

JERSEY LAW COMMISSION
TOPIC REPORT NO. 1 - October 1998

THE RIGHTS OF BENEFICIARIES TO INFORMATION REGARDING A TRUST

To be laid before the States by the President of the Legislation Committee pursuant to the Proposition to establish the Commission approved by the States on 30 July 1996

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To the President of the Legislation Committee of the States of Jersey

PART 1 The interpretation of Article 25 of the Trusts (Jersey) Law, 1984

1.1 The attention of the Jersey Law Commission was drawn to a possible ambiguity in Article 25 of the Trusts (Jersey) Law, 1984. It is claimed that the language of the Article, which sets out the rights of beneficiaries to information regarding the trust, does not make it clear whether those rights can be excluded or even restricted by express provision in the trust instrument.

1.2 Article 25 provides as follows:

Trustee may refuse to make disclosure.

Subject to the terms of the trust and subject to any order of the court, a trustee shall not be required to disclose to any person, any document which –

(a) discloses his deliberations as to the manner in which he has exercised a power or discretion or performed a duty conferred or imposed upon him; or

(b) discloses the reason for any particular exercise of such power or discretion or performance of duty or the material upon which such reason shall or might have been based; or

(c) relates to the exercise or proposed exercise of such power or discretion or the performance or proposed performance of such duty; or

(d) relates to or forms part of the accounts of the trust,

unless, in a case to which sub-paragraph (d) applies, that person is a beneficiary under the trust not being a charity, or a charity which is referred to by name in the terms of the trust as a beneficiary under the trust or the enforcer in relation to any non-charitable purposes of the trust.

1.3 The alleged ambiguity arises from the question of whether the correct interpretation is that the words, “Subject to the terms of the trust...” at the beginning apply to the whole Article including its closing lines, or only to the body of the Article up to the end of the indented part of sub-paragraph (d). If they applied to the whole Article it would presently be possible for a settlor, in drafting the terms of a trust, to narrow as well as to widen the rights of beneficiaries to compel the disclosure of information. If not, those rights could only be widened.

PART 2 Clarifying the Article

2.1 Even if a court were to find that the meaning of the Article could be construed with certainty, we consider that the double negative resulting from the closing lines of the Article makes interpretation more difficult than it should be. We are therefore proposing that the Law should be amended to clarify the position, and that view is supported by the vast majority of those who responded to our Consultation Paper.

2.2 That leaves us with the problem of whether to recommend that the ambiguity be resolved by making it clear that the statutory rights of beneficiaries to information may be varied by the terms of a trust or that they may not be so varied. If such variation were permitted, the further problems would then arise of whether the amended wording should enable them only to be widened or also to be narrowed; and if the latter, whether any restriction should be imposed on the ability to narrow them, or indeed to exclude them altogether.

2.3 The whole philosophy of the enactment of Jersey’s trust statute in 1984 was to introduce formally into Jersey law, which has its roots in continental European legal thinking, the essentially English concept of the trust. The only way to achieve that result was by statute, and yet the whole development of the trust concept in English law had been through actual court decisions meeting the ever-changing needs of the times. It was hoped that by avoiding enacting the Jersey statute as a code, enough latitude would be left for a similar process to occur here. It was hoped that the many gaps would be filled by decisions of the Jersey courts based on the wealth of judicial precedent available in England and other trust jurisdictions. In the fourteen years of the Law’s existence that has proved to be the case, and the Commission does not wish to hinder that process by causing any of the fundamental principles of the Jersey trust to edge away from those of the trust as known to English law and other common law jurisdictions.

2.4 It is clear that English law allows settlors to specify some restriction of beneficiaries’ rights of access to accounts and other trust documents although it does not permit them to exclude them altogether. To deny settlors of Jersey trusts any latitude here would go well beyond the intervention permissible under English law. We therefore consider that it should be possible in Jersey law for a settlor to narrow the rights of beneficiaries to information within limits as well as to widen them, and this view is shared by most of

those who responded to our Consultation Paper. Where, however, should those limits be set?

2.5 Under English law the core obligation of trusteeship includes the duty of trustees to account to the beneficiaries, and so an attempt to remove or exclude that duty altogether in an English law trust would founder. The English courts would declare such a provision in a trust instrument to be repugnant to the nature of a trust, and strike it out. We agree that the principle of accountability of trustees is central to the trust concept and that it should not be possible for a settlor of a Jersey trust to exclude it altogether. We also note that the accountability of trustees forms an essential part of the definition of a trust in the Hague Convention on the Law applicable to Trusts and on their Recognition, which extends to the Island. As our Consultation Paper reports, it is essential that the trust remains pragmatically enforceable by the beneficiaries, and so a restriction which offended that principle should be struck down.

2.6 The difficulty lies in drawing the line between what is and what is not an acceptable restriction of beneficiaries' rights to information. The responses to the Consultation Paper generally agreed with the Commission's inclination to resist the introduction of a comprehensive statement of the minimum level of accountability required for a trust to be valid and enforceable in the Jersey courts. There was considerable support for the Commission's preference for leaving the matter to the court by the express grant of a right (which would be exercised principally by beneficiaries) to apply to the court for relief where insufficient information was forthcoming. We believe that the introduction of such a remedy would enable the court to intervene in circumstances where it considered that a settlor had narrowed the beneficiaries' rights to information too restrictively or inappropriately, as well as where a settlor had excluded such rights altogether, and that is what we propose.

PART 3 Notifying beneficiaries of their interest

3.1 Hand in hand with the rights of a beneficiary to information about the trust is his right to be made aware that he is a beneficiary at all. The English law on this subject is not free from doubt, but the currently accepted view appears to be:

(i) A beneficiary under a fixed trust is entitled to be told that he is a beneficiary. This will of course in most cases be apparent from the receipt of income or capital from the trust. In *Hawkesley v May* [1956] 1 QB 304, trustees who failed to inform a beneficiary, on reaching majority, that he had an interest under a settlement, were held to be in breach of trust (although they were excused from liability as they had acted throughout honestly and reasonably).

(ii) A beneficiary under a discretionary trust does not appear to have an absolute right to be told of his status. However, Professor Hayton argues convincingly that "since the beneficiary's entitlement to put his case to the trustees for the exercise of their discretion in his favour is of no effect unless he is aware of it, and since he cannot be expected to become aware of it unless the trustees draw it to his attention it must surely be a necessary incident of the trustee-beneficiary relationship that the trustee must take reasonable steps to make a discretionary beneficiary aware that he be such." What comprise 'reasonable steps' will inevitably depend upon the size, nature and location of the class.

(iii) A person who is the object of a power of appointment is not, however, entitled to be informed of his legal position: see Templeman J in *Re Manisty* [1974] 1 Ch 17, 25. Unlike the beneficiary under a discretionary trust, he has no right to request that the trustees consider his case.

3.2 The requirement that beneficiaries be aware of their beneficial entitlement is in many ways central to the concept of trust enforceability. As the trust is an instrument of the private law, its viability depends upon beneficiaries being able to bring proceedings against the trustees, and such action is only possible once beneficiaries are aware of their status.

3.3 Although the Jersey Law makes no express provision in this regard, we believe that the difficulties of legislating on this point (defining the various kinds of trust and explaining precisely what the beneficiary is entitled to know) would outweigh the advantages. As the English trust principles already underpin the Jersey law of trusts, and can be applied on a flexible basis to each individual case, it is open to frustrated beneficiaries to use them and make demands of information from the trustees.

PART 4 The Commission's proposals

4.1 To clarify Article 25 we propose that the sense of its existing category (d) and closing lines be restated in a separate sub-paragraph 1(a) and in positive form, and that that sub-paragraph should be clearly stated to be "subject to the terms of the trust."

4.2 To preserve the principle of accountability we propose that new sub-paragraphs 2(a) and (b) be added to Article 25 whereby the Court may declare that the terms of the trust do not render the trustees sufficiently or appropriately accountable to the beneficiaries, and may make a consequential order amending or rejecting the terms of the trust.

4.3 As to the mechanics of obtaining such a declaration and order we propose the addition of a new paragraph (3) (as in other comparable provisions in the Law) equating them with Article 47, providing that application may be made by the Attorney-General, by the trustee or a beneficiary, or, with the leave of the court, by any other person.

4.4 Although we are not proposing the introduction of any language expressly defining a statutory duty for trustees to inform beneficiaries that they are beneficiaries, we are proposing a new paragraph (4) to Article 25 acknowledging that there are such duties and making it clear that nothing in the Trusts (Jersey) Law derogates from those duties.

4.5 We recognise that should the States decide to implement this Report the detailed drafting of the amendments we are proposing will be a matter for the States Law Draftsman, but we believe that the desired result could be achieved by re-writing Article 25 in the following terms:

Article 25

Disclosure.

(1) The following provisions (1)(a) and (b) shall apply subject to the terms of the trust and subject to any order of the court:

(a) a trustee shall on application in writing being made to him by a beneficiary under the trust not being a charity, or by a charity which is referred to by name in the terms of the trust as a beneficiary under the trust or by the enforcer in relation to any non-charitable purposes of the trust

disclose to the applicant all documents which relate to or form part of the accounts of the trust.

(b) a trustee shall not be required to disclose to any person, any document which -

(i) discloses his deliberations as to the manner in which he has exercised a power or discretion or performed a duty conferred or imposed upon him; or

(ii) discloses the reason for any particular exercise of such power or discretion or performance of duty or the material upon which such reason shall or might have been based; or

(iii) relates to the exercise or proposed exercise of such power or discretion or the performance or proposed performance of such duty.

(2) The following provisions (2)(a) and (b) shall apply notwithstanding the terms of the trust:

(a) The court may on application made to it declare that in the particular circumstances of the trust its terms do not render the trustees sufficiently or appropriately accountable to the beneficiaries or any of them;

(b) Pursuant to such declaration the court may extend or restrict the rights of all or any beneficiaries to information regarding the trust either generally or in a particular instance or may make such other order as it thinks fit.

(3) An application to the court under this Article may be made by any person referred to in sub-paragraph (3) of Article 47.

(4) Nothing in this Law shall derogate from any duty of the trustee to inform a beneficiary that he is a beneficiary under the trust.

KEITH BAKER, Chairman
DONALD LE BOUTILLIER
DAVID LYONS
DAVID MOON
WILLIAM BAILHACHE
October 1998

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APPENDIX A PERSONS AND ORGANISATIONS WHO COMMENTED ON THE CONSULTATION PAPER

The Bailiff of Jersey Sir Philip Bailhache

Athena Trust Co. Ltd., Jersey E H A Le Mee

Atlas Trust Co. Jersey Ltd I R Swindale
Messrs. Bailhache Labesse giving Clyde & Co's comments
Barclays Private Banking, Jersey A D Barron
Bentley Trust (Jersey) Limited N B Bentley, FCA
The Beresford Group, Jersey M Killmister
Bermuda Trust Co. (Jersey) Ltd K.J.Ponter
Messrs. Bryan Cave, London J A Field (US Attorney)
Coutts (Jersey) Ltd C N Maltby
Messrs. Crills, Advocates Advocate P R Cushen
Data Protection Registrar, Jersey H M Smith
Ernst & Young Trust Co., Jersey P Hargreaves
Financial Services Department R C A Syvret
Hill Samuel, Jersey K Moss
D Hochberg & W Norris ounsel, of Lincoln's Inn
Mr D Levitt Retired trust officer
Meghraj Group, Jersey J A Drew
Plectron Trust Co. Ltd., Jersey S A Homyard
Reads Trust Company Limited B J Pierce
Messrs. Rooks Rider, Solicitors, London C E C Cooke
Royal & Sun Alliance, Jersey J K Shield
Royal Bank of Canada (Jersey) K J Simpson
S G Hambros Trust Co., Jersey R A Bougeard
Sanne Trust Company Ltd, Jersey G A Witts
Messrs. Schroders, Jersey G D Allan
Scotia Trust, Jersey K C Brierley
Messrs. Simpson Froud (tax specialists) G J Simpson FCA
Society of Trust and Estate Pract. P L Pexton
Tortola Trust Corp.(Jersey) Ltd. E V Murphy
Trusts & Trustees Journal J Goldsworth

APPENDIX B ACKNOWLEDGEMENTS

The Topic Commissioner for this case was Advocate Keith Baker and he joins with the other Commissioners in thanking Advocate Cyman Davies, who specialises in trusts, for giving his services free of charge in acting as Topic Practitioner, charged with the task of

keeping us in touch with the realities of day-to-day practice in this field, as well as giving much valuable general advice and assistance.

We would also like to thank Mr. Stuart Bridge, M.A., Fellow of Queens' College, Cambridge, for his expert and invaluable assistance with the research for the Commission on this topic, and with the drafting of the consultation paper, the evaluation of the responses and the preparation of this Final Report.