

R&H TRUST CO (JERSEY) LIMITED

KAT/ljd

5 April 2011

The Strategy Manager
Economic Development Department
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Dear Sir

Financial Services Ombudsman Scheme for Jersey and Guernsey

The introduction to the Islands of a comprehensive independent dispute resolution service to settle complaints between consumers and businesses providing financial products and related advice, which can make awards to make good financial loss incurred by a customer, is to be welcomed and represents best practice.

However, we do wonder why the JFSC are not taking responsibility for dispute resolution; they are already established and therefore the marginal cost of having a dispute resolution division should not be as significant as that which will be incurred through the creation of a separate Ombudsman office. The JFSC could encourage mediation or an independent fee audit, where appropriate, and this would mean the relevant fee would be met by the parties involved in the dispute.

In your Consultation Paper you point out that any legislation relating to an Ombudsman scheme will need to be clear that the scheme does not cover all services by providers of financial services. We would strongly support the argument it should not, for a number of reasons, cover the legitimate exercise of discretion by the trustee of a private trust. We note this is a point you have addressed in 8.1, Ineligible Complaints, but wish to emphasise our concerns on this point from the outset.

We are a trust company business and recognise an independent dispute resolution service - which could be an Ombudsman Scheme - could offer a useful alternative to having to consider the involvement of the court, particularly in the case of a perception of maladministration or unreasonable charging of professional fees, but are concerned to understand how the practicalities of the Scheme will be managed.

Obtaining Information

We would be interested to understand how the Ombudsman would obtain information to enable him to make assessments as to a complainant's case, if they were a trust beneficiary. The disclosure of information to beneficiaries of trusts is not a simple matter. In 5.5 you state the Ombudsman will have powers to require the 'provision of information by financial services providers; where failure to do so can be punished as if guilty of contempt of court'. We do not think this will necessarily provide sufficient reason for professional trustees to simply adhere to the request of the ombudsman and that, as a result, legal advice which may not otherwise have been required will be sought, the costs of which may be properly

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chargeable to the trust, depending on circumstance, and additional time being spent by the Ombudsman's offices managing claims of this nature. It will therefore be important the powers of the Ombudsman are very clear and that guidance is given as to the position of private trustees when information is requested.

Presentation of Case

We do have concerns as to the way the Consultation Paper presents the case for the inclusion of trust company business. You note the Isle of Man Ombudsman Scheme does not include such trust and corporate business in its scope, but what you do not note is that the UK Scheme also does not include such business. It could be argued your Consultation document gives the impression the UK Scheme includes trust company business; for example, in 7.5, you set out a list of categories of possible complainants which includes beneficiaries under a trust and note the list is 'broadly from the UK Scheme'. Unlike Jersey, which has a well-developed regulator for trust company business in the JFSC, there is no similar regulation in the UK. The UK Financial Services regulator does not cover trust company business, as such, and deals with the management, or selling of, investments (broadly financial products); these regulated activities are listed in Schedule One attached to this letter. The UK 'Financial Services Ombudsman' was set up under the 'Financial Services and Markets Act 2000' and is the regulator for complaints for activities falling under the 'FSMA 2000'. As trust company business does not fall under FSMA 2000, the Financial Services Ombudsman has no authority over trust administration.

In addition to the above, per the summary of responses requested in 16.1 of the Consultation Paper, we would comment as follows:

7.2 Limit on size of trust or foundation whose trustees / council members can bring a complaint to the Ombudsman Scheme and, 7.4 Proposed Categories of Complainants?

Whilst the complex nature of the relationship between parties of such private trusts is not akin to the contractual relationship between a customer and the provider of the kind of financial services we believe Ombudsman Schemes in the UK and Isle of Man are designed to cover and, therefore, the context in which Eligible Complaints might be made by beneficiaries of private trusts will be limited to circumstances such as that where they believe a trust has not been administered appropriately and/or where fees have been charged in an unreasonable manner, this should not prevent trustees or council members able to bring complaints to the Ombudsman if they have, themselves, entered into contractual relationships with other financial services providers.

We understand a key principle of the scheme, as described in the proposal, 'should be that the Ombudsman Scheme is only open to those for whom using the courts is not a viable option'. Within the proposal this rationale is used to conclude therefore that 'complaints will be excluded from trustees and council members who are carrying on trust company business' but that complaints will be allowed from consumers or private individuals with no limitations and a trustee of a trust or council member of a foundation who is not carrying on trust company business.

Under the Trusts (Jersey) Law, a trustee shall act as would a prudent person and, subject to the terms of the trust, so far as is reasonable, preserve and enhance the value of the trust property. It would not seem equitable for a trustee who is a private individual or a wealthy private individual in their own capacity to be able to access the Ombudsman but a professional trustee carrying on trust business, who has the duty to preserve and enhance

the trust property for the benefit of what could be a large number of beneficiaries, not having the same ability to claim. The argument a trust company business is a more sophisticated consumer and has an increased knowledge and understanding of the subject matter, and also has 'more financial and legal resources', is misleading with regard to claims which might be made in respect of individual trusts.

If a professional trustee were to seek to make a claim against a financial service provider and found their claim was not appropriately resolved, they would have to consider, in the context of the value of the trust fund, the value of the claim and the costs of any litigation, whether to pursue the matter through the courts in the same way as would an individual consumer. The costs of any such litigation would, in many cases, not be met by the trust company business but properly by the trust fund.

We note the UK currently has a limit of £1million on the value of the trust fund, after which the trustee cannot use the Ombudsman Scheme. The difficulty with placing such a limit is, as we have said, it fails to take into consideration the number of beneficiaries under a trust and thus the relative impact of the potential claim for a loss of value because of an unresolved complaint between the trustee and a financial service provider with which it has contracted.

We would argue there should not be a limit placed on the size of trust or foundation whose trustees / council members can bring a complaint to the Ombudsman Scheme when there is not a similar limit placed on other complainants, such as private individuals, who may also be of a higher than average net worth and experience.

The UK describes their own Scheme as being the 'official independent expert in settling complaints between consumers and businesses providing financial services' and a service for 'everyone'. The fact they currently discriminate against trustees of trusts with a value greater than £1 million is arguably inequitable; if these trustees consume the same financial service and contribute to the costs of the relevant financial services provider, why should they not also be able to access the Scheme?

7.5 Proposed relationships between financial services providers and complainants?

As we suggested earlier, the number of situations in which a Complaint will be judged by the Ombudsman as ineligible, which include - where the complainant has not suffered financial loss, the matter would be more suitably dealt with by a court, the dispute relates to the legitimate exercise of discretion under a will or private trust, the dispute relates to a failure to consult beneficiaries before exercising a discretion under a will or private trust, where there is no legal obligation to consult, the resolution of the dispute may prejudice the rights of other parties, who have not consented to the consideration of the complaint by the Ombudsman scheme - indicates that any proposal to cover trust company business relating to private structures must be very carefully managed so as not to make the whole scheme unworkable and prevent the proper business of the office being concluded in a timely and efficient manner.

A Guidance Note should be issued for potential complainants, setting out examples of situations in which the Ombudsman would and would not be able to act.

9.3 General Time limit within which to bring a complaint

It would seem logical for the time limit to be in line with other contractual limitation periods and so **10 years** appears sensible.

9.4 Time by which financial services providers covered by the scheme should issue a final response to a complaint.

Three months seems sensible.

10.1 Starting Date

A starting date of **1 January 2010** seems sensible.

15.2.2 and 15.2.3 Balance between Case fees and annual levy?

On the premise complaints relating to trust company business will be ineligible if focused on the exercise of trustees' discretion and therefore eligible if relating to inappropriate administration, unreasonable fee levels etc, ***we are very keen there should be more emphasis, from the outset, on case fees than an annual levy since such emphasis should provide an incentive to service providers to improve their general service levels.***

The office of the Ombudsman needs to operate in an effective and efficient manner. For the Ombudsman to establish whether they have jurisdiction and, for example, investigate, in the context of a discretionary trust with a number of beneficiaries, whether a beneficiary has 'experienced financial loss as a result of the actions of the provider and so have a valid complaint to be considered' (7.5) could, in itself, be a difficult and time-consuming exercise. We assume the inclusion in the Consultation Paper of a significant number of ineligible complaints, which relate to trusts, is indicative of the fact that to attempt to cover trust company business within the scope of the Scheme is potentially difficult.

If trust company business is to be included in the scheme there should, therefore, be very clear guidance issued to potential complainants who are linked to private trust or foundation structures as to what might or might not constitute an Eligible Complaint.

There should also be the ability for the Ombudsman to ***award costs*** against a complainant if their complaint is found to be vexatious or frivolous or without grounds.

We are also concerned to note it is proposed there will be no ***right of appeal*** to any judgement made by the Ombudsman. There should be a right of appeal.

We think that, unless the fees charged to fund the Scheme are heavily weighted toward case fees, the inclusion of trust company business within Scheme may put Jersey and Guernsey at a disadvantage to their competitors because the costs of administering such a Scheme - were it to include trust company business - are likely to be high due to its complex nature and therefore add onto the already significant costs of operating as a trust company in the Islands.

The Ombudsman must also be accountable to those who fund it and who may use it. To this end, we believe there should be an ***Annual Report / website*** maintained by the Office which summarises complaints and their resolution and divides such information into sectors for ease of understanding. This should, again, assist with a greater understanding on the part of complainants as to when the Ombudsman's jurisdiction is or is not relevant.

Whilst we recognise the need to ***levy*** to assist with the establishment of the office, the ongoing level of such any annual levy should be relatively small - we would suggest £2,000 per service provider - since the overall costs of the service provision which will, in the case of

trust company business, be driven by complaints regarding unreasonable fee levels and poor service quality. Such costs should be linked directly to the subject of the complaints and charged as case fees accordingly.

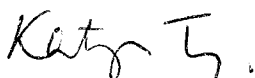
15.2.8 and 15.2.9 Flat and graded fees for different financial services providers?

As above, we would support a relatively small annual levy with the majority of costs being funded from case fees.

We understand you are considering, when thinking about the annual levy, whether to apply a flat fee to certain businesses - such as trust company businesses - but that other financial services businesses such as bankers and insurers may be charged a graded fee. We would support the scheme being as simple as possible. If you are to pursue a graded approach we imagine this will create additional administrative costs so would suggest proceeding on this basis with caution.

We hope these comments prove of assistance when considering how the Scheme will best serve the needs of customers and those linked to Jersey's financial services industry.

Yours faithfully
R & H Trust Co (Jersey) Limited



Kathryn Tully
Director

cc: JBCCA
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