

UPDATE

Consultation on Amendments to the Trusts (Jersey) law 1984

Update prepared by Edward Devenport (Jersey)

On 8 July 2024, the Government of Jersey published a consultation paper seeking input on proposals to make amendments to the Trusts (Jersey) Law 1984 (**TJL84**). The consultation paper was prepared following discussions with the Trust Law Working Group, a group of Jersey trust law practitioners. This update summarises the proposed changes and includes some commentary from Edward Devenport on them.

Introduction

TJL84 has been amended on various occasions since it came into force over 40 years ago. The proposals for further amendments are summarised below.

Comment: The amendments contemplated by the Government's consultation are more in the nature of evolution than revolution and, in some respects, are a response to developing case law.

Priority of secured creditors and the trustee's lien

The Privy Council recently heard appeals from cases concerning the nature of liens of trustees of Jersey law trusts in *ETJL v Halabi and ITGL v Fort Trustees* [2022] UKPC 36. The Privy Council concluded, amongst other things, that the right of indemnity of trustees and former trustees carries with it a proprietary interest in the trust property in their favour (i.e. the trustee's lien). However, there remains some uncertainty on the impact that the voluntary creation of security over the trust fund (such as in the case of a trustee granting a mortgage over trust property to commercial lenders) has on the lien, especially the lien of a former trustee who is not party to the security arrangements. The proposal is to clarify this to say that such security would rank ahead of such liens.

Comment: One would expect that such a clarification would be welcomed by lenders to trustees, though understandably former trustees may have greater reason to reflect on it. However, on the latter point, it is only in the last decade that Jersey trust lawyers have been confident, on the basis of developing case law that a trustee had a lien at all (no mention is made of them in TJL84), and therefore a trustee who retired before then is unlikely to have placed reliance upon the concept when considering security for their liabilities when retiring. Moreover, in our experience, most retiring trustees accept commercially that the value of the indemnity they receive can potentially be undermined by factors outside their control (for example future investment losses in the trust fund) and this proposed change is arguably just another example of that.

Ability of the beneficiaries collectively to call for the termination or variation of trusts

The Guernsey case of *Rusnano* [2019] GRC 011, decided that the members of the class of beneficiaries of a discretionary trust could together terminate the trust provided that they are of full age and capacity, even if there was a power to add beneficiaries. This was based on an interpretation of a particular provision of the Guernsey trust statute which is very similar to the equivalent in Article 43(3) of TJL84. This was something of a surprise for some local trust lawyers who had assumed that the position would be the same as in England under the rule in *Saunders v Vautier* and where recent authority suggests that a power to add beneficiaries would prevent such a termination.

The proposal in the consultation paper is that Article 43(3) would be amended so that the presence of a power to add beneficiaries in such a case would prevent termination by the beneficiaries.

At the same time, it is proposed to clarify that, where the beneficiaries' ability to terminate does apply, that ability would extend also to varying the trust (there is already Jersey case law authority to the effect that it does).

Comment: this proposal seems uncontroversial and, in relation to variations, would add useful flexibility.

Position where a sole trustee purports to resign

It is self-evident that the statutory power to resign by notice to co-trustees in Article 19(1) of TJL84 does not apply to a sole trustee. However, it is not clear whether the same applies where the power to resign is conferred by the terms of the trust (for example, a power to resign by notice to a protector). The proposal in the consultation paper is to amend Article 19 to make it clear that it does, so that a sole trustee could not resign in that manner.

Comment: this seems an uncontroversial amendment in that it must be undesirable for any trust to be left with no trustee.

Data trusts

The consultation discusses whether TJL84 should be amended to enable the creation of trusts of pure data where the data does not itself constitute property in the legal sense of that word as used in TJ84. The suggestion is that this may increase the competitiveness of Jersey in the area of provision of services in respect of digital assets (such as, but not limited to, crypto-tokens and cryptoassets).

Comment: this is an interesting proposal, but it would be a significant change which would likely have ramifications for other areas of property law distinct from trust law, and therefore no proposal is put forward in the consultation paper. Rather, it is proposed to await the outcome of a separate wider consultation being made by the Jersey Law Commission in this area in their paper Digital Assets Reform Project: Smart Contracts, Data Assets & DAO (24 March 2024).

Minor corrections

Proposals are also made to correct minor errors or inconsistencies in the wording of TJL84. These include:

- clarifying that the trustee of a purpose trust must exercise their powers in pursuance of the purposes and not just in the interests of any beneficiaries; and
- eliminating the inconsistency between Article 55(1) (so that it refers to *any* notice not just *actual* notice) and other provisions of TJL84 which refer to notice (actual or otherwise). Article 55(1) protects persons dealing with trustees who are bona fide purchasers for value without actual notice of a breach of trust. There seems to be no justification for this inconsistency, which is not present in the Guernsey trust statute.

Comment: these proposals seem uncontroversial.

Next steps

The Government's consultation paper can be found [here](#) or otherwise please approach your usual Mourant contact who can provide you with a copy. The deadline for responses to the consultation is 16 August 2024. It is hoped that draft legislation will be finalised for lodging before Jersey's parliament in the autumn of 2024.

Note

Edward Devenport is a member of the Trust Law Working Group which has contributed towards the preparation of the Government's consultation paper. Note that, in so far as this update includes commentary on the proposed changes, they represent Edward Devenport's own views and do not necessarily represent the views of the other members of the Trust Law Working Group.

Contacts



Edward Devenport
Partner
Mourant Ozannes (Jersey) LLP
+44 1534 676 366
edward.devenport@mourant.com

This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts. You can find out more about us, and access our legal and regulatory notices at [mourant.com](https://www.mourant.com). © 2024 MOURANT ALL RIGHTS RESERVED