



Economy

# Consultation Paper: Amendments to the Trusts (Jersey) Law 1984

July 2024



## INTRODUCTION

1. Recent court decisions dealing with issues of import to the trusts industry in Jersey have led to renewed consideration of the provisions of the [Trusts \(Jersey\) Law 1984](#) (“TJL84”) and whether amendments should be considered to ensure that the TJL84 continues to support the needs of those establishing Jersey law trusts together with their beneficiaries and trustees.
2. The trusts industry in Jersey is known for offering a sophisticated product and a high level of service to a worldwide body of clients, making Jersey the trusts jurisdiction of choice. One of the key strengths of the jurisdiction is the well-developed legislation augmented by a strong independent judiciary and a recognised body of case law relied upon around the world.
3. As is often stated, the TJL84 is not, and was not intended to be, a codification of the law, thereby allowing flexibility and development. Various discussion points have been raised and certain amendments to the TJL84 proposed, drawing on the work of the Trusts Law Working Group (the “Working Group”) comprised of leading industry practitioners and in light of their practical experience in the operation of the TJL84. The Government of Jersey is grateful to them for their work in this regard.
4. Subject to the responses to the Consultation, the Government of Jersey intends to bring forward legislation on the amendments for adoption during the course of 2024.
5. There are five areas for consultation:
  - A. Confirmation of the priority of claims between a former and current trustee and a secured lender given the recent case on ‘insolvent trusts’ (Re Z);
  - B. The ability of beneficiaries to call for the termination or variation of a trust pursuant to either Article 43 of the TJL84 and/or the rule in *Saunders v Vautier*;
  - C. Clarifying the position where a sole trustee purports to resign;
  - D. Minor corrections in relation to Articles 24, 43, and 55;
  - E. The concept of a ‘data trust’.
6. This paper should be read in conjunction [with a copy of the TJL84](#). This Consultation Paper also references a variety of other documents, links to which appear in the appropriate sections below as appropriate.

7. The Government is always interested to hear any suggestions for improving the TJJ84 or other connected legislation which are not covered in this paper and can be contacted directly or via Jersey Finance. Respondents may respond in relation to particular parts of the Consultation Paper only if they so wish.

## SECTION A

### Confirmation of the priority of claims between a former and current trustee and a secured lender given the recent case on ‘insolvent trusts’ (Re Z).

8. The issue of ‘insolvent’<sup>1</sup> trusts came before the Jersey Royal Court in the case commonly known as “Re Z”.
9. The case involved a series of eight trusts including two trusts known as the Z II and Z III Trusts, both of which were Jersey law discretionary trusts established in 2004 and 2005 respectively. The original trustee of the trusts had either resigned or been replaced.
10. Some six years after its resignation, the original trustee was sued for a significant sum in the High Court of England and Wales for breach of duty in relation to one of the companies within the Z II Trust structure. The proceedings were settled on confidential terms but resulted in a liability of over £18 million for the original trustee. It was assumed for the purposes of the hearing that this was a properly incurred liability for which the original trustee could properly seek reimbursement from the assets of the trust.
11. The only asset of the Z II Trust was a loan due by the Z III Trust of £186 million. The liabilities of the Z III Trust exceeded its assets and so the likely recovery of the loan was only about £6 million. The total liabilities of the Z II Trust were said to amount to some £211 million excluding the claim of the original trustee, who nonetheless claimed reimbursement from the Z II assets of the £18 million and asserted that its claim took priority over the other creditors of the Z II Trust. If successful in that argument, the original trustee would effectively ‘scoop the pot’ and take the £6 million; if unsuccessful, it would rank *pari passu* with the other creditors and recover only about £330,000.
12. The Royal Court considered various issues including the ranking of different liabilities incurred by former and successor trustees. The decision of the Royal Court (on this particular issue) was appealed to the Court of Appeal and then to the Privy Council. Links to the judgments are found below for ease of reference.

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<sup>1</sup> For the sake of brevity, the phrase ‘insolvent trust’ is adopted as a convenient description of a situation where the trust assets are insufficient to meet the amount due under the trustee’s right of indemnity. However, it is acknowledged that technically a trust itself cannot be insolvent; rather it is the trustee who may be insolvent whether on account of trust liabilities or personal liabilities or both.

[Rawlinson & Hunter Trustees SA \(in place of Volaw Trustees Limited\) v. Chiddicks \(representing the minor beneficiaries of the Z II Trust\) and Others \(jerseylaw.ie\)](#) [2018 (2) JLR 81 RC]

[Rawlinson and Hunter Trustees SA \(in place of Volaw Trustees Limited\) v. Chiddicks \(representing the minor beneficiaries of the Z II Trust\) and Other \(jerseylaw.ie\)](#) [2019 (1) JLR 87 CA]

[Equity Trust \(Jersey\) Ltd \(Respondent\) v Halabi \(in his capacity as Executor of the Estate of the late Madam Intisar Nouri\) \(Appellant\) \(Jersey\) \(jcpc.uk\)](#) [2022 UKPC 36]

13. Various topics were covered within the judgments, including as to the nature of a trustee's right of indemnity; whether it conferred on the trustee a proprietary interest in the trust assets rather than being merely possessory; whether the interests of the trustee survived the transfer of the property to a successor trustee; what the priority was; and whether the trustee's general right of indemnity extended to costs.
14. However, the issues for consideration for the purposes of the discussion in this Consultation Paper related to the right of a trustee under Jersey law to recover from or be indemnified out of the trust assets in respect of liabilities and expenditure incurred as trustee; and the priority of debts, if the trust was 'insolvent'. In particular, what was the order of priority in respect of a former trustee - and third party creditors claiming through that former trustee - and one of more successor trustees and creditors claiming through them?
15. The Privy Council held that the trustee's indemnity did confer a proprietary interest in the trust assets and confirmed that it gave rise to an equitable lien which continued after the transfer of trust assets to a successor trustee.
16. There is no express reference to a trustee's lien in the TJJ84 and the existence and extent of such liens has previously been subject to uncertainty. Given the lien is said to be proprietary, the question is then whether such a lien ranks above security taken over the trust fund by lenders (or other creditors).
17. The Royal Court held that the trustees and their respective creditors claiming through them ranked *pari passu*; this in the absence of direct authority on this point, was in the interests of fairness and due to some of the practical implications of finding otherwise.

18. The Court of Appeal reversed this finding such that the claims were ranked on a 'first in time' basis. The Court of Appeal held that the liens of both a former and current trustee are equitable interests and therefore are subject to the 'first in time principle' that applies generally to equitable interests. The effect of ordering *pari passu* payment was the practical extinguishment of the lien when its continued existence would be most critical due to there being insufficient assets of the trust to meet all the liabilities.
19. The Privy Council held that the trustees' claims should be ranked on a *pari passu* basis (as per the Royal Court) and not on a 'first in time' basis. This was said, in the judgment, to be the 'least worst' option.
20. The arguments were, however, not straightforward, and it is noted that the decision of the Privy Council on the priority issue was by majority (4-3) rather than unanimous.
21. Commercial lenders to trustees naturally expect security granted over trust assets to provide priority over all unsecured creditors in the event of insolvency – and indeed that their security would rank over a trustee's lien. Whilst a lender may insert contractual terms into an agreement which will protect the position in relation to a current trustee, such contractual terms arguably might not be binding on a former trustee by virtue of the former trustee's lien.
22. Accordingly, it has been suggested by some that amendments could be made to the TJL84 to avoid any uncertainty on this point. Others, however, do not consider amendment to be strictly necessary.
23. If it is to be amended, the suggestion is that the TJL84 should clarify that lenders to trustees (or any other creditors who might include trustees themselves), where such lenders have taken security over trust assets, can enforce their security in priority to the liens of a trustee that arise by way of operation of law as the security will rank above such liens.
24. This clarification would, if made:
- (i) apply to both current and former trustees regardless of whether or not those liens are proprietary in nature;
  - (ii) apply to security over trust assets situated in Jersey or in any other jurisdiction;
  - (iii) not affect the nature of or other rights arising from the respective lien or security; rather it would merely set out the order of ranking of priority on enforcement. Thus, the actual priority of any security, other than in relation to the trustee's lien arising by operation of Jersey law, would continue to be determined in accordance with the law.

(iv) not alter the nature of the trustee's lien which would continue to be proprietary in nature. A trustee would still be able to take actual security over trust assets, whether on retirement or at any other time, if appropriate, as is currently the case. That security would rank above the trustee's proprietary lien and alongside other security in the same way as determined by the laws of the relevant jurisdiction of the assets over which security was taken. To reiterate, the proposal would affect only the priority of enforcement between the proprietary lien and actual security; it is not intended to alter any other rights relating to security or liens.

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## **SECTION A QUESTIONS**

### **QUESTION 1**

Do you consider that such an amendment should be made? If you are experiencing difficulties in practice, please provide examples.

### **QUESTION 2**

Are there any reasons not to make such an amendment? For example, might it lead to retirements of trustees becoming more protracted, for example, if trustees were more likely to seek to take security over the trust assets?

### **QUESTION 3**

Are there any other issues arising from this case, which you consider require addressing by way of change to the TjL84? Please provide details.

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## SECTION B

### The ability of beneficiaries to call for the termination or variation of a trust – Article 43 and the rule in *Saunders v Vautier*

25. Article 43(3) of the TJL84 states that “...where all beneficiaries are in existence and have been ascertained and none are interdicts or minors they may require the trustee to terminate the trust and distribute the trust property among them.”.

26. A “beneficiary” is defined in Article 1 of the TJL84 as “a person entitled to benefit under a trust or in whose favour a discretion to distribute property held on trust may be exercised”.

27. Article 43(3) has long been seen as reflecting the rule in *Saunders v Vautier* [1841] EWHC J82. This rule states that where all persons entitled absolutely and indefeasibly under a trust to the whole of the income and capital of the trust property have been ascertained and have full legal capacity to act in their own right, they are entitled to call for the termination of the trust. The rule has been noted in Jersey – see for example *In re Y* [2017] (1) JLR 266. [[A and Nine Others v. K and Seven Others \(jerseylaw.ie\)](#)] From a practical perspective, it has generally been considered in Jersey that where there was an ongoing ability to add further beneficiaries, then the right to call for termination of the trust and distribution of its assets would not be possible, as not all beneficiaries would be ascertained.

28. These assumptions have been questioned following the Guernsey case of *Rusnano Capital AG (in liquidation) v (1) Molard International (PTC) Limited and (2) Pullborough International Corp* [2019] GRC011 (“**Rusnano**”) (decisions both at first instance and on appeal), as the relevant part of the Trusts (Guernsey) Law 2007 (the “TGL2007”) is in similar terms to Article 43 of the TJL84.

- *Rusnano Capital AG (in liquidation) v (1) Molard International (PTC) Limited and (2) Pullborough International Corp* [2019] GRC011 [CHttpHandler.ashx \(guernseylegalresources.gg\)](#)
- *In the matter of The RN Pharma Trust* Civil Division Appeal [2019] GCA077 [CHttpHandler.ashx \(guernseylegalresources.gg\)](#)
- Trusts (Guernsey) Law 2007 [Trusts \(Guernsey\) Law, 2007 \(guernseylegalresources.gg\)](#)
- Trusts (Jersey) Law 1984 (as amended) [Trusts \(Jersey\) Law 1984 \(jerseylaw.ie\)](#)

29. *Rusnano Capital AG* (“**Rusnano**”) was the only named beneficiary of a discretionary trust governed by Guernsey law. The trust deed contained a power to add or exclude beneficiaries, which power



had not been exercised. There was a power irrevocably or revocably to release or restrict the future exercise of any powers in the trust deed, which power had also not been exercised.

30. The applicant – the liquidator of Rusnano and standing in Rusnano’s shoes – sought an order as the sole named beneficiary that the trust be terminated pursuant to Section 53(3) of the TGL2007 and the trust fund be distributed to Rusnano forthwith. Essentially the liquidator was seeking to gather in the assets of Rusnano and thus required the trustee to terminate the trust and to distribute the trust property to him. The respondents were the trustee and the protector of the trust respectively.

31. Section 53(3) of the TGL2007 states:

*“(3) Without prejudice to the powers of the Royal Court under subsection (4), and notwithstanding the terms of the trust, where all the beneficiaries are in existence and have been ascertained, and none is a minor or a person under legal disability, they may require the trustees to terminate the trust and distribute the trust property among them.”*

*(4) The Royal Court, on the application of any person mentioned in section 69(2), may:-*

*(a) direct the trustees to distribute, or not to distribute, the trust property, or*

*(b) make such other order in respect of the termination of the trust and the distribution of the trust property as it thinks fit.”*

32. The definition of a beneficiary is found in Section 80(1) of the TGL2007 as “*a person entitled to benefit under a trust or in whose favour a power to distribute trust property may be exercised*”.

33. The liquidator of Rusnano claimed that Rusnano was the sole beneficiary, but the respondents, praying in aid *Saunders v Vautier*, argued that the power to add meant that the class of beneficiaries was not closed and thus the trust could not be terminated.

34. Ultimately, the Guernsey Royal Court considered that this was a question of the interpretation of the statute alone and so it was not required to resolve any of the issues relating to the interpretation or applicability of the rule in *Saunders v Vautier*. Any comments made as to the rule in *Saunders v Vautier* by the Guernsey Royal Court were, therefore, obiter. The Court found that the key phrase in section 53 of the TGL2007, was: ‘*where all the beneficiaries are in existence and have been ascertained.*’ The Court found that there was a distinction between someone who is a beneficiary and someone who is a potential object of the power to add one or more beneficiaries. The only beneficiary was Rusnano (as had been the case since the creation of the trust) and it could therefore call for the termination of the trust pursuant to Section 53.

35. The Guernsey court specifically alluded to the fact that the conclusion reached might well not be what was intended when the section was enacted, and might result in a different approach from that which would follow from applying the rule in *Saunders v Vautier*. 'If so,' they stated, *"the problem rests with the legislature rather than this Court."*

36. The Guernsey court was referred to the possibility that its decision would mean that *"an unperfected set of beneficiaries could take the step that the Applicant has taken"* [that is to call for the termination of the trust] and that *"such finding would defeat the terms of many trusts, whether in Guernsey or elsewhere."* However, the Guernsey Court did not think that the consequences would be as far-reaching as suggested and again noted that *"the solution lies in the legislature re-visiting the provisions in the 2007 Law."*

37. The case has been the subject of appeal [In the matter of The RN Pharma Trust Civil Division Appeal No. 527]. The Appeal Court upheld the decision of the Royal Court confirming that whilst the court must interpret the statute in its context and will look to English law in this area, that does not mean that all concepts of English law are accepted especially where the statute does not reflect it.

38. The Court of Appeal noted that:-

*"49. Furthermore, where the 2007 Law wishes to include not only beneficiaries but also those who may become beneficiaries in the future, it specifically says so. Thus section 52(c) provides that trust property is to be held on resulting trust for the settlor where "there is no beneficiary and no person who can become a beneficiary in accordance with the terms of the trust." If the States had intended to provide that, in order to exercise the power to terminate under subsection (3), one must have the agreement not only of all the beneficiaries but also those who may become beneficiaries in the future, it could easily have so provided in the same way as it has in section 52(c)"*

39. Whilst there may be potential consequences such that certain trusts would be vulnerable to a sole named beneficiary seeking to terminate a trust intended to benefit others also, the Court of Appeal considered that the further beneficiaries could be added. Also that, *"...provided the class of beneficiaries is defined as including issue, there can be no question of the beneficiaries being able to utilise section 53(3) as long as there is any possibility of future issue being born."*

40. The Court of Appeal, however, accepted that the court retained a discretion as to whether to permit the termination to proceed pursuant to section 53(4), and in the absence of the Royal Court having considered this, remitted the question back to the court of first instance. The Court stated:-

*“57. In summary, whilst the States have provided in subsection (3) that beneficiaries may require termination of the trust in circumstances where they would not necessarily be able to do so by application of the Rule under English law, the States have also provided an element of protection against the termination of trusts by conferring a discretion on the Royal Court under subsection (4) to refuse termination of the trust notwithstanding fulfilment of the requirements under subsection (3).”*

## MAKING A CHANGE

41. Whilst the prevailing view to date amongst Jersey lawyers has been that the existence of a power to add beneficiaries is sufficient to prevent termination of a trust and trusts have been drafted accordingly, it is accepted that a Jersey court, whilst not bound by it, may well give weight to the decision of the Guernsey court in *Rusnano*.

42. The Working Group has, therefore, recommended that amendments should be made to Article 43 of the TJL84 to give certainty to the position, to reflect the prevailing view, and to avoid any unnecessary costs and delays in having to seek a court determination on this question.

43. It is suggested that such amendments would assist in ensuring that the wishes and intentions of the settlor when establishing the trust are given due regard. Furthermore, if the beneficial class is truly closed, the beneficiaries will be able to call for a termination. If trustees are acting unreasonably, a dissatisfied beneficiary retains the remedy of being able to bring an application before the Court pursuant to Article 51 of the TJL84. The trustee of a discretionary trust would also normally have discretion under the terms of the trust instrument to distribute the whole of the trust fund to one or more of the beneficiaries, although the beneficiaries would not have the right to demand this.

44. Given the enhanced requirements relating to the identity of beneficiaries in the current climate and the wish to ensure that the terms of the trust instrument are reflective of the settlor's intentions, the drafting trend in recent times has been to be more specific around the identify of beneficiaries of discretionary trusts and not to list as beneficiaries those who probably won't benefit but may have previously been included on a 'just in case' basis. This trend is to be encouraged.

45. In a recent case heard in the English High Court, *Serious Fraud Office (1) Messrs Milsom & Standish (as Enforcement Receivers) (2) v Litigation Capital Limited [2021] EWHC 1272 (Comm)* (paras 195-201), the judge, whilst commenting that these are treacherous waters for a commercial judge to navigate, goes on to suggest (obiter) that his view is that the position in English law currently is that the existence of a power to add in a trust deed precludes the use of the *Saunders v Vautier* jurisdiction. This reflects the experience of Working Group members who have indicated that it is considered to be standard English law advice that powers to add beneficiaries would prevent a *Saunders v Vautier* application succeeding. The Working Group considered that it would be undesirable if there were a difference between the requirements of Article 43(3) and the rule in *Saunders v Vautier* and the uncertainty this could cause.

## DRAFTING CONSIDERATIONS

46. Accordingly, it is proposed that Article 43 be amended so that where there is a power to add – even if not currently exercisable but which could be used in the future - the trust cannot be terminated by the beneficiaries. The comments of the Guernsey Court of Appeal at para 49 of *Rusnano* (referenced above) are noted, and it may be that the wording ‘where “*there is no beneficiary and no person who can become a beneficiary in accordance with the terms of the trust.*” is the correct starting point for the drafting of the amendment. It is contemplated that any amendments would be without prejudice to the Court’s supervisory jurisdiction over trusts – such as reviewing the exercise of a power to add a beneficiary.

## VARIATION

47. The Working Group has further noted the potential for the beneficiaries (of full age and capacity) to vary a trust, as confirmed by the Royal Court in, for example, the case of [Mourant and Co Retirement Trustees Ltd v JG and HK 20-Jun 2008 \(jerseylaw.je\)](#) at para 40:-

*“It is trite law (the rule in Saunders v Vautier (1841) Cr & Ph 240) that where all the beneficiaries of a trust are in existence, have been ascertained and are of full age, they may require the trustees to terminate the trust. This is reflected in Article 43(3) of the Trusts Law. It is equally true that they can vary the terms of the trust. As Matthews & Sowden, The Jersey Law of Trusts (3rd Edition) correctly state at para 13.6: “Just as all the beneficiaries of a trust, if of full age and sound mind, can put an end to a trust and direct the trustees to transfer the trust property as they direct (para 15.12 below) so too they can vary the trusts of the settlement. In a sense, this is just one application of the rule that beneficiaries who between them own the trust property can direct how it be dealt with ....”*

48. It is considered that it may be an opportune time to enshrine this principle in statute.

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## **SECTION B QUESTIONS**

### **QUESTION 4**

Should Article 43(3) be amended to make it clear that if there is, within the trust instrument, a power to add to a beneficial class, even if not currently exercisable but which could be used in the future, the beneficiaries cannot call for the termination of the trust?

### **QUESTION 5**

A power to add beneficiaries is often seen as a special type of power of amendment. If there is no specific power to add beneficiaries in a trust instrument, but there is a power of amendment or appointment generally which could be used to add beneficiaries, do you consider the presence of the power should prevent the beneficiaries from calling for the termination of the trust?

### **QUESTION 6**

Are there any other common clauses which might have an effect on this? For example, should an amended Article 43(3) specifically reference what the effect is where there is a default beneficiary or default trust, such as a charity or general charitable purposes clause?

### **QUESTION 7**

Should the TjL84 be amended to confirm that the beneficiaries can call for a variation of a trust? Should the agreement of the trustee be a prerequisite to any such variation becoming effective?

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## SECTION C

### Clarifying the position where a sole trustee purports to resign

49. Article 16(1) of the TJJ84 requires that a trust must have at least one trustee, although Article 16(2) confirms that the trust will not fail on the ground that it has fewer trustees than required by the TJJ84 or the terms of the trust. If there are fewer than the minimum required, appointments must be made as soon as is practicable.

50. Article 19 of the TJJ84 states that:

**19 Resignation or removal of trustee**

*(1) Subject to paragraph (3), a trustee, not being a sole trustee, may resign his or her office by notice in writing delivered to his or her co-trustees.*

*(2) A resignation takes effect on the delivery of notice in accordance with paragraph (1).*

*(3) If two or more trustees purport to resign simultaneously, the effect of which would mean that there would be no trustee, the resignations shall have no effect.*

*(4) A trustee shall cease to be a trustee of the trust immediately upon –*

*(a) the trustee's removal from office by the court; or*

*(b) the trustee's resignation becoming effective; or*

*(c) the coming into effect of a provision in the terms of a trust under which the trustee is removed from office or otherwise ceases to hold office.....*

51. It has been noted that the above does not specifically refer to what happens should a sole trustee seek to resign without appointing a successor. In the normal course of events, a sole trustee would appoint a new trustee before retiring (or ensure that the person given the power to appoint new trustees exercises it). However, it is possible that a sole trustee may purport to resign under powers set out in the particular trust instrument. A minor clarificatory amendment is suggested to reflect what is considered to be the current position: that a sole trustee cannot resign unless a new trustee has been appointed in his or her place regardless of the terms of the trust instrument, and any such purported resignation will have no effect (as per Article 19(3)). This clarification will avoid any confusion, particularly for lay trustees.

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## SECTION C QUESTION

### QUESTION 8

Do you agree with the need to clarify this point?

## SECTION D

### Other: minor corrections to Articles 24, 43, and 55

52. Certain errors or inconsistencies in the TjL84 have been noted and it is suggested that these can be dealt with as part of this round of amendments.

#### ARTICLE 24 (i) [Trusts \(Jersey\) Law 1984 \(jerseylaw.ie\)](http://jerseylaw.ie)

53. Article 24 deals with the powers of a trustee, and specifically in sub paragraph (2) that the trustee shall exercise the trustee's powers only in the interests of the beneficiaries and in accordance with the terms of the trust. There is no reference therein to the *purposes* of a trust in the context of a trust for charitable or non-charitable purposes. Therefore, it is proposed that Article 24(2) be amended to include such a reference.

54. The current wording of Article 24 is set out below for ease of reference:-

#### *24 Powers of trustee*

*(1) Subject to the terms of the trust and subject to the trustee's duties under this Law, a trustee shall in relation to the trust property have all the same powers as a natural person acting as the beneficial owner of such property.*

*(2) A trustee shall exercise the trustee's powers only in the interests of the beneficiaries and in accordance with the terms of the trust.*

*(3) The terms of a trust may require a trustee to obtain the consent of some other person before exercising a power or a discretion.*

*(4) A person who consents as provided in paragraph (3) shall not by virtue of so doing be deemed to be a trustee.*

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## SECTION D (i) QUESTION

### QUESTION 9

Do you agree that the amendment should be made?

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ARTICLE 43 (ii) [Trusts \(Jersey\) Law 1984 \(jerseylaw.je\)](http://jerseylaw.je)

55. It is suggested that paragraph (2) of Article 43 is clarified to confirm that the right of a trustee to be provided with reasonable security for its liabilities – as set out in Article 43A and as then referred to in Article 43(2) - applies notwithstanding *either* of paragraphs (1) or (3), and thus regardless of the circumstances of the termination of the trust; that is whether it is under the terms of the trust, or by all of the beneficiaries acting together to terminate the trust. Only the former is currently referred to in Article 43(2).

56. In addition, as a matter of housekeeping, it is proposed that Article 43(5) be deleted as it provides a definition of 'liabilities' which term is no longer mentioned in Article 43. This would appear to have been an oversight at the time of a previous amendment when Article 43(2) was amended from “(2) *Notwithstanding paragraph (1), the trustee may require to be provided with reasonable security for liabilities whether existing, future, contingent or otherwise before distributing trust property.*” (underline added)

57. The current wording of Article 43 is set out below for ease of reference:-

*43 Termination of a Jersey trust*

*(1) On the termination of a trust the trust property shall be distributed by the trustee within a reasonable time in accordance with the terms of the trust to the persons entitled thereto.*

*(2) Notwithstanding paragraph (1), Article 43A applies on the termination of a trust.<sup>[70]</sup>*

*(3) Without prejudice to the powers of the court under paragraph (4) and notwithstanding the terms of the trust, where all the beneficiaries are in existence and have been ascertained and none are interdicts or minors they may require the trustee to terminate the trust and distribute the trust property among them.*

*(4) The court may –*

*(a) require the trustee to distribute the trust property;*

*(b) direct the trustee not to distribute the trust property; or*

*(c) make such other order as it thinks fit.*

*(5) In this Article “liabilities” includes contingent liabilities.*

*(6) An application to the court under this Article may be made by any person referred to in Article 51(3).*

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## **SECTION D (ii) QUESTION**

### QUESTION 10

Do you agree that the amendments should be made?



ARTICLE 55 (iii) [Trusts \(Jersey\) Law 1984 \(jerseylaw.je\)](http://jerseylaw.je)

58. There are four references to “notice” in the TJL84, in the context of a ‘bona fide purchaser for value without notice’. [see Articles 33(2), 471(4), 54(3), and 55(1).] Three of these refer simply to notice; but in Article 55 there is a reference to “*actual* notice”. The original reason for this differentiation is not clear despite reference to papers available to the Working Group from the date these provisions of the TJL84 were drafted.

59. The current wording of Article 55 is set out below for ease of reference:-

*55 Protection to persons dealing with trustee*

*(1) A bona fide purchaser for value without actual notice of any breach of trust –*

*(a) may deal with a trustee in relation to trust property as if the trustee was the beneficial owner of the trust property; and*

*(b) shall not be affected by the trusts on which such property is held.*

*(2) No person paying or advancing money to a trustee shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the propriety of the transaction or the application of the money.*

60. It is noted that the equivalent provision in the Trusts (Guernsey) Law 2007 (Article 75) requires only “notice” rather than “actual notice”.

<https://www.guernseylegalresources.gg/CHttpHandler.ashx?documentid=55864>

61. It is also understood that the requirement for actual notice is more stringent than in England and Wales.

62. The difference has been considered recently in a case before the High Court of England and Wales, namely *Adams v FS Capital Limited* [2023] EWHC 1649 (Ch)

[High Court Judgment Template \(xxiv.co.uk\)](http://xxiv.co.uk)

63. The trusts in question were three Jersey law discretionary trusts forming part of employer-financed retirement benefit schemes. Certain loan assets were settled on trust which, when the trusts became ‘insolvent’, were sold at a value matching the total liabilities owed to the creditors, who were the trustee and a connected law firm. This was alleged to be at a significant undervalue, for an improper purpose, and in breach of trust. The defendants denied this and contended that the sale was for sound commercial reasons and further, that the requisite notice of the breach was not present and thus Article 55(1) applied.

64. The High Court, having heard expert evidence on Jersey law, considered the interpretation of Article 55(1). The High Court noted that Article 55(1) qualifies Article 54(3), such that where a person deals with a trustee, that person is protected provided that they are a 'bona fide purchaser for value without actual notice of a breach of trust'.

*"280. As can be seen, Article 55(1) provides protection for a bona fide purchaser for value who is without actual notice of a breach of trust. Article 54(3) provides protection in relation to a claim to recover trust property where a bona fide purchaser for value is without notice of the breach of trust, or is a person deriving title through such a purchaser. In the case of Article 54(3) any notice is sufficient. In the case of Article 55(1), the notice must be actual notice. Given the language of each Article, there is no obvious way of drawing a dividing line between claims which are within Article 54(3) and claims which are within Article 55(1). A case in point is the present case. So far as notice is concerned, is the position of the First Defendant governed by Article 54(3) or Article 55(1)? Is it sufficient for the First Defendant to demonstrate that it had no actual notice of the breach of trust, or must the First Defendant demonstrate that it had no notice of the breach of trust of any kind; actual or constructive?"*

*Ultimately therefore, I have to consider the language of Articles 54(3) and 55(1), and to give effect to that language, as best I can. It seems clear to me that the purpose of Article 55(1) was to provide protection to persons dealing with a trustee in relation to trust property. This was achieved in four ways. First, such protection was provided to bona fide purchasers. Second, such protection allowed the relevant person to deal with the trustee in relation to trust property, as if the trustee was the beneficial owner of the trust property. Third, such protection was made available to the bona fide purchaser for value without actual notice. The reference was not to any kind of notice, and clearly did not mean any kind of notice, given the difference in language in this respect between Article 55(1) and Article 54(3). The reference was to actual notice. Fourth, such protection was made available to anyone having dealings with a trustee in relation to trust property. The words "deal with" are very wide and, as it seems to me, are capable of applying to a wide variety of transactions and situations.*

*287. One can see good reason why an offshore jurisdiction such as Jersey might think it right to give a relatively high level of protection to persons dealing with trustees in relation to trust property, and might think it right to help in achieving this by requiring actual notice of the breach of trust, as opposed to any notice. Indeed, Article 55 is cited as an example of this kind of*

*approach in various jurisdictions in Panico; International Trust Law (2nd Edition) at page 407.....*

288.....

289. *I accept that this construction of Article 55(1) does not sit easily with the provisions of Article 33 and Article 54(3). Given the width of the language in Article 55(1) it is not easy to see in what situations Article 33 and Article 54(3) will apply. In particular, in relation to the operation of Article 54(3), it seems inevitable, at least in most cases, that the bona fide purchaser for value referred to therein will be a person who has dealt with the trustee, within the meaning of Article 55(1). If the First Defendant is right in its argument, the requirement of actual notice in Article 55(1) must trump the requirement of notice in Article 54(3). ..... Article 55(1) qualifies the provisions of Article 33 and Article 54(3). In the case of a person dealing with a trustee who is a bona fide purchaser for value, that person is protected unless he has actual notice of a breach of trust. This protection is not confined to situations of personal liability for breach of trust.”*

65. The court went on to consider what was meant by *actual* notice. Actual notice was said to comprise: (i) actual knowledge; (ii) wilfully shutting one’s eyes to the obvious; and (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make. It did not include (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; and (v) knowledge of circumstances which would put an honest and reasonable man on inquiry.
66. Applying the facts of the case, as it was found that the first defendant had *actual* notice of the breach of trust, it could not avail itself of the protection under Article 55 of the TjL84.
67. The Working Group has considered the case and the interpretation of the statute generally as well as the position in other jurisdictions. The inconsistency has clearly raised questions as can be seen in the recent case described above. It is, therefore, considered appropriate to consult on whether the inconsistency should be resolved such that the requirement for notice is standardised throughout the TjL84. This could, of course, be achieved in two ways; either the word *actual* is deleted from Article 55, or the word *actual* is added to Articles 33(2), 47I(4), and 54(3),
68. Whilst it is noted that the requirement for *actual* notice in Article 55 might be said to provide a greater protection for the bona fide third party, it is not clear why there is a justification for this in respect of Article 55 and not in the other circumstances. It might be said that an honest and reasonable

purchaser should be expected to make inquiries if there is something to put him or her on inquiry. This seems to be the position in other jurisdictions.

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## **SECTION D (iii) QUESTIONS**

### **QUESTION 11**

Do you agree that action should be taken to standardise the position on the form of notice required or should the status quo be retained?

### **QUESTION 12**

If you consider that action should be taken, do you consider that the word actual should be deleted from Article 55 or added to Articles 33, 47, and 54?

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## SECTION E

### Data Trusts

69. Digital Jersey has recently convened a working group to explore the concept of a data trust as part of considerations relating to data stewardship. A pilot project was run entitled “LifeCycle”, using a Jersey law governed data trust.

70. The concept is that the pooling of data (whether from say a number of companies in one sector or across different sectors) and the sharing of it permits a more effective analysis of the data which in turn permits more efficient and improved decision making based on better evidence. Suggested uses have been in medical research and town planning but others exist.

71. The sharing of this data must be done in an organised way with proper governance and security, and in compliance with principles of confidentiality and all appropriate regulation including as to data protection where applicable. It has been suggested that using a trust to do this is an effective solution with the capability of providing services to multiple users with different interests. Furthermore, it is suggested that Jersey, with its well-established expertise in trust administration and experience in the stewardship of assets, is well-placed to provide data trust services.

72. The concept is considered in the recent Consultation Paper issued by the **Jersey Law Commission (“JLC”) entitled “Digital Assets Reform Project: Smart Contracts, Data Assets and DAO”** (decentralised autonomous organisations). The consultation ran from March 2024 to 16 June 2024.

[https://www.jerseylawcommission.org.je/files/ugd/f5ec37\\_b1cad51913344bd4b8935bada672de9e.pdf](https://www.jerseylawcommission.org.je/files/ugd/f5ec37_b1cad51913344bd4b8935bada672de9e.pdf)

73. It is not intended to duplicate the work of the JLC in connection with this subject but rather to highlight it given the focus on data trusts and the fact that this Consultation Paper relates to trusts. Anyone with an interest in this area is encouraged to contact the JLC with comments.

74. However, a key issue relates to the definition of property. It is well-established that a valid trust must have three certainties: certainty of intention (to create a trust); certainty of subject matter (the trust assets); and certainty of objects (beneficiaries or purposes). In addition, Article 8 of the T.JL84 states as follows: -

#### **Property which may be placed in a trust**

*“Subject to Article 11(2) –*

*(a) any property may be held by or vested in a trustee upon trust; and*

*(b) a trustee may accept from any person property to be added to the trust property.”*

75. Property is defined in Article 1 as: *“property of any description wherever situated, and, in relation to rights and interests includes those rights and interests whether vested, contingent, defeasible or future;”*

76. Contractual rights and intellectual property rights have long been considered to be capable of being assets that can be placed in a trust – and it is also clear that immovable property in Jersey cannot be directly held in a Jersey law trust. However, as the Law Commission Consultation Paper states, “Historically, unstructured data, pure information, has not constituted or attracted property rights.” Views are sought in the JLC consultation paper as to “whether a data trustee needs a proprietary interest in unstructured data to establish a trust or rights relating to it?”
77. The Law Commission Consultation Paper goes on to ask whether Jersey should “introduce a new category of property rights or otherwise recognise “data objects” (however defined) as capable of constituting movable property?” in order to make “these property rights ... clear and unequivocal and to give flexibility to cater for unstructured data not held in a medium or that do not attract contract rights, intellectual property rights or other ancillary rights.”
78. The paper draws on the work of the Law Commission of England and Wales which it states has recommended that a new “third category of thing to which personal property can relate” be introduced. This reflects the 2019 conclusion by the UK Jurisdiction Taskforce that the common law, as it stood, was capable of recognising digital assets albeit more certainty was desirable.
- [Feb-2024-digital-assets-and-personal-property-CP.pdf \(cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com\)](https://s3.amazonaws.com/e218f50a4812967ba1215eaecede923f/CP.pdf)
79. A possibility would be to consider whether a change should be made to the TJJ84 to say that a trust is not invalid solely on the grounds that a person (known as a trustee) only holds rights, powers, duties, interests, relationships and obligations in data (to include pure data and/or data objects) or information (directly or indirectly in any form whatsoever), with such rights being deemed to constitute “property” for the purposes of the TJJ84.
80. Should a new category be adopted, it would be likely that such assets would then be included within the definition of property in Article 1 of the TJJ84 (to the extent that they are not already).
81. However, at this point in time, the Trusts Law Working Group considers it more appropriate to await the outcome of the JLC consultation and also any developments in England and Wales as to the definition of property, before making any recommendations as to changes in the TJJ84.
82. If there are any additional thoughts and suggestions as to changes to the TJJ84 to deal with data trusts more generally, these may be submitted in response to this consultation paper. Comments in relation to data trusts may also be made. In addition, wider comments and suggestions to ensure that the TJJ84 continues to be fit for purpose in relation to questions concerning digital developments can be submitted in response to this paper.

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## SECTION E QUESTIONS

### QUESTION 13

Do you agree that an amendment should *not* be proposed at this time to state that a trust is not invalid if the subject matter of the trust comprises only data? Should any such amendment depend on whether a new category of property is introduced for the purposes of the TjL84 or more widely?

### QUESTION 14

Do you have any other comments in relation to data trusts?

### QUESTION 15

Are any other amendments to the TjL84 required to keep it fit for purpose in relation to digital developments?

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## CONCLUSION

83. There have, as always, been a number of cases involving trusts before the Jersey courts, and indeed in other jurisdictions. These cases often raise interesting questions such as in relation to variation (*Representation of RBC Trustees re the LM Will Trust* 10 May 2024) or on charitable trusts, and trusts for an indefinite duration (*Representation of Equiom Trust re Estate of the late Constantin Mattas* (01 March 2024)).

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## CONCLUSION QUESTION

### QUESTION 16

If there are points which have arisen and which have not been considered in this paper, and which would benefit from discussion, please provide detail of this. Also please indicate any other suggestions for improving the TJL84 or topics that should be considered for discussion.

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## HOW TO RESPOND TO THE CONSULTATION

84. Government welcomes feedback to this consultation and is grateful for the support of the Working Group members and industry more widely in developing these proposals. Upon consideration of responses, draft legislation will be finalised for lodging in the autumn.

Questions have been listed at the end of the section to which they relate, and they are collated in Appendix A below.

You may respond in relation only to particular questions if you wish. You can respond:

- a) online by going to [gov.je/consultations](https://gov.je/consultations)
- b) by email to [Economy@gov.je](mailto:Economy@gov.je) with the subject line FAO Louise Richardson
- c) in writing to  
FAO Louise Richardson, Department for the Economy, 19-21 Broad Street, St Helier,  
Jersey JE2 3RR

Jersey Finance will also be collating an industry response. These responses should be sent:

- a) by email to [Sally.Edwards@jerseyfinance.je](mailto:Sally.Edwards@jerseyfinance.je) or
- b) in writing to:  
Sally Edwards, Jersey Finance Limited, 4<sup>th</sup> Floor, Sir Walter Raleigh House, 48-50  
Esplanade, St Helier, Jersey, JE2 3QB

Responses should be submitted no later than Friday 16 August 2024.



## **APPENDIX A QUESTIONS**

### **SECTION A**

QUESTION 1: do you consider that such an amendment should be made? If you are experiencing difficulties in practice, please provide examples.

QUESTION 2: are there any reasons not to make such an amendment? For example, might it lead to retirements of trustees becoming more protracted, for example, if trustees were more likely to seek to take security over the trust assets?

QUESTION 3: are there any other issues arising from this case, which you consider require addressing by way of change to the TjL84? Please provide details.

### **SECTION B**

QUESTION 4: should Article 43(3) be amended to make it clear that if there is, within the trust instrument, a power to add to a beneficial class, even if not currently exercisable but which could be used in the future, the beneficiaries cannot call for the termination of the trust?

QUESTION 5: A power to add beneficiaries is often seen as a special type of power of amendment. If there is no specific power to add beneficiaries in a trust instrument, but there is a power of amendment or appointment generally which could be used to add beneficiaries, do you consider the presence of the power should prevent the beneficiaries from calling for the termination of the trust?

QUESTION 6: Are there any other common clauses which might have an effect on this? For example, should an amended Article 43(3) specifically reference what the effect is where there is a default beneficiary or default trust, such as a charity or general charitable purposes clause?

QUESTION 7: should the TjL84 be amended to confirm that the beneficiaries can call for a variation of a trust? Should the agreement of the trustee be a prerequisite to any such variation becoming effective?

### **SECTION C**

QUESTION 8: Do you agree with the need to clarify this point?

### **SECTION D (i)**

QUESTION 9: Do you agree that the amendment should be made?

## **SECTION D (ii)**

QUESTION 10: Do you agree that the amendments should be made?

## **SECTION D (iii)**

QUESTION 11: Do you agree that action should be taken to standardise the position on the form of notice required or should the status quo be retained?

QUESTION 12: If you consider that action should be taken, do you consider that the word actual should be deleted from Article 55 or added to Articles 33, 47, and 54?

## **SECTION E**

QUESTION 13: Do you agree that an amendment should *not* be proposed at this time to state that a trust is not invalid if the subject matter of the trust comprises only data? Should any such amendment depend on whether a new category of property is introduced for the purposes of the TjL84 or more widely?

QUESTION 14: Do you have any other comments in relation to data trusts?

QUESTION 15: Are any other amendments to the TjL84 required to keep it fit for purpose in relation to digital developments?

## **CONCLUSION**

QUESTION 16: If there are points which have arisen and which have not been considered in this paper, and which would benefit from discussion, please provide detail of this. Also please indicate any other suggestions for improving the TjL84 or topics that should be considered for discussion.