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Varying trusts in Jersey

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Jersey is one of the world's leading jurisdictions in which to establish and manage private wealth through trusts.

While many modern trusts include powers that allow the trustees to amend the terms of their trusts without the Court's assistance, there are circumstances where that is not possible and Court approval is required for an action that goes beyond the trustees' existing powers.

Applications to vary Jersey trusts are common and, when properly prepared, are generally dealt with efficiently, pragmatically and with sensitivity by the Royal Court of Jersey (**Court**).

Reasons to vary a Jersey trust

Trusts established to hold family wealth are intended to last for decades. A Jersey trust can, at least in theory, last indefinitely.

While a discretionary trust will often confer wide and flexible powers on a trustee, over time, the circumstances affecting a trust will change in ways the settlor could never have anticipated or in ways the drafting of the trust cannot adequately accommodate.

While, at least historically, tax was often a significant factor in variation applications, a theme in a number of the modern authorities is the Court's willingness to approve variations that make historic trusts better adapted to the needs of the modern HNW families they are intended to serve.

Common reasons for needing to vary a Jersey trust include:

Changes in family circumstances

- The birth of new beneficiaries;
- Changes in family structure (eg divorce, remarriage, 'blended families', non-traditional families etc);
- Vulnerable or incapacitated beneficiaries;
- Shifts in family wealth or dependency (to better reflect beneficiaries' changing needs)

Tax and regulatory developments

- Changes in international tax or regulatory laws affecting beneficiaries based in particular jurisdictions;
- The need to restructure to preserve the tax neutrality, the efficiency or workability of the structure;

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- Increased reporting or compliance burdens.

Outdated or rigid trust terms

- Administrative provisions that are no longer fit for modern asset management or investment practices;
- To enlarge or restrict the powers of the trustee (eg whether administrative or dispotive powers);
- Updating trusts to better reflect modern family structures or circumstances that are not properly catered for by 'old-fashioned' drafting (eg does the trust properly cater for adopted children, surrogate children, children born to same sex or unmarried parents etc.)
- Trusts created before modern drafting standards or terms contained in an inappropriate document (eg a will trust).

Trust reorganisations, diversification or transactions

- The sale or restructuring of key trust assets;
- The division of a trust into sub-trusts or sub-funds for different branches of the family;
- The appointment of assets into new structures;
- Better managing exposure to claims, creditors or political risk.

Legal principles governing variations in Jersey

The statutory route to a Court approved variation of a Jersey trust is Article 47 of the Trusts (Jersey) Law 1984, which allows the Royal Court to approve 'arrangements' that vary or revoke the terms of a trust on behalf of certain classes of beneficiaries.
The Court can approve a variation on behalf of:

- Minor and unborn beneficiaries;
- Unascertained beneficiaries;
- Persons lacking capacity; and
- Persons who cannot be found or who cannot consent.

The Court can approve a variation on behalf of any of the above categories of person or persons, whether or not they have a vested interest or are a discretionary beneficiary or object of the trustee's powers.

The Court's role in applications of this kind is to supply consent on behalf of those listed who are unable to represent their own interest or to give their own consent to any proposed variation.

The Court has no power to vary the terms of a Jersey trust on behalf of, or if that is opposed by, any of the sui juris beneficiaries (ie those who are adult, capable and ascertained). Adult beneficiaries who have the capability to do so must usually consent to any variation. For this reason, a variation application will often be proceeded by a consultation process with the family to achieve a consensus before any application is made.

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The Court's variation powers are very broad. The Jersey case law is such that a variation can extend to a total or partial re-writing or resettlement of the Trust property on materially different terms to those on which it was originally established.

Jersey has established 'firewall' legislation which prevents the variation of Jersey trusts by a foreign Court order (eg a variation of a trust as a nuptial settlement under the Matrimonial Causes Act 1973). Only the Royal Court of Jersey can vary a Jersey law trust.

The core test: 'Benefit'

The central question for the Court in giving its approval is whether the proposed variation is for the benefit of the class of beneficiaries on whose behalf the law gives it power to consent.

'Benefit' is to interpreted broadly, and does not mean a financial benefit to any particular beneficiary or group of beneficiaries that is affected by the variation (ie the variation does not have to materially improve the financial circumstances of any beneficiary).

'Benefit' may include:

- Any kind of benefit (whether financial, physical, educational or social);
- Family harmony;
- Improved administration (accruing for the befit of the beneficiaries as a whole);
- Protection from risk (whether that be the trust as a whole or the protection of a particular beneficiary or group of beneficiaries); and
- Long-term flexibility.

It is not an obstacle to the Court's approval of a variation that there is not a benefit for all the persons on whose behalf the Court is giving its approval in every possible circumstance. The Court will examine the proposed arrangement as a whole.

The Court must also be satisfied that the variation is one that is a 'fit and proper' one for the Court to approve. The Court will not approve a variation designed solely to avoid tax, but sensible tax planning is an accepted consideration. The Court has also said it will exercise close scrutiny of a variation that involves the Court 'undoing' previous decision making by the trustee (eg to reverse the exercise of a power of exclusion).

Variation and other Court applications

Sometimes a variation application will be a prelude to the trustee being in a position to take a major decision concerning the trust. Depending on the particular context, the trustee may seek, a blessing of its decision or directions on how to properly exercise its powers.

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Where a variation application is just one step in a wider restructuring or tax planning exercise, trustees may wish to put the subsequent planned stages of the exercise before the Court for approval or 'blessing' as a momentous decision.

The Court has confirmed that it can sit to hear a variation application and a blessing application at the same time – providing procedural simplicity and helping to save some costs of not running two separate applications.

Whilst this sort of conjoined application will increase the amount of preparatory work which trustees will need to undertake, it does have a number of benefits including:

- enabling the Court the assess the merits of the variation application in the context of the wider intentions of the trustee; and
- avoiding the need for (and therefore the time and cost associated with) multiple applications to Court.

A variation application is distinct from an application to rectify the terms of a trust. A variation is about what the parties want the terms of the trust to be going forward. A rectification application is about correcting an error in the drafting of the trust to make its terms accord with what they were always intended to be.

Both variation and rectification applications may ultimately end up in the same place – the terms of the trust will be changed – but the procedural and evidential requirements for each are very different. Choosing the correct route is an important strategic decision.

Confidentiality and privacy

The possibility of obtaining a privacy order from the Court is an important feature of legal proceedings concerning trusts in Jersey and is often very attractive to families looking to preserver the confidentiality of their affairs.

- Unlike the prevailing position in England, trust variation applications are generally heard in private (meaning no public or media access to the hearing, the Court file or the evidence);
- Judgments are often anonymised, so it is not possible to identify beneficiaries or factual information about the family and the trust;
- Sensitive and financial information is protected.

The question of whether the proceedings are to be conducted in private is addressed at a very early stage in the application. Privacy makes Jersey a particularly suitable for high-value or high-profile family structures.

Where a variation application is made in the context of a wider restructuring or tax planning exercise it will be necessary for a trustee to provide the Court with as much information as possible in respect of the broader restructuring objectives and intentions.

Timing, procedure and practicality

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Variation applications are procedurally straightforward and can often be dealt with relatively quickly by the Court, once launched. Applications are 'front loaded' – where the supporting affidavit evidence is produced when the application is first launched. Early engagement with local counsel can be critical to understanding the process and to avoid delays.

In the lead up to an application, there is often a period of family consultation necessary to achieve a measure of consensus. Complex family dynamics or contested issues will put naturally extend the timeline to achieve a variation.

Costs

The cost of a variation application are usually met from the trust fund. There is a cost-saving in the hearing by securing consensus of the ascertained, adult beneficiaries in advance. A poorly prepared or unnecessary applications may attract the Court's criticism, which is another reason to engage early with local legal advisors.

Key takeaways

As the Court will not approve a variation if there is opposition from the adult beneficiaries, successful applications require a measure of 'front loading' in the preparation of evidence and advice so that an application can proceed from a foundation of consensus.
The key touchstones for applicants to bear in mind and to seek early advice upon are:

- What benefit is to accrue from the variation;
- Whether the variation touches on any areas that are likely to be regarded as sensitive for the Court (particularly important where the proposed variation is tax driven).

Where these considerations are borne in mind, Court applications to vary trusts can be a useful tool for restructuring wealth in Jersey. The Court's focus is practical, protective and beneficiary-centred.

How can we help?

- ***For more insights like this, explore our dedicated 'Modern families resource centre' which highlights our expertise working closely with ultra-high-net-worth (UHNW) and multi-generational families.***

Collas Crill has decades of experience advising international UHNW families and trustees on the structuring of assets using offshore trusts, international estate planning and in resolving disputes about private wealth offshore.

If you need any guidance or advice when reviewing existing structures as to whether they are fit for purpose or require variation, please do not hesitate to contact us. Our experienced team of lawyers and planning professionals are ready to assist with any questions or concerns you may have regarding this important aspect of offshore wealth management.

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