TRUST LAW JERSEY 84 AMENDMENT NO 7 UPDATE
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Zillah Howard (Bedell Cristin)
Chair: Naomi Rive (Highvern Trustees)

The Trusts (Jersey) 1984 Law: Amendment No. 7

BY ZILLAH HOWARD, 12 JANUARY 2017
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We are a leading award-winning offshore law firm providing Jersey, Guernsey and BVI legal advice.

Proposed amendments to the Trusts (Jersey) Law 1984

- Consultation Paper: issued 11 April 2016
- Consultation on a variety of topics
- Consultation closed on 4 July 2016
- 21 sets of comments received
- The Government's Response Paper
The Trusts Law: rationale

– Central to Jersey's position as a leading private wealth and trusts jurisdiction

– Introduced on 23 March 1984 to provide a statutory framework for trusts in Jersey: not a codification

Regular review: balanced approach

– Importance of:
  • preserving the reputation of Jersey trusts
  • maintaining the original objective of providing a statutory framework which is not a codification and allows the judiciary to apply and develop principles over time
  • maintaining flexibility to allow structures to be tailored to suit individual requirements

– Amendments desirable to:
  • provide clarity
  • introduce new provisions, to allow Jersey trusts to develop in a competitive and international market place
TRUSTS LAW AMENDMENTS
AMENDMENT NO. 7

TRusts Law amendments

21 July 1989
24 May 1996
2 April 2012
30 January 2013

No. 1
No. 2
No. 3
No. 4
CP. 1
No. 5
CP. 2
No. 6

1 October 1991
27 October 2006
2 November 2012
25 October 2013

CP.1 = Civil Partnership (Consequential Amendments) (Jersey) Regulations 2012
CP.2 = Civil Partnership (Consequential Amendments) (No.2) (Jersey) Regulations 2013

The Response Paper: the Government decides

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Amendment No. 7

- Article 29: provision of information to beneficiaries
- Article 9A: reserved powers
- Article 34: indemnity provisions
- Article 38: accumulation and distribution of income
- Presumption of immediate effect
- Article 47: the court's powers of variation
- Statutory lien

Topics for further consideration or enactment outside the Trusts Law

- Légitime
- Confirmation of appointment of corporate trustee post-merger
- The need for a beneficiary at all times
- Removal of restrictions on direct holding of Jersey immovable property
- Express power to ratify conduct of improperly appointed trustee
- Insolvency and trusts
Topics not being taken forward

- Arbitration
- Trustees self-contracting: Article 31
- Reconsideration of Article 9
1. Article 29: provision of information to beneficiaries

- Two competing factors:
  
  • desirability of withholding information from certain beneficiaries
  
  • upholding the principle of trustee accountability, central to the trust concept

Construction of Article 29: the double negative

"Subject to the terms of the trust and subject to any order to the court, a trustee shall not be required to disclose to any person, any document which –

(a) discloses the trustee’s deliberations as to the manner in which the trustee has exercised a power or discretion or performed a duty conferred or imposed upon him or her;

(b) discloses the reason for any particular exercise of such power or discretion or performance of duty or the material upon which such reason shall or might have been based;

(c) relates to the exercise or proposed exercise of such power or discretion or the performance or proposed performance of such duty; or

(d) relates to or forms part of the accounts of the trust;

unless, in a case to which sub-paragraph (d) applies, that person is a beneficiary under the trust not being a charity, or a charity which is referred to by name in the terms of the trust as a beneficiary under the trust or the enforcer in relation to any non-charitable purposes of the trust."
The issue and the proposal

- The double negative has led to uncertainty as to whether a trust instrument can restrict a beneficiary's entitlement to see the trust accounts

- No. 7 will make it clear that this can be done

- Not a complete prohibition: restrictions within the principles of accountability, with court access where information considered insufficient

For further consideration

- Third parties to enforce a trust on behalf of beneficiaries?

- Preservation of accountability

- An alternative trusts régime: Jersey Enforcer Trust (JET)?
2. Article 9A: reserved powers

- Amendments to provide clarification, such as:
  - article 9A(1)(b): 'all' as well as 'any' of the powers in 9A(2)
  - the holder of a reserved power is not a trustee
  - presumption that reserved powers cease on death, incapacity or bankruptcy
- No presumption that reserved powers are held personally
- No amendment to Article 9A(3): Article 21

3. Article 34: indemnity provisions

- Article 34: an outgoing trustee is entitled to 'reasonable security' for liabilities
- Security provided by way of indemnity
- Article 34(2A): trustee can enforce an indemnity which has been extended or renewed, although not party to it
- Contracts of indemnity often provide for a trustee's officers and employees to be indemnified
- STEP precedents allow for 'Indemnified Persons' to be indemnified
"... 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".

Consultation and proposal

- The Consultation Paper asked whether the ability to enforce indemnities should be extended to non-parties, in addition to trustees

- Amendment No. 7 is to allow direct enforcement by Indemnified Persons (including a trustee’s officers and employees) and those employed by service companies

- Similar amendments in relation to indemnities given during the lifetime of a trust and on its termination
4. Article 38: accumulation and distribution of income

- Article 38: a trust may direct or authorise accumulation of income... income not accumulated must be distributed

- Working Group: no guidance as to permitted retention period for income required to be distributed: nor to whom income to be distributed if not accumulated

The Government proposals

- Widen the options for trustees

- Subject to the terms of the trust:
  
  - accumulate income to capital
  - retain income in character as income
  - distribute income

- Default: income to be retained as such

- Article 38(5) extension to allow all of the trust property to be advanced
5. Presumption of immediate effect

- Where extensive powers are reserved, there may be concerns that a trust is illusory and not valid

- If testamentary intent, compliance with execution formalities for wills

- Article 9A(1): reservation or grant of powers not to affect validity of trust nor delay it taking effect

The Government's proposal

- Additional clarification: presumption that, unless specified otherwise, trust takes immediate effect once property is identified and vested in trustees
6. Article 47: the court's powers of variation

- A trust can be drafted to include a wide power of variation, exercisable by the trustees or others: Article 37

- Article 47 confers limited powers of variation upon the court

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Article 47

- **Article 47 (1):**
  - the court can approve an arrangement which varies a trust
  - the court gives its approval on behalf of those who cannot consent themselves
  - all adult beneficiaries must give their own consent

- **Article 47(3):**
  - the court can confer powers on trustees to enter into transactions considered 'expedient' in the 'management or administration' of a trust
  - not a power to alter beneficial trusts
Consultation question

- The Consultation Paper asked whether a new provision should be added to the Trusts Law, allowing the court to vary trusts without the consent of all adult beneficiaries

- Advantages:
  - a beneficiary's consent could have an adverse tax impact
  - it can be difficult and expensive to obtain the consent of all adult beneficiaries
  - just one beneficiary can prevent a variation being made
  - court variation allows for flexibility

Consultation question (continued)

- Disadvantages:

  - possible adverse impact on Article 9 'firewall' provisions
  - settlors' preference for certainty of trust structuring, rather than court-determined flexibility
The Government's response

- Majority of responses not in favour of an extension of the court's powers of variation

- Amendment No. 7 to give the court a limited power of variation where:
  
  - a beneficiary cannot be found; or
  
  - 'practically unfeasible' to contact a beneficiary
  
  - ONLY if the amendment is in the beneficiary's best interests

7. Statutory lien

- An additional provision: not in the Consultation Paper

- Consulted on previously, prior to the introduction of Amendment No. 5

- Re Z [2015] JRC 031 and Investec Trust (Guernsey) Limited v Glenalla Properties Limited and Ors [2014] 29 October 2014 (Gsy CA)
The Government's proposals

- Non possessory lien, to continue after the trustee has left office
- To secure payment of authorised remuneration and reimbursement of expenses and liabilities reasonably incurred
- Arises when remuneration due / expense or liability incurred
- Priority over beneficiaries but subsequent to other charges
- Survives a distribution unless waived expressly
- Defeated by bona fide purchase for value: attaches to proceeds

Open questions

- The priority of the trustee's lien against other creditors
- Priority between current and former trustees
- Court determination in due course
Closing thoughts

- Importance of keeping the Trusts Law under review, with the ability to make amendments where appropriate

- Amendments to be approached with care, respecting the reputation and integrity of the Trusts Law

- Against this background, the proposed amendments – to clarify and to introduce new provisions – are to be welcomed, supporting Jersey’s position as a leading private wealth jurisdiction

- Anticipated timescale

Thank you

Zillah Howard
Partner
T +44 (0)1534 824735
E zillah.howard@bedellcristin.com
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