

Philean Trust Company Limited

Regulated by the Jersey Financial Services Commission to conduct Trust Company Business under the Financial Services (Jersey) Law 1998

P.O. Box 384
6 Hilgrove Street
St. Helier
Jersey JE4 9ZH
Channel Islands

Telephone : 44 . (0) 1534 . 610.782
E-mail : Philean@hilgrove.com
Facsimile : 44 . (0) 1534 . 610.871
Our Ref : SJH/KS

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D Scott
Strategy Manager
Economic Development Department
3rd Floor, Liberation Place
St Helier
JE1 1BB

Dear Mr Scott

Financial Services Ombudsman Scheme for Jersey and Guernsey Consultation

I am writing in response to the Ombudsman Consultation Paper.

From having studied the paper it would appear that the main two purposes of any such proposed scheme are:

1. To meet the Single Euro Payments Area ("SEPA") requirement for an effective out of court redress system in relation to payments in Euros.
2. To produce a scheme to give a cheap and effective resolution system for consumers on lower income levels with concerns about financial services products that they have purchased.

It is my view of that such a scheme does have merit in as much as it appears to suitably address the points above. Further it is my view that such a scheme should not be set up in such a way as to capture trusts and for that matter Jersey foundations.

My understanding from the original scoping document is that the intention is to produce a scheme that addresses consumer issues after the purchase of a financial services product, i.e. a retail item.

The trust sector whilst regulated in Jersey by the Jersey Financial Services Commission is anything but an industry that operates in the retail sector. Trusts set up in Jersey and administered in Jersey are frequently of a very specialised nature requiring expert knowledge and advice. It is questionable in my view as to whether a trust, which is in reality a relationship with associated rights and duties, can accurately be described as a financial product.

Whilst the trust business is a large part of the Island's financial services the settlor who is the main "customer" is not the "ordinary man in the street" but someone who will invariably have already sought expert advice and understand the reasons for the setting up of a trust. Indeed it is a widely acknowledged fact that there are very few Jersey consumers of Jersey Trusts.

Turning now to the beneficiaries of Jersey trusts or trusts with Jersey trustees, they already have the ability to make applications to the Royal Court of Jersey for orders in respect of numerous matters relating to their trust that fall short of claims for breach of trust (for example, questions concerning the provision of documents or fee disputes), and to ask the Court to exercise its supervisory jurisdiction in relation to trusts. Often their costs of doing so will be met out of the trust fund. Further the principles governing the exercise of the Court's supervisory jurisdiction in these matters are well established in statute and Jersey case law. It is my belief that the involvement of an Ombudsman is not only, therefore, unnecessary but could be a complicating factor in trustee / beneficiary disputes, where it is unclear that an Ombudsman will be subject to the same rules and principles laid down in statute and/or case law.

Jersey's extensive case and statutory law in the field of trusts together with its robust but fair judiciary with a global reputation for its expertise in this area, give settlors of Jersey trusts in particular certainty, assurance and knowledge on how matters would be treated. The introduction of an Ombudsman with the ability to look at what could be highly complex structures would add uncertainty which could in turn act as a deterrent to those settlors establishing their trusts here.

Furthermore, it is unlikely that any Financial Ombudsman would have the requisite degree of expertise in trusts in order to make decisions on the sorts of matters most likely to be raised (eg, a beneficiary seeking to challenge an exercise of the trustee's discretion, or a request for access to detailed information on a trust going beyond the scope of that to which a beneficiary is usually entitled, or fee disputes which are usually time based). This is likely to result in the need for expensive external legal support and advice. Furthermore, because on the face of it the scheme could extend not only to trusts of which the proper law is Jersey law, but also to any trusts administered in Jersey regardless of their proper law, the Financial Ombudsman would need also to involve foreign lawyers in an appropriate case.

In all the circumstances, the proposed process could well lead to the Ombudsman making decisions that are inconsistent with established legal principles.

The introduction of the scheme as it is currently proposed would, I feel, have the potential to cause substantial damage to the reputation of the Island. The uncertainty that it would introduce with regard to who could complain and what the outcome could be could, I believe, lead to a downturn in business for the Island with trusts that would otherwise be set up and administered in Jersey instead being established in other jurisdictions. I am aware that other jurisdictions are already using these proposals as a marketing tool to divert business from the Island to their own jurisdiction which promises no such legislation.

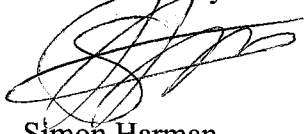
The current proposals do set out substantial exemptions which it might be said would alleviate some of the problems referred to above, because the scheme would not then cover such matters. However, there may be an element of discretion in the Ombudsman to decide whether the exemptions apply in a particular case, leading to further uncertainty. In any event, these exemptions are so extensive that I believe that this could give rise to a negative view of the Ombudsman's powers. It would I believe be better to exclude the trust sector in its entirety.

The costs of running a scheme that would include the trust sector would be astronomical and certainly not commensurate with the outcome. The Jersey proposal is that the financial services industry covers all these costs. Jersey is already a high cost jurisdiction and these additional and what I can only conclude to be substantial costs looking at the experience of the Isle of Man may well drive firms out of the Island.

In conclusion whilst I understand the need for the introduction of an Ombudsman scheme I would not wish to see such an extensive scheme that covers the trust sector.

The urgency is to introduce a scheme that meets the needs of SEPA and we would encourage this need is met with a later review of a possible extension of a scheme at a later stage.

Yours sincerely



Simon Harman
Compliance & Marketing Director
