IN THE FOOTSTEPS OF LORD MACNAUGHTON

By Milton Grundy

"Income tax, if I may be pardoned for saying so," Lord Macnaughton famously observed[1], "is a tax on income. It is not a tax on anything else." We might go on to say that inheritance tax is a tax only on transfers of assets. And neither of them are taxes on possibilities, hopes or expectations. From which it follows, as is well-known, that UK beneficiaries of a discretionary trust pay no tax on undistributed income and their estates no inheritance tax on their death. In the era of very high taxes after the Second World War, what had been an amenity for the rich and titled in England became the huge industry of the offshore discretionary trust. If we look at the offshore discretionary trust through the eyes of the tax collector, we see that it does three really distasteful things. If the trust fund is £10m and it is invested at 4%, it will produce a yield of £400,000, some of which may be income and some of which may be capital gains, but if the fund had stayed in the hands of the settlor, the tax collector might be looking at collecting half of it – £200,000 – in tax. But if the trustees decide to accumulate the income, he will see no tax at all, and what is more, the £200,000 may be invested next year and produce another untaxed £8,000 and so on and so on – a process of accumulation which, over time, produces such astonishing results that we used to have in England a rule limiting accumulation to lifetime or 21 years – a rule never, for some reason, extended to Ireland, and never, happily for the growth of the offshore industry, extended to the Overseas Territories. And when – to add, our tax collector may think, insult to injury, the accumulated income comes to be paid to a beneficiary, it may come in the form of capital which is not, in principle, subject to taxes on income or capital gains. As if that were not bad enough, the effect of the discretionary trust is to make assets "disappear" – disappear in the sense that the trust fund is not part of the estate of anyone – not of the settlor and not of the discretionary beneficiaries. It is impossible to guess how much wealth tax, exit tax and – especially – tax on death has been avoided by the use of the discretionary trust by taxpayers in many countries.

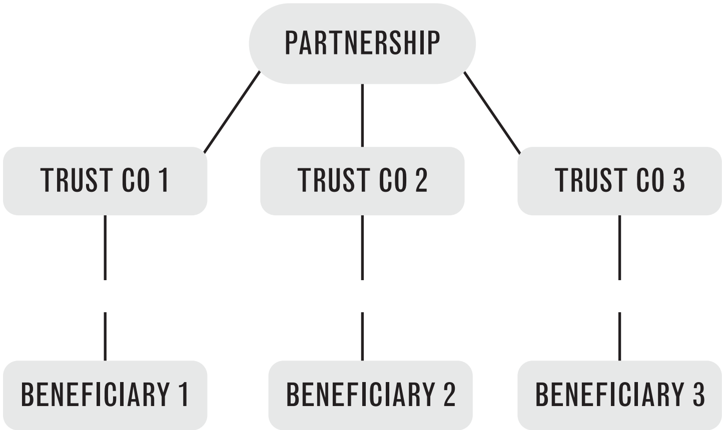
The very success of the discretionary trust in escaping tax charges has led many jurisdictions to surround it with a thicket of anti-avoidance provisions. In the United Kingdom, for example, we have provisions for taxing trust income at a specially high rate, for attributing income and capital gains to the settlor and for charging inheritance tax when the trust is made, and again on every tenth anniversary and on distributions. None of this is very new. But there has been in the last few years what I can describe as a change of perception. The change of perception has not just affected discretionary trusts. It has affected trusts of all kinds. You could say the word "Trust" has become a dirty word. There have been HSBC Geneva accounts, Panama papers, Paradise papers – "leaks" of one kind or another, and somehow the public perception now is that anyone connected to a trust is up to no good. It is amusing – but also indicative, that the Society of Trust and Estate Practitioners became so embarrassed by the word "trust" that it resolved to omit it from its name! So what I want to explore here is whether we can have the benefits of the discretionary trust, by using some other kind of vehicle in place of the trust.

Let me begin with a story of long ago. A production company was putting on a musical at a London theatre. Both the composer and the leading lady were famous, and it was agreed that they should get 15% of the box office receipts in excess of half a million pounds, the 15% to be divided between them in whatever proportion they should decide. By the time the company came to do its accounts, the musician and the star had not come to an agreement. Could the company nevertheless deduct the 15% in computing its profits for tax purposes? And was any part of the 15% taxable as income, either in the hands of the composer or in the hands of the leading lady? It seemed at first anomalous that there could be a trading expense without a receipt, but in fact a receipt is not a requirement for a deduction. What you need is a liability. The company was going to have to pay the 15%. It was only a question of how the payment would be divided between the two of them. In those circumstances, I was happy to advise that the 15% was undoubtedly deductible for the company and not taxable for the individuals. I should like to say that after a long fight with Her Majesty's Revenue, it was eventually held by the House of Lords that my view was correct, their Lordships observing, to my embarrassment, that the Revenue would have been well advised to have listened to Mr Milton Grundy's views in the first place and not waste public money pursuing the appeal. But that did not happen. The show closed after a fortnight and there were no box office takings to distribute. But the story provides an interesting example of the difference between a possibility of income and taxable income – even though, in this case, the person providing the funds for the possibilities gets a deduction for the provision.

This is a story without a happy ending, but I think it is worth the telling, because it illustrates the basic truth, as I said earlier, that income tax is a tax on the taxpayer's income and not on his hopes or expectations. I have found support for this proposition in a UK tax case from 1930, called *Franklin v Commissioners of Inland Revenue*[2]. The case is not very well known and is little noticed in the textbooks. It is about partnership income, but it is of much wider interest. The partnership concerned was the banking firm of Samuel Montagu & Co. One of the partners had died, exercising by his will a right under the partnership deed to appoint his son to be a partner. The other partners did not regard the son as a suitable new partner, and there was disagreement – stretching over many years, and including two sets of proceedings in the High Court – between the son and the remaining partners. While all that was going on, what would have been the son's share of the profit, if he had succeeded in becoming a partner, was accumulated in a reserve. It was eventually decided that the partners were entitled to refuse the son admittance to the partnership, and the accumulated reserve was distributed to the partners, so that each of them got the amount he would have received if the income put to reserve had been distributed year by year. The Court held that amounts put to reserve were not income of the partners. What the case tells us is that where a taxpayer's entitlement to income is, as the judge put it, *contingent upon a fact which is going to happen in a future year,* "it is," he said, "impossible to say that he is entitled to it in the years which passed before that event happens." He is not talking about amounts which are uncertain, but can nevertheless be estimated. An estimate can brought into an account. This was a case where no estimate could possibly be made: nobody knew at the time whether the partners would succeed in keeping the son of the deceased partner out of the partnership, or whether the son or they would ultimately become entitled to the money placed to reserve. There was therefore nothing which could be brought into account in computing the partners' liability to tax in that year, and – logically – nothing the son could be taxed on in that year, either. This is a statement of the income tax law of the United Kingdom, but I think it reflects a general principle – the principle that sums which cannot be ascertained cannot be taxed, and one which ought to apply to tax systems everywhere in the world. What I want to do in a moment is to see whether this principle can still be applied to partnerships.

But before I do that, I want to go forward from the year in which the amount is uncertain, and ask what happens when, in some later year, the uncertainty comes to an end and the amount is ascertained. Is the amount then taxable? And if so, is it taxable in the year in which it is ascertained, or is it related back to the earlier year when it would have been taxable if the amount had been known? The UK cases are not very easy to reconcile, but the tendency is to relate the amount back to the earlier year and re-open an earlier assessment, if it is still possible to do so. Other tax systems may well do things differently. But I think one always has to keep at the back of one's mind the possibility that, though it might be all very well to avoid a charge to tax while the discretion remains unexercised, a tax charge may crystallise once it is exercised – bearing in mind that the ability to invest money which would otherwise have gone in tax – even for a limited period – is itself an advantage (provided, of course, that the investment is a success).

Let me stay with the United Kingdom a little longer, and envisage a UK partnership with three partners, carrying on a business in the United Kingdom. 80% of the partnership profits is to be distributed among the partners in shares fixed by the partnership agreement, but 20% of the trading profit is not be distributed, but will be re-invested in the business and distributed at some future date in such shares as shall then be decided. In the meanwhile, it will be shown in the accounts as a reserve. Is the 20% subject to tax? Well, not in the United Kingdom, because the United Kingdom does not levy tax on partnership income as such. It taxes each partner on his share of partnership income, and so long as I am not entitled to any part of the 20%, it is not my income. One practical disadvantage of a partnership is that it comes to an end if a partner dies. A structure I have used to overcome this replaces each partner with a trust for his benefit, like this–



I envisage that each trust company holds its interest in the partnership on trust to pay the trust income to the beneficiary for X years and subject thereto as the beneficiary may by deed or will appoint – a "thin" trust. The Beneficiary in each case is beneficially entitled to the income of the trust – that is, the distributions of partnership profits, but let us suppose that distributions are postponed until such time as the beneficiaries are not liable to tax on them – either because they have gone non-resident, or because the time limit for charging tax has expired or for whatever other reason. The really nice thing about this structure is that clients like it: it is not complicated and not difficult to understand. It is, as said, particularly suited to clients who are resident in a jurisdiction which taxes partners rather than partnerships, but it does in any case have the advantage, whatever the tax regime of the beneficiaries, that the partnership is unaffected by the death of a beneficiary, and – incidentally – the beneficiaries get the benefit of limited liability.

I will leave partnerships now and turn to companies. Is there some corporate vehicle which has the same sort of effect as the discretionary trust? The obvious candidate, of course, is the foundation. The Liechtenstein Foundation has been popular for many years. It is a creature of statute, and owes nothing to those concepts of fairness and justice – the rules of equity – which are the basis of the anglo-saxon trust. It came into existence in 1926 – a year not without other claims to fame. The Liechtenstein Foundation is not something on which I can speak with any authority or any real insight. In fact, the more I know about it, the less I understand it. I was shocked a little while ago to learn that the founder can lawfully provide that if any beneficiary has any complaint against the governing body of the foundation and goes to law to find a remedy, he will be automatically excluded from all future benefit! But whatever the merits and shortcomings of the foundation, I do not think it really has any place in a survey of alternatives to the trust. The imaginary client wants to avoid the trust, because he thinks the word carries the message of avoidance, and he does not want to be stigmatised as an "avoider". Is he going to be any happier being connected with a "foundation"? I, for my part, do not think he is. But I can see there is an opposite view: "foundation" is the label attached to many charitable bodies – the Ford Foundation, for instance. In the early years of this century, it became fashionable for jurisdictions with English-style trusts to provide a corporate alternative. It is in the form of a statutory foundation. There is a list of these jurisdictions in the Appendix below, and I have included Cyprus, which enacted such a provision many years earlier. But to carry this train of thought to what I suppose is its ultimate destination, are we just talking costumes here? Could we not give our discretionary trust a name excluding the word "trust" and using instead the word *foundation*? "I am a beneficiary under the Soloman Grundy Foundation." How does it sound?

But I digress. Let us leave aside the corporate foundation, and look at the common corporate vehicle – the company limited by shares. Can a regular limited company function like a discretionary trust? Well, I think the first thing to be said is such a thing is possible – very unusual, perhaps, but possible. I looked back in my archive and found a constitution I had drafted for a discretionary company dated 1980! I do not now recall what impelled the client to ask for a discretionary company in 1980, but nowadays I can quite see that to be associated with a company is somehow more respectable than to be associated with a trust, at any rate in a domestic context, even though – ironically – trust income and gains may be taxed more heavily than income and gains of a company. In an offshore context, I think we need to consider the image of the jurisdiction as well as the image of the vehicle. If what we want to achieve is to circumvent the popular prejudice against offshore trusts, we need to move away from the well-known zero tax centres as well as move away from trusts. If I say, 'I am a beneficiary of a discretionary trust in the Cayman Islands', I am obviously a wicked tax avoider. But if I say I have some shares in a company in Uruguay, people will take me for a shrewd investor.

A positive advantage of the company to practitioners with a civil law background is that they know what kind of entity they are dealing with. The trust, on the other hand, comes with all the baggage of a couple of centuries of the Court of Equity, with its perpetuity period, and cy-près doctrine and rule in *Andrews* v *Partington*. But the trust was invented for the purposes of conferring bounty on others, whereas the company's purpose was to confer limited liability on investors, and it is only natural that we find problems when we apply one for the purposes of the other. The first that springs to mind is lack of mobility. By replacing the trustee in one jurisdiction by a trustee in another, the trust can migrate in a moment, without any permission from anybody. Some countries allow companies to redomicile themselves elsewhere, but the process is more cumbersome, and of course if my reason for leaving the jurisdiction is because a revolution has installed a dictator, I may find that redomicilation has already been forbidden. A serious disadvantage of the corporate form comes in the matter of succession. There is no way for the constitution of a company to confer rights on an unborn person. The constitution can provide for parents to be entitled to new shares for a new child, but that would be a right vested in the parents, and if they forget or die or for some other reason do not do it, the child has no remedy. But shares may be gifted or settled, and the UK taxpayer may find that a combination of gifts to living descendants and settlements for unborn ones offers the ideal structure.

It is worth pausing for a moment, to reflect what a revolutionary departure this is: companies, as we know them, are – yes – there for their shareholders, but for their shareholders only in an abstract sense. They do not have to know whether a shareholder has needs, or is married or infirm or insolvent. The company does not need to know whether a shareholder has any beneficial ownership in the shares at all. Discretionary trustees, on the other hand, need to know about all of these things, and if we are going to construct a kind of discretionary company embodying all these features, we are going to have to do some hard thinking. What happens if one of the shareholders is unhappy with the treatment he is getting from the directors? Will the Companies Court take on the obligation to guide the directors in the way a Court of Equity would feel obliged to guide trustees? One point where the difference emerges – between trustees who are focussed on the needs and aspirations of beneficiaries and directors assuming similar obligations, is when the point arrives that the directors want to distribute a sum which would reduce share value below par. In principle, dividends are declared out of profits. What happens if there are no profits? I think some offshore funds in corporate form have issued participating preference shares at a premium, and I believe that some jurisdictions – and Jersey is one of them – will let you redeem preference shares otherwise than out of profits. Otherwise, I suppose the company will have to go to the court for permission to reduce its capital, and how is the court going to react to a proposal to reduce the capital of the company – giving £X pounds to one, half £X to another, a token amount to a third? One escape from this problem is to use – not a company limited by shares, but a company limited by guarantee. These are commonly used in England as a corporate form of charity. There are, typically, just a few guarantors, each guaranteeing only a nominal sum, the substantial assets being given to the company by one or more founders and these assets can be distributed down to the last penny if that is when the guarantors want. The model is quite easily adapted by substituting individuals for charitable purposes, and – behold! – the draftsman's problems are solved.

But not quite. An intending benefactor may see it as a disadvantage of the corporate form that it does not enable him to rule from the grave in the same way he can with the trust. If the beneficiaries are shareholders, they can always get together and pass a resolution to make whatever changes in the constitution of the company they choose. And even if you use some corporate body which does not have shareholders, like a company limited by guarantee, there are always going to be some people – directors, committee members, guardians, whoever – who are going to have the power to make changes. You may know the story of Sergeant's Inn. The Inns are rather like university colleges for students of the law. This particular

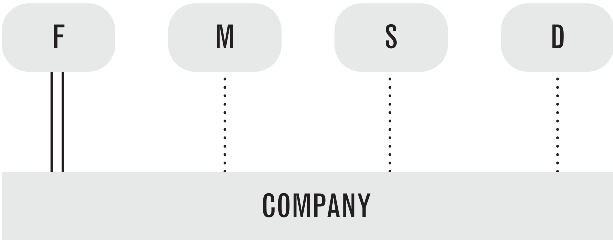
Inn was founded in the 15th century and took the form of an unincorporated association. By the 1870s its members had dwindled to a very few, and it no longer had any students. But what it did have was a substantial property in Chancery Lane, and a property in Chancery Lane was, even in those days, an asset of considerable value. So the members called a meeting, to decide what to do next. They could start a new legal education programme and recruit some new students. But then it occurred to them that nothing in their charter forced them to do that. And moreover, there was nothing in their charter to prevent them forgetting about education altogether, selling the building and dividing the proceeds amongst themselves. Which they did, and lived happily ever after.

This story should discourage any intending donor from entrusting any significant sum to a discretionary company. Is there anything we can do to solve the problem? Well, I think we might take a tip from the Charity Commissioners in the United Kingdom. There used to be nothing in the Charities Act to prevent trustees from altering the memorandum of association of a charitable company, to take out charitable objects and insert "for the benefit of Milton Grundy absolutely." It was just that the Charity Commissioners would not recognise the company as a charity unless its memorandum included language providing that the objects could only be changed with the prior consent of the Commissioners, which of course in such a case they would not give. If the company was not recognised as a charity by the Commissioners, one consequence was that it would not be recognised as a charity by HMRC. And so, of course, in practice, UK charitable companies had such a proviso. For charitable companies, this manoeuvre is now forbidden by statute, but can we adapt this mechanism for a discretionary company? I have never seen it done in practice, but I have toyed with the idea of vesting the right to give or withhold consent to any change in the memorandum of the company in a trustee for the benefit of the same beneficiaries.

On the other hand, there is the kind of client who does not want the future of the family fortune to be determined by a trust, but prefers a structure where the power is shared out among family members. For such a client a corporate vehicle could be an option. I see no reason why shareholders, or guarantors for that matter, should have to share dividends equally, if the constitution of the company provides otherwise. It is only a matter of drafting. Distribution may not be all that tax efficient, but for UK taxpayers, at least, accumulation in a company – with no tax on UK dividends, and 18% on everything else, is a great improvement on accumulation in a trust, with a 40% income tax rate and an inheritance tax charge every ten years and on distributions. I think the establishment of the discretionary company will carry the same 20% inheritance tax entrance charge as the trust, but no ten year charge and no exit charge. Of course, the zero-tax offshore company can in some circumstances be more tax efficient, but then we come back to the problem I discussed earlier – that some clients are going to think that they do not want to be associated with a vehicle established in a jurisdiction associated in the public mind with tax avoidance.

Is there a half-way house – the jurisdiction which behaves like an offshore jurisdiction, but does it not look like one? I mentioned Uruguay. It has a territorial system, not essentially different from that of Gibraltar or Panama, but without the suggestion of avoidance. I once used a company incorporated in Botswana. It was managed and controlled in Gibraltar and therefore non-resident for tax purposes, but nobody outside the government office in Gaborne knew this, and the company attracted no attention from any journalist. Botswana is perhaps a little exotic for most clients, but is worth mentioning, if only to make the two vehicles I am now going to talk about seem more run-of-the-mill. One is the English company resident in Barbados and effectively free of tax on income not arising in Barbados. The other is the Limited Liability Company incorporated in one of the states in the United States which imposes no state tax, all of whose members are non-resident aliens. It is effectively free of tax on non-US income. These are big topics, on which I can touch only fleetingly here. I have not actually tried the UK/Barbados route, but I have tried a discretionary LLC in Texas, which worked for many years without problems.

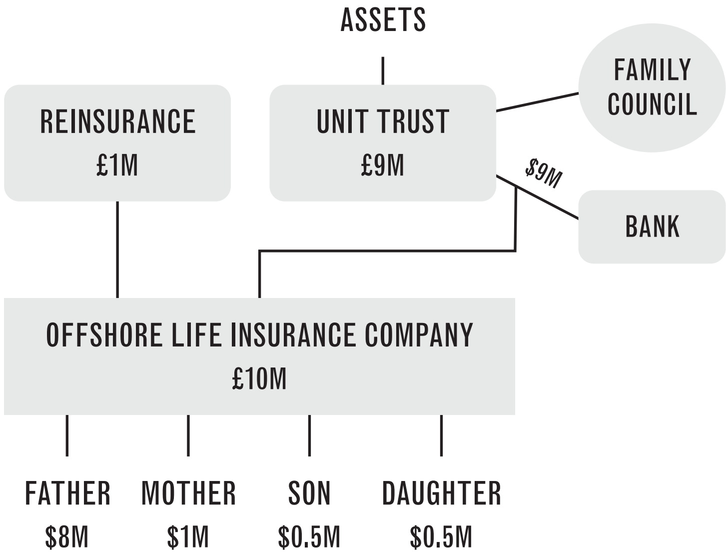
Let me come back onshore again, and consider whether there is a way of combining the security of the trust with the tax advantage of a company? Well, consider this –



Father – "F" in the left-hand circle – forms an investment company whose constitution reserves to the directors a discretion to determine which, if any, of the ordinary shareholders is to receive a dividend and how much is to be paid to each of them. He subscribes for all the ordinary shares, which he gives away to members of his family – mother, son and daughter, shown here as "M", "S" and "D", their ordinary shares shown as dotted lines. Father himself takes a single share, which I show as a double line. This is a "golden" share: it has little value in itself, but carries 51% of the votes and can thereby determine the identity of the board members, who in turn have power to determine the distributions, if any, to be made to the family members – a role similar to that of the Protector in the usual kind of discretionary trust. Father could even settle the golden share, on trusts bequeathing its very extensive powers to future holders of that office.

I have mentioned ways of having an offshore company without appearing to do so. But if we move from *offshore company* to *offshore unit trust* we enter a completely different world. Lots of people have offshore unit trust units. It is true there was a bit of a flutter when the Panama leaks revealed that our then Prime Minister's father had them. And when the Queen of England was discovered to own some. But I think it is fair to say that offshore investment funds are respectable. An offshore unit trust with a corporate trustee will do everything an offshore company can do – accumulate tax-free income and capital gains and distribute as little or as much of them as it cares. I think I am the only person who has drafted a discretionary unit trust, but I am here to say that there is no mystery to it: the trustees of a unit trust can be given a discretion, just like the trustees of any other trust, and just like the directors of the discretionary company. And the unit trust has the advantage over most companies – that you do not have to worry about distributions reducing share capital, and an advantage over all companies – that, like any other trust, it can be redomiciled in another jurisdiction at the stroke of a pen.

Is there a way to apply the discretionary principle to life insurance policies? I do not think anybody ever has done so in the past, but that is no reason to refrain from doing so in the future. I am conscious that we are in unchartered territory here, and one of the first questions we are going to have to ask is, who is going to be our insurance company? I doubt very much whether any of the major insurance companies would want to do this kind of business. In many countries, they have managed to get a quite favourable tax treatment for insurance policies, and they may well see the instant tax freedom offered by the discretionary policy as endangering their good relations with government. A smaller company, on the other hand, may see here a promising new line of business, which it cannot afford to refuse. I will assume, for present purposes, that we have found a company in an offshore jurisdiction, willing to do the business. The problem from the policyholder's point of view, is risk – the risk that some act by the company (and it may be an act wholly unconnected with the policy) will make the company insolvent, with the policyholder sharing the loss with other creditors. Is there a way to ring-fence the assets allocated to the policy so as to avoid the risk? Well, let us try this.



Here is an imaginary offshore life insurance company. It has issued four life policies – one to Father, who has paid a premium of $8m, one to Mother for $1m and one to Son and to Daughter who have paid half a million each. Suppose the insurance company spends one out of the $10m to re-insure the life risks and has $9m to invest. The bank creates a unit trust and subscribes for 9m units of $1 each. It then sells the units to the insurance company which allocates 80% to Father's policy 10% to Mother's and 5% each to Son and Daughter. The unit trust invests the $9m in the assets the family wants to hold – shares in quoted or unquoted companies, properties, yachts, art, holiday homes and so on, and (if any of the policyholders' is UK resident) makes its investments through a subtrust. The policies provide for a sum to be payable on death, 10% of which is a fixed sum payable in cash and 90% depends on the value of the units allocated to the policy.

So far so good, you may say, but where is the discretion? The discretion is in the constitution of the unit trust. I envisage that the unit trust will be in the form of what I have elsewhere[3] called the *Fortress Trust*, that is to say, a unit trust where the unit holders cannot be sure what distribution of income or capital they will get from the trustee, because that is left to the discretion of the trustee and requires the unanimous consent (in this case) of the Family Council. The assets allocated to the policy are not, of course, the shares, properties, boats and so on. These are owned by the trustee of the unit trust, and it is the units which belong to the insurance company. Let us suppose that the worst happens and the 9m units are now in the hands of a liquidator of the insurance company. Are the units worth anything? In the absence of agreement with the Family Council, the unitholders have the right to sit out the rest of the Perpetuity Period, and then to enjoy whatever distributions are determined by the trustee – the trustee being a person owing his office to the Family Council. In these circumstances the liquidator is going to be open to an offer by the family to purchase the units for a nominal amount.

I said that the bank creates the unit trust, subscribes for the units and sells them to the insurance company. 'Why', you may ask, 'do we need the bank? Why cannot the company just subscribe for units?' Well, it could. And I expect the tax effect would be much the same, with income and gains accumulated within the unit trust, and the units allocated to each policy having a nil value, even though all the units taken together have a value equal to the value of the trust fund. There is however an advantage to a UK taxpayer who is a policy holder, and that is that – in my view at least – the income of the unit trust does not arise to the trustee by reason of any transfer of assets made by him and therefore cannot be attributed to him under our "transfer of assets" provisions. But my more general reason for preferring purchase to issue is the obstacle it places in the way of the creditor who would like to have access to the trust fund. Insolvency is not my area of the law, but my understanding is that if the insurance company subscribes for units at a total premium of 9m, the creditor may try to set aside that transaction and claim the $9m from the trustee. But if the insurance company has bought the units from the bank, the creditors can only go against the bank and have no way of laying their hands on the assets in the trust fund. The use of the discretionary units will also protect the family fortune in the event of the insolvency of one of the family members. If, in my example, Father were to become insolvent, the creditors would get the benefit of the life cover, but have no access to the assets which I show at the top of the diagram, which would continue to be held by the trustee of the unit trust for the benefit of the family. Part of the charm of the insurance policy as an asset-holding vehicle is that nowhere is there – for the time being any at rate – a register of beneficial owners of policies. And the insurance industry is such a powerful lobby everywhere that one might expect them to put up a successful resistance to any change in the *status quo*. Moreover, taking out a foreign life policy does not automatically brand you as a tax avoider.

I shall say no more on the possible income and capital gains tax savings to me made by a discretionary policy. These are of course going to depend on the tax regime applicable to the policy-holders, but I venture to say that the benefits of a policy are unlikely to be less than the benefits of a trust. Where the discretionary vehicle comes into its own is in the field of exit tax, estate tax and inheritance tax. On the death of a policy holder, the life company will place only a nominal value on the units, and it is hard to see what arguments could be raised by any taxing authority to attribute to the policy any value significantly higher than the death benefit. And it is also very possible that the taxing authorities would not see any reason to challenge the valuation, if there had been no occasion for the payment of the premium or the issue of the policy, let alone the constitution of the unit trust, to come to their attention.

I am rather drawn to the discretionary policy. Of course, it has novelty value, which makes it a great topic for a GITC Review article. And it is a Milton Grundy original, so I can glow with inventor's pride. But it does not *look* like a novelty. Offshore policies linked to unit trusts are quite common: in the United Kingdom they are widely marketed under the name "offshore bonds" and have a well-established tax regime, with income tax postponed until disposal, and allowing an annual 5% tax-free drawdown of the premium. Lots of people have them. And in tax matters, it is never a good idea to stand out from the crowd. A little while ago one of my colleagues in these chambers was involved in a case[4] where the client had decided he would like to be non-resident. So he berthed his yacht in Monte-Carlo and spent in England only the days indicated as permissible in HMRC's then guidance notes – IR20. Then a Daily Mail journalist spotted his private plane landing in Blackpool airport on a regular basis, found he spent three days a week in his office and spent the intervening night in his old home in Skelmersdale. Then came the denunciations in the newspaper indicating that Her Majesty's Revenue and Customs had been hoodwinked by a taxpayer smarter than they, and so on and so on. Naturally, staff at HMRC were stung, and there followed years and years of litigation. The charm of the discretionary policy is that there is no yacht, no Monte-Carlo, no private plane. It is well-nigh impossible for journalists to make out of an insurance policy a story to captivate his readers. Indeed, it is quite hard to say what tax is avoided. And from popular disapproval, it is saved by its sheer dullness. As you may gather, my top choice of discretionary non-trust is the discretionary offshore policy.

Appendix

Anguilla (2006)
Antigua (2006)
Bahamas (2004)
Cyprus (1972)
Jersey (2009)
Gibraltar (2017)
Guernsey (2012)
Isle of Man (2011)
Malta (2006)
Nevis (2004)
St Kitts (2003)

Endnotes

1. In *London County Council v A-G* [1901] AC 26
2. 15 TC 464
3. GITC Review Vol XV No 1
4. *Hargreaves v Commissioners* [2019] UK FTT 0244 (TC)

Adapted from a talk given to Itpa last year in Estepona.