

Proposed Amendments to the Trusts (Jersey) Law 1984

INTRODUCTION

The trusts industry in Jersey offers a sophisticated product and a high level of service to a worldwide body of clients, making Jersey the trusts jurisdiction of choice. One of the key strengths of the jurisdiction is the well-developed legislation augmented by a strong independent judiciary and a recognised body of case law relied upon around the world. As part of the continuing work to ensure that the legislative framework for trusts, the Trusts (Jersey) Law 1984 ("TJL84"), continues to support the needs of the industry certain amendments are being proposed by the Government of Jersey.

The TJL84 is not, and was not intended to be, a codification of the law thereby allowing flexibility and development. It has been amended only six times since 1984. Certain of the proposals within this consultation were canvassed previously but not taken forward for various reasons and are considered again in the context of the developing jurisprudence and evolving industry practice in order to build upon the strong foundations already in place. The aim is to clarify certain provisions where necessary, or to incorporate new provisions where required. It is important that those involved in the trusts industry both in the island and beyond its shores, are able to regard Jersey's trusts law as having maximum flexibility for clients within an appropriate and legitimate framework. The Government of Jersey considers that these proposed amendments support that proposition.

Therefore, various amendments to the TJL84 have been proposed drawing on the work of the Jersey Finance Trusts Law Working Group (the "Working Group") comprised of leading industry practitioners (as listed at Appendix A) and in light of their practical experience in the operation of the TJL84. The Government of Jersey is grateful to them for their work in this regard.

The Government of Jersey intends to bring forward legislation on the amendments for adoption during the course of 2016.

There are 12 areas for consultation:

1. The need for a beneficiary at all times during the existence of a trust
2. The rights of beneficiaries to information
3. Reservation of powers by a Settlor
4. Arbitration provisions
5. Trustees self-contracting
6. Confirmation of the appointment of a corporate trustee post-merger
7. Extension of indemnity provisions
8. Retention and accumulation
9. Presumption of lifetime effect
10. Variation of trusts
11. L gitime
12. Other

This paper should be read in conjunction with a copy of the Law which can be accessed at:

<https://www.jerseylaw.je/laws/revised/Pages/13.875.aspx>

The Consultation Paper also references a variety of other documents, links to which appear in the appropriate sections below.

Date published:

Closing date:

11 April 2016

4 July 2016

How we will use your information

The information you provide will be processed for the purpose of consultation. The Chief Minister's Department will use your information in accordance with the Data Protection (Jersey) Law 2005 and the Freedom of Information (Jersey) Law 2011. Please note that we may quote or publish responses to this consultation but we will not publish the names and addresses of individuals. If you do not want any of your response to be published, you should clearly mark it as confidential. Confidential responses will be included in any summary of statistical information received and views expressed.

Who should respond and ways to respond

The Government of Jersey is interested in receiving responses from individuals or businesses that have an interest in the trusts industry.

Responses should be submitted **by e-mail** to:

George Pearmain

Lead Policy Adviser, Private Wealth and Financial Crime
Financial Services Unit, Chief Minister's Department

Email: g.pearmain@gov.je

Alternatively, Jersey Finance will be collating an industry response and these responses should be sent to:

Thomas Cowsill

Jersey Finance Limited

Email: thomas.cowsill@jerseyfinance.je

Responses sent to Jersey Finance will be shared with the Government of Jersey unless the respondent indicates that they wish to remain anonymous. Please indicate clearly on your response if this is the case.

This consultation paper has been sent to the Public Consultation Register.

Feedback on this consultation

We value your feedback on how well we consult or seek evidence. If you have any comments on the process of this consultation (as opposed to the issues raised) please contact Communications.Unit@gov.je

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

1.1 Whether or not a Jersey law trust requires there to be a beneficiary at all times has become the subject of some comment as a result of three decisions of the Royal Court of Jersey:-

- (a) *Re Representation of AIB Jersey Trust Limited re the Exeter Settlement* [2010] JRC012
- (b) *Re the 'A' Employees Shares Trust* [2010] JRC013
- (c) *Harper v Apex Trust Company Limited* [2014] JRC253

1.2 It is established law that for a trust to be valid, there must be: certainty of intention, certainty of subject matter and certainty of objects (see *Knight v Knight* (1840) 3 Beav 148 at 172). In simple terms, therefore, it must be clear from the terms of the trust that it is the intention to create a trust (rather than anything else), what the initial trust assets are, and who the trust is to benefit (whether the beneficiaries or the purpose). It is this third requirement that has been the subject of comment.

1.3 The TJJ84 makes various references to beneficiaries which on one analysis suggest that it is not necessary for there to be a beneficiary at all times, in the sense that a beneficiary need not be ascertained or in existence either at the time of the creation of the trust, or at a particular later period during its existence. The relevant provisions are as follows:-

Article 1 defines a beneficiary as 'a person entitled to benefit under a trust or in whose favour a discretion to distribute property held on trust may be exercised.'

Article 2: Existence of a trust

A trust exists where a person (known as a trustee) holds or has vested in the person or is deemed to hold or have vested in the person property (of which the person is not the owner in the person's own right) –

- (a) for the benefit of any person (known as a beneficiary) whether or not yet ascertained or in existence;*
- (b) for any purpose which is not for the benefit only of the trustee; or*
- (c) for such benefit as is mentioned in sub-paragraph (a) and also for any such purpose as is mentioned in sub-paragraph (b).*

Article 10(1) and (2): Beneficiaries of a trust

A beneficiary shall be

- (a) identifiable by name; or*
- (b) ascertainable by reference to –*
 - (i) a class, or*
 - (ii) a relationship to some person whether or not living at the time of the creation of the trust or at the time which under the terms of the trust is the time by reference to which members of a class are to be determined.*

Article 42(1): Failure or lapse of interest

- (1) Subject to the terms of a trust and subject to any order of the court, where–*
- (a) an interest lapses;*
 - (b) a trust terminates;*
 - (c) there is no beneficiary and no person who can become a beneficiary in accordance with the terms of the trust; or*

(d) property is vested in a person which is not for his or her sole benefit and the trusts upon which he or she is to hold the property are not declared or communicated to the person,

the interest or property affected by such lapse, termination, lack of beneficiary or lack of declaration or communication of trusts shall be held by the trustee or the person referred to in sub-paragraph (d), as the case may be, in trust for the settlor absolutely or if he or she is dead for his or her personal representative.

There are also provisions as to class interests at Article 36.

The particular cases

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

A Jersey discretionary trust was to be established with a named charitable default beneficiary, a provision for the class of beneficiaries to be named in a schedule and a power to add beneficiaries. The trust deed was executed with the schedule of beneficiaries intentionally left blank; unfortunately, the name of the charitable default beneficiary was unintentionally also left blank. One year after execution, the trustee exercised its power to add beneficiaries. Some years later, the concern was raised that a valid trust may not have been created given the uncertainty as to the identity of the beneficiaries at the outset and directions were sought from the Royal Court. The court held that no valid trust had ever been created (but was prepared to rectify the trust deed by insertion of the name of the charitable default beneficiary with usual retrospective effect from date of execution thereby saving the trust). The power of addition was not sufficient to save the trust: in the absence of any beneficiaries at the outset there was never a valid trust and consequently no power to add. In any event, the court stated that the

object of a power to add beneficiaries is not a beneficiary until the power is exercised.

Commentators have argued that this is a restrictive interpretation of the English law test of whether it is possible to say of any given person whether or not that person is within the class of beneficiaries at the given time. This is a conceptual rather than evidential test of certainty and a comprehensive list of beneficiaries is not required (*McPhail v Doulton* [1971] AC 42). Furthermore, that even if initially it fails, a resulting trust arises in favour of the settlor which trust is subject to non-distributive powers (such as to add a beneficiary) until the power to add a beneficiary is exercised.

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

The trust was created for the employees of a given company and its subsidiaries. At the outset, the company had no employees but one of its trading subsidiaries did. That subsidiary was later sold and thus neither the settlor company nor any of its subsidiaries then had any employees, although they might later have acquired employees. The court held that the trust failed upon the sale of the subsidiary as there were then no beneficiaries. Whilst not actually a decision on Jersey law as the trust in question was governed by English law and the court based its decision on expert written evidence of English law from two English barristers, there is a question as to whether it does in fact fully reflect the English law position. For example, it is possible to have an English law trust for the benefit of X's children, even if he has no children at the time of establishment of the trust. Equally, a trust established by X for his children at a time when he has one child, who then dies leaving X with no children, continues to be valid for as long as it is possible for X to have further children.

1.6 *Harper v Apex Trust Company Limited* [2014] JRC 253

The case concerned two non-charitable purpose trusts in respect of which the purposes, which were intended to be detailed in a schedule, were missing. The court held that, in the absence of a definition of “Purpose”, the settlements must be void for uncertainty, referring both to Article 11(2)(b) of the Trusts (Jersey) Law [that the terms of the trust are so uncertain that its performance is rendered impossible] and to the three certainties.

Impetus for change

1.7 The Government of Jersey acknowledges that the validity of a trust is of primary significance and given that these recent judgments might be interpreted as pointing towards a conclusion which, if correct, would render certain Jersey trusts vulnerable to being void for uncertainty, it wishes to consider legislative change in order to make it clear beyond doubt in law that there is not a need for the existence of beneficiaries at all times throughout the existence of the trust.

1.8 It is important to emphasise that the circumstances where this will arise will be relatively rare but any perception that there is uncertainty on this point is unhelpful and clarification is clearly beneficial. The Government of Jersey is seeking an opinion from English counsel in connection with this, and in particular the terms and consequences of any amendment. It also seeks the views of key stakeholders by way of this paper.

1.9 The Working Group notes that that there may be a question from a policy perspective that a trust could theoretically be created with an indefinite trust period, with a class of beneficiaries which does not have any existing or ascertained members at the time of its creation, and which is drafted so that the class remains open, and does not close, for so long as the trust subsists. The Government of Jersey invites respondents to consider how this

question should best be addressed if an amendment to the TJL84 is taken forward in this area.

Proposed legislative amendment

1.10 The proposal is to amend the TJL84 to insert express words into the statute to remove any element of uncertainty that might have been introduced by the recent court decisions referenced above, thereby maintaining the flexible nature of the Jersey trust.

1.11 First, to confirm that a beneficiary need not be alive or in existence at the time of creation of a trust or at a later period during its existence so long as it is possible for a beneficiary to be alive or in existence at some future time during the existence of the trust e.g. to allow for a trust to be created with the beneficiaries being the settlor's grandchildren, when the settlor either has no grandchildren, or has grandchildren who subsequently die, in circumstances where future grandchildren might be born during the trust period.

1.12 Secondly, that the beneficiaries may be defined as a class which does not have any ascertained members within it, either at the time of creation of the trust, or at a later stage during the trust's existence, so long as it is possible for members to be ascertained e.g. to allow for a trust to be created with:

(i) a class of beneficiaries comprising the spouses of the settlor's issue at a time when there are no such spouses and therefore no ascertained members of this class, or

(ii) a class of beneficiaries comprising those added in exercise of a power (such as a power exercisable by the trustees in favour of anyone in the world, other than a small number of excluded people) at a time when no one has been added to the class and thereby ascertained.

1.13 Amendment to Article 11(2)(a)(iv) (the current wording of which is set out below) will also be required:

(2) *Subject to Article 12, a trust shall be invalid –*

(a) *To the extent that –*

...

(iv) *it is created for a purpose in relation to which there is no beneficiary, not being a charitable purpose; ...*

QUESTIONS

- 1) **Should the Government of Jersey take steps to place beyond doubt the position as to the need for a beneficiary at all times during the existence of a trust?**
- 2) **If so, please comment on the above proposal. If you consider that there are alternatives, please state what they are.**
- 3) **How should the Government of Jersey consider addressing the policy question in respect of the potential for there to be a trust with an indefinite trust period and class of beneficiaries without any existing or ascertained members at the time of creation and which class does not close for as long as the trust subsists?**

2. The rights of beneficiaries to information

2.1 The need to amend Article 29 (formerly Article 25) of the TJL84 which deals with the rights of beneficiaries to information concerning the trust has been the subject of much debate for a considerable time. There are two aspects to that debate.

2.2 First, the point of principle as to how much information a beneficiary should be permitted to have about a trust. On the one hand is the desire on the part of some settlors to restrict a beneficiary's access to information, for example, to prevent a young beneficiary from learning of the provision made for him until he has matured and established his own career. On the other, is the fundamental trust law concept that there must be someone (whether the beneficiary or otherwise) who can hold the trustee to account for his trusteeship and who will only be able to do so with relevant information.

2.3 Secondly, there has been consideration of the drafting of the Article and in particular the use of the double negative; it has been suggested that Article 29 is ambiguous as it is unclear from the wording whether the rights of the beneficiaries to information pursuant to Article 29 can be extended, restricted or excluded by express provision in the trust deed.

2.4 Article 29 of the TJL84 as currently drafted provides that:-

29 Trustee may refuse to make disclosure

Subject to the terms of the trust and subject to any order of 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.

2.5 The drafting issues:

- (i) Concern has been expressed that the Article does not state what the trustee must disclose but instead states what a trustee is entitled to withhold - exemplified in the title of the Article - *Trustee may refuse to make disclosure*.
- (ii) Pursuant to subsection (d), documents which relate to or form part of the accounts of the trust must be disclosed to *'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'*. However, it is not necessarily clear from the wording of the Article alone whether this obligation is covered by the introductory words to the Article and is thus *'subject to the terms of the trust and subject to any order of the court'*.

Case law suggests that the disclosure obligation is indeed subject to any order of the court, with the then Deputy Bailiff (Birt) stating in *In re Rabaiotti* (2000) JLR 173 at 184, “*that the right conferred by art. [29] is also subject to any order of the court, which may, in an appropriate case, exercise a discretion to refuse to order disclosure.*” There has been further comment in the Privy Council decision of *Schmidt v Rosewood* [2003] UKPC 26, which held that no beneficiary 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 approach has been echoed by the Royal Court on several occasions.

One might also expect that the disclosure obligation under (d) can be limited by the terms of the trust, provided that the principle of accountability is maintained. It is not clear where the line is to be drawn and it has been observed that settlors are sometimes advised not to restrict such rights due to the apparent uncertainty in the Law.

- (iii) What is meant by ‘*the accounts of the trust*’ is not defined. Guidance has been provided by the Jersey court relying on English authority with a wide interpretation to include ‘*accounts, vouchers, coupons, documents and correspondence relating to the administration of the trust property*’. As set out in subsections (a) – (c), any documents relating to the exercise of the trustee’s discretion including letters of wishes are not usually discloseable. The matter was 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 together with 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.

Jersey Law Commission Paper: the rights of beneficiaries to information regarding a trust

2.6 The Jersey Law Commission published a Consultation Paper and Topic Report on this subject in 1998, ultimately concluding that any ambiguity should be removed by amendment. Furthermore, that attempting to iterate a comprehensive statement of the minimum level of disclosure required would be misguided; rather a settlor should be able to restrict (or widen) the disclosure available to a beneficiary but not so far as to exclude the beneficiary's ability to call the trustee to account. The beneficiary should have the opportunity to apply to the court for relief where insufficient information was forthcoming.

2.7 The Law Commission papers are available here

<http://jerseylawcommission.org/reports/>

Previous Consultation

2.8 Potential amendment of Article 29 was included for consideration in the 2008 consultation paper preceding Amendment No. 5 of the TJL84. The Summary of Responses to the Consultation records that the response was mixed with some respondents not recognising any need for change and others supporting some aspects but rejecting others. There was recognition of the complexity of the issue and the decision was deferred for further review following meetings with the Working Group. Ultimately, amendment was not progressed due to a lack of consensus as to the appropriate way to address any change in wording at that point of time. Since that time the Working Group has had cause to give further detailed consideration to this.

2.9 There are a number of potential options:

- (a) Maintain the status quo, it being noted that since the 2008 consultation there have been only a limited number of cases before the Royal Court relating to the disclosure of documents to a beneficiary and that the case law has clarified some of the ambiguity within the statute. Any further uncertainty could be resolved on a case by case basis.
- (b) Amend the provision to remove the double negative and clarify the extent to which the statutory provisions as to disclosure of information can be restricted or extended by the terms of the trust deed – potentially using Section 26 of the Guernsey legislation as a starting point. Also potentially to introduce a statutory definition of the information that must be provided.
- (c) Permit a settlor to nominate a third party or other fiduciary to whom disclosure can be made instead of to a beneficiary. Further considerations then arise such as whether the third party role should be filled only by a fiduciary (such as an Enforcer or a Protector) and how the role is to be supervised.
- (d) Repeal the provision entirely and rewrite it to set out a full statement of the principles of disclosure. This would be a complex exercise and contrary to the current basis of the TJL84 as a framework rather than a codification.
- (e) Specify that it is for the Royal Court, on application by a beneficiary, to determine to what information a beneficiary is entitled in order to hold trustees to account and to order the trustees to provide the same. This is considered as likely to be expensive, cumbersome and time consuming for the Royal Court and parties involved in the proceedings.

- (f) Maintain or enhance the role of the court in assisting an enquiring beneficiary in obtaining more information if the court considers it appropriate.

2.10 Full restriction of information to beneficiaries (which is essentially the exclusion of their rights) is not considered to be an option on the basis that, *“There is an irreducible core of obligations owed by the trustee to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts.”* *Armitage v Nurse* [1997] EWCA Civ 1279. The duty of trustees to account to beneficiaries is an ‘essential ingredient of trusteeship’. This concept of accountability is reflected in the Hague Convention on the Law Applicable to Trusts and on their Recognition (which has been ratified by the United Kingdom including for the crown dependencies) and without it, a Jersey trust might not be recognised in another jurisdiction.

2.11 The Working Group recognised that the Guernsey legislation (the Trusts (Guernsey) Law 2007) may illustrate an alternative approach and referred to Sections 26 and 38 of the legislation in Guernsey which state as follows:-

Duty to give information

26(1) A trustee shall, at all reasonable times, at the written request of –

- (a) any enforcer, or*
- (b) subject to the terms of the trust –*
 - (i) any beneficiary (including any charity named in the trust),*
 - (ii) the settlor, or*
 - (iii) any trust official,*

provide full and accurate information as to the state and amount of the trust property.

- (2) *Where the terms of the trust prohibit or restrict the provision of any information described in subsection (1), a trustee, beneficiary, trust official or settlor may apply to the Royal Court for an order authorising or requiring the provision of the information.*
- (3) *The person applying to the Royal Court for an order under subsection (2) must show that the provision of the information is necessary or expedient –*
- (a) *for the proper disposal of any matter before the court,*
 - (b) *for the protection of the interest of any beneficiary,*
 - (c) *for the proper administration or enforcement of the trust.*
- (4) *In its application to a trust arising from a document or disposition executed or taking effect before the 18 April 1989, subsection (1) only operates for the benefit of a beneficiary whose interest in the trust property became vested before that date, but this subsection does not prejudice any rights that the beneficiary may have under the terms of the trust.*

Non-disclosure of deliberations or letters of wishes

- 38(1) *A trustee is not, subject to the terms of the trust and to any order of the Royal Court, obliged to disclose –*
- (a) *documents which reveal –*
 - (i) *his deliberations as to how he should exercise his functions as trustee,*
 - (ii) *the reasons for any decision made in the exercise of those functions,*
 - (iii) *any material upon which such a decision was or might have been based,*
 - (b) *any letter of wishes.*

- (2) *A “letter of wishes” is a letter or other document intimating how the settlor or beneficiary wishes the trustees to exercise any of their functions.*
- (3) *The person applying to the Royal Court for an order under this section for the disclosure of any document must show that the disclosure is necessary or expedient –*
- (a) *for the proper disposal of any matter before the court,*
 - (b) *for the protection of the interests of any beneficiary, or*
 - (c) *for the proper administration or enforcement of the trust.*

Proposals

2.12 The Working Group considered whether it would be useful to substantially rewrite Article 29 to set out a full statement of the principles of disclosure and to provide positive definitions, but concluded that for the time being, the focus should be a reworking of Article 29, in particular to remove the double negative so that it clearly enunciates the current position under Jersey law. A helpful starting point is section 26 of the Guernsey legislation (as set out above).

2.13 This will make it clear that the beneficiary's right to certain information is subject to the terms of the trust and to the orders of the court and can be restricted within the limits of the principle of accountability. The beneficiary may apply to the court for directions where necessary.

2.14 In addition the Working Group considered that it would be advantageous to extend the provisions, for example, to make express provision for the assignment of the rights of a beneficiary to a third party or other fiduciary (such as an Enforcer or a Protector), thereby ensuring the accountability of the trustees whilst preserving the confidentiality of the trust documents.

2.15 It is not considered that the adoption of these measures will have any adverse effect on Jersey's reputation, maintaining as it does the ability for effective accountability and enforcement of the trust by the beneficiaries and the court.

QUESTIONS

- 4) **Should there be a full iteration of the principles of disclosure or do you consider that Article 29 should be reworked so as to provide greater clarity and in particular to remove the double negative? The alternative is that, given the case law on the subject thus far, the provision should be left untouched.**
- 5) **Should the rights of a beneficiary to obtain information about a trust be restricted in statute or by way of election in the trust deed if so required? What is the minimum level of information that must be given to beneficiaries to maintain trustee accountability?**
- 6) **Alternatively, is there another approach that should be considered?**
- 7) **Is it appropriate to offer an opportunity for a settlor to transfer the rights to information to a third party? If so, should there be a restriction on who that third party should be – for example, that they are a Protector, or an Enforcer or acting in some fiduciary capacity?**

3. Reservation of powers by a Settlor

- 3.1 Consideration has been given to various amendments to further clarify and enhance Article 9A of the TJL84 which deals with powers reserved to the settlor of a trust. Article 9A was introduced into the TJL84 in 2006 by the Trusts (Amendment No.4) (Jersey) Law 2006.
- 3.2 In considering these further amendments, reference has been made to similar provisions in Guernsey (Section 15 of the Trusts (Guernsey) Law 2007), in Cayman (Section 14 of the Cayman Trusts Law (2011 Revision) and in Bermuda (the Trusts (Special Provisions) Amendment Act 2014).
- 3.3 It is obviously of advantage to all concerned with trusts that the greatest degree of flexibility is obtained alongside the certainty required to ensure all are comfortable to proceed. The Government of Jersey is of the view that these amendments will further consolidate the leading position of the Jersey trusts industry.
- 3.4 Ten potential amendments have been considered all of which are of a fairly technical nature. This section should be read in conjunction with the extract of the statute below showing the proposed amendments which are of course subject to the detailed consideration of the law draftsman.
- (i) Article (9A)(1) (a) and (b) This amendment is intended to avoid any potential for the current Jersey legislation to be interpreted as saying that reservation of one or some of the list of powers set out within subsection (2) is acceptable but that the reservation of all of them might cause the settlor to be exceeding the acceptable parameters for the drafting of a Jersey trust.

- (ii) Article 9A(2)(c) refers to a 'corporation' which is defined in Article 1(1) of the TJJ84 as 'a body corporate wherever incorporated'. This definition does not encompass other now commonly used vehicles such as Scottish Limited Partnerships, SLPs, and other partnership interests (used, inter alia, in private equity carry vehicle structures). The recommendation is that the widest definition possible should be used in this context to permit the widest flexibility in terms of structuring for a trust.

- (iii) The Working Group considered it advantageous to include in sub-section 9A(2)(f), the words 'including any person acting in relation to the affairs of the trust or holding any trust property' (deliberately omitting any reference to professionals).

- (iv) The recent Privy Council judgment in *Crociani & Ors v Crociani & Ors* [2014] UKPC 40 recognised that the express terms of a trust might refer to the courts of a particular jurisdiction which were intended (at least by the settlor and original trustee) to have exclusive jurisdiction, and debated the scope and enforceability of such clauses. Making an express selection of exclusive jurisdiction may not of course be conclusive in determining a court of convenience for the hearing of a trust dispute, but having the ability by statute to direct such a matter might be helpful for a foreign court in their determining to defer to the Jersey court. Accordingly, it is proposed that the addition of words similar to those set out below at sub-section (2)(g) should be considered.

- (v) The addition of the words as set out at sub-section (3), reflecting provisions already adopted in the Guernsey legislation, is considered favourable.

- (vi) The addition of the words as set out at new sub-section (2A) below thereby confirming that the reservation, grant or exercise of a power or interest does not constitute the holder of the power or interest a trustee, is considered to be beneficial and again reflects the terms of the Guernsey legislation in this area. In certain jurisdictions, the location of the trustee(s) affects the taxation position of the trust so that if one has a sole corporate trustee in Jersey and also an individual with reserved powers resident in a high-tax jurisdiction, it would be beneficial to be able to say with certainty that the person holding the power is not a trustee.

- (vii) The Working Group considered it to be a retrograde step to introduce a presumption that the powerholder holds the powers personally unless they were explicitly described as fiduciary powers. Personal powers can be used as the power holder sees fit but fiduciary powers must be used for the benefit of the beneficiaries. Although this default position has been adopted in Guernsey, the Working Group considered it preferable to permit the Jersey court to determine whether a power was held on a fiduciary basis or not based on the express wording in the trust and all other relevant circumstances on a case by case basis.

It is, however, considered desirable to have a provision that the trust terms may expressly prescribe whether reserved or granted powers are held on a personal or fiduciary basis. This is akin to the position in Bermuda and is considered as being helpful where powers are given to

protectors who may be trusted family friends, and on whom there is no desire to impose strict fiduciary standards of liability. It is noted that this could theoretically lead to a potential situation where powers are exercised capriciously with it being more difficult for the Jersey court to intervene. (Such provision is not yet included in the draft set out below).

- (viii) The Working Group referred to *Barclays v Equity* [2014] JRC102D in which the court considered the nature of the office of a manager of a property unit trust and the relationship between the property manager and the trustee, and found it arguable that the trustee of the unit trust had a residual duty to the unit holders as beneficiaries to challenge unauthorised instructions of the manager. Parallels could be drawn with 'reserved power' type provisions where a trustee was directed to do something.

Consideration was given to amending Article 21 of the TJJ84 to remove any residual duty owed to beneficiaries (including the duty to observe utmost good faith) when a trustee was subject to a direction from a settlor with reserved powers but this was rejected by the Working Group. The Working Group considered that such an amendment would be regressive and introduce unnecessary reputational risks. A trustee should be required to apply his mind to any direction and to challenge unauthorised instructions; there should not be an automatic abrogation of any responsibility on the part of the trustee.

- (ix) It was noted that Bermuda had pursued a change to their trust law to make specific provision confirming that the property in a Bermudian trust subject to a reserved power or a grant of power does not form part of the settlor's estate. The Working Group felt that if a trust is valid

notwithstanding a wide reservation of powers then the settlor had successfully divested his estate of the assets in the trust fund and that amendment was not therefore necessary.

- (x) Whether or not a power ceases upon the death of the powerholder has been considered by the Working Group. Some powers are explicitly reserved to be exercisable by will or testament and such provisions should continue to have effect in accordance with their express terms. It is considered that a presumptive provision (rebuttable by express language to the contrary) would be helpful in order to clarify that reserved powers issued by a powerholder cease to have effect on the death (or earlier incapacity) of that powerholder and that such powers would not vest in the hands of a trustee in bankruptcy in a situation where that powerholder becomes bankrupt.

3.5 Subject to consideration by the law draftsman, if all proposed amendments are approved, Article 9A would read in some similar formulation as is set out below:

3.6 Any timeline for implementation will only be determined after a policy decision on automatic updating of beneficial ownership information and the introduction of a Register of Directors is made.

9A Powers reserved by settlor

- (1) *The reservation or grant by a settlor of a trust of–*
- (a) *any beneficial interest **or the whole of the beneficial interest** in the trust property; or*
 - (b) *any **or all** of the powers mentioned in paragraph (2), shall not affect the validity of the trust nor delay the trust taking effect.*

- (2) *The powers are –*
- (a) *to revoke, vary or amend the terms of a trust or any trusts or powers arising wholly or partly under it;*
 - (b) *to advance, appoint, pay or apply income or capital of the trust property or to give directions for the making of such advancement, appointment, payment or application;*
 - (c) *to act as, or give binding directions as to the appointment or removal of, a director or officer of any corporation wholly or partly owned by the trust;*
 - (d) *to give binding directions to the trustee in connection with the purchase, retention, sale, management, lending, pledging or charging of the trust property or the exercise of any powers or rights arising from such property;*
 - (e) *to appoint or remove any trustee, enforcer or beneficiary, or any other person who holds a power, discretion or right in connection with the trust or in relation to trust property;*
 - (f) *to appoint or remove an investment manager or investment adviser **including any person acting in relation to the affairs of the trust or holding any trust property;***
 - (g) *to change the proper law of the trust, **or the forum for the administration thereof or to determine the exclusive jurisdiction of the court to the trust;***
 - (h) *to restrict the exercise of any powers or discretions of a trustee by requiring that they shall only be exercisable with the consent of the settlor or any other person specified in the terms of the trust.*
- (2A) The reservation, grant or exercise of a power or interest referred to in subsections (1) or (2) does not constitute the holder of the power or interest a trustee.**

- (3) *Where a power mentioned in paragraph (2) has been reserved or granted by the settlor, a trustee who acts in accordance with the exercise of the power is not acting in breach of trust, **nor should compliance with such exercise of power of itself render such trustee liable.***
- (4) *The States may make Regulations amending paragraph (2)*

QUESTIONS

- 8) In respect of each of the above amendments, do you consider that the amendments enhance the TJJ84 as currently drafted and should be made in the suggested or similar form?
- 9) Do you agree with the suggestion that no amendments should be made to certain provisions as set out above? If not, what amendments should be made and why?
- 10) Do you agree that the terms of the trust should be able to expressly specify that reserved powers are held on a personal rather than fiduciary basis?

4. Arbitration

- 4.1. Arbitration is the process by which a dispute is adjudicated upon by an independent person (or panel of more than one person). The arbitrator will often be chosen by the parties (if agreement can be reached) and may have an expertise in the subject area of the dispute. The decision of the arbitrator is binding on the parties.
- 4.2. If parties to a dispute which involves a trust wish to refer that dispute to arbitration, there is nothing to prevent them agreeing to do this. Nor is there anything to prevent a settlor and/or trustee including arbitration provisions within a trust deed to which they are party, and which could be enforced as between them in the normal way.
- 4.3. However, whether or not such a clause could bind a beneficiary – usually not a party to a trust deed - seeking to enforce its rights under the trust is less clear. One possible argument is to apply the Jersey authorities on the enforceability of exclusive jurisdiction clauses in trust instruments by analogy so that if beneficiaries seek to enjoy the fruits of the settlor's bounty then they must abide by the terms on which it is offered. However, in the analogous case of exclusive jurisdiction clauses the Privy Council has opined that while there should be a presumption that the clause should be upheld, the fact that beneficiaries are not signatories to the trust deed means that the threshold for them to show that it is appropriate for them to litigate in some other jurisdiction than that specified in the clause should be lower. Further, the Privy Council observed that where a trustee seeks to uphold an exclusive jurisdiction clause despite the objection of a beneficiary, the trustee would be expected to justify why that is appropriate. It is not clear

whether the courts would adopt the same reasoning for arbitration provisions in a trusts context.

- 4.4. The question for consideration is whether or not legislation should be enacted so as to render an arbitration clause in a trust instrument binding on a beneficiary by statutory force and without the consent of the beneficiary (whether or not that is due to a beneficiary not wanting to arbitrate or that the beneficiary is unascertained, unborn, a minor or otherwise lacks capacity and thus cannot provide valid legal consent).
- 4.5. The key advantage of the arbitration process is seen as the ability to resolve trust disputes away from the glare of publicity and to maintain the privacy of the trust arrangements which are often family arrangements which would otherwise not be revealed to the world.
- 4.6. Whilst administrative applications will often be heard in private by the court and any judgment will likely be anonymised, hostile litigation before the court, such as an action for breach of trust against the trustee, is heard in public. It is often suggested that this potential for publicity – and indeed adverse publicity – might act as a deterrent to poor practice by settlors, or trustees and other fiduciaries.
- 4.7. Secondly, as noted above, the parties can, in theory, choose the arbitrator, where the arbitration will take place and the procedures which apply, potentially making it a more informal and flexible process than court proceedings. Unfortunately, in reality, the parties are often so deep in dispute that they cannot reach meaningful agreement on anything and instead of an abbreviated process, the arbitration follows a similar adversarial format to court proceedings. The advantage of appointing an

expert in the field as the arbitrator is neutralised by the fact that the judges of the Royal Court have particular trusts expertise. It is therefore likely that an arbitration will cost as much and take around the same time period as it would to bring the case before the court.

- 4.8. Looking more broadly, the Working Group has noted that if trust disputes or applications brought before the court reduce in number, quality and variety, the body of case law will also reduce with a risk that Jersey trust law as a separately identifiable body of legal principles will diminish. At the current time, it is not uncommon for Jersey decisions to be cited in foreign courts and for the Royal Court to be at the cutting edge of development of new principles. One of the key reasons for choosing Jersey as a jurisdiction for the location of a trust is the widely recognised body of case law and the strong judiciary within a stable and predictable court and political system.
- 4.9. Finally, it is not considered to be clear that an arbitration award made in the absence of a voluntary submission to arbitration will be enforceable in a foreign jurisdiction as it will not be made pursuant to an 'arbitration agreement' as required by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (commonly known as the "New York Convention").
- 4.10. Whilst Jersey naturally wishes to be at the vanguard of new developments for the trusts industry, the Working Group has concluded that it is not desirable to impose enforced arbitration in the trusts context, certainly at this time. It is noted that it has been adopted in other jurisdictions such as the Bahamas, but the Working Group is not aware of any evidence of a strong market demand for this option.

4.11. One alternative is to consider whether greater protection of confidential matters can be afforded to parties making applications before the court. Public and open justice is a key principle of democracy; also important is an individual's legitimate right to privacy. The Government of Jersey will continue to explore ways in which the confidentiality of trusts business may be enhanced by, for example, extension of the circumstances where an application is heard in private and/or whether any judgment should be anonymised or redacted in any way.

QUESTIONS

- 11) Are you aware of a demand for arbitration of trust disputes to be introduced into the Jersey legislation?**
- 12) Do you support the conclusion reached by the Working Group that, on balance, provisions should not be inserted into the TJL84 at this time to so as to render an arbitration clause in a trust instrument binding on a beneficiary?**

5. Trustees self-contracting

- 5.1. By virtue of the Trusts (Amendment No. 5) (Jersey) Law 2012 (coming into effect as of 2 November 2012), a new paragraph was added to Article 31 of the Law whereby a trustee was expressly permitted to contract with him/herself where that person was contracting in their capacity as trustee of different trusts. This was done in order to remove any uncertainty, it being the case that a trustee, especially a professional trustee, often finds himself acting as sole trustee of numerous trusts and wishing to transact essentially with himself albeit in a different capacity.
- 5.2. Since the amendment it has been noted that that (i) there is some potential ambiguity over the retrospective nature of the provision (that is as to whether the Amendment No. 5 provision should apply to contracts which were entered into before it came into effect as well as to contracts entered into after that date); and (ii) it is not expressly stated that a trustee can contract with itself in different capacities i.e. as an individual/company and as a trustee.
- 5.3. It is, therefore, proposed that the Article be amended to resolve these points beyond doubt.
- 5.4. The overarching duties of a trustee to act in the best interests of the beneficiaries, to observe the utmost good faith, and to declare any conflict of interest, remain.

5.5. Article 31 as it currently stands states:

31 Trustee acting in respect of more than one trust

- (1) *A trustee acting for the purposes of more than one trust shall not, in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust if the trustee has obtained notice of it by reason of the trustee's acting or having acted for the purposes of another trust.*
- (2) *A trustee of a trust shall disclose to his or her co-trustee any interest which he or she has as trustee of another trust, if any transaction in relation to the first mentioned trust is to be entered into with the trustee of such other trust.*
- (3) *Subject to this Law (including in particular Articles 21 and 23), but despite any other enactment or rule of law to the contrary, a person may in the capacity of a trustee of one trust enter into a contract or other arrangement with himself or herself in the person's capacity as a trustee of one or more other trust.*

5.6. Subject to consideration by the Law Draftsman, it is proposed that the amendment would read in similar terms to the following:

- (3) *Subject to this Law (including in particular Articles 21 and 23), ~~and but~~ despite any other enactment or rule of law to the contrary, a person may **either in their personal capacity or** in the capacity of a trustee ~~of one trust~~ enter into a contract or other arrangement with himself or herself in **his or her** ~~the person's~~ capacity as a trustee of one or more other trusts.*

(4) The provisions of paragraph (3) apply in relation to any contract or other arrangement that was entered into before or after the coming into force of the Trusts (Amendment No. 7) (Jersey) Law 201-.

QUESTION

13) Do you consider that Article 31 should be amended as proposed?

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

6.1 From time to time a corporate trustee merges with another corporate body. The TJJ84 is silent as to whether, following that merger, the newly formed corporate body continues as the validly appointed trustee of a particular trust without further action. Reference is made to the relevant sections of the Companies (Jersey) Law 1991 ("CJL91"), namely Part 18B.

6.2 It is the view of the Working Group that whilst it is strongly arguable on the statutes that a valid appointment of a corporate trustee would continue to be valid notwithstanding any subsequent merger, it was nevertheless desirable to introduce confirmatory wording into both the TJJ84 and the CJL91 to put the point beyond doubt.

6.3 It is proposed that the following (or words to this effect) be inserted into the TJJ84:

"A trustee which merges with another company pursuant to the provisions in the Companies (Jersey) Law 1991 shall continue to be a duly appointed trustee of a trust notwithstanding its merger with another company."

6.4 And the following (or words to this effect) be inserted into the CJL91 at Article 127FN(2)(b):

(1) *When a merger is completed in which the merged body is a company or a body falling within Article 127B(3) –*

(a) all property and rights to which each merging body was entitled immediately before the merger was completed become the property and rights of the merged body;

- (b) *the merged body becomes subject to all criminal and civil liabilities, and all contracts, debts and other obligations **which include (for the avoidance of doubt) rights and obligations entered into as a trustee or within another fiduciary capacity**, to which each of the merging bodies was subject immediately before the merger was completed; and*
- (c) *all actions and other legal proceedings which, immediately before the merger was completed, were pending by or against any of the merging bodies may be continued by or against the merged body.*

6.5 A connected issue arises from the provisions in the CJL91 that state that creditors who are known to have claims against the company exceeding £5,000 must be given notice of the merger. It is potentially unclear as to whether a corporate trustee planning to undertake a merger would need to give notice to itself. The notice provisions appear to suggest not, as a corporate trustee (which had been validly appointed as a trustee of a trust prior to its merger and having a power to indemnify itself from the trust fund of that trust) would not be a creditor of the merging bodies, so that consequently the corporate trustee would not be obliged to give itself advance notice of its proposed merger pursuant to Article 127FC of the CJL91.

6.6 Secondly, again to resolve any potential doubt, it is considered desirable to confirm that no notice has to be given to creditors who have dealt with the merging entity solely in that entity's capacity as trustee.

6.7 It should also be noted that as part of these proposed amendments, consideration will be given to the inclusion of wording in either both, or one of the TJL84 and the CJL91 to the effect that any licence held by either of

the merging companies shall not pass to any merged company unless the permission of the relevant licensing or regulatory authority is granted.

- 6.8 At this time, consideration is also being given to the introduction of company demerger provisions in the CJL91 and it may be that the above amendments are deferred to tie in with those legislative changes rather than in the proposed trusts amendment. However, the Government of Jersey wishes to consult on the principle and seeks responses to the following questions.

QUESTIONS

- 14) Do you consider that the TJJ84 and CJL91 should be amended to introduce confirmatory wording to put beyond doubt the point that the newly merged corporate body continues as the validly appointed trustee of a particular trust without further action?**
- 15) Do you consider that the CJL91 should be amended to resolve any potential doubt as to (i) the need to give notice to creditors who have dealt with the merging entity solely in that entity's capacity as trustee? and (ii) the need for the corporate trustee planning to undertake a merger to give notice to itself?**
- 16) Are there any other points that need clarification related to the merger of a corporate trustee with another corporate body?**

7. Extension of indemnity

- 7.1 Article 34(2) of the TJL84 provides that “*a Trustee who resigns, retires or is removed may require to be provided with reasonable security for liabilities whether existing, future, contingent or otherwise before surrendering trust property.*”
- 7.2 Usually, a retiring trustee will enter into a deed of retirement and appointment of trustees with the new trustee, and that deed will contain an indemnity in favour of the retiring trustee and its officers and employees. This indemnity will be the ‘reasonable security’ referred to in Article 34(2).
- 7.3 If there are further changes of trustee, the indemnity referred to above will typically be extended or renewed by future trustees providing for the original trustee and its officers and employees to be indemnified.
- 7.4 Article 34(2A) of the TJL84 (inserted by the Trusts (Amendment No. 5) (Jersey) Law) allows a former trustee to enforce such an extended or renewed indemnity in his or her own right, even though the former trustee is not a party to the extended or renewed indemnity. (It being the case that, subject to certain exceptions, someone who is not a party to a contract in his own right will not be able to enforce the terms of that contract). This amendment reflects the English position as to third party rights encapsulated in the *Contracts (Rights of Third Parties) Act 1999*.
- 7.5 The Working Group has recommended the extension of Article 34 to permit a former trustee’s officers and employees (and those included in the definition of ‘Indemnified Persons’ set out below) also to enforce an indemnity in their own right, even though they are not parties to the relevant

deed of indemnity, and whether or not it is the original indemnity or an extension or renewal.

- 7.6 The current Society of Trust and Estate Practitioners (“STEP”) precedent in this area provides for indemnities to be given to ‘Indemnified Persons’ defined not only as the retiring trustee and its successors but also directors, officers and employees of each and the respective heirs, personal representatives, and estates of those directors, officers and employees.
- 7.7 The extension of an indemnity to the trustee’s officers and employees has been judicially recognised (see *In re the Essel and Bruce Trusts* JLR N18 and [2008] JRC065).
- 7.8 In order for a former trustee to be able to enforce the relevant term (of the contract or other arrangement) in his own right, Article 34(2A) of the TJJ84 requires that the contract or other arrangement by which the provision for security (e.g. indemnity) is extended or renewed expressly identifies the former trustee. It is recognised that similar provisions requiring the express identification of all Indemnified Persons in the context of what could be a significant number of individuals would be onerous. Adoption of a similar provision to Section 1(3) of the English *Contracts (Rights of Third Parties) Act 1999* may assist in that it provides for a third party to be ‘*expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.*’
- 7.9 It is also noted that where an indemnity is given in favour of others in addition to the trustees, a typical approach (as adopted in the STEP precedent) is to

provide for the trustee who is given the indemnity to act as trustee of the indemnity for those others.

7.10 It is, however, noted that this will provide directors of companies who have acted as trustees, with greater protection and rights than a director of another company in terms of being able to enforce an indemnity directly even though they are not party to it. Another approach would be to introduce legislation equivalent to the aforesaid English Contracts (Rights of Third Parties) Act 1999 rather than simply making special provision for directors and other officers, their heirs etc. in the context of companies that have acted as trustee. Doing that would, of course, have to be considered in a wider context than simply in respect of the TJL84.

7.11 For ease of reference Article 34 of the TJL84 currently states:

34 Position of outgoing trustee

- (1) *Subject to paragraph (2), when a trustee resigns, retires or is removed, he or she shall duly surrender trust property in his or her possession or under his or her control.*
- (2) *A trustee who resigns, retires or is removed may require to be provided with reasonable security for liabilities whether existing, future, contingent or otherwise before surrendering trust property.*
- (2A) *If the provision for security to which paragraph (2) refers is extended or renewed by a contract, or other arrangement, to which the trustee who resigns, retires or is removed is not party, and –*
 - (a) *the contract or other arrangement expressly provides that the trustee may in his or her own right enforce a term of the contract or other arrangement; or*

(b) a term of the contract or other arrangement purports to confer a benefit on the trustee,

and in either case the contract or other arrangement expressly identifies the trustee, the trustee may enforce that term in his or her own right.

(3) A trustee who resigns, retires or is removed and has complied with paragraph (1) shall be released from liability to any beneficiary, trustee or person interested under the trust for any act or omission in relation to the trust property or the trustee's duty as a trustee except liability –

(a) arising from any breach of trust to which such trustee (or in the case of a corporate trustee any of its officers or employees) was a party or to which the trustee was privy;

(b) in respect of actions to recover from such trustee (or in the case of a corporate trustee any of its officers or employees) trust property or the proceeds of trust property in the possession of such trustee, officers or employees .

7.12 It is further recommended that equivalent provisions should be introduced in regard to indemnities provided during the lifetime of a trust when a trustee makes distributions.

7.13 Equivalent amendments will also be required to Article 43 (which deals with distributions on the termination of trusts) to reflect the terms of both the original and extended Article 34(2A).

QUESTIONS

- 17) Should Article 34(2A) of the TJL84 be extended to permit a former trustee's officers and employees to enforce an indemnity in their own right?
- 18) If so, should the trustee who employed them be appointed to act as trustee of the indemnity for those individuals?
- 19) It may be that there are others, in addition to a trustee's officers and employees, in respect of whom this same issue of direct enforcement might arise. Are there others to whom you think this direct enforcement provision should be extended?
- 20) Should the provisions be extended to include indemnities provided in respect of distributions made during the lifetime of a trust?

8. Retention and accumulation

8.1 Article 38 of the TJL84 as currently drafted permits the accumulation of trust income if so authorised by the terms of the trust. Any income not so accumulated shall be distributed (underline added).

38 Power of accumulation and advancement

- (1) *Subject to Article 15, the terms of a trust may direct or authorize the accumulation for any period of all or part of the income of the trust.*
- (2) *Subject to paragraph (3), income of the trust which is not accumulated under paragraph (1) shall be distributed.*
- (3) *Subject to the terms of the trust and subject to any prior interests or charges affecting the trust property, where a beneficiary is a minor and whether or not the beneficiary's interest –*
 - (a) *is a vested interest; or*
 - (b) *is an interest which will become vested –*
 - (i) *on attaining the age of majority,*
 - (ii) *at any later age, or*
 - (iii) *upon the happening of any event,**the trustee may –*
 - (A) *accumulate the income attributable to the interest of such beneficiary pending the attainment of the age of majority or such later age or the happening of such event;*
 - (B) *apply such income or part of it to or for the maintenance, education or other benefit of such beneficiary;*
 - (C) *advance or appropriate to or for the benefit of any such beneficiary such interest or part of such interest.*
- (4) *The receipt of a parent or the lawful guardian of a beneficiary who is a minor shall be a sufficient discharge to the trustee for a payment made under paragraph (3).*

- (5) *Subject to the terms of the trust and subject to any prior interests or charges affecting the trust property, the trustee may advance or apply for the benefit of a beneficiary part of the trust property prior to the date of the happening of the event upon the happening of which the beneficiary becomes entitled absolutely thereto.*
- (6) *Any part of the trust property advanced or applied under paragraph (5) shall be brought into account in determining from time to time the share of the beneficiary in the trust property.*
- (7) *No part of the trust property advanced or applied under paragraph (5) shall exceed the presumptive, contingent or vested share of the beneficiary in the trust property.*

8.2 The Working Group has noted that there is no guidance within the statute as to the permissible retention period for the accumulation of income; nor to whom any trust income should be distributed if not accumulated. Whilst most trust deeds will deal with these points specifically, this is not always the case, potentially leading to expensive rectification applications, and it has been observed that these points are of particular relevance when considering employee benefit trusts.

8.3 If it is clear for whom income is accumulated, it is at least arguable that between the time that the income accrues and it being distributed, the trustee holds it only as nominee for the beneficiary to whom it is destined, which might have tax consequences for that beneficiary and impose limitations on the investment options available to a trustee. An alternative, if the trust is silent, is that the income must be distributed to whomever would be entitled to the income in the absence of the trust – potentially the settlor or, if a testamentary trust, the residuary beneficiaries. Again this might well have unforeseen and unfortunate tax consequences.

- 8.4 Consideration was given to the Guernsey position as amended by the Trusts (Guernsey) Law 2007 which reverses the Jersey position (and the position in Guernsey prior to the 2007 Law) so that all income that is not distributed is to be accumulated. However, the Working Party was of the view that this position also had certain downsides.
- 8.5 Historically, legislation on accumulation was in place to limit the length of time during which the income of a trust could be accumulated to ensure that wealth was not tied up for too long and that a deceased settlor was not dictating financial arrangements from beyond the grave. These rules often accompanied restrictions on the duration of a trust (the perpetuity period). These policy considerations have increasingly been viewed as anachronistic resulting in the removal of limits in other jurisdictions.
- 8.6 It is therefore recommended that, always subject to the terms of the trust, three options should be permitted:
- (a) Accumulation of income to capital; or
 - (b) Retaining income in its character as income; or
 - (c) Distribution of income.
- 8.7 It is proposed that the default position should be the retention of income in its character as income.
- 8.8 As a separate point, it is also considered sensible to amend the wording of sub section (5) of the Article to clarify that the power of advancement may be exercised for *all* of the trust property rather than only *part* of the trust property (as currently drafted).

8.9 These issues arise largely in older trusts and it is therefore proposed to make these amendments retrospective in order to achieve maximum benefit and to avoid two separate regimes running in tandem.

QUESTIONS

- 21) Do you agree that it is desirable for Article 38 to be amended to widen the options for the trustee in relation to accumulation and distribution of income?
- 22) Do you agree that the default position should be the retention of income in its character as income? Or should the default position be that all income that is not distributed is to be accumulated (as per the Guernsey law).
- 23) Do you agree that the amendments (if adopted) should have retrospective effect?
- 24) Do you agree that Article 38(5) should be amended to clarify that the power of advancement may be exercised for all of the trust property rather than only part of it?

9. Presumption of lifetime effect

- 9.1 Where a trust includes the reservation by the settlor of a large number of powers, the trust may, in certain circumstances, be seen as “merely illusory” and therefore not a valid trust. If it is established that there is in fact a testamentary intention the purported trust may well, depending upon requirements as to formalities, be considered a will rather than a trust leading to associated tax consequences.
- 9.2 In reality, this is likely to be rare and careful drafting can avoid any problems. Lewin on Trusts states: *“It is not thought that the reservation of even very considerable rights and powers would make the trusts illusory during the settlor’s lifetime unless the settlor was virtually the equitable owner of the property during his life.”*
- 9.3 However, Bermuda and the Cayman Islands have inserted provisions into their trusts statutes to provide certainty in this area, providing that, unless specified to be a will, a trust will take immediate effect upon the property being identified and vested in the trustee.
- 9.4 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.”
- 9.5 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.”

9.6 In the Bermuda case of *AQ Revocable Trust* [2010] 13 ITELR 260, Ground CJ stated that Section 2(3) of the Bermuda Act “*merely acknowledges the general common law position*” and cited with approval the comment in Lewin on such legislation that:

“Such provisions may go no further than give effect to what is the position without statutory intervention in England and Wales, but have the advantage of eliminating doubt as to the scope of the common law rules and are no doubt a comfort to settlors who wish to establish lifetime trusts in those jurisdictions reserving wide powers to themselves.”

9.7 Whilst it is considered that the law in Jersey covers this situation it is considered desirable to put the matter beyond doubt. A provision confirming this effect will provide certainty and therefore additional comfort to settlors and their onshore advisors that reserved power instruments – and, in particular, those which came under attack subsequent to the death of the settlor – could be defended.

QUESTION

25) Are respondents in favour of introducing wording similar to that found in the Cayman statute in order to put the matter beyond doubt?

10. Power of the court to vary a trust

- 10.1 The Royal Court has limited statutory powers to 'vary' a trust pursuant to Article 47 of the TJJ84.
- 10.2 First, the court may approve an arrangement put before it which varies all or any of the terms of the trust, on behalf of minors, interdicts, unascertained or unborn beneficiaries if the court reaches the view that it is for their benefit. However, the court has no power (either under Article 47, Article 51 or as part of the general supervisory jurisdiction of the court) to approve a variation on the part of adult beneficiaries who are able to consent (or not) themselves.
- 10.3 Secondly, the court has the power pursuant to Article 47(3) to confer upon the trustee certain powers to enter into particular transactions (such as a sale or a lease) connected with the 'management or administration of a trust', where the trustee does not have such a power and the court considers it expedient in the particular circumstances to grant it. These powers cannot be used to alter the beneficial trusts.
- 10.4 Article 47 draws on English legislation namely Section 1 of the Variation of Trusts Act 1958 and Section 57(1) of the Trustee Act 1925.
- 10.5 The Working Group has given consideration to whether or not the powers of the court should be extended to empower the court to vary a trust regardless of whether that variation is supported or opposed by any one or more of the adult beneficiaries. It found that the arguments were finely balanced.

10.6 The Working Group has noted that the benefits of the introduction of such a power would be:

- the ability for the court to assist where there is a cumbersome or poorly drafted trust or one which does not include more modern provisions such as in *In re Greville Bathe Fund* [2013] (2) JLR 40, which was a fund established in 1949;
- the concern has been raised that, in some jurisdictions, the act of consenting to the exercise of a power of variation, even if conferring no benefit on the particular beneficiary, may be seen as that beneficiary exerting some control over the trust, participating in a re-settlement of the trust, or giving up a valuable asset or right, thereby attracting tax consequences;
- the ability for a change to be made where a variation is for the benefit of the beneficiaries generally and all consent save for one un-co-operative beneficiary;
- where there are a number of adult beneficiaries spread over the world, it can be costly and time-consuming to obtain the consent of all, if indeed it is possible;
- it provides an alternative tool for resolution of disputes by the court. It is noted that the costs of a court application will usually outweigh the cost of obtaining beneficiary consent and so it is anticipated that it will remain preferable to use the latter method rather than approach the court.
- Bermuda has similar provisions which have been interpreted widely to permit court variation and the Working Group is keen to ensure that Jersey is not at a competitive disadvantage on the international stage. Having said that, there is no available evidence to suggest that, when deciding on a jurisdiction for their trust, settlors give any consideration to the existence of such provisions.

10.7 Counter arguments are:

- the new statutory power might undermine Jersey's existing firewall provisions especially in matrimonial cases;
- it could be said that settlors desiring certainty over court determined flexibility could be discouraged from using Jersey proper law trusts – the settlor may not wish for his intentions as to the beneficial interests to be undone. In reality, the most common vehicle in Jersey is the discretionary trust where the trustee has wide powers to decide upon the destination of the trust funds anyway. It is also the case that if all the beneficiaries agree to an amendment, the beneficial interests can be changed;
- there is a question as to whether any such amendment is in reality removing the right for adult beneficiaries to give or withhold consent and to properly participate in the consent process;
- some hold the view that there is little if any real need for a wide court-held power, as a settlor could bestow a general power of variation on a trustee at the outset if he wished to do so.
- The Bermuda statutory provisions have different wording modelled partly on the same English sections as the Jersey legislation but also on another section which has no connection with Jersey. The interpretation by the Bermuda court has not yet been examined by way of adversarial argument, or on appeal. Doubts on the long-term efficacy of the Bermuda interpretation have, therefore been raised.

10.8 The Working Group has concluded that it would be beneficial to consult more widely on these suggestions and have also recommended obtaining an opinion from Counsel. The Government of Jersey has therefore adopted this recommendation.

QUESTION

- 26) Do respondents consider that it would be beneficial to provide the court with wider powers to vary a trust?

11. *Légitime*

11.1 As the law stands, in broad terms, a person enjoys unrestricted testamentary freedom over his immovable property in Jersey but, if domiciled in Jersey, is restricted as to how he can leave his moveable property by the rules relating to *légitime*. Immoveable property is broadly defined as land and buildings, and moveable property as anything else (which includes the shares held for a 'share transfer' property).

11.2 The *légitime* rules provide that a surviving spouse and/or issue of a deceased person have rights to certain proportions of the deceased's moveable estate regardless of the deceased's testamentary wishes. Issue includes children, grandchildren and further descendants. If a person attempts to leave his moveable estate in any other way, a disappointed spouse or child may bring an action to reduce the will *ad legitimum modum* thereby enforcing his or her rights as set out below.

11.3 In basic terms the rules state that where the deceased leaves:

- (a) a spouse and issue: the spouse can claim one third of the estate; the issue can claim one third of the estate between them; the remaining third devolves according to any will.
- (b) a spouse but no issue: the spouse can claim one half of the estate; the remaining half devolves according to any will.
- (c) no spouse but issue: the issue can claim two thirds of the estate; the remaining third devolves according to any will.
- (d) no spouse and no issue: the estate devolves according to any will.

If there is no will, the 'free' portion of the estate will devolve according to the rules of intestacy.

- 11.4 These rules are often referred to as 'forced heirship' rules. Under Article 9(3), these rules will apply to Jersey trusts established by a Jersey domiciled settlor.
- 11.5 There has been a long running debate as to whether or not it remains appropriate to maintain restrictions on testamentary freedom in the modern world. It is noted that the concept has been abolished in Alderney (as of 1.1.2016) and Guernsey (as of 02.04.2012) and, by way of example, that there are no forced heirship provisions in England and Wales, the Isle of Man, the Cayman Islands, or the British Virgin Isles. Since 17 August 2015 when the European Succession Regulation No. 650/2012 (known as Brussels IV) came into force, one law applies to succession across all EU Member States (save for the UK, Ireland and Denmark) under which any national forced heirship rules can be avoided by non-resident nationals and resident non-nationals.
- 11.6 Concerns have been raised that high net worth migrants have shown some reluctance to set up trust structures on the island due to the forced heirship provisions and those individuals are therefore setting up structures in competitor jurisdictions.
- 11.7 In addition, it has been observed that Jersey trusts established by Jersey domiciled persons are not as uncommon as one might first think. In one example, if a person with a death in service policy governed by Jersey law, is Jersey domiciled, the monies may be said to be held on trust after their death and on one analysis, as the current law stands, their distribution may be bound by forced heirship rules because of Article 9(3). An associated letter of wishes might express the wish that the entirety of the policy proceeds is paid to the surviving spouse. However, it is possible that

surviving issue might argue that they are entitled to their *légitime* over that sum. It is, therefore, considered that this issue is one of general application relevant to many people resident in Jersey.

11.8 The Working Group, having considered the impact of *légitime*, specifically in connection with the TJJ84 and more generally, is in favour of its abolition and expresses the desire that the Government of Jersey progresses with the abolition of *légitime* more generally. However, accepting that this is a point which affects more than the TJJ84 and the trusts industry and requires wider debate than is envisaged by this consultation, save for expressing the desire that the Government of Jersey progresses with the abolition of *légitime*, the Working Group has restricted its recommendations to amendments to the TJJ84 to remove provisions which preserve *légitime* in the trusts context.

11.9 The Government of Jersey considers that this amendment would be beneficial, and intends to review the wider question of the reform of the *légitime* provisions. It is noted that matters of succession have been discussed by the Legislative Advisory Panel in the recent past and that *légitime* may be the subject of further consultation.

11.10 For the purposes of this consultation, consideration is therefore given to the removal of the references to *légitime* in Article 9 at subsections (1) and (3) of the TJJ84, as follows.

9 *Extent of application of law of Jersey to creation, etc. of a trust*

(1) ~~Subject to paragraph (3),~~ Any question concerning –

(a) *the validity or interpretation of a trust;*

- (b) *the validity or effect of any transfer or other disposition of property to a trust;*
- (c) *the capacity of a settlor;*
- (d) *the administration of the trust, ...[&c]*

...

- (3) *The law of Jersey relating to *légitime* shall not apply to the determination of any question mentioned in paragraph (1) ~~unless the settlor is domiciled in Jersey.~~*

QUESTIONS

- 27) Do respondents agree with the proposed limited amendment to the TJL84 as set out above?**
- 28) Do the respondents agree in principle that the Government of Jersey should now look to reform the law relating to *légitime* more widely?**

12. Other

12.1 The Working Group has given further consideration to the following matters but has recommended not to progress with consideration of legislative amendments at this time. The Government of Jersey has accepted that recommendation subject to responses received through this consultation.

(a) Removal of the restriction on direct holding of Jersey immovable property by trustees

12.2 Article 11(2)(a) (iii) of the TJL84 states that a Jersey trust shall be invalid to the extent that it purports to apply directly to immovable property situate in Jersey. This has been the subject of previous consultation and a paper by the Law Commission *The Prohibition on Trusts Applying Directly to Jersey Immovable Property*¹ and respondents are referred to that paper for detailed analysis of the topic. The Law Commission recommended the abolition of this prohibition and noted that consequential amendments of other laws in Jersey would be required. The Working Group is currently of the view that on balance this issue should not be pursued independently of other amendments.

(b) Implementation of a specific 'non-charitable purpose trusts' regime (akin to the Cayman STAR regime and the BVI VISTRA regime)

12.3 The Working Group noted the different options available in other jurisdictions particularly the Cayman Islands but was of the view that the principal advantage of the Cayman STAR regime was the ability to limit a beneficiary's right to information through the use of an enforcer. As consideration was being given to the amendment of Article 29 of the TJL84

¹ <https://jerseylawcommission.files.wordpress.com/2015/06/2006-the-prohibition-on-trusts-applying-directly-to-jersey-immovable-property.pdf>

(in respect of the rights of beneficiaries to information) in this regard, it was not considered that the provisions already existing within the TJL84 dealing with non-charitable purpose trusts required further amendment at this time.

(c) Introduction of an express power to ratify conduct of an improperly appointed trustee;

12.4 From time to time circumstances occur where trustees, unbeknown to them, have been invalidly appointed. They may have acted as trustees, making decisions and exercising powers in good faith whilst under the mistaken belief that they were properly appointed. In addition to the court's power to release such persons (and any trustee who believed it had retired validly upon the actually invalid appointment of new trustees) from liability under Article 45 of the TJL84, it was considered whether the court should also be able to ratify or confirm those acts to avoid the havoc that might result from unscrambling the actions or omissions of the trustees. However, the Working Group concluded that the validity and limits of such principle can be better clarified and developed by the courts (as occurred in a recent case, *Representation re the Z Trust* [2016] JRC048) unless a power to vary trusts without the consent of all adult beneficiaries (discussed above) is introduced when the power to ratify decisions taken by an invalidly appointed trustee might reasonably be incorporated in such a provision. This will be considered further in light of the outcome of the consultation on variation.

(d) Reconsideration of the language of Article 9 (in light of critiques published in peer journals).

12.5 Article 9 is often referred to as the 'firewall' provision because of its aim, namely to ensure that questions concerning the validity of a trust, or the

validity of a transfer of property to a trust, are governed by Jersey law. It has received a largely favourable reaction since its introduction in 2006 but has inevitably been the subject of further suggestions as to improvement. At this time, however, it is considered undesirable to make further minor amendments to what is an important and complex provision. Should any respondents be of the view that further change is needed, attention will be given to any suggestions made.

(e) Insolvency and trusts

12.6 There is no formal insolvency regime applicable to trusts in Jersey. Recent judgments of the Royal Court - *Representation of the Z Trusts* [2015] JRC196C and [2015] JRC214 - held that in the context of a trust, the test for insolvency is the cash flow test (which is whether or not the trustee can meet its debts as trustee as they fall due out of the trust property). Further, that on insolvency, the trust should thereafter be administered (whether by the trustee or any other fiduciaries exercising a power in connection with the trust) on the basis that it is insolvent, treating the creditors, rather than the beneficiaries, as the persons with the economic interest in the trust. It is likely that this statement of principle will need to be refined in future cases as circumstances where the trustee (and other fiduciaries) should have regard to the interests of both beneficiaries and creditors can readily be envisaged (for instance where a trust is cash flow insolvent but its assets exceed its liabilities).

12.7 The court went on to consider the appropriate manner in which the ongoing administration should be conducted which would be case specific and might include the appointment of an insolvency practitioner or the approval or imposition of a court supervised regime by way of directions to the trustee. The court noted the '*wide and vibrant jurisdiction*' which

was the court's equitable jurisdiction in relation to trusts reflected in Article 51 of the TJL84 and which could be exercised here.

- 12.8 The Working Group and the Government of Jersey observe that this is a complex and developing area of the law. At this time, it is considered that there is only a small number of cases where this would be relevant and that it is preferable to allow the flexible and pragmatic development of the relevant principles by the Royal Court.

QUESTION

- 29) **Do any Respondents to the Consultation Paper believe that any of these topics should be considered further at this time?**

APPENDIX A

Members of the Jersey Finance Trust Law Working Group

Advocate Giles Corbin, Mourant Ozannes

Advocate Keith Dixon, Carey Olsen

Advocate David Dorgan, Appleby

Advocate Sally Edwards, Ogier

Advocate Zillah Howard, Bedell Cristin

Advocate Andreas Kistler, Carey Olsen

Advocate Paul Matthams, Carey Olsen

Advocate Steven Meiklejohn, Ogier

Advocate Naomi Rive, Coutts (*representative of STEP Jersey*)

Mrs Linda Williams, Steven Slater Legal Service

Advocate Victoria Yates, Ward Yates (*representative of JATCO²*)

William Byrne, Head of Technical, Jersey Finance Limited (Chair)

George Pearmain, Advocate (non-practising), Lead Policy Adviser, Private Wealth and Financial Crime, Government of Jersey

The assistance of Advocate Louise Richardson of Appleby (on secondment to the Government of Jersey) is acknowledged in the preparation of this Consultation Paper.

² Jersey Association of Trust Companies

SUMMARY OF CONSULTATION PAPER QUESTIONS

- 1) **Should the Government of Jersey take steps to place beyond doubt the position as to the need for a beneficiary at all times during the existence of a trust?**
- 2) **If so, please comment on the above proposal. If you consider that there are alternatives, please state what they are.**
- 3) **How should the Government of Jersey consider addressing the policy question in respect of the potential for there to be a trust with an indefinite trust period and class of beneficiaries without any existing or ascertained members at the time of creation and which class does not close for as long as the trust subsists?**
- 4) **Should there be a full iteration of the principles of disclosure or do you consider that Article 29 should be reworked so as to provide greater clarity and in particular to remove the double negative? The alternative is that, given the case law on the subject thus far, the provision should be left untouched.**
- 5) **Should the rights of a beneficiary to obtain information about a trust be restricted in statute or by way of election in the trust deed if so required? What is the minimum level of information that must be given to beneficiaries to maintain trustee accountability?**
- 6) **Alternatively, is there another approach that should be considered?**
- 7) **Is it appropriate to offer an opportunity for a settlor to transfer the rights to information to a third party? If so, should there be a restriction on who that third party should be – for example, that they are a Protector, or an Enforcer or acting in some fiduciary capacity?**

- 8) In respect of each of the above amendments, do you consider that the amendments enhance the TJL84 as currently drafted and should be made in the suggested or similar form?
- 9) Do you agree with the suggestion that no amendments should be made to certain provisions as set out above? If not, what amendments should be made and why?
- 10) Do you agree that the terms of the trust should be able to expressly specify that reserved powers are held on a personal rather than fiduciary basis?
- 11) Are you aware of a demand for arbitration of trust disputes to be introduced into the Jersey legislation?
- 12) Do you support the conclusion reached by the Working Group that, on balance, provisions should not be inserted into the TJL84 at this time to so as to render an arbitration clause in a trust instrument binding on a beneficiary?
- 14) Do you consider that the TJL84 and CJL91 should be amended to introduce confirmatory wording to put beyond doubt the point that the newly merged corporate body continues as the validly appointed trustee of a particular trust without further action?
- 15) Do you consider that the CJL91 should be amended to resolve any potential doubt as to (i) the need to give notice to creditors who have dealt with the merging entity solely in that entity's capacity as trustee? and (ii) the need for the corporate trustee planning to undertake a merger to give notice to itself?
- 16) Are there any other points that need clarification related to the merger of a corporate trustee with another corporate body?

- 17) Should Article 34(2A) of the Law be extended to permit a former trustee's officers and employees to enforce an indemnity in their own right?
- 18) If so, should the trustee who employed them be appointed to act as trustee of the indemnity for those individuals?
- 19) It may be that there are others, in addition to a trustee's officers and employees, in respect of whom this same issue of direct enforcement might arise. Are there others to whom you think this direct enforcement provision should be extended?
- 20) Should the provisions be extended to include indemnities provided in respect of distributions made during the lifetime of a trust?
- 21) Do you agree that it is desirable for Article 38 to be amended to widen the options for the trustee in relation to accumulation and distribution of income?
- 22) Do you agree that the default position should be the retention of income in its character as income?
- 23) Do you agree that the amendments (if adopted) should have retrospective effect?
- 24) Do you agree that Article 38(5) should be amended to clarify that the power of advancement may be exercised for all of the trust property rather than only part of it?
- 25) Are respondents in favour of introducing wording similar to that found in the Cayman statute in order to put the matter beyond doubt?
- 26) Do respondents consider that it would be beneficial to provide the court with wider powers to vary a trust?
- 27) Do respondents agree with the proposed limited amendment to the TJL84 as set out above?

28) Do the respondents agree in principle that the Government of Jersey should now look to reform the law relating to *légitime* more widely?

29) Do any Respondents to the Consultation Paper believe that any of these topics should be considered further at this time?

[END OF PAPER]