

The Jersey Law Commission



CONSULTATION PAPER

The rights of beneficiaries to information regarding a trust

JERSEY LAW COMMISSION

CONSULTATION PAPER No 1

February 1998

The Jersey Law Commission was set up by a Proposition laid before the States of Jersey and approved by the States Assembly on 30 July 1996.

The Commissioners are:

Advocate Keith Baker, *Chairman*

Jurat Donald Le Boutillier

Mr David Lyons

Mr David Moon

Advocate William Bailhache

The Jersey Law Commission invites comments on this Consultation paper before **31 July 1998** in writing addressed to:

The Jersey Law Commission

. PO Box 87

St Helier

Jersey

JE4 8PX

fax no. 01534 609333.

Contents

1. The Jersey law of trusts.
2. The problem to be addressed
3. The characteristics of the trust.
4. Rights to information in Jersey law and in English law systems compared.
 - 4.1. Knowledge of beneficial entitlement.
 - 4.2. Duty of trustees to account and provide other information to the beneficiaries.
5. Rights to information in other jurisdictions.
 - 5.1. Guernsey.
 - 5.2. Cayman Islands.
 - 5.3. Cook Islands.
6. The five preliminary questions.
 - 6.1 What is the present position in Jersey law?
 - 6.2 What is the present position in English law?
 - 6.3 Would it be desirable to permit a settlor to restrict rights to information about the trust?
 - 6.4 If it were desirable, would it be possible without undermining the trust?
 - 6.5 Would such a change be appropriate to the standing of Jersey?
7. The way forward - choices:
 - 7.1 Rewrite Article 25 with comprehensive provisions on rights to information
 - 7.2 Permit settlors to restrict rights to information but lay down detailed statutory limits
 - 7.3 Permit settlors to restrict rights to information but give the court power (on application) to invalidate excessive restrictions.
 - 7.4 Make no change.
8. Questions for consultation

1. The Jersey law of trusts.

(Return to Contents Menu)

1.1 The Trusts (Jersey) Law of 1984, which was enacted to alleviate concerns that the enforceability of trusts in Jersey might be open to question, placed Jersey trust law on a statutory basis. According to a nineteenth century Privy Council decision, *inter vivos* trusts of movable property had been known in Jersey since the eighteenth century at least, and appeared to have been recognised as being enforceable for both public and private purposes(1). However, the Royal Commissioners, in their Report of 1860, stated that trusts of private individuals unconnected with public objects were "*absolutely unknown*", although not expressly forbidden (2). In consequence of the Commissioners' recommendations, a law was passed two years later to confirm the validity of certain trusts for public purposes which had been created by contract or act between living persons (3). Subsequent decisions of the Royal Court appeared to accept, without positively deciding, that Jersey recognised and would enforce *inter vivos* trusts of land outside the 1862 Law (4). *Inter vivos* trusts of movables seem to have produced even less controversy, and it has since been accepted that they are both valid and enforceable for public and private purposes (5). Thus, whilst (like England and Wales since 1875) Jersey has no separate court of equity, the Royal Court has dispensed and developed what can fairly be described as an equitable jurisdiction in relation to trusts. In doing so, its peculiar status has resulted in its paying due regard to the broad principles of English trust law (6).

1.2 The Trusts (Jersey) Law, 1984 concentrated on underpinning the foundations of Jersey trust law rather than promulgating a complex and detailed code. The statute is not, nor was it intended to be, a codification (7). This has allowed settlors considerable latitude in promulgating trusts to give effect to their sometimes extremely complicated intentions with the minimum of legislative interference or administrative bureaucracy, whilst at the same time it secured within the Law concepts which are readily identifiable by and familiar to trust practitioners across the world. Where the Law does not deal with a particular issue expressly, or in sufficient detail, resort is expected to be made to "the general principles" of trust law as developed over the centuries by the English courts.

1.3 The keenness of Jersey to provide the most effective trust law and to maintain and enhance its standing as a responsible and sophisticated trust jurisdiction has resulted in the enactment of three amending statutes since the Trusts (Jersey) Law, 1984 (8).

2. The problem to be addressed.

(Return to Contents Menu)

2.1 The purpose of this Consultation Paper is to consider whether a further amendment to the Trusts (Jersey) Law should be made. There is, we understand, a perception (analysed in section 4.2 post) that Jersey trust law does not offer the advantages to settlors afforded by other jurisdictions in one particular respect, namely the possible restriction of the rights of

beneficiaries to information regarding the trust. Potential settlors have been led to believe that the rights of beneficiaries to information (such as the trust accounts, and detailed lists of recent distributions) are considerably greater in Jersey than in some other jurisdictions, such that (for instance) a remote collateral relative of the settlor, or a spouse of one of his children or grandchildren, may be entitled under Jersey law, as a member of a class on whom benefits may be conferred by the trustees, to full disclosure of the trust accounts and of details of the trust assets, and, furthermore, that such rights of beneficiaries cannot be effectively excluded (or even restricted) by express provision in the trust instrument.

2.2 We intend in this Consultation Paper to review this area of Jersey trust law, to consider whether the perception which has arisen is well founded, and to solicit responses from those affected as to the desirability of amending legislation. Whilst it is accepted that legal uncertainty is in itself highly undesirable, it is also considered essential that any reforms which may result do not imperil the island's reputation for integrity.

3. The characteristics of the trust.

[\(Return to Contents Menu\)](#)

3.1 The trust is a long established institution of the private law. A trustee (or trustees) holds property for the benefit of a beneficiary or beneficiaries, and manages it in order to promote that benefit. Legal title to trust property vests in the trustee(s), not the trust itself. The prime characteristics of a trust in most jurisdictions are flexibility, relative informality, and lack of public accountability. For example, trusts do not normally need to be entered on any register to secure their validity, and there is no requirement that accounts be filed and published. These characteristics are not only at the heart of trust law, they also make trusts attractive as a means of holding assets, and we do not envisage that Jersey would wish to make any significant inroads into them. Although there is no public accountability, however, we shall see that the private right of beneficiaries to demand accounts from their trustees is highly material, and may be essential to the very validity of a trust (9).

3.2 The flexibility of trusts is manifested most clearly in the various forms they can take. There is a wide spectrum of possibilities for the settlor to select, and a successful trust jurisdiction will wish to offer the maximum freedom of choice within the bounds of legitimacy and propriety to potential settlors.

3.2.1 Fixed trusts. At one extreme is the *fixed trust*, whereby the trustees are instructed exactly how much capital and income is to be distributed to each beneficiary. In other words, the objects and entitlements are prescribed at the outset, and it is clearly essential that the trust specifies precisely the identity (by name, or by description) of each individual who is intended to be benefited. Whilst these individuals may be described generically, by reference to a designated class, it must be possible for the trustees to draw up a "comprehensive list" from any such description, otherwise the trust will be void.

3.2.2 Discretionary trusts. The *discretionary trust*, on the other hand, confers on the trustees considerable power over the allocation of the trust assets. Typically (but not necessarily) a discretionary trust will specify a "class" containing individuals who are named or who are identified by reference to their relationship to the settlor or another person (or body or

institution). The trustees are then given power, which they are legally obliged to exercise, to make payments of trust moneys to persons within the class. They may also be empowered to add or delete persons from the class from time to time (10). The class may be enormous, potentially comprising the whole world, and in such circumstances will only be challengeable (as being "administratively unworkable") if the trustees are given inadequate guidance as to whom payments should be made (11). The discretionary trust is a popular arrangement for holding assets in Jersey (as in other jurisdictions), as it meets a prime objective of estate and tax planning of ensuring that fixed interests, which might incur tax liability elsewhere for the beneficiaries, are not created.

3.2.3 Powers of appointment. One further method of distribution which may be employed by a settlor is to vest in his trustees a *power of appointment*. This gives the trustees power, which they may or may not exercise, to make payments of trust money to named individuals or to members of a class. There will almost always be a gift over in default in appointment, providing for the eventuality that the trustees do not expend all the trust assets. The trustees, as fiduciaries, are under a duty to consider from time to time whether to exercise their power, to consider the range of objects and the appropriateness of individual appointments, and to ensure that any appointment made is within the power (12).

(Return to Contents Menu)

3.3 They must apply their minds to the decision making process (13). However, no power is invalidated by it being impossible to ascertain every potential object, provided the language is clear enough to make it possible to say whether any given individual is an object of the power. The trustees, it has been said, need not "*worry their heads to survey the world from China to Peru, when there are perfectly good objects of the class in England.*" (14)

3.4 It must be realised that the three models described above are capable of considerable refinement and sophistication. Ultimately, it is the trust instrument which must be consulted and construed in each individual case to determine the scope of the duties and powers conferred upon the trustees. It is in the context of discretionary trusts that the issue which is the subject of this paper is most likely to arise.

3.5 Despite the inherent flexibility of the trust concept, there are certain components which are necessary for the proper constitution of any trust. If they do not appear, the trust is, quite simply, not a trust at all, with potentially disastrous consequences for the settlor and the beneficiaries. This principle extends some way further than the initial requirement that a trust have certainty of intention, subject-matter and objects. The English Court of Appeal has recently recognised this, stating that "*there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts.*" (15)

3.6 The significance of this principle to the issues discussed in this Paper can hardly be overstated. If Jersey were to legislate so as to permit total latitude to settlors, for example entitling them to deny beneficiaries any rights whatsoever to enforce the trustees' fiduciary obligations, the recognition and enforcement of that legal relationship outside Jersey would be fraught with difficulty (16). The Jersey courts themselves would face serious intellectual obstacles in understanding and applying the Jersey trust law as informed by the trust principles of the English courts, and the Jersey trust would become a very different arrangement from the trust as known in the common law jurisdictions. It is important in this Paper to distil the core content of trusteeship as it is recognised in England and elsewhere, and to ensure that any proposals do

not subvert the vital ingredients of the trust relationship. We intend to do this as we proceed to consider the current law of Jersey concerning the beneficiaries' rights to information regarding the trust.

4. Rights to information in Jersey law and in English law systems compared.

[\(Return to Contents Menu\)](#)

4.1 Knowledge of beneficial entitlement.

4.1.1 A trust is a legal obligation, the legal enforceability of which is central to its viability and credibility. As has been recently stated by an eminent Canadian trusts lawyer, *The whole history of the common law trust is the story of a remedy*" (17). Thus, in *Morice v Bishop of Durham*, (18) Lord Eldon held that there is no valid trust unless the court can control and execute it. The question is both linguistic and pragmatic, both *de jure* and *de facto* control being required. The leading case on certainty of the objects of a discretionary trust, *McPhail v. Doulton* (19) was concerned primarily with *de jure* control, holding that a discretionary trust was sufficiently certain if it could be said of any given person that he was within the class of beneficiaries. If this test is satisfied, then the trust can be enforced as a matter of law, and the court can intervene in the event of a failure of the trustees to carry out their legal obligations. For control to be practically effective, however, further steps need to be taken, in particular informing such persons who are known to the trustees to be within the class. Unless this is done, the failures of the trustees would never be brought before the court, as the beneficiaries would not have the necessary knowledge to prosecute a claim. In short, the effective policing of the trustees can only take place if beneficiaries are aware that they are beneficiaries.

4.1.2 A strong argument can therefore be made that a beneficiary is entitled to know of the fact of his interest (*i.e.* that he is a beneficiary). However, the Trusts (Jersey) Law, 1984 does not make any express provision in this respect, and whilst it is felt that here Jersey law will follow English law (20) the English law is itself relatively uncertain. There is good authority to suggest that a beneficiary of full age with a fixed interest has the right to know the fact of his beneficial entitlement. (21) Where a person is a member of a class pursuant to a discretionary trust, (22) Professor Hayton has argued that the trustees are under some duty of this kind: (23)

"..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 be under a duty to take reasonable steps to make a discretionary beneficiary aware that he be such."

4.1.3 It is important to note that the duty imposed by English law is not absolute. It is enough for the trustee to "*take reasonable steps*". This is an important and pragmatic qualification. As a discretionary trust is perfectly valid although no full list of beneficiaries can be drawn up, it would be wholly illogical, as well as unrealistic, to expect the trustee to contact all potential beneficiaries. In many cases, where there may be thousands or tens of thousands to whom payment of trust moneys may be made, the trustee is unlikely to know them all. *A fortiori*, where the class of possible beneficiaries under a discretionary trust is not only wide, but also capable (by exercise of a power to add) of significant expansion, the trustees cannot be obliged

to seek out all such persons to inform them of the possibility that they may acquire rights under the trust. (24)

4.1.4 A mere object of a power of appointment is not, it appears, entitled to know of his legal position (although he will of course find out if a payment is made from the trust to him). (25) This too is entirely logical. An object of a power of appointment can only compel the trustees to consider whether a payment should be made to any of the objects specified. As the object of a power has no right to request the trustees to consider making an appointment of trust funds to him, it follows that there is no need that he be made aware that he is such an object.

4.1.5 Where it can be established that the beneficiary of a particular trust has the right to know of his entitlement, any attempt to exclude such a right is liable to be struck down:

"A clause directing the trustees not to inform any discretionary beneficiary that he be such unless so directed by the settlor or the protector should either negate the trust or more likely be regarded as repugnant to the trust: such a person should only be made the object of a power." (26)

4.1.6 We should however conclude this section by stating that the Jersey law in this regard is currently uncertain, as there is no specific provision in the Trusts (Jersey) Law, and there has been no litigation before the Jersey courts.

(Return to Contents Menu)

4.2 Duty of trustees to account and provide other information to beneficiaries.

4.2.1 It would seem to follow from the most basic principles of English trust law, and applying the pragmatic principle of enforceability, that a beneficiary is entitled to an account of dealings with the trust property by the trustees. The principle of accountability underpins the English law, the Trusts (Jersey) Law, 1984, (27) and the Hague Convention on the Law applicable to Trusts and on their Recognition. (28) The beneficiary is also entitled to be provided with certain information about the trust, although the precise extent of the latter duty at least is far from clear. The Trusts (Jersey) Law 1984 makes express provision in these respects by virtue of Article 25, which reads, in its amended form:

"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."

4.2.2 Article 25 has caused the concern leading to this Consultation Paper, as it has been argued that it confers "entrenched" rights on beneficiaries which cannot be taken away. The provision begins with two qualifications. The substance of the Article is subject to (i) the terms of the trust being considered, and (ii) any order of the court. With these riders, the Article stipulates that a trustee shall not be required to disclose to any person any document which falls within one of the four categories, (a), (b), (c), and (d). Although its impact is greatest on discretionary trusts, its ambit is not so limited. Its short title "*Trustee may refuse to make disclosure*", and its essentially negative language does not immediately confer the notion that this provision is creating entrenched rights for beneficiaries.

4.2.3 Article 25 is limited in its effect to "documents". There will be information in the trustees' possession which is not in documentary form, to which Article 25 will have no application. There will also be documents in the possession of the trustees which will not fall within any of the categories of Article 25. But such information and such documents may still be regulated by the courts. Beneficiaries may claim the right of access by application to the trustees, failing which by application to the court. Despite the presence of Article 25, the Jersey courts have found themselves having to determine the rights of beneficiaries to information (both documentary and non-documentary) with reference to English case law, and in particular the decision of the Court of Appeal in *Re Londonderry's Settlement*.⁽²⁹⁾

(Return to Contents Menu)

4.2.4 In *Re Londonderry's Settlement*, the Court of Appeal heard the application of a beneficiary for disclosure of information relating to a trust and the trustees' administration thereof. They recognised that two conflicting lines of authority required reconciliation. First, trustees exercising a discretionary power are not obliged to give reasons for their decision.⁽³⁰⁾ Secondly, beneficiaries are entitled to see "trust documents" on the ground that as they belong to "the trust" the beneficiaries of the trust have proprietary rights over them.⁽³¹⁾ Whilst documents such as the minutes and agenda of the trustees' meetings would seem to be "trust documents", their disclosure to the beneficiary would inevitably "reveal to her the motives and reasons of the trustees in making their distributions."

4.2.5 The Court of Appeal held that the trustees were bound to disclose to the beneficiary at her request any written advice from their solicitors or counsel as to the manner in which the trustees were in law entitled to exercise their powers.⁽³²⁾ Although not at issue in *Re Londonderry*, one can safely assume that beneficiaries would also be entitled to see the trust instrument, and subsequent instruments effecting the removal, retirement or appointment of trustees. The trustees were not, however, obliged to disclose:

(i) the agenda of the meetings of the trustees of the settlement;

(ii) correspondence passing between the individuals holding office as trustees of (or appointors under) the settlement;

(iii) correspondence passing between the trustees and appointors or any of them on the one hand and the beneficiaries on the other;

(iv) minutes of meetings of the trustees and other documents disclosing the deliberations of the trustees as to the manner in which they should exercise the discretionary powers conferred on

them by the settlement or disclosing the reasons for any particular exercise of such powers or the material upon which such reasons were or might have been based. [\(33\)](#)

4.2.6 This statement of the order as approved by the Court of Appeal appears to indicate that the right of the trustees to keep their reasons for the exercise of discretion to themselves overrides any proprietary right the beneficiaries might have to so-called "trust documents", and *Londonderry* has been so interpreted by subsequent courts. However, the reasoned judgments of the Court of Appeal do not uniformly state such a simple resolution of the conflict, as Salmon LJ believed that if a part of a "trust document" contained information which the beneficiary was not entitled to know, that part could not truly be said to be an integral part of the document, and therefore should be automatically excluded from disclosure on that ground. Harman LJ (with whom Danckwerts LJ agreed) did not believe that the minutes and agenda of trustee meetings were "trust documents" as such, but that if they were, they were protected by the special reason protecting the trustees' deliberations on a discretionary matter from disclosure: *"If necessary, I hold that this principle overrides the ordinary rule."*

4.2.7 *Re Londonderry's Settlement* did not consider by any means all types of documents which might be encountered as held by a trustee. Thus, no consideration was given to information concerning companies in which the trust has an interest ("underlying companies"). If trustees have such information in their possession which has been acquired in their capacity as shareholders in the underlying company, the beneficiaries would appear to be entitled to it, as such papers would be documents relating to the assets of the trust. But if the trustees had acquired such information in their capacity as directors in the underlying company, the information not being provided to shareholders, then the beneficiaries would not be entitled to access. [\(34\)](#) In Jersey, it has been held that where a trust owned underlying companies, the "trust accounts" would include the accounts of the companies. [\(35\)](#)

[\(Return to Contents Menu\)](#)

4.2.8 Letters of wishes provided by settlors (or other instigators of the trust) to the trustees indicating how the trust assets should be distributed were considered at length by the Court of Appeal of New South Wales in *Hartigan Nominees Pty Ltd v. Rydge*, [\(36\)](#) an important decision as the reasoning in *Re Londonderry's Settlement* was thoroughly analysed by the Australian judges. It concerned an attempt by a beneficiary of a discretionary trust to obtain disclosure of a memorandum of wishes deposited by the instigator of the trust with the trustees. By a majority of 2:1, the Court refused to order disclosure. Only one of the three judges, Mahoney JA, approved of *Re Londonderry's Settlement*, as both *"correct in principle and in accordance with commonsense. The right of a beneficiary to disclosure is ordinarily based upon the beneficiary's proprietary interest in the documents in question: but, by virtue of the fiduciary obligations of a trustee, it extends, I think, to information of a non-documentary kind."* [\(37\)](#) The memorandum of wishes (which none of the judges had read) was not a document forming part of the property of the trust, as it was, "as a matter of probability", directed to matters of administration and was, moreover, likely to have been given on a confidential basis. Whilst it may be discoverable in proceedings by the beneficiary for breach of trust (e.g. alleging that the trustees had taken account of irrelevant factors), the court "should not order disclosure in the current action."

4.2.9 Sheller JA, also in the majority, did not consider that *Re Londonderry* had stated a satisfactory test for determining whether a document was a "trust document", and found Salmon LJ's attempted definition of no assistance, as it assumed the answer to the question it was directed to solve. [\(38\)](#) Nor did he find the notion of the beneficiary's proprietary interest in trust documents helpful. He accepted that documents which would disclose the motives and

reasons actuating the trustees in coming to their decision need not be disclosed to the beneficiary, although at the same time (contrary to the order in *Londonderry*) he did not agree that material upon which reasons were or might be based could be generally withheld. But his decision to deny access to the beneficiary is firmly based on confidentiality. The memorandum was intended by its author to be confidential, and its communication in such circumstances bound the trustees not to disclose his wishes to the beneficiaries, and to withhold the memorandum from them.

4.2.10 It should not be thought that *Hartigan Nominees* decides once and for all that a memorandum or letter of wishes is not disclosable to the beneficiaries of a discretionary trust in any circumstances. On the facts, the majority held that the memorandum had been provided in circumstances of confidentiality which effectively precluded disclosure to the beneficiaries, but the terms of such a document, the circumstances in which it was delivered to the trustees, and any accompanying instructions of its author would have to be considered in any subsequent case. Although there is no express consideration in *Hartigan Nominees* of exclusion or restriction of the trustees' duty to provide information to beneficiaries of a discretionary trust, the reliance of the majority on confidentiality comprises a tacit admission of circumstances where the duty to disclose on demand may be qualified. If the settlor (or instigator) can instruct his trustees that they shall not disclose a memorandum of wishes to the beneficiaries, it should follow that he can by clear instructions deny them access to other documents or information, provided that such denial of access does not preclude the relationship between trustees and beneficiaries from being recognised as one of trust.

(Return to Contents Menu)

4.2.11 As we have indicated above, Jersey case law has followed the decision in *Re Londonderry's Settlement*, and Article 25 is to a large extent modelled upon it. Thus, in general terms, categories (a), (b) and (c) of Article 25 of the Trusts (Jersey) Law protect documents from disclosure which would be likely to give the beneficiaries information to which they would not be entitled on the basis of *Re Londonderry's Settlement*. Underpinning both categories (a) and (b) is the *Beloved Wilkes* principle- that a trustee exercising a discretion is not required to give reasons, and in applying this particular rule Article 25 adopts the terminology of the order approved in *Re Londonderry's Settlement*.⁽³⁹⁾ Thus, by category (b), a trustee of a Jersey trust shall not be required (subject to the statutory qualifications) to disclose to any person any document which discloses the reason for any particular exercise of a power or discretion or performance of duty *or the material upon which such reason shall or might have been based*. As we have already noted, these latter italicised words were criticised by Sheller JA in *Hartigan Nominees* as being unnecessarily restrictive.⁽⁴⁰⁾ Category (a) appears to give extra security to the trustees by protecting their "deliberations". This word would seem to denote the trustees' discussions (as minuted) leading up to their decision to exercise a power or perform a duty, and is consistent with the refusal of the Court in *Londonderry* to order disclosure of the minutes and agenda of the trustees' meetings. Category (c) is a rather general provision, which is possibly wider than any formulations in *Re Londonderry's Settlement*. However, it does not appear that this has led the Jersey courts to order disclosure of documents less readily than the English courts have. In *In the Matter of a Settlement*,⁽⁴¹⁾ the function of categories (a) to (c) was well explained by Sir Philip Bailhache, when Deputy Bailiff, as follows:

"Those paragraphs make it clear that, subject to the terms of the trust and any order of the court, trustees are entitled to refuse to disclose matters touching upon the exercise of a power or a discretion or the performance of a duty imposed upon them. In the context of discretionary trusts, it seems to us eminently sensible and reasonable that trustees should be able to weigh conflicting considerations as between different beneficiaries and to judge the merits and

demerits of particular courses of action without being exposed to minute examination as to their motives and processes of reasoning by disaffected beneficiaries. Trustees of such a trust have been entrusted with a confidential role and should, in general, be permitted to exercise their functions away from the glare of publicity. Of course, if they are not acting in good faith, that is an entirely different matter."

4.2.12 Categories (a) to (c) are, we believe, as satisfactory as they can be, in view of the underlying uncertainty, which all trust jurisdictions have found impossible to resolve, concerning the definition of a "trust document". The difficulty may be more semantic than real, and it is not one which we propose to expend any further energies on.

4.2.13 More practical difficulties have been caused by category (d), which comprises any document which "relates to or forms part of the accounts of the trust". It is unique amongst the categories of Article 25 in that it contemplates the right of disclosure in certain circumstances. Where a document falls within this category, the trustees may be required to disclose it to any person within the definition of the proviso. A "beneficiary" is defined for the purposes of the Law so as to include a person in whose favour a discretion to distribute property held on trust may be exercised.⁽⁴²⁾ This is a wide definition, which will include not only a person potentially entitled to benefit under a discretionary trust, but also an object of a power of appointment.

The trustees may only be required to disclose to a beneficiary which is a charity where the charity is referred to by name in the terms of the trust as a beneficiary. Finally, where the trust has non-charitable purposes, the "enforcer" of those purposes may seek disclosure of the accounts. As Matthews & Sowden note,⁽⁴³⁾ the apparent effect of this final paragraph is that a beneficiary, as defined, has the right (at any rate "subject to the terms of the trust and subject to any order of the court") to see documents relating to or forming part of the trust accounts.

[\(Return to Contents Menu\)](#)

4.2.14 In *West v. Lazard Brothers & Company (Jersey) Ltd*⁽⁴⁴⁾ application was made to the Royal Court for, *inter alia*, disclosure of accounts and production of an inventory of trust assets to beneficiaries under a trust. The Court took a "very wide view" of what constituted trust accounts, and ordered the supply to the plaintiffs' advocate of

"all accounts, vouchers, coupons, documents, and correspondence relating to the administration of the trust property or otherwise to the execution of the trust, including a full inventory of the trust assets and all dealings relating to any real property (as defined in Re Londonderry's Settlement, where the kind of information to which beneficiaries are entitled is set out)..."

4.2.15 It is felt that it would be unwise to treat these words as affording a watertight definition of documents which relate to or form part of the accounts of the trust for the purposes of category (d). The Bailiff, Sir Peter Crill, acknowledged that the Court was taking a "very wide" view, and they were clearly influenced by the fact that the trustees had kept the beneficiaries in the dark for some considerable time.⁽⁴⁵⁾ It has been subsequently denied that "accounts" embraced *"virtually every document connected with the trust,"*⁽⁴⁶⁾ and emphasised that the general propositions in *Re Londonderry's Settlement* *"were not intended to be applied inflexibly and in all circumstances."*⁽⁴⁷⁾ However, at least one recent order of the Royal Court has described the documents to be disclosed in the same way as in *West v. Lazard Brothers & Company Ltd.*⁽⁴⁸⁾

4.2.16 An important issue to consider is the effect of the two qualifications at the outset of Article 25, *"Subject to the terms of the trust and subject to any order of the court"*. *"Subject to any order of the court"* gives the court power to override the trustees' refusal to disclose

particular documents to the beneficiaries. Although no limitations are placed on the discretion of the court, this power would be most likely to be utilised where a beneficiary has initiated (1987-88) J.L.R. 414.

proceedings for breach of trust against the trustees. As was recognised in *Re Londonderry's Settlement*, at the discovery stage, the question of disclosure becomes purely one of relevance to the action, and, subject to claims of privilege, documents must be disclosed whether or not they are trust documents. (49) As was succinctly asked shortly after the *Londonderry* decision, "Will the courts permit the bonds of secrecy to be invaded by the simple process of commencing hostile litigation against the trustees? It is not easy to see how the courts can prevent this." (50)

4.2.17 Some protection can be afforded by insisting that the beneficiary seeking discovery in pending proceedings satisfy the court that there is a prima facie case of bad faith on the part of the trustees. (51) But there is a danger in setting too high a standard, as the beneficiary's case will be difficult to construct without access to the information which only the trustee possesses. (52)

(Return to Contents Menu)

4.2.18 Trustees may themselves seek the directions of the court where they are unsure whether particular documents fall within Article 25, and wish to have the sanction of the court for their actions. (53) The court has discretion to order that beneficiaries be joined as parties to such an application so that it may have before it all the relevant material, including the views of any beneficiary who did not agree with the trustee's proposals or who might be affected by any order proposed. However, an order to join beneficiaries is not automatic, and it will depend on the circumstances of each case. It is normally expected that trustees consult with beneficiaries prior to making application to the court, at least apprising them of the application which is to be made. (54)

4.2.19 Do the words "Subject to the terms of the trust and subject to any order of the court" qualify the lines ("the closing lines") which immediately follow category (d)? If they did not, a substantive argument could be advanced that the Article conferred an absolute right on the persons listed in the closing lines to demand the accounts from the trustees: absolute in the sense that it could not be excluded or restricted by the terms of the trust. It is our view, however, that that argument is not totally convincing, and that the closing lines are in all likelihood qualified by the opening words of the Article. The closing lines are intimately concerned with category (d), and although they are not indented in the same way as category (d), they should be treated as part of it. We believe that to separate out the closing lines from the remainder of the Article, and thereby to treat them as conferring absolute rights on the persons there listed, is to give undue significance to the layout of the page as printed.

4.2.20 It should not, however, be thought that the settlor has complete freedom to do as he wishes. Whilst it may be possible by express provision in the trust instrument to confer on the beneficiaries completely unfettered access to all trust information in the hands of the trustees, (55) it is necessary to be cautious at the other extreme. If a settlor attempted to deny beneficiaries any access to any information, there would be a considerable danger of an attack on the instrument on the basis that it had failed to create a viable trust. The duty of trustees to account to beneficiaries is an "essential ingredient of trusteeship" which "affords the beneficiaries a correlative right to have the court enforce the trustees' fundamental obligation to

account".(56) Whether we term it "essential" or "fundamental", the implication is that the trustees' duty to account to beneficiaries on demand cannot be excluded.

4.2.21 A similar debate has taken place in the context of trustee exemption clauses.(57) It has been resolved by the English Court of Appeal in *Armitage v. Nurse*(58) where it was held that a trust instrument could exclude liability for negligence, including gross negligence. It was accepted that an irreducible core of obligations was owed by trustees to beneficiaries, as being fundamental to the concept of a trust, and that "the minimum necessary" to give substance to the trust relationship was a duty to perform the trusts honestly and in good faith for the benefit of the beneficiaries.(59) In other words, exclusion of liability for fraud would be contrary to public policy and/or repugnant to the trust, and any clause which purported to have such effect would be struck down.

(Return to Contents Menu)

4.2.22 Although *Armitage v. Nurse* recognises that there is an irreducible core of obligations, it does not attempt to list what those obligations are. Whilst it is surely right to assume that the duty to account to the beneficiaries is so central to the concept of a trust that it cannot be excluded, it is more difficult to determine the extent to which such a duty may be restricted. If the true basis of trust is the enforceability of the obligation of trusteeship, it is necessary to ensure that at least one person is entitled (*de jure* and *de facto*) to enforce. The inability to enforce has led to the failure of private purpose trusts in most common law jurisdictions, and ultimately to the statutory invention of an "enforcer" of such purposes to ensure their validity in Jersey and elsewhere.(60) If, then, the reasoning goes, there is at least one beneficiary who is given the express right to demand accounts and other trust information then that should be enough. Denial of such rights to others amongst the beneficial class would not render the trust unenforceable, as there would be inevitably one person with the necessary knowledge and status to prosecute any actual or anticipated breaches of trust.

4.2.23 There are dangers inherent in this approach. The settlor may select someone who is, for reasons of indolence or self-interest, disinclined or unlikely to police the trustees' activities carefully. Would the selected beneficiary be treated as a fiduciary, such that a failure to act in good faith and with honesty pursuant to the enforcement role could render him liable to action by the other beneficiaries? If that is the case, how will the beneficiaries (those beneficiaries, that is, who know they are beneficiaries) respond to their representative's conduct if they do not know his identity? If the selected beneficiary is not a fiduciary, what remedies would the others have? The problem is similar to that encountered where a settlor makes use of a protector whom he empowers to approve investments, or dismiss and appoint trustees, or add and delete beneficiaries. In some circumstances, the protector will be a fiduciary. In others he will not.(61) The position of the beneficiaries is in serious danger of being compromised. In the words of Juvenal, *Quis custodiet ipsos custodes?*(62)

4.2.24 Matthews & Sowden(63) present an alternative way of looking at the beneficiaries' rights to trust information, in proprietary terms. The settlor vests property in the trustees to be held for the benefit of the beneficiaries of the trust. This property includes information about the trust, largely but not exclusively in documentary form. This information is therefore "owned" by the beneficiaries in equity. It cannot be withheld from the beneficiaries, nor can terms be imposed restricting their proprietary rights to the information. If this is right, any attempt to restrict, *a fortiori* prohibit, access by the beneficiaries will be liable to be struck down as repugnant to the nature of the trust. Matthews & Sowden concede that in certain cases it will be arguable by the trustees that the information is held for the trustees' own benefit, or for that of persons other than the beneficiaries (maybe even for the settlor on resulting trust), but it is

difficult to see how this would be a satisfactory interpretation in all save the most unusual circumstances. [\(64\)](#)

4.2.25 However, the proprietary approach to trust information has, as we have already seen, caused considerable difficulties and confusion in this area. The theory was advanced most powerfully by Lord Wrenbury in *O'Rourke v. Darbyshire* [\(65\)](#) in 1920, but more recently the courts have been less enthusiastic, as they have realised that rigid adherence to this theory would result in the delivery of all documents, including those which disclose the reasons for trustees' decisions, to the beneficiaries. It led to much confusion in *Re Londonderry's Settlement*, where the Court of Appeal had to reconcile the two conflicting principles, and were faced with the choice between adopting a restrictive definition of "trust documents" or holding that the principle of non-disclosure of reasons overrode the principle of proprietary right. It would have no application where the "beneficiaries" seeking disclosure were no more than objects of a power of appointment. It is hardly surprising that a majority of the Court of Appeal of New South Wales in *Hartigan Nominees Pty Ltd v. Rydge* found the proprietary approach unsatisfactory, [\(66\)](#) Kirby P citing a leading Australian text on trust law:

"The legal title and rights to possession are in the trustees: all the beneficiary has are equitable rights against the trustees... The beneficiary's rights to inspect trust documents are founded therefore not upon any equitable proprietary right which he or she may have in respect of those documents but upon the trustee's fiduciary duty to keep the beneficiary informed and to render accounts." [\(67\)](#)

[\(Return to Contents Menu\)](#)

4.2.26 The proprietary approach has also been rejected in Canada. [\(68\)](#) In Jersey, the Royal Court in *Re A Settlement* [\(69\)](#) did not think it necessary to determine whether the beneficiaries of a trust had a proprietary interest in the trust documents, which must mean that at the very least the question remains open. In principle, whilst it can be seen that beneficiaries can assert proprietary rights to the trust property (thus being able to join together and demand an outright transfer to themselves if they are all absolutely entitled), it is less clear why such rights should extend over the trust documents, which are in the trustees' hands so that effective management can be carried out. In short, we would agree with Professor Hayton when he says:

"The beneficiaries' rights to inspect trust documents are now seen to be better based not on equitable proprietary rights but on the beneficiaries' rights to make the trustees account for their trusteeship." [\(70\)](#)

4.2.27 It should not be forgotten that beneficiaries have the remedy of suing the trustees for breach of trust, and then seeking disclosure of the accounts in the course of the proceedings, but that would be a most unsatisfactory and circuitous procedure on which to place reliance. Moreover, the trustees might seek to argue, with some justification, that such beneficiaries did not have a *prima facie* case of breach of trust, and that the action is nothing more than a fishing expedition.

4.2.28 It is now becoming clear that where trustees have failed to acquit themselves of their obligation to produce accounts on demand, thereby requiring the beneficiaries to bring proceedings, the Royal Court will not hesitate to order that costs be paid by the trustees on a full indemnity basis. [\(71\)](#) Where trustees have delivered trust documents to beneficiaries on demand, English authority supports the right of the trustees to claim payment of the costs from the beneficiaries seeking disclosure (rather than from the trust assets as a whole), [\(72\)](#) and there would seem no good reason why this rational approach should not also apply in Jersey.

There is, however, no decision on the point.

4.2.29 To summarise the apparent effect of Article 25:

-a trustee shall not be required to disclose any document falling within categories (a) to (c), subject to the terms of the trust or any order of the court;

-a trustee may be required to disclose any document which relates to or forms part of the accounts of the trust, where the person seeking disclosure is a beneficiary, a named charity, or the enforcer of a trust for non-charitable purposes;

-the court has a residual discretion to order or prohibit disclosure of any of the documents falling within categories (a) to (d), or, indeed, any information or documents falling outside Article 25 altogether.

The difficulty concerns the extent to which the terms of the trust may modify or exclude the rights of beneficiaries, charities and enforcers to demand disclosure of the accounts from the trustee.

5. Rights to information in other jurisdictions.

(Return to Contents Menu)

We should consider briefly the provisions in other trust jurisdictions which have been held up as offering settlors greater control over the rights of beneficiaries to information than the Jersey provisions.

5.1. Guernsey

5.1.1 Article 22(1) of the Trusts (Guernsey) Law (of 1989) provides:

"Subject to the terms of the trust, a trustee shall, at all reasonable times, at the written request of any beneficiary (including any charity named in the trust) or of the settlor, provide full and accurate information as to the state and amount of the trust property."

5.1.2 This provision has the attractiveness of simplicity and immediacy. Somewhat ironically, it has a libertarian, "freedom of information" stance, imposing as it does a duty on the trustees. However, it is clearly qualified by the opening words, thereby enabling an investor who places his wealth in a Guernsey trust to limit (as well as widen) the beneficiaries' rights to information. It does not set out the minimum level of trustee responsibility in this respect, leaving this (one assumes) to the courts, as it must be doubtful that under Guernsey law a trust would be able to deny beneficiaries all rights of information and still remain a trust.

5.2 Cayman Islands

5.2.1 The recently enacted Special Trusts (Alternative Regime) Law 1997 purports to offer to

settlers a form of trust which denies to the beneficiaries, as such, *any* enforceable rights against the trustee, or indeed any standing to enforce the trust. Settlers may designate their trust a "special trust", in which case the provisions of the 1997 Law will apply to it. (If the trust is not so designated, it will be subject to the general Cayman Islands trusts law, as an "ordinary trust".) Enforcement is carried out by an "enforcer", who is identified, and authorised to act in this capacity, in the trust instrument. He may, but need not, be a beneficiary. He is granted the same rights as a beneficiary of an ordinary trust, to bring administration and other actions, and to be informed of the terms of the trust, to receive an account, and to inspect trust documents.

In the absence of evidence of a contrary intention his role is deemed to be fiduciary. In the event of there being no enforcer able, fit and willing to act the court may (on application) make an appointment.

5.2.2 Thus the rights normally exercisable by beneficiaries are vested in the enforcer, and accountability to an enforcer replaces accountability to the beneficiaries themselves. The question which arises is whether such an arrangement will be recognised in other jurisdictions as a valid trust. While there are superficial similarities to Jersey's own law on purpose trusts, there is a highly significant difference. A purpose trust has by definition no beneficiaries, and is only valid if some person has *locus standi* to enforce it. A trust for persons has beneficiaries, and the fiduciary duty owed by the trustees to the beneficiaries should surely be enforceable by the beneficiaries themselves. We doubt that indirect enforceability by an enforcer who may or may not be a beneficiary will convince jurisdictions outside the Cayman Islands that this is indeed a valid trust.

5.3 Cook Islands

5.3.1 No parallel jurisdiction is as restrictive (or as secretive) as the Cook Islands. By section 23(1) of the International Trusts Act, it is a criminal offence for any person "to divulge or communicate to any other person information relating to the establishment, constitution, business undertaking or affairs of an international trust." Any criminal (or civil) proceedings are to be held in camera. This ultimate extreme of privacy may render the Cook Islands a jurisdiction of choice for settlers who seek the utmost privacy in their dealings, perhaps where asset protection is their main incentive, but it is unlikely to be politically attractive to Jersey as it could endanger the reputation of the island for the promotion of high quality, effectively controlled, financial business.

5.4 There are of course many other similar jurisdictions which have legislated in the area of trustees' accountability. The examples are given to indicate the range of options which might be available.

6. The five preliminary questions

(Return to Contents Menu)

In our First Annual Report, now laid before the States, we identified five questions which were deserving of consideration, and we feel it would be useful to address these briefly here in the

light of the above text prior to summarising the options which appear to us available to Jersey:

6.1 What is the present Jersey law on the accountability of trustees to beneficiaries?

6.1.1 Without repeating the detail of the foregoing text, we can indicate that many consider the correct interpretation of Article 25 of the Trusts (Jersey) Law, 1984 to be that the words "subject to the terms of the trust" apply to the whole Article, including the closing lines. If this were correct, it would presently be possible as a matter of construction of Article 25 for a settlor to narrow as well as widen the rights of beneficiaries to disclosure of trust accounts.⁽⁷³⁾ That interpretation is, however, not free from doubt: nor are the legal consequences of a settlor using that power to narrow these rights excessively.

6.2 What is the present English law on the accountability of trustees to beneficiaries, and in particular is it true that provisions in a trust instrument purporting to restrict or remove the accountability of trustees to beneficiaries would undermine the validity of the trust?

6.2.1 We hope that we have summarised the English law in sufficient detail above. It is very clear from the recent case of *Armitage v. Nurse* that there is an irreducible core of obligation owed by trustees to their beneficiaries. This includes the duty of trustees to account, and so an attempt by a settlor to remove altogether the accountability of the trustees to the beneficiaries would result either in the trust being invalid, or in the offending clause being struck out as repugnant to the trust. Some restriction is possible, but it is not possible on the current state of authority to draw a clear line between what is acceptable and what is not.

6.3 Would it be desirable for the ambiguity in Article 25 to be resolved in favour of permitting a settlor to introduce terms into the trust restricting or removing the right of some or all beneficiaries to accounts or other information about the trust?

6.3.1 Our provisional preference is to adopt a broadly permissive approach, thereby enabling settlors to restrict the rights of beneficiaries to information and accounts. However, we believe that the principle of accountability is so central to any reputable trust jurisdiction that we would not advise the adoption of a completely unqualified power to do so. We consider that a case can be made for a more radical and innovative legislative approach which we set out below.

6.4 If it were desirable, would it be possible to achieve that result without undermining the fundamental concept of the arrangement known as a trust?

6.4.1 We feel that there is a clear distinction to be drawn between restriction of rights and exclusion of rights. The exclusion of rights would be almost certain to undermine the trust concept. Some restriction of rights is clearly possible. It is essential that the trust remains pragmatically enforceable by the beneficiaries. It is difficult to be any more precise than this, and courts would look at the individual circumstances of each case.

6.5 If it were possible, would such a change in the law be appropriate to the standing of Jersey as a responsible and sophisticated finance centre?

6.5.1 Jersey must ensure that it does not facilitate the instigation of trusts which are merely devices, or which cannot be effectively enforced. There is also a serious danger that trusts which resulted would not be recognised by other trust jurisdictions. As English law appears to allow for some restrictions in this respect, however, there is clearly some scope for Jersey to proceed along similar lines. Article 25 is a difficult provision, and clarification of the current law is highly desirable.

7. The way forward - choices.

(Return to Contents Menu)

Jersey is faced with several options, and its choice will be determined to some extent by the seriousness with which the current problem is perceived.

7.1 Rewrite Article 25 with comprehensive provisions on rights to information

7.1.1 It can take the view that the determination of beneficiaries' rights to information is so fraught with difficulty and obscurity that it is necessary to repeal Article 25, and enact a new provision which is clear and comprehensive. In conjunction with this policy, or independently of it, it may decide that it is desirable to set out precisely what the minimum level of accountability is required for the trust to be valid and enforceable in the Jersey courts. If this particular option is adopted, it will be necessary for the States to decide precisely what is expected of settlors and trustees, and skilled draftsmanship will be required. It would be, as far as we are aware, an entirely novel departure, although that should not in itself deter Jersey from proceeding in this way. If Jersey were by its legislation to reduce accountability below what other jurisdictions (in particular common law jurisdictions) would consider acceptable for the institution to remain a trust, recognition of Jersey trusts in those jurisdictions would become a more delicate matter than at present. In particular, we must not lose sight of the characteristics of the trust specified in Article 2 of the Hague Convention.

7.2 Permit settlors to restrict rights to information but lay down detailed statutory limits

7.2.1 An intermediate course could be adopted, perhaps less prescriptive, and therefore more in keeping with the original ideals of the Trusts Law than the proposal in the above paragraph. This would be to amend Article 25 so as to make it very clear that the terms of a trust may narrow as well as widen the rights of beneficiaries to an account. We have seen that the root of any current confusion has been the marriage in Article 25 of provisions relating to disclosure of trust documents (categories (a) to (c)) and provisions relating to trust accounts (category (d)). The former provisions are clearly qualified by the initial words of the Article (*"Subject to the*

terms of the trust and subject to any order of the court...") The latter provisions may be intended to be qualified similarly, but the closing lines (which only affect category (d)) result in a double negative, and make interpretation more difficult than it should be. A sensible solution might be to take out category (d) and the closing lines altogether from Article 25, which would then conclude with the words *"..performance of such duty"* in category (c). A new provision could then be added to the Law (perhaps as Article 25A) which would state clearly that the persons currently listed in the proviso have rights to production of the trust accounts, subject to the terms of the trust (and, if necessary, subject to any order of the court). It would remain possible to define the minimum level of accountability required for a trust to be valid (and thereby to indicate the extent to which the terms of the trust could restrict the accountability.) However, it would also be acceptable to leave the task to the courts if and when the matter arose.

7.3 Permit settlors to restrict rights to information but give the court power (on application) to invalidate excessive restrictions

7.3.1 The most flexible approach would be to leave the matter to individual settlors, but to make specific provision in the Law for aggrieved beneficiaries to apply to the court to intervene if they felt that their rights of access to trust information had been wrongly restricted or excluded. For this purpose it would be possible to use the existing mechanism of Article 10(2) (b), which provides that a trust shall be invalid *"to the extent that the court declares that.."* one of three listed vitiating factors have been established. It would be possible to add a fourth factor, to the effect that (however expressed) the terms of the trust do not render the trustees sufficiently accountable to the beneficiaries. Such a provision would enable the court either to strike down terms of the trust which offend this essential principle, whilst preserving the basic validity of the trust, or in an extreme case to declare the trust as a whole invalid. This would result in a more sophisticated approach, specifically directed to the mischief requiring remedy and tailor-made to the circumstances of the particular trust under consideration. Such a provision could also act as a warning to settlors who might be minded to proscribe beneficiary access very closely, and as confirmation of the intent of the Jersey legislature to preserve the all-important principle of trustee accountability.

7.4 Make no change

7.4.1 The above paragraphs postulate some reform but it is of course an available option to do nothing, leaving any remaining uncertainty to be resolved on a case by case basis by the judiciary. That approach would only be satisfactory if the considered response to this Paper was that the problem of Article 25 was viewed as being insignificant, and that little consequential harm was being done. The judiciary cannot answer hypothetical questions, and can therefore only act to clarify or mould legal principles if and when an appropriate legal dispute comes before the courts, which may not happen for many years.

8. Questions for consultation

(Return to Contents Menu)

8.1 The purpose of this Paper is to put the issues in the public domain for comment and suggestions. The provisional view of the Commissioners is that the case for some statutory

reform is strong. Before making our final report, however, we invite responses from interested parties both generally upon the contents of this paper, and more particularly upon the following questions:

A. Should the Trusts (Jersey) Law be amended in the light of the problem of interpretation that we are now addressing ?

B. If so, which of the approaches outlined under the heading "The way forward" should be adopted?

C. Alternatively, is there any other approach that would be preferable?

Responses to this Consultation Paper should be made in writing to:

The Jersey Law Commission

PO Box 87

St Helier

Jersey

JE4 8PX

Fax no. 01534 609333

Those who respond may be invited to meet the Commissioners to discuss their comments, and possibly also to participate in a symposium which the Commissioners may decide to organise prior to compiling their final report and recommendations.

[Return to the Top](#)