention to detail needed to make something look flawless. I still sew, but not as much as I would like to. I currently have a half-made skirt sitting on a mannequin waiting patiently beside my desk. Maybe I'll get it finished for Spring.

Q What's the strangest, most exciting thing you have done in your career?

A I'm not sure I have done anything strange and exciting, but the strangest thing I've done was asking a waiter whether they remembered a lady whom he had served at The Wolseley some 15 years ago and finding that he did. The lady order a lettuce leaf for her dining partner and pet snail, Druid, so I guess she was hard to forget! The most exciting thing I've done was bringing an out of hours injunction application coming on before the judge just before midnight and successfully getting the order we wanted around 2am. Needless to say, I couldn't sleep for some time afterwards.

Q What is the easiest/hardest aspect of your job?

A The easiest aspect of my job is turning up every morning with enthusiasm, because I really do love it. The hardest is watching clients deal with grief at the same time as dealing with litigation, especially when that litigation is against their siblings or wider family.

Q If you could give one piece of advice to aspiring practitioners, what would it be?

A Merits, strategy, life, everything changes over time and you have to adapt to stay on track. That goes as much for career progression as it does for litigation. Keep reassessing.

Q What has been the most interesting case you have seen in 2021?

A It's not so much a case as an asset class, but I find the way in which the judiciary, tax authorities, academics and practitioners are addressing cryptocurrency fascinating. At the time of writing there is currently a disagreement between HMRC and STEP as to how you ascertain the location of cryptocurrency, which is fundamental to taxation and affects how we advise clients in almost every area of law. It's such a fast-moving area as a huge number of decisions need to be made to keep up with technology, and each jurisdiction is responding in a slightly different way. Watch this space!

Q What do you think will be the most significant trend in your practice over the next 12 months?

A Sadly, I think the most significant trend will be the increase in will disputes and claims under the Inheritance (Provision for Family and Dependents) Act 1975 as a result of the large number of deaths from Covid-19. For many of those who died, their passing will have been unexpected, and they will not have had the chance to update their will or to speak with friends and family about their wishes. I think we are already seeing this and, combined with greater press attention being given to the type of claims that can be brought, the number of claims is only going to rise.

Q If you could learn to do anything, what would it be?

A I recently attended a dance performance in the loading bay of a major London department store. Despite being freezing, it was one of the most captivating experiences I can recall. To see the physical and mental strength of the dancers. So, if I could learn to do anything, I'd like to be incredible at yoga or ballet or breakdancing, something that requires real core-strength.

Q What is the one thing you could not live without?

A The truth is my family, but in this moment it's coffee and a cinnamon bun.

Q If you could meet anyone, living or dead, who would you meet?

A I'm reading the Little People, Big Dreams set of books to my daughters at the moment and learning an embarrassing amount from them at the same time. The women whose lives they chronicle are just so inspiring: Rosa Parks, Emmeline Pankhurst. They saw something that wasn't right and fought to change it.

Q What songs are included on the soundtrack to your life?

A My go-to karaoke song was always 'Everybody' by Backstreet Boys until I sung it at a work event and realized too late that the lyrics in the middle get quite provocative. But it's still a classic. Also, I never really liked Oasis back in the day, but am loving them now. 'Stand By Me' and 'Slide Away', both amazing songs.

Q What does the perfect weekend look like?

A It's Autumn at the moment so a crisp, sunny day. A walk in the park with my family kicking up the piles of leaves and collecting conkers. Back home for hot chocolate and an arts and crafts session where no one cries/fights/pulls anyone's hair, and no one draws on the chair/table/wall or drops glue on the floor. Then snuggling up on the sofa under a load of blankets to watch a family film.

Q Reflecting on 2021, what have you been most grateful for?

A I made partner in January 2021, so it's been a year of new challenges. Joining the partnership at Withers was something I'd been aiming towards for a long time and achieving it made me reflect on the people that have supported me through my career and continue to do so: my colleagues, friends and family. They are certainly who I have been most grateful for.

Resolving private client disputes

Our aim is to work collaboratively and strategically with legal teams to achieve the best possible outcome for clients.

We know that when clients are dealing with personal disputes, whether this is following the death of a family member or a family fall out, they often become emotionally charged and sometimes extremely acrimonious. But we also know that with the right team in place, who have experience in assisting and managing these complex and sensitive matters, resolution and recovery strategies can be implemented to ensure the dispute is successful resolved for your client.

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REFLECTIONS ON A BUSY YEAR IN PRIVATE CLIENT

Authored by: Richard Joynt – Highvern

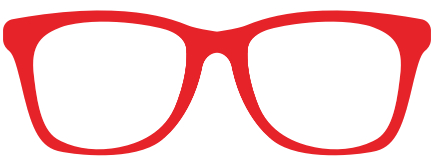
2021 has been a very significant year in the private wealth sector – and also for me personally! I took up a new role as Head of Family Office at Highvern in Q2 2021, and the combination of this new role and interesting client experiences have led me to reflect on the following lessons learned:

Personal growth

Entrepreneurs are relentless in their search for business opportunities despite a global pandemic! These are the types of clients that have kept my team very busy during 2021 and continue to educate me in new investment categories and industries.

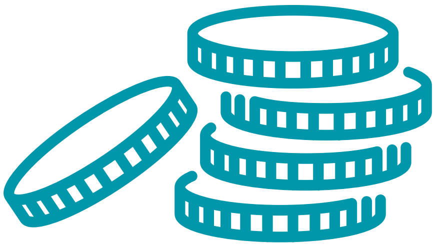
MediTech and Cryptocurrencies are two areas that have made me "up my game" in terms of upskilling and responding to client demand.

The global pandemic has not hampered this kind of client activity – if anything, it has given these clients more time to focus on their objectives and demand faster response times from their family office professionals. I feel like I'm not alone in revelling in this kind of challenge – excellent private client advisers like nothing better than a time-pressured and complex client transaction to be able to demonstrate fantastic client service – don't we all like the opportunity to show that we can provide a solution to a client when others might put it in the "too difficult" box?



Changing views

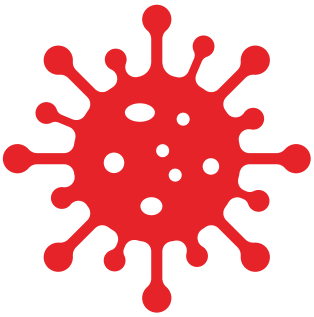
Private Client practitioners tend to stick with structures and processes that they have used / implemented before. That's not to say that we aren't all intrigued by newer ways of doing things but they do have a habit of taking some time to properly come to market after they are introduced. Reserved Powers Trusts and Foundations are both Jersey vehicles that a surprising number of practitioners still view as "newfangled" even though they have been around for 15 and 12 years respectively. Having said that, other ways of delivering more innovative client solutions are coming through a little quicker – for instance the hybrid Trust / Private Fund structure which is very useful to a certain category of client family interested in investing in Private Equity in particular.



The new normal

Alternatives are no longer particularly alternative! So many clients now have an allocation to Private Equity that it is now rapidly becoming a core requirement for a family office team to have experience in this area. With the first UK based PE houses having taken firm root in the 1990s, we are now looking at a relatively mature industry with thousands of professionals thoroughly well trained in this sector.

Professional private investing is now more popular with some family offices than public markets.



Working post-pandemic

Although I'm weary of discussing the pandemic itself, it has been very encouraging to see how the private client world has responded to the international easing of restrictions. Conferences, networking events and face to face meetings have all returned to our professional lives, but these now happily co-exist alongside video calls. Flexible working did indeed remain for many practitioners after a return to the office proved possible, and there are those who formerly supported traditional working practices who now see that many ways of working can be equally successful. A minor thing I've noticed though – if 2020 was characterized as the age of Zoom in Britain, 2021 seems to have been the year when Microsoft Teams took precedence. Amazing to see how a technology platform can wax and wane so quickly.

People power

Most organisations are characterised by its people (their energy, skills, passion and relationships) – in the private client and family office world people are absolutely crucial. My new position at Highvern has led to a reconnection with many such private client people around the world and they have shown great interest in my new role, which I have really appreciated. This has caused me to reflect that the private client world is one which thrives on relationships – between clients, tax and estate planning specialists, family office professionals, fiduciaries and investment professionals.

To be a good private client practitioner is to know where all the excellent people are, and to seek them out when a client is looking for a solution to a complex issue.

ESG as theme of the year

2021 also seems to have been the year that ESG finally became a mainstream issue to discuss in most client conversations – and a general appreciation that to engage with this properly is not a swift and easy matter. However, the technological change which is driving such impressive innovation in this sector is something to be admired and there is a sense that we must all buy into this revolution, at some point or another.

Positive change

2021 also seems to have been a year when private client practitioners were willing to explore opportunities with new firms (in contrast to 2020). I'm not the only one to have moved to a new role – the family office and fiduciary market has been generally very busy leading to competition to recruit people at virtually all levels. As 2021 comes to a close (and as we collectively hope that we are easing out of the worldwide pandemic), I for one am grateful that I belong to such a vibrant industry that continues to bring such strong opportunity for growth and challenging employment opportunities.

60-SECONDS WITH:

LAURA PERKINS
GROUP PARTNER
COLLAS CRILL

Q What would you be doing if you weren't in this profession?

A If I wasn't a solicitor, I would likely have been an accountant.I also like the idea of being a detective, the type you read about in Agatha Christie novels. Generally, I'm interested in people, the intricacies of their personalities and the complexities of relationships and I think this lends itself equally to being a detective or a private client lawyer.

Q What's the strangest, most exciting thing you have done in your career

A I didn't anticipate when I started out as a trainee in Edinburgh that my career would take me to BVI, Cayman and most recently Jersey. There is something hugely exciting about working and living in a new jurisdiction (especially one on a Caribbean island). Preparing my office in the BVI for a hurricane was a strange experience though– I'd taken part in several business continuity planning exercises in Scotland but nothing prepares you for living through an event like that in real life. The weeks of remote working which followed was good preparation for the Covid era. I'm now settled in Jersey but the job continues to be both exciting and on occasion, strange - as the saying goes, there's nowt so queer as folk! Private client lawyers are more than just professional advisors. We're often privy to really personal information about our clients (including family secrets, health concerns and opinions on a wide variety of subject matters). There's rarely a dull moment.

Q What is the easiest/hardest aspect of your job?

A I am in the enviable position of really enjoying my job. I'm lucky to work with great people and have (mostly!) great clients. My work is varied, interesting and challenging and so the easiest part is doing the job. The hardest part for me is balancing work and home life, achieving the elusive work-life balance. With two young children at home I often feel like I'm chasing my tail and being tired is now a permanent state! Thankfully I'm at a firm that is really supportive of working parents and proactive in ensuring that the demands of the job don't negatively impact of the health and wellbeing of its people.

Q If you could give one piece of advice to aspiring practitioners, what would it be?

A Never be afraid to ask questions or to admit when you don't understand. Never turn down an opportunity to learn, even if it doesn't at first sight appear directly relevant. Lawyers shouldn't ever stop learning.

Q What has been the most interesting case you have seen in 2021?

A Many years ago, I wrote an essay on the role of protectors of trusts as part of my entrance into STEP. As an onshore lawyer practicing in Scotland at the time, I had no practical experience of what a protector did. That has changed significantly since moving offshore, and I am currently advising on a couple of matters where the role of the protector is causing or is likely to cause friction. There have been a few cases over the course of 2021 looking at the role of the protector, including the judgment of the Royal Court of Jersey in the matter of the Piedmont Trust & Riviera Trust, and I suspect there will be more to come on this. It's an interesting area and in my view, the nature and the extent of the powers given to a protector requires more consideration when the trust structure is put in place than it is often given.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A The great wealth transfer, ESG investing and cryptocurrency have all been hot topics this year and will likely be again next year. That said, I think that the fundamental reasons why private client lawyers are needed remain the same as they always have been. Where there is wealth, there will always be a need for advice, planning and structuring.

Q If you could learn to do anything, what would it be?

A DIY. My husband and I bought a new house over the summer and we'd love to be able to complete some fairly basic tasks like putting up shelves and regrouting the bathroom but we wouldn't know where to start. That said, I am also a strong proponent of taking professional advice when it's needed – it generally works out cheaper in the long-run!

Q What is the one thing you could not live without?

A As much as I hate to admit it, my phone – it serves so many functions. And affordable Californian Chardonnay.

Q If you could meet anyone, living or dead, who would you meet?

A There are too many inspirational or controversial figures that I'd like to sit down with to name! Being a mother, I'm fascinated watching my children's developing characters and intrigued as to what traits can be attributed to nature and which to nurture. I'd love to have the opportunity to sit down with relatives in my ancestral family line, particularly the women. As a mother to two daughters, I consider it really important that they have strong female role models, and I'd like to think they could find some inspirational females in our lineage.

Q What songs are included on the soundtrack to your life?

A Currently, the soundtrack to my life is provided by Cocomelon. Anyone who doesn't know what Cocomelon is should aim to remain blissfully unaware.

Q What does the perfect weekend look like?

A I haven't been home to Scotland since July 2020 and so the perfect weekend for me right now would be there, catching up with family, watching my girls play with their big cousins whilst my mum and dad over-feed us. We've missed so many occasions and reasons to celebrate in the last year or two so there's a lot to catch up on!

Q Reflecting on 2021, what have you been most grateful for?

A As I'm sure everyone is after the last year or so, I'm very grateful for my and my family's health. On a more personal level, I spent nine months of this year on maternity leave and I will always be grateful for that time with my children. Saying that, I was also grateful to return to the peace and quiet of the office and hot cups of coffee at the end of my leave!

LITIGATION LENDING

Authored by: Alex Cooke, Jeremy Ellis and Alex Hulbert – Schneider Financial Solutions

Reflecting on an eventful 2021, we thought it would be interesting to explain how Litigation Lenders assess and evaluate cases and to set out the drivers that we have seen at play in the private client litigation we have funded over the past twelve months or so.

As a civil litigator you will likely be familiar with "non-recourse" litigation funding solutions, in which litigation funders make investments (to pay legal fees etc) based on a merits of a case. Where successful funders are repaid their investment (i.e. the capital they deployed into the case) plus a success fee, however in the event of a loss the funder takes the loss on the chin. Success fees are often calculated as a percentage of the damages or a multiple on the funding arrangement.

Litigation lending is very different, providing a much lower cost of finance for cases the lender deems to be lower risk, but where the loan including interest and fees are repayable by the borrower regardless of outcome of their litigation. The loan is therefore full recourse to the borrower. Such arrangements are very familiar to matrimonial lawyers to the point that the Family Courts now expect evidence that specialist litigation lenders have been approached and turned down before making a legal services order. Litigation Lenders make loan directly to customers, and as such should be regulated by the FCA for Consumer Credit. Such lenders should not expect guarantees from the solicitor firm.

Whilst standard in matrimonial disputes, litigation lending is a newer concept in other areas of litigation affecting private clients.

One of the main differences between the Family Courts and other forms of civil litigation (for example probate or trust litigation) is the availability of solicitor funding through conditional fee agreements for the latter.

This additional dimension has been relevant to our experience over the last year as well, as outlined towards the end of this article.

When considering offering a loan to a customer, lenders must assess both the credit risk and customers best interests, which includes considerations as to affordability and credit worthiness. The latter is relatively simple for lender lending against fixed assets, such as a house, where affordability of monthly interest payments will be determined by demonstrable income and future values can be statistically modelled using decades of data across millions of properties, and security is based on a legal charge over the fixed asset. However thing are not quite so simple when lending against the asset of litigation.

Credit risks are the risks associated with a proposed loan; the focus is on whether the client can and will repay, the reliability of their enforcement routes and the value of the underlying assets. In probate litigation for example, this risk is assessed by reference to the strength of the claim both in terms of the legal argument and the evidence, the structure of the loan, the manner in which any proceeds of litigation are safeguarded on success, and the value of the estate and the claim.

Whilst credit risk can be assessed on facts and variables that can be measured to within given tolerance, considering a customer's best interest under consumer credit legislation is considerably harder since the regulation does not dictate specifically how we are to make such assessment.

Under the Consumer Credit Act 1974, we are required to assess both the affordability of a loan and whether it is in the best interests of the client, whilst of course ensuring decisions are non-discriminatory and in line with TCF (treating customers fairly).

The way we choose to do it is to assess what we consider to be the reasonably likely worst-case scenario of the case. We don't focus on outlandish possibilities but realistic and bad outcomes at trial, with the litigation going on for the maximum amount of time and having to fund the litigation to trial, and potentially beyond. We draw this picture by reference to the advice that has been given to the client and on our own internal specialists views. We then look carefully at the financial impact on the client with their resources if the reasonably likely worst-case scenario happened.

That is admittedly a pessimistic way of looking at a case, however it has stood us in good stead to deal with the unexpected delays and resulting increased cost caused by a global pandemic. Such a "plan for the worst and hope for the best" approach does not mean that litigation lending is only available to wealthy clients with means. We have handled a number of cases where a client brings a claim to enhance their inheritance. They may be challenging the validity of a less generous later will or bringing a 1975 Act claim, but in those cases where the client will receive value from the estate in any event, we will treat those assets as likely to be available to the client when assessing affordability.

We have also dealt with cases where the amount the client will recover may be in dispute but where they have protection against a negative outcome. For instance, we have assisted executors with the benefit of Beddoes relief and cases where executors have singularly failed to administer the estate. In those cases where the client runs very little risk of a losing and having to pay their own / adverse costs, the affordability test becomes much easier to meet.

Many trust and probate claims are now brought by lawyers acting on conditional fee agreements. But the others involved in the litigation, the defendants, also need representation and lawyers can find it much harder to fashion a CFA around a defence. Over the last year, we have helped in a number of situations where defendants need to mobilise their legal team but do not have access to cash or a CFA.

And we have worked in tandem with a number of law firms creating a hybrid retainer which is constituted in part by a traditional hourly charge and in part by a CFA.

This hybrid model changes the risk profile of the CFA for the law firm and ultimately reduces the cost for the client.

Overall, we reflect on the year gone by and the conversations we have had with lawyers and their clients. Litigation lending has provided a useful extra dimension to these conversations and meaningful optionality to clients. We look forward to the year ahead.

NOW IS THE TIME TO PROTECT YOUR BUSINESS AGAINST THE UNEXPECTED

Authored by: Chris Wilson – Gilson Gray

Why would business owners want to consider putting protection in place in case of a ‘what if’ scenario?

As individuals we like to think that we will always be fit and healthy, but sometimes life just happens! Being a business owner is no different and for many it will have taken a lot of hard work to get to where they are today. For the last 18 months we have been living through a global pandemic and this has hit a lot of businesses hard with a knock-on effect on cash flow. Some businesses have had to rely on CBILS or Bounceback Loans to provide them with a cash injection to, hopefully, see them through this period. Also, when you consider how tough mentally this period has been for many business owners not knowing whether they would be able to survive, it really has been a difficult time.

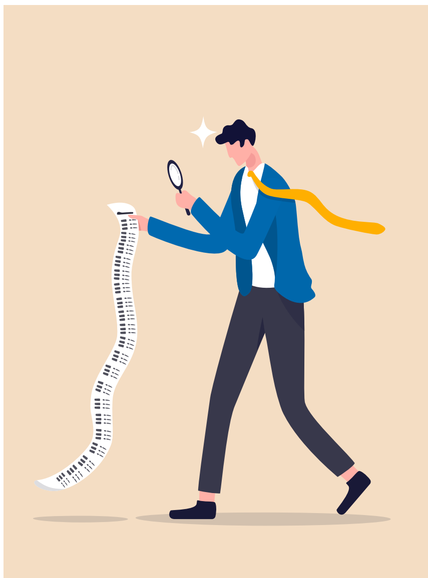
The good news is with things opening up once again, depending on government guidance, businesses will be able to restart trading. However, now more than ever it has shown how important it is for business owners to protect themselves and/or key employees against the unexpected.

Recent research conducted by Legal and General* found that 52% of SME’s felt they would cease trading within a year following the death or serious illness of a key individual, which demonstrates why it is important for business owners to take action.

What are the possible consequences of not having measures in place?

Businesses within the UK come in all shapes in sizes including: Ltd Companies, Limited Liability Partnerships and Sole Traders. No matter the size of the organisation or the sector it operates in whether that be engineering, hospitality, technology or retail, there will be people within each and every business who are crucial to its overall success.

For some businesses, contingency planning against the impact of the potential loss of a key individual may be something they have never considered before.



However, as a business owner, were the worst to happen have you considered how your creditors or suppliers would rule such a loss? Would you still be able to serve your customers and not to mention how would your staff feel following a loss of this nature? I appreciate these are questions that no business owner ever hopes to have to answer although, having seen first-hand the devastation which can be caused by not putting the relevant business protection in place, when I lost my dad to a heart attack when he was only 54, I very much see myself as an educator by sharing my experience.

My dad ran a very successful transport refrigeration business and had big contracts with M&S and Sainsbury's, as well as a few staff members. When he passed away I had to deal with the difficult process of finalising his financial estate, including his business, and because he did not have any protection in place should key individuals get seriously ill or die, this meant the business did not have any funds to replace him.

Had the business had the relevant financial protection in place we would have had the finances available to continue my dad's legacy.

What support is available to business owners?

To limit the potential financial impact of such a scenario, a business owner can setup what is called Key Person Cover and this is put in place for individuals whose role is crucial to the businesses' overall success. The premiums are paid for by the business themselves and should the worst happen, the business would be paid a lump sum, which would allow them to do a number of things including: bringing in a temporary replacement, replacing potential loss of profits and still serve their customers.

Dealing with the ownership of a company can be stressful, particularly when a sudden death or illness occurs.

For businesses that have more than one shareholder they may want to consider protecting the interests of the partners and their immediate families.

Shareholder protection allows business owners to buy back shares from any partner should the worst happen, which ensures the surviving partners retain overall business control and there are a number of ways in which these agreements can be put in place.

What kinds of business protection can owners put in place to retain staff?

One of the things business owners can look to put in place to retain staff is a group death in service scheme. A group scheme would allow individuals who have previously found it difficult to be accepted for cover due to health reasons the opportunity to have something in place without any medical underwriting, which can provide peace of mind to not only them but also their families.

In addition, Private Medical Insurance is another benefit which is often overlooked. We all know the massive pressure the NHS has been under throughout Covid and the waiting lists for treatment are now longer than ever. Were one of your staff members unable to work and had to take time off,

wouldn't you want to know that they could get the required treatment quickly, as a speedier recovery could potentially minimise the time they are unable to work?

**Business Protection State of the Nation's SMEs report*

In Focus: Next Gen

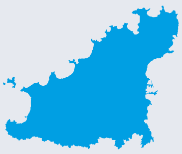
SUSTAINING IMPACT

ESG CONSIDERATIONS FOR GUERNSEY TRUSTEES AND FAMILY OFFICES

Authored by: Elena Gogh - Bedell Cristin (Guernsey)

Introduction

Sustainable investing is having its moment as high-net worth individuals, investors, entrepreneurs, business people and other agents of transformation seek out investments with a view to providing blended value – financial returns but also a positive social and environmental impact on society. The younger generations of wealth-owners - millennials and Gen Zers - are leading the trend by increasingly investing in ESG-compliant[1] companies that adhere to the stakeholder model and a better stewardship of the environment. ESG, which is often used interchangeably with the term "sustainable investing" is increasingly tied up to a company's long-term financial performance and success. As such, more and more high-net worth wealth-owners are looking to integrate sustainable investing insights into the traditional investment strategies of their family offices and asset-holding structures, which in turn affects their fiduciaries, advisers and other service providers.



Relevance to fiduciaries

Fiduciaries, in particular trustees and family offices, that are considering a sustainable investment path, should carefully consider their powers and obligations and how ESG factors would affect them in the course of their respective offices.

One of the core functions of a family office will be oversight and management of the financial assets of the family and the key question is likely to be how the family office can protect itself against the risks inextricably linked with new and potentially speculative investment strategies, which the family may wish to pursue.

For any fiduciary it will be important to ensure that they have the authority to make sustainable investments, as well as to consider any restrictions and stipulations imposed by the family, for example avoiding investments in businesses that are viewed as unethical or environmentally unfriendly.

What if younger family members want to commit to impact investing, such as seeking investments that contribute measurable solutions to global challenges like the United Nations Sustainable Development Goals, but the older generation has a bias towards sustainable businesses and investments altogether? The focus for family offices is likely to be how to manage the expectations of different family members and avoid conflict.

In the case of trustees, most modern Guernsey trust instruments tend to give trustees the widest powers to invest in such investments as they think fit. As trustee of a Guernsey trust has "all the powers of a beneficial owner" [2], the trustee has the power to invest as if the trustee were the sole beneficial owner of the trust property, which he must exercise subject to the terms of the trust and in the interests of beneficiaries. It is commonly held that to act "in the best interests of beneficiaries" means their best financial interests, although trustees can take ethical considerations into account where two investments are equally suitable [3]. However, in the current

1 ESG stands for environmental, social and governance.

2 The Trusts (Guernsey) Law, 2007, s 30.

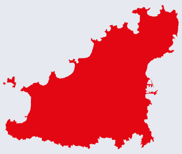
3 Cowan v Scargill [1985] Ch. 270

global environment the trustees simply cannot ignore the likely consequences of ESG factors on the financial value of investments when fulfilling their primary duty to act in the best financial interests of beneficiaries, as it is now generally accepted that companies with poor ESG ratings are at considerably higher risk of financial losses and potential reputational harm affecting the entire business.

Under Guernsey law, the overriding duty to act 'en bon père de famille'[4] will apply to trustees' investment duties.

In broad terms, the duty follows the "prudent person of business" rule under English law and requires "… to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide" [5].

Underestimating ESG risks is not prudent and trustees should factor ESG principles into their investment decisions. This is also relevant in appointing professional investment managers, whose sustainable investing capabilities should not be presumed, and in making decisions as to investment objectives and asset allocation. There is also a statutory duty to "preserve and enhance, so far as reasonable, the value of the trust property" [6], which will need to be considered when making investment decisions unless it is excluded under the terms of the trust.



Mitigating risks

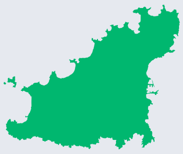
For the trustees, the starting point will be to examine the terms of the trust, in particular the investment clauses and any duties owed by the trustees. Consideration should be given to including specific provisions in the trust instrument giving the trustees express power to invest in sustainable investments combined with a statement of investment principles recording the settlor's intentions concerning the sustainable investing strategy. Alternatively, the family's vision on sustainable investments could be set out in the family charter or a letter of wishes, including their commitment to integration of ESG principles into the investment strategy of their asset-holding structures/ family offices and guidelines to relevant fiduciaries in respect of such investments. Any exclusionary policies, where families reject investments that do not meet their values, should be confirmed with the wealth-owners. The family office should also seek clear agreement with the wealth-owners as to the limits or guidelines on the level of risk that they are prepared to accept. Investment mandates should accurately record these commitments, so that the family office or trustees can monitor the performance of an investment manager accordingly with a view to taking the appropriate action, including removing it, should it be the cause of consistent investment under-performance. It is also important to keep the investment strategy under review and report performance on a consistent basis to families/beneficiaries.

In the case of outdated Guernsey law trusts that cannot accommodate future beneficiaries' needs in the context of the new global reality, it may be possible either to amend trust provisions, if this is allowed under the terms of the trust, or apply to the Royal Court of Guernsey to vary the trust. If, for example, the settlor wants to focus on pure impact investing, which arguably could create greater risks for trustees than simply making ESG investments in the best financial interests of the beneficiaries, a safer option from a trustee's perspective, may be to form a reserved powers trust. Such trust provides for the manner in which the trust fund is managed and invested to be directed by means of a "prescribed direction" by a third party (typically the settlor or primary beneficiary) who is known as the power holder.

Under Guernsey law a trustee who acts in compliance with a prescribed direction will not, by reason only of such compliance, act in breach of trust [7].

As such, whilst the trustee of a reserved powers trust has no investment function, it should take reasonable steps to satisfy itself that the power holder is acting within its powers. If the power holder is a fiduciary, which would usually be the case with professional investment managers, and appears to be acting in breach of its fiduciary duties, the trustee can no longer stay passive and should consider taking action (which may involve not complying with a prescribed direction).

Other possible options include establishing a stand-alone structure, such as a Guernsey Private Trust Company (a "PTC") or a Guernsey foundation, dedicated to meeting the investing objectives of the family separate from the family's existing asset-holding structures. Broadly, this would also mitigate the risk of cross-contamination between structures. A Guernsey PTC will act as trustee of a discretionary trust with the board of the PTC taking strategic investment decisions concerning an ESG strategy, thereby removing the scope of personal liability that would attach to a professional trust company were it to act as trustee of such trust. A Guernsey foundation can be established for either a specific purpose(s) or to benefit beneficiaries or both. However, if the family is more familiar with trusts than foundations, a Guernsey purpose trust, which can be formed for any purpose, could be a suitable vehicle for any impact ventures, e.g. "to support organisations or projects that benefit clean energy, health, education and microfinance and are often overlooked by traditional investors." A Guernsey purpose trust, which is often used in family office structuring, would also have the advantage of simplicity and cost-efficiency with the trustees and enforcer conferring a top layer as a check and balance.



Conclusion

From a private wealth perspective the trend in sustainability is still growing in momentum but is here to stay. If fiduciaries are focusing purely on financial returns in their investment decision making, they may not only miss the macro-trends that will affect them in the long run, such as the changing preferences and concerns of new generations towards investments, but could also be failing their fiduciary duties if they fail to incorporate financially material ESG factors into their investment decision making. With Guernsey's world's first regulated green fund regime, sustainable finance strategy, and regulatory and legal framework Guernsey trustees and family offices are really well placed to rise to the challenges of managing ESG factors and helping families transition to more responsible investment, but they should also be mindful of risk-management, which should not be understated.

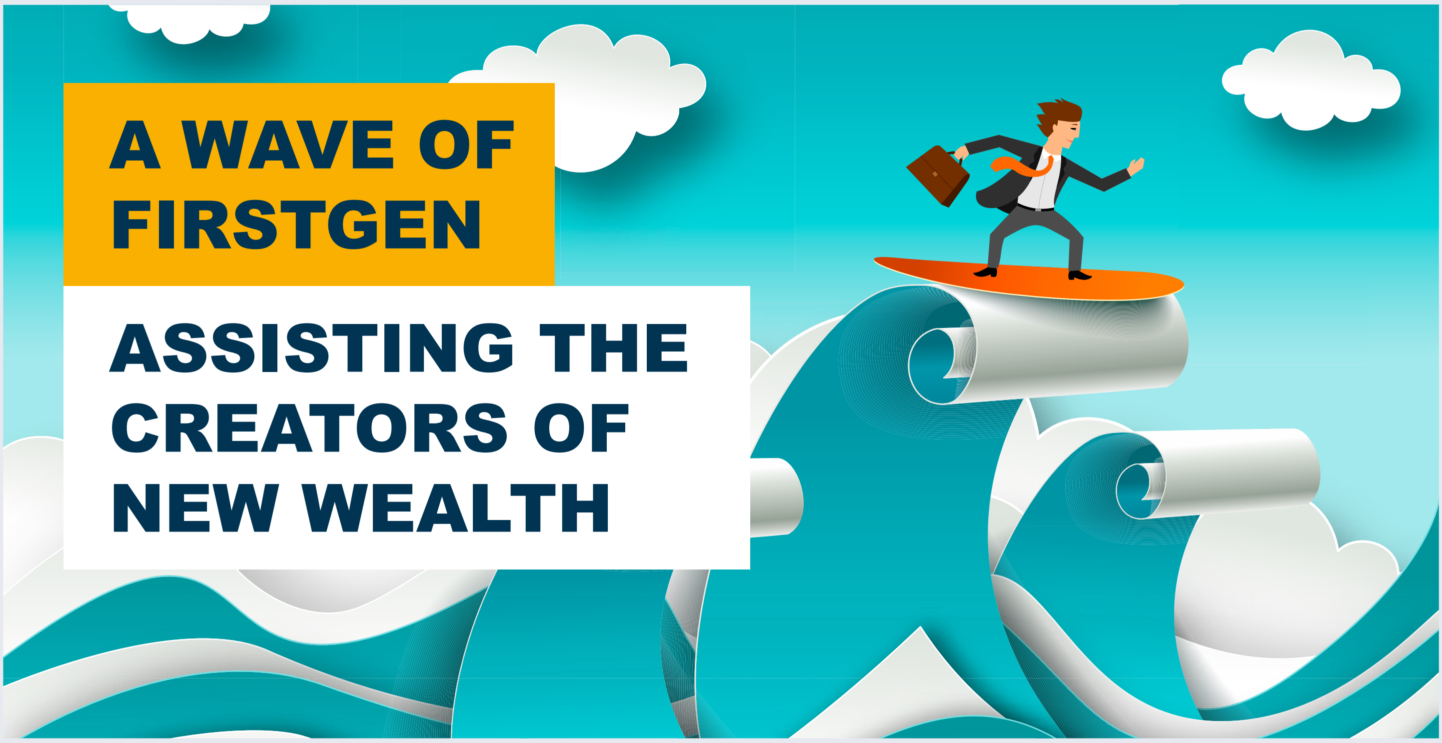
4 The Trusts (Guernsey) Law, 2007, s 22.

5 Re Whiteley (1886) 33 Ch. D. 347

6 The Trusts (Guernsey) Law, 2007, s 23 (b).

7 The Trusts (Guernsey) Law, 2007, s 15 (3).

In Focus: **Next Gen**



A WAVE OF FIRSTGEN

ASSISTING THE CREATORS OF NEW WEALTH

Authored by: Bernadette Carey and Chris Duncan – Carey Olsen (Cayman Islands)

While the increased profiles and demands of the famed “Next Generation” (NextGen) of established high net worth families have been well traversed over recent times, little has been said to date about the growing and very different needs of a new group of first generation wealth creators (FirstGen) now filling the books of private client advisors. These newly-minted individuals and families are the recipients of a large portion of the huge wealth generated globally in the past 12 to 18 months, and require special attention from advisors and fiduciary service providers not only to manage and protect their newfound fortune but to deal with the inevitable pressures associated with it.

The FirstGen – who are they?

Broadly speaking, the FirstGen are original wealth creators who are predominantly from a younger age bracket. Unlike the NextGen, who are young adults emerging from a long line of established wealth made via family businesses that have evolved over generations, the FirstGen are the recipients of life-changing wealth for the first time in their family history. In many cases, that wealth comes from non-traditional avenues such as investments in new technology and digital assets or cryptocurrencies (crypto), and it has been accumulated in a relatively short space of time.

By way of example, FirstGen settlors might be persons in the following situations:

- **The founder of tech company which is about to undertake an initial public offering (IPO) or raise capital in a private setting resulting in the founder receiving significant sums as part of the process. These clients often need assistance to establish pre-IPO or liquidity event structures to house their interests in the business before the listing or fundraising so that it can be appropriately managed and protected into the future.**
- **Investors in crypto that have seen a modest initial investment leading to generational wealth. For the crypto investor, as those familiar with the industry will know, these gains can arise in a matter of weeks and months and fluctuate significantly over time.**
- **The founder or founders of a new crypto project which issues a token as part of the launch of the project. These founders often do exceedingly well at the time the tokens hit the market, with any appreciation in the asset value post-launch being a bonus.**

While the way in which the FirstGen have made their fortunes may differ from traditional private clients who have created family wealth over a long period of time or throughout a successful high profile career, the FirstGen also want the same from their wealth management and structuring advisors: a clear strategy for asset protection, succession planning, and privacy as a means of security for their families into the future.

NextGen vs FirstGen

As noted above, the NextGen typically will not have generated the family wealth themselves and will instead beneficiaries of the foundational efforts of their parents who established investment management and private wealth structures in early course to ensure the longevity of the family business. Consequently, NextGen beneficiaries have often (but not always) grown up in a well-resourced environment and are familiar with the considerations and practicalities that come with significant wealth such dealing with legal and financial advisors and ensuring that tax and other obligations are met.

In contrast, the FirstGen, whilst similar to the NextGen to the extent they are often younger and tech savvy, are typically not as comfortable or familiar with great wealth and the considerations that come with it. Dealing with fiduciary and investment management service providers and legal advisors, and talking frankly about money, relationship, and security issues may also seem a foreign (and daunting) exercise. The FirstGen may not have considered the tax implications of their new wealth at all, and may feel particularly vulnerable to the demands not only of regulators but also family and friends who have more than a passing interest in the FirstGen's fortuitous change in circumstances.

Different challenges for advisors and trustees

When dealing with sophisticated clients, it is often not necessary to go over the basic principles of wealth structuring and succession planning in any great detail. However, that is unlikely to be true for FirstGen settlors, who may be unfamiliar with trust and estate structures and the associated implications and benefits. It is therefore important for both legal advisors and trustees to take the time to ascertain at an early stage what level of familiarity a FirstGen client has with these concepts, to ensure information is provided at the right level and the client builds a clear understanding of why structures are used and how they operate in practice.

Another key challenge for those working with the FirstGen concerns the technical expertise of the advisors and trustees themselves. FirstGen clients, particularly in the crypto space, will select advisors and trustees based on their knowledge and understanding of what are often complex assets and investments. By way of example, a client wanting to establish a trust to hold a particular cryptocurrency might ask about concepts, such as "staking rewards", with which the trustee or advisor is not familiar or in a position to provide good quality advice. A fundamental understanding of new technical concepts will likely become a competitive advantage for advisors and trustees who can engage in intelligent discussions around areas of interest for FirstGen clients. More generally, advisors who can embrace technological innovations and solutions when working with FirstGen clients, to whom simplicity and speed of delivery are big drivers, will likely see their client base grow significantly. For example, innovative ways of onboarding clients and obtaining KYC such as using Blockchain and other new tools will likely be appealing to younger tech savvy clients.

A trend likely to continue

Given the huge amount of activity in capital markets and the crypto industry, FirstGen clients will undoubtedly continue to comprise a large portion of the modern private client advisor's book. For those willing to embrace this new type of client, and geared to provide the more bespoke advice required, a great opportunity awaits.

In Focus: Next Gen

Authored by: Frederick Bjørn – Payne Hicks Beach

"Boom to bust in three generations". It is a phrase trotted out in numerous client meetings and a warning, in particular, to those wealth creators who have been so fixated on their business that they have not stopped to think about what comes next.

What is it that causes the dissipation of significant wealth over such a relatively short period? There are numerous answers, some of which are unavoidable and some of which are the reason that succession planning and family governance has become such a significant part of a private client adviser's workload in recent years.

One unavoidable side is the often exponential growth of families. Starting with a wealth creator in generation one (G1), it is typical for this wealth to be spread over 10-15 family members by generation 3 (G3). Even without other barriers, a fortune divided 15 ways takes on a very different complexion. Whilst the allotted sum may still be significant for each individual it will quickly diminish without appropriate planning.

Tax should never be the sole driver of succession planning. However, with the headline rate of Inheritance Tax (IHT) in the UK being 40% (one of the highest in the world) it is hard to ignore.

The moral issue surrounding the mitigation of IHT is beyond the scope of this article, but at an objective level, this is a material barrier to intergenerational wealth transfers and needs to be considered early on in the process. When advising family businesses, for example, the availability of IHT business property relief can be key at this stage.

Tax aside, the dissipation of wealth is often driven by a failure to bring the next generation(s) into the fold. There has to be a balance between on the one hand protecting the next generation (G2) and G3 from the wealth in a bid to maintain their drive and ambition, and on the other hand the risk of failing to educate them about the responsibility of wealth. It is notable how often material wealth becomes overwhelming and this is something which has to be addressed early on to enable a smooth transition.

As well as being overwhelmed by wealth, the next generations can be stymied by the success of G1. The wealth that derives from G1 is often the result of business acumen from one or both parents, and this can lead to feelings of inadequacy by G2 and G3 and motivational paralysis. G1 may simply attribute this to a sense of entitlement or laziness, as opposed to a fear of failure. There is of course the other side to this which is that having a financial safety net means that G2 and G3 are less willing to graft and apply themselves when the going gets tough but this should be explored with the family.

How much protection should there be for future generations – does G1 educate G2/G3 and leave them to make their own successes/failures or does G1 put in place a structure to protect them? The use of trusts in this context is one way of balancing this conundrum.

Whilst trusts have fallen out of favour due to increasingly adverse tax implications, they continue to be important succession planning tools.

Rather than merely distributing large sums to G2/3, or indeed G1 retaining sums and paying an allowance (which can seem overly paternalistic), trusts have the benefit of introducing G2/3 to the family wealth/business in a controlled manner – often with third party oversight. Whilst the funds are initially protected, they enable the next generation to feel involved in the wealth which is crucial to a successful transition. This can of course be achieved in other ways, but it is the involvement of third party advisors that can help G2/3 to immerse themselves in the family's affairs without the exclusive oversight of the generation above.

A further issue which often arises is the reluctance on the part of G1 to relinquish control. They have built up the wealth and they never accept that the next generation are no longer children, so they feel duty bound to control everything throughout their life and indeed from beyond the grave in some circumstances. As well as educating G2/3 in the responsibility of wealth, it is important to work with G1 to understand that they can start to let go as their children become more involved and better able to protect the wealth for their own children. This is a core aspect of family governance work and is often delicate. Not every child wants to take on the family business, and not every child will adhere to the principles laid down by their parents. However, it is important for there to be a forum to discuss this and often dialogue will enable both generations to understand the other's concerns so that these can be factored in to the planning. This can lead to a family constitution in which the agreed philosophies are laid down.

How does one raise the barrier to succession planning? As every lawyer likes to say, it depends. It depends on the particular circumstances of the family in question and the characters involved. It also depends on the assets representing the wealth and how far through a wealth cycle the family is. When the material wealth lies in a family business, questions arise as to how this will be run in the absence of G1 and the extent to which it is beneficial for one or more of G2 to get involved (assuming that is what they want to do). If, in fact, the wealth is more liquid then questions of investment and diversification arise, as well as the benefits and pitfalls of remaining as a family unit or splitting off into branches. In any event, the next generation must be educated in protecting what has built up. Is the existing structure fit for purposes? Are there matrimonial considerations to take into account (ie should pre-nups/ post nups be considered)? What is the ultimate aim?

It is never too early to start the discussions about family governance and succession planning but it does require an open minded approach. Not every solution will be workable but exploring a family's options and ensuring an open and regular dialogue is key to success.

In Focus: **Next Gen**

NEXT GEN:

IMPACT INVESTING – NAVIGATING AN INCREASINGLY COMPLEX UNIVERSE

Authored by: Andrew Sams - TwinFocus

Background

There has been a huge amount of discussion in recent years about the largest ever generational transfer of wealth that is anticipated over the course of the next few decades.

In the next ten years alone over GBP3trillion is anticipated to be transferred globally.

As has already been seen and widely acknowledged, the next generation of investors is mission-driven and cares deeply about social and environmental matters, as well as pursuing philanthropic and social enterprise endeavours. Debating definitions and the nuances between them is a topic in and of itself, so for the purpose of this article, I shall refer to this collectively as "Impact Investing".

Add to this tectonic change in thinking a shift in other macro factors, such as:

Global regulatory/Political shifts – Biden's election in the US, United Nations Principles for Responsible Investment & Sustainable Development Goals, and the International Finance Corporation's Operating Principles for Impact Management, to name but a few.

Greater focus on global taxation & transparency – the OECD & G20's BEPS project, Pillar One & Pillar Two, which aim to deal with the challenges arising from the digitisation of the economy and a shift in global attitudes towards tax avoidance - i.e., the move to 'responsible taxation' and establishing an environment where the ultra-wealthy, whose focus is on avoiding taxation, will have "nowhere to hide".

Increased focus on equality – in all senses (race, gender, socio-economic background etc.), at all levels, including income equality and the actions such as those of Dan Price at Gravity Payments, who's implementation of a $70,000 minimum wage by drastically reducing his CEO earnings has been well-documented.

Global increase in wealth and number of UHNWIs – the number of UHNW Individuals has soared in recent years. According to the Global Wealth Report published on 10th June 2021 by Boston Consulting Group, even during the pandemic the number of super-rich (those with a net worth >$100m) rose by 10%.

In short, there is a huge amount of financial fire power that is already being aimed at Impact Investing, with the trend set to continue as further wealth is transferred to Next Gen. This has already been keenly identified by those in the wealth management industry with products being promoted as being ESG, impact investments or 'purpose led'.

This has created the challenge as to how to discern the genuine impact investment offerings from those branding themselves as such with the aim of capturing some of the huge amounts of wealth directed at this space but offering limited genuine impact substance. In the United States, the Securities & Exchange Commission has made it a central theme to crack down abuses in the investment industry ESG and Mission-related Investment labels are misused for the sole purpose of increasing assets under management.

In addition, there has even been the creation of various certifications and accreditations, such as 'B Corporations', which require detailed impact assessments and criteria to be met on an annual basis to ensure purpose is balanced with profit.

With so much already out there, a lack of widely accepted terminology and minimal disclosure requirements and regulatory oversight, how can Next Gen carefully navigate this landscape to truly participate in the ESG movement and accomplish meaningful impact?

Impact Investment Strategy

At the outset, it's important to engage with Next Gen as early as possible over a sustained period to truly understand what is most important to them; to borrow Simon Sinek's phraseology – start with 'why', and I would add, make sure you really understand the 'why'. This greatly assists the process of developing a clear vision for how they wish to deploy their funds to achieve their purpose led goals and build a successful impact investment strategy.

As part of this, it is important to understand where on the impact investment spectrum (see Figure 1) Next Gen may lie; there may be multiple strategies focused on one or more segments.

Risk, Return, Impact ("RRI")

Much like with traditional investing, risk and return are fundamental. However, subject to where the strategy sits along the spectrum in figure 1, such terms may take on slightly different meanings than they do in traditional investing. For example, 'risk' can take on a broader meaning of risk e.g. risk that the investment may not deliver on certain non-financial objectives (i.e. not just risk of financial loss).

In addition, a third metric of 'impact', being the delivery of the impact strategy's objectives, needs to be introduced and appropriately balanced with risk and return. Similar to risk and return, impact has a comparable relationship; high impact strategies tend to come with a greater risk tolerance and potentially an acceptance that return may be subordinate to (or even sacrificed for) impact.

There is no 'one size fits all' in the various models, metrics and approaches that can be applied in considering risk, return and impact. However, one of the key areas that detailed consideration of RRI will highlight is whether the investment strategy is aimed at social value creation or values alignment. This is a topic, which I have briefly summarised below.

Social Value Creation vs Values Alignment

Values Alignment

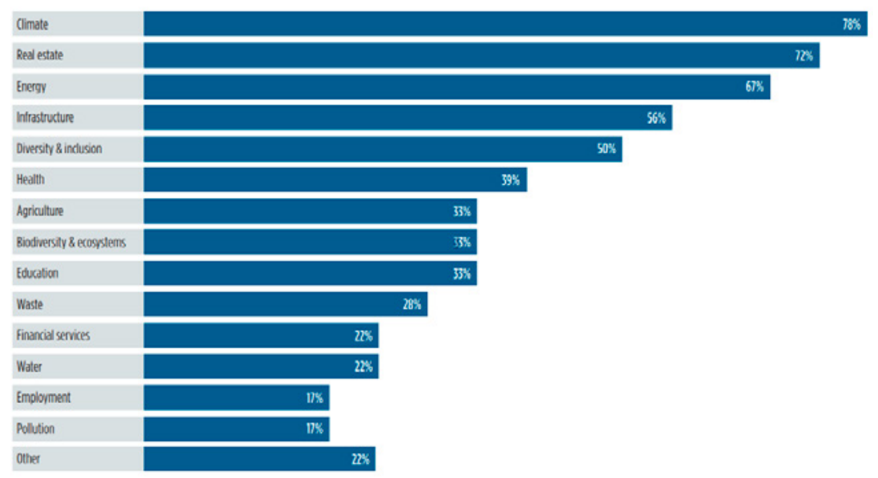
Values alignment is achieved by investing only in companies whose business practices, products and services align with the investor's personal values. For example, expressing personal values through their investments by tilting their portfolios to companies that are providing clean energy alternatives or companies whose corporate culture is known for emphasizing equality and diversity.

Values alignment is typically achieved through the following investment structures:

Passive ESG ETFs.

ESG Mutual Funds.

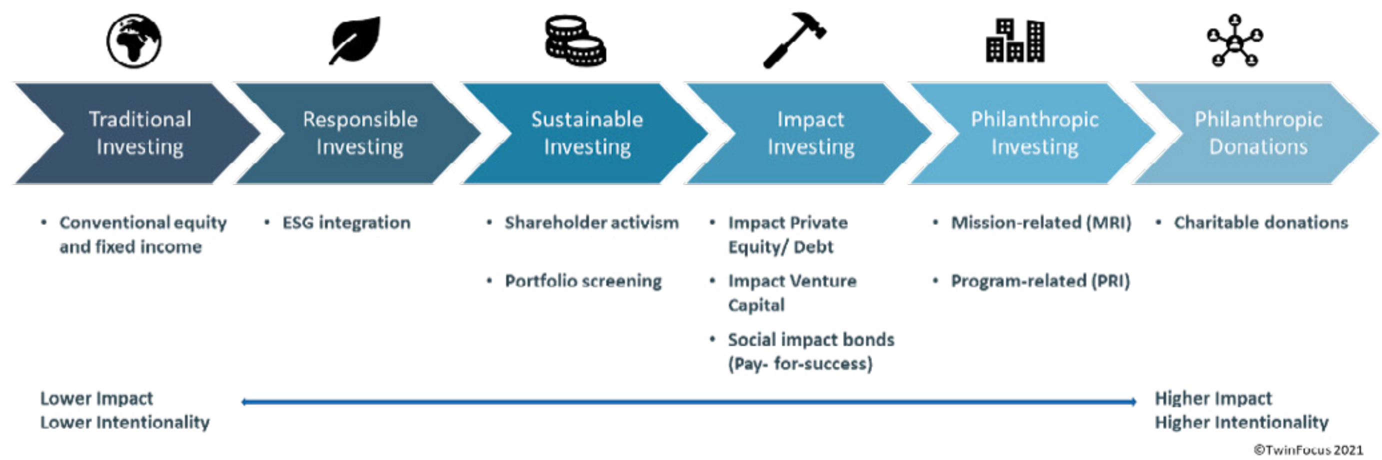
The breadth of impact categories able to be accessed via institutional asset managers has vastly increased in recent years, so values alignment is more obtainable than ever before. A survey undertaken by the Global Impact Investing Network ("GIIN") published in July 2021 shows the focus of impact categories by institutional asset owners at present:



Respondents could make multiple selections

Source: GIIN 2021, Institutional Asset Owners: Approaches to setting social and environmental goals

Figure 1



Social Value Creation

Social value creation goes beyond values alignment and involves investing in (or creating) companies that generate more social value. This requires more active engagement and is typically achieved through the following structures:

- Actively managed Mutual Funds.
- Activist Hedge Funds.
- Private Equity/Venture Capital Funds.
- Direct creation of new ventures/funds/ social enterprises/foundations etc.

It can be a useful exercise to work through RRI to establish whether Next Gen are most interested in social value creation or values alignment. This will ensure that funds are effectively deployed as it also helps to further the conversation to more specific portfolio construction considerations such as:

key impact themes;

- asset class/strategy selection;
- asset location (entity type, jurisdiction, etc.); and
- appropriate target weight/sizing selection.

Monitor, Measure, Manage & Move

A key part of creating an effective impact investment strategy is to determine what success looks like – i.e., identifying achievable, measurable, and realistic goals and appropriate benchmarks. This will determine the appropriate level and type of monitoring and measurement to ascertain whether the strategy is on track to be successful or not, and how such portfolios should best be reviewed and compared on an absolute and relative basis.

What success looks like, and the measurement and monitoring thereof, will be different for everyone. Risk and return are more tried and tested with well-known strategies and process for determining and monitoring ‘success’.

From an impact perspective, it may be:

- Output oriented – for example, 1,000 lives saved; or
- Outcome oriented – for example, eradication of hunger in X jurisdiction.

This should also include what the relevant timeframe may be – i.e., 3 years, 5 years, 10 years, 3 generations, etc, which has impact, risk, return and liquidity considerations and should all feed into the specific portfolio construction considerations in addition to those already outlined above.

The next challenge is then one of management and movement. The ‘management’ part of this effectively considers how funds should be deployed/invested (and by whom) to best achieve the established impact investing objectives and to keep this under review on an ongoing basis.

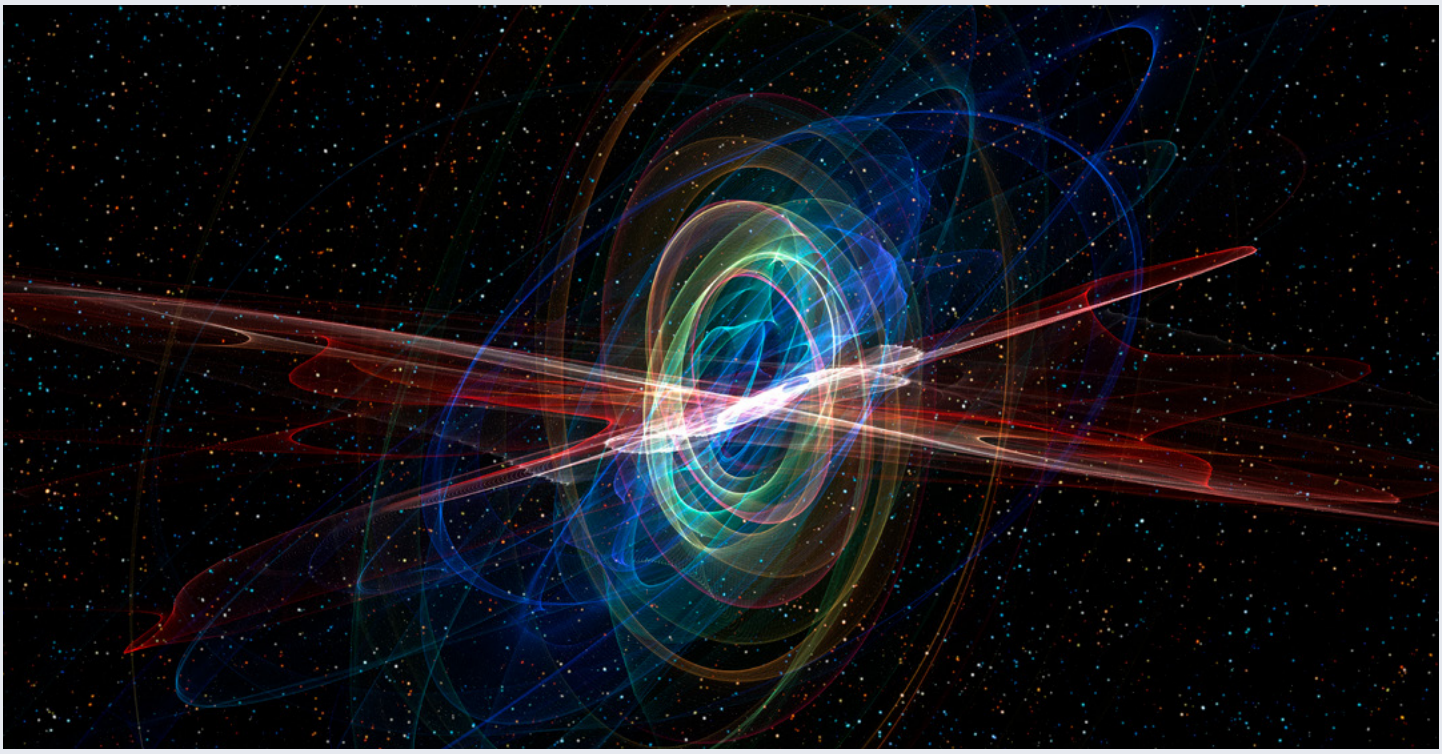
The ‘movement’ part refers to both the implementation of the impact investment strategy and the need to build in flexibility and agility to the strategy, as well as the objectives and portfolio. This allows for it to be adjusted (or moved) if the ongoing reviews identify any divergence from the objectives or an inability to achieve the desired success level.

Summary

In summary, the level of interest (and therefore capital deployed) from Next Gen in impact investing is only set to increase. This trend has already been well documented with numerous advisers and asset managers positioning themselves to serve such demand.

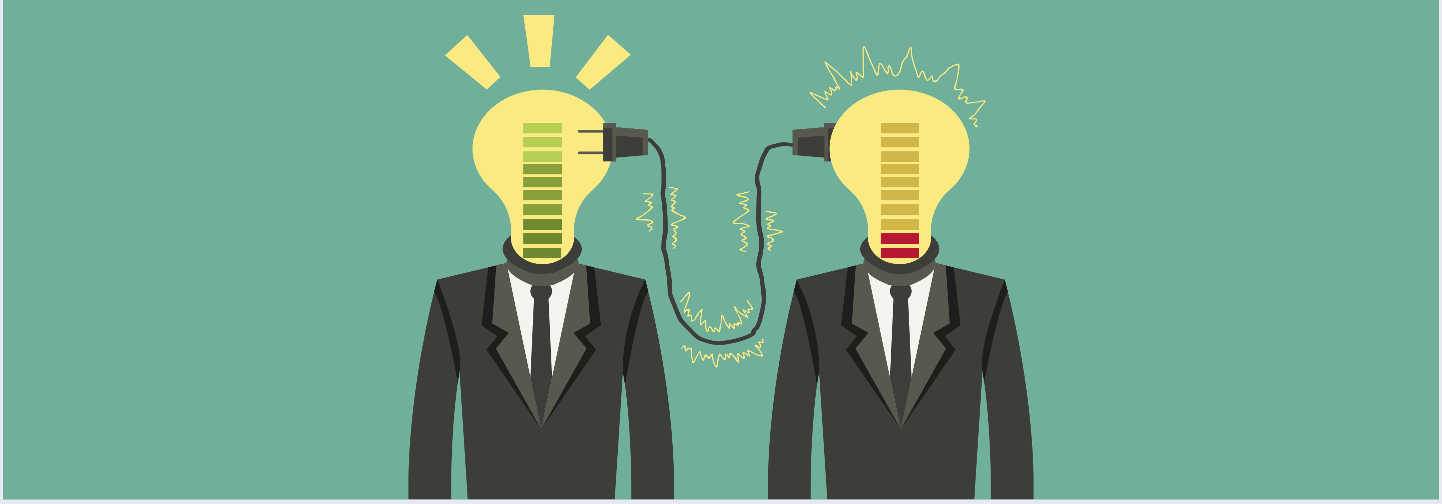
As a result, more than ever, it is necessary to undertake a diligent, methodical, and well-thought-out approach, seeking the support of objective conflict-free industry experts to help navigate this landscape.

This will help discern the genuine impact investing opportunities from those lacking substance and most importantly help Next Gen create and authentically express their own personal impact investing vision and strategy.



In Focus: Next Gen

THE POWER OF SHARED PURPOSE: IT'S GOOD FOR YOU



Authored by: Amy E. Blackwell - Acorn Capital Advisers

Purpose is everywhere. It is tied to investments, ESG, impact, philanthropy, families, family offices, businesses and more. So, what's the big deal? Does having purpose make any real difference? Who should care about purpose and how do you define it?

Purpose is good for you. Evidence from Brett Steenbarger [1] shows that it leads to greater emotional and physical health, increased happiness and enhanced work productivity. It channels energy, fosters optimism and hope, and contributes to positive outcomes and impact. He describes people as being "wired as meaning-makers" with purpose acting as an organising force that propels us toward our goals.

It's clear that purpose is important. However, when it comes to families, shared purpose is an even greater driving force. It can be the strategic framework that guides families to define the why, what, and how of their legacy and the roadmap that enables a family to travel individually to a shared destination and achieve far more than the sum of their parts.

How does purpose flow through families, their businesses, and wealth?

Shared purpose is born out of a strong sense of legacy and values shared across generations. When families are driven by the sole purpose of the principal it can often be one generational. However, if a shared purpose can be developed then the family can define a long-lasting legacy.

Legacy planning therefore needs to be about much more than IHT strategy, trust structures and tax efficiency. It is an opportunity to explore a family's history, make an honest assessment of where they are and look ahead to identify what they stand for and wish to be known for.

Wealth is a tool not an identity, with each generation learning how to wield that tool with purpose.

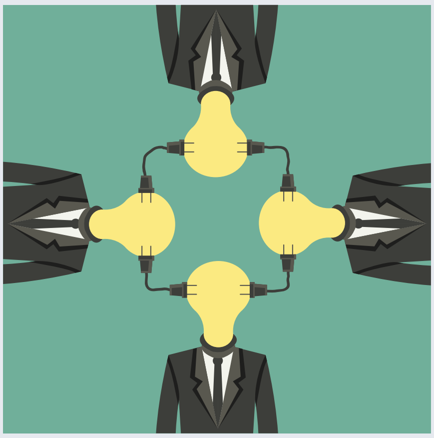
Purposeful families think critically about how to feed the passions of family members so that they feel connected to the family, its history and future. By defining a purpose and legacy, they create the shared destination, with the wise understanding that family members may take their own unique journey there. They think across generations about how to build a path of opportunity for members of the family as they mature.

Family constitutions can play a role in articulating purpose and defining a common family agenda. The process of planning for a family constitution is often more important than the document itself. Families that celebrate their differences and ability to bring their own passions and goals to the discussions create greater bonds and purpose. Honesty is a critical ingredient in discussions related to purpose; as is a safe space to share fears, insecurities, and personal goals.

Support needs to be in place to offer opportunities to everyone. One way of doing this, especially for families with a history of entrepreneurialism, is to create VC funds to which family members can apply for funding. This affords access to capital but with expectations of performance and repayment. By providing mentoring, support and advice, families can set up young businesses for success. The purpose of those new business ventures can often align smoothly with the overall family purpose.

1 Forbes, November 2019

Ideally, the shared family purpose represents the skeleton of the family tree, but each member adds their own unique branch to the greater structure. As a result, the depth and dimension make the tree more purpose-driven and impactful. Supporting the professional and personal dreams of the next generation is an effective strategy for preparing the legacy to pass on. By embracing the difference in the journeys, the family has brought purpose to life and established a connection to something larger than their individual lives.



Integrating purpose into family businesses and family offices

Purpose matters - to individuals, to a family's legacy and to the ecosystem around it. Transparency and purpose alignment across all aspects of the family's wealth is important for many reasons. Yes, it builds consensus and trust across stakeholders, however, it is also good for business. A 2021 survey by Transmission Private, found that top talent, partners, and banks place significant importance on working with family offices that have strong consistent values and ethics.

The family's ecosystem includes wider stakeholders, so their core values and shared purpose need to be clearly articulated for everyone. Being explicit about expectations around values, ethics, business practices and goals helps to avoid separate sets of rules for family and for everyone else. Shared purpose and drive grow from a sense of belonging and that is built from a belief that opportunity exists for all those in the ecosystem. The family needs to "walk the talk" and be who they say they are.

Trust and respect are built when families communicate clear career paths and expectations for family members so that all stakeholders can understand their place in the business' future.

Ensure purpose is tangible (and not just theoretical) by bringing it to life throughout the business and family office, for example through ESG policies that are transparent and open for review. Take people on the journey by defining, measuring, and monitoring success through KPI's and business plans that have clear metrics to showcase progress.

Often, there is a strong sense of place within a family business. This can be gratitude for the community where the business has operated; toward the employees and their families; or to customers, the community, and suppliers. A family's purpose and impact strategy can be a desire to give back to the places where they have operated. One family, which had made its fortune in the luxury travel industry, supported the ecosystems throughout the world where they offered travel through philanthropic projects. They were committed to helping local populations retain their cultural identity and traditions and by integrating local stakeholders into the programming, they were able to empower local communities to benefit from the family business' success.

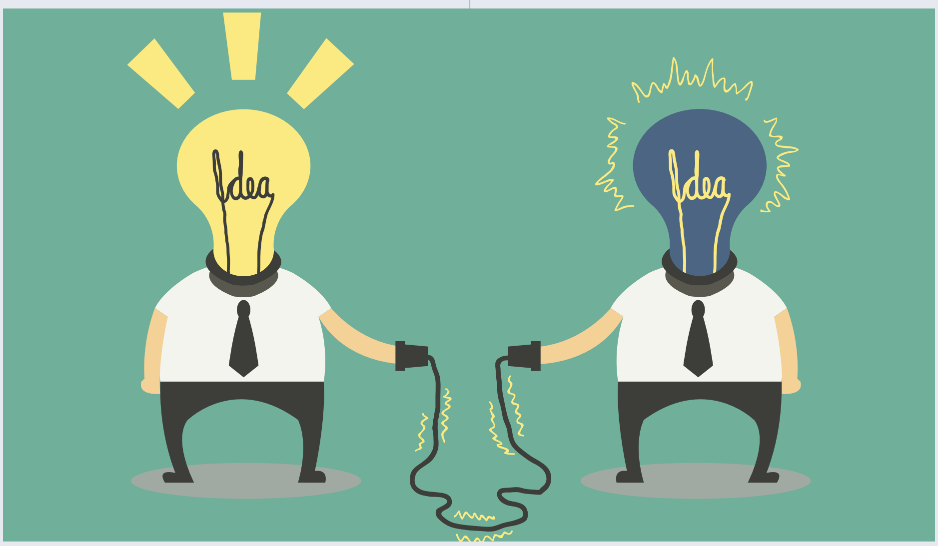
Aligning purpose into wealth strategies

Investments and philanthropy are another area in which shared purpose can prove an important tool. It can be the glue that ties the wealth in an overarching strategy and drives sustainable impact across portfolios. By removing silos and thinking about wealth across the impact spectrum, families can be certain that their values are part of the decision-making process. They can confidently stand for something and demonstrate it in their investment choices and philanthropic grant making. Family members will have multiple risk appetites, timelines, income, and liquidity requirements. A holistic approach to impact and purpose across all asset classes and philanthropic channels will offer a spectrum of opportunities to suit them all.

The impact of shared purpose

The impact of shared purpose is far more than the sum of its parts. It is collaborative and it is a powerful amplifier. In today's Covid-influenced world, there is a sense of gratitude and purpose rising in wealthy families. They understand that to whom much is given - much is expected.

At a time when social and environmental challenges abound, the opportunity to define a purposeful path is ready for the taking. To truly be "meaning makers," families should begin by placing purpose as the cornerstone of their strategy and unite multiple generations with a great sense of pride in building a legacy that will live on long beyond them.



In Focus: Next Gen

CHARGE AND BREATHE...

Authored by: Jennifer Ronz – McDermott Will & Emery

Pressure is inherent within the legal profession, often driven by differing factors such as long working hours, competition, targets, expectations, imposter syndrome and digital overload. All too often people have confused being 'busy' with being successful, viewed high levels of stress as a badge of honour and, assumed mental health issues are as a sign of weakness. There is also a damaging perception that because the legal sector is a so-called 'rewarding' profession that individuals should be able to handle such high levels of pressure. But at what cost?

Many in the legal profession have taken their mental health and wellbeing for granted for a long time and the recent statistics on lawyer wellbeing are alarming:

- **The International Bar Association (IBA) has published the initial results of a global evaluation into the wellbeing of the legal profession from surveys open in July 2020 –December 2020. It provided confirmation that lawyer wellbeing is a cause for global concern and that stigma is a major problem: 41 per cent of respondents said that they could not discuss wellbeing issues with their employer without worrying that it would damage their career or livelihoods [1].**
- **In the American Lawyer 2021 Mental Health and Substance Abuse Survey, 71% of respondents in the legal sector said they have experienced anxiety, 37% percent of respondents said they felt depressed, and 70% said COVID-19 had made their mental health worse [2]**

Thankfully, in recent years and, even before COVID-19, wellbeing and mental health has become an 'acceptable' conversation in the legal sector and it has been making its way on to the agenda. Whilst COVID-19 has been a perfect storm for lawyers working long stressful hours in isolation, it has also helped to dispel myths and reduce the stigma surrounding mental illness.

The SRA, the Law Society, law firms and legal publishers are all seeking to enhance the understanding of wellbeing in the law to drive cultural change across the industry. It is after all massively in the interests of everyone to invest far more in improving mental health (i.e. individuals feel supported and valued in order to sustain their careers in a stressful profession and, law firms benefit from having thriving and productive lawyers). It

1 https://www.lawcare.org.uk/news/iba-releases-interim-survey-results-on-wellbeing-in-the-legal-profession

2 https://www.law.com/americanlawyer/2021/05/03/lawyers-were-already-struggling-with-stress-and-isolation-and-the-pandemic-has-made-things-much-worse/

may be surprising to know that it costs businesses less to spend money on effective measures for employee mental health than not addressing this at all and having in turn to deal with high staff turnover and loss of knowledge and skills. Actively engaging with employee wellbeing has therefore become a critical part of workforce strategy.

Wellbeing; what we do?

At McDermott, we have sought to embed a culture of wellness at the core of what we do, encouraging personal wellbeing – including physical health, mental health but also bringing in the important aspects of social connection, community and giving back. We are encouraging mental and physical wellness practices firm-wide, not only for the welfare of our team, but for the betterment of the wider industry too. At McDermott, we believe in our #AlwaysBetter, so even though we celebrate success, we acknowledge that everything is a work in progress and we aspire to do better.

The initiatives below demonstrate how we have kept wellbeing and mental health a priority both prior to and during COVID-19:

1. We were fortunate that mental wellbeing was already a focus for McDermott prior to COVID-19. Our London Wellbeing Committee–now led by Hamid Yunis, head of office was set up, with a small committee, in 2017. In January 2019, we also introduced the ‘mindfulness policy’, a time-recording code for people to specifically allocate time spent on mindfulness and wellbeing [3]. These initiatives meant we were able to quickly respond to COVID-19.

2. Our London Wellbeing Committee was expanded during COVID-19 to include members from lawyers and staff, at both senior and junior levels, and we meet fortnightly. It does the following:

   A. Sends out regular communications and resources, emphasising the importance of wellbeing and raising awareness of self-help measures (recent examples: on exercise and movement, stress management and mindfulness, sleep, reducing symptoms of burnout).

   B. Launched our “Inspiring Leaders Monthly Talks” in London in 2021, which has been a real success. The talks are primarily designed to focus around a number of themes including: female empowerment; racial diversity and inclusion; overcoming adversity; promoting physical and mental wellbeing; and business and commercial inspiration. In one of these talks we welcomed, an inspirational speaker who spoke passionately on topics including mental health, abuse, malaria and her own story overcoming a life threatening illness. Another of our speakers suffered a life-changing injury whilst serving with the British Army in 2009. He stepped on an explosive device in Afghanistan and became a double leg amputee. The injury brought an end to life as he knew it both physically and mentally. He talked through the far reaching ramifications of this event on him and those around him and shared the tools he utilized when dealing with such uncertainty, challenge and change.

   C. Encouraging our people to reflect on their feelings, and especially in relation to current events, including the murder of Sarah Everard, which led to open discussions about the anxiety people felt about returning to the office and transitioning out of lockdown to normal social activities.

3. Running regular training sessions to provide an overview of how mental health and wellbeing is relevant to us all and fundamental to how we all perform at work.

4. McDermott employees have a free subscription to a range of mindfulness, meditation and other resources including Ginger. This offers one-on-one and on-demand mental health support to ensure employees get the support that’s right for them — all from an app and the privacy of their phone.

5. We provide resources to the whole office, including:

   A. The Employee Assistance Programme (with telephone counselling and information lines);

   B. Mental Health First Aiders – Peer support;

   C. Sign-posting to external support;

   D. Medical insurance – can be referred for counselling/ psychotherapy;

   E. Wellbeing induction meetings with new joiners; and

   F. Inclusion of wellbeing goals in all lawyer development plans.

6. We have run a series of events to bring people together when in the office, screen-free, for a short time to mix socially. We have also run social events over zoom during the pandemic, recognising the importance for social connection.

7. We also offer opportunities for the firm to participate in community service activities/ initiatives and pro bono work. When considering our approach, we look to the The New Economics Foundation Report - 5 Ways to Wellbeing which considers both physical health and mental health but also bringing in the important aspects of social connection, community and giving back.[4]

As we begin to re-enter a semblance of normality, it is important to remember how much mental health matters in our professional lives, the impact it has on our work, and how our experiences and views are all different. We must strive to be #AlwaysBetter in order to keep the conversation around mental health and wellbeing moving forward and to remove any stigma associated with this in the legal profession.

3 This counts as 25 hours towards the associates’ chargeable hours.

4 New Economics Foundation – 5 Ways to Wellbeing https://neweconomics.org/uploads/files/five-ways-to-wellbeing-1.pdf

In Focus: Next Gen

Authored by: Celia Speller and Bryony Cove – Farrer & Co

Since 1945, baby boomers have emerged to become the largest and wealthiest generation ever seen in the UK. Many of the group previously identified as the working middle class now sit firmly in the high-net-worth category, each owning over £1 million of assets including residential property to their name. They hold 80% of the UK's net wealth, and around 70% of this wealth will be passed on to the next generation. Additionally, the UK is currently home to over 16,000 Ultra High Net Worth individuals who each own assets of at least £30 million, and globally the Ultra High Net Worth population looks set to grow 27% over the next five years, according to the Brooks Macdonald intergenerational wealth transfer report.

Clearly, there is a vast amount of wealth coming down the line to the next generation. So after such a tumultuous year, it is no surprise that succession and transfer of wealth to the next generation now sits high on their agenda and there is a whole advice industry around them.

Knight Frank's 2021 Global Wealth Report recorded marked recent shifts in attitudes towards succession planning involving the next generation. 60% of UHNWs interviewed had reviewed their succession planning in light of Covid-19, with the number of people reviewing their Will tripling in 2020. Knight Frank found that 28% of UHNWIs and HNWIs interviewed cited the transfer of wealth to the next generation as one of their top three concerns (after Covid-19, geopolitical and tax issues), and 23% cited the transfer of wealth to the next generation as one of their top three opportunities. With divorce and dementia rates both on the rise and regard for health at the forefront of people's minds, clients are clearly considering the question of the protection and transfer of their wealth, and their succession, more than ever.

Simultaneously it is becoming apparent that millennials and generation Z's have different expectations, aspirations, and priorities to their forbears. They are more technologically focused and often less risk averse than their parents and grandparents, with diverse priorities and interests which include cryptocurrency, AI, and digitalisation. The next generation are also increasingly concerned by the ESG agenda, motivated not just by huge returns and reward, but by climate change, philanthropy and sustainability. They are engaged, particularly in the context of entrepreneur clients.

According to PwC's 2019 Global NextGen Survey, 70% of next generation adults are already very engaged in the family business, with almost a quarter holding an executive director position and almost half running significant internal operations.

We have watched all this with interest at Farrer & Co and firmly believe it is critical for both the client and the adviser to involve the next generation in discussions about the transfer of wealth and succession at an early stage, and not simply to involve them in the business or family philanthropy. By 2035 over 25% of the UK's population will be over 65, and by 2040 one in five individuals will live to be 100. As a result, the older generation may feel disincentivised from starting the path to succession to the next generation; they are living longer, and working longer, and they are often reluctant to hand over the reins.

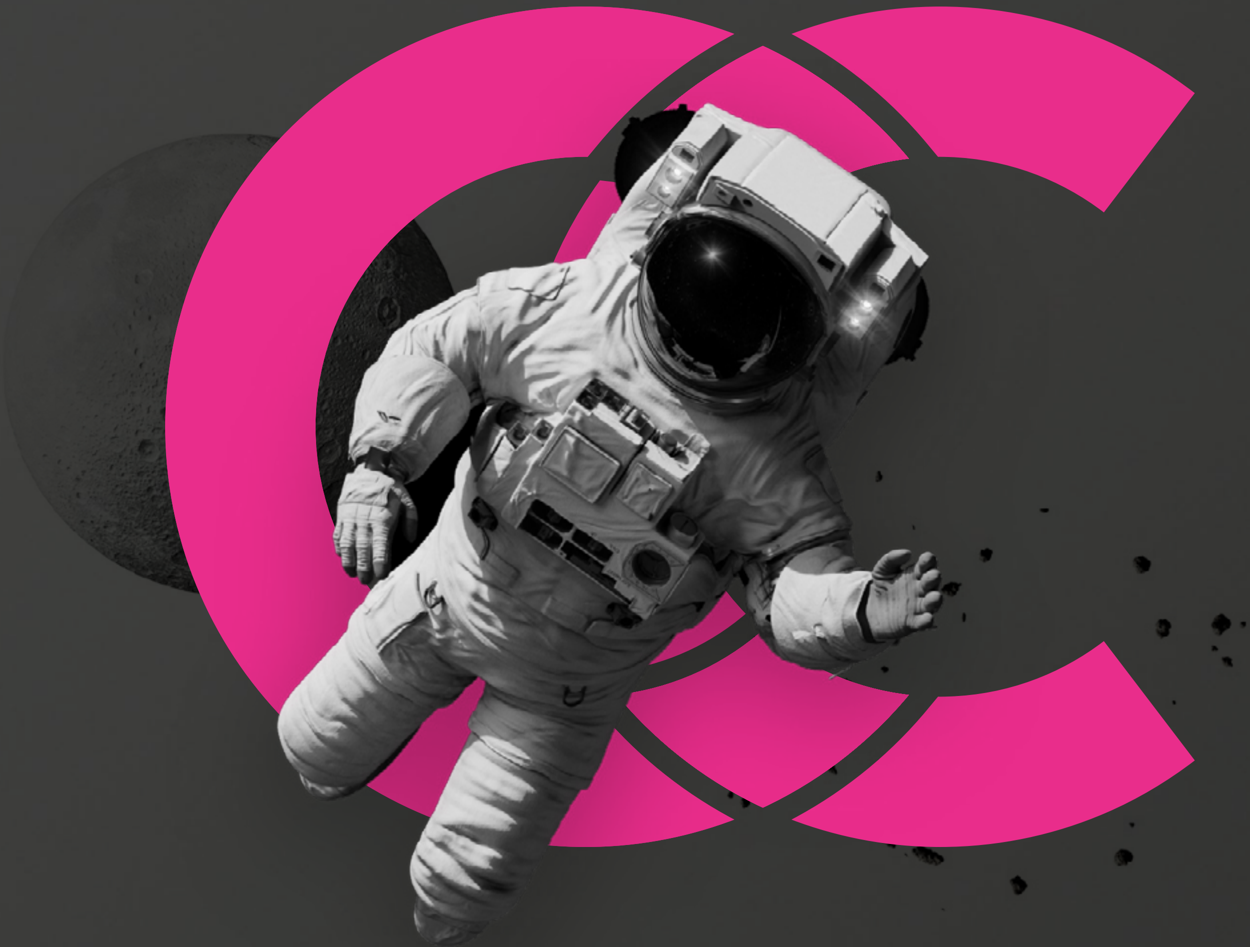
Wealth protection and preservation is one of the key facets of intergenerational wealth transfer. It has long been the case for the private client adviser that the intergenerational transfer of wealth can mark a sea-change; according to Christina Melling in the FT Adviser, one third of children will change advisers on inheriting. The private client adviser must, therefore, handle the transition carefully and sensitively to ensure continuity and satisfaction amongst a new generation of clients who will have different aspirations, priorities and expectations of their adviser than their parents.

The old adage "shirtsleeves to shirtsleeves in three generations" frequently sees wealth created by one generation and lost by the third.

One of the main causes for this is family members who are ill-prepared to take on the responsibility which comes with wealth. They are often familiar with growing up surrounded by wealth, and certainly how to spend it, but removed from the hard work and motivation of the people who built the family fortune in the first place. By allowing the next generation to become involved in not only the creation of wealth – by engaging them in the family business, for example – but also in the preservation of it, we will help them to grow into the wealth owner and protector rather than simply the "spender".

Private client professionals can assist families in navigating this education process for the next generation, showing them that there are tools and structures available which will empower them to become a sustainable wealth owner rather than restrict them. One example would be the use of trusts - trusts have long been seen as a mechanism which enables the older generation to protect wealth from the younger. In fact, we can teach the younger generation that trusts can be a hugely helpful tool if the right people are involved. The appointment of trustees who are familiar with both generations and their needs and priorities will be important, rather than allowing the old guard of advisers to remain in situ until long after the settlors and elder generations have died.

Additionally, putting together a team of advisers who can manage the transition of wealth and advise the beneficiaries on matters which are relevant to them will be hugely important. Most investment managers and banks now incorporate an ESG strategy into their investment policies, which is just one of the benchmarks which will be expected by the next generation. The creation of family charters, succession plans and regular family meetings, with all generations invited, will be important for larger family groups. Crucially, it is becoming clear that for the intergenerational transfer of wealth (and with it, the transfer of control) to be successful, advisers need to spend as much time preparing the next generation to receive the family wealth as we do investing, protecting and managing it today.



60-SECONDS WITH:

JESSICA HENSON
PARTNER
PAYNE HICKS BEACH

Q 1. What would you be doing if you weren't in this profession?

A I'd love to have a column in the Sunday papers (move over Sophia Money-Coutts) but in reality I would probably be a Latin teacher.

Q What's the strangest, most exciting thing you have done in your career?

A A business trip to Mauritius started out as one of the most exciting things in my career but ended up being rather strange when a shortage of rooms meant sharing a delightful honeymoon suite with a female colleague. We'll always have the memories of the towel swans.

Q What is the easiest/hardest aspect of your job?

A I don't think I would say any aspect is easy but it's important to keep it in perspective. I am gradually learning to spend less time sweating the small stuff.

Q If you could give one piece of advice to aspiring practitioners, what would it be?

A Find a supervisor/mentor who will champion and challenge you to do more than you may think you are capable of.

Q What has been the most interesting case you have seen in 2021?

A I've been particularly struck by the recent decision of the Jersey Royal Court not to bless a trustee's decision to restructure assets for the purposes of pre-emptive divorce planning. The threshold for a blessing of this nature is that the decision should be within the rational range of decisions open to the trustees but, here, the Court found that it was "sufficiently uncomfortable… to be in doubt as to its propriety". At first blush, it strikes me as a further instance in a growing trend of the Jersey Court seeking to engage constructively with the English matrimonial courts and not allowing trustees to rely on the "pirate's defence" offered by firewall legislation . That said, it seems to me that this was a case that turned on quite particular facts (and figures) and should not deter those embarking upon responsible pre-emptive divorce planning in the context of trust assets.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A Within my own practice, I'm aware of a couple of growing trends:

1) an increase in 1975 Act Claims at two ends of the spectrum: at one end, the impecunious (now able to recover success fees) and, at the other, those maintained to a very high standard of living in circumstances where there is not a great deal of judicial authority for the treatment of such high quantum claims.

2) Inter-sibling disputes – particularly where one or more is engaged in the family business and others are not. Of course, there is nothing new here but it is certainly a trend that continues through the generations.

Q If you could learn to do anything, what would it be?

A Play the piano with any real skill.

Q What is the one thing you could not live without?

A Irony (and bread sauce).

Q If you could meet anyone, living or dead, who would you meet?

A I quite like the idea of a dinner party with all six of the Mitford sisters in c. 1935.

Q What songs are included on the soundtrack to your life?

A Queen of the Night – Whitney Houston (my karaoke 'go-to')

Sull'aria – the letter duet from Mozart's Marriage of Figaro (sung at many weddings with my sister)

Halo – Beyoncé (on repeat for 48 hours during labour)

Anything by the Toots & The Maytals (the only way I can get cleaning done)

Q What does the perfect weekend look like?

A Big skies, open fields, strong cocktails, good company, bad jokes and undisturbed sleep.

Q Reflecting on 2021, what have you been most grateful for?

A Finally getting to know my fantastic new colleagues IRL.

TRUST CASES IN COURT IN GUERNSEY DURING 2021

Authored by: Paul Buckle – Trust Corporation International

The last twelve months or so have seen some significant Guernsey trust cases. Here are three especially interesting ones.

Can a trustee recover its successful defence costs from trust assets?

Even after a decade or more, the Investec v Glenalla litigation keeps giving. Earlier this year, Hon Hazell Marshall, QC Lieutenant Bailiff, heard what has become known as an "Alhamrani taxation" (or assessment) [1] on the extent to which former co-trustees could claim under their right of indemnity against the trust assets, the costs they incurred in successfully defending two claims against them for breach of trust. Note that right subsists even after retirement; a trustee who has vacated office, should not become liable for costs to which her indemnity applied whilst she was a trustee.

Trustees are concerned not to be litigating for the beneficiaries at their own cost.

Where they properly pursue litigation on behalf of the trust against third parties, trustees usually get their costs out of the trust assets. But where they are sued for misconduct themselves, it might be thought they should fund even a successful defence from their own pocket. After all, defending the action benefits the trustee, not the trust, and trustees can be denied their indemnity if costs are unreasonably incurred (in type or quantum) or they display misconduct. So, where the defence is that whilst at fault, the trustees were not grossly negligent, should not the indemnity be automatically denied?

Marshall LB thought not. A trustee had a basic right to be held harmless against liability it incurred without material fault, through being a trustee. Only "operative misconduct" would deny it that right. So, if the trustee properly conducted a successful defence of a claim brought against it as trustee, but is left with a costs bill, the indemnity would apply in

1 ITG Limited & anr v Glenalla Properties Limited & ors [2021] GRC007.

principle; "in principle" because other matters could still prevent the trustee from relying on it, quantum and nature being obvious ones.

In that regard, some useful principles emerged. The trust in Investec was in danger of insolvency, but even that did not mean the trustee's right of reimbursement was to be proportionately reduced; the right of indemnity was a right to be paid in full, not in part. Moreover, the trustees' use of English lawyers in Guernsey litigation concerning a Jersey law trust was not unreasonable, given their historical associations with the trust and their position in the commercial litigation market. Finally, the trustees' lawyers' costs when dealing with insurers and even managing media updates were in part recoverable.

Reflective loss again

Readers may be aware of cases where trustees who are sued for losses caused to underlying companies can raise the so-called "reflective loss" defence. This says that that given it is the company which has suffered the loss, only the company and not the shareholders or the beneficiaries, can claim to recover the loss. A recent UK Supreme Court decision[2] rather poured cold water on that, by saying the defence only held good where a shareholder brought the claim, and not a creditor or by implication a beneficiary.

In May this year, following trial in September 2019, McMahon, Bailiff, issued judgment in the case of Pilatus (PTC) Limited v RBC Trustees (Guernsey) Limited. [3]In that case, he said the rule against reflective loss was part of Guernsey law, and followed the approach in the UK Supreme Court to say it did not offer a former trustee a defence when it was sued by its successor.

Gross negligence by a trustee

Last year, the Guernsey Court of Appeal overturned a decision of the Royal Court in Manita Khuller v FNB International Trustees Limited[4] to find for the first time in Guernsey that a trustee was grossly negligent. Mrs Khuller sued her trustee for her loss of pension funds resulting from the collapse of what she claimed were three inappropriate high- risk investments. The trustee responded that an investment company had selected the investments on behalf of Mrs Khuller who had appointed them, and recommended their purchase by the trustee. Thus, if Mrs Khuller had any complaint, it was against the company as the trustee's role was that of an execution only trustee.

However, it was established the trustee also had appointed the investment company as an investment advisor and not as it claimed as investment manager. That meant when acting on instructions from the company the trustee had a responsibility to assess the risk posed by the investments being recommended. When it ignored the red flag of a warning from its own head of pensions, that the most substantial of the three investments was in what he called "bubble territory" and presumably about to burst, the Court found the trustee grossly negligent. Given the investment company was an adviser, not a manager, the trustee's "..clear duty was at least some effort to look into what was proposed, with its possible risk, and to exercise its own judgment as to suitability of the investment", and when it ignored the red flag, it "went ahead with what can only be described as indifference to its duty and the identified risk…[which] ….qualifies as having been grossly negligent".

Khuller is an interesting case. Significantly, the Court of Appeal did not stop at saying the trustee should have thought about the investment recommendations made to it before going ahead.

It went on to say that "If the trustee's task was only to give effect to an instruction (or request), still a red flag should usually be given at least some attention, if only to confirm that the instruction (or request) had been made with knowledge of the red flag".

That sounds very much like saying that even where a trustee has no discretion, and must follow instructions, it still has a residual duty of sorts. The extent of that duty is a matter for another day.

2 Sevilleja v Marex Financial Ltd [2020] UKSC 31.

3 [2021] GRC012.

4 [2020] GCA051 overruling [2019] GRC 063.

NEW RULES ON THE BENEFICIAL OWNERSHIP REGISTER IN LIECHTENSTEIN

Authored by: Dominique Marxer - Gasser Partner

Within the framework of implementing the 4th EU Anti-Money Laundering Directive (AMLD), the "Act establishing a Register of Beneficial Owners of Domestic Legal Entities" (the "Beneficial Ownership Register Act") was formally approved at the December 2018 session of the Liechtenstein Parliament. The Beneficial Ownership Register Act, which entered into force on 1 August 2019, introduced a register containing details of the beneficial owners of domestic legal entities and trusts (the "Beneficial Ownership Register"). The declared purpose of the 4th AMLD and the Beneficial Ownership Register Act based thereon, is to combat money laundering, predicate offences to money laundering and terrorist financing.

Less than two years after the Beneficial Ownership Register Act entered into force, however, the Liechtenstein legislator was already forced to implement the additional requirements of the 5th AMLD by revising the rules on the Beneficial Ownership Register and enacting a new law that entered into force on 1 April 2021.

The initial Beneficial Ownership Register Act

The initial Beneficial Ownership Register Act, which entered into force on 1 August 2019, obligated legal entities listed in Annex 1, such as public limited companies and other corporate entities, to collect and retain certain information, as specified by law, concerning their beneficial owners as well as their beneficial interest. Persons who ultimately, whether directly or indirectly, hold or control a share or voting rights of over 25% or who ultimately, whether directly or indirectly, participate in the profit of such legal entities to an extent of over 25% were deemed to be beneficial owners. In addition, persons who, in any other manner, exercise control over the relevant legal entity or its management, were also considered beneficial owners under the initial Beneficial Ownership Register Act.

Further, persons subject to due diligence obligations under the Due Diligence Act (DDA), in particular registered trust companies and banks, were obliged by the Act to collect and retain certain information concerning the beneficial owners of domestic legal entities as defined in Annex 2 of the

Act, such as foundations and trusts. The beneficial owners were deemed to be those natural persons in whose ownership or under whose control a foundation or trust is ultimately held. This could include the settlor or founder, the trustee, a potential protector and the beneficiaries or certain groups of beneficiaries as well as any other natural person who ultimately controls the foundation or the trust. Accordingly, a founder or settlor was only considered to be the beneficial owner of a foundation or a trust if the entity was ultimately controlled by them. Similarly, discretionary beneficiaries were only deemed beneficial owners if they themselves were able to receive assets on the basis of their own control.

Access to the data contained in the register was largely reserved for the Financial Intelligence Unit (FIU), the Financial Market Authority (FMA) and the Public Prosecutor's Office. Persons subject to due diligence obligations (e.g. banks, trust companies, asset managers) were only given access to the data contained in the register insofar as this was necessary for the performance of their due diligence obligations under the DDA, and other domestic and foreign persons and organizations could only request disclosure of the data contained in the register relating to legal entities as listed in Annex 1 of the Beneficial Ownership Register Act. Data relating to foundations and trusts were not disclosed to such third parties. The disclosure of data to third parties was, however, only undertaken upon demonstration of a legitimate interest in connection with combating money laundering, predicate offences to money laundering, or terrorist financing.

Total revision of the Beneficial Ownership Register Act

The 5th AMLD provides for extended obligations in terms of content and transparency of the Beneficial Ownership Register through a modification of Articles 30 and 31. In order to implement these additional requirements, Liechtenstein has, less than two years after its entry into force, completely revised the initial Beneficial Ownership Register Act. The revised measures entered into force on 1 April 2021.

The core of the revision was the abandonment of the Beneficial Ownership Register Act's own definition of beneficial ownership in favor of the - slightly different - respective definition contained in the DDA, according to which, the following persons must be identified as beneficial owners with respect to foundations and trusts:

1. **natural persons who are effective, non-fiduciary founders, incorporators or settlors, irrespective of whether they exercise control over the legal entity after its establishment;**
2. **natural persons or legal entities who are members of the foundation board or board of directors or of the trustee;**
3. **any natural persons who are protectors or persons in similar or equivalent functions;**
4. **natural persons who are beneficiaries;**
5. **if the beneficiaries have yet to be determined, the group of persons, in whose interests the legal entity is primarily established or operated;**
6. **in addition to the above, the natural persons who ultimately control the legal entity through direct or indirect ownership rights or in any other way.**

Consequently, under the revised Beneficial Ownership Register Act, all economic beneficiaries of foundations and trusts must be identified and entered in the register, irrespective of whether or not they exercise any control.

The DDA deems such natural persons to be beneficial owners of corporate entities who have a share, voting rights or a profit share of 25% or more in said legal entities or who in any other manner exercise control over such legal entities. With regard to the determination of the beneficial owner of corporate entities, the revision of the Beneficial Ownership Register Act has thus not resulted in any significant changes.

Legal entities existing at the time of entry into force of the revised Beneficial Ownership Register Act, (i.e. 1 April 2021) had to notify the data relating to their economic beneficiaries to the Office of Justice within six months with effect from entry into force of said Act (i.e. by 30 September 2021).

The 5th AMLD further also required adjustments regarding the disclosure of data contained in the Beneficial Ownership Register. Most notably, access by foreign or domestic natural persons or legal entities that substantiate a legitimate interest in connection with combating money laundering, predicate offences to money laundering, or terrorist financing, was extended to data concerning foundations and trusts.

60-SECONDS WITH:

CARMEL KING
DIRECTOR
GRANT THORNTON

Q What would you be doing if you weren't in this profession?

A I pretty much fell into this profession and found it suited me, so a completely different path in life was not beyond the realms of possibility! The alternative was probably to continue along the path of my undergrad degree, which was English with Psychology. Being a lecturer in English Literature at a nice university still appeals sometimes.

Q What's the strangest, most exciting thing you have done in your career?

A The day of 'the Knock' is always interesting, particularly in a criminal context. I've been on various different seizures which included all sorts of assets from garages full of Lamborghinis, Aston Martins, Humvees, Ferraris and Porsches to car boots full of cash to suits of armour and exotic animals.

Q What is the easiest/hardest aspect of your job?

A The answer is probably one and the same: the fact that no two cases are ever the same. I really enjoy the fact that fraud investigation and asset recovery requires a constant evolution and updating of methods and approaches, and I think the challenge keeps me interested.

Q If you could give one piece of advice to aspiring practitioners, what would it be?

A A boss once observed that I'm not afraid to ask the stupid questions. After some deliberation I decided to take it as a compliment! My advice would be to ask for clarification when you really need it. The chances are that there are others in the meeting nodding their heads without a clue either, leaving that meeting unclear on what's going on or what's expected of you helps nobody.

Q What has been the most interesting case you have seen in 2021?

A I couldn't tell you the most interesting things about any of my own cases without breaching confidentiality clauses! Very generally speaking, I think the requirement to move to remote working in 2020 and 2021 has hugely facilitated international collaboration. Of course fraudsters have been agnostic as to jurisdiction for some time, but we have caught up I think in terms of this mindset. Cases of interest might have a company in Seychelles, servers in Texas, employees in Russia and clients and assets all over the world and we are really able to assign the best team to deal with them.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A I'm doing a huge amount of work in cryptoassets at the moment, tracing and asset recovery through the application of corporate intelligence techniques and insolvency powers. Case law is developing quickly in this space and people are realising that cryptoassets are in most part traceable and recoverable. Investment in cryptoassets has increased significantly in the last couple of years, 2.3 million people in the UK hold cryptoassets. That brings opportunity for fraudsters and in turn asset recovery specialists like me. It also means that professional service firms will need to get to grips with this new technology pretty quickly in order to be able to provide a full range of services to clients.

Q If you could learn to do anything, what would it be?

A I would love to learn how to scuba dive. My pie-in-the-sky, know nothing about it really dream job was to be a marine biologist, scuppered somewhat by mild asthma being a bigger barrier to learning to dive than I had thought. Sooner or later, I'll quit all of this and live a life diving somewhere sunny! Or I could learn to fly. My grandfather was a pilot so that may be more immediately achievable.

Q What is the one thing you could not live without?

A My children. That's two things, but I'm not going to choose one for the purpose of this publication in case they ever see this.

Q If you could meet anyone, living or dead, who would you meet?

A My grandfather (the pilot). He died (in a plane crash if you can believe it) before I was born. Since having children myself as often happens I've become interested in my family history and I would love to have a conversation with him.

Q What songs are included on the soundtrack to your life?

A I'm a child of the indie 90s without much awareness of any music today I'm afraid, so it would be lots of Pixies, Pavement, Beck, Radiohead and the like. Some Leonard Cohen to cheer things up maybe.

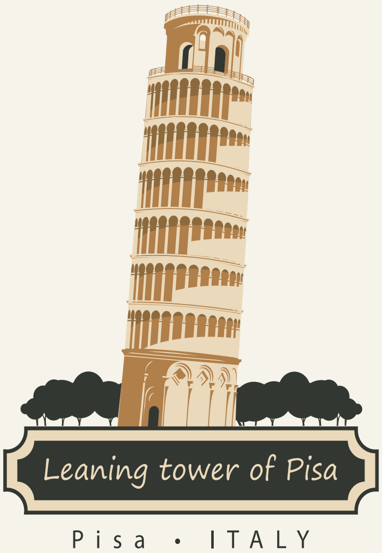
Q What does the perfect weekend look like?

A With kids, it's probably some outdoorsy stuff to burn off energy in the mornings, the beach or woods, or visiting somewhere we haven't been before. An afternoon with friends or family before collapsing with a glass of wine in the evening is about right these days!

I recently had a day in Dublin without the kids which involved some new piercings, a long and peaceful mosey around a bookshop and a fantastic pint at Kehoes. Add my husband for company, a nice dinner and theatre and that's close to perfect.

Q Reflecting on 2021, what have you been most grateful for?

A We moved house in 2020. It was an international move, mid-pandemic, in the works for some time and for the purpose of being closer to friends and extended family. At this point in 2021 I'm grateful for the bonds I see developing between my children and their grandparents and aunties, how that has settled them and given them a really strong sense of home. It makes me feel a little less guilty when travelling for work – the other thing I am grateful for this year being the opportunity to work closely with new colleagues and really push our practice in new and exciting directions.



THE NEW DRAFT GUIDELINES ON TAXATION OF TRUSTS

Authored by: Nicola Saccardo - Maisto e Associati

Beside the continued significant relocation of HNWIs to Italy under the Italian lump sum tax regime[1], the most important Italian development in 2021 consists of the publication, on 11 August 2021, of draft administrative guidelines dealing with the taxation of trusts. The draft guidelines were published for public consultation, which closed on 30 September 2021. This article sets out to comment on the most important points arising from the draft guidelines.

The draft guidelines mainly deal with three subjects[2]:

- The inheritance and gift tax treatment of trusts;
- The income tax treatment of distributions from non-resident opaque (i.e. not looked through and not transparent) trusts to resident beneficiaries; and
- The reporting obligations for resident beneficiaries of non-resident trusts.

As far as the inheritance and gift tax treatment of trusts is concerned:

1. The tax authorities withdraw their past interpretation that inheritance and gift tax is due on the additions to the trust fund and accept the interpretation, supported by the case law of the Supreme Court, that inheritance and gift tax is due only on the distributions of capital (not income) to the beneficiaries. The new position of the tax authorities will allow a tax deferral until the distributions to the beneficiaries (obviously, the inheritance and gift tax rates will be those applicable at the time of the distribution).

2. The tax authorities do not clarify how to deal with trusts that were funded through additions already subjected to inheritance and gift tax according to the past approach of the tax authorities. Will the distributions from such trusts be excluded from inheritance and gift tax to the extent that they stem from previously taxed additions? Will the tax levied on the additions be credited against the tax ultimately due on distributions? Will the taxpayer have to file a refund request for the tax levied on the additions? Will the statute of limitation period for the refund start to tick from the date of the publication of the final guidelines?

3. The circumstance that the trust is viewed as a two-step transaction (addition followed by distribution), whereby the settlor enriches the beneficiary, raises interpretative issues not entirely clarified by the draft guidelines. For instance, the territoriality rules are based on the residence of the settlor and the situs of the assets. Is the relevant residence of the settlor the one at the time of the addition or the one at the time of the distribution? The same issue arises in relation to the situs of the assets.

1 The Italian lump sum tax regime consists of an annual flat tax of either 100k Euro or 25k Euro on foreign source income and gains, coupled with an exemption from wealth taxes, inheritance and gift taxes and reporting obligations for foreign-situs assets.

2 The draft guidelines are drafted on the assumption that the individuals involved do not benefit from the lump sum tax regime.

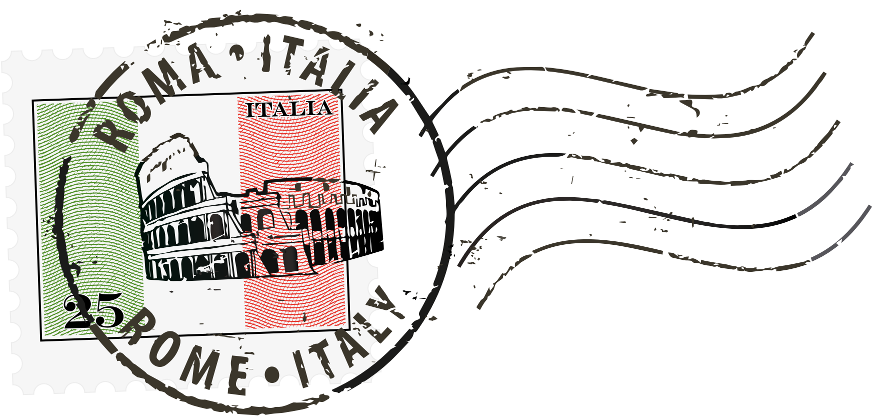
4. The tax authorities do not address the issue of whether distributions to the settlor should be excluded from the scope of inheritance and gift tax. In this regard, it is worth noting that the Supreme Court, in the judgment 10256 of 29 May 2020, expressly held that such distributions are not taxable. A similar position was endorsed by the tax authorities in the rulings 106 and 352 of 2021.

Regarding the income tax treatment of distributions from non-resident opaque trusts to resident beneficiaries:

1. The draft guidelines comment on the 2019 provisions, which stipulate that (i) distributions of "income" from trusts established in "low-tax jurisdictions" are taxable income for the recipient, and (ii) trust distributions qualify as distributions of income, unless there is adequate evidence that capital is distributed. The draft guidelines take the view that the new provisions are interpretative, rather than innovative, in nature, so that distributions may have been subject to income tax even prior to the change in law. The position of the tax authorities is highly disputable given the lack of a specific category of income suitable to cover trust distributions prior to the change in law.

2. On the notion of "low-tax jurisdiction", the tax authorities clarify that the characterisation of a jurisdiction as low-tax should be assessed on the basis of (i) the nominal (rather than effective) tax rates, and (ii) the existence of special tax regimes. Therefore, for instance, if a non-resident trust is established in a jurisdiction where no income tax is levied on the trust since the settlor, the beneficiaries and the income are located outside the jurisdiction, then the trust should be regarded as established in a low-tax jurisdiction, even if the nominal tax rate applicable to the trust would not be lower than 50% of the Italian nominal tax rate. The tax authorities further clarify that relevant Italian nominal tax rate is the income tax rate (generally levied at the 24% rate on trusts), without taking into account the rate of regional tax on productive activities. Finally, according to the draft guidelines, EU/EEA States are not automatically excluded from the notion of low-tax jurisdictions.

3. The draft guideless include the welcome clarification that the trustee may freely decide whether to distribute income or capital. However, to this purpose, the trustee must keep adequate accounting records on the computation of income and capital and must properly formalise the distribution resolutions. On the computation of income and capital, the tax authorities state that (i) income consists of income and gains, even if accumulated (capital consists of the original settlement and subsequent additions), and (ii) income is computed on the basis of Italian tax rules. It is therefore expected that trustees should carry out a substantial exercise to be able to compute and document the current amount of income and capital that is available for distributions.



On the reporting obligations for resident beneficiaries of non-resident trusts:

1. Consistently with the position taken in the ruling 693 of 2021, in the draft guidelines the tax authorities take the view that resident beneficiaries, including discretionary beneficiaries, have reporting obligations – in their capacity of beneficial owners – on trust assets. According to the draft guidelines, such reporting obligations apply since the 2017 tax year (following a change of the notion of beneficial owner of trusts). It is hoped that the tax authorities will take the view that no penalties should apply in relation to the past reporting, given the uncertainties on the interpretation of the law and the lack of available administrative guidelines until very recently;

2. Interestingly, the tax authorities seem to hold the view that no reporting obligations on trusts assets apply to an individual that has a second tier interest ("titolari di interessi successivi"). This seems to be based on the assumption that such an individual cannot receive any distribution until the demise of another individual.

Extensive comments on the draft guidelines have been provided by practitioners and associations in the context of the public consultation. It is hoped that such comments, as well as the issues raised in this article, will be addressed in the final guidelines, in order to provide further clarity on the subject.

PROTECTORS DEVELOPMENTS IN 2021

Authored by: Ashleigh Carr and Bryan Shacklady - Forsters

For a variety of reasons, settlors may seek to have their voice heard when trustees exercise discretion, even from beyond the grave. One increasingly common way in which they do so is by appointing a protector, who will typically be granted powers of their own when the trust is settled. What steps are protectors required to take when exercising their power, particularly where they have a discretion in its exercise? 2021 has so far produced two apparently conflicting judgments exploring this issue:

In the Matter of the X Trusts [2021] SC (Bda) 72 Civ (Supreme Court of Bermuda)

In the Matter of the Piedmont Trust & Riviera Trust [2021] JRC 248 (Royal Court of Jersey).

Analysis Of The Cases

Both cases concerned protectors with power to consent to, or veto, a trustee's proposed exercise of power.

The issue is whether protectors should exercise independent discretion and make their own decision when deciding whether to consent, taking into account relevant considerations and disregarding irrelevant considerations (referred to by the Bermudian Court as "the Wider View")? Or are protectors limited to satisfying themselves that the proposed exercise of the trustee's power is one that a reasonable body of properly informed trustees could undertake, such that the role of a protector is essentially the same as that of the Court in a blessing application ("the Narrower View").

In the matter of the Piedmont and Riviera Trusts [2021]

Despite noting that no assistance could be derived from any provision in the trust deed, the Jersey Court had "no hesitation" in rejecting the Narrower View.

They reasoned that a protector is often a longstanding friend or trusted advisor of the settlor, or the settlor themself. This suggested that the protector was appointed in order to exercise their own judgment, not to simply review the trustee's decision. If the role was limited to judging issues of rationality, the settlor might as well have appointed someone with a legal qualification.

Furthermore, adopting the Narrower View would make the protector's role almost redundant. It would add nothing to the Court's role on a blessing application. The Court preferred the analysis that the protector was intended to fulfil a different role to the Court's role and could therefore properly veto a trustee decision that was rational, which the Court might approve if faced with the same decision.

However, a protector's power to consent did not equate to a duty to itself take the decision or dictate how a trustee must exercise its powers. A protector's discretion to consent lies within a "narrower compass" than the decision-making role of a trustee. But a protector is not confined to a yes or no answer, and trustees and protectors should work together, as necessary, to identify an outcome on which they can both agree, in the interests of the beneficiaries. This requires full and open discussion. A trustee should provide all documents and information which may be reasonably necessary for the protector to properly discharge its fiduciary duties to the beneficiaries, which might include detailed reasons for the trustee's proposed decisions.

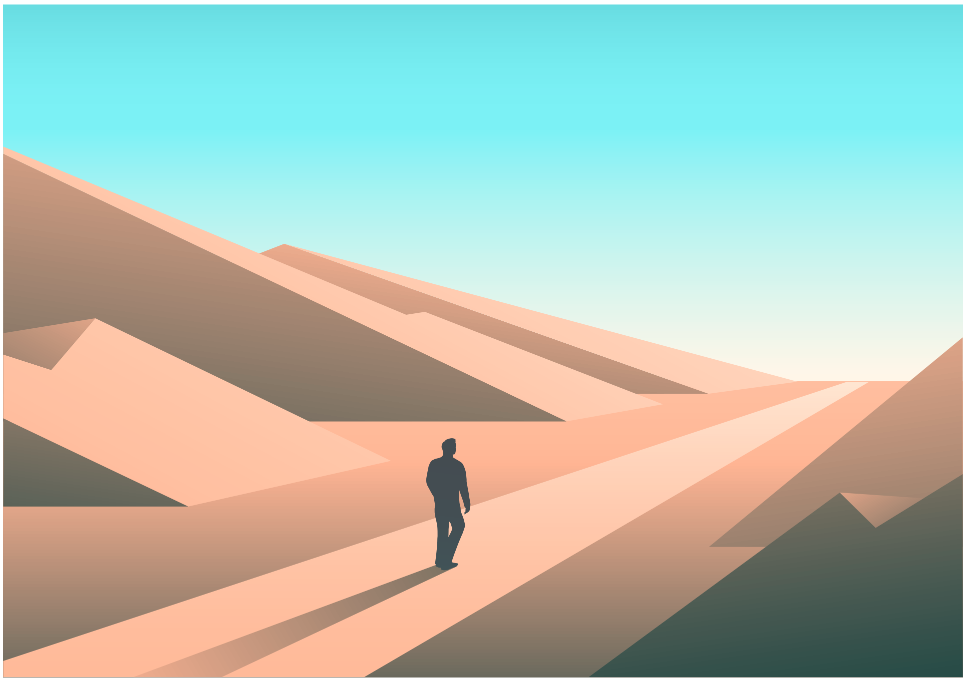
Re The X Trusts [2021]

In stark contrast, the Supreme Court of Bermuda ultimately preferred the Narrower View, having considered the same question through the lens of construction principles.

Whilst the Court accepted that, when read literally, the protector provisions suggested a power of veto, it held that other relevant considerations must be taken into account in addition to the literal meaning. Thus the Court concluded that the Narrower View reflected the true construction. The Court considered that it was clear from the terms of the instruments that their dominant purpose was to ensure due exercise of the powers vested in the trustees.

As such, the Court concluded that, unless there is something to the contrary in the trust deed, then the usual role was not to exercise a power "jointly" with the trustees (a characterisation of the Wider View that the Jersey court did not share). Instead, it was an ancillary power that allowed the protector to act as a watchdog (the Narrower View).

In reaching its decision, the Bermudian Court had heard submissions that



criticised the leap that the Wider View necessitated i.e. from the proposition that a protector is a fiduciary, to the conclusion that a protector must take its own independent view of whether and how the trustee's power should be exercised. The Bermudian Court rejected the thesis that the Narrower View defined a protector's role as a fundamentally limited one. It considered it to be substantial.

Conclusion

Both judgments acknowledged the scant judicial authority on the nature of a protector's duties, particularly in the context of a requirement for a protector's consent. It is perhaps unfortunate that although the Jersey judgment was handed down second, the case had been heard and the judgment prepared without the benefit of access to the Bermudian judgment, which was addressed in a postscript. This may explain why the two Courts adopted fundamentally different approaches: whilst the Bermudian Court approached the question as a "construction conundrum", the Jersey Court (which, as it acknowledged, heard less detailed argument on the point) preferred a more intuitive approach and analysis that arguably promotes settlor influence.

It is also unfortunate that the cases are limited to considering consent powers of protectors that were also fiduciary. This might otherwise provide a clear basis for a distinction.

Whilst the tension remains, trusts practitioners should take a careful approach when advising settlors, trustees and/or protectors, and highlight the conflicting approaches taken by the different courts and the risks this poses.

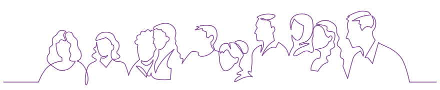
Whilst settlors may gravitate towards the Jersey forum (preferring this jurisdiction to others which would potentially reduce the role of protectors to "mere toothless tigers"), trustees, at least, may prefer the Narrower View (particularly given the reduced opportunity for deadlock).

Care should also be taken when drafting trust instruments to ensure that they best meet the settlor's objectives and are clear about the nature of the power. As the Bermudian judgment suggests, that could make all the difference.

GUERNSEY INTRODUCES NEW COMPLIANCE MEASURES FOR CRS AND FATCA REPORTING

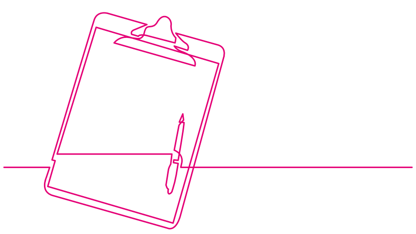
Authored by: Konrad Friedlaender and Laila Arstall - Carey Olsen, Guernsey

On 14 September 2021, the Revenue Service published Bulletin 2021/5 which covers enhanced compliance strategies introduced by a new law that came into force in July earlier this year. This briefing note provides a summary of those strategies and will be of interest to those operating in the finance industry and compliance sector.



Background

On 15 July 2021 the States of Deliberation (Guernsey's parliament) approved the Income Tax (Guernsey) (Amendment) Ordinance, 2021 (the "Ordinance") which makes a number of important amendments to Guernsey's Income Tax Law. One of the key purposes of the amendments is to follow through on Guernsey's commitment to have in place measures that enable the Island's authorities to demonstrate that it has a robust and effective compliance framework underpinning its regime of automatic exchange of information for tax purposes ("AEOI") based on the OECD's common reporting standard ("CRS") and the US' Foreign Account Taxes Compliance Act ("FATCA"), both as implemented in Guernsey.



Background to Introduction to Enhanced Compliance Framework

AEOI has been implemented in Guernsey in a phased approach, starting first with FATCA and then with CRS. The enhanced compliance measures introduced by the Ordinance apply to both CRS, as well as FATCA, obligations. In the early years, the emphasis was on providing education and establishing a robust IT system to enable financial institutions to submit financial data in the format specified by the OECD and the US. The implementation of AEOI was overseen by Guernsey's Revenue Service, which also deals with the ongoing administration of CRS and FATCA.

The next phase saw an increase in monitoring and compliance activities, with a focus on financial institutions that failed to file AEOI reports by the designated deadlines.

Now that Guernsey is into its fifth annual cycle of receiving and submitting data under AEOI, it is moving to the next phase of the implementation process by enhancing the Revenue Service's ability to monitor and audit compliance within the finance industry. This has necessitated the creation of additional powers for the Director of the Revenue Service, as well as the introduction of certain additional obligations for financial institutions. The intention is to bring these changes into effect in a manner that balances the requirement to have in place a robust system to monitor and enforce compliance whilst limiting, insofar as is possible, the extent of any additional compliance burdens on Guernsey financial institutions. In essence, the changes ensure that the Revenue Service has the power to conduct compliance reviews and take appropriate action in cases of non-compliance in an environment where stakeholders are now familiar with the requirements of AEOI and have already put in place systems and procedures that can readily be adapted to meet evolving demands at operational level.

Legislative Changes

The changes introduced fall under the following headings:

- **Extending the registration requirements on IGOR**
- **Facilitating on-site inspections by the Revenue Service**
- **Enabling the Revenue Service to issue directions and appoint inspectors**
- **Dealing with recalcitrant account holders**
- **Increasing penalties for non-compliance**

Extending The Registration Requirements on Igor

Up until now, only financial institutions that have CRS and or FATCA reporting obligations were required to register on the Revenue Service's online reporting system, the Information Gateway Online Reporter ("IGOR"). This obligation is now extended to all financial institutions, whether they have a reporting obligation or not.

The registration obligation will be extended to include a declaration of the institution's classification as a Reporting Financial Institution, Non-Reporting Financial Institution, Participating Jurisdiction Financial Institution or Non-Participating Financial Institution, as well as the category, class or description of such institution into which it falls under CRS or FATCA regulations. Where such classification/category is not applicable, the financial institution is required to confirm that it is not an institution within any of those classifications/categories.

Financial institutions will also be required each calendar year by the end of February to submit an annual validation in which the institution confirms that the information provided on registration and thereafter as concerns classification and category of the institution, remains complete and correct. Alternatively, the institution must provide amended information. In addition, if there is any change to the registered information, a financial institution is required to inform the Revenue Service of the change as soon as practicable after becoming aware of it and in any event within 14 days of such change.

By extending and enhancing the registration process the Revenue Service will be able to factor into their risk parameters those entities which meet the criteria to be regarded as financial institutions but have not registered as such either because they have been correctly classified as non-reporting financial institutions or because they have simply failed to engage with the reporting system, the so-called "Ghost FIs". Going forward, the Revenue Service will be able to focus resources on identifying such Ghost FIs and assessing associated risks. Whilst the additional registration process should not pose an additional compliance burden on financial institutions insofar as they would have had to make such determinations at the time FATCA and CRS were introduced and should have kept records of those determinations, it is nonetheless recognised that there will be now be an additional requirement for more information than is currently being provided to the Revenue Service.

The extension of the registration requirements is stated in the Ordinance as not coming into effect until 1 July 2021 or such later date as later specified by regulation. It is understood that Revenue Service is currently updating its IGOR system and the intention is for the enhanced registration process to commence no earlier than 2022, with the deadline for registration being 28 February 2022. Further information is to be provided in December 2021 regarding the requirements of the extended registration process.

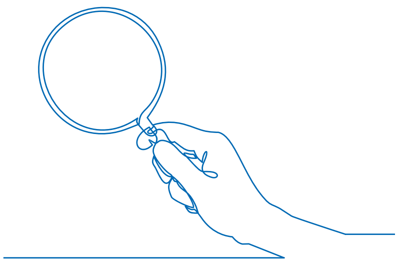
Facilitating On-Site Inspections by the Revenue Service

The Revenue Service's approach to AEOI compliance is essentially risk-based. IGOR's software is currently being developed to further enhance the Revenue Service's ability to review and analyse CRS reports in order to identify and profile potential risks. Whilst the Revenue Service already has a broad suite of information gathering powers contained in Part VI A of the Income Tax Law, these powers lend themselves to the traditional methods that the Revenue Service has used to date when making enquiries, for example by calling for records and information and then, if necessary, requesting further explanations in respect of identified concerns.

Whilst it is understood that this method of desk-based compliance checks will continue to be deployed, the amendments introduced by the Ordinance now enable the Revenue Service to conduct on-site visits at the business premises of financial institutions in order to review relevant records in situ and discuss any immediately identified concerns.

Whilst the Revenue Service has been conducting CRS and FATCA compliance activities, including site visits, for almost a year, to date those site visits have taken place with the prior consent of the relevant financial institution. The amendments provide a legislative basis for the Revenue Service to carry out such site visits with 7 days' written notice (unless approval has been granted by the Bailiff for a shorter notice period). In practice, the Revenue Service anticipates that they would provide longer notice, allowing time for the relevant financial institution to prepare and provide information and documents, including responses to a questionnaire to be sent in advance of the visit itself.

The approach to AEOI on-site visits replicates the framework introduced as part of the compliance strategy underpinning Guernsey's economic substance regime that was introduced with effect from 2019. The same safeguards and restrictions applicable to on-site visits for economic substance purposes apply in the case of on-site visits for CRS/FATCA purposes. In both cases the Revenue Service may not inspect items which are subject to legal professional privilege.



Enabling The Revenue Service to Give Directions and Appoint Independent Inspectors

As a result of the compliance reviews that the Revenue Service will be carrying out, it is possible that the Revenue Service will discover cases where there are serious failings in compliance, for example in carrying out the relevant customer due diligence or account classification requirements under the CRS or FATCA. The Director of the Revenue Service will be able to issue directions to a non-compliant institution for the purposes of securing compliance. Where the financial institution has or is reasonably suspected of having contravened AEOI obligations, the Director of the Revenue Service will also have power to appoint one of more inspectors for the purposes of investigating and securing compliance.

The power to appoint inspectors is anticipated to be deployed in limited circumstances where the Revenue Service has identified potential significant failings on the part of the relevant financial institution. The task of the inspector would be to investigate and oversee the remediation of any significant failings and to report to the Revenue Service. The relevant institution being investigated and their key personnel and advisers are obliged to cooperate with the inspector by providing documents, explanations and assistance.

Crucially, the costs, fees and expenses of an investigation and report by an inspector will be met by the relevant institution which is being investigated.

Whilst the Revenue Service has been allocated additional human resources to perform compliance reviews in respect of AEOI, the new powers introduced by the Ordinance are more akin to a regulatory role than those that have traditionally been undertaken by the Revenue Service to date.

Dealing With Recalcitrant Account Holders

Both the CRS and FATCA regimes require Guernsey financial institutions to undertake due diligence procedures that are designed to determine whether the holder of a financial account is a reportable person, being a person who is tax resident in a foreign jurisdiction with which Guernsey has agreed to exchange information under AEOI agreements through their respective competent tax authorities. Obtaining an accurate and complete self-certification from the account holder is a critical component for ensuring that CRS and FATCA are correctly applied in order to determine reporting obligations in respect of the relevant account. Where the financial institution has been unable to obtain a valid self-certification under the CRS/FATCA regime, or having obtained a self-certification, has reasonable grounds to suspect that the self-certification is or has subsequently become incorrect or unreliable, the financial institution must immediately notify the Revenue Service. On receipt of notification the Revenue Service has power to require the institution to provide further information and documents or to make further enquiries. Where appropriate, the Revenue Service may make a freezing order prohibiting the institution from making any transfer, withdrawal or payment from, or otherwise dealing with, the account, except under the authority of, and in accordance with, the prior written permission of the Director of the Revenue Service. Any interest or increment accruing to the frozen account will also be frozen and will be added to the account on its release.

The introduction of this additional power is intended to support financial institutions and their efforts to obtain full and accurate self-certifications from account holders, by virtue of the threat to stop transactions on the account in the event of non-compliance. It is understood that the notification obligation will be enforced from January 2022 and further information regarding how notice can be given and what information will be required by the Revenue Service, will be published in December 2021. In practice, this means that, in order to avoid triggering a notification requirement leading potentially to a freezing order, financial institutions have until the end of this year to remediate any oversights in due diligence documentation. The next few months also present an opportunity for institutions to check that they have accurately transposed data collected from account holders into CRS and FATCA reports, so that it is consistent with AML/KYC and self-certifications provided by clients.

Increased Penalties for Non-Compliance

As part of the new compliance measures, new regulations have been brought into effect to apply enhanced sanctions for failure to comply with CRS and FATCA obligations. The new regulations are:

The Income Tax (Approved International Agreements) (Implementation) (Common Reporting Standard) (Amendment) Regulations, 2021; and

The Income Tax (Approved International Agreements) (Implementation) (United Kingdom and United States of America) (Amendment) Regulations, 2021,

(together, the "Regulations").

The Regulations came into operation on 29 April 2021 and have the effect of increasing daily penalties for failure to submit either a CRS or FATCA report by the due deadline. They also introduce a new basis for calculating penalties in the case of failure due to negligence or fraud. The increased daily penalty of up to £1,000 per day will apply where there has been 30 days of continual failure, following the imposition of an initial penalty of £300 and daily penalties of £50, to submit a report by the reporting deadline (set at 30 June of each year).

Where CRS or FATCA reports have been found to be incorrect or incomplete owing to negligence or fraud, a penalty calculated by reference to the value of the account(s) affected may be applied.

In the case of negligence, the maximum penalty will be 0.5% of the balance or value of the account(s) to which the failure refer. However, if a complete and accurate return has been delivered before the Director institutes an enquiry into potential non-compliance, then no penalty will be payable. In the case of fraud, the maximum penalty will be 1% of the balance or value of the account(s) to which the failure relates.

Comment

The latest changes to Guernsey's tax law facilitate greater monitoring by the Revenue Service at industry and institutional levels and provide the legal basis for targeted compliance measures to be taken by the Revenue Service. In the run up to the introduction of these changes, the Revenue Service published Bulletin 2021.3 which included details of the CRS and FATCA Compliance Assurance Statements that form part of the AEOI annual reporting procedures. This was followed by the publication in July this year of CRS and FATCA Compliance Information, setting out compliance pointers to be taken into account by financial institutions when attending to AEOI obligations. With the advanced notice through these recent publications and given that Guernsey's financial institutions have now had over 5 years to become accustom to the AEOI requirements of CRS and FATCA, it is anticipated that any additional compliance burden on Guernsey's financial institutions will have limited impact for those who are already engaged with AEOI and have in place appropriate policies and operational procedures that can be readily adapted to meet new requirements. Certainly, the exchange of information based on accurate data is in stakeholders' interests and ultimately assists with Guernsey retaining its well-deserved reputation as a centre of excellence in the world of offshore financial services.

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60-SECONDS WITH:

BRYONY COVE
PARTNER
FARRER & CO

Q What would you be doing if you weren't in this profession?

A Definitely working in property. Like most Londoners I know, I am obsessed with other people's houses!

Q What's the strangest, most exciting thing you have done in your career?

A I'm not sure how strange it is, but being a court appointed deputy for a brain injured adult has been incredible – she is an absolute inspiration in terms of her joyous nature and positivity.

Q What is the easiest/hardest aspect of your job?

A The easiest part is staying interested, there is literally never a dull moment in my practice. The hardest part is keeping up – modern technology and the new ways of working are very demanding.

Q If you could give one piece of advice to aspiring practitioners, what would it be?

A Be curious and always look for new angles on what the client is telling you,

Q What has been the most interesting case you have seen in 2021?

A That's a really tricky one, but one client we have been working with has been such a great project, passing a family business down to the next generation in one big step. They have been a real joy to work with and getting to understand what makes them tick and how they see the future has been fascinating.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A We hear more and more from our clients about digital assets and in particular crypto currency – the market is a bit like the wild West just now and will continue to evolve very fast I'm sure.

Q If you could learn to do anything, what would it be?

A Surf, my husband is a demon and I lag far behind!

Q What is the one thing you could not live without?

A Chocolate

Q If you could meet anyone, living or dead, who would you meet?

A Barack Obama and Elizabeth I

Q What songs are included on the soundtrack to your life?

A Live and Let Die by Paul McCartney/ Wings and A Dustland Fairytale by The Killers – I love a bit of drama

Q What does the perfect weekend look like?

A At home in London with my family, going to Portobello Road, seeing friends, walking by the river and cooking lots.

Q Reflecting on 2021, what have you been most grateful for?

A My good health and my family

Thought Leaders 4 Private Client

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