

## TRUSTS (AMENDMENT NO. 7) (JERSEY) LAW 20[•]

What's Included

by David Dorgan

January 2017

The Trusts Working Party discussed several areas consulted upon for Amendment No. 7 to the Trusts (Jersey) Law 1984 (as amended). This briefing will focus on those areas anticipated to be included in Amendment No. 7. A separate briefing will highlight those areas which were also considered, but which will not be progressed at this time. These will be subject to further consultation or will be enacted pursuant to other legislation.

### **RIGHTS OF BENEFICIARIES TO INFORMATION - ARTICLE 29**

Article 29 will be reworded to remove the double negative language and to clarify that a trust instrument can restrict the provision of information to beneficiaries. However, such restrictions will not be completely prohibitive (i.e. it will be invalid to remove the ability to see the accounts) and any restriction must be considered against the principles of accountability to beneficiaries. There is no intention to specify the principles of disclosure or what must be disclosed. A beneficiary will retain the ability to apply to the court for further access to information and the court will retain an overarching discretion.

Also debated was the possibility of a third party enforcer having the duty to enforce rights of information on behalf of beneficiaries, but it was felt that Government should look at developing an alternative trusts regime in separate legislation similar to the Cayman Islands STAR Trust. Government intends to further explore this option as a distinct project during 2017.

### **RESERVED POWERS BY A SETTLOR - ARTICLE 9A**

Various minor amendments were proposed in order to clarify and enhance Article 9A. The fundamental amendments being progressed are as follows:

- Article 9A(1)(a) – clarification that “all” or any of the beneficial interest may be reserved or granted (current language uses “any”).
- Article 9A(1)(b) – clarification that “all” of those powers at Article 9A(2) can be reserved or granted (current language uses “any”).
- New Article 9A(2A) – confirmation that the holding of a reserved power or interest does not of itself constitute the holder a trustee.
- New insertion of a presumptive provision (rebuttable by express language to the contrary) that reserved or granted powers cease to have effect upon the death, incapacity or bankruptcy of powerholder.

Of interest, two clarifications not being progressed are as follows:

- Article 9A(3) – confirmation that a trustee complying with the exercise of a power by another power holder is not liable. There were differing views of this point. On the basis that it is already arguable there is no obligation on the trustee to monitor the exercise of reserved powers or supervise the actions of a powerholder, the Government has decided not to proceed with this amendment.
- It was debated as to whether clarification should be inserted on the question of whether reserved or granted powers are personal or fiduciary in nature. Again, there were differing views of this point, but it was decided the issue would continue to be ultimately determined by the court on a construction of the trust instrument and all other circumstances.

### **EXTENSION OF INDEMNITY TO THE TRUSTEE’S OFFICERS AND EMPLOYEES - ARTICLE 34(2) AND (2A)**

The Government is minded to extend the indemnity provisions at Article 34(2) to cover distributions made during the lifetime of the trust and on termination. Whilst indemnification upon distributions has been common practice for years, it has been an obvious omission from Article 34(2).

Furthermore, amendments will be made to Article 34(2A) to clarify that individual officers and employees (and all those encapsulated by the STEP definition of ‘Indemnified Persons’ together with service company employees) will be able to benefit from indemnities from a new trustee (including where an indemnity has been extended or renewed by subsequent trustees) and to have direct access to the court to enforce such indemnities as necessary.

### **RETENTION & ACCUMULATION OF INCOME - ARTICLE 38(5)**

Missing from Article 38 is guidance as to the retention period of income before it must be distributed and to whom income should be distributed where a trust instrument is silent.

Government intends to widen the options for trustees in relation to accumulation and distribution of income. Where the trust instrument is silent, a trustee will be able to accumulate income to capital, retain the income in its character of income or distribute the income. The default position will be the retention of income in its character as income. This provision will not be given retrospective effect.

## POWER OF THE COURT TO VARY A TRUST – ARTICLE 47

Essentially, Article 47(1) limits the court's power of variation in the management or administration of the trust to provide consent on behalf of those who cannot consent for themselves (e.g. minors, interdicts and unborns). The court cannot, for example, approve a variation on behalf of an adult beneficiary with legal capacity. Therefore, the working party considered widening the court's powers of variation, for example, to avoid just one of many beneficiaries preventing a variation.

However, there was strong opposition to the proposal from the majority of respondents, including the Chancery Bar Association (i.e. English Barristers specialist in trust law), and it was concluded it was not prudent to extend the power of variation. Therefore, the Government is not minded to make amendments to enhance the power of variation of the court. But, it is seen as helpful to permit the court to provide consent to a variation on behalf of beneficiaries who the court is satisfied cannot be found, despite proper attempts to locate them or who, due to their number, it is practically unfeasible to contact, and then only if the Court determines that such variation is in their best interests.

## STATUTORY LIEN

Previous consultation for Amendment No. 5 received positive responses for the inclusion of a non-possessory lien to cover the proper expenses and liabilities of trustees. Its introduction was then delayed due to the impending introduction of the new Security Interests (Jersey) Law 2012, but has since been confirmed as existing in Jersey customary law pursuant to the judgment of *re the Z Trusts* [2015] referring to the Guernsey court of Appeal case of *Investec Trust (Guernsey) Limited v Glenalla Properties Limited & Ors* [2014].

Following *re the Z Trusts* case, Government intends to now introduce a statutory lien with the following characteristics:

- to be non-possessory and accordingly to continue to apply even after the trustee has left office and surrendered the trust property to a new trustee;
- to secure the payment of authorised remuneration to the trustee and reimbursement of all expenses and liabilities reasonably incurred by the trustee;
- to arise at the time the remuneration falls due or the expense or liability is incurred;
- to take priority over the interests of the beneficiaries but be subsequent to other charges on the trust property;
- to survive a distribution unless expressly waived;
- to be defeated by a bona fide purchaser for value in which case it should attach to the sale proceeds.

Reflecting *re the Z Trust* case, questions of priority of a trustee's lien against other creditors and between a former and current trustee remain to be determined. Rather than attempting to legislate to cover the multitude of complex and varying situations that could arise, Government considers it more appropriate for these questions to be determined by the court in due course.

**COMMENT**

The amendments will not fundamentally change the existing trust law of Jersey, but will look to helpfully clarify certain areas and introduce some new provisions to continue to develop Jersey's place as a competitive jurisdiction for private wealth administration.

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