

THE JERSEY LAW COMMISSION



CONSULTATION PAPER

THE PROHIBITION ON TRUSTS APPLYING DIRECTLY TO JERSEY IMMOVABLE PROPERTY

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.

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1 Introduction

The Royal Commission of 1860 on Jersey Law recommended provision equivalent to public trusts for Jersey immovable property leading to the Loi (1862) sur les Teneures en Fideicomis et L’Incorporation d’Associations (“the 1862 Law”). However, it concluded that “the inhabitants of Jersey are not prepared for the general introduction of trusts”. There was therefore no statutory provision for private trusts of Jersey immovable property, but equally there was no prohibition against such trusts, and Mathews and Sowden in “The Jersey Law of Trusts” indicate that in practice Jersey Law recognised express private trusts of Jersey immovables prior to bringing into force of the Trusts (Jersey) Law (“TJL”).¹

Nonetheless, Article 11(2)(a)(iii) of the TJL introduced a prohibition against trusts applying directly to Jersey immovable property. This Commission’s Consultation paper “The Jersey Law of Real Property” September 2002 at pages 30-33 recommended removing the prohibition and this paper seeks to build on and suggests the practicalities for the implementation of that recommendation.

2 Comparative perspective

Substitutions in France or strict settlements in England under which land was passed absolutely to an heir, subject to obligations not to dispose of the estate and to pass it on (subject to equivalent restrictions) to his heirs in turn, historically either caused or were perceived as causing significant problems in both England and France in terms of concentrating and making inalienable land ownership and creating perpetuities.

Neither substitutions nor strict settlements were trusts under which trustees held land for beneficiaries, although the documents creating the strict settlement might include trusts.

The solutions to the problems reached by France and England to the problems of substitutions and strict settlements may be seen as typical of the two jurisdictions, France prohibiting substitutions both inter vivos and by will, England providing a solution via trusts, the Settled Land Act 1882 replaced in due course by the Settled Land Act 1925, under the terms of which considerable powers including those of alienation were given to the tenants for life acting as trustee/beneficiary.

¹ The argument is set out in extensio on pages 26-31 of the “Jersey Law of Trusts” 3rd edition which should be referred to rather than being repeated here.

The French prohibition on testamentary substitutions, but not substitutions inter vivos, was repeated in Jersey's Loi (1851) sur les testaments d'immeubles (the 1851 Law) but as Matthews and Sowden stress the prohibition was against substitutions and not trusts of Jersey immovable property.

The English property land reforms of 1925 created a dualistic trust system applying to English land – imposing the provisions of the Settled Land Act where there were interests in succession unless explicit provisions had been made for a trust for sale.

Weaknesses and redundancy in due course became apparent in the dual system:-

- (a) The trust for sale was a legal fiction understood by few except specialist lawyers and trust professionals.
- (b) Changes in society and the deprivations of Estate Duty meant that the aristocratic rigidities of strict settlement were no longer the problem they may once have been.
- (c) The Settled Land Act sometimes applied unintentionally empowering deemed tenants for life in a way that donors and testators would not have intended.

As a result, under England's Trusts of Land and Appointment of Trustees Act 1986

- (a) no more Settled Land Act trusts were to be created;
- (b) direct trusts of land were introduced although it remains possible to create trusts for sale. Note Matthews & Sowden consider a settlor could “convey Jersey immovables to trustees placing them under a duty to sell the property and to hold the proceeds under certain trusts. This would be a kind of “trust for sale” indicating the incomplete and therefore unsatisfactory nature of the present prohibition against trusts of Jersey immovables.

Settled Land Act Settlements were an English solution to strict settlements prohibited as substitutions in Jersey law at least, by will, and not as far as we are aware encountered in practice. We therefore do not consider that removing the prohibition against trusts of Jersey immovables involves any requirement to introduce statutory Settled Land Act type settlements into Jersey law.

3 The case for removing the prohibition on trusts applying directly to Jersey immovable property

We find the case for removing the prohibition overwhelming:-

- (a) Removing the prohibition would allow a more flexible alternative to holding property for minor children than by tutelle. The creation of a trust in such circumstances is likely to be more familiar to Jersey residents today than a tutelle.
- (b) Difficulties have been encountered in practice where a limited partnership was to acquire Jersey commercial property, as the usual arrangement would be to vest property in the general partner: Article 11(2)(a)(iii) to the TJJL would have applied to invalidate the general partner holding the property on trust for the limited partners, and the tax transparency which is a principal feature of the limited partnership form would have been lost by title being held through an underlying company.
- (c) Matthews and Sowden also comment that “The experience of other jurisdictions (e.g. England, Australia, New Zealand) in admitting trusts when titles to land are registered at a public registry has not been that it will not work, or works significantly less well where trusts are concerned than where they are not.” We do not consider that this comment is any less valid because Jersey’s is a register of deeds rather than a register of land.
- (d) The views of the Royal Commission of 1860 on Jersey Law that “the inhabitants of Jersey are not prepared for the general introduction of trusts” can scarcely be the case in 2006.
- (e) It is unhelpful for Jersey trustees, in claiming a level playing field in foreign courts against challenges to their powers etc to hold foreign immovables, that the restriction exists under Jersey domestic law.
- (f) The prohibition is incomplete:
 - (i) A form of trust for a limited range of public purposes is permitted under the 1862 Law. There are weaknesses in that law, including that devises under wills of Jersey immovables are permitted in favour of

incorporated associations but not fideicomis, and the restricted range of purposes to which the law applies. The lack of provision for devises means in practice that charitable trusts/fideicomis are established by separate Act of the States, an expensive and time consuming necessity.

- (ii) The prohibition is contained within the part of the TJJ applying to Jersey proper law trusts. It seems therefore that the prohibition would not apply to acquisition of Jersey immovables by trustees of an English or any other foreign proper law trust.
 - (iii) The prohibition does not apply to shares in a company which in turn owns Jersey immovables. We are not attracted to the view that removing the prohibition is unnecessary because it is possible to circumvent the prohibition by holding immovable property through a company, as this involves extra complexity, obligations and costs, and can be fiscally disadvantageous. Furthermore, operation of the Housing Law restricts those given consent to acquire Jersey immovables through a company, a restriction that means, in practice, that only the minority can acquire Jersey property through a company and transfer shares in such companies into trust.
- (g) Jersey is now committed to introducing a law allowing foundations to be established in the Island but, as far as we are aware, without prohibiting Jersey foundations holding Jersey immovables. If there is no prohibition against foundations holding Jersey immovables, why should there be an (incomplete) prohibition on trustees holding Jersey immovables?
- (h) As a matter of principle, we do not believe that the distinction between the law relating to Jersey immovables and other forms of property is appropriate to modern circumstances.
- (i) The shift in Jersey Trust Law first to a longer trust period, now to abolish the trust period altogether, suggests there are no longer the concerns there once were, inter alia as discussed in section 2. above, with perpetuities. Indeed, we would go further and note that, in practice, there has never been a great

concern in Jersey with perpetuities possibly because historically there have not been large blocks of land in Jersey in concentrated ownership. Thus in copying the French prohibition against substitutions, Jersey did so in an incomplete way prohibiting them only by will and not inter vivos. We conclude therefore that concerns about perpetuities should not in current social circumstances be an objection to removing the prohibition against trustees holding Jersey immovables.

If the case for removing the prohibition is so clear, why was it included in the TJJL? We think the answer is that it enabled the TJJL to be brought in with the minimum of consequential amendments. These consequential amendments need to be addressed now if the prohibition is to be removed.

4 Consequential Amendments

4.1 The Propriété Foncière Laws

The Laws will need to be amended to:-

- (a) require that where individuals or a company acquire Jersey immovable property as trustees, that this is stated in the register, e.g. if Peter Hargreaves and Alan Dart acquire Jersey immovable property as trustees, the entry appears as “Peter Hargreaves and Alan Dart as trustees”;
- (b) where Jersey immovable property is to be registered in the name of trustees, require that this should be at least two individuals or an individual company registered to do trust company business under the Financial Services (Jersey) Law 1998;
- (c) require that wherever there is a change in trustees of a trust holding Jersey immovable property, that the change must be recorded in the Registry;
- (d) ensure that if trustees hold Jersey immovable property and provide security over such immovable property, that the counterparty’s ability to call on such security will be restricted to properties held by the trustees in their capacity as trustees of the particular trust. We discussed the possibility of a requirement to register trustees of a particular trust e.g. “Peter Hargreaves and Alan Dart as

trustees of the X trust” rather than simply “Peter Hargreaves and Alan Dart as trustees”, but felt on balance that this created more difficulties than it solved.

4.2 Housing Law

The Housing Law controls those who can occupy Jersey residential property by controlling those to whom title to Jersey property can be transferred. Trusts of Jersey residential immovable property, which separate legal from beneficial ownership, run across the operating grain of the Housing Law.

It will therefore be necessary to introduce a change in the Housing Regulations prior to the change in the Trust Law being effective, so that where residential immovable property is to be transferred to the trustees - consent would be given to the transfer but on condition that the trustees only grant permission to occupy either to a beneficiary or by licence etc to individuals qualifying to purchase or occupy Jersey property in their own name. There would be a standard condition preventing transfer of a property to a beneficiary by appointment unless with the consent of the Department.

A separate consent possibly obtained at the same time as that for acquisition of the property by trustees would then be given for the trustees to grant rights of occupation to a particular beneficiary or licensee.

Where there is a change of trustees – registration in the name of the new trustees would be permitted so long as they are bound by the same restrictions applying to occupation of the property which applies to their predecessors.

4.3 Stamp Duty

This should be charged at the same rate as acquisitions other than by trustees on purchases of property, and at the same rate on registration in the name of trustees where Jersey immovable property is left in trust under the terms of a will as where Jersey immovables are left other than to trustees.

Registration in the name of new trustees on a change of trustees should be free of ad valorem duty.

The question arises as to whether duty should be charged on settlements inter vivos. We believe it should as it applies on absolute gifts of Jersey immovables. Equally, we believe it should apply where a property is registered in the name of a beneficiary on appointment from or termination of a trust.

However, we propose two relaxations from the general rules charging duty on trustees' transactions in Jersey immovables:

- (i) We propose that all individual owners of Jersey immovables held at the time the law is changed to permit generally the transfer of Jersey immovables into trust should have a single opportunity to transfer such property into trust without stamp duty in recognition of the general inability to acquire Jersey property in trust prior to the change in the law.
- (ii) In order to avoid a double charge to duty where, say, property is settled on trust for a minor and on the property being appointed to him when he reaches majority, a provision that no duty be charged on a non-discretionary appointment from or termination of a trust to a named beneficiary on a certain event or on his reaching a certain age.

4.4 The 1862 Law

Once the prohibition on trusts of Jersey immovables has been removed, we see no reason for further fideicomis to be created under the 1862 law, although existing fideicomis should continue to function under the terms of the old law. A similar argument may apply to incorporated associations once the new foundations law is in place.

We do not believe that there should be significant concern from the fact that the Attorney-General's office will no longer be reviewing the constitutions of fideicomis. Removing such a requirement would not change the Attorney-General's rights to be heard in respect of public objects in the event of disputes.

This paper was prepared by Peter Hargreaves. The Commissioners are indebted to Advocate Alan Dart for his comments on successive drafts of the paper.

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