

LINK-UP

AUGUST 2005

6TH EDITION

A CLOSER LOOK AT...

THE ROLE OF THE PROTECTOR OF
A JERSEY OR GUERNSEY TRUST

ENTER

Trust & Fiduciary Team



INTRODUCTION TO LINK-UP

Welcome to the 6th edition of Link-Up - our electronic news sheet published by the Trust and Fiduciary Law Team of Carey Olsen. Each edition will feature one principal topic of relevance to trustees and their advisors. It is also hoped that the publication will be of interest to trustees and beneficiaries of trusts established and administered in Guernsey and Jersey and their advisors.

This month's leading article is on the role of the protector of a Jersey or Guernsey trust

We hope that the publication is of interest to recipients. Please contact any of the individuals listed on the "Contact us" page with comments and suggestions for future articles.

MEET THE TEAM

Billy Grace is a senior associate at Carey Olsen, Jersey. He advises Jersey's trust industry and worldwide clients in relation to trust disputes in Jersey. He frequently appears in court on trust related matters. Billy's work also involves advising trust companies on regulatory and money laundering issues. He passed the Jersey advocates' exams in 1998 and has been with Carey Olsen since 2002.

He also has the added benefit and experience of being a trustee. Most recently he advised the husband in Jersey's leading case on the effect of UK matrimonial 'trust busting' orders.



Advocate Billy Grace

Carey Olsen
Trust & Fiduciary Team

BACK FORWARD

CONTACT JERSEY CONTACT GUERNSEY

HOME

PAGE 1

1. PROTECTORS

It is not unusual for a settlor to wish to exercise a degree of control over trustee activities. One can understand such a desire in a case where, for example, shares in a settlor's family company are to be held in trust, or where the settlor does not know his intended trustees. In these circumstances the settlor may require some assurance that his original intentions in setting up the trust will be fulfilled.

There are various methods for providing a degree of control and these methods may involve:

- requiring trustees to obtain the consent of someone else before being able to exercise certain powers; or
- giving certain specific powers to persons other than the trustees, such powers often including powers to appoint and dismiss trustees and powers of appointment over trust assets.



Both these methods involve a party other than the settlor being able to exercise a degree of control or influence over the trustees. The person who is usually called upon to exercise this function is known as the "protector". Commonly, the protector will be a trusted friend or relative of the settlor but may also be a professional advisor.

What is a protector?

Protectors are largely an offshore phenomenon, but there is no statutory definition of a protector in Jersey or Guernsey law. Some jurisdictions have attempted a definition - in the Cook Islands International Trust Act of 1984 a protector has been defined as:

"a person who is the holder of a power which, when invoked, is capable of directing the trustees on matters relating to the trust and in respect of which matters the trustees have a discretion and includes the person who is the holder of the power of appointment or dismissal of trustees".

While this definition may cover a person holding specific powers it does not cover very adequately the more common case where an individual's consent is required before the trustees can undertake certain activities.



Carey Olsen
Trust & Fiduciary Team

BACK FORWARD

CONTACT JERSEY CONTACT GUERNSEY

HOME



Article 24(3) of the Trusts (Jersey) Law 1984 (the "**Jersey Law**") states:

"The terms of a trust may require a trustee to obtain the consent of some other person before exercising a power or a discretion."

Article 24(4) of the Jersey Law states:

"A person who consents as provided in paragraph (3) shall not by virtue of so doing be deemed to be a trustee."

Whilst this statutory reference covers the "consent" type of protector it does not cover at all the holder of powers. It is interesting to note that Section 28(2) of the Trusts (Guernsey) Law, 1989 (the "**Guernsey Law**") states:

"The terms of a trust may require a trustee to consult or obtain the consent of another person before exercising any function".

In addition to making a specific reference to a requirement to consult, the Guernsey Law indicates that such consultation or consent may be required before exercising any function. This is clearly much wider than just the exercise of a power or a discretion. However, since Article 24 (3) of the Jersey law is not prescriptive, it is perhaps a difference without any significant consequences.

When seeking a definition we have to adopt an amalgamation of the statutory references to which we have referred and can perhaps define a protector as:

- a person whose consent may be required by trustees under the terms of a trust to the exercise of certain powers and discretions vested in them; and
- a person other than the trustees who, under the terms of the trust, is given powers which may include powers of appointment over trust assets and powers to appoint and remove trustees

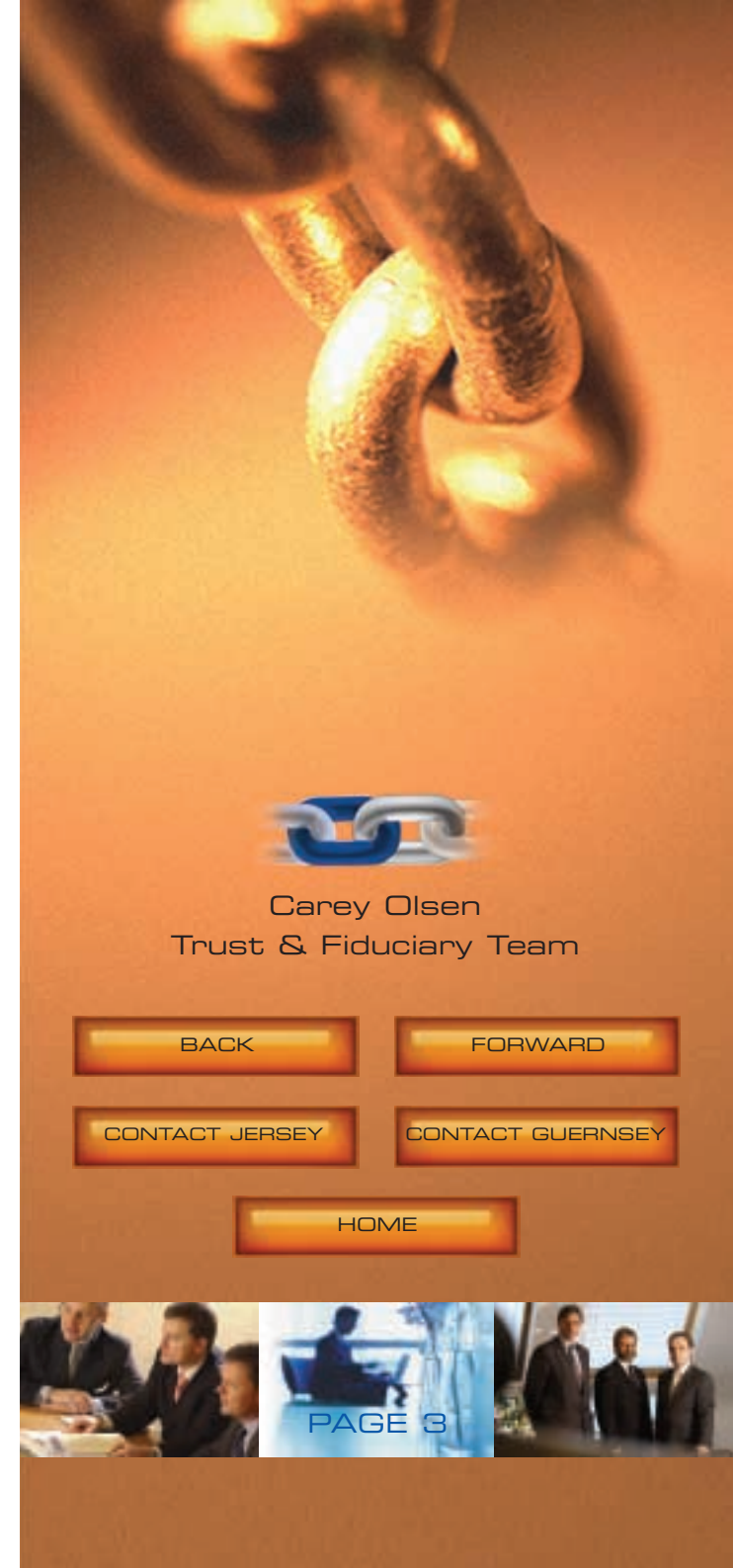
What are the powers and rights of a protector?

One of the fundamental differences between the concept of the protector and that of the trustee is that there is no statutory list of the protector's powers and rights. Instead, the protector's role, rights and powers will be dictated by the terms of the trust instrument concerned. What the protector can do will, in other words, be decided entirely by the extent of his, her or its powers under the trust instrument, and any other document which contains any trust terms.

Typically, the powers of the trustees to which a protector may be asked to consent may include: -

- Power to appoint capital or income;
- Power to add or exclude beneficiaries;
- Power to terminate the trust;
- Power to shorten the trust period;
- Power to change the proper law;
- Power to alter the trust; and
- Power to invest (for instance, in a particular class of investments), especially where a family business is concerned.

In many cases, however, a settlor may take a view that the protection he or she seeks is sufficiently provided by limiting the powers by which consent is required to the appointment of capital and/or income and/or the power to add or exclude beneficiaries.



Carey Olsen
Trust & Fiduciary Team

BACK

FORWARD

CONTACT JERSEY

CONTACT GUERNSEY

HOME



PAGE 3

What are the duties and liabilities of a protector?

The appointment of a protector in order to provide a degree of control over the trustees of a trust will normally give rise to a fiduciary relationship between the protector and the beneficiaries of the trust and therefore the protector will owe a duty of care to the beneficiaries of the trust (note, such a duty is not owed to the settlor, unless the settlor is also a beneficiary). When a protector's consent is required to the proposed exercise by a trustee of certain of its powers, the protector must consider whether the proposal is in the best interests of the beneficiaries. This may present difficulties when a proposal is to the advantage of one beneficiary but to the disadvantage of another.

As far as the exercise of a protector's "active" power is concerned, the protector's duties will be threefold, namely:

- a duty to consider from time to time whether to exercise the power;
- a duty to make a proper survey of the objects of the power; and
- a duty to consider the appropriateness of any exercise of the power.

In addition, it is clear that the protector must not exercise that power for an improper or collateral purpose.

In the recent Jersey case of Mourant -v- Magnus [2004] JRC 056 the Royal Court held that:

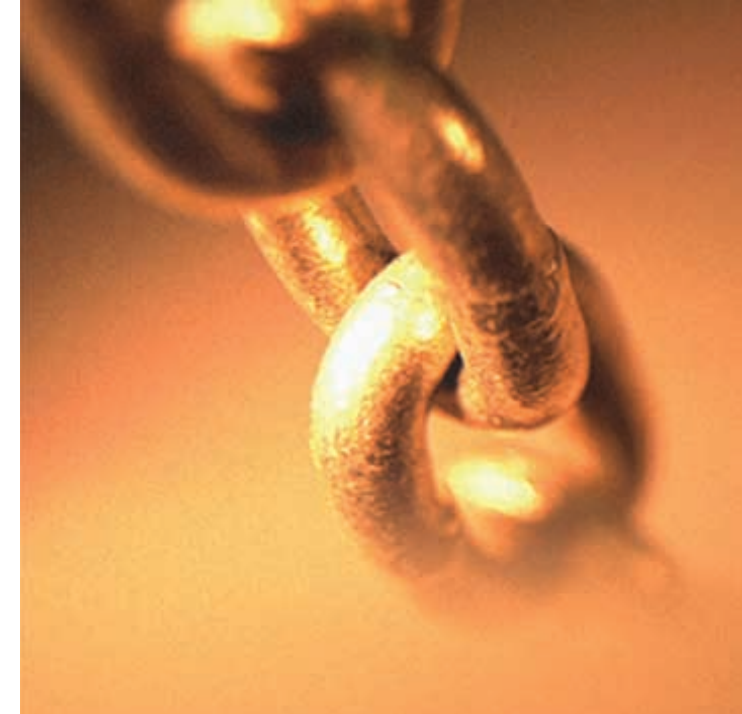
"A protector is in a position of a fiduciary and the Court must have power to police the activities of any fiduciary in relation to a trust whether he be called a protector or indeed by any other name. Such a jurisdiction is a necessary incident of the duties to protect the interests of beneficiaries, especially minor and unascertained beneficiaries, and to ensure that the wishes of the settlor are respected as far as may be possible and appropriate."

This judgment suggests that all protectors are fiduciaries, no matter what their powers may be or whether the settlor intended them to be in a fiduciary position. However, on the facts of this case, it was necessary to confirm that the protector was a fiduciary in order to enable the court to exercise its inherent power to remove an allegedly unsuitable protector from office. It does not appear from the judgment that submissions were made to the Court on the subject of whether all protectors are fiduciaries and it remains to be seen whether the Court will uphold this broad statement in the future.

Summary

It is to the particular trust instrument that one must turn to establish the precise nature of the role that the protector is to perform. Both trustees and protector must familiarise themselves with any powers that are expressed to require protector's consent. If consent is required, it must be obtained if the power is to be validly exercised.

In most cases the protector will be a fiduciary who will owe a duty of care to beneficiaries.



Carey Olsen
Trust & Fiduciary Team

BACK

FORWARD

CONTACT JERSEY

CONTACT GUERNSEY

HOME



PAGE 4

RECENT NEWS

2. REVISED EDITION OF THE LAWS OF JERSEY

A revised edition of the written laws of Jersey (the “**revised edition**”) came into force on 1 July 2005 pursuant to provisions contained in the Law Revision (Jersey) Law 2003. The revised edition is an authorised restatement of the laws of Jersey in force as at 31 August 2004. Laws which have been amended over the years have been consolidated, spent or out of date provisions have been removed and certain words and expressions in enacted legislation have been made “gender neutral”.

The revision and consolidation process means that in many Laws and Regulations article and paragraph numbers have been changed. The Trusts (Jersey) Law 1984 is no exception and the attached [briefing note](#) lists the changes.

References to articles of the Trusts (Jersey) Law 1984 in other parts of this edition of Link-Up are to the articles as numbered in the revised edition.

3. EU SAVINGS TAX DIRECTIVE

Bilateral agreements on the taxation of savings income between each of Jersey and Guernsey and EU member states came into force on 1 July 2005.

Background

On 3 June 2003, the EU formally adopted Council Directive 2003/48/EC on the Taxation of Savings Income (the “**Directive**”). The preamble to the Directive states that its ultimate aim is to enable savings income in the

form of interest payments made in one EU member state to individuals resident in another member state to be made subject to effective taxation in accordance with the laws of the latter member state¹.

The member states were concerned that so long as the USA, Switzerland, Andorra, Liechtenstein, Monaco, San Marino and the relevant dependent or associated territories of the member states did not all apply measures equal to, or the same as, those provided for by the Directive, capital flight towards these countries or territories could imperil the attainment of the Directive’s objectives. For this reason, the EU sought to conclude agreements with the countries and territories concerned that provide for the objectives of the Directive to be met within those countries and territories from the same date as within the member states.

Whilst the ultimate aim of the Directive is to bring about effective taxation through the exchange of information between member states concerning interest payments, the Directive allows three member states² to adopt a withholding tax for a transitional period. The same option was extended to the non-EU jurisdictions referred to above, including the Crown Dependencies of Jersey, Guernsey and the Isle of Man.

¹ Current member states of the EU are the UK, Ireland, France, Germany, Luxembourg, Belgium, The Netherlands, Italy, Spain, Portugal, Greece, Austria, Sweden, Finland, Denmark, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

² Austria, Belgium and Luxembourg



Carey Olsen
Trust & Fiduciary Team

BACK

FORWARD

CONTACT JERSEY

CONTACT GUERNSEY

HOME



The authorities in Jersey and Guernsey worked closely together with the other Crown Dependencies in reaching agreement with the EU member states. The outcome of the negotiations was two model agreements, one between each of Jersey and Guernsey and those EU member states that have adopted automatic exchange of information and one between each of Jersey and Guernsey and the three member states that have opted for a withholding tax. These model agreements have been approved by the legislature in each Island and have been the basis for the individual agreements (the **"Agreements"**) signed between each of Jersey and Guernsey and each of the member states and the specific insular legislation required to bring the Agreements into effect.

The text of the Agreements follows that of the Directive in large part but with appropriate adaptations and the inclusion of provisions for the suspension or termination of the Agreements if certain events come to pass. In addition, to distinguish the Island from the EU member states and to reflect the fact that the Islands are not part of the European Union and are not subject to the Directive, the term "retention tax" is used rather than "withholding tax".



Jersey and Guernsey have agreed to adopt the retention tax option during the transitional period and to apply automatic exchange of information from the end of the transitional period. The rate of retention tax is 15% during the first three years of the transitional period, 20% for the subsequent three years and 35% thereafter. 25% of the retention tax deducted in accordance with the bilateral agreements will be retained and the remaining 75% will be transferred to the other contracting party.

Guidance Notes

The authorities in Jersey, Guernsey and the Isle of Man have each agreed to a form of guidance notes (the **"Guidance Notes"**) to accompany their respective insular legislation that is required to bring into effect the agreements with each of the member states.

The Guidance Notes should be considered by banks, registrars, custodians and other financial institutions that make interest payments or distributions from certain collective investment schemes to individuals in the member states. They may also be of interest to financial dealers and securities houses which purchase money debts or units in collective investment schemes from individuals and businesses and those who hold or administer money debts and investments in collective investment schemes on behalf of individuals.

A copy of the Jersey Guidance Notes can be obtained by visiting www.policyandresources.gov.je.




Carey Olsen
Trust & Fiduciary Team

BACK FORWARD

CONTACT JERSEY CONTACT GUERNSEY

HOME



PAGE 6



CONTACT US - JERSEY

For further information or professional advice please click on any of the e-mail links below.



Paul Matthams, Partner
[E-mail: paul.matthams@careyolsen.com](mailto:paul.matthams@careyolsen.com)
Telephone: +44 (0) 1534 822225

Charlotte Mason
[E-mail: charlotte.mason@careyolsen.com](mailto:charlotte.mason@careyolsen.com)
Telephone: +44 (0) 1534 822317

Tony Fulton
[E-mail: tony.fulton@careyolsen.com](mailto:tony.fulton@careyolsen.com)
Telephone: +44 (0) 1534 822280



Edward Quinn, Partner
[E-mail: edward.quinn@careyolsen.com](mailto:edward.quinn@careyolsen.com)
Telephone: +44 (0) 1534 822254

Siobhan Riley
[E-mail: siobhan.riley@careyolsen.com](mailto:siobhan.riley@careyolsen.com)
Telephone: +44 (0) 1534 822355

Charlotte Perchard
[E-mail: charlotte.perchard@careyolsen.com](mailto:charlotte.perchard@careyolsen.com)
Telephone: +44 (0) 1534 822332



Nicholas Crocker, Partner
[E-mail: nicholas.crocker@careyolsen.com](mailto:nicholas.crocker@careyolsen.com)
Telephone: +44 (0) 1534 822409

Keren Bellringer-Jones
[E-mail: keren.bellringerjones@careyolsen.com](mailto:keren.bellringerjones@careyolsen.com)
Telephone: +44 (0) 1534 822455

Billy Grace
[E-mail: billy.grace@careyolsen.com](mailto:billy.grace@careyolsen.com)
Telephone: +44 (0) 1534 822361

Michelle Hare
[E-mail: michelle.hare@careyolsen.com](mailto:michelle.hare@careyolsen.com)
Telephone: +44 (0) 1534 822372

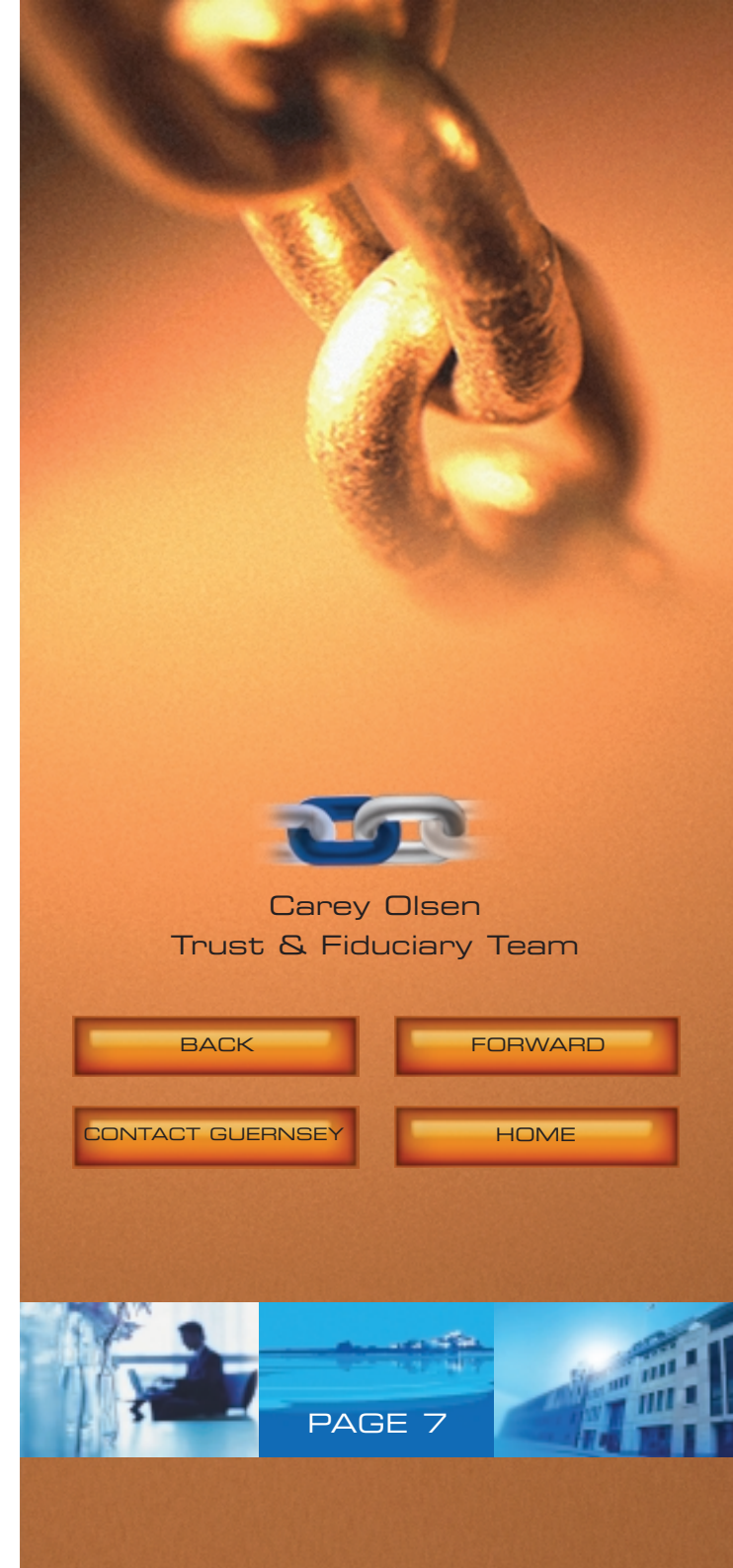
Nicholas Chapman
[E-mail: nicholas.chapman@careyolsen.com](mailto:nicholas.chapman@careyolsen.com)
Telephone: +44 (0) 1534 822314

CAREY OLSEN 47 Esplanade St Helier Jersey JE1 OBD
Telephone: +44 (0)1534 888900 Facsimile: +44 (0)1534 887744

www.careyolsen.com

If you do not wish to receive further editions or wish to nominate someone else, please click on link below.

info@careyolsen.com



Carey Olsen
Trust & Fiduciary Team

BACK

FORWARD

CONTACT GUERNSEY

HOME



PAGE 7





CONTACT US - GUERNSEY

For further information or professional advice please click on any of the e-mail links below.



Russell Clark, Partner
[E-mail: russell.clark@careyolsen.com](mailto:russell.clark@careyolsen.com)
Telephone: +44 (0) 1481 732049

Konrad Friedlaender
[E-mail: konrad.friedlaender@careyolsen.com](mailto:konrad.friedlaender@careyolsen.com)
Telephone: +44 (0) 1481 741567

Laila Arstall
[E-mail: laila.arstall@careyolsen.com](mailto:laila.arstall@careyolsen.com)
Telephone: +44 (0) 1481 741544



Michael Eades, Partner
[E-mail: michael.eades@careyolsen.com](mailto:michael.eades@careyolsen.com)
Telephone: +44 (0) 1481 732020

Patricia Montgomery
[E-mail: patricia.montgomery@careyolsen.com](mailto:patricia.montgomery@careyolsen.com)
Telephone: +44 (0) 1481 732093

Stewart Womersley
[E-mail: stewart.womersley@careyolsen.com](mailto:stewart.womersley@careyolsen.com)
Telephone: +44 (0) 1481 741551

Paul Buckle
[E-mail: paul.buckle@careyolsen.com](mailto:paul.buckle@careyolsen.com)
Telephone: +44 (0) 1481 741578

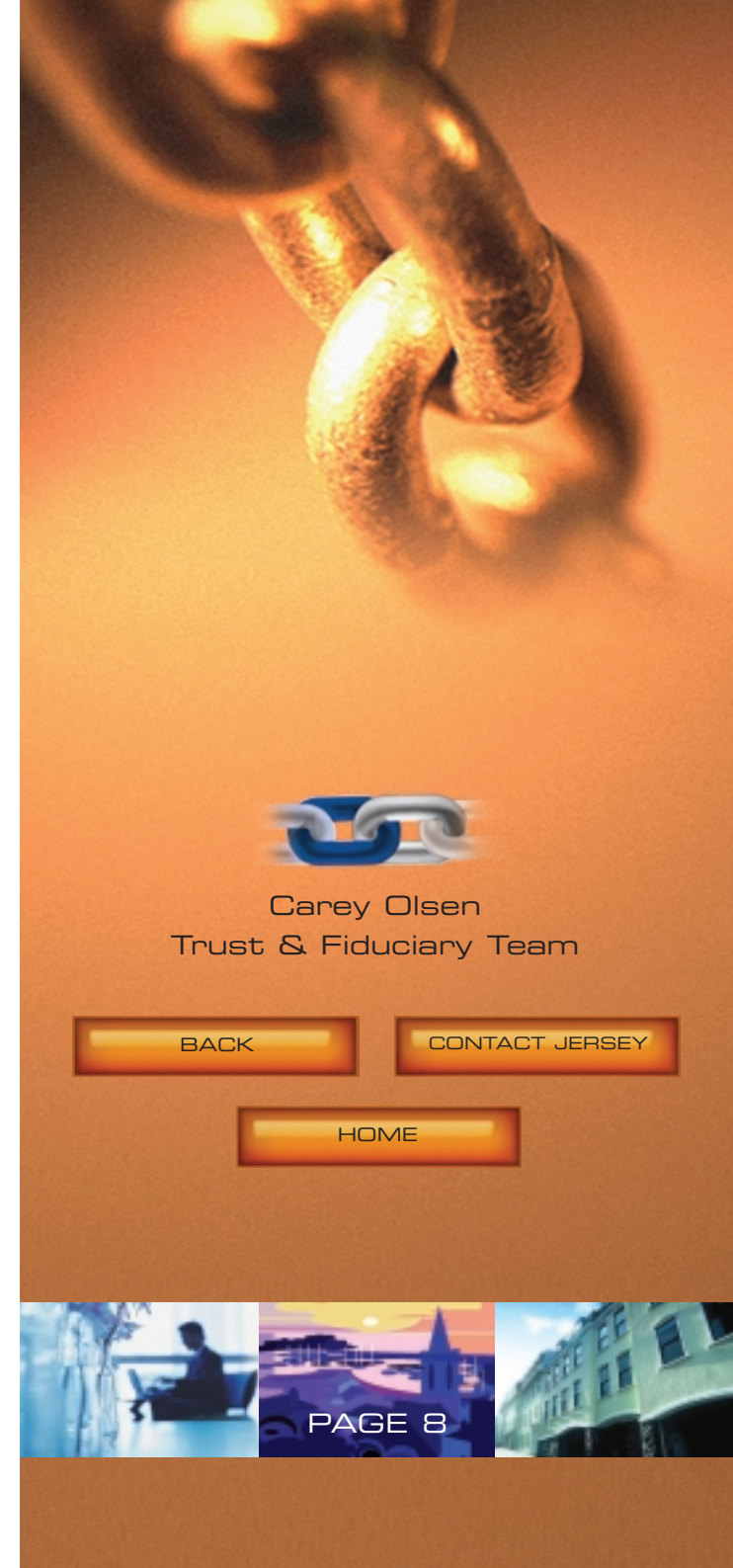
Rob Jones
[E-mail: rob.jones@careyolsen.com](mailto:rob.jones@careyolsen.com)
Telephone: +44 (0) 1481 741572

CAREY OLSEN PO Box 98 7 New Street St Peter Port Guernsey GY1 4BZ
Telephone: +44 (0) 1481 727272 Facsimile: +44 (0) 1481 711052

www.careyolsen.com

If you do not wish to receive further editions or wish to nominate someone else, please click on link below.

info@careyolsen.com



Carey Olsen
Trust & Fiduciary Team

[BACK](#)

[CONTACT JERSEY](#)

[HOME](#)



PAGE 8