

STATES OF JERSEY



DRAFT TRUSTS (AMENDMENT No. 6) (JERSEY) LAW 201-

Lodged au Greffe on 31st May 2013
by the Minister for Economic Development

STATES GREFFE



Jersey

DRAFT TRUSTS (AMENDMENT No. 6) (JERSEY) LAW 201-

European Convention on Human Rights

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

In the view of the Chief Minister the provisions of the Draft Trusts (Amendment No. 6) (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Senator I.J. Gorst**

Chief Minister, for and on behalf of Minister for Economic Development

Dated: 29th May 2013

REPORT

Summary

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

The Draft Trusts (Amendment No. 6) (Jersey) Law 201- (“the draft Amendment”) inserts into the Law a statutory version of the existing Jersey law relating to what has become known as the ‘rule in *Hastings-Bass*’ (established in a UK case of the same name in 1975) and the doctrine of *mistake*. Currently, the position is that this is established in Jersey law as a result of case law (i.e. the rulings of the Royal Court of Jersey).

Background and consultation

The concept of the amendment was first considered by the Trusts Law Working Group which comprises leading members of industry in 2011. During the genesis and development of the amendment, the working group also made use of the expertise of the Society of Trust and Estate Practitioners (“STEP”). Drafting Instructions on the amendment were provided by EDD to the Law Draftsman following consultation with the working group. Accordingly, the amendment has been subject to significant consultation with those specialist practitioners in industry who are most concerned in this area of law.

The Draft Amendment

Trustees are commonly given certain powers in relation to the management and distribution of trust assets. The rule in *Hastings-Bass* enables the court to set aside a trustee’s exercise of such a power if the trustee failed to take into account relevant considerations which he ought to have taken into account, or took into account considerations which should properly have been disregarded.

A similar ‘rule’ has been formed in relation to settlors of trust property (individuals who settle assets into a trust). This ‘rule’ known as the doctrine of *mistake*, operates on similar principles and allows a settlor who settles assets into a trust to apply to the Royal Court to set aside or unwind his actions.

In relation to both these rules, the “considerations which ought to have been taken into account, or considerations which should properly have been disregarded” is often advice provided by a professional adviser (usually an accountant or lawyer) which transpires to be incorrect.

The ultimate benefit from the provisions is certainty for settlors and beneficiaries that if a transaction is made that results in adverse consequences to the trust fund, an application can be made to the court to state that the transaction can be unwound. This avoids the alternative option which would involve the uncertainty and costs of litigation against the professional adviser who provided the incorrect advice.

The draft amendment is not a comprehensive code covering exhaustively the circumstances in which transfers or dispositions into trust, and exercises of powers or discretions in relation to trusts or trust property, are voidable. The statutory provision provides a framework for practitioners to work within when bringing certain

applications to the Royal Court. The objective has been to enshrine the principles of existing Jersey law concerning *Hastings-Bass* and *mistake* into statute.

The statutory provision covers the following 4 areas –

- (1) The remedy of setting aside a settlor's transfer or disposition into a trust on the ground of *mistake* (draft Article 47E).
- (2) The remedy of setting aside an exercise of a fiduciary power in relation to a transfer or disposition into trust on grounds falling within the doctrine of *Hastings-Bass* (draft Article 47F).
- (3) The remedy of setting aside an exercise of a power or discretion in relation to a trust or trust property on the ground of *mistake* (draft Article 47G).
- (4) The remedy of setting aside an exercise of a power or discretion in relation to a trust or trust property on grounds falling within the doctrine of *Hastings-Bass* (draft Article 47H).

The draft amendment is drafted to be positioned within Part 2 of the Law and therefore will only apply to Jersey trusts. The decision whether to grant relief under the provision will be at the discretion of the Royal Court. The Royal Court will have the power to decide that the transfer or other disposition of property or exercise of a power is voidable and of such effect as the court may determine or, alternatively, of no effect from the time of its exercise.

The provisions can be applied in relation to the disposition of property or exercise of a power that occurred before the draft amendment came into force. Further, the provisions in relation to *mistake* will include a mistake as to a fact existing before the time of transfer or disposition of property or exercise of a power.

An application to the Royal Court may be made by –

- (i) a trustee;
- (ii) a beneficiary or enforcer;
- (iii) the Attorney General in relation to a trust containing charitable trusts, powers or provisions;
- (iv) any other person with leave of the Court.

It was considered whether a provision should exclude cases where an application had been brought in another jurisdiction and where despite a previous adverse determination, the trustees sought to change the proper Law of the trust to Jersey law purely in order to use the Jersey provision. It was concluded that no such provision was necessary, as the Royal Court of Jersey would apply equitable principles or other legal doctrines to prevent such applications being successful.

The draft Amendment also clarifies that the customary law of Jersey in respect of the principle of *erreur* (which relates to the law of contract) has no relevance when the Royal Court is determining an application for *mistake*.

Financial and manpower implications

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

Human Rights

The notes on the human rights aspects of the draft Law in the Appendix have been prepared by the Law Officers' Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

APPENDIX TO REPORT

Human Rights Note on the Draft Trusts (Amendment No. 6) (Jersey) Law 201-

1. This note has been prepared in respect of the Draft Trusts (Amendment No. 6) (Jersey) Law 201- (“the draft Law”) by the Law Officers’ Department. It summarises the principal human rights issues arising from the contents of the draft Law and explains why, in the Law Officers’ Opinion, the draft Law is compatible with the European Convention on Human Rights (“ECHR”).

These notes are included for the information of States Members. They are not, and should not be taken as, legal advice.

The right to a fair hearing

2. Article 6 of the ECHR provides that –
“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”
3. Article 6 of the ECHR applies if the civil rights and obligations of the applicant are in issue, there is a dispute as to those civil rights and obligations, and the proceedings are determinative of those civil rights and obligations. Those conditions will not necessarily be present in the context of every trust dispute, but they will be present often as is the case in the draft Law where the application is to set aside a disposition or transfer of property or the exercise of a power.
4. A key requirement of Article 6 of the ECHR is the need for access to a fair and public hearing within a reasonable time *“by an independent and impartial tribunal”*. The independence in question here is independence from the executive, the parties and the legislature¹.
5. It was held in *Albert v Belgium*² that access to an independent and impartial tribunal may be granted in two ways: either the decision-making body itself complies with the requirement of Article 6(1) of the ECHR, or the decision-making body is subject to control by a body which complies with the requirements of Article 6(1) and which has full jurisdiction.
6. In the context of Article 1 of the draft Law which inserts *Articles 47B to 47J* into the principal Law, the primary decision-making body is the Royal Court, which has responsibility for setting aside the transfer or disposition of trust property or the exercise of a power by a trustee. In terms of the right to be heard, the Royal Court Rules dictate that the Court will have discretion as to whether to hear a party where an application is made. The Court is obliged under the Human Rights (Jersey) Law 2000 to exercise that discretion in a manner that is compatible with the ECHR, and therefore with the requirements of Article 6. Further, there is a right of appeal to the Court of Appeal against a decision of the Royal Court; this is provided for in civil cases by Article 12(2) of the Court of Appeal (Jersey) Law 1961.

¹ *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165 (para. 78) and other cases.

² *Albert Le Compte v Belgium* Series A No. 58 (1883) 5EHRR, 533.

Explanatory Note

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

Article 1 of the draft Law inserts new *Articles 47B* to *Articles 47J* into the Law, the purpose of which is to specify the circumstances in which the court (i.e. the Inferior Number of the Royal Court, by virtue of *Article 1(1)* of the Law) may exercise supplementary powers in order to remedy the adverse effect or consequences of mistakes, or other acts or omissions made by settlors, trustees or other persons. The court would be able to declare in specified circumstances, that a transfer or other disposition of property to a trust, or the exercise of powers over or in relation to a trust or trust property, is voidable. Such a declaration is a legal remedy which has the effect of setting aside the transfer, etc. or exercise of the power and declaring it to be of no effect or to have such effect as the court may determine.

The new *Articles* would fall under Part 2 of the Law which means that the powers exercisable by the court will only apply in relation to a Jersey trust (i.e. “a trust whose proper law is the law of Jersey” as defined in *Article 1(1)* of the Law), and would provide as follows –

Article 47B is an interpretation provision and modifies the expression “disposition of property”, so that for the purposes of *Articles 47D* to *47J* any such reference excludes a testamentary disposition made by a settlor. The term “mistake” is defined in broad terms to include the effect of a mistake and a mistake of fact occurring before or at the time of a transaction or exercise of a power.

Article 47C clarifies that the doctrine of “*erreur*” under Jersey customary law does not apply for the purposes of determining what constitutes a mistake in relation to an application under *Article 47E* or *47G*.

Article 47D applies with retrospective effect so that the court may exercise the powers contained in *Articles 47E* to *47I* in relation to cases where a transfer of property to a trust or other disposition, etc., or the exercise of any power over or in relation to a trust has occurred either before or after the coming into force of this draft Law.

Article 47E sets out the grounds on which a court may declare that transfer or other disposition of property to a trust is voidable where a settlor (whether alone or with another settlor) or another person who has exercised a power to make a transfer etc. on the settlor’s behalf, has made a serious mistake in relation to that transaction, and that transfer, etc. would not have been effected but for that mistake. The mistake (see definition in *Article 47B(2)*) can be one of fact or law. It has to be extremely grave to the extent that it would be just for the court to make a declaration under this *Article*. The declaratory remedy setting the transaction aside may only be sought by the settlor (or any other settlor if more than one), his or her personal representative or successor in title (see *Article 47I(1)*).

Article 47F also concerns cases which involve the transfer or other disposition of property to a trust. But in contrast to *Article 47E*, applies where the transfer, etc. has been effected through a person who has exercised a power on behalf of a settlor (rather than exercised directly by the settlor) and who owes a fiduciary duty towards the settlor in the exercise of his or her power. Where that person

when exercising his or her power to transfer property failed to take into account relevant considerations, or took into account irrelevant considerations, the court may declare the transfer, etc., voidable if it is clear that the person exercising the power would not have effected the transfer, etc., had he or she not failed to take into account considerations which he or she ought to have taken into account, or taken into account considerations which he or she ought not have taken into account.

In such cases it is not necessary for the person seeking the court's remedy to establish that the person exercising the power was at fault because of any lack of care in the way in which the power was exercised. As in *Article 47E*, a declaration that the transfer, etc. is voidable may only be sought by the settlor (i.e. the person to whom the fiduciary duty is owed), or his or her personal representative or successor in title.

Article 47G concerns cases where the property has passed into trust, and where a trustee or any person who has exercised a non-fiduciary power in relation to the trust makes a mistake in the exercise of that power. The grounds on which the court may declare the exercise of the power voidable on the grounds of mistake are analogous to the grounds set out in *Article 47E*.

Article 47H also concerns cases where the property has passed into trust, but involves the exercise of fiduciary powers by a trustee or by a person otherwise than in the capacity of a trustee, who exercises a power over, or in relation to a trust, or trust property and who owes a fiduciary duty towards a beneficiary. The grounds for setting aside the exercise of the power are analogous to those set out in *Article 47F* concerning the failure to take into account relevant considerations or taking into account of irrelevant considerations when exercising the power.

Article 47I provides for the persons who may apply to the court for a setting aside declaration under any of *Articles 47E to 47H*. The court may make such order as it thinks fit pursuant to a declaration. For example, a supplementary order might be required to deal with the recovery of distributions made to beneficiaries, rendered unlawful following a declaration made on *Article 47H* grounds. The order making power contained in this provision does not affect other powers of the court to make orders under Article 51 of the Law. This provision also protects the position of a purchaser for value who has in good faith purchased trust property in ignorance of the background history which has resulted in the setting aside of the transfer of property to a trust etc. or other powers exercised in relation to the trust.

Article 47J is a saving provision which protects the position of persons who wish to challenge the transfer of property to a trust or other disposition etc., or the exercise of any power over or in relation to a trust, and to seek remedy on grounds which are different from those set out in *Articles 47E to 47H*.

Article 2 of the draft Law sets out its title and provides for its coming into force 7 days after it is registered in the Royal Court.



Jersey

DRAFT TRUSTS (AMENDMENT No. 6) (JERSEY) LAW 201-

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

Adopted by the States [date to be inserted]

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

Registered by the Royal Court [date to be inserted]

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

1 Trusts (Jersey) Law 1984 amended

After Article 47A of the Trusts (Jersey) Law 1984¹, there are inserted the following Articles –

“47B Articles 47D to 47J: Interpretation

- (1) In Articles 47D to 47J –
 - (a) references to a transfer or other disposition of property to a trust, do not include a testamentary disposition;
 - (b) ‘power’ includes a discretion as to the way in which an obligation is performed.
- (2) In Articles 47E and 47G, ‘mistake’ includes (but is not limited to) –
 - (a) a mistake as to –
 - (i) the effect of,
 - (ii) any consequences of, or
 - (iii) any of the advantages to be gained by,a transfer or other disposition of property to a trust, or the exercise of a power over or in relation to a trust or trust property;
 - (b) a mistake as to a fact existing either before or at the time of, a transfer or other disposition of property to a trust, or the

- exercise of a power over or in relation to a trust or trust property; or
- (c) a mistake of law including a law of a foreign jurisdiction.

47C Determination of ‘mistake’

The doctrine of ‘erreur’ in Jersey customary law as applied to the law of contract, shall not apply to any question concerning the meaning of ‘mistake’ for the purposes of determining an application under Article 47E or 47G.

47D Application of powers under Articles 47E to 47I

Articles 47E to 47I apply in relation to the transfer or other disposition of property to a trust, or the exercise of any power over or in relation to a trust or trust property that occurs either before or after the coming into force of the Trusts (Amendment No. 6) (Jersey) Law 201-².

47E Power to set aside a transfer or disposition of property to a trust due to mistake

- (1) In this paragraph, ‘person exercising a power’ means a person who exercises a power to transfer or make other disposition of property to a trust on behalf of a settlor.
- (2) The court may on the application of any person specified in Article 47I(1), and in the circumstances set out in paragraph (3), declare that a transfer or other disposition of property to a trust –
 - (a) by a settlor acting in person (whether alone or with any other settlor); or
 - (b) through a person exercising a power,
is voidable and –
 - (i) has such effect as the court may determine, or
 - (ii) is of no effect from the time of its exercise.
- (3) The circumstances are where the settlor or person exercising a power –
 - (a) made a mistake in relation to the transfer or other disposition of property to a trust; and
 - (b) would not have made that transfer or other disposition but for that mistake, andthe mistake is of so serious a character as to render it just for the court to make a declaration under this Article.

47F Power to set aside a transfer or disposition of property to a trust exercised by fiduciary power

- (1) In this paragraph, ‘person exercising a power’ means a person who exercises a power to transfer or make other disposition of property

to a trust on behalf of a settlor and who owes a fiduciary duty to the settlor in relation to the exercise of his or her power.

- (2) The court may on the application of any person specified in Article 47I(1), and in the circumstances set out in paragraph (3), declare that a transfer or other disposition of property to a trust by a settlor (whether alone or with any other settlor) through a person exercising a power, is voidable and –
 - (a) has such effect as the court may determine, or
 - (b) is of no effect from the time of its exercise.
- (3) The circumstances are where, in relation to the exercise of his or her power, the person exercising a power –
 - (a) failed to take into account any relevant considerations or took into account irrelevant considerations; and
 - (b) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that failure to take into account relevant considerations or that taking into account of irrelevant considerations.
- (4) It does not matter whether or not the circumstances set out in paragraph (3) occurred as a result of any lack of care or other fault on the part of the person exercising a power, or on the part of any person giving advice in relation to the exercise of the power.

47G Power to set aside the exercise of powers in relation to a trust or trust property due to mistake

- (1) In this paragraph, ‘person exercising a power’ means a person who, otherwise than in the capacity of trustee, exercises a power over, or in relation to a trust, or trust property.
- (2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and –
 - (a) has such effect as the court may determine; or
 - (b) is of no effect from the time of its exercise.
- (3) The circumstances are where the trustee or person exercising a power –
 - (a) made a mistake in relation to the exercise of his or her power; and
 - (b) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that mistake, andthe mistake is of so serious a character as to render it just for the court to make a declaration under this Article.

47H Power to set aside the exercise of fiduciary powers in relation to a trust or trust property

- (1) In this paragraph, ‘person exercising a power’ means a person who, otherwise than in the capacity of trustee, exercises a power over, or in relation to a trust, or trust property and who owes a fiduciary duty to a beneficiary in relation to the exercise of that power.
- (2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and –
 - (a) has such effect as the court may determine; or
 - (b) is of no effect from the time of its exercise.
- (3) The circumstances are where, in relation to the exercise of his or her power, the trustee or person exercising a power –
 - (a) failed to take into account any relevant considerations or took into account irrelevant considerations; and
 - (a) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that failure to take into account relevant considerations, or that taking into account of irrelevant considerations.
- (4) It does not matter whether or not the circumstances set out in paragraph (3) occurred as a result of any lack of care or other fault on the part of the trustee or person exercising a power, or on the part of any person giving advice in relation to the exercise of the power.

47I Applications and orders under Articles 47E to 47H

- (1) An application under Article 47E(2) or 47F(2) may be made by any settlor or any of his or her personal representatives or successors in title.
- (2) An application under Article 47G(2) or 47H(2) may be made by –
 - (a) the trustee who exercised the power concerned, or the person exercising a power (as the case may be);
 - (b) any other trustee;
 - (c) a beneficiary or enforcer;
 - (d) the Attorney General in relation to a trust containing charitable trusts, powers or provisions;
 - (e) any other person with leave of the court.
- (3) Without prejudice to Article 51 and subject to paragraph (4), the court may, consequential upon a declaration made under any of Articles 47E to 47H, make such order as it thinks fit.
- (4) No order may be made under paragraph (3) which would prejudice any bona fide purchaser for value of any trust property without notice of the matters which render the transfer or other disposition

of property to a trust, or the exercise of any power over or in relation to a trust or trust property, voidable.

47J Savings in respect of applications made under Articles 47E to 47H

Nothing in Articles 47E to 47H shall prejudice –

- (a) any application for a declaration that a transfer or other disposition of property to a trust, or the exercise of any power over or in relation to a trust or trust property, is void or voidable on grounds other than those specified in Articles 47E to 47H; or
- (b) any personal remedy which may be available against a trustee or any other person.”.

2 Citation and commencement

This Law may be cited as the Trusts (Amendment No. 6) (Jersey) Law 201- and shall come into force 7 days after it is registered.

¹ *chapter 13.875*
² *P.62/2013*