CHANCERY BAR

Proposed Amendments to the Trusts (Jersey) Law 1984

Response of the Chancery Bar Association to the Consultation Paper published on 11 April 2016 by the Chief Minister's Department

Introduction

1. The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,250 barristers. Its members handle the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales and in cases overseas. It is recognized as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

2. The Chancery Bar Association is glad of the opportunity to comment on the Consultation Paper published on 11 April 2016 by the Chief Minister which canvasses proposed amendments to the Trusts (Jersey) Law 1984 ("the TJL").

3. This is the response of the Chancery Bar Association to the consultation. It has been approved by the Committee of the Association. The working party responsible for the detailed comments comprised Nicholas Le Poidevin, Q.C., James Brightwell, Jordan Holland, Thomas Fletcher, and Francesca Perselli, all practitioners of the English Chancery Bar. All of them have experience of Jersey trusts.

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

Q1. 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?

4. Yes. The decisions in *Re Exeter Settlement* and *Re 'A' Employees Shares Trust*, referred to in the Consultation Paper, may make some Jersey trusts vulnerable to a challenge for uncertainty.

5. The decision in *Harper v Apex Company Ltd*, however, does not appear to be objectionable. In that case, there was a purported purpose trust with no specified purposes. Unless a claim for rectification is available, it seems to us that a trust with no beneficiaries and no purposes must fail, and that there must be a resulting trust for the settlor from the outset.

Q2. If so, please comment on the above proposal. If you consider that there are alternatives, please state what they are.

6. Those recent Jersey authorities do suggest that the mere fact that there is no beneficiary in existence at any given time may cause a trust to fail for lack of beneficiaries. As the Consultation Paper correctly states, that would be a more restrictive position than in England. The proposed amendments (paras. 1.11, 1.12) would remove the risk.

7. One alternative to the proposal in the Consultation Paper would be a regime similar to the STAR trust regime in the Cayman Islands, which appears presently not to be under consideration. Such a trust can be for beneficiaries or purposes or both.

Q3. 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?

8. In England the policy of the law is to ensure that the property will vest within the perpetuity period applicable to the trust. Where, as in Jersey, it has been deliberately chosen to have no perpetuity period, we doubt whether there is any separate policy against a trust which may continue indefinitely without a beneficiary.

9. We nonetheless think that where no beneficiary may become entitled to a vested interest for a very long time consideration should be given to ensuring that a trustee can be held to account. One possibility would be to require in the TJL that before the end of a certain period there must be a person in existence and capable of enforcing the duties of the trustees (and in default there would be a resulting trust). That would be quite different from a perpetuity period, which requires the trust property to vest. A provision that there must be a default beneficiary, or the object of a discretion, would not require the property to vest within any particular period.

10. In practice, most trusts do have default beneficiaries or discretionary objects who are capable of taking action. Furthermore, Article 51(3) presently permits any person to make an application to court for directions, with the leave of the court.

11. A provision permitting a trust to have an enforcer apart from the beneficiaries may also be attractive to some settlors, and consistent with the policy of the law. The existence of such a person need not restrict the rights of the beneficiaries to take action; if it did then a regime similar to the Cayman STAR regime might be created. But for reservations about the practical utility of enforcers see our answer below to Q7.

2. The rights of beneficiaries to information

Q4. 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.

12. We do not consider that it is desirable or practicable to formulate a complete restatement of the principles of disclosure. The discretionary approach laid down in *Schmidt* and adopted in Jersey (though subject to the provisions of the TJL) accommodates such factors as:

(1) The nature and quantum of the applicant beneficiary's interest and the likelihood or unlikelihood that the beneficiary might benefit from the trust;

(2) The relation between the beneficiary's interest and the disclosure sought; and

(3) The maintenance of (i) confidentiality of communications between the trustee and other beneficiaries and (ii) any relevant commercial confidentiality.

It would be difficult to draft a set of rules to cater for all situations and we agree that the attempt would be contrary to the nature of the TJL as a framework rather than a codification.

13. On the other hand, there is nothing to be said for maintaining an ambiguity and at a minimum the wording of Article 29 could usefully be reformed to eliminate the double negative. See under Q5 for our proposal.

14. A beneficiary can seek information only if he or she knows of the trust and of his or her interest under it. We raise for consideration whether the TJL should contain some obligation *obliging* the trustee to inform a beneficiary of the interest under the trust, though perhaps only in specific circumstances. In the absence of such a provision, the Jersey court could be expected to look to English law; but the English rules are markedly uncertain (*Lewin on Trusts*, 19th ed.), paras. 23-007 *et seq*.).

Q5. 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?

15. We consider that settlor autonomy should be respected and that it may be legitimate for a settlor to wish to restrict access to information in particular cases, *e.g.* (as the Consultation Paper mentions at para. 2.2) 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 hand, there is an obvious tension with the need to hold the trustee accountable. It would be impossible to permit the exclusion of any right to

information and extremely difficult to lay down comprehensive rules as to what restriction was or was not permissible.

16. We consider that sections 26 and 38 of the Trusts (Guernsey) Law 2007 ("the TGL") do provide a useful model. The scheme is threefold:

(1) There is an obligation under section 26 to disclose basic information as to the state and amount of the trust property. The obligation can be excluded by the trust instrument but the court may nonetheless direct disclosure.

(2) There is a provision in section 38 protecting the trustee from disclosure of its reasons for exercising its functions or of a letter of wishes; but again the court may direct disclosure.

(3) Documents and information outside those categories are not the subject of statutory rules and appear to fall within the general *Schmidt* discretion.

That scheme in our view (i) adequately respects settlor autonomy, (ii) identifies good practice as to the disclosure of basic information and (iii) leaves the final say, as a matter of discretion, with the court.

17. We consider nonetheless that if adopted in the TJL two modifications to the scheme of the TGL should be considered:

(1) The basic information to which there is a right under section 26 of the TGL (subject to the terms of the trust) is confined to "the state and amount of the trust property". That appears to us unduly restrictive. The beneficiary cannot tell (i) what the original trust property was, (ii) whether a suitable investment policy has been followed or (iii) what distributions have been made. The basic information should include at least that held to Jersey to fall within the expression "the accounts of the trust" (Consultation Paper, para. 2.5(iii)).

(2) Where the trust instrument restricts access even to that information, the TGL (by section 26(3)) requires the applicant beneficiary to show that provision of the information is necessary or expedient for (i) the proper disposal of any matter before the court, (ii) the protection of the interests of any beneficiary, or (iii) for the proper administration or enforcement of the trust. We think that those requirements, at any rate if narrowly construed, would be difficult for a beneficiary to fulfil when he merely wishes to check that all is well. The discretion of the court should be a sufficient check on frivolous requests.

Q6. Alternatively, is there another approach that should be considered?

18. No.

Q7. 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?

19. We take the question to be whether the TJL should permit a settlor to bar the beneficiaries from any access to trust information and instead provide a third party with the right to it. (The reference here to "transfer" (and to "assignment" in the consultation Paper, para. 2.14) are perhaps misleading.)

20. We draw attention to the fact that the TJL already permits a purpose trust which is intended to benefit persons if it also provides for an enforcer; see Article 12 (and see Article 11(2)(a)(iv)). The enforcer of a purpose trust is not specifically given any rights to information but that may be implied; he can apply to the court under Article 51(3). Hence the proposal seems to duplicate a facility which already exists.

21. Apart from that consideration, the proposal in our view suffers from shortcomings as follows (though we acknowledge that some of them equally apply to the enforcer of a purpose trust):

    (1) The third party, who will have been chosen by the settlor, would be unlikely to be assiduous in seeking information if the settlor did not wish it. The problem would be acute if the settlor were also a trustee.

    (2) Imposing a fiduciary duty on the third party would not amount to much of a sanction. A beneficiary would find it difficult to know whether the duty had been breached (or indeed what would amount to a breach). It would anyway be an unattractive remedy for the beneficiary to sue the third party when doing so would not itself provide the beneficiary with information or rectify any shortcomings in the administration of the trust.

    (3) It is not clear what the third party would be expected to do with any trust information once he had obtained it, if (say) it revealed a breach of trust or showed a case for replacing the trustee. Either the third party would have to be given standing to apply to court himself (under Article 51) or he would have to be entitled to pass on the information to a beneficiary.

    (4) The third party would not as such have any interest in an application to court, whether to obtain information in the first place or to seek other relief on grounds revealed by the information. He would have to fund the application himself and would be exposed to the risk of an adverse order for costs in favour

of the trustee. It is hard to see that many third parties would be willing to intervene on those terms.

22. Hence as formulated we are not in favour of the proposal.

3. Reservation of powers by a Settlor

Q8. 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?

23. We comment both on the substance of the proposed amendments and, where given, their wording, though we understand that the legislative drafter may adopt other wording.

Article 9A(1)(a)

24. The proposed amendment is not separately explained in para. 3.4(i) of the Consultation Paper. It is unclear how there could be said to be a trust at all where the settlor reserves "*the whole of the beneficial interest* in the trust property" (our emphasis). It is true that in a *Quistclose* trust the settlor might be said to reserve the whole beneficial interest but the "reservation" of the beneficial interest there is simply the converse of the failure of the purpose trust. We query, therefore, whether the proposed amendment to Article 9A(1)(a) is necessary or desirable.

Article 9A(1)(b)

25. We consider the proposed amendment to be sensible.

Article 9A(2)(c)

26. Although no proposed amendment to the definition of "corporation" in Article 1(1) is set out, it makes sense for a wide definition to be used to take account of the varied structures which may be encountered.

27. We note, however, that the definition of "corporation" expressly refers to a body which is incorporated. Any amendment seeking to embrace *all* partnership interests (as para. 3.4(ii) of the Consultation Paper appears to suggest) would therefore have to take account of the fact that the ordinary partnership is not incorporated.

Article 9A(2)(f)

28. The proposed amendment is framed so as to expand the category of "investment manager" or "investment adviser" by "including any person acting in relation to the affairs of the trust or holding any trust property". That may conceivably have the unintended effect of expanding the range of persons who should be treated as an investment manager or adviser outside the context of Article 9A; we think that "including any person ..." would preferably read "or any other person ...".

29. The proposed reference to any person "holding any trust property" may also need modification, given the definition of "trustee" under Article 2 as a person who "holds or has vested in the person ... property ...".

Article 9A(2)(g)

30. The proposed addition of the words "determine the exclusive jurisdiction of the court" may unintentionally imply that the Royal Court is bound to give effect to an exclusive jurisdiction clause, which is not consistent with the Privy Council's decision in *Crociani v Crociani* [2014] UKPC 40. Para 3.4(iv) of the Consultation Paper shows that that is not intended. It seems to us desirable to modify the wording to avoid the implication.

31. The final three words ("to the trust") would be better if they read "over the trust".

Article 9A(3)

32. We doubt whether the proposed additional wording alters the scope of this provision. It is difficult to see any relevant distinction between a trustee who acts "in accordance with the exercise of the power" (existing) and a trustee who complies "with such exercise of power" (new) or between acting in breach of trust (existing) and being rendered liable (new).

33. The proposed additional words are intended to reflect the position in Guernsey (Consultation Paper, para. 3.4(v)). But the equivalent provision in Guernsey (section 15 of the TGL) is drafted differently, in providing (so far as relevant) that:

> (2)(c) The reservation, grant or exercise of a power or interest referred to in subsection (1) does not … of itself render any trustee liable in respect of any loss to the trust property.
>
> (3) A trustee who acts in compliance with the valid exercise of any power referred to in subsection (1) does not, by reason only of such compliance, act in breach of trust.

34. The inclusion of the proposed additional words in the TJL may therefore encourage arguments on the meaning of Article 9A(3) and the scope of protection given to trustees by it. We suggest that alternative wording is considered in line with the Guernsey legislation, by drawing the same distinction between (i) the fact of the reservation, grant or exercise of the power or interest and (ii) the trustee's role in the exercise of a power.

35. Section 15(3) of the TGL, however, protects a trustee only if it acts in compliance with "the valid exercise" of a power. That wording may be ambiguous. There is a distinction between (i) expecting a trustee to ensure that an exercise is within the terms of a power to give directions and (ii) expecting a trustee to check that an exercise which on its face is within the terms of the power is in the interests of the beneficiaries. If the exercise of the power is valid only when in the interests of the beneficiaries, the protection given by section 15(3) is illusory. If the TGL is adopted as a model on this point, consideration should be given to clarifying it.

Para 3.4(x) of Consultation Paper

36. We do not agree that the proposed amendment is desirable, at least as presently framed, given that:

(1) Any amendment about the survival or extinction of powers ought to be of general application (that is, it should apply whether the powerholder is the settlor or a third party); and

(2) Separate considerations arise on the death of the powerholder and on his or her bankruptcy (in particular whether a power to revoke the trust should really be unavailable to creditors on a bankruptcy); and

(3) An amendment which provided for the presumption to be rebutted only by express language to the contrary risks producing perverse results.

Q9. 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?

Para 3.4(vii) of the Consultation Paper

37. We agree with the view that there should be no presumption that the powerholder holds powers personally unless they were explicitly described as fiduciary powers.

Para 3.4(viii) of the Consultation Paper

38. We agree with avoiding "an automatic abrogation of any responsibility on the part of the trustee". But we refer again to the distinction between (i) expecting a trustee to ensure that a direction is within the terms of a power to give directions and (ii) expecting a trustee to check that a direction which on its face is within the terms of the power is in the interests of the beneficiaries. There seems to us no reason why a settlor should be precluded from excluding the latter duty (if not already excluded by Article 9A(3)); and a trustee should be able to take office on the footing that such a provision will be respected.

39. Such a trustee might properly act merely as custodian of the trust property, which is particularly important in the context of unit trusts (*Barclays v Equity*, cited in the Consultation Paper, being an example). In the standard unit trust the trustee has minimal duties, acting merely as custodian, and all management decisions are taken by a manager. The risk otherwise is that a trustee may be reluctant to assume office as trustee in Jersey in such a structure.

Para 3.4(ix) of the Consultation Paper

40. We agree that such an amendment is unnecessary.

Q10. 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?

41. We agree that it should be permissible for the trust instrument to specify whether reserved powers are held on a personal or a fiduciary basis.

42. We do, however, query the proposal (at para 3.4(vii) of the Consultation Paper) to include a provision in the TJL to that effect. As far as we are aware, it has never been doubted that it is possible to specify the category of power in the trust instrument as a matter of principle and trust instruments containing such provisions have been considered by the Jersey courts: see *e.g. Centre Trustees Ltd v Pabst* [2009] JRC 109. If express provision in the TJL were made, it would have to take into account that:

    (1) The number of trust instruments containing such clauses would be likely to increase as a result;

    (2) There is a risk that such clauses would be inadequately drafted and require their meaning and effect to be determined by the court; and

    (3) There may be some confusion over the effect of specifying, for example, that a power is not held in a fiduciary capacity: see *Centre Trustees*, above, at [27] where the court noted that specifying that powers were not fiduciary meant only that the powerholder was "not under an obligation to consider from time to time whether or not to exercise them".

43. Further, any express provision should in our view recognise a threefold (not twofold) classification of powers, *i.e.* fiduciary, limited and beneficial: see e.g. *Lewin*, *op. cit*., paras. 29–015 to 29–018.

4. Arbitration

Q11. Are you aware of a demand for arbitration of trust disputes to be introduced into the Jersey legislation?

44. No. Arbitration of trust disputes has attracted a good deal of attention from the legal profession in the last few years but as far as we are aware it has not been generated by trustees, beneficiaries or settlors.

Q12. Do you support the conclusion reached by the Working Group that, on balance, provisions should not be inserted into theTJL84 at this time to so as to render an arbitration clause in a trust instrument binding on a beneficiary?

45. Yes, for the reasons cited in the Consultation Paper and because we do not perceive there to be a demand for it at present.

46. Should such a provision be made, it would need to be adapted to the context of trust litigation:

(1) It should provide for minor, unborn and unascertained beneficiaries to be bound;

(2) It should provide for their representation, *e.g*. by a representative or guardian; and

(3) It should provide for that person's costs to be paid out of the trust fund if not otherwise paid.

5. Trustees self-contracting

Q13. Do you consider that Article 31 should be amended as proposed?

47. We should like to be clear about the precise proposal being advanced. The proposed amendment to Article 31(3) set out in the Consultation Paper (para. 5.6), taken literally, would entirely abolish the rule against self-dealing. Under that rule, a trustee is not allowed to purchase trust property or enter into other transactions under which it obtains a benefit; if it does so, the sale or transaction may be set aside as of right on the application of a beneficiary. See *Lewin*, *op. cit*., paras. 20-105 *et seq*. (Not every transaction attracts the rule in its full rigour but the qualifications to it do not matter here.) The amendment would appear to permit such self-dealing. It is true that it is proposed (Consultation Paper, para. 54.) to retain the duties to act in the interest of the beneficiaries and so on but it would then be necessary for a complaining beneficiary to show that the trust was worse off.

48. We consider that an abolition of the self-dealing rule would be inconsistent with the nature of trusteeship as generally understood and that Jersey trusts might well become less attractive in consequence to settlors.

49. We assume, however, that it is not in fact intended to effect the abolition of the self-dealing rule but instead to deal with the technical difficulty that a contract purportedly made between a person and himself, even if acting in different capacities, is not a contract at all; a contract presupposes at least two parties. If that is the purpose of the proposal, the drafting should in our view make it clear that the self-dealing rule is unaffected.

50. As to what may be called the two-party rule, it may well be useful for a trustee of more than one trust to be able to contract with itself. If, for example, it is trustee of several trusts for the same family, it may be desirable to be able to lend money on commercial terms from a cash-rich trust to a cash-poor one. That, however, is already covered by Article 31(3) in its present form. The proposal would confer on the trustee a capacity to contract with itself personally. No instance is given in the Consultation Paper of a case in which it would be in the beneficiaries' interest for the trustee to be able to contract with itself personally and we have been unable to think of one. Accordingly, we do not support the proposal.

51. We do agree that it is sensible to remove any doubt that Article 31(3) applies to validate contracts entered into before it came into force in its present form.

6. Confirmation of the appointment of a corporate trustee postmerger

Q.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?

52. Yes. There is no reason for refraining from doing so.

Q15. 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?

53. Yes.

Q16. Are there any other points that need clarification related to the merger of a corporate trustee with another corporate body?

54. No.

7. Extension of indemnity

Q17. 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?

55. It is not proposed that there should be any compulsion to give an indemnity to officers and employees but only to ensure that if such an indemnity is given it is legally effective. We consider it plainly sensible, if there is doubt on the point under Jersey law, to ensure that officers and employees (and former officers and employees) should be able to enforce the indemnity.

Q18. If so, should the trustee who employed them be appointed to act as trustee of the indemnity for those individuals?

56. If the indemnity were made enforceable by those individuals by legislation, a trust would be pointless, indeed a needless complication. They would be able to enforce it directly in reliance on the legislation and would have no need of a trust. Conversely, if there were a trust, it might be said that only the trustee could enforce the indemnity. Moreover, it is difficult to see how an indemnity could be the subject of a trust.

Q19. 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?

57. Possibly auditors of the trustee (who might not otherwise be regarded as officers) should be expressly included, if the indemnity extended to them. But auditors of the trust should not.

Q20. Should the provisions be extended to include indemnities provided in respect of distributions made during the lifetime of a trust?

58. We think that sensible.

8. Retention and accumulation

Q21. 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?

59. We consider that "accumulation" properly means merely the retention of income, as opposed to its distribution. Whether it is then added to the capital of the fund or is held for later distribution to an income beneficiary (*e.g.*, in English law, pursuant to section 31(2)(i) of the Trustee Act 1925 and, seemingly, in Jersey law, under Article 38(3)(A)) will depend on the terms of the trust, although there will be a question only where, unusually, the trust instrument is silent. It follows that Article 38(2) simply states the logical converse of not accumulating income and does not itself impose any compulsion.

60. It seems sensible to clarify that there are two different ways in which accumulated income may be treated but without broadening the trustees' powers by virtue of Article 38. It should be clear that the term "accumulated" should apply both to income held as an accretion to capital and to income retained in its character as income.

61. It is true that under English law a discretionary power to distribute income is impliedly subject to the restriction that the power must be exercised within a reasonable time; absent such a distribution, the power expires and the income is added to capital: *Lewin*, *op. cit*., para. 29-225 to 29-226. That restriction may be adopted in Jersey law. Trust instruments quite often make contrary provision, so that undistributed income from past years may be distributed as income of the current year.

62. It may well be sensible to clarify the position on that point under Jersey law. But if so, we consider that any revision to Article 38 should be a default provision only, *i.e*. that it would apply only where the trust instrument made no express or implied provision.

63. Note that if the clarification takes the form of permitting the indefinite retention of income for later distribution as such, the income so retained would have to be invested separately from capital. Otherwise the trustees would not be able to identify the return on the retained income.

Q22. 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).

64. Opting for a default position for retained income to keep its character as such would be logical. It should be capable of being treated as income of the current year so that a beneficial born in that year may benefit.

65. We do not consider that labelling accumulated income as "income" rather than an accretion to capital would prevent income from being accumulated for potentially very long periods of time in the absence of express time-limits.

Q23. Do you agree that the amendments (if adopted) should have retrospective effect?

66. In respect of existing trusts, yes, but not so as to alter existing entitlements to income arising before the amendment.

Q24. 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?

67. Yes.

9. Presumption of lifetime effect

Q25. Are respondents in favour of introducing wording similar to that found in the Cayman statute in order to put the matter beyond doubt?

68. Yes.

10. Power of the court to vary a trust

Q26. Do respondents consider that it would be beneficial to provide the court with wider powers to vary a trust?

69. Whether and to what extent it would be beneficial for the court to have wider powers of variation depends on the nature of the powers it is proposed to confer on the court. The proposal as presently framed in the Consultation Paper (at para. 10.5) of) is "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". We are not convinced that that would be beneficial, bearing in mind the following (with particular reference to paras. 10.6 and 10.7 of the Consultation Paper):

(1) Subject to the requirement of the beneficiaries' consent, it is unclear to us why the existing powers are not sufficient to address the problem of "a cumbersome or poorly drafted trust or one which does not include more modern provisions". The comment appears directed at administrative provisions, which would appear to fall already within the power conferred by Article 47(3).

(2) We do not think that the proposal does avoid any potential difficulty arising from the beneficiary being seen as "exerting some control over the trust, participating in a re-settlement of the trust, or giving up a valuable asset or right". If the court was empowered as proposed then the beneficiaries would still have the right to be heard, and their views would no doubt carry significant weight, so they might still be seen as exercising some control over the trust and so on. Alternatively, there is a risk that the change would encourage a practice of beneficiaries declining to express a view or participate purely due to concerns over the potential tax consequences, which is not desirable.

(3) The costs of obtaining court approval should not be underestimated. The Consultation Paper records the view that "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" but then immediately afterwards acknowledges 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". For our part, we agree with the latter view that the costs of going to court will almost invariably exceed the cost of steps to obtain consent.

(4) We note the view in the Consultation Paper 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". That is unsurprising. If a settlor *were* aware of the existence of wide statutory powers to vary the terms of the trust which he or she was proposing to create (potentially in the face of opposition from one or more of the beneficiaries in whose favour that trust

was created), they would be more likely to discourage than encourage the use of a Jersey trust.

(5) There is some risk that introducing a general power of variation without the requirement for consent would undermine, or would be seen as undermining, the effectiveness of Jersey's existing firewall provisions in Article 9.

70. If there were to be an expansion of the court's powers, we consider that it would be beneficial for that to form part of a wider process of rationalising and clarifying the statutory regime governing the variation of trusts. Any proposal to expand the court's powers should, therefore, address how those expanded powers would interact with the existing statutory powers under Article 47 and clearly demarcate the respective jurisdictional bases for variation.

71. We do not in any event consider that section 47 of the Bermudian Trustee Act 1975, referred to in the Consultation Paper, affords a satisfactory model for any Jersey legislation. The wording does not clearly support the wide meaning which appears to have been attributed to it.

11. *Légitime*

Q27. Do respondents agree with the proposed limited amendment to the TJL84 as set out above?

72. We consider that is a matter for Jersey residents alone to decide.

73. We note that the effect of the proposal made in isolation would be to remove the forced heirship requirements for settled property, which would create an inconsistency *vis à vis* other assets. Whether that is desirable is again a matter for Jersey alone.

Q28. Do the respondents agree in principle that the Government of Jersey should now look to reform the law relating to *légitime* more widely?

74. As above. A comparable change has, of course, been made in Guernsey. The way in which it has been implemented there, *i.e.* accompanied by provisions similar to the English Inheritance (Provision for Family and Dependants) Act 1975, provides a sensible alternative. Whether it is something that Jersey should do as a matter of principle is for Jersey residents to decide.

12. Other

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

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

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

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

(e) Insolvency and trusts

Q29. Do any Respondents to the Consultation Paper believe that any of these topics should be considered further at this time?

75. Our view is that item (c) (express power to ratify conduct of an improperly appointed trustee) may be worthy of consideration now.

76. There is no doubt that serious problems may be caused where a trustee has been improperly appointed. That is so especially where the power of appointing new trustees is vested in the existing trustees, since an entire chain of trusteeship may be invalidated. All subsequent decisions taken by the trustees, including the making of distributions, are open to challenge. In *Jasmine Trustees Ltd* v. *Wells & Hind* [2008] Ch. 194 it was decided that appointments of trustees in a period of more than 20 years before the decision had all been invalid. The law of prescription or limitation provides only a partial and unsatisfactory solution to such difficulties. The situation is not uncommon.

77. The Royal Court has asserted a jurisdiction to "ratify" invalid appointments of trustees or decisions taken by them. The juridical basis of the jurisdiction, however, is uncertain and its correctness is controversial. It may well be useful to consider whether a general legislative treatment of the difficulties can be devised.