GUARANTEE COMPANIES: THEIR NATURE AND SOME POSSIBILITIES

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Preliminary

Over the years since the United Kingdom led the way in recognising the limited liability company very little publicity has been given to the Guarantee Company. The inherent nature of such a company was first recognised through the Companies Act 1862 and probably even before that. But in fact, apart from the recognition of the status of what is now referred to colloquially as "a Guarantee Company", very little indeed is known about such a company and even less about its possibilities. The purpose of this article is to highlight the nature of such a company and to indicate some of its characteristics and resultant possibilities.

Nature of a Company

The full title of a "company" is "an incorporated company." An incorporated company is the product of two or more persons who, wishing to be associated for a lawful purpose, subscribe their names to a memorandum of association and register it, with articles of association prescribing regulations for the company, with the Registrar of Companies who retains and registers them, and then certifies that the company is incorporated and, in the case of a limited company, that the company is limited.

Thus a company is different from a partnership and from other unincorporated associations, such as clubs. It is also different from a trust or settlement, although between 1720 and 1844 deeds of settlement were a recognised method of forming unincorporated companies. The principal features of such deeds were:-

(a) They were made between the various shareholders or members and a trustee or trustees;

(b) The shareholders or members covenanted with the trustee or trustees to observe the provisions of the deed of settlement or trust;

(c) The deed commonly declared that the several persons for the time being holding shares or members' rights in the capital of the company should constitute and be a company with a specified name, a specified capital and subject to specified regulations (set forth in the deed) until dissolved in a specified manner;

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(d) The deed often made the shares or members' rights transferable;

(e) Management of the enterprise was vested in a select body of directors, usually known as a committee, to the exclusion of members generally;

(f) The property of the company was vested in some or all of the directors as trustees.

By separating management from membership, and property holding from membership, continuity of the company was assured notwithstanding the death or bankruptcy of a shareholder or member. But such associations were in law nothing more than large partnerships with special features, as the shareholders or members were always fully liable for the debts of the association.

Since the enactment of the Joint Stock Companies Act 1844 the formation of unincorporated companies has not been possible unless membership was below twenty-five (twenty in 1856). Limited liability only became possible in 1855. The contrasts between a settlement company and an incorporated company may be summarised thus:-

(i) The memorandum, supplemented by articles, of association replaces the deed of settlement;

(ii) The incorporated company replaces the trustee or trustees;

(iii) The covenant is in the legislation (e.g, Companies Act 1985 section 14) instead of in the deed;

(iv) The other characteristics of the deed of settlement are in the legislation and the memorandum and articles;

(v) There is high appellate judicial authority that an incorporated company owns its property and does not hold it on trust for its members (*Bowman v Secular Society* [1917] AC 406) - at any rate where English law is in point.

The importance of the foregoing is that although a company cannot by nature be a settlement, there are historical parallels between the form of a company and the form of a settlement. These parallels have relevance in considering the utilising of the form of a company to achieve objectives previously identified with settlements, such as discretionary trusts.

Kinds of Companies

There are three kinds of incorporated company:-

1. a company not having any limit on the liability of its members;
2. a company having the liability of its members limited by the Memorandum to the amount not paid on the shares respectively held by them;
3. a company having the liability of its members limited by the Memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up.

A company in category 2 is usually called "a company limited by shares". Such a company usually obtains its initial working funds through the issue of shares. A company in category 3 is usually called "a company limited by guarantee" or "a guarantee company". Such a company does not obtain its initial working funds from its members. Such a company is therefore most appropriate if no initial funds are required or those funds are obtained from other sources - e.g., endowments, fees, borrowings, donations or subscriptions. Traditionally the form is used by non-profit making associations - such as charities, trade or professional research associations, mutual insurers, members' clubs, etc.

However, the legislation contemplated cases where non-profit making concerns might need some initial fixed capital, e.g., to fund the purchase of company premises, while normal working funds were to be provided from elsewhere, such as fees, subscriptions, mortgages, etc.. Contrast, for example, a school carried on by a schoolmaster from his own home (when a company without capital might be appropriate), or from separate premises (when capital might be needed to purchase the premises). To cater for cases where fixed capital might be required the legislators contemplated two kinds of guarantee company:-

(a) the company limited by guarantee and not having a share capital; and

(b) the company limited by guarantee and having a share capital.

In recent years a third kind of guarantee company has emerged - namely one in which some members may be shareholders and some may not, even though both kinds are liable under the guarantee clause. Such companies may lawfully be formed, following the United Kingdom decision in *Re Albion Life Assurance* (1880) 16 ChD 83.

The format of such companies was considered of particular use where (for example) it was desired to group subsidiary companies with a particular parent for the purposes of corporation tax on chargeable gains and by reference to the provisions of s.272 TA 1970 while ensuring that for accounting consolidation purposes the same companies might be grouped with a different parent undertaking. The format was in fact pioneered in Gibraltar, where limited liability companies are exempted from ordinary local taxation under certain conditions which include the necessity for the company to have a minimum paid-up share capital of £100. A company limited by guarantee without share capital could not therefore be so exempted. Accordingly, after 1976, companies began to be formed in Gibraltar which were limited by guarantee with non-shareholder members (as would be applicable if the company had no share capital) but with shareholder members as well as having a share capital of £100 and so enabling the companies thus formed to qualify for exempt status.

Characteristics Unique to Guarantee Companies

The question asked is - why have a guarantee company in preference to a share capital company? Or, put more specifically, what are the advantages inherent in the utilisation of the company limited by guarantee rather than the company limited by shares?

The writer's view is that is that a guarantee company has potentially far greater scope for practical use in the modern commercial world than any other kind of company, although this scope has been narrowed in regard to the creation of such companies in the United Kingdom. This scope results from the fact that in current terms a company can carry on commercial activities without the need for subscribed equity capital, which is traditionally provided by the issue of shares for cash or other valuable considerations. In today's commercial environment companies can now carry on business without equity capital (see above).

A second reason for holding the view that a guarantee company carries far greater scope for use results from the fact that membership of, and control over the equity of, the company can be achieved without holding any shares - witness the evolution of the guarantee company without a share capital or with non-shareholder, as well as shareholder, members. It is the case that such Companies can confer membership status without a membership certificate or other documentary evidence of non-shareholder membership. It is also the case that under some jurisdictions, non-shareholder membership cannot be transferred, as would be the case where a shareholder wishes to cease membership of a company. Cessation is in such cases possible only by a transfer of shares, or by the company purchasing its own shares. But in the case of a non-shareholder member, membership status can be brought to an end by mere resignation from membership; indeed, membership can be brought to an end on death, leaving no asset available for devolution on personal representatives. Such a state of affairs carries potential scope in an estate or inheritance tax context, and also in the context of a company being used to protect its members from undesirable creditor claims. A third characteristic of guarantee companies is that non-shareholder members are excluded from registration, and consequent disclosure, in published annual returns of members of companies.

The possibilities for the use of guarantee companies in commercial circumstances have been greatly curtailed within the United Kingdom, and in some jurisdictions following its statutory company law from 1900 onwards.

Section 27, Companies Act 1900 was introduced in the United Kingdom to prevent companies limited by guarantee and not having a share capital from distributing their divisible profits to non-members. A further provision in s.27 also prohibited such companies from including within their constitutions provisions dividing their undertaking into shares of no par value. Such a provision is now treated as a provision for share capital. Possibly this provision may have been copied from the U.S.A.. Other jurisdictions copying United Kingdom legislation for their company law legislation have included similar provisions in their legislation - see, for example, Companies Ordinance s.21(1) (Gibraltar); Companies Consolidation Act 1931 s.21 (Isle of Man). But other colonial jurisdictions the company law legislation for which originates from references to pre-1900 legislation do not contain such restrictions. See, for example, Company Ordinances of the British Virgin Islands and the Cayman Islands.

The prohibition on the distribution of divisible profits to non-members does not apply to a company which in addition to being limited by guarantee is also possessed of a share capital. This was therefore a concept capable of adoption into Gibraltar and Isle of Man company law. In the case of English law a limited liability company being both limited by guarantee and having a share capital cannot now be incorporated, or created on re-registration, the prohibition dating from 22nd December 1980 (Companies Act 1985 s.1(4)). It might be thought that this was as a consequence of the desire to effect some kind of harmonisation with European company law. Gower, in writing in *The Principles of Modern Company Law* (3rd Ed.), observes (on p.12 Note 45) that only two such companies were registered in 1965, three in 1966 and four in 1967. However, ten were registered during the twelve months prior to the coming into operation of the prohibition (which first appeared in the Companies Act 1980 s.1(2)).

A useful summary of the current United Kingdom legislative provision relating to guarantee companies prior to 1980 can be found in the 21st edition of *Palmer's Company Law* at pages 23 to 27.

Before carrying on, it should be noted that whereas shareholder members of all companies need recording on relevant public files, non-shareholder members do not. This dispenses with the need for nominees in cases involving guarantee companies.

Thought-Provoking Possibilities for Companies

There were two initial reasons why it was thought possible for interest to be aroused in the use of Guarantee Companies:-

A. In August 1974 the United Kingdom Labour Government published a Green Paper on the possible form which a Wealth Tax might take. The basis for the tax levy was that it would apply to individuals and to trusts, but not to companies. This hypothesis was founded on the stated premise that all companies were owned either by individuals or by trusts (or by other companies) so that corporate wealth could always be attributed to individuals or trusts; the tax could therefore be collected from them without interfering with the commercial activities of the companies themselves.

   The writer conceived of a basis upon which companies could be used to avoid Wealth Tax liability without taxing the participating individuals or trusts. This basis involved the formulation of what may shortly be described as a "Discretionary Company". This concept is the subject of greater expansion in the next section of this article. But the Wealth Tax threat abated in 1979, when Labour were ousted and Conservatism replaced it.

B. Between 1979 and 1991 legislative measures have been enacted in the United Kingdom which have as their objective the erosion of tax advantages from the utilising of trusts. The latest example of such measures came in March 1991 when the Conservative Government enacted measures for attacking offshore trusts which had been used to avoid United Kingdom Capital Gains Tax on trust gains and distributions representing those gains. Most of these proposals affect offshore trusts created after 19th March 1991 but some affect trusts created before that date.

The Conservative Government also published proposals which would substantially remove the tax advantages for domestic trusts.

Companies are not attacked by any of these measures except as regards payments, from (or to) them, associated with trusts. The time seems ripe to reactivate interest in those companies which though not trusts might be thought to have trust characteristics without being trustees of their assets.

Discretionary Companies

The essence of a discretionary trust is that money or property is transferred by one person (the settlor) to another (the trustee) to hold it upon trust to apply it among members of a class of third parties in such shares or proportions as may from time to time be determined by the trustee or the settlor or someone else, the income from the money or property being accumulated in the absence of any application of either the money or the property or the income from either. The trustee has no beneficial interest in the money or property or the income therefrom: his primary function is to hold it on behalf of the objects of the trust, and to enable the settlor to divest himself of any interest in or rights over the money or property transferred to the trustee.

In recent times changes in legislation have resulted in the taxation advantages resulting from the creation of trusts being gradually whittled away to the point where in 1991 many of the capital and income benefits can be visited back upon the settlor even if he is excluded by the terms of the settlement from benefiting from either the settled property or its income. Some of the recent legislative changes made to achieve this are sufficiently Draconian to justify a review of business organisations to at least consider whether trust advantages can be re-created through the use of companies without trust linkages (for a company controlled by trustees is an effective adjunct of the controlling trust).

The principal obstacle to the utilising of companies to achieve trust objectives is a conceptual one - namely the fact that commercial and business considerations have always identified the company as having an exclusively commercial or business purpose. This conception involves the primary purpose of a company being to carry on a business for profit and to divide that profit among its members, who have provided the capital to enable the business to be carried on. Such a conception therefore rejects the notion that a company can be used either for non-profit making purposes, or for profit-making where those promoting the company do not wish to benefit from the provision of share or working capital. Historically profit-making concerns derive their asset base from subscriptions for shares, and their profit participation from distributions of profits to shareholders according to the rights attributable to the respective classes of issued shares. Put together, any scope for discretion as to participation was limited to adjustments in share rights, and any attempt to divert funds to non-shareholders ran the risk of being impugned as an unauthorised reduction in share capital and as being therefore illegal. As a consequence, the company having its liability limited by shares is basically unsuitable as a vehicle for discretionary or family-related participation in profits or assets, and would not normally be used in such circumstances.

Prospective innovators are usually unfamiliar with forms of company which lack share capital and are therefore suspicious of them. The suspicion is heightened when one examines corporate entities in some civil law jurisdictions which are used for non-commercial activities, such as Anstalts in Liechtenstein and Stiftungs in Holland; such entities are either regarded as analogous to trusts (and taxed accordingly) or are disregarded as being nominees for those who participate in them. Those who have misgivings about the absence of shares in incorporated companies overlook the legal fact that if such companies are created under the same system of law as that which creates companies having shares or share capital, the acceptance of one necessarily involves recognition of the other. In the case of English or English-related law, the Crown and, through it, the State created the process for incorporation of companies and later endowed the process with legislative authority. Recognition of both kinds of company by legislation necessarily involves acceptance of all forms of corporation capable of creation under such legislation. The guarantee company is therefore just as acceptable in law as a share capital company.

The essence of flexible participation as between the members of a guarantee company is that it does not need to be confined to equality as between eligible non-shareholder participators. In the case of a company having only shareholder members, participation is normally regulated by the rights attributed to the class or classes of shares carrying participating rights. But where the company has members who are not shareholders, and who therefore have not subscribed for share capital, participation rights do not need to be on a *pari passu* basis provided the Articles of Association so provide. The statutory Articles of an English-incorporated guarantee company (and the position is similar under Gibraltar statute law) are silent on the point, but precedents on the point contemplate equality as between non-shareholder members of a Guarantee Company. But there is nothing in company law compelling such a basis of distribution. Therefore, in the case of a Guarantee Company not having a share capital, and as between non-shareholder members of a Guarantee Company having a share capital, so long as the Articles of Association permit unequal distributions as between members, no member not in receipt of a distribution made to another member or other members can complain.

But participation by means of distributions to non-members can also be lawfully made, and cannot be impugned if the following conditions precedent are satisfied:-

1. the distribution does not cause the distributing company to be insolvent;

2. the distribution is permitted as being within the objects of the distributing company;

3. the distribution does not reduce any paid-up share capital;

4. in the case of a guarantee company without share capital, there is no prohibition on distributions to non-members.

To sum up this part of the paper, distributions from a guarantee company can be made in the same way as they could from a discretionary trust. The tax consequences will vary from one jurisdiction to another; in the case of U.K. recipients such distributions can be rendered tax-free if made to non-members.[2]

Formation of a Guarantee Company

There is no inherent difference between forming a guarantee company and forming any other kind of company. The only problem is the initial one of finding a suitable precedent to use as a basis for the drafting of a suitable constitution.

Such companies cannot be formed under Channel Islands law, but can be incorporated in most other English-related, Colonial and ex-Colonial jurisdictions. Such a company can probably not be created under International Business Companies legislation in the Bahamas or British Virgin Islands, though they can be incorporated under the ordinary Company Ordinances in those territories. Such companies will need to have a share capital if formed in Gibraltar or the Isle of Man to overcome section 21 restrictions, and in the case of Gibraltar to be accepted as an exempt company.

Formation costs may be slightly greater because of the differing constitutions. There may also be a need to observe local licensing requirements in relation to the purchase of or subscription for shares in (for example) Gibraltar.

Funding of a Guarantee Company

Although the provision of a small share capital is necessary in Gibraltar, and may be desirable in the Isle of Man, and in section 21-related jurisdictions, it is not envisaged that the promoter of a guarantee company will wish to provide its operating capital by means of share subscriptions. In practice such capital will be provided by means of loans, gifts, bank borrowings, or - if large amounts are required - commercial endowments or isolated life annuity contracts. The latter can be particularly efficient

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[2] Distributions to or at the direction of non shareholders members, if made by a company incorporated within the United Kingdom, are prospectively within the scope of sections 703 -710 ITCA 1988 (Transaction in securities resulting in tax advantages) as giving rise to possible income tax liability. Such liability can be avoided if the company is rendered outside the scope of (para D) of s. 704 ibid. The position in regard to companies incorporated outside the United Kingdom is obscure, depending on the law of the country of incorporation.

in the context of estate planning, especially if a possible death-bed or early death scenario is a possibility. But such endowments or contracts must be for full consideration.

Every case is different and each needs to be evaluated on its own merits.

Some Fiscal Aspects of the Guarantee Company

This is a very extensive subject indeed, and one upon which it is not possible to opine both definitively and exhaustively. In the following sub-parts of this section of this memorandum, comments have been largely limited to fiscal problems in the United Kingdom. In the process the opportunity has been taken to refer to other tax systems - e.g., the U.S.A.. The writer does not claim a detailed knowledge of U.S. Internal Revenue rulings, regulations or legislation (though the same is not true in relation to the United Kingdom). Set forth below are some matters which will merit further research and discussion:-

A. Would a Guarantee Company be Classed as a Trust?

The answer to this question, it is considered, is a firm negative.

In relation to the United Kingdom, the *sine qua non* for inheritance tax-related purposes is that the company's property must not be -

(a) held *in trust* for persons in succession or for any person subject to a contingency; or

(b) held by trustees *on trust* to accumulate the whole or any part of any income of the property or with power to make payments out of that income at the discretion of the trustees or some other person, with or without power to accumulate surplus income; or

(c) charged or burdened (otherwise than for full consideration in money or money's worth paid for his own use or benefit to the person making the disposition) with the payment of any annuity or periodical payment payable for a life or any other limited or terminable period.

Inheritance Tax Act 1984 section 43(2)

As regards (a) and (b) a company registered in England under the Companies Acts is the beneficial owner of its own property and does not hold its property in trust - see *Bowman v Secular Society* [1917] AC 406 (referred to above) and in particular Lord Parker at pages 440-441:

> "If I give property to a limited company to be applied at its discretion for any of the purposes authorised by its memorandum and articles the company takes the gift as absolutely as would a natural person to whom I give a gift to be applied by him at his discretion for any lawful purposes."

A similar position would appertain in an English-related jurisdiction.

Provided the company is the true beneficial owner of its assets, the adminstration of the property cannot be said to be governed by provisions equivalent in effect to a trust, for the essence of a trust is that the property holder must be obliged to deal with it for the benefit of someone other than himself. This obligation is present in even the widest type of discretionary trust. But the company's constitution must not bind it to apply assets in a particular way; otherwise the company might be regarded as being in a position analogous to a trustee. See also s.5(2) of the 1984 Act above. The company may therefore be empowered, but must not be obliged, to make gifts, nor must there be any duty on the operator of the gift-making power to consider specially any person or class.

As regards (c) above, any funding annuity or endowment must be for full consideration.

As regards the position of the company in relation to United Kingdom CGT the definition of the term "settlement" is to be extracted from the meaning attributed to the related term "settled property" - namely, any property held in trust otherwise than on a nominee or bare trustee basis (Taxation of Chargeable Gains Act 1992, s.68). Property belonging beneficially to the company cannot therefore be settled property, and the company cannot be a settlement, for CGT purposes.

As regards income tax, the definition of a "settlement" for the purposes of that tax is wider - "any disposition, trust, covenant, agreement or arrangement" and including an outright gift where infant children of the settlor are concerned. But there is no decision in which a company has been held to be part of a settlement except in conjunction with a trust or settlement. A company has been held not be a settlement (*Bulmer v CIR* 44 TC 1; *Plummer v CIR* 54 TC 1).

By contrast, the United States has no reported ruling rendering a company as a trust or settlement apart from rulings involving Liechtenstein Anstalts. Since the Guarantee Company owes its current corporate status to the same volume of legislation as that under which conventional companies are incorporated, it is unlikely that the Internal Revenue Service would regard a Guarantee Company any differently to any other company - i.e., as compared with a trust. In particular, the fact that the company is the owner of its property would be regarded as strongly against the treatment of the company as a trust. A different position would arise if the company's constitution empowered it to, and it did, hold its assets on trust for its members, as is the case with some Guarantee Companies managed in Guernsey.

The United States Federal tax system possesses Draconian sections of legislation affecting foreign companies, which can be brought into play if the company is classed as either a foreign personal holding company (Internal Revenue Code s.552) or a Controlled Foreign Corporation (Internal Revenue Code ss.957 and 958). Before either classification can be invoked it has to be established that more than 50% of the shares, stock or voting power in the company has at some time in the relevant tax year been or become in the ownership or control of five or fewer U.S. citizens or residents. The rights of a guarantee company member which do not derive from the holding of shares are not stock, though if voting rights are identified with membership they would be counted in determining whether 50% or greater U.S. voting control existed. It is possible, under United Kingdom company law, to organise members' general meeting control and director control so as to overcome the 50% stricture, but the issue is by no means free from uncertainty.

B. Attribution of Income and Capital Gains in Guarantee Companies

A guarantee company's own taxation position will be determined by reference to the tax laws prevailing in the country in which it is created or (if different) in which it is managed and controlled. In some of these countries special legislation exists to exempt companies from local taxation - e.g., Gibraltar, Isle of Man. But legislation and laws exist in other, higher-tax, jurisdictions to attribute the income and capital gains of foreign companies to residents of those jurisdictions who are considered eligible to benefit from them and who fall into the relevant category of assessment.

Under United Kingdom tax laws (and similar provisions exist in Irish tax laws), income which becomes payable to a company incorporated or resident outside the United Kingdom can be assessed upon UK residents who have power to enjoy that income or who receive or are entitled to receive loans or gratuitous capital amounts from such companies. This form of tax liability can be readily averted, but it is equally as applicable to the income of a foreign guarantee company as to any other form of foreign company. However, whereas CGT is payable by UK residents holding shares in foreign companies which make gains upon which they would be chargeable to UK capital gains tax if resident in the United Kingdom for tax purposes, the holder of non-shareholder membership of a guarantee company is not similarly assessable. Nor is such a holder assessable to United Kingdom income tax on offshore income gains of a non-qualifying offshore fund.

In the United States, passive income (including certain capital gains) of a foreign personal holding company is attributable to U.S. citizens or residents having interests therein. With this exception, attributory tax liabilities do not arise in the States on income or gains of foreign companies.

C. Avoiding Taxation on Distributions from Guarantee Companies

In the normal way any distribution to a UK-resident member of a company out of the assets of a company will be income in the hands of the recipient as being income derived from a foreign possession (*CIR v Reid's Trustees* 30 TC 431), unless the distribution is in respect of a winding-up, or the relevant foreign law compels the distribution to be capital (*Rae v Lazard Investments Co* 41 TC 1). But whereas a capital sum paid to a member on his selling his shares to the company is prima facie income if the company is a foreign company, a similar payment on surrender of non-shareholder members' rights in a guarantee company would be capital. Similarly a lump sum paid to a non-member under a power in the Memorandum of Association would not be income because the recipient would have no property right in relation to the company which could be regarded as producing income.[3]

Any distribution to a member which was not subject to income tax would be potentially subject to CGT if the recipient was domiciled and either resident or ordinarily resident in a part of the United Kingdom. But a lump sum paid to a non-member could not attract CGT because the non-member would have no asset from which the capital amount could be said to be derived (though there is a risk of an attributory liability to a UK member of the distributing company). Further, the relevant company should not have UK-resident members at the time of such a distribution to avoid imputed inheritance tax liability. Such liability normally arises on distributions from any company controlled by five or fewer persons but where the distribution is to a member whose estate is increased by the distribution there is no net liability (since the loss of value in the company is offset by such increase).

From a United States standpoint, distributions to U.S. citizens are all potentially taxable as income unless made as a gift (under a power in the Memorandum) to a non-member from a company which is not a Controlled Foreign Corporation or a Foreign Personal Holding Company. In the latter circumstances, non-liability to U.S. federal taxes can be a possibility.

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3 But see footnote 2 supra.

The Commercial Usages of Guarantee Companies

It should be apparent from the foregoing that guarantee companies have not received the attentions of legislators and jurists which have been extended to other forms of organisation. But the question which will be posed by any prospective promoter of such a company, and which needs to be addressed, is - How can I use such a company, and what needs will it satisfy that an ordinary share capital company or a trust will not?

The question cannot be posed or answered with exhaustive certainty. Different jurisdictions have different problems, and some problems require different answers, depending on the jurisdictional obstacles present, and also the practical difficulties attendant upon a particular course of action. Set forth below are a selection of possibilities for which Guarantee Companies can be tailored to provide satisfactory solutions. But there will be other possibilities and other solutions, not set forth here:-

1. As was pointed out earlier in this paper, a modern offshore company does not need to generate its working capital from an issue of shares. It can acquire such capital from loans, bank borrowings, endowments, etc. This therefore means that such a company is capable of standing on its own, independent of its sponsors - a kind of "separate estate" but having no prospect of death on account of its corporate personality.

   A conventional company, because it has share capital, needs to have shareholders who may not decease, become insane or acquire bankruptcy status. The usual way of handling the problem was to have the company owned by trustees of a widely drawn discretionary trust. But successive legislative changes are making such an ownership less attractive, by virtue of attacks by fiscal legislators upon the controlling trust. So the idea of having a trust in control of a company is less attractive than it was.

   Against this background, a Guarantee Company has substantial attractions, either as a repository for growth assets or as a holding company. Such a company does not need to have equity share capital; if it needs share capital (e.g., as being a guarantee company with a share capital) the shares need not confer equity rights to the company's corpus. Non-shareholder members do not need to be recorded on public files. In some jurisdictions a guarantee company can lawfully exist without any member at all. And the ability of non-members to benefit by endowments, grants or gifts in their favour without tax liability or tax accountability, produces potential methods of preserving substantial monies from erosion by tax collectors without thereby breaching tax laws.

2. A guarantee company can be an extremely useful tool in the hands of the estate planner. In some jurisdictions guarantee company articles provide that non-shareholder membership ceases on death or upon earlier resignation, and that such membership is non-transferable.
   Query: is it then an asset?

   The use of an annuity ceasing on death as consideration for the provision of capital in money or money's worth can also be recommended for estate planning in appropriate cases, the membership of the company being then vested in associates of the eligible next-of-kin.

3. A third group of possibilities involves the use of such a company for a

variety of mutual business activities in the insurance or service fields or involving the functions of management of large blocks of flats where all the tenants are members. Such companies are used as a vehicle for Theatre Clubs.

4. There are possibilities for a guarantee company to be used to take the place of the discretionary trust as a long-term enterprise for holding family wealth. The utilisation of the non-member basis of benefit avoids the restrictions placed on the nomination of unborn children or remoter issue by the existence of rules against perpetuity since all interests in a company will be vested when created, thus rendering inapplicable the perpetuity period.

5. The rules against breach of trust are inapplicable to companies not under control of trusts. Further, the professional obligations of directors of such companies, though stringent, are less onerous then those applicable to directors of trust-controlled companies.

6. The ability to create companies with both shareholder and non-shareholder members can result in the use of such companies to take advantage of fiscal legislation which confers benefits by reference to shareholder association or control when legal control is desired to be elsewhere - e.g., stamp duty exemptions on transfers of UK property between associated companies.

   The same ability may also enable a company under the control of an appropriately constituted Guarantee Company to circumvent the provisions of relevant company law legislation requiring disclosure of an ultimate holding company where this disclosure might not be in the commercial interests of the trading company - e.g., as being in South Africa.

7. The presence of an appropriately structured guarantee company may also be relevant in constructing a corporate group for (say) V.A.T. purposes.

8. A guarantee company is an effective way of creating positions where persons beneficially entitled to benefits from companies can so benefit without the risk of discovery or public scrutiny - e.g., to Swiss Bank Regulators.

The foregoing are a selection of possibilities. Each needs to be evaluated in depth by specialist advisers in conjunction with those having the task of formulating the company constitution concerned, for every actual case is different.

Conclusion

The use to which Guarantee Companies can be put is for the professional adviser to consider. The possibilities touched on herein may at least stimulate his further deliberation.