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Guernsey company formation – the Procureur’s Visa

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This article traces the history and records the demise of the Procureur’s Visa which at one time was a pre-requisite for the incorporation of a Guernsey company.

1 Section 12 of the Companies (Guernsey) Law, 2008, which came into force on 1 July 2008, provides as follows—

“12. The consent of Her Majesty’s Procureur is not required for the incorporation of a company.”

Thus, somewhat brutally, a curious, and occasionally controversial, function of Guernsey’s Law Officers was consigned to the dustbin of history. Before memories fade, it may be of interest to provide a note as to how that consent first came about, and of some related matters.

2 Prior to s 12, and ever since Guernsey’s companies’ legislation of 1883—the *Loi relative aux Sociétés Anonymes ou à Responsabilité Limitée*—a Guernsey company had been incorporated by its founder shareholders making application to the Royal Court for permission to register its Memorandum of Association at the Greffe, and either then, or subsequently within six months and in any event before commencing business, likewise registering its Articles of Association. The 1883 Law, and subsequent Guernsey legislation until the 2008 Law (which created the statutory office of Companies Registrar) functionally prescribed HM Greffier (clerk to the Royal Court and keeper of judicial and other public records) as the registrar. The 1883 Law was specifically and substantially based on the Companies Act 1862, of the United Kingdom.

3 Interestingly, Guernsey’s first companies’ law—the *Loi relative aux Sociétés en Commandite, 1856*,¹ by which the States, on a petition submitted by members of Guernsey’s Chamber of Commerce, enabled limited partnerships based on the French *société en commandite*, also required registration, not by formal application to the Royal Court but rather in the same manner as conveyancing transactions are undertaken, its constitutional documents being passed devant justice.

4 The 1883 Law was subsequently repealed and replaced by the *Loi relative aux Sociétés Anonymes ou à Responsabilité Limitée 1908*, subsequently anglicised as the Companies (Guernsey) Law, 1908, which was amended on various occasions—particularly in 1936, 1958, 1965 and 1973: all of which were eventually repeated and consolidated, and to a

¹*Sociétés en commandite* were abolished from 12 May 1977 because neither the Law Officers’ visa nor any other regulatory consent was required before incorporation. The Guernsey Ladies’ College was first constituted as a *société* and failed financially, and the last *société* financed a film called “The Eagle’s Wing” which was not (it is thought) a box office success!

limited extent developed, in and by the Companies (Guernsey) Law, 1994. By the Companies (Enabling Provisions) (Guernsey) Law, 1996, particular features of corporate activity were for the first time enabled, including protected cell companies, companies limited by guarantee, and the immigration, emigration and amalgamation of companies; and more recently (as a species of protected cell company) incorporated cell companies.

5 In the 1920s the Crown Dependencies (but then not colloquially known as such) were faced by a request from HM Government to contribute further to the costs of the Great War, the States having already paid £100,000 during the hostilities.² During the course of the discussions consequent upon that request, HM Government reminded the Insular authorities of the continuing costs borne by British taxpayers of, particularly, (i) the provision and maintenance of their armed forces,³ and (ii) their foreign relations, and particularly the protections afforded to British subjects including those domiciled and resident in the Crown Dependencies; *i.e.* diplomatic and consular services. During the course of these discussions, which were protracted, HM Treasury drew attention to the fact that the Crown Dependencies, and in particular Jersey, were places to which British domiciled and resident taxpayers were removing to reduce the incidence of UK taxation (which after the Great War had increased significantly on wealthier taxpayers), and in which companies were formed for the avoidance of UK taxation.⁴

6 Eventually in 1927 the question of Guernsey's contribution was settled, only to re-emerge in the 1980s, as a result of which Guernsey assumed (*inter alia*) the (not insignificant) costs of repair and maintenance of Alderney's breakwater from the UK Government. One apparent result of the 1927 agreement was the confirmation of an arrangement by which the Royal Court would only approve the registration of a Guernsey company if its Memorandum had been initialled by a Law Officer, *i.e.* their "visa", signifying approval to its incorporation following consideration of a questionnaire in which the name and address of the beneficial owner of the company, the purpose of the company, and particularly whether or not the incorporation of the company would result in the avoidance of UK taxation, were disclosed by the advocate procuring its incorporation. This

²For a full account see de Sausmarez, *Guernsey and the Imperial Contribution*, published by the Royal Court (1930).

³A contemporary report prepared by Sir Maurice Hankey, Cabinet Secretary and Clerk to the Privy Council, relating to the Imperial contribution for defence purposes deserves quoting—

"It is true that (the Channel Islands) participate in the general defence of the British Empire provided by the British Navy and the other Imperial forces, but from the local defence point of view our case is rather weak. There is only one country which is likely to cover the Channel Islands and that is France. Against France we can offer no effective local protection whatsoever. There is little doubt that if we were at war with France we should lose the Channel Islands at once, and should only regain them as the result of a Peace Conference if we were successful in the war. The Committee of Chiefs of Staff have advised that, from a strategical point of view, there is no object in maintaining the regular military garrison of the Channel Islands, and there is little doubt that the Committee of Imperial Defence will approve its withdrawal as soon as accommodation can be found elsewhere."

⁴"There are however in Jersey a few individuals of considerable means whose migration there we can only regard as a deliberate attempt to evade their responsibilities to the community. We feel strongly that His Majesty's Government should take effective steps to compel these persons to take their proper share in bearing the burdens of the United Kingdom". *Report of the Committee of the Privy Council on the question of Contributions to Imperial Funds from the Islands of Jersey, Guernsey and Man*, 1926 Cmd 2586, HMSO, at page 33.

questionnaire, with modifications, and the Law Officers' visa, remained operative until 30 June 2008, though not without recognition of the deficiencies of that somewhat anachronistic regime as respects Guernsey companies.⁵

7 The issue of Guernsey's contribution first engaged the attention of the States of Guernsey in February 1923, following receipt of a letter of request from HM Government dated 30 January 1923. Eventually, the States' offer of £220,000 was accepted by HM Treasury, in July 1927, "as a final contribution by way of a free gift towards the expenses of the war".

8 The issue mentioned above of what came to be described, rather pejoratively, during the negotiations as "tax dodging", was first considered by the States in September 1926. In consequence of that debate the States resolved that they were—

"2. ... sincerely desirous of co-operating with His Majesty's Government in any way they can with regard to the persons who migrate to Guernsey from the United Kingdom for the purpose of evading British taxation, and are ready at any time to confer with His Majesty's Government in the matter".⁶

9 It seems that the practice of the Law Officers' visa first came into effect in about July 1923, in this way. The 1883 and 1908 Laws enabled incorporation of companies formed for the somewhat limited purpose of developing any "commercial or industrial interest". English company law as it statutorily related to the permissible objects of a company was much wider, the limitation extending to carrying on "any business that has for its object the acquisition of gain by the company". However, many companies were incorporated in Guernsey with objects that went beyond the development of any "commercial or industrial interest", including personal asset holding and investing, and other non-commercial or non-industrial purposes.

10 This long-ignored limitation on the purpose for which a Guernsey company could be formed was removed by the Companies (Amendment) (Guernsey) Law 1958, which recognized the realities and retrospectively enabled incorporation "for any lawful purpose".

11 Registration of a company had always been granted by way of application to the Royal Court, which was never in a position to make enquiries as to the company's intended purpose, *i.e.* whether it was being formed for an "industrial or commercial" purpose. Accordingly, in 1923 the Royal Court made an order that applications for registration, and the Memorandum of any company to be incorporated, should be submitted to the Law Officers for consideration. (Whether this particular order was developed to include some assessment of the avoidance of UK tax cannot now be precisely ascertained, but it seems doubtful as tax avoidance issues were apparently first raised—at least formally—by HM

⁵The questionnaire and visa remain applicable to Alderney companies, though probably not for long: see below at para 24.

⁶This resolution has never been rescinded.

Treasury some years later, in 1926.) In default of opposition by the Law Officers, registration was granted as of course, but it was recognised that the process was inadequate as the Law Officers had no statutory power to enforce any demand for information, even though in their processing of their questionnaires, they often requested, and were almost invariably given by the advocates concerned, further information; and those promoters or their agents who did not furnish the requisite information went away and/or incorporated elsewhere.

12 As part of the settlement of the issue of the Imperial contribution, HM Government and Guernsey and Jersey entered into an agreement of 15 July 1927 (“the 1927 Agreement”) by art 1 of which it was agreed that means should be devised to secure that on application for registration of a company the Law Officers should be enabled to enquire effectively into its objects and constitution and state their conclusions to the Royal Court, with a view to refusal of registration to investment and similar companies appearing to be formed to promote the avoidance of British taxation.

13 It will be noted that, to some extent, art 1 of the 1927 Agreement had been foreshadowed by the order of the Royal Court of 1923. However, the 1927 Agreement was never formally implemented by legislation. Sir Havilland de Sausmarez writing in 1930⁷ refers to further discussion following the 1927 Agreement, and to the fact that the matter had “now laid dormant for two and a half years”. There exists in Guernsey’s Archives correspondence suggesting that the original pre-vetting regime (which to a limited extent anticipated the visa regime) was operated throughout the 1930s, but the 1927 Agreement was never put to the States to be the subject of legislation, nor otherwise put into full effect as contemplated. In particular, the other provisions of the Agreement, which might have proved constitutionally problematic,⁸ were never, in any respect or by any means,⁹ implemented.

14 It is reasonable to infer that, in the aftermath of the settlement of the contribution issue, HM Treasury did not attempt to press the 1927 Agreement to its full implementation. Not all the copies of the Memoranda of Association of Guernsey companies registered in the 1920s and 1930s exhibit the Law Officers’ initials, but that may merely reflect some variability of practice in not registering the copy bearing the visa. It may also, but more doubtfully, suggest that the process was then generally “slacker”, and that not all companies received the Law Officers’ visa.

15 In operating the system, the Law Officers were careful to confine their enquiries and considerations to matters of UK tax avoidance which necessarily involved consideration of the activities of the company, and which usually, but not necessarily, required information about the identity and circumstances of its beneficial owner(s). These subsequently

⁷De Saumarez, *op. cit.* at page 69

⁸*E.g.* by requiring certain information—principally, accounts and share transfer details, including beneficial ownership—to be made available to the UK Inland Revenue.

⁹*Cf* and in different contexts, the 1950 UK-Guernsey Double Tax Arrangement and the UK-Guernsey Tax Information Exchange Agreement—see below at para 29.

became more matters of concern to the Guernsey Financial Services Commission (“GFSC”) under Control of Borrowing legislation, as delegate of the Policy Council, and subsequently in its implementation and enforcement of AMC/CFT regulation.

16 The issue of UK avoidance of tax in latter years came to be dealt with by the Law Officers on the basis of requiring the applicant, if the beneficial owner was a UK resident person, to declare whether or not a tax adviser had been engaged, and if so who, no permission being given if not disclosed unless the Law Officers were otherwise satisfied. One further feature of the former system was that the questionnaire had to be signed by a Guernsey advocate, because only an advocate could apply to the Royal Court for permission to register a company’s Memorandum, and so incorporate; and undoubtedly an advocate who deliberately or recklessly, or even negligently, provided erroneous or misleading information was potentially subject to disciplinary sanction.

17 The Law Officers’ questionnaire had, to a large extent, become supplanted in its company formation regulatory purposes by the application of amendments to ss 3 and 8(1) of the Control of Borrowing (Bailiwick of Guernsey) Ordinance, 1959, as amended (“COBO”), which were introduced in 1976. The background to this was as follows.

18 The Protection of Depositors, Companies and Prevention of Fraud (Bailiwick of Guernsey) Law, 1969 for the first time enabled the States by Ordinance to provide a general scheme for the regulation of banking, but the States had no effective means of supervising or regulating other particular finance sector businesses and transactions, except somewhat unsatisfactorily through the COBO regime. The Law Officers’ visa was certainly not fit for that purpose. Following the enactment of the Protection of Depositors Ordinance, 1971, which (for the first time in the Bailiwick) regulated banking business, the States, through their Advisory and Finance Committee eventually engaged a Commercial Relations Adviser, and established an Office with regulatory and supervisory functions in connection with financial services, particularly banking.

19 As part of this recognition of the need for effective regulation of financial services activities, the practice developed of the Law Officers consulting with the Commercial Relations Adviser on particular company formations. At that time, the Commercial Relations Adviser also reviewed companies proposed to be incorporated for persons resident outside the Scheduled Territories (colloquially the “Sterling Area”) under a delegated authority from the Bank of England in its administration of the 1947 Exchange Control regime, which was eventually dismantled in June 1979.

20 The lack of any statutory regime led eventually to the enactment of the Control of Borrowing (Amendment) (Bailiwick of Guernsey) Ordinance, 1976 which required the consent of the Advisory and Finance Committee to be obtained to the raising of money by the issue of shares to the founder shareholders of Guernsey companies. In practice this was administered by the Commercial Relations Office, mentioned above, established by and under that Committee. In 1987 the GFSC was established and had delegated to it

authority to exercise the Advisory and Finance Committee's COBO functions, reserving reference to the Committee of any doubtful or difficult case. The Advisory and Finance Committee was replaced from May 2004 by the States Policy Council.

21 The 1979 Ordinance amended the principal Ordinance—the Control of Borrowing (Bailiwick of Guernsey) Ordinance, 1959—which was made pursuant to the Borrowing (Control) (Bailiwick of Guernsey) Law, 1946 which, in its terms and effect, is very similar to the Borrowing (Controls and Guarantee) Act 1946. The 1946 Act, and subordinate legislation made under it, replaced with modifications certain provisions (subsequently revoked) of the Defence (Finance) Regulations 1939 and the Capital Issues Exemption Order 1941.¹⁰

22 The 1939 Regulations and the 1946 Act were measures framed at a time of chronic, and subsequently acute, financial ills for the UK for which, the treatment, in part, was that borrowing was to be regulated. The legislation operated, in effect, throughout the UK and Crown Dependencies, all of course then, and still, in monetary union. Although the 1946 Act and Guernsey's 1946 Law were primarily concerned with borrowing, they also regulated certain aspects of the raising of money by issues of securities, and extended through their subordinate legislation—in Guernsey the 1959 Ordinance—to e.g. regulate the issue of prospectuses. The COBO regime was subject to a number of general and specific exemptions, both transactional and financial.

23 In Guernsey the COBO regime came in practice to be utilised for two principal purposes—

- (a) regulating the incorporation of companies, by requiring consent (under the 1976 Ordinance in its amendment of the 1959 Ordinance) to the raising of monies by the issue of shares to the founding shareholders of a Guernsey company; and
- (b) regulating “closed ended” investment funds.

24 However both the 1946 Law and the 1959 Ordinance were (arguably) defective to regulate company formation, principally in that—

- (a) they provided no mechanism for appeal against any decision made either by the GFSC on behalf of the Policy Council, or by the Policy Council, and this applied across the board i.e. not only to general borrowing but also to the company formation and investment aspects of the COBO regime (although the recent development and more general availability of judicial review meant that certain COBO decisions of the Policy Council or GFSC became challengeable in the Royal Court);
- (b) the use of the 1959 Ordinance from 1976 to regulate the incorporation of companies might be *ultra vires* the 1946 Law, on the basis that—

¹⁰The 1946 Act was also replicated in Jersey.

- (i) the legislation was not intended to regulate corporate formation—by which in this context is actually meant corporate ownership and, to a lesser extent, corporate activities—but was directed to the control of borrowing, including the raising of monies, whether by non-commercial or long term borrowing, or by soliciting or attracting monies for investment, or whatever;
- (ii) the structure and scheme of the legislation was to admit of general monetary exemptions at levels far in excess of those applicable on the formation of a company, which could be as little as £2 (or even less) for a company with the statutory minimum of two shareholders, and to control the raising of £2 hardly fulfilled the policy of the legislation, and was disproportionate.

25 So the COBO regime came to be subverted for a purpose antithetical to that for which it was originally enacted. However, no legal challenge to a decision of the GFSC or Policy Council concerning the raising of money by the issue of founders' shares was ever mounted, and the *vires* issue remains open, and only "live" to the extent that Alderney companies remain subject to the COBO regime, pending some appropriate replacement.

26 In any event, the 1946 Act was repealed in Great Britain by s 4 of the Government Trading Act 1990, with effect from 11 February 1991. Prior to its repeal (not only reflecting lack of economic necessity but also less *dirigiste* monetary policies) legislation relating to borrowing control had largely been superseded by legislation framed to protect borrowers and consumers e.g. the Consumer Credit legislation. In retrospect, repeal of the 1946 Act can be seen as part of a broader relaxation of the movement and deployment of capital, including the eventual abolition of exchange control by s 68 of the Finance Act 1987.

27 Following the establishment of the GFSC, a range of laws, regulations and procedures has been enacted and applied to the establishment and conduct of financial services businesses, but until 1 July 2008 there remained the necessity in every case in which a Guernsey company was incorporated, and irrespective of whether or not it required or received any other regulatory consent, that the Law Officers approved the company's incorporation via their visa.

28 The application of regulatory legislation has also been accompanied by the development of measures framed to counter criminal activity, particularly money laundering, and to enable exchange of information, including information in fiscal matters, for regulatory or administrative purposes, *i.e.* non-criminal.

29 Returning to the Law Officers' role in company incorporation, despite extensive research (including research undertaken at the National Archives in Kew), it has not proved possible to obtain details of the course of the discussions leading to or following the 1927 Agreement, insofar as they concerned the role of the Law Officers.

Notwithstanding this relative lack of information, it was felt appropriate by the Guernsey authorities that the practice of the Law Officers in approving Guernsey company

incorporations should cease on the implementation of the 2008 Law, insofar as the practice had as its purpose the countering of avoidance of United Kingdom taxation, because—

- (i) the Double Tax Arrangement between the UK and Guernsey of 1950 enables exchange of information, and is routinely utilised for that purpose;
- (ii) the UK's declared position on countering tax avoidance emphasises exchange of information by *e.g.* Double Tax Agreements and Tax Information Exchange Agreements ("TIEAs"), and of course Guernsey has expressly committed to the OECD's TIEA process;
- (iii) a TIEA between Guernsey and the UK was then under negotiation (and which was signed on 20 January 2009);
- (iv) the EU Directive on Taxation of Savings Income, which Guernsey has implemented by means of bilateral agreements with each EU Member State, will eventually give rise to automatic exchange of information with the UK in relation to certain types of (individuals') savings income (the extension of this regime is presently under active consideration by the EU Commission);
- (v) in relation to tax evasion, and defrauding and cheating the UK revenue, statutory powers have existed since 1991, exercised by and through the Law Officers, by which documents and information may be compulsorily obtained and passed to HM Revenue and Customs and the Serious Fraud Office;
- (vi) the Law Officers were never in a position effectively to process, by means of their visa, their somewhat limited and anachronistic UK tax avoidance function in respect of Guernsey company incorporations;
- (vii) in any event, and perhaps crucially, the constitutional relationship between Guernsey and the UK has developed since the Great War. Despite the actual or prospective existence and implementation of modern international agreements, such as the 1950 Double Tax Arrangement or the bilateral agreement between Guernsey and the UK domestically implementing the EU Tax on Savings Directive, or a TIEA between the UK and Guernsey, it was considered that for the Law Officers to be acting as some sort of offshore company formation "gatekeeper" protective of the revenues of the UK was inappropriate.

30 Relevantly, the 2008 Law, provides that a resident agent, being either a Guernsey resident director of a Guernsey company or a Guernsey regulated corporate service provider, is under the duty to know on incorporation, and thereafter from time to time to

take reasonable steps to obtain, the identities of the beneficial owners of the company,¹¹ which information is available to the Companies Registrar who, in turn, will have the power to pass it on to Guernsey law enforcement and regulatory authorities; and it will be exchangeable by them with overseas law enforcement and regulatory authorities for purposes of enquiries and investigations into suspected criminal offences or regulatory breaches.

31 The Law Officers, whose questionnaire had long outlived its original purpose for the reasons articulated above, were—absent an admission by or on behalf of its promoters—unable to form any defensible view as to whether a company was being incorporated to avoid or facilitate the avoidance of UK taxation, and the requirement of obtaining information about the tax adviser concerned somewhat deflected or deferred the issue.

32 The Law Officers had been long troubled by the lack of transparency with which the questionnaire process was conducted, and the lack of any realistic and reasonable criteria against which particular responses to the questionnaire's enquiries were to be evaluated. Further, the Law Officers had neither the means nor the resources to determine the issues which they were supposed to monitor. The Law Officers thus concluded, and the Insular authorities agreed, that their continuing involvement in Guernsey company formations was inappropriate. Furthermore, the Law Officers are the public prosecutors, and companies had been approved in the past by former Law Officers for companies in which tax defrauding or cheating was subsequently discovered to be their *raison d'être*, not to mention other criminal or tax evasion activities, though of course these were not known or suspected at the time of incorporation. This highlighted a weakness of the questionnaire: the Law Officers relied on the Guernsey Bar, who in turn completed the form on the basis of their instructions, which were difficult of verification. When companies ceased to be incorporated by application to the Royal Court, from 1 July 2008, the judicial process, in which the Law Officers and the Guernsey Bar might be considered to have been properly involved, was removed, to be replaced by a non-judicial quasi-governmental process. *Sic transit brutum fulmen*.

33 Interestingly the equivalent process in Jersey, although it did not involve the Law Officers, has long since passed into desuetude. In the aftermath of the 1927 Agreement it was resolved that every investment holding company which was incorporated for an individual domiciled in the United Kingdom should be required to have a "Bailiff's clause" in the Memorandum of Association. Readers with long memories will recall that a company in those days could only carry out the functions specified in the objects' clause of the Memorandum of Association. In Jersey a promoter was required to answer the following questions at the time of his application for incorporation: (i) will any person be enabled by the registration of the company to avoid an existing liability to UK (a) Income Tax and/or Corporation Tax, (b) Capital Gains Tax? If so please give details; (ii) will any

¹¹See s 484 *et seq*. These provisions do not apply to listed companies, and open-ended and closed-ended investment companies. This list may be extended by regulations made by the Commerce and Employment Department.

persons be enabled by the registration of the company to avoid an existing potential liability to UK Death Duties? If so please give details.

34 An affirmative answer would attract a requirement to include after the standard investment holding object a clause along the following lines: "PROVIDED ALWAYS" that notwithstanding the provisions above stated:

"(1) The above objects shall be done and carried out in the Channel Islands and there shall be done and carried on outside the Channel Islands only such things as are incidental to the attainment of such objects or any of them;

(2) The company shall not purchase, acquire or hold any investment which, according to the laws of the United Kingdom of Great Britain and Northern Ireland would, if held by a British subject whose domicile is outside the United Kingdom of Great Britain and Northern Ireland, be liable on the death of such an individual to Estate Duty in the United Kingdom of Great Britain and Northern Ireland".

35 Lawyers in Jersey eventually learned their own anti-avoidance measure and began to form "shelf" companies without the Bailiff's clause which could eventually be sold on for profit. By the mid-1970s it was felt that the UK had sufficient weapons in its fiscal armoury to cope with tax avoidance by English residents. By administrative act, and without fanfare, the Bailiff's clause was quietly buried.¹²

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¹²The demise of the Bailiff's clause was noted in a judgment of Crill, Bailiff in *Re Tucker* 1987–88 JLR 473, at 484.