PURPOSE OF CONSULTATION

To invite comments on various options for amendments to the Trusts Law

DEADLINE FOR RESPONSES

19 September 2008

SUMMARY / QUESTIONS TO CONSIDER

The following issues are considered and comments are invited:

- Amendments to clarify the extent of the application of the law of Jersey to trusts. The proposed amendments are intended to ensure that decisions in relation to Jersey trusts are made in accordance with Jersey law (as opposed to foreign law).

- The possibility of removing the prohibition on trusts of Jersey immovable property.

- The possibility of clarifying what will constitute a valid purpose for non-charitable purpose trusts.

- The possibility of reform to the “Prudent man rule”. It is proposed that it be made clear that trust property should be considered as a portfolio in relation to the trustees’ duty to preserve and enhance its value.

- Trustees’ remuneration and expenses. It is proposed that, since most Jersey trustees are now professionals, the law should provide for payment of a reasonable fee where the trust deed is silent.

- The rights of beneficiaries to information under a trust. It is proposed to clarify that these are subject to the terms of trust, provided that the principle of accountability is maintained.

- The position of an outgoing trustee. It is proposed that an outgoing trustee shall have a non-possessory lien over the trust property and also that deeds of indemnity for trustees should be enforceable by retired trustees even when they are not party to the deed.

- Various issues of limitation and prescription.

- Certain difficulties which may be faced by a trustee who acts in relation to several different trusts.

- The possibility of introducing a statutory definition of the word ‘charitable’.

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FURTHER INFORMATION  This consultation paper should be read in conjunction with a copy of the law, which can be viewed at the following web address:

SEND COMMENTS TO

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<th>James Mews</th>
<th>Robert Kirkby at Jersey Finance Limited</th>
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It is the policy of Jersey Finance to make individual responses it receives available to the Economic Development Department upon request, unless a respondent specifically requests otherwise.

This consultation paper has been sent to the following individuals / organisations:

The Public Consultation Register
Jersey Finance Limited

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1. Introduction

Jersey is considered one of the finest trusts jurisdictions in the world. Our trust industry is firmly established as a market leader, offering a sophisticated and established product backed up by a strong body of case law. This is coupled with the high quality of service offered by Jersey’s trust company businesses to their clients worldwide.

The backbone of this success story is the Trusts (Jersey) Law (“the Law”) which came into force in 1984. It has been amended four times, most recently in 2006 (“the Fourth Amendment”). There were several proposals contemplated at the time but not ultimately included in the Fourth Amendment. This paper considers these and further amendments.

A trusts working group (“the Working Group”), the members of which are listed at Annex A, meets on a regular basis to consider these issues. The consultation paper has drawn substantially on the deliberations of this group.

Various proposals are set out in this paper and comments are invited to be sent to the addresses stated above by 19 September 2008. Responses will then be reviewed to enable the Economic Development Department to determine whether these proposals are supported and whether any amendments are required.

Following this process, it is anticipated that law drafting instructions will be issued in the fourth quarter of 2008. Once a draft amendment to the Law is received, a further consultation will be carried out to consider technical law drafting issues and to ensure that the concerns of all users of the law have been fully considered and, where practical, addressed.

This paper should be read in conjunction with a copy of the Law. This can be accessed at http://www.jerseylaw.je/Law/display.aspx?url=lawsinforce\consolidated\13\13.875_TrustsLaw1984_RevisedEdition_1January2007.htm.

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2. **Key Issues**

2.1 **Article 9: Protection from Foreign Interference**

Article 9 (formerly Article 8A) was revised by the Fourth Amendment, with the intention of giving Jersey trusts protection from foreign interference equivalent to that available in other off-shore financial centres. Since enactment, the new Article 9 has been subject to comment both academically and judicially, as discussed below.

2.1.1 **Article 9 and the doctrine of comity**

There have been a line of English matrimonial cases, both before and after the Fourth Amendment, in which the English court purported to vary Jersey trusts and there is a perception that the Royal Court gave effect to these orders by invoking the doctrine of comity.

The Jersey cases on the doctrine of comity and the enforcing of foreign judgments are set out below. The *locus classicus* of the Jersey doctrine is set out in the headnote of *Lane v Lane* [1985-86] JLR 48, which states:

> Where on the matter before the Royal Court, there was a declaration of a competent English court, properly made, submitted to by the same parties and not appealed, the doctrine of comity required that the declaration of the English court be given effect to, provided that it was clear that the defendant had had every opportunity to raise all relevant defences at that hearing.

However, in subsequent cases the requirement that the same parties should have submitted to the English court appears to have been waived. While in some cases the trustees have submitted to the English courts (usually for special reasons and following the approval of the Royal Court), the beneficiaries (other than the husband and wife) have not, although their rights are affected by the variation of the trust. It has been said by the Royal Court\(^1\) that the trustees are capable of representing the beneficiaries’ interests in the English proceedings, but it might be considered that this goes against the usual practice in trust cases, where the beneficiaries are entitled to separate representation, because they will generally have competing interests. It also seems that the nature of matrimonial proceedings in England and Wales, where the trustees play a strictly limited role, may not have been fully considered. It seems to the Working Group that there is a risk that in seeking to do justice between the husband and wife, the English courts may inadvertently disregard the interests of the other beneficiaries.

Although in many of the cases it appears that the submission of the trustees to the English courts was a crucial element, in *SW v X Trust Company Ltd (Re H Trust)* [2007] JRC 187 the Royal Court gave effect to the English order, citing the interests of comity, notwithstanding that the trustees had not submitted.

The element requiring that the foreign court’s order be “properly made” also appears to have been removed in subsequent cases. In particular, in *CI Trustees v Minwalla (Re Fountain Trust)* [2005] JLR 359, the Royal Court made no reference to this.

\(^1\) In *CI Trustees v Minwalla (Re Fountain Trust)* [2005] JLR 359 at [29]
element, despite there being some doubt in that case as to the propriety of the English court's order because it purported to declare a Jersey trust void by applying English law principles.

It is, however, important to analyse carefully the role which the Royal Court is carrying out in many of these applications. An application is generally made because a trustee is faced with the decision of a foreign court, in proceedings to which it may not have been a party, which purports to affect the trust property; the trustee has to decide what action to take. The trustee will not normally be able to surrender that decision to the Royal Court, but rather has to take the decision itself. Thus the trustee takes a decision, but because that decision is or is likely to be momentous, it wishes to obtain the sanction of the Royal Court, exercising its supervisory jurisdiction over trusts and trustees. Accordingly, the Royal Court is often being asked to bless a decision on the part of the trustee, and is not on careful analysis being asked to enforce the ruling of a foreign court directly.

The cases following *Lane v Lane* have all made it clear that the Royal Court applies a fairness test in deciding whether to give effect to a foreign judgment in accordance with comity. It will only give effect to a judgment if it is fair to do so in all the circumstances. Moreover, the Royal Court may give effect to foreign judgments in part only, again by reference to what the justice of the case demands, although this approach has been questioned by academics.²

Article 9(4) states that no foreign judgment shall be “enforceable” if it is inconsistent with Article 9. However, it was held in *Re B Trust* [2006] JRC 185 that this did not exclude judgments from being given effect in accordance with the doctrine of comity. It was also said in *H Trust* that Article 9 has “no bearing upon the exercise by the Court of its jurisdiction under Article 51 of the Law.” It may be noted that the equivalent Guernsey provision (s14(4) of the Trusts Law 2008) is drafted in considerably wider terms:

*Notwithstanding any legislation or other rule of law for the time being in force in relation to the recognition or enforcement of judgments, no judgment or order of a court of a jurisdiction outside Guernsey shall be recognised or enforced or give rise to any right, obligation or liability or raise any estoppel if and to the extent that -

(a) it is inconsistent with this Law, or
(b) the Royal Court, for the purposes of protecting the interests of the beneficiaries or in the interests of the proper administration of the trust, so orders.*

2.1.2 Other considerations relating to Article 9

In addition to issues relating to comity, a number of other areas have been identified where it is possible that Article 9 could be improved. The Article appears to attempt to apply Jersey law to dispositions of foreign immovables, which is likely to cause problems for trustees where their ownership of the trust property is not recognised by the law of the jurisdiction where the property is situated.

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² Harris, ‘Comity Overcomes Statutory Resistance: In the matter of the B Trust’ (2007) JGLR 184 at 196

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Article 9(1)(d) makes the administration of a Jersey trust subject to Jersey law, but there does not seem to be any reason why the settlor should not be allowed to specify another law to apply to the administration of the trust. Such an exclusion may also be contrary to the provisions of the Hague Convention.

It is arguable that Article 9(2) could be phrased more broadly such as in s14(3) of the Guernsey Law or Art 91 of the Cayman Law in order to be more effective and give greater protection to Jersey trusts.

Article 9(3), insofar as it deals with the conflict of laws, is not as clear as it could have been. The intention was to ensure Jersey substantive law would always be applied to Jersey trusts matters, not withstanding any alternative pre-existing rule in Jersey international law. Unfortunately, the paragraph does not make it clear that its effect does not exclude the operation of Article 9 itself. Further, the reference to légitime is expected to be made redundant by the Inheritance (Legitimacy and Provision for Family and Dependents) (Jersey) Law 200-, which, if passed by the States, will abolish that concept.

2.1.3 Summary

It is believed that Jersey’s mature body of trusts jurisprudence is one of the strengths of the Island as a trusts jurisdiction. There is a desire to maintain the Royal Court’s ability to deal with cases flexibly so as to do justice between the parties as well as to bring greater clarity to this area. The recent case-law concerning Article 9 indicates that the certainty that was the aim of the Fourth Amendment has not been fully achieved. In addition, a number of other areas have been identified where the Article could be improved. Therefore, it is proposed to repeal the existing Article 9 and replace it with a new provision.

Proposal

The new Article will begin with a paragraph similar to the existing Article 9(1). It will state that certain matters in relation to a Jersey trust (or any disposition of property subject to a Jersey trust) are to be determined only according to Jersey law and that all provisions of foreign law are excluded. These matters shall include: (i) the capacity of the settlor, (ii) any question as to the validity, interpretation or effect of the trust, (iii) the administration of the trust, including the powers, obligations, liabilities and rights of the trustees, and the appointment and removal of the trustees and (iv) the existence and extent of any functions in respect of the trust, including (without limitation) any powers and the validity of any exercise thereof.

The provision will be subject to provisos that it takes effect subject to the terms of the trust; that it does not affect the recognition of foreign laws prescribing formalities for the disposition of property; and that it does not validate any disposition of immovable property which is invalid according to the law of the jurisdiction where the property is situated.

3 See the description by the Bailiff in Re B Trust [2006] JRC 185 at [18]

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The new Article will include a provision similar to the existing Article 9(2) but more widely drawn. This will provide that no Jersey trust (and no disposition of property subject to a Jersey trust) is void, voidable, liable to be set aside, defective in any fashion or subject to any condition, because the laws of any foreign jurisdiction prohibit or do not recognise trusts or because the trust avoids or defeats rights (etc) arising from any personal relationship with the beneficiary or under foreign heirship rules or because of any foreign rule of law or judicial or administrative order (etc) intended to protect (etc) any such rights (etc). Similarly the capacity of any party to the trust is not to be questioned on any of those grounds and no party to the trust shall be subject to any obligation (etc) on any of those grounds.

There will be a provision which is similar to the existing Article 9(3)(b) stating for the avoidance of doubt that references to the application of Jersey law do not include references to any Jersey rule of conflict of laws other than Article 9 itself.

The existing Article 9(4) will be replaced by a new provision which will provide that (irrespective of any other legislation from time to time in force as to the recognition of foreign judgments) no judgment or order of any foreign court shall be enforced, recognised, give rise to any right, obligation, liability or estoppel or otherwise be given any effect, if (and insofar as) in giving or making any such judgment or order the foreign court has purported to apply any rule of foreign law (or any judicial or administrative order) which is rendered inapplicable by Article 9.

There will be a new provision stating that where a foreign court has purported to make an order affecting a Jersey trust under its statutory or inherent powers, then, notwithstanding any applicable rules of Jersey customary law or international law, such order shall be of no effect (and shall not be enforced, recognised, etc) unless in making the order the foreign court has had regard to the rights of the beneficiaries as a whole and has given every beneficiary and trustee a full opportunity to make representations to it.

There will also be a provision similar to the existing Article 9(5) excluding the rule *donner et retenir ne vaut*, but this will be placed in a separate article as it is not obviously connected with the rest of Article 9.

Article 51 will be amended to state that in exercising its discretion under the Article the Royal Court shall have regard to the interests of the beneficiaries as a whole. Also, the Royal Court shall not have regard to any foreign judgment or order to which the new Article 9 applies.

Respondents are asked to consider whether Article 9 should be replaced and, if so, what amendments are needed. In particular, respondents are asked to comment on the above proposals.
2.2 Article 11(2): Trusts of Jersey Immovable Property

Article 11(2)(a)(iii) states that a Jersey trust shall be invalid to the extent that it purports to apply directly to immovable property situated in Jersey. The history and significance of this restriction have been considered at length by the Jersey Law Commission in their Consultation Paper No 9: The Prohibition on Trusts Applying Directly to Jersey Immovable Property. Respondents are referred to that paper for detailed analysis. The Law Commission state that they find the case for removing the prohibition to be overwhelming.

The reasons given by the Law Commission for removing the prohibition are as follows:

a) It would allow a more flexible alternative to holding property for minor children than by tutelle.
b) It would allow general partners of limited partnerships to hold property on trust for the partnership.
c) Overseas experience shows that there is no practical difficulty raised by registering land in the name of a trustee.
d) The previous objection raised by the Royal Commission, that “the inhabitants of Jersey are not prepared for the general introduction of trusts” no longer applies.
e) The restriction is unhelpful for Jersey trustees when asserting their right to hold immovables in foreign jurisdictions.
f) The prohibition is incomplete and can easily be avoided.
g) There is no suggestion that foundations should be prohibited from holding Jersey immovables.
h) There is no relevant principled distinction between immovable and movable property.
i) The abolition of the perpetuity period for Jersey trusts suggests that there is no strong objection to removing rules relating to perpetuities.

The Law Commission suggests that Article 11(2)(a)(iii) of the Law might be abolished. As stated in the Law Commission’s paper there would be some further consequential amendments of other laws in Jersey. The Propriété Foncière Laws will need to be amended to ensure that where individuals or companies acquire Jersey immovable property as trustees, the entry in the Property Register records the fact. There would be a requirement, where property is registered in the name of trustees that, in the case of natural persons, there be at least two and, in the case of a company, that it be registered to do trust company business under the Financial Services (Jersey) Law 1998. There would be an additional requirement that wherever there is a change of trustees that change must be recorded in the Register.

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5 Although this is stated by the Law Commission, and was true at the time of their paper, it is now envisaged that there will be a prohibition on the holding of immovables by foundations, although this prohibition will be reviewed if the position is changed for trusts.

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It would also be necessary to introduce a change in the Housing Regulations prior to this change in the Law being made effective so that restrictions are placed on the right to purchase and occupy immovable property in accordance with the policies of the Housing Minister and Housing Control.

In this context it should be noted that the whole area of housing control is currently under review in the context of Projet 25/2005, which proposes fairly radical changes to population and migration policy. One suggestion is that the restriction on property ownership should be abolished and that the only restriction should be on property occupation. If this suggestion were taken up, it would clearly have a significant impact on the issues set out above.

Stamp duty should be charged on purchases of property at the same rate as applies to non-trust acquisitions or, where Jersey immovable property is left in trust under the terms of a will, at the same rate as in any other case where Jersey immovables are devised under a will. It is suggested that registration in the name of new trustees on a change of trustees should be free of ad valorem duty.

Respondents are asked to express their views on these suggestions.
2.3 **Article 12: Purpose Trusts**

The Trusts (Amendment No 3) (Jersey) Law 1996 provided for the creation of non-charitable purpose trusts in Jersey. It is therefore now possible to establish a valid trust for specific purposes, notwithstanding that the trust does not have charitable objects or ascertainable beneficiaries.

The terms of the trust must define its purpose. Subject to the Article 11(2) provisions preventing trusts which are illegal, immoral, contrary to public policy or too uncertain to be performed, there is no restriction on the purposes for which trusts may be established, although for a trust to exist, the purpose cannot be for the benefit only of the trustee (Article 2(b)).

Purpose trusts are used for in a variety of transactions. One significant use is to hold the shares of a private trust company ("PTC") or special purpose vehicle ("SPV"). It is often desired to keep such companies wholly separate from the settlor of the underlying trust or from the parties to the underlying transaction, but the shares (which have only token value) have to be owned by someone. A common solution is to use a charitable purpose trust, but this has been criticised as having no real charitable intent. It might be simpler to use a purpose trust for the purpose merely of holding the shares. However, there is doubt as to whether this is a valid purpose.

The difficulty is whether the trustee can be said to hold the shares for “any purpose which is not for the benefit only of the trustee” (Article 2(b)) if he or she holds the shares for the purpose of holding the shares. Accordingly it is not clear whether “ownership only” purpose trusts are permitted under the current law.

2.3.1 **Arguments in favour of change**

Various other offshore financial centres specifically provide in their trusts laws that owning assets constitutes a sufficient purpose. Guernsey’s new Trusts Law contains such a provision. There is a need for Jersey trust law to mirror these developments in order to stay as flexible as our competitors.

Although charitable trusts have often been used in such structures in the past this approach has been criticised on the basis that charity is being used for commercial benefit. Also if there is a named charitable beneficiary, and if this beneficiary is aware of the trust, then it may seek to interfere in the management of the underlying structure, when this is not the intention of the settlor.

It has also been argued that if, for instance, the real purpose of a trust is to enable the administration of an underlying trust through a PTC, this should be stated. However this approach risks defeating the point of the PTC structure, because the top level trustee may effectively become responsible for the objects of the underlying trust. While this issue may be more theoretical than real, there is a risk that trust companies will be unwilling to act as trustee if they think they may potentially become liable to account for the underlying trust.

Although there are devices which may be used to get round the issues concerning “ownership only” trusts these introduce additional complexity. Settlers may consider it a simpler option to use another jurisdiction, where such trusts are expressly...

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permitted. There is a real risk that settlors will prefer the simpler route and not use Jersey trusts unless the law is changed.

2.3.2 Arguments against change

It is said that there is an “irreducible core” of trustee duties which must be present for a trust to exist, a point that is given increased weight by consideration of the Hague Convention. Article 2 of the Convention states that one of the characteristics of a trust is that the trustee has the power and duty to manage, employ or dispose of the assets in accordance with the terms of the trust. In an “ownership only” trust the trustee would not appear to have any duty to manage, employ or dispose of the assets. It could therefore be argued that such a trust was outside the terms of the convention and therefore liable not to be recognised overseas. This would not only cause practical problems for settlors and trustees but might be damaging to Jersey’s reputation as a trusts jurisdiction.

Secondly, no settlor ever wishes assets to be in trust purely so they can be in trust. There is always an ulterior motive: to enable the administration of an underlying trust, or to facilitate a structured finance transaction, or to prevent the break-up of a family business, or to protect the assets from the claims of others, etc. Some may consider that the stated purpose of the trust should be its actual purpose.

As a matter of public policy, there is a risk that “ownership only” purpose trusts may be open to abuse by those trying to put their assets beyond the reach of their creditors. The danger might be that a settlor would use such a trust to separate the benefit and ownership of the assets, retaining the benefit but putting the ownership into the trust.

2.3.3 Previous consultation

The suggestion that “ownership only” purpose trusts should be expressly permitted was also included in the consultation paper preceding the Fourth Amendment. The response to that consultation paper was mixed and it was decided to take no further action at that time. The point is raised again here because of the international developments mentioned above which may mean that it is time for Jersey to act in order to keep a level playing field in line with other offshore jurisdictions.

2.3.4 Enforcer

One suggestion that has been put forward is that the suggested change to what can constitute a valid purpose should be combined with a change to the provisions concerning the enforcer of a purpose trust, so that the enforcer would have to be Jersey resident or regulated. While this might add to the administration costs of the trust and reduce the flexibility available to the settlor, it would address the issue that an enforcer appointed in a territory that lacked Jersey’s high regulatory standards might fail in his or her duty to enforce the trust and the Jersey courts would have no effective oversight.

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Respondents are asked to consider whether Article 12 (or Article 2(b)) should be amended to state that the holding of property shall constitute a valid purpose. Should there be some requirement for a continuing duty on the trustees? If so, what should that duty be? If respondents are in favour of the amendment, could they please give examples of problems caused by the existing law? Finally, would respondents be in favour of requiring enforcers to be Jersey resident or regulated?
2.4 Article 21: Prudent Man Rule

Article 21(1) of the Trusts Law states that a trustee must exercise his or her powers and discretions with due diligence, as would a prudent person, to the best of his or her ability and skill, and observe the utmost good faith.

The Working Group considered whether it would be useful to rewrite this rule substantially, but concluded that it would not. The preference of the working group was for keeping trustees’ duties in simple and general terms rather than trying to specify specific standards which may not be readily applicable to all situations and which would require updating to reflect changes in business practices.

However, there was one point which the working group felt it might be helpful to clarify. Article 21(3) could be amended to make clear that the trust property should be considered as a portfolio of assets in relation to the preservation and enhancement of its value, rather than treating each trust asset separately.

Proposal

It is proposed that Article 21(3) be amended to state that for this purpose the trust property shall be considered as a whole and that where the property has been invested in a range of assets, those assets shall be considered as a portfolio.

Respondents are asked whether the duty imposed by Article 21 is suitable. Should the duty be clarified or modified in any way? Do respondents agree that it would be helpful to make explicit that the trust property should be considered as a portfolio of assets in relation to its preservation and enhancement?
2.5 Article 26: Remuneration and Expenses of the Trustee

Article 26 of the Law states that unless a trustee is so authorised by the terms of the trust, the consent in writing of the beneficiaries or any order of the Court, the trustee shall not be entitled to remuneration for his or her services. Paragraph (2) states that the trustee may reimburse him- or herself out of the trust for all expenses and liabilities reasonably incurred in connection with the trust.

Historically the office of trustee was gratuitous. Often the trustees would be family or friends of the settlor. However, it is becoming more and more common to have professional trustees. It is the nature of a professional trustee that he or she requires to be paid a reasonable fee. Thus Art 26 can cause a problem if, through an omission in drafting, the trust deed makes no provision for the payment of trustees’ fees. In Re Mrs M G Rearden 1983 Trust [2005] JRC 130, the Royal Court was willing to vary the terms of the trust to insert a trustee remuneration clause where it was clear that it had been the settlor’s intention that a professional trustee should act. However, an application to court is a time-consuming, expensive and cumbersome solution to this problem.

It is therefore the view of the Working Group that, where a professional trustee is acting, he or she should be entitled by default to a reasonable fee for his or her services. This would be subject to any provision to the contrary in the trust deed. A similar provision already exists in the UK: see s29 of the UK Trustee Act 2000.

The Working Group also considered following the model of the new Trusts (Guernsey) Law 2007, s35(3) which provides:

“For the avoidance of doubt, and subject to the terms of the trust, the cost of purchasing and maintaining professional indemnity insurance is, for the purposes of subsection (2), an expense properly incurred in connection with the trust, but not if the insurance is against liability for a breach of trust arising from the trustee’s own fraud, wilful misconduct or gross negligence.”

The majority of the Working Group were opposed to this step, on the basis that it was preferable to retain the broad test of “reasonably incurred”: otherwise there was a danger that the principle expressio unius est exclusio alterius might apply. The Working Group was of the view that in the vast majority of cases professional indemnity insurance would constitute a recoverable expense under the present law.

Proposal

It is proposed that Article 26 be amended to provide that, where the trust deed is silent on the matter, a professional trustee shall be entitled to the payment of a reasonable fee for his or her services using the UK Trustee Act 2000 as a model.

Respondents are asked to express their views on the above proposal. Comments are also invited on whether trustee professional indemnity insurance should be specifically identified as an expense of the trust.

6 The express mention of one thing excludes others

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2.6 Article 29: Disclosure of Information to Beneficiaries

The duty of trustees to account is a core principle of trust law both in England and in Jersey. In order to give effect to the duty to account it is essential that there is at least one individual, usually a beneficiary, who is in possession of sufficient information relating to the trust to enable him or her to hold the trustees to account. The extent of information to which beneficiaries are entitled in order to allow them to hold trustees to account is also critical. Both these principles have been considered by the Working Group. To aid further consideration of these issues, a summary of the current position under Jersey law is set out below.

2.6.1 Beneficiaries’ statutory entitlement under Article 29

Article 29 of the Law (previously Article 25) is the basis for a beneficiary’s right to information under Jersey law. Article 29 has been the subject of considerable debate over a number of years and a proposed reform of Article 29 was considered in some detail in the Jersey Law Commission’s Consultation Paper No 1: The rights of beneficiaries to information regarding a trust (February 1998) and the subsequent Topic Report (October 1998). These papers are broadly endorsed by the Working Group although the position has now changed somewhat as a result of the Rabaiotti judgment.

One of the perceived concerns over Article 29 is that it can be argued that it does not impose any positive obligation upon trustees to disclose information to beneficiaries but rather lists material which the trustees are entitled to withhold, subject to the terms of the trust or an order of the court.

Article 29(d) of the Law requires trustees to disclose to beneficiaries of a trust, named charities, or the enforcer of a non-charitable purpose trust “any document which… relates to or forms part of the accounts of the trust.” However, the existence of a double negative within Article 29 makes construction of the article less obvious than necessary and it is not entirely clear whether sub-paragraph (d) is subject to the terms of the trust or to any order of the court. The legal basis of the beneficiary’s right to inspect documents forming part of the ‘accounts of the trust’ and the definition of this phrase have been discussed in the case law, summarised in the following section.

2.6.2 The legal basis for disclosure

In 2000 the Deputy Bailiff delivered his judgment in the case of re Rabaiotti 1989 Settlement [2000] JLR 173. The judgment in Rabaiotti concluded that under Jersey law a beneficiary’s right to inspect trust documents was not founded upon any equitable proprietary interest in respect of such documents but upon the trustee’s fiduciary duty to keep the beneficiary informed and to account for his trusteeship. Whilst a beneficiary would ordinarily be entitled to inspect certain trust documents this entitlement was always subject to the discretion of the court and disclosure could be refused if the court was satisfied that it was not in the best interests of the beneficiaries as a whole.

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This position is consistent with the Privy Council’s decision in *Rosewood Trust Co Ltd v Schmidt* [2003] UKPC 26, which is likely to be followed by the Jersey courts. In this case, the Privy Council chose to adopt the approach of the Australian court in *Hartigan Nominees Pty Ltd v Rydge* [1992] 29 NSWLR 405 where it was stated that the right to seek disclosure was best approached as simply one aspect of the inherent jurisdiction of the court to supervise and, where appropriate, to intervene in the administration of trusts.

The Privy Council in *Rosewood v Schmidt* went on to hold that no beneficiary, whether with a fixed or discretionary entitlement, has an automatic right to disclosure of trust documents and that where there were issues of personal or commercial confidentiality, the court might have to balance the competing interests of different beneficiaries, the trustees themselves and third parties. This finding is considered to be consistent with Jersey law as set out in the decision in *Rabaiotti*. It also adds weight to the view expressed by the Deputy Bailiff in the case of *In the matter of the L & M Trusts* [2003] JLR N6 that beneficiaries will not readily be allowed access to information where the sole purpose of obtaining the information is to mount a challenge to the validity of the trust in foreign proceedings.

### 2.6.3 Definition of Trust Accounts

As stated above, Article 29 of the Law as presently drafted entitles a beneficiary of a trust to see documents that relate to or form part of the accounts of the trust. However there is no definition of ‘the accounts of the trust’ in the Law and as a result this phrase has fallen to consideration by the Royal Court.

In the case of *West v Lazard Brothers* (1987-88) JLR 414 the court held that ‘accounts’ ought to have a very wide meaning and includes every bit of information concerning the administration of the trust for which the beneficiaries may properly ask including accounts, vouchers, coupons, documents and correspondence relating to the administration of the trust property. In contrast, in *Re A Settlement* (1994) JLR 319 the Royal Court rejected the argument that ‘accounts’ embraced virtually every document connected with the trust and held that the statutory provision made it clear that, subject to the terms of the trust and to any order of the court, trustees are entitled not to disclose matters touching upon the exercise of a power or discretion or the performance of a duty imposed upon them.

The matter was also considered at length in the *Rabaiotti* case where the court held that a beneficiary was normally entitled to inspect documents such as the trust deed and documents that show the nature and value of the trust property, the trust income and how the trustees have been investing and distributing the trust property, but that a beneficiary is not normally entitled to see a letter of wishes because this is a document that is confidential to the trustees.

Consideration has been given both by the Law Commission and previous trusts law working parties as to whether it would be helpful to introduce a statutory definition of what is meant by ‘accounts of the trust’ or ‘trust documents’. It is widely considered that forming a satisfactory statutory definition would be difficult if not impossible.

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2.6.4 Variation of beneficiaries rights

A further issue concerns the extent, if at all, that the trust deed can restrict the beneficiaries’ rights of information. The Royal Court expressly declined to decide this point in Rabaiotti. The view of the Working Group is that it is possible to restrict such rights provided that the principle of accountability is maintained. However, the uncertainty in the law means that settlors are commonly advised not to restrict such rights.

The Working Group also note that the Jersey Law Commission, in its Topic Report No 1: The rights of beneficiaries to information regarding a trust, recommended that Article 29 (previously numbered Article 25) be amended to make clear that the right to information is subject to the terms of the trust but subject also to an overriding right to apply to court if the information provided is insufficient to render the trustees accountable.

The experience of the Working Group is that settlors do often wish to restrict beneficiaries’ rights to information. For instance, many settlors of dynastic trusts do not wish the beneficiaries to be aware of the provision made for them until they have established themselves in their careers and attained maturity. In some cases a settlor may wish the trust to remain secret until his or her death.

However, the Working Group recognises that the principle of accountability means that settlors cannot be given an entirely free rein in this respect. Ultimately, it is not in the interests of settlors or beneficiaries if trustees are not accountable. One suggestion is that there should be a minimum requirement of at least one person who is given the necessary information and is capable of enforcing the trust. This person could potentially be the settlor him- or herself, a nominated beneficiary or an enforcer.

Comparison may be made with the proposed Foundations Law, under which it is anticipated that beneficiaries will have no automatic right to information. Instead, it will be the foundation guardian to whom the foundation council must account for their administration of the foundation and who will be responsible for enforcing the foundation’s constitution. It is envisaged that the key difference between foundations and trusts in this respect is that a foundation must have a guardian. It would be possible to expand the role of protectors of trusts to mirror this, but the Working Group felt on balance that this would not be desirable as a general measure, although there would be scope for allowing settlors to include provision for a protector where they wished to restrict beneficiaries’ rights to information.

Proposals

It is proposed that Article 29 be amended to make clear that the beneficiaries’ right to information is subject to the terms of the trust, provided that the principle of accountability is maintained. There will be a right for beneficiaries to apply to court for a variation in their right to information where this is necessary.

In order to ensure compliance with the principle of accountability it is proposed to provide that there must always be at least one person who has sufficient information (and sufficient powers) to hold the trustees to account. This person could be the...
founder him- or herself (although this may be undesirable for tax reasons), a nominated beneficiary or an enforcer.

Respondents are asked to comment on this proposal. To what extent should settlors be able to restrict beneficiaries’ rights to information? What is the minimum level of information which must be given to beneficiaries to maintain trustee accountability? Do respondents agree that the position of enforcer could be used to make good any gap in accountability which may arise where the beneficiaries’ access to information is restricted?
2.7 Article 34: Position of Outgoing Trustee

2.7.1 Background

The consultation paper published prior to the Fourth Amendment raised the issue of the proliferation of indemnities and chains of indemnities which arise upon the retirement of a trustee. These can make the execution and administration of trusts inefficient, thereby adding to costs. The experience of the Working Group suggests that retired trustees call upon these indemnities very rarely.

The previous consultation put forward the possibility that statutory provision should be made for a non-possessory lien for a retiring trustee. There was a strong response in favour of introducing a statutory lien, although a number of respondents felt that this would not solve the issue of indemnities.

This matter has been the subject of further consideration since the previous consultation, and, apart from the continuing suggestion of a statutory lien, the question of contractual rights for third parties has also been reviewed. This receives further consideration at 2.7.3 below. In relation to liens it is noted that the new Trusts (Guernsey) Law 2007 provides for a statutory lien.

2.7.2 Lien

Jersey law recognises the right of a trustee to be reimbursed for expenses and liabilities. In most common law jurisdictions, the right of a trustee to indemnity has been seen as not only conferring a right to retain possession of trust property, but also as 'a property right equivalent to (and ranking ahead of) the interests of the beneficiaries.' However Jersey law does not have any clearly developed concept of lien, although the concept of non-possessory security is being considered in the draft Security Interests (Jersey) Law 200- currently being prepared. The Working Group is mindful of the need to ensure that a further trusts law amendment should be compatible with the new security interests law.

A statutory provision could provide for the interest of the trustee to be protected at all times by a lien over the trust fund ranking in priority to the interest of the beneficiaries but subsequent to other charges. It would secure the payment of authorised remuneration to the trustee and the reimbursement of all expenses and liabilities reasonably incurred by the trustee. If the property of the trust fund were no longer identifiable, or if it were in the hands of a bona fide purchaser for value without notice the lien might be lost. The lien would arise at the time the trustee incurred the relevant liability (etc), even though it would not necessarily be crystallised at that time. It could be provided that such a lien would survive a distribution, unless expressly waived. Further, such a lien would continue without any limit of time.

2.7.3 Rights of third parties

It is also considered that much of the time and expense arising from the obligations imposed by contractual indemnities might be reduced, if not eliminated, were it possible for a person to take the benefit of a contract to which he was not a party. In

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8 Dimos v Dikeakos Nominees Ltd (1997) 149 ALR 113 at 117, per Hearey J

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that way a former trustee could be included in the ambit of a deed, and his indemnity could be subsequently renewed, without the necessity for him to join in executing the documentation. Such a principle exists in many EU countries and was introduced in England through the Contracts (Rights of Third Parties) Act 1999.

It could be helpful to amend Jersey’s trust law in a similar way as an addition to Article 34 of the Law, perhaps in a new paragraph (2A). This would provide that where the security given to a trustee in accordance with paragraph (2) is to be renewed or extended by contract the trustee in question may in his or her own right enforce a term of that contract notwithstanding that he or she is not a party to it if:-

i. the contract expressly provides that he or she may, or

ii. the term purports to confer a benefit on him or her, and (in either case)

iii. he or she is expressly identified in the contract.

Such a trustee would also be able to avail him- or herself of any remedy which would be available to a party to the contract

For such a provision to have the desired effect of simplifying the process of trustee retirement, it would be necessary for retiring trustees to include in their indemnities something to the effect that the new trustee would be released from the indemnity if and to the extent that he or she imposed an indemnity in the same terms on any persons acquiring the trust property. However, there is the possibility that retiring trustees might be concerned that any subsequently appointed trustee might not be good for the indemnity and therefore that retiring trustees might wish to retain a broad discretion as to whether to waive their indemnities.

**Proposal**

It is proposed that Article 34 be amended to provide that a trustee shall have a non-possessory lien over the trust property. This would secure the payment of authorised remuneration to the trustee and reimbursement of all expenses and liabilities reasonably incurred by the trustee and would arise at the time the remuneration fell due or the expense or liability was incurred. The lien would take priority over the beneficiaries’ interests but be subsequent to other charges on the trust property. Being non-possessory the lien would continue to apply over the trust property even after it had ceased to be in the hands of the original trustee. Depending on responses, the lien may survive a distribution unless expressly waived. The lien would only be defeated by a *bona fide* purchaser for value.

It is also proposed to amend Article 34 to provide that where security is given to a trustee in accordance with paragraph (2) and such security is to be renewed or extended by contract the trustee in question may in his or her own right enforce a term of that contract notwithstanding that he or she is not a party to it if:-

i. the contract expressly provides that he or she may, or

ii. the term purports to confer a benefit on him or her, and (in either case)

iii. he or she is expressly identified in the contract.
Respondents are asked to comment on these proposals. In particular, comments are invited as to whether these steps would help to solve the problem of extravagant indemnities and as to whether any other steps would be helpful in this regard. If respondents are in favour of introducing a trustees’ lien, comments are invited as to whether, and in what circumstances, this lien should survive a distribution.
2.8  Article 57: Limitation of Actions or Prescription

The possibility has been raised that beneficiaries may take advantage of the terms of Article 57 so as to extend the three year limitation period that exists for breach of trust claims. By way of example, Article 57(3A) states that a current trustee has three years to bring a claim for breach of trust against a former trustee and that time begins to run from the date on which the former trustee ceased to be a trustee of the trust. The question that arises is whether, in circumstances where all of the beneficiaries of a trust are adults and have had knowledge of a breach of trust for in excess of three years, so that limitation has expired against them, it is open to the beneficiaries, subject to the terms of the trust instrument, to seek a change of trustee and then ask the new trustee to bring an action for breach of trust against the former trustee. If this is possible then the beneficiaries have in effect overcome the fact that limitation has expired against them. It may be that Article 57 should be clarified to ensure that stale claims cannot be revived.

The Guernsey Trusts Law has recently been amended to include an 18 year “long stop” limitation period (s74(3)), under which all actions for breach of trust (save for those involving fraud or where the trustee retains trust funds) cease to be actionable 18 years after the breach. The advantage of this is that it allows trustees to draw a line under ancient events, in relation to which evidence is likely to be sparse. The introduction of this long stop would also help to alleviate the problem identified in the previous paragraph.

The Working Group have also taken notice of the Jersey Law Commission’s Consultation Paper: Prescription and Limitation. In particular, respondents’ attention is drawn to the Law Commission’s view that “prescription” is to be preferred over “limitation” in the Jersey context.

The Law Commission refer, at paragraph 5.7 of their consultation paper, to a lack of clarity in the application of the customary law principle of empêchement d’agir to breaches of trust. This is a principle which provides that prescription will not run against a person who is subject to an impediment, either involving a legal disability or a physical impossibility of bringing an action. Given that Article 57 itself contains a provision that time shall not run during the minority of a beneficiary, it is not clear whether the broader customary law principle also applies.

The Law Commission’s paper also suggests that it is not clear whether, in the case of minor beneficiary, time is stopped in respect of claims both by a beneficiary and by an enforcer (if any). Logic would suggest that time ought not to be suspended in respect of the enforcer, but the strict wording of the Article implies otherwise. This will rarely be a problem in practice since a trust with beneficiaries will not usually have an enforcer.

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Respondents are asked to consider whether Article 57 requires clarification. Should the principle of empêchement d’agir apply to actions for breach of trust. Does this need to be clarified in the Law? Would it be more appropriate to await a more wide ranging review of the Jersey law of prescription, as is envisaged by the Law Commission? Ought Jersey to introduce an 18 year long stop provision?
2.9 Transactions where One Trustee Acts for Different Trusts

Trustees, especially professional trustees, often find themselves acting as sole trustee of numerous trusts. Sometimes these include multiple trusts with the same settlor and/or the same beneficiaries. In this context a trustee will sometimes wish to “transact” with him- or herself as trustee of two different trusts. This might occur, for instance, where the trustee wishes to make a loan from a cash rich trust fund to a cash poor trust fund, perhaps with the same beneficiaries. Of course all the assets would remain vested in the common trustee at all times, but it may be that the beneficial interests in these assets would change. The trustee must take care that such a “transaction” does not impugn his duty under Article 21(6) of the Law to keep property subject to one trust separately from property subject to another trust.

If the same situation occurred where the two trusts had differing trustees, then the trustees acting as trustees of the respective trusts could enter into a contract with each other, e.g. for a loan. However, it is not certain as a matter of Jersey law whether it is possible for such a contract to exist where there is only one trustee involved, as is often the case. Similar issues arise where a trustee of one trust wishes to "appoint" assets from that trust to another trust of which he or she is also a trustee and seeks to be indemnified out of those assets in respect of liabilities incurred by him or her prior to the appointment (liabilities in respect of which he or she could have been indemnified from the assets had they been retained on the terms of the first trust). It is suggested that it may be helpful to clarify this point.

Respondents are asked whether such clarification is desirable. It would be helpful if respondents could identify whether there are specific problems which arise from the existing state of the Law. It would also be helpful if respondents could provide examples of how this point is dealt with in overseas trusts jurisdictions, preferably by reference to specific statutory provisions. How should the Law be amended (if at all) to deal with this issue?
2.10 Introduction of a Statutory Law Definition of the Word ‘Charitable’

The Law uses the term ‘charity’ twice and ‘charitable’ ten times but there is no express definition of these expressions in the Law or elsewhere. The Jersey Law Commission Consultation Paper No 7: The Jersey Law of Charities (issued in January 2004 and revised in November 2006) recommended that there should a statutory definition of ‘charity’, which the Law Commission recommended be inserted in an entirely new Charities Law.10

The Jersey Law on charity has effectively followed the preamble to the English Charitable Uses Act 1601 (also known as the Statute of Elizabeth). The categories of charitable activity which applied in England prior to the Charities Act 2006, and which still apply in Jersey, were set out in Pemsel’s Case [1891] AC 531. The four categories are: (i) the relief of aged, impotent and poor people, (ii) the advancement of religion, (iii) the advancement of education and (iv) other purposes beneficial to the community not falling under any of the three preceding heads. Members of the Working Group have proposed that this definition be modernised and extended. For instance, because the Recreational Charities Act 1958 did not extend to Jersey, sporting associations are not classed as charitable.

The present intention of government is that the existing case law definition should be placed on a statutory basis (subject to one small modification) in the Income Tax Law, and that this will be brought forward in the 2008 budget. However, this still leaves open the possibility of a more wide-ranging reform to a definition now over 400 years old, which is no longer used in the jurisdiction where it was formulated.

Jersey is currently reviewing the possibility of introducing a Jersey Charities Commission, with an associated Charities Law. If this takes place, the definition of ‘charity’ will naturally be included in the new law. However, the outcome of the review is not yet known. If the conclusion is that it would not be appropriate to create a Charities Commission, then it is proposed that the discrete question of defining ‘charity’ be taken forward separately.

The new English definition of ‘charitable purpose’ is set out in s2 of the Charities Act 2006 and is reproduced below for comparison:

(1) For the purposes of the law of England and Wales, a charitable purpose is a purpose which—

   (a) falls within subsection (2), and
   (b) is for the public benefit (see section 3).

(2) A purpose falls within this subsection if it falls within any of the following descriptions of purposes—

   (a) the prevention or relief of poverty;
   (b) the advancement of education;
   (c) the advancement of religion;
   (d) the advancement of health or the saving of lives;
   (e) the advancement of citizenship or community development;

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10 Both versions of the paper are available at http://www.lawcomm.gov.je/.
(f) the advancement of the arts, culture, heritage or science;

(g) the advancement of amateur sport;

(h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;

(i) the advancement of environmental protection or improvement;

(j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;

(k) the advancement of animal welfare;

(l) the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services;

(m) any other purposes within subsection (4).

(3) In subsection (2)—

(a) in paragraph (c) “religion” includes—

(i) a religion which involves belief in more than one god, and

(ii) a religion which does not involve belief in a god;

(b) in paragraph (d) “the advancement of health” includes the prevention or relief of sickness, disease or human suffering;

(c) paragraph (e) includes—

(i) rural or urban regeneration, and

(ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities;

(d) in paragraph (g) “sport” means sports or games which promote health by involving physical or mental skill or exertion;

(e) paragraph (j) includes relief given by the provision of accommodation or care to the persons mentioned in that paragraph; and

(f) in paragraph (l) “fire and rescue services” means services provided by fire and rescue authorities under Part 2 of the Fire and Rescue Services Act 2004 (c. 21).

(4) The purposes within this subsection (see subsection (2)(m)) are—

(a) any purposes not within paragraphs (a) to (l) of subsection (2) but recognised as charitable purposes under existing charity law or by virtue of section 1 of the Recreational Charities Act 1958 (c. 17);

(b) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of those paragraphs or paragraph (a) above; and

(c) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised under charity law as falling within paragraph (b) above or this paragraph.
Respondents are asked whether a revision to the existing Jersey law on the meaning of ‘charity’ is desirable. If so, does the English law provide a suitable model? Respondents may wish to consider whether there are additional categories of charitable purposes which should be included or whether any of the categories in the English law should be excluded. Respondents may also wish to comment on whether a “public benefit” test should be applied, and if so whether any definition of this phrase is required.
**Annex A**

**Members of the Trusts Law Working Group**

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<thead>
<tr>
<th>Name</th>
<th>Company/Association</th>
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<tbody>
<tr>
<td>Giles Corbin</td>
<td>Mourant du Feu &amp; Jeune</td>
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<tr>
<td>Alan Dart</td>
<td>Bedell Cristin</td>
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<td>Philip Le Cornu</td>
<td>Jersey Association of Trust Companies</td>
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<td>Joanne Luce</td>
<td>Ansbacher Channel Islands</td>
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<td>Paul Matthams</td>
<td>Carey Olsen</td>
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<tr>
<td>Steven Meiklejohn</td>
<td>Ogier (representing the Society of Trustees and Estate Practitioners)</td>
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<td>Linda Williams</td>
<td>The Law Society of Jersey</td>
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<td>Naomi Rive</td>
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