

# STATES OF JERSEY



## **DRAFT TRUSTS (AMENDMENT No. 5) (JERSEY) LAW 201-**

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**Lodged au Greffe on 21st September 2011  
by the Minister for Economic Development**

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**STATES GREFFE**





Jersey

## **DRAFT TRUSTS (AMENDMENT No. 5) (JERSEY) LAW 201-**

### **European Convention on Human Rights**

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000 the Minister for Economic Development has made the following statement –

In the view of the Minister for Economic Development the provisions of the Draft Trusts (Amendment No. 5) (Jersey) Law 201- are compatible with the Convention Rights.

(Signed) **Senator A.J.H. Maclean**

## REPORT

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### Summary

The Trusts (Jersey) Law 1984 (“the Law”) has provided a successful legislative framework for the establishment of public and private trusts for over 20 years. However, due to the constantly evolving nature of trust laws at a global level, as well as developments in case law, the Law is necessarily subject to amendments to ensure that Jersey remains a leading trusts jurisdiction.

The Draft Trusts (Amendment No. 5) (Jersey) Law 201- (“the Draft Amendment”) has been widely consulted on and enhances the current Law in a number of important aspects. There are no cost or manpower implications for the States.

### Background

Jersey is considered one of the finest trusts jurisdictions in the world. The trust industry is firmly established as a market leader, offering a sophisticated and established product backed up by a strong body of case law. This is coupled with the high quality of service offered by Jersey’s trust company businesses to their clients worldwide.

The backbone of this success story is the Trusts (Jersey) Law 1984 which came into force in 1984. It has been amended 4 times, most recently in 2006 (“the Fourth Amendment”). There were several proposals contemplated at the time, but not ultimately included in the Fourth Amendment. In 2008, a Consultation Paper was issued considering these and further proposed updates to the Law.

Responses to the consultation were received from lawyers, accountants and the Trust Working Group (a representative body comprised of members of the Trusts Industry). An anonymous contribution was also submitted. There was broad agreement on a number of proposals, while for others the responses highlighted that additional work needed to be performed or there was a lack of sufficient consensus to take forward changes at this stage.

Subsequent to the consultation, there was also an important development in case law regarding one of the key proposals about the treatment of Jersey trusts by overseas courts (*Mubarak v Mubarak* [2008 JLR 250]). Proposals have therefore required review in light of this, as well as further feedback from the Trust Working Group. The Draft Amendment has been developed taking these issues into account.

### The Draft Amendment

The changes incorporated into the Draft Amendment cover a number of different areas.

Two definitions are inserted into the Law through an amendment to Article 1. A definition of ‘Professional Trustee’ is added, as well as a definition of ‘purpose’. The latter is of particular significance, as it clarifies that ownership of assets constitutes a sufficient purpose for a non-charitable purpose trust. This is important to ensure that Jersey remains a competitive trusts jurisdiction with appropriate flexibility to suit settlors’ requirements.

There are amendments to Article 9, regarding the extent of application of Jersey law to a trust. Although the case of *Mubarak v Mubarak* confirmed that a judgment of an overseas court that purports to alter or vary a Jersey trust cannot be enforced by the Royal Court, questions as to the meaning of the Law were raised. The changes incorporated in the Draft Amendment address this issue. In addition, further revisions are made to the Article to widen the definition of personal relationship to explicitly prevent personal relationships with beneficiaries from being used as grounds to look through a Jersey trust by a foreign court under foreign law and to clarify the conflict of laws provision.

Article 26 is revised to provide that where a trust instrument is silent on the matter, a professional trustee is entitled to reasonable remuneration. This alters the current situation where unless payment is authorized by the terms of the trust, a trustee is not entitled to be paid for his or her services. This reduces costs, as there will now be no need for the trustees to apply to the Court to amend the trust instrument depleting the value of the assets of the trust.

The Draft Amendment also revises Article 34, which currently provides that a person, on ceasing to be a trustee, may require to be provided with reasonable security against liability before surrendering trust property. A provision is inserted which strengthens the position of incoming trustees by giving them a right to enforce a term of a contract extending or renewing such security, even though they are not party to the contract. A similar principle was introduced in England through the Contracts (Rights of Third Parties) Act 1999.

A number of changes are made to Article 57 regarding limitation of actions or prescription. A 21 year long-stop is introduced, which will allow trustees to draw a line under past events, in relation to which evidence is likely to be sparse. The lack of clarity in the application of the customary law principle of *empêchement d'agir* to breaches of trust is also addressed. The Draft Amendment provides that if a breach occurs when the beneficiary is a minor, an interdict or under a legal disability, the period does not run until he or she reaches full age or ceases to be an interdict or under a legal disability.

Furthermore, a number of additional clarifications are made through the Draft Amendment, regarding the definition of 'protector' through setting out a description at Article 9A and revising Article 31 to clarify that trustees have the ability to enter into a contract with themselves in the capacity of trustees of separate trusts, subject to their duty to account to the beneficiaries, and resign in appropriate circumstances where there is a conflict of interest.

### **Financial and manpower implications**

There are no financial or manpower implications for the States arising from the adoption of this Draft Law.

## **European Convention on Human Rights**

Article 16 of the Human Rights (Jersey) Law 2000 requires the Minister in charge of a Projet de Loi to make a statement about the compatibility of the provisions of the Projet with the Convention rights (as defined by Article 1 of the Law). On 19th September 2011, the Minister for Economic Development made the following statement before Second Reading of this Projet in the States Assembly –

In the view of the Minister for Economic Development the provisions of the Draft Trusts (Amendment No. 5) (Jersey) Law 201- are compatible with the Convention Rights.

## Explanatory Note

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This draft Law would amend the Trusts (Jersey) Law 1984 (“the principal Law”).

The draft Law is arranged in the following way –

*Article 1* is the draft Law’s own interpretation clause.

*Article 2* inserts new definitions in the principal Law.

“Professional trustee” means a person who is registered under Article 9 of the Financial Services (Jersey) Law 1998, by the Jersey Financial Services Commission, to carry on trust company business within the meaning of Article 2 of that Law. The expression appears in Article 26 of the principal Law, as it would be amended by Article 5 of this Law (q.v.).

“Purpose” is defined to include the acquisition, holding, ownership, management or disposal of property, and the exercising of any function. Whether or not a purpose confers a benefit on a person, or is capable of consuming the income or capital of a trust, will be immaterial.

*Article 3* amends Article 9 of the principal Law, relating to the application of Jersey law and foreign law to Jersey trusts, in the following ways –

- (a) paragraph (1) amends Article 9(1) of the principal Law to explicitly cover questions concerning the variation of a Jersey trust by a foreign court, or the nature and extent of beneficial rights or interests in trust property;
- (b) paragraph (2) widens the exclusions in Article 9(2) to include any personal relationship, whether or not it is to the settlor;
- (c) paragraph (3) provides that, subject to Article 9(2), Article 9(1) does not have any effect specified in the new Article 9(2A);
- (d) the effect of paragraph (4) is that whether or not the settlor is domiciled here, the law of Jersey as to the conflict of laws – i.e. other than Article 9 itself – does not apply to any question mentioned in Article 9(1);
- (e) paragraph (5) restates the restrictions in Article 9 on the enforcement of foreign judgments to include, explicitly, other decisions of foreign tribunals (such as arbitration awards); and also the giving of effect in Jersey (whether or not by enforcement) of such decisions;
- (f) paragraph (6) widens the definition “personal relationship” in Article 9(6) to explicitly include relationships with beneficiaries.

*Article 4* amends Article 9A of the principal Law.

That Article provides (*inter alia*) that the reservation or grant by the settlor of a trust of a power to appoint or remove a protector does not affect the validity of the trust or delay its taking effect.

The amendment has the effect of defining “protector”, by replacing that expression by a reference to a person (other than a trustee, enforcer or beneficiary) who holds a power, discretion or right in connection with a trust.

*Article 5* amends Article 26 of the principal Law.

Article 26(1) at present says that a trustee is not entitled to be paid for his or her services unless payment is authorized by the terms of the trust or by an order of the Royal Court, or all of the beneficiaries consent in writing.

The amendment applies only to a professional trustee. It will entitle such a trustee to reasonable remuneration, if the terms of the trust are silent as to remuneration. The new provision will only apply to services provided after it comes into force.

*Article 6* amends Article 31 of the principal Law (which relates to a trustee acting in respect of more than one capacity).

Its effect is to allow a trustee to make a contract with himself, or with herself, in the trustee's separate capacities in respect of 2 or more trusts. He or she will in respect of each trust be subject to all the duties of a trustee, including in particular those in Articles 21 and 23.

*Article 7* amends Article 34 of the principal Law.

That Article provides (*inter alia*) that on ceasing to be a trustee, a person may require to be provided with reasonable security against liabilities, before surrendering trust property.

The amendment gives the person a right to enforce a term of a contract extending or renewing such security, even though he or she is not party to the contract.

*Article 8* amends Article 57 of the principal Law, which (*inter alia*) limits the period within which an action for a breach of trust may be brought.

The effect of the amendment is as follows –

- (a) the period in which an adult beneficiary or an enforcer may sue for a breach of trust is either 3 years from the date on which he or she is given the final accounts or 3 years from the date he or she becomes aware of the breach, whichever is earlier;
- (b) however, if at the time when the breach occurs the beneficiary is a minor or an interdict or is under any other legal disability, the period does not begin to run before he or she attains full age or ceases to be an interdict or under that other legal disability, or sooner dies;
- (c) the period in which a trustee may sue a former trustee for a breach of trust is 3 years from the date on which the former trustee ceases to be a trustee;
- (d) no action for a breach of trust may in any case be brought by any person more than 21 years after the breach.

None of these limitations apply in cases of fraud, or in respect of proceedings to recover trust property in a trustee's possession or control, or received and converted by a trustee to his or her own use.

*Article 9* provides for the citation of the draft Law, and that it will come into force 7 days after it is registered in the Royal Court.





Jersey

## **DRAFT TRUSTS (AMENDMENT No. 5) (JERSEY) LAW 201-**

### **Arrangement**

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Jersey

## DRAFT TRUSTS (AMENDMENT No. 5) (JERSEY) LAW 201-

A LAW to amend further the Trusts (Jersey) Law 1984.

*Adopted by the States* [date to be inserted]

*Sanctioned by Order of Her Majesty in Council* [date to be inserted]

*Registered by the Royal Court* [date to be inserted]

**THE STATES**, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

### 1 Interpretation

In this Law, “principal Law” means the Trusts (Jersey) Law 1984<sup>1</sup>.

### 2 Article 1 amended

In Article 1(1) of the principal Law –

- (a) after the definition “personal representative” there shall be inserted the following definition –

“ ‘professional trustee’ means a trustee who is registered under Article 9 of the Financial Services (Jersey) Law 1998<sup>2</sup>, by the Jersey Financial Services Commission, to carry on trust company business within the meaning of Article 2(3) of that Law;”;

- (b) after the definition “property” there shall be inserted the following definition –

“ ‘purpose’ means any purpose whatsoever, whether or not –

- (a) involving the conferral of any benefit on any person; or  
(b) consuming or capable of consuming the income or capital of the trust,

including without limitation the acquisition, holding, ownership, management or disposal of property and the exercise of functions;”.

### 3 Article 9 amended

- (1) In Article 9(1) of the principal Law –
  - (a) in sub-paragraph (d), the word “or” following the semicolon shall be deleted;
  - (b) after sub-paragraph (e) there shall be added the following sub-paragraphs –
    - “(f) the exercise or purported exercise by a foreign court of any statutory or non-statutory power to vary the terms of a trust; or
    - (g) the nature and extent of any beneficial rights or interests in the property,”.
- (2) In Article 9(2)(b) of the principal Law, the words “to the settlor” shall be deleted.
- (3) After Article 9(2) of the principal Law there shall be inserted the following paragraph –
  - “(2A) Subject to paragraph (2), paragraph (1) –
    - (a) does not validate any disposition of property which is neither owned by the settlor nor the subject of a power of disposition vested in the settlor;
    - (b) does not affect the recognition of the law of any other jurisdiction in determining whether the settlor is the owner of any property or the holder of any such power;
    - (c) is subject to any express provision to the contrary in the terms of the trust or disposition;
    - (d) does not, in determining the capacity of a corporation, affect the recognition of the law of its place of incorporation;
    - (e) does not affect the recognition of the law of any other jurisdiction prescribing the formalities for the disposition of property;
    - (f) does not validate any trust or disposition of immovable property situate in a jurisdiction other than Jersey which is invalid under the law of that jurisdiction; and
    - (g) does not validate any testamentary disposition which is invalid under the law of the testator’s domicile at the time of his death.”.
- (4) For Article 9(3) of the principal Law there shall be substituted the following paragraphs –
  - “(3) The law of Jersey relating to *légitime* shall not apply to the determination of any question mentioned in paragraph (1) unless the settlor is domiciled in Jersey.

- (3A) The law of Jersey relating to conflict of laws (other than this Article) shall not apply to the determination of any question mentioned in paragraph (1).”
- (5) For Article 9(4) of the principal Law there shall be substituted the following paragraph –
- “(4) No –
- (a) judgment of a foreign court; or
  - (b) decision of any other foreign tribunal (whether in an arbitration or otherwise),
- with respect to a trust shall be enforceable, or given effect, to the extent that it is inconsistent with this Article, irrespective of any applicable law relating to conflict of laws.”
- (6) In Article 9(6) of the principal Law, for the definition “personal relationship” there shall be substituted the following definition –
- “ ‘personal relationship’ includes the situation where there exists, or has in the past existed, any of the following relationships –
- (a) any relationship between a person and the settlor or a beneficiary, by blood, marriage or adoption (whether or not the marriage or adoption is recognised by law);
  - (b) any arrangement between a person and the settlor or a beneficiary such as to give rise in any jurisdiction to any rights, obligations or responsibilities analogous to those of parent and child or husband and wife; or
  - (c) any relationship between –
    - (i) a person who has a relationship mentioned in either of paragraphs (a) and (b) with the settlor or a beneficiary, and
    - (ii) a third person who does not have a relationship mentioned in either of paragraphs (a) and (b) with the settlor or a beneficiary.”

#### 4 Article 9A amended

For Article 9A(2)(e) of the principal Law there shall be substituted the following sub-paragraph –

- “(e) 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;”

#### 5 Article 26 amended

After Article 26(1) of the principal Law there shall be inserted the following paragraph –

- “(1A) Despite paragraph (1), where the terms of a trust are silent as to his or her remuneration, a professional trustee shall be entitled to

reasonable remuneration for services that the professional trustee provides after this paragraph comes into force.”.

#### 6 Article 31 amended

After Article 31(2) of the principal Law there shall be added the following paragraph –

“(3) Subject to this Law (including in particular Articles 21 and 23), but despite any other enactment or rule of law to the contrary, a person may in the capacity of a trustee of one trust enter into a contract or other arrangement with himself or herself in the person’s capacity as a trustee of one or more other trusts.”.

#### 7 Article 34 amended

After Article 34(2) of the principal Law there shall be inserted the following paragraph –

“(2A) If the provision for security to which paragraph (2) refers is extended or renewed by a contract, or other arrangement, to which the trustee who resigns, retires or is removed is not party, and –

- (a) the contract or other arrangement expressly provides that the trustee may in his or her own right enforce a term of the contract or other arrangement; or
- (b) a term of the contract or other arrangement purports to confer a benefit on the trustee,

and in either case the contract or other arrangement expressly identifies the trustee, the trustee may enforce that term in his or her own right.”.

#### 8 Article 57 amended

In Article 57 of the principal Law, for the paragraphs following paragraph (1) there shall be substituted the following paragraphs –

“(2) Where paragraph (1) does not apply, the period within which an action founded on breach of trust may be brought against a trustee by a beneficiary is 3 years from –

- (a) the date of delivery of the final accounts to the beneficiary; or
- (b) the date on which the beneficiary first has knowledge of the breach of trust,

whichever is earlier.

(3) Where paragraph (1) does not apply but, when the breach occurs the beneficiary –

- (a) is a minor;
- (b) is an interdict; or
- (c) is under any other legal disability,

the period to which paragraph (2) refers shall not begin to run before the beneficiary ceases to be a minor or interdict or under that other legal disability (as the case may be), or sooner dies.

(3A) Where paragraph (1) does not apply, the period within which an action founded on breach of trust may be brought against a trustee by an enforcer is 3 years from –

- (a) the date of delivery of the final accounts to the enforcer; or
- (b) the date on which the enforcer first has knowledge of the breach of trust,

whichever is earlier.

(3B) Where paragraph (1) does not apply, the period within which an action founded on breach of trust may be brought against a former trustee by a trustee is 3 years from the date on which the former trustee ceased to be a trustee.

(3C) Where paragraph (1) does not apply, no action founded on breach of trust may in any event be brought against a trustee by any person after the expiry of the period of 21 years following the occurrence of the breach.

(4) This Article does not apply to a foreign trust whose proper law is the law of a jurisdiction to which the Convention on the law applicable to trusts and on their recognition, signed at The Hague on 20th October 1984, for the time being extends.”.

## 9 Citation and commencement

- (1) This Law may be cited as the Trusts (Amendment No. 5) (Jersey) Law 201-.
- (2) This Law shall come into force 7 days after it is registered.

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- <sup>1</sup> *chapter 13.875*  
<sup>2</sup> *chapter 13.225*