

Trust briefing: Breach of trust

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Jersey trust law is principally governed by the Trusts (Jersey) Law 1984 (the **TJL**). In a number of important areas, Jersey trust law has developed in a different and often more flexible way than in England. Care must therefore be taken when applying English principles to a dispute involving a Jersey trust.

This article explores breach of trust as set out in the TJL, outlining trustee duties, the ins and outs of a claim, third-party liability and circumstances where exoneration may be granted.

The duties of trustees

A trustee is an office endowed with fiduciary obligations.

At the core of the trustee's duties are the obligation to act with utmost good faith and loyalty towards the beneficiaries as a whole. The trustee also owes other duties, such as duties of care and skill, but these are not fiduciary duties. As a fiduciary, a trustee must act in the best interests of the beneficiaries (or trust purpose where there are no beneficiaries) of the trust, and ensure that he or she puts those interests ahead of their own and any third party's interests.

Article 21 of the TJL imposes the following core duties upon a trustee:

1. A trustee shall act with due diligence and prudence, to the best of the trustee's ability and skill, and with the utmost good faith;
2. Subject to the TJL, a trustee shall administer the trust in accordance with its terms;
3. Subject to the terms of the trust, a trustee shall, so far as is reasonable, preserve and enhance the value of the trust property;
4. Except with the permission of the court or as permitted by the TJL or expressly provided by the terms of the trust, a trustee is not permitted to:
 - a. directly or indirectly profit from their trusteeship;
 - b. cause or permit any other person to profit directly or indirectly from such trusteeship;
 - c. on the trustee's own account enter into any transaction with the trustees or relating to the trust property which may result in such profit;
5. A trustee shall keep accurate accounts and records of the trustee's trusteeship; and
6. A trustee shall keep trust property separate from the trustee's personal property and any other property of which he or she is a trustee.

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A breach of any of these core obligations prescribed in Article 21 of the TJL is potentially actionable as a breach of trust. In relation to 4(c) above, while Jersey law does allow a trustee to contract with itself in their capacity as a trustee of another trust, the trustee still owes these core duties.

Article 23 of the TJL requires that where a trust has more than one beneficiary or purpose, subject to any contrary provision in the terms of the trust, the trustee must remain impartial in its administration of the trust. In reality, most Jersey trusts are discretionary and the trustee can exercise their powers to benefit one beneficiary over another.

Trustees also owe a duty of confidentiality to beneficiaries in relation to trust matters. However, this duty is not absolute and disclosure of confidential information by trustees is permitted in certain circumstances including where to maintain that confidence would put the trustee in breach of the criminal law, where there is a conflicting legal obligation (such as to file a tax return) or pursuant to a court order. The issue of what information or documents a trustee must or may disclose can be affected by the terms of the trust and is an area where disputes can often arise. To learn more about disclosure from trustee see [here](#).

Claims for breach of trust

When a trustee breaches any duty imposed by the TJL or the terms of the trust, this can give rise to a claim in breach of trust.

As a result of this broad definition of what may amount to a breach of trust, there are numerous situations in which a breach of trust may arise. To be actionable, a breach of trust must ordinarily cause loss to the trust fund. A profit that the trustee makes for itself or is conferred upon a third party at the expense of the trust will also amount to an actionable breach of trust.

A breach of trust claim is a hostile claim and is usually brought by a beneficiary, except in the case of a non-charitable purpose trust, when it is made by the enforcer. A breach of trust claim can also be brought by a co-trustee or by a new trustee against a former trustee or co-trustee.

Liability for breach of trust is framed by Article 30 of the TJL. A successful claim will leave the trustee personally liable to make good any loss (or depreciation in value) of the trust fund due to the breach, and/or any profit which the trust property would have generated if the breach had not occurred. A trustee can also be ordered to provide an account of the trust fund, so that the scope of the liability can be established. The extent of the account that the trustee will be required to provide will depend on the facts of the case in question.

Third-party liability

It is possible for a person to be held liable as if they were a trustee – even if they have not been formally appointed as a trustee. This concept is known as constructive trusteeship. Article 33 of the TJL provides that where a person makes or receives any profit, gain or advantage from a breach of trust, that person shall hold that benefit on trust and must deliver up the relevant property to the person properly entitled to it.

Jersey has sophisticated and practical remedies to identify and then recover misappropriated trust funds even if they are held by a third party. Jersey, unlike England, has endorsed the possibility of ‘backwards tracing’ in order to assist in the vindication of proprietary rights where funds have been misappropriated.

Where there has been a breach of trust, it may also be possible to bring a claim against a third party who assists in the breach of trust but with whom the beneficiary has no formal relationship. In circumstances where the assistant’s knowledge of the transaction in

question was such as to render their participation contrary to normally acceptable standards of honest conduct, they will be a dishonest assistant. Such a person can be held personally liable to the same extent as the trustee for the loss arising from the breach of trust.

A trustee will not be liable for a breach of trust which occurs prior to their appointment, however if the trustee becomes aware of a breach of trust then, under Article 30(9) of the TJL, it assumes a duty to take all reasonable steps to ensure that that breach is remedied. Similarly, where more than one trustee commits a breach of trust, the other trustee(s) will not incur liability unless they were aware or ought to have been aware of it or of the intention of the co-trustee to commit a breach of trust.

A trustee will not be liable for the actions of a co-trustee unless the trustee actively conceals such breach or such intention and fails to take proper steps within a reasonable time to protect or restore the trust property or prevent the breach of trust. A trustee shall not be liable for loss to the trust arising from a delegation by the trustee (such as to an investment advisor) where the trustee acts in good faith and without neglect. However, a trustee who resigns from office in order to facilitate a breach of trust shall be liable as if they had not resigned. Where two or more trustees are held liable in breach of trust, their liability is joint and several.

Exoneration for breach of trust

The liability of a trustee for breach of trust can be limited by the terms of the trust. The only limit to such exemption or 'exculpation' clauses is that Article 30(1) of the TJL makes it impossible for the terms of the trust to exclude a trustee's liability for breach of trust which arises from the trustee's own fraud, wilful misconduct or gross negligence. A beneficiary may expressly relieve and/or indemnify a trustee against liability for breach of trust provided that they have legal capacity, full knowledge of all material facts and are not improperly induced by the trustee to do so.

The court has additional powers to excuse trustees from liability. Article 45 TJL provides the court with a discretion to relieve a trustee from liability for breach of trust where the trustee has acted honestly and reasonably.

Time limits on claims for breach of trust

Article 57 of the TJL governs limitation in hostile trust disputes.

A breach of trust claim is normally subject to a three-year limitation period. This period starts to run from the date of delivery of the final accounts of the trust, or the date on which the beneficiary acquires knowledge of the breach of trust, whichever is earlier. The threshold of knowledge is interpreted objectively to mean knowledge that would have caused a reasonable person to conclude that a breach of trust had probably occurred.

The state and degree of knowledge needed to trigger time running for a claim can be nuanced and complicated. Limitation in Jersey is different to the limitation rules in English law. If you are thinking of bringing a claim, it is vital to get Jersey law advice early.

Article 57(1) of the TJL sets out two situations in which no limitation period will apply. This applies where a trustee is privy or party to fraud or where an action is brought to recover property from the trustee which is in the trustee's possession, under their control or previously received by them.

If the beneficiary is a minor, lacking capacity or under a legal disability, the limitation period of three years will only begin to run when the beneficiary becomes of age and legally able, except in cases of fraud or an action to recover trust property as discussed above.

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There is a long-stop provision in Article 57(3C) of the TJL which provides that all breach of trust claims will be time-barred after 21 years from the breach of trust, except those based on fraud or to recover property from the possession of a trustee.

How can Collas Crill help?

Collas Crill has decades of experience dealing with litigation and disputes involving trusts and trustees. Collas Crill continues to be involved in some of the most legally and factually complex trust litigation in the offshore world.

Whether you require advice or representation as a trustee, a protector, a beneficiary or a third party in relation to any contentious issue involving a Jersey trust, we are happy and ready to assist.

For more information please contact:



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