VOISIN LAW

Proposed Amendments to the Trusts (Jersey) Law 1984 | 1

The Trusts (Jersey) Law 1984 (the **"Law"**) has only been amended six times since 1984 and is not, and was not intended to be, a codification of the law, allowing for flexibility and development.

In order to ensure that the Law continues to support the needs of the trust industry, various amendments to the Law have been proposed drawing on the work of the Jersey Finance Trusts Law Working Group and in a recent consultation paper it has been proposed that amendments be made to the Law during the course of 2016.

The proposed areas to be amended include:

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

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 recent decisions of the Royal Court of Jersey, including *Harper v Apex Trust Company* Limited [2014] JRC253.

It is established law that for a trust to be valid, 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) and it is this third requirement that has been the subject of comment.

The Law makes various references to beneficiaries which on one analysis might 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.

However, in contrast, recent cases might be interpreted as pointing towards a conclusion which would render certain Jersey trusts vulnerable to being void for uncertainty due to a lack beneficiaries. For example, in *Re Representation of AIB Jersey Trust Ltd re the Exeter Settlement* [2010] JRC012 it was held that the power of addition was not sufficient to save a trust as in the absence of any beneficiaries at the outset there was never a valid trust and consequently no power to add.

Given that the validity of a trust is of primary significance, the consultation paper considers whether legislative change is therefore necessary 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.

The consultation paper does however note that a possible criticism of changing the Law in this manner is 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 and therefore this could potentially lead to undesirable results from a policy perspective.

2. The rights of beneficiaries to information

The need to amend Article 29 of the Law, which deals with the rights of beneficiaries to information

concerning the trust, has been the subject of much debate for a considerable time.

On the one hand there is the desire on the part of some settlors to restrict a beneficiary's access to information, (for example, young beneficiaries) and 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

There has also been criticism of the use of the double negative in Article 29 of the Law, as it has been viewed as being unclear.

This is a difficult area, which has been subject to previous consultation, but the current consultation paper has concluded that for the time being, the focus should be a reworking of Article 29, in particular to remove the double negative and to 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.

3. Reservation of powers by a Settlor

Ten potential amendments have been considered to the Law in relation to the reservation of powers by the Settlor, all of which are of a fairly technical nature, with the amendments including clarification that the reservation of all of the powers mentioned in clause 9A (1) (b) of the Law (which sets out the powers which may be reserved by the settlor of a trust) shall not affect the validity of the trust and the reservation, grant or exercise of a power or interest referred to in subsections (1) or (2) of Article 9A of the Law does not constitute the holder of the power or interest a trustee.

4. Arbitration

The question for consideration in the consultation paper, was 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. A 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. However, on the other hand, a disadvantage of arbitration is that it often costs as much and takes around the same time period as it would to bring a case before the court and the consultation paper therefore concluded that it is not desirable at this stage to impose enforced arbitration in the trusts context as there did not appear to be any evidence of a strong market demand for this option.

5. Trustees self-contracting

Since the last amendment it has been noted that there is some potential ambiguity over the retrospective nature of the provision (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 the fact 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) and it has been recommended that Article 31 of the Law (which deals with a Trustee acting in respect of more than one trust) be amended to make this clearer as to permit the

same.

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

Whilst it is strongly arguable that a valid appointment of a corporate trustee would continue to be valid notwithstanding any subsequent merger, it has been recommended that it is desirable to amend the Law in order to clarify the matter.

7. Extension of indemnity

The consultation paper has recommended the extension of Article 34 of the Law (which deals with the position of an outgoing trustee) to permit a former trustee's officers and employees to be able to also 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.

8. Retention and accumulation

The consultation paper has noted that there is no guidance within the Law 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. It has therefore been suggested that Article 38 of the Law (which deals with power of accumulation and advancement) be amended to widen the options for the trustee in relation to accumulation and distribution of income with the default position being the retention of income in its character as income.

9. Presumption of lifetime effect

Where a trust includes the reservation by the settlor of a large number of powers, it has been argued that the trust may, in certain circumstances, be seen as "merely illusory" and therefore not a valid trust. In addition, 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. Whilst this is not viewed as a significant problem under Jersey law, it has been suggested that a provision be inserted into the Law to clarify that, unless specified to be a will, a trust will take immediate effect upon the property being identified and vested in the trustee in order to put this matter beyond doubt.

10. Power of the court to vary a trust

Pursuant to Article 47 of the Law, the Royal Court has limited statutory powers to vary a trust.

However, although 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, the court has no power to approve a variation on the part of adult beneficiaries who are able to consent (or not) themselves.

Following on from the current approach adopted in Bermuda, the consultancy paper considers 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 and it is clear that the arguments are finely balanced.

Arguments for extending the court's power of variation have included 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 and 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 beneficiary.

However, on the other hand, it has been argued that the new statutory power might undermine Jersey's existing firewall provisions (which make it clear that the effectiveness of an order by a foreign court purporting to vary a Jersey trust must be decided in accordance with Jersey law) especially in matrimonial cases and 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 and it remains to be seen whether powers of court will be extended in this regard.

11. Légitime

As the law stands, in broad terms, a person enjoys unrestricted testamentary freedom over his immoveable 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*.

These rules are often referred to as 'forced heirship' rules. Under Article 9(3) of the Law, these rules will apply to Jersey trusts established by a Jersey domiciled settlor.

The consultation paper has recommend to remove provisions in the Law which preserve *légitime* in the trusts context as 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.

The various proposed amendments highlighted above are still the subject of consultation within the legal profession and it will be interesting to see what amendments are actually made to the Law in the near future to ensure the trusts industry in Jersey remains flexible and highly competitive.