

The Insider's analysis of the potential future changes to Jersey's Trust Law

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Introduction

The Trusts (Jersey) Law 1984 (the **Law**) has been amended six times since its inception. The most recent consultation on the proposed amendments to the Law (the **Consultation**) cites the need to clarify existing provisions and incorporate new ones in the Law, the aim of which being to ensure that the Law continues to support the evolving Jersey trusts industry, in providing flexibility and room for development.

This briefing guide summarises the 12 areas discussed in the Consultation and the resulting proposals made by the Trusts Law Working Group (the **Working Group**) to the States of Jersey (the **States**), in respect of each area.

1. The need for a beneficiary at all times during the existence of a trust

Following *Knight v Knight*^[1], certainty of intention (the intention to create a trust), subject matter (the assets of the trust) and object (beneficiaries, or a purpose), are required for a trust to be valid. The proposed amendment focuses on the third requirement, that is, who the trust is to benefit.

In considering the definition of 'a beneficiary' in the Law, two recent cases have created some uncertainty as to whether a Jersey trust is subject to a requirement for an ascertainable beneficiary, or one that is in existence at all times. The cases of *Re Representation of AIB Jersey Trust Ltd re the Exeter Settlement*^[2] and *Re the 'A' Employees Shares Trust*^[3] are examples of cases where the court has found trusts to be invalid due to a lack of object (for further information please see the Consultation). The decisions in both of

these cases have been met with some critical commentary. In the former case, it is said that the court based its decision on a restrictive interpretation of the English Law test (as in *McPhail v Doulton*[4]) as to whether or not a person is within a class of beneficiaries at a given time. In the latter case, as the trust was governed by English law, some have questioned whether the verdict was fully representative of the English law position, in that, under English law it is possible to have a trust for the benefit of one's own children, even if those children are not yet in existence. Nonetheless the cases have created an element to doubt which is not desirable.

The Working Group cites the risk of trusts being declared void for uncertainty as the impetus for the proposed amendment to the Law, notwithstanding that the cases in which this issue would arise are likely to be relatively rare.

The proposed amendment seeks to clarify, beyond doubt, that there is no requirement for the existence of beneficiaries *at all times* during the lifetime of a trust (although as under English law, the Working Group generally believes this is to be the case anyway). Part one of the amendment would confirm that, so long as it is possible for a beneficiary to be alive *at some point* during the trust's existence, the trust will be valid. That is, a beneficiary (for example, an unborn grandchild) does not have to be alive at the trust's inception. Part two of the amendment would operate so that a class of beneficiaries may be defined without having any initial ascertainable members in it at the start of and during the trust's lifetime, provided that it is possible for members of that class to be ascertained at some point during the lifetime of the trust. The examples cited in the Consultation concern a class of beneficiaries, such as the spouses of the settlor's issue (where there are none in existence at that time) and a class where beneficiaries are added in exercise of a power, at a time when no one has yet been added to the class.

Ogier Comment

The concern emanating from the decisions in the two Royal Court cases referred to above, was raised quite quickly after the judgments were published in 2010. Practitioners believe it leaves the state of our law on this point in an unsatisfactory position. If it can be clarified by a law change, then let's get on and do it, is the view of the Working Group.

2. The rights of beneficiaries to information

Article 29 of the Law concerns the rights of beneficiaries to information in respect of the trust (please see the Consultation document for the text of Article 29). The Consultation lists the following concerns with its drafting:

(a) the provision states that the trustee '*shall not be required to disclose*' information and therefore is unclear what must be disclosed;

- (b) It is unclear under sub-section (d), whether the obligation to provide trust accounts to a qualifying beneficiary under this sub-section is subject to the introductory wording in Article 29, that this disclosure is '*subject to the terms of the trust*' or '*any order of the court*'; and
- (c) further to the above point, precisely what is meant by '*accounts of the trust*'.

Case law has gone some way to providing clarification on point (ii) and in the case of *West v Lazard Brothers*^[1] the courts provided a wide view on what '*accounts*' may include as: '*accounts, vouchers, coupons, documents and correspondence relating to the administration of the trust property*'.

The following options are considered in addressing these concerns:

- (a) to take no action, with the justification for this being that ultimately there are very few cases which come before the Royal Court in respect of these issues and this could be solved on a case by case basis;
- (b) amend the relevant provision to provide clarity perhaps based on Section 26 of Guernsey's trusts law which is set out in the Consultation;
- (c) consider providing for a third party to be nominated by the settlor, where that person would receive the relevant disclosed information (rather than a beneficiary);
- (d) repeal the provision and rewrite it; or
- (e) state that the Royal Court shall determine cases on application by a beneficiary or enhance the role of the court in its ability to assist a beneficiary.

The resulting proposal of the Working Group suggests that a reworking, rather than complete rewriting of Article 29 should be the primary focus (and it is noted that a complete restriction of information available to the beneficiary is not a desirable outcome). The position under Jersey law would therefore be clarified by removal of ambiguous and unclear wording. The beneficiary's right to information would be subject to the terms of the trust and orders of the court and that right could be restricted within the limits of accountability. It was also noted that it would be advantageous for Article 29 to be extended making express provision for the assignment of rights of a beneficiary to a third party, or fiduciary, thereby ensuring the accountability of trustees whilst preserving the overall confidentiality of trust documentation.

Ogier Comment

This is an interesting one. A beneficiary's right to information is not as topical a question as it used to be. Nonetheless, there is a sense that we should tackle this chestnut. The paragraph above summarises the options. The author of this briefing is attracted to the

provision in Guernsey's trust law namely Section 26.

3. Reservation of powers by a Settlor

Article 9 of the Law concerns the reserved powers of a settlor, in respect of a trust. The Consultation states that in considering amendments to this particular article, reference has been made to similar provisions in Guernsey, Cayman and Bermuda. For example, one suggested amendment would provide that the trust terms may prescribe whether reserved or granted powers can be held in a personal or fiduciary basis, akin to the position in Bermuda.

The general impetus behind the amendments is stated as being to ensure that the Law remains flexible and consistent with Jersey's position as a leading trust jurisdiction.

Ten potential amendments are being considered as a result, which are described in detail in the Consultation to which reference should be made for further information.

Ogier Comment

This proposal is an example of a provision gradually refined and improved over time. All of the suggested tweaks listed in the Consultation seem eminently sensible and will improve the Article overall, albeit none of the changes individually are dramatic.

4. Arbitration

The Consultation considers arbitration in the context of trusts, where a dispute between parties is adjudicated upon by an independent person or panel of people. Although arbitration provisions may be included in a trust deed, they may or may not be binding on a beneficiary. The Consultation therefore considers the proposal of enforced arbitration.

The key advantage of arbitration in a Jersey trust setting are said to be that disputes may be resolved less publicly, therefore maintaining the privacy of family trust arrangements.

Although it is noted that Jersey wishes to be at the forefront of new trust industry developments, the Consultation concludes that enforced arbitration is not desirable in the trusts context at this time. The Working Group notes that although it has been adopted in certain other jurisdictions such as the Bahamas, currently there is little evidence of there being a strong market demand for this change in the law.

The Working Group further notes that an alternative may be to consider how applications before the court may be afforded a greater level of confidentiality. It recognises that although the availability of information to the public is key in a democracy such as Jersey, an individual's right to privacy is also of high importance. The Working Group confirms that it will therefore continue exploring the ways in which the confidentiality of a trust can be enhanced as well as the anonymisation of court judgments.

Ogier Comment

Different practitioners will have different views on a topic like arbitration. Non-contentious practitioners cannot testify to there being any demand from the ultra high net worth community to the effect that they want some form of arbitration regime. We do not see it as something that is likely to win the island work either.

5. Trustees self-contracting

Trustees (who are often professional trustees) may act in different capacities, in a transaction, in roles as trustee of more than one trust. Predictably, this often leads to circumstances where that trustee will require the ability to contract with himself or herself (albeit as trustee of different trusts). This problem was addressed by the Trusts (Amendment No.5) (Jersey) Law 2012 which added a new provision to the Law (Article 31) allowing trustees to contract with themselves in their capacities as trustees of different trusts. Trustees are thereby expressly permitted to do this.

Following the incorporation of the amendments into the Law in November 2012, the Consultation notes that it remains unclear as to whether Article 31 has retrospective application to contracts entered into before its inception and, as to whether a trustee can contract with itself in its different capacities as, for example, an individual, a company and trustee.

The Consultation details the proposal to amend Article 31 to address this concern by including wording to the effect that a person ‘*may either in their personal capacity or in the capacity as a trustee*’ enter into a contract with himself or herself as a *trustee*. The

proposed amendment would also insert a provision that unequivocally states that the amended provisions of Article 31 should have a retrospective effect.

Ogier Comment

There is little to be said on this proposal save that the Working Group should have dealt with the retrospective point at the time the provision was introduced in 2012. However, it is better late than never in dealing with it. The other suggestions in the Consultation make sense also.

6. Confirmation of the appointment of a corporate trustee post-merger

The Working Group noted that the question had been raised where a corporate trustee merges with another corporate body, as to whether any resulting corporate entity could be said to continue to be validly appointed in the office of trustee (in place of the former corporate trustee).

Although the Working Group itself did not consider there to be a serious issue, nonetheless the

Consultation suggests amendments to both the Law and to the Companies (Jersey) Law 1991 (the Companies Law) (at Article 127FN(2)(b)) which would serve to clarify the position that an appointment as described would remain valid.

Ultimately, the Consultation seeks further input as to the need for the amendments proposed above and views regarding any other points which require clarification in this area.

Ogier Comment

Ogier as a firm does not believe there is a need to legislate on this one. We did not see that there is a problem. That said, once set out expressly in statute, the point would be unarguable.

7. Extension of indemnity provisions

A retiring or resigning trustee, or a trustee that is removed from office is entitled to be provided with ‘reasonable security’ for its liabilities, before transferring the trust property to the new trustee. This is provided for by Article 34(2) of the Law. This reasonable security is typically provided by way of securing an indemnity in favour of the outgoing trustee, the terms of that indemnity being recorded in the instrument which effects the retirement (or removal).

An amendment to the Law has already been made by the Trusts (Amendment No. 5) (Jersey) Law, which in 2012 inserted a new Article 34(2A). This addition to the Law allows a trustee (the former trustee) to enforce an extended indemnity, following his or her retirement or removal, and when there is a further change in trustee. The provision allows the former trustee, although not a party to any subsequent indemnity, to enforce the indemnity in his or her own right, providing that he or she is expressly identified in the instrument containing the indemnity.

The Consultation puts forward the Working Group's proposal that Article 34 of the Law should be extended to permit the officers and employees of a former trustee to also be able to enforce indemnity provisions as mentioned above. In line with guidance by the Society of Trust and Estate Practitioners (STEP), an extended indemnity should typically be drafted to include a class of 'Indemnified Persons', which includes a trustee's directors, officers and employees, and the successors, and heirs, personal representatives and estates of those directors, officers and employees. The extension of the indemnity provisions in this way has had judicial approval in the case of *In re the Essel and Bruce Trusts*^[1].

The Working Group further recognises that an express identification of all of the Indemnified Persons, in the same way as Article 34(2A) provides for a former trustee, is potentially an onerous requirement, particularly where a number of individuals are involved.

Under the English law provision in the Contracts (Rights of Third Parties) Act 1999 (the Third Parties Act), a third party may be expressly identified in an instrument of indemnity, not only by name but also as a member of a class, or under a particular description, although not necessarily in existence at the time that the instrument is entered into. The Working Group suggests that the adoption of a similar approach in the Law is likely to be beneficial.

It is also noted that under current practice in Jersey, as outlined above (and recommended by STEP) the trustee who is given the benefit of the indemnity often will act as trustee of the extended indemnity for those Indemnified Persons named. Where those trustees are directors of companies, they will receive the benefit of greater protection and increased rights when compared with a director of another company, i.e. those directors would be able to enforce the terms of the indemnity directly, even though they are a party. In line with the Third Parties Act, the Consultation acknowledges that similar legislation could be introduced which would remove the need to make special provisions for directors and other officers in this way, for companies that have acted as trustee.

Two further proposals made under this heading are to introduce provisions in respect of those indemnities provided during the lifetime of a trust when distributions are made, and equivalent amendments to Article 43 (distributions on termination) to reflect the terms of the original and extended Article 34(2A), upon which the Consultation also seeks input.

Ogier Comment

A very sensible improvement on what's there. Ogier commend these changes to its clients.

8. Retention and accumulation

The Consultation moves on to consider the accumulation and retention of income in trusts. The current law states that where the accumulation of income is authorised under

the terms of the trust, any income which is not accumulated *shall* be distributed by the trustee under Article 38 of the Law.

In respect of this, the Working Group recognise that there is currently no guidance in the Law as to precisely what the permissible period of retention is for this income and to whom any income not accumulated should be distributed to. Although the majority of trust instruments address these issues within their own terms, the Working Group have noted that where such terms are omitted, it can occasionally lead to costly issues associated with rectifying trust instruments, in particular in consideration with employee benefit trusts.

Reference is made in the Consultation to the Guernsey position where it is provided that any income which is not distributed shall be accumulated, although the Working Group note that this position (having being reversed from Jersey's position by the Trusts (Guernsey) Law 2007),

has its disadvantages. It is also noted that legislation restricting the perpetuity period of a trust, and accordingly the length of time during which income may be accumulated (to ensure that a settlor's wealth is not tied up within a trust for an excessive period of time), is generally an undesirable concept and similar legislation in several other jurisdictions has been abolished.

The Working Group proposes, that subject to the terms of the trust, the accumulation of income to capital, or, retaining income in its character as income (being the proposed default position), or distribution of income should be permitted in the Law.

Additionally, the Working Group suggest that the wording of sub section (5) of Article 38 could be clarified to provide for the power of accumulation to be exercised over *all* of the trust property rather than only *part*.

It is proposed that both of these suggested amendments shall have a retrospective effect in order to achieve unity of regimes and to confer maximum benefit.

Ogier Comment

It was in fact Advocate Meiklejohn of Ogier who first raised this point based on client work he had dealt with. The proposal in the Consultation represents the collective thinking of the Working Group. It will improve not only the current provision in the Law, but would be an improvement (in flexibility terms) on the Guernsey equivalent provision.

9. Presumption of lifetime effect

In this section of the Consultation the reservation of powers by a settlor is considered. The Working Group addresses the concern that a trust may be considered “illusory” in certain circumstances, where a settlor chooses to reserve a large number of powers upon establishing the trust. Such a trust is also at risk of being regarded as a will (provided the formalities are also met) and therefore may attract unforeseen tax liabilities.

The Working Group notes that given careful drafting of the trust instrument, this problem is relatively rare and cites Lewin on Trusts in that the settlor would need to be “*virtually the equitable owner of the [trust] property during his life*” for a trust to be judged as illusory. That said, the Working Group suggests that as in Bermuda and Cayman law, it would be beneficial to put the matter in Jersey law, beyond any doubt.

Bermuda and Cayman law achieve this certainty by providing clarification in their respective, relevant statutory provisions which are as follows:

Section 2(3) of the Trusts (Special Provisions) Act 1989 in Bermuda states:-

“The reservation by the settlor of certain rights and powers, and the fact that the

trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.”

Section 13 of Cayman’s Trust Law (2012/2011) Revision states:-

“In construing the terms of any instrument stipulating the trusts and powers in and over the property, if the Instrument is not expressed to be a will, testament or codicil and is not expressed to take effect only upon the death of the settlor, it shall be presumed that all such trusts (and in particular the duty of the trustees to the beneficiaries to administer the trust in accordance with its terms) and powers were intended by the settlor to take immediate effect upon the property being identified and vested in the trustee, save as otherwise expressly, or by necessary implication, provided in the instrument.

Subsection (1) shall apply notwithstanding -

(a) that the trust may have been created in order to avoid the application upon the settlor’s death of laws relating to wills, probate or succession;

(b) that during the lifetime of the settlor, beneficiaries of the trust may not be ascertainable;

(c) that beneficial interests may only vest in remainder or may remain contingent or subject to defeasance by the exercise of reserved powers or otherwise; or

(d) that the settlor may be one of the trustees.

Subsection (1) does not apply in the case of a declaration by a person constituting himself the sole trustee of a property to which he was beneficially entitled.”

The Working Group also notes the Bermuda case of *AQ Revocable Trust*^[1] which confirmed that although the relevant Bermuda legislation ‘merely acknowledges the general common law position’ it had the advantage of ‘eliminating doubt as to the scope’ of those common law rules.

The Working Group therefore conclude that providing similar certainty in the Law is desirable and would provide those wishing to establish trusts in Jersey (and their advisors) with the reassurance that such trusts with powers that are reserved to the settlor, specifically those that may be challenged following the settlor’s death, will be better protected from attack.

Ogier Comment

Once more it was Ogier who suggested it was worth looking at Section 13 of the Cayman’s Trust Law and that given the work we do with reserved power provisions much of the time, it

seemed to us that the intent behind Section 12 (or Section 2(3)) in Bermuda) was laudable, made sense, and would improve our law.

10. Power of the court to vary a trust

The Royal Court's power to vary a trust, under Article 47 of the Law is currently limited to the following:

- (a) it may approve an arrangement to vary a trust instrument where all and any terms of the trust can be varied on behalf of minors, interdicts and unborn or unascertained beneficiaries. This power can be exercised provided the court takes the view that the proposed arrangement is for those beneficiaries' benefit; and
- (b) under Article 47(3) the court may grant a trustee certain powers in order to enable it to enter into a given transaction provided that it is connected with the management or administration of the trust (although these powers cannot be used to alter beneficial interests under the trust instrument).

The Working Group considers those powers in the Consultation and whether or not those powers of the court should be extended (noting that the arguments are finely balanced). It is suggested that an introduction of further powers would permit the court to vary a trust whether or not the proposed variation is supported or contested by one or more of the adult beneficiaries of the trust to which the application relates.

In support of an extension of the court's power:

- (a) the court would then be able to assist in the case of a poorly drafted trust (for example such as reported in *In re Greville Bathe Fund*^[1]);
- (b) the act of consenting to an exercise of a power of variation (even where conferring no benefit on a particular beneficiary) may arguably be perceived as the exertion by a beneficiary of a degree of control over the trust, taking part in a resettlement of the trust or giving up an asset or right, causing there to be associated tax consequences;
- (c) the current problem, where there is one beneficiary who will not consent to a variation, would be solved;
- (d) the need to obtain consent from all beneficiaries, especially where obtaining that consent is a problem due to location, could be more easily be addressed;
- (e) there would be another means by which the court could resolve disputes (although the Working Group notes that obtaining beneficiary consent is still likely to be a more cost effective solution than a court application); and

(f) the extension would assist in Jersey maintaining its competitive edge in an international setting (for example, Bermuda law possess provisions similar to those proposed, although the Consultation also notes that there is no evidence to suggest that settlors give consideration to such provisions in deciding upon which jurisdiction in which to establish a trust).

The disadvantages and counter arguments are:

(a) Jersey's firewall provisions may be undermined by the court having such a power to vary (for example, in matrimonial cases);

(b) settlors may find the prospect of court determined flexibility, unattractive, particularly in respect of the power to alter the underlying beneficial interests of the trust (however, it is also noted that trusts which are discretionary in nature are popular in Jersey, where trustees have wide powers to decide upon beneficial entitlement anyway. Additionally, beneficial interests may be varied where all beneficiaries are in agreement);

(c) whether there is a need for such a power to vary, given that the settlor may confer such a power upon the trustee in the terms of the trust instrument from the outset; and

(d) the Bermuda law provisions have not yet been examined by way of an adversarial argument which in turn raises doubts as to the long-term efficacy of the current Bermuda interpretation.

Ogier Comment

Notwithstanding the arguments both ways neatly summarised in this briefing, we at Ogier think this is a desirable extension of the Court's powers. Jersey is already the forum of choice for many international advisors. Giving the court more easily the ability to assist applicants when it is potentially the right thing to do for beneficiaries, seems to us to be what any amendments to the Law should be seeking to do.

11. Légitime

Under Article 9(3) of the Law, when a person who is domiciled in Jersey dies, there are restrictions as to how he or she may leave their moveable property. These restrictions are provided by the rules relating to *légitime*. The *légitime* rules provide that the surviving spouse and/or issue of a deceased Jersey domiciled person will have rights over that person's moveable property (which is anything other than land or buildings). These rights exist regardless of the testator's wishes. A disappointed spouse or member of the class of issue (which includes children, grandchildren and remoter descendants) may bring a claim enforcing these rights.

Predictably, there is much debate as to whether it remains appropriate to continue to enforce

‘forced heirship’ provisions in a jurisdiction that has a modern and evolving legal system (for example, the concept has now been abolished in Alderney and Guernsey and there are no forced heirship provisions in England and Wales, the Isle of Man, the Cayman Isles and the British Virgin Isles).

The Consultation also highlights concerns that the regime could be unattractive to those of high net worth, who consider migrating to Jersey, persuading them to set up trusts in other jurisdictions. It is also noted that the occurrence of Jersey trusts established by a person who is domiciled in Jersey are not that uncommon. For example, if a Jersey domiciled person has a death in service policy governed by Jersey law (the proceeds of which may require to be held in trust), the distribution may be bound by the rules of *légitime*.

The Working Group state that the possible abolition of the principle of *légitime* exceeds the Law and Consultation, affecting, as it does, all Jersey domiciled individuals. Their suggestions therefore only focus on amendments to the Law (in summary, the removal of reference to *légitime* at Article 9) although they suggest that a much wider debate should take place. The States therefore intend to review the general position and confirm in the Consultation that the amendments proposed by the Working Group to the Law are viewed as beneficial.

Ogier Comment

It has always seemed incongruous that Jersey welcomed non-Jersey domiciliaries establishing trusts in breach of their own forced heirship laws, when this would not be possible for Jersey domiciliaries. The States may say that this amendment will need to wait until forced heirship rights (i.e. légitime) is abolished as part of any succession reform in the Island (e.g. if that is what the States want) but why not be bold and largely achieve abolition by allowing Jersey domiciliaries to shield behind Article 9 of the Law when setting up trusts in the way non-Jersey domiciliaries can?

12. Other

Several other areas of potential amendment are considered in the Consultation by the Working Group. However it proposes that no legislative amendments should be made in respect of these areas at the time of writing (reference should be made to the Consultation for further details). These are:

- (a) removal of the restriction on the direct holding of Jersey immovable property by trustees;
- (b) implementation of a specific ‘non-charitable purpose trust’ regime (akin to the Cayman STAR regime and the BVI VISTA regime);

- (c) introduction of an express power for the trust to ratify the conduct of an improperly appointed trustee;
- (d) reconsideration of the language of Article 9 (in light of critiques published in peer journals); and
- (e) considering the trend to legislate on the topic of insolvency and trusts (in particular that there is no formal insolvency regime applicable to trusts in Jersey).

Conclusion

The amendments proposed by the Working Group, as discussed above, are diverse and address a wide range of legal issues within the area of trusts in Jersey.

Now that the Consultation has closed (on 4 July 2016), we await news of the outcome, which we will provide an updated on in due course.

[1] *Knight v Knight* (1840) 3 Beav 148

[2] *Re Representation of AIB Jersey Trust Ltd re the Exeter Settlement* [2010] JRC012

[3] *Re the 'A' Employees Shares Trust* [2010] JRC013

[4] *McPhail v Doulton* [1971] AC 42

[1] *West v Lazard Brothers* [1987-88] JLR 414

[1] *In re the Essel and Bruce Trusts* JLR N18 and [200] JRC065

[1] *AQ Revocable Trust* [2010] 13 ITELR 260

[1] *In re Greville Bathe Fund* [2013] (2) JLR 40

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