The Trusts (Jersey) Law 1984: Have your say...

May 2016

The Chief Minister's Department has recently issued a consultation paper on proposed changes to the Trusts (Jersey) Law 1984 ("**Trusts Law**").

The primary aim of the amendments proposed is to provide maximum flexibility for clients within an appropriate and legitimate framework.

The consultation process is open until 4 July 2016. If any of the amendments below raise any concerns for you, your clients or clients in the pipeline, make sure you put those concerns in writing to the Chief Minister's Department.

Our Trusts Law needs to evolve with time and if we all contribute to our Government's consultation papers we can all be instrumental in shaping its future and adding to its foundations.

PROPOSED AMENDMENTS

There are twelve areas being considered for amendment and they are as follows:

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
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. Légitime
12. Other

This briefing summarises the amendments proposed, but should you wish to read about the amendments in more detail, you can download the consultation paper at http://www.gov.je/government/consultations/pages/trustsjerseylaw1984.aspx.

Need for a beneficiary at all times during the existence of a trust

It is well established that for there to be a valid trust, it must be clear from the terms of the trust that:

- it is the intention to create a trust;
- what the initial trust assets are; and
- who the trust is to benefit.

The third requirement has been the subject of both comment and Royal Court judgments in recent years and the judgments in question have introduced an element of uncertainty as to what will satisfy the third requirement.

To illustrate this point, the court held in one case that a power of addition is not sufficient to save a trust from failing. In the absence of any beneficiaries at the outset there is not a valid trust and consequently no power to add.

The consultation paper proposes to remove any such uncertainty by amending the Trusts Law so that a beneficiary or class of beneficiaries need not be alive or in existence at the time of *creation* of a trust, but that it must be possible for them to be alive or in existence at some future time during the trust period. For example, the trust provides for the settlor's grandchildren to be beneficiaries when he or she has no grandchildren at the time of creation of the trust.

Rights of a beneficiary to information

This provision of the Trusts Law has been the subject of much debate over the years.

Whilst the provision in the Trusts Law ensures that trustees can be held to account by a beneficiary (which is of paramount importance), at what point is it appropriate for a beneficiary to receive any information? The answer to this could vary depending upon, for example, the value of the trust fund and the individual beneficiary's character. It might not be in a beneficiary's interest to establish at 18 years of age that there is a trust fund of substantial value available to him, therefore negating any need for that beneficiary to find his or her own way in life.

The consultation paper proposes the following amendments to Article 29:

- removing the double negative in Article 29 ie. to refer to what the trustee *must disclose* and not what it is entitled to withhold;
- making it clear that a beneficiary's right to certain information is subject to the terms of the trust; and
- making express provision for the assignment of the rights of a beneficiary to a third party (such as a protector) so ensuring accountability of the trustees and preserving the confidentiality of the trust documents.

These amendments would allow settlors the flexibility to determine when a beneficiary should become entitled to certain information and what should happen prior to that point in time (i.e. the protector or a third party may be entitled to request such

information) whilst at the same time ensuring somebody can at all times hold the trustee to account.

We envisage this proposed amendment being attractive to many (if not all) settlors.

Reservation of powers by a settlor

Article 9A of the Trust Law was introduced in 2006 and ultimately provides for a settlor to be able to reserve the following powers to himself or herself:

- to revoke, vary or amend the terms of a trust or any trusts or powers arising wholly or partly under it;
- 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;
- 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;
- 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;
- 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;
- to appoint or remove an investment manager or investment adviser;
- to change the proper law of the trust;
- 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.

A number of potential amendments are being considered to this article, the overriding purpose of which is to increase flexibility and remove any uncertainty as to whether:

(i) all of the abovementioned powers can be reserved by a settlor;
(ii) the powers reserved end on the death of the powerholder; and
(iii) in reserving the powers the trust constitutes a trust or a will.

Whilst (i) and (iii) might be uncontroversial and necessary, (i) is likely to be highly controversial, giving rise to questions such as:

- Does that create a relationship of principal and agent?
- If a settlor has all of those powers, would they vest in a trustee in bankruptcy in the event that the settlor is declared bankrupt?
- Is the trust illusory?

Do you have any thoughts on this that you wish to share?

Arbitration

The consultation paper wishes us to consider whether an arbitration clause in a trust instrument ought to be binding on a beneficiary. Have you noticed any demand from your clients for disputes to be dealt with by arbitration as opposed to the disputes being heard at a mediation or before the Royal Court of Jersey?

If a provision were to be introduced into the Trusts Law permitting binding arbitration clauses in trust instruments, whilst the obvious advantage is that arbitration would maintain confidentiality, the disadvantage is that the fees for arbitrating can be more expensive than litigation and in allowing such a clause the number of claims heard by the Royal Court of Jersey could (and are likely to do so) diminish in number, quality and variety impacting upon Jersey's body of case law.

Trustees self-contracting

In 2012 the Trust Law was amended so that a trustee be permitted to contract with itself where it is trustee of *different* trusts. The consultation paper suggests clarifying this provision to confirm that it can operate retrospectively ie. apply to contracts entered into before the provision came into force.

Confirmation of appointment of a corporate trustee post-merger

Typically, where a trust company joins with another, recourse will be had to the merger provisions of the Companies (Jersey) Law 1991. These provisions enable the corporate trustee to merge with another, avoiding the need for numerous instruments of retirement and appointment. It is suggested that the Trusts Law is amended to confirm that when a corporate trustee merges with another corporate body, this newly formed corporate body will continue as the validly appointed trustee without further action.

Extension of indemnity

Where a trustee retires, it is standard practice for the former trustee to have the benefit of an indemnity from the new trustee to protect it, should a claim be made against it after it has retired. This indemnity is often extended so as to require future trustees to indemnify the earlier trustee. The Trusts Law provides that this indemnity can be enforced even when the earlier trustee it is not a party to the relevant instrument.

It is proposed to extend this provision so that a former trustee's officers and employees can also enforce the indemnity in their own right (such persons often falling within a contractual definition of 'Indemnified Persons'). This extension has already been the subject of hearings before the Royal Court of Jersey and the court has held that an indemnity does indeed extend to a trustee's officers and employees. This amendment would not be altering this, it would merely be confirming the position in the Trusts Law itself and potentially adding to it (by extending it to lifetime distributions, including on the termination of trusts).

Retention and accumulation

The Trusts Law permits the accumulation of trust income if authorised by the terms of a trust. Any income not accumulated must however be distributed. The Trusts Law is currently silent as to how long income may be accumulated for and to whom any trust income should be distributed if not accumulated. The consultation paper proposes that this be clarified.

Presumption of lifetime effect

Whilst careful drafting of the trust instrument will avoid any uncertainty, the consultation paper proposes to amend the Trusts Law to make it clear that unless specified to be a will, a trust takes immediate effect upon the property being identified and vested in the trustee.

Power of the court to vary a trust

The Royal Court currently has somewhat limited statutory powers to vary a trust under the Trusts Law. The court has no power, for example, to approve a variation on the part of adult beneficiaries who are able to (or not) themselves. Further, the court cannot confer upon a trustee powers to enter into particular transactions (such as a sale or lease) connected with the management or administration of a trust if to do so would alter the beneficial trusts.

The consultation paper acknowledges (amongst other points) that if the court was allowed to vary a trust on behalf of an adult beneficiary it might overcome any argument from foreign tax authorities that a beneficiary has exerted some control over the trust, participated in a resettlement or given up a valuable asset or right. However, if such amendment was allowed, it might undermine our firewall legislation especially in matrimonial cases (and we know that the English family court, in particular, is partial to making orders in relation to Jersey trusts!).

Quasi-forced heirship

Jersey draws a distinction between movable and immovable property (broadly speaking real estate but not share transfer properties) and if a person has both, he or she should have a will for each. At present, there is testamentary freedom in respect of immovable property but, if a person is domiciled in Jersey, there are rules as to how someone may leave their movable estate known as *légitime*. These *légitime* rules afford a surviving spouse and/or issue of a deceased person rights to claim certain proportions of the deceased's moveable estate regardless of what any will may provide.

The consultation paper highlights concerns raised that high net worth individuals moving to Jersey have been reluctant to set up trust structures here due to this quasi-forced heirship rule, and have therefore used competitor jurisdictions instead. These rules also dissuade other Jersey residents from using trust structures due to the fear that they could one day be challenged by a disgruntled spouse or any issue.

The consultation paper notes that the Working Group is in favour of the abolition of these rules, however, such abolition has implications not just for the Trusts Law, but also the local succession law. The consultation paper confines its proposals to the removal of *légitime* in the context of determining the validity of a trust and the transfer of property, but whether *légitime* should be abolished from our succession law is a question for another day. It would seem to be somewhat discriminatory however, to abolish the rule for high net worth individuals coming to the Island, but not local residents and so it would appear to me to be sensible to put forward arguments for both when responding to this consultation paper.

Have your say...

The period of consultation concludes on 4 July 2016. If you have any observations, comments or thoughts on the abovementioned proposals, please submit them to the Chief Minister's Department by emailing g.pearmain@gov.je.