



Proposed Amendments to Jersey's Trusts Law

By Zillah Howard

The Government of Jersey has confirmed that amendments are to be made to the Trusts (Jersey) Law 1984 (the 'Trusts Law'). This follows a consultation process which took place during 2016, with the Consultation Paper drawing upon the work of the Jersey Finance Trusts Law Working Group.

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The Trusts Law is of central importance to Jersey's position as one of the world's leading private wealth jurisdictions. The legislation was introduced in 1984 to provide a statutory framework for trusts in Jersey, rather than a codification of the law. The intention was that there should be sufficient flexibility to allow the court to apply and develop principles over time: that has happened and the

extensive body of case law that has been created, along with the reputation of the Island's judiciary, are key factors for those deciding to use Jersey trusts.

The Trusts Law has been kept under regular review over the years and, with each set of amendments, it has been important to strike the right balance: preserving the

flexibility and reputation of the legislation and yet also providing clarity where appropriate and introducing new provisions to allow Jersey trusts to develop in an international market place.

Seven topics are to be addressed in the amending legislation – Amendment No. 7:

1. AMENDMENT OF ARTICLE 29: THE PROVISION OF INFORMATION TO BENEFICIARIES

The court in Jersey is able to address questions relating to access to trust information in the exercise of its inherent jurisdiction. There are also statutory provisions within Article 29. The construction of those provisions is not as clear as it perhaps might be, giving rise to a question as to whether or not a trust instrument can restrict a beneficiary's access to documents which relate to or form part of the trust accounts.

The ability to restrict access to trust documents can be important for settlors. For example, they may feel that it is in the interests of younger family members to complete their education and establish independent careers for themselves, without being distracted by knowledge of wealth within a family trust structure. On the other hand, the principle of accountability is central to the trust concept and requires beneficiaries to be able to hold trustees to account: to do that, beneficiaries require access to relevant trust documents.

Amendment No. 7 will rework Article 29, making it clear that a beneficiary's rights to see the accounts can be restricted by the terms of the trust, albeit not completely removed. Beneficiaries will be able to apply to court for assistance if they consider the information provided to be insufficient.

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2. CLARIFICATION OF ARTICLE 9A: RESERVED POWERS

Article 9A contains provisions relating to the reservation or grant of powers by a settlor. Several minor amendments will provide clarification, including the following:

- Article 9A(1)(b) will provide that all - rather than any - of the powers referred to in Article 9A(2) can be reserved or granted;
- the holder of a reserved power will not be considered to be a trustee;
- there will be a rebuttable presumption to the effect that reserved powers cease on the death, incapacity or bankruptcy of the power holder.

The Government's view is that it is for the court to determine whether a power is held on a personal or fiduciary basis (considering the terms of the trust instrument and all other relevant circumstances). Accordingly, there will not be a presumption to the effect that a reserved or granted power is held personally.

3. EXTENSION OF THE INDEMNITY PROVISIONS IN ARTICLE 34

An outgoing trustee is entitled to 'reasonable security' for liabilities before surrendering the trust property: this is



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usually given in the form of an indemnity. Article 34(2A) provides that, so long as certain conditions are satisfied, a trustee can enforce an indemnity which has been renewed or extended even though the trustee is not party to the renewed or extended indemnity. A former trustee can therefore enforce an indemnity contained in a contract between subsequent trustees.

Indemnities are often drafted to indemnify a corporate trustee's officers and employees and this practice has been recognised by the court. In addition, STEP's Jersey precedents (published in 'A Practical Guide to the Transfer of Trusteeships' (2nd edition)) allow 'Indemnified Persons' to be indemnified i.e. '... the Retiring Trustee and its successors, its directors, officers and employees and each of them and the respective heirs, personal representatives and estates of such directors, officers and employees and each of them'.

Amendment No. 7 will extend Article 34, allowing direct enforcement of indemnities by (i) those within the STEP definition of 'Indemnified Persons' and (ii) those who are employed by a service company rather than directly by the trustee.

There will be equivalent amendments in relation to the enforceability of indemnities given in respect of distributions made during the lifetime of a trust or upon its termination.

4. EXTENSION AND CLARIFICATION OF ARTICLE 38: ACCUMULATION AND ADVANCEMENT

Article 38 states that the terms of a trust may require or allow the accumulation of trust income and that, subject to provisions which apply in relation to minor beneficiaries, income which is not accumulated must be distributed.

Amendment No. 7 will widen the options for trustees: subject to the terms of the trust, income may be accumulated and added to capital, retained as income, or distributed. The default position will be for income to be retained in its character as income.

Article 38(5) contains powers which allow trustees to advance or apply trust property for the benefit of a beneficiary before the time at which the beneficiary becomes absolutely entitled to the property. Amendment No. 7 will make it clear that these powers can be used in respect of the whole – rather than just part – of the trust property to which the beneficiary will become entitled.

5. CLARIFICATION THAT A TRUST TAKES IMMEDIATE EFFECT WHEN PROPERTY VESTS IN THE TRUSTEE

When a settlor reserves extensive powers, there can sometimes be a concern that there is not a valid trust. If it is established that there is a testamentary intention, the purported trust may be considered to be a will and consequently subject to the execution formalities applicable to wills. Careful drafting can address this and the Trusts Law already provides that the reservation or grant of powers listed in Article 9A(2) will not affect a trust's validity nor delay it taking effect.

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Amendment No. 7 will introduce an additional clarification to the effect that, unless specified otherwise, a trust takes immediate effect when the property is identified and vested in the trustee.

6. LIMITED EXTENSION OF THE COURT'S POWERS TO VARY A TRUST

In Jersey, the court has limited powers of variation. Pursuant to Article 47(1), it can approve an arrangement which varies a trust: the court gives its approval on behalf of those who cannot consent for themselves (minors, interdicts [persons without legal capacity] unascertained or unborn beneficiaries), where it considers the arrangement to be for their benefit. However, the court is unable to approve a variation on behalf of adult beneficiaries and they must give their own consent.

Article 47(3) allows the court to vary a trust to enable trustees to enter into particular transactions (such as sales or leases) where those transactions are considered 'expedient' in the 'management or administration' of a trust but the trust instrument does not include the necessary powers. It is accepted that, unlike Article 47(1), the powers conferred by Article 47(3) cannot be exercised



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to alter the beneficial trusts and are limited to administrative matters.

The Consultation Paper asked whether the court should have more extensive powers of variation. That might be helpful in allowing the court to approve variations, for example (i) on behalf of adult beneficiaries where the provision of their own consent could have adverse tax consequences, or (ii) where there were administrative difficulties in obtaining the consent of all the beneficiaries.

The Consultation Paper noted, however, that an extension of the court's powers might possibly undermine Jersey's robust 'firewall' provisions: these can be important, for example, where a trust is challenged in matrimonial cases. Article 9 requires certain questions (e.g. relating to powers of variation) to be determined in accordance with Jersey law and Jersey law currently provides that the court cannot effect or approve an alteration that the trustees could not make themselves. A strong argument can also be made to the effect that settlors prefer to determine the terms of a trust themselves, rather than to contemplate the possibility of the court being able to change those terms at a later date.

In the light of comments received during the consultation process, Amendment No. 7 will introduce a limited extension of the court's powers, allowing it to consent to a variation on behalf of beneficiaries whom the court is

satisfied cannot be found despite proper attempts to locate them or whom (due to their number) it is 'practically unfeasible to contact' and then only if the court determines that the proposed variation is in their best interests.

7. INTRODUCTION OF A STATUTORY LIEN

The introduction of a statutory lien was considered some years ago but was postponed, pending the implementation of the Security Interests (Jersey) Law 2012. With that legislation now in force and the court in Jersey having confirmed the existence of an equitable lien, the topic is being revisited.

Amendment No. 7 will introduce a statutory lien to secure the payment of authorised remuneration to the trustee and the reimbursement of all expenses and liabilities reasonably incurred by the trustee: it will be non-possessory, so that it continues after the trustee has left office and surrendered the trust property to a new trustee. The lien will take priority over the interests of beneficiaries but will be subsequent to other charges on the trust property. It will survive a distribution unless expressly waived and will be capable of being defeated by a bona fide purchaser for value (in which case it will attach to the sale proceeds).

Questions as to the priority of the trustee's lien against other creditors – and between former and current trustees – will not be addressed in Amendment No. 7: the Government's preference is for the court to address these questions in due course.

COMMENT

Whilst preserving the flexibility and reputation of the legislation, Amendment No. 7 will provide clarity where appropriate and introduce new provisions to allow Jersey trusts to develop in an international marketplace. The amendments are to be welcomed, supporting Jersey's position as one of the world's leading private wealth jurisdictions.

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With more than 25 years' experience in international private client work, Zillah provides Jersey law advice in relation to trusts, foundations and philanthropy, and works with settlors, beneficiaries, trustees and leading law firms on wealth structuring and estate planning.

Zillah is an active member of Jersey Finance working groups which help to shape trusts, foundations and charities law in Jersey.