<u>THE STATES OF DELIBERATION</u>
<u>of the</u>
<u>ISLAND OF GUERNSEY</u>

COMMITTEE FOR ECONOMIC DEVELOPMENT

TRUSTS LAW AMENDMENTS

The States are asked to decide:-

Whether, after consideration of the policy letter entitled 'Trusts Law Amendments' dated 20th March 2026, they are of the opinion:-

1. To approve the recommended amendments to the Trusts (Guernsey) Law, 2007, as set out in section 2 of the policy letter.

2. To direct the preparation of such legislation as may be necessary to give effect to the above decision.

The above Propositions have been submitted to His Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

COMMITTEE FOR ECONOMIC DEVELOPMENT

TRUSTS LAW AMENDMENTS

The Presiding Officer
States of Guernsey
Royal Court House
St Peter Port

20th March 2026

Dear Sir

1 Executive Summary

1.1 This policy letter proposes amendments to the Trusts (Guernsey) Law, 2007 (the "**Trusts Law**") that are designed to maintain and enhance Guernsey's position as a jurisdiction of choice for the domicile of trusts. Trusts form an important part of the offering of Guernsey's highly successful and long-established fiduciary sector, which is one of the main pillars of the island's highly successful financial services offering. The fiduciary sector comprises approximately 150 regulated trust and company service providers and, at 30th June 2024, employed just over 1,600 people, making it the largest employing sub-sector of Guernsey's successful and important finance sector. It makes a significant contribution to the local economy, both directly in terms of employment, revenue and community engagement but also indirectly in terms of services provided to the sector and its staff.

1.2 In 1989 trusts law in Guernsey was put on a statutory footing with the enactment of the Trusts (Guernsey) Law, 1989 (the "**1989 Trusts Law**"). The 1989 Trusts Law was the subject of a comprehensive review by a working party, established in 2005, which resulted in the enactment of the Trusts Law. The Trusts Law has stood the test of time well, contributing to the continued success of the fiduciary sector.

1.3 A sub-committee of the Guernsey Bar (the "**trusts law sub-committee**") has undertaken a comprehensive review of the Trusts Law, local jurisprudence and developments in other relevant jurisdictions and the Committee *for* Economic Development (the "**Committee**"), through the Finance Sector Development team, has worked with the trusts law sub-committee and the Law Officers in

developing the proposals for reform in this policy letter. The proposals also take account of feedback from practitioners and developments in other jurisdictions, to ensure that Guernsey remains a jurisdiction of choice in what is a highly competitive market for international trust services, whilst at the same time maintaining the high standards, and reputation, which Guernsey enjoys.

2 Proposed amendments to the Trusts Law

2.1 Following consideration of feedback from the trusts law sub-committee, the Committee proposes the following amendments. References are to sections of the Trusts Law, except where indicated to the contrary.

2.2 Section 15

Section 15(2)(b) provides that the reservation, grant or exercise of a power or interest referred to in section 15(1) does not, subject to the terms of the trust, impose any fiduciary duty on the holder of the power.

The trusts law sub-committee has advised the Committee that this is contrary to the position in most other jurisdictions, where there is a presumption in favour of fiduciary powers. The Committee understands that, in some other jurisdictions, legislation is silent on this point, leaving the question to be specified in the terms of the trust instrument and/or determined by a Court.

It has also been noted that, in the context of powers reserved to a protector, there could be tension between the current presumption against fiduciary powers in section 15(2)(b) and another provision of the Trusts Law, section 32(3)(b), which provides for a presumption of fiduciary powers in that context.

The Committee therefore proposes that section 15 be amended to reverse the presumption in section 15(2)(b) so that there will be a presumption in favour of fiduciary powers unless the terms of the trust provide otherwise and to make such ancillary provision as may be necessary. It is also proposed that section 32 should be reviewed and amended, if necessary, accordingly.

The Committee has considered whether such amendment should apply to all Guernsey trusts, or only to those created after the date of the amendment. The trusts law sub-committee has recommended, and the Committee proposes, that the amendment should only apply to powers pursuant to trusts created after the date of the amendment, as trust instruments that pre-date the amendment would have been drafted on the basis of the Law as it was at the time and it is not considered to be appropriate to retrospectively alter the legal nature of such powers.

2.3 Section 16

2.3.1 Section 16 provides that there is no limit on the period for which a trust created after commencement of the Trusts Law may continue to be valid and enforceable. This was a departure from the previous position, under section 12 of the 1989 Trusts Law, which stated that a trust would terminate on the expiration of 100 years from the date of its creation (unless it was a trust for a charitable purpose or terminated sooner) but the enactment of section 16 reflected the traditional position in Guernsey Law. The provision relating to trusts created under the 1989 Trusts Law was however preserved in section 16(2) of the Trusts Law, in order to avoid complications for trusts which had received appointments in from jurisdictions which did have a limit on the period for which a trust may last.

A potential issue is that the current wording of section 16(2) is such that it arguably applies to all trusts created prior to the commencement of the Trusts Law, regardless of where they were created. If a trust was created in a jurisdiction with no limit on its maximum duration, and subsequently the governing law of the trust is changed to Guernsey Law, it is potentially arguable that the effect of section 16(2) might be to restrict the trust's duration to 100 years, when no such restriction originally existed. It is therefore proposed that section 16 be amended to provide that the 100-year limit only applies to trusts the proper law of which was the law of Guernsey in the period between the enactment of the 1989 Law and the enactment of the Trusts Law.

2.3.2 Also, section 16(3) provides a mechanism for the assets of a trust, with a limited duration, to be decanted into a new trust of unlimited duration, except where the terms of the trust expressly provide to the contrary. The trusts law sub-committee has advised that decanting the assets into a new trust could potentially give rise to a tax liability in a foreign jurisdiction and it is considered to be helpful to permit the Court to extend the duration of a limited duration trust where this would be in the best interests of the beneficiaries.

2.4 **Section 17**

The trusts law sub-committee has advised that the requirement in section 17 of the Trusts Law that the number of trustees of a trust shall not be less than two, except in certain specified circumstances, is unnecessary and can create difficulties at times, for example where two trustees were originally appointed but, for whatever reason, one of them ceases to be a trustee and another trustee cannot be appointed immediately. The Committee understands that the minimum number of trustees in some other jurisdictions is one and recommends that section 17 is amended accordingly to provide that the minimum number of trustees shall be one, except where the terms of the trust expressly provide otherwise.

2.5 **Section 20**

2.5.1 Section 20 makes provision for the resignation or removal of trustees. It has been noted that there is currently no provision for the automatic removal of a trustee due to mental incapacity or unfitness to act, which causes administrative difficulties, and expense, should an application to Court be required. It is proposed that section 20 should be amended to provide for the automatic removal of a trustee from office when they lack the necessary capacity[1].

2.5.2 Although it is clear, as a matter of Guernsey law, that the personal appointment of a trustee fails upon that person's death, it is suggested that the Trusts Law could helpfully be amended to provide greater clarity around the further consequences of the death, or removal, of a trustee, including provisions relating to the appointment of new trustees and the vesting of trust assets. In some other jurisdictions, for example in England and Wales, there are well established statutory provisions[2] addressing these issues and it is proposed that the Trusts Law should reflect such provisions, subject to such adaptations as may be necessary for local purposes.

2.6 **Section 34**

2.6.1 Section 34 provides for a trustee to delegate, by power of attorney, the performance of any trust or function vested in him for a period not exceeding three years. It also sets out certain procedural safeguards. The Committee has considered whether the restrictions and safeguards in this section could be relaxed to make the use of powers of attorney, by trustees, more user friendly. The Committee notes that a power of attorney can already subsist for longer than is permitted in England and Wales but nonetheless, given the other safeguards in section 34, considers that the time limit on a power of delegation should be removed so that a power of attorney delegating the performance of a trust or function can be for an indefinite period. As a consequence, it is proposed that the words "for a period not exceeding 3 years" are repealed in section 34(1) and that 34(10) should also be repealed.

2.6.2 The Committee has also considered whether any further provisions of section 34 should be amended or repealed. It has concluded that in the case of a wholesale delegation of any trust or function these provisions serve a useful purpose in ensuring that interested parties have notice of the delegation (which will be particularly important in light of the potentially indefinite nature of the delegation) and, in the case of section 34(3), in ensuring that delegation to a sole co-trustee does not undermine the intention of a settlor if that settlor has

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[1] It may also be necessary to make consequential amendments, for example to section 14 to provide that all questions relating to the capacity of a trustee are to be determined according to the law of Guernsey.
[2] See for example Part III of the Trustee Act, 1925.

stipulated that there should be more than one person acting as trustee. However, the Committee is of the view that greater flexibility could be introduced where the delegation is of a single function for the purpose of a single transaction and recommends that sections 34(3), and 34(5), 34(6) and 34(7) should not apply in such circumstances.

2.7 **Section 35**

Section 35(1) provides that a trustee is not entitled to remuneration for his services, unless this is authorised by (a) the terms of the trust, (b) the consent in writing of every beneficiary, or (c) an order of the Royal Court. It has been reported to the Committee that this can cause administrative difficulties and expense where the terms of a trust are silent, defective or ambiguous as to remuneration. The Committee notes that other jurisdictions[3] permit remuneration of a professional trustee in certain circumstances. It is proposed that the Trusts Law should be amended to effectively reverse the current position insofar as professional trustees[4] are concerned to provide that a professional regulated trustee is entitled to receive reasonable remuneration out of trust property for acting as a trustee after the date of the amendment, subject to the terms of the trust, any agreement in writing between the trustee and every beneficiary or any order of the Royal Court.

2.8 **Section 38**

2.8.1 This section provides that, subject to the terms of the trust and to any order of the Royal Court, a trustee is not obliged to disclose certain documents relating to the exercise of their functions.[5] The purpose of this provision is to allow trustees to engage in their role in a full, and frank, manner without fear of disclosure of documents revealing their deliberations, reasons for, or material on which, their decisions were based; and to protect the confidentiality of any letter of wishes[6]. The Committee has been advised that the purpose of this section could be undermined if such material, etc, were required to be disclosed by a trust official, for example a protector of a trust, or an enforcer with fiduciary duties to whom the relevant documents had been disclosed by the trustee. The Committee therefore recommends that the Trusts Law should be amended to extend the protection afforded by section 38 to the same documents held by trust officials and enforcers with fiduciary duties, where the documents have

[3] For example, England and Wales and Jersey.

[4] For example, holders of a fiduciary licence under the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000, or equivalent legislation and/or regulations in another jurisdiction.

[5] And such information is exempt from the provisions of the Data Protection (Bailiwick of Guernsey) Law, 2017 (the **"DPL"**) by virtue of paragraph 16B of Schedule 8 to the DPL.

[6] Section 38(2) of the Trusts Law defines a letter of wishes as *"…a letter or other document intimating how the settlor or beneficiary wishes the trustees to exercise any of their functions."*

been provided to the trust official by the trustee.

2.8.2 It is also recommended that the protections against disclosure, which are afforded to trustees under section 38 of the Trusts Law, are extended to the same categories of documents relating to the exercise of functions by trust officials and enforcers.

2.9 **Section 41**

This section makes provision regarding trustees of more than one trust. Principles of trust law, established in decisions of the English courts which have persuasive authority in Guernsey, require that a trustee should not have a personal interest in a transaction, as this may lead to a conflict between their personal interests and their duties as a trustee (the "no conflict rule" and the "self-dealing rule"). The self-dealing rule makes voidable any transaction in which a trustee enters into a contract to purchase trust property, or to sell his own property to the trust. It is also a principle of trusts law that a trustee's ordinary powers to sell or otherwise deal with trust property do not authorise him to sell to, or deal with, a person with whom he cannot deal at arms-length (the "genuine transaction rule"). Finally, it is a principle of contract law that a person cannot contract with themselves (the "two party rule").

The combined effect of these principles is that a professional trustee, who may act as trustee for multiple trusts, cannot contract with him or herself, even where they wish to do so in the capacity of trustee. Jersey addressed this situation in legislation in 2012 and it is proposed that section 41 should be amended to permit a person acting in the capacity of trustee to enter into a contract or other transaction with themself in the capacity as a trustee of one or more other trusts, subject to any necessary safeguards, especially in relation to the self-dealing rule.

2.10 **Section 44**

This section deals with trustees' liens and was a new provision when it was included in the Trusts Law. A trustee, or former trustee, is entitled to a non-possessory lien over trust property[7] for the purpose of securing the trustee's right to pay, and be reimbursed from the trust property for, all expenses and liabilities properly incurred in connection with the trust. A non-possessory lien is a form of security over assets by a party who is not in possession of the assets in question.

Section 44 grants a trustee a lien which, in Guernsey law, effectively gives the trustee priority over other security arrangements in respect of trust assets, including those which existed before the Trusts Law came into force, unless the

[7] With the exceptions set out in section 44(3).

lien is expressly waived or released, or one of the other exceptions in section 44(3) applies. In the case of a security interest which predates the enactment of the Trusts Law, the statutory lien will not have been expressly waived, as it didn't exist at the time the security interest was created. Whilst the number of instances of this being a live issue is anticipated to be rather limited, due the passage of time since the enactment of the Trusts Law, the Committee considers that it might be helpful expressly to provide that a trustee's lien under section 44 does not give priority to the trustee in favour of a security arrangement created before the Trusts Law came into force; and recommends that the Trusts Law should be amended accordingly.

The Committee is also aware of a recent amendment to trusts law in another jurisdiction providing that the lien of a past or current trustee does not take priority over express security granted to banks or other third-party lenders. It is proposed that the Trusts Law should make appropriate equivalent provision to ensure that lenders have confidence that security granted over trust assets is effective.

2.11 **Section 48**

It has been noted that there is no statutory provision in the Trusts Law, and no case law in Guernsey, regarding (i) how long trustees have before a power to distribute income lapses, and (ii) how the income is required to be accumulated under section 48(2), in the absence of any express provision in the terms of the trust. The legislation does not explicitly state that income which is accumulated is to be added to capital, although this is assumed to be the position.

It is recommended that the Trusts Law should be amended to make the position clearer in relation to the treatment of capital and income and accumulation of the same.

2.12 **Entitlement to Security**

A number of sections of the Trusts Law address the rights of a trustee to reasonable security for liabilities (existing, future, contingent or otherwise)[8] before surrendering trust property to a successor or beneficiary. By way of example, section 50 addresses the power to revoke a trust but does not address the right of a trustee of a revoked trust to reasonable security before surrendering trust property.

The Committee proposes that the relevant provisions of the Trusts Law should, in the interests of certainty, be amended to clarify that:

[8] For example, sections 43, 44 and 53.

- a trustee is entitled to require that they are provided with reasonable security for liabilities (existing, future, contingent or otherwise), before surrendering trust property, including on revocation or termination of a trust, and
- that a trustee's entitlement to require reasonable security, before surrendering trust property on termination of a trust, is subject to the proviso that, where the security to be given is by way of indemnity against the trust property, the indemnity shall not, except with leave of the Royal Court or with the consent of all beneficiaries, be greater than that to which the trustee would have been entitled had he remained a trustee.

2.13 **Section 53**

Section 53(3) addresses the right of the beneficiaries of a trust, where all are in existence and have been ascertained, and none is a minor or a person under a legal disability, to require the trustees to terminate the trust and distribute the trust property among them. Section 53(3) effectively replicated a provision of the 1989 Trusts Law[9] to the same effect. This sub-section reflects a well-established rule in English trusts law, known as the rule in *Saunders v. Vautier,* after the English case in which the rule was first set out, the rationale being that all the equitable interests in the trust property are collectively held by the beneficiaries, so if they all agree then they should be able to require the trustees to terminate the trust and distribute the property. Whilst neither the 1989 Trusts Law, nor the Trusts Law, were intended to be a comprehensive codification of the common law of trusts, it had been thought that the rule in *Saunders v Vautier* had effectively been put on a statutory footing in section 53(3) of the Trusts Law. However, in the case of *Rusnano Capital AG (In liquidation) v. Molard International (PTC) Ltd and Ors*[10] ("**Rusnano**") at first instance, and confirmed on appeal[11], it was concluded that section 53(3) applied to require the termination of a trust and distribution of its property at the request of the sole existing beneficiary at that time in the case of a trust for beneficiaries where there was a power to add further beneficiaries, which had not been exercised. This has been the subject of considerable comment, and the trusts law sub-committee has advised the Committee that these decisions mean that section 53(3) goes beyond the rule in *Saunders v. Vautier* and potentially gives beneficiaries greater powers to require the termination of a trust and the distribution of its property. In *Rusnano*, the Royal Court recognised the outcome may have resulted in a different approach from that which would follow from applying the rule in

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[9] Section 48.

[10] Rusnano Capital AG (in liquidation) v. Molard International (PTC) Limited and Pullborough Int. Corp [2019] GRC011.

[11] Molard International (PTC) Limited and Pullborough Int. Corp v. Rusnano Capital AG (in liquidation) [2019] GCA 077.

Saunders v. Vautier, without having any regard to any domestic statutory intervention, but concluded that if that was so, then rectifying such a problem rests with the legislature rather than the Court.

The Committee has received representations that it is desirable, in the interests of certainty, to amend section 53(3) to ensure that it does not expand upon the scope of the rule in *Saunders v. Vautier*. This will provide practitioners with confidence that the principles which apply in Guernsey in relation to this issue, will be the same principles which apply in England and other common law jurisdictions. The Committee agrees that this is desirable and recommends that section 53(3) should be amended accordingly so that it only applies where the class of beneficiaries is closed (i.e. there is no power to add new beneficiaries) and the beneficiaries can therefore demonstrate an absolute, vested and indefeasible interest in the trust property. In *Rusnano*, the trust in question was a hybrid trust (i.e. one for beneficiaries and purpose). In *Rusnano* the purpose trust had never come into effect, as there had never been a time when there were no beneficiaries. However, the trusts law sub-committee has also recommended that section 53(3) should be amended to provide that the power of beneficiaries to require the termination of the trust and distribution of the property does not apply in the case of a hybrid trust (i.e. one where there is potentially a purpose as well one or more beneficiaries).

2.14 **Section 57**

Section 57 provides that applications for variation, etc, of trusts on behalf of minors, persons under a legal disability, persons unborn, or potential future beneficiaries, etc may be made by any of the persons listed in section 69(2) of the Trusts Law, without leave of the Royal Court. Section 57(1)(e) provides that an application made on behalf on "any other person" requires the leave of the Court. It is proposed to add a new category of person in respect of who leave of the Royal Court is not required, namely a person who is able to agree to the variation, etc, but for whom there may be adverse consequences of doing so.

2.15 **Powers of the Royal Court to vary beneficial interests under a trust and approve particular transactions**

Presently the variation of beneficial interests can be achieved only by way of an "arrangement" with the consent of all the beneficiaries, with the Court only having a power to give consent to such an arrangement on behalf of those persons referred to in section 57.

The Court's power under section 58 is limited to giving trustees powers "in the management or administration of the trust". This provision is similar to Section 57(1) of the Trustee Act 1925 of England and Wales and Article 47(3) of the Trusts (Jersey) Law, 1984 as amended. Such provisions do not permit the variation of

beneficial interests in the trust property per se. The Court confers a power on the Trustee to effect a "transaction" "in the management or administration of the trust" in question if it is expedient and in the interests of the beneficiaries as a whole.

It is proposed to amend the Trusts Law to clarify and expand the ability of the Court to make amendments to a trust, in appropriate cases, without the beneficiaries being made parties and without beneficiaries being required to give their consent, subject to appropriate safeguards. This will mean that the powers of the Court to give consent to variations of the beneficial interests more generally, under the Trusts Law, will be far wider and will permit, for example, the Court to vary a trust where a variation is for the benefit of the beneficiaries as a whole, but one uncooperative beneficiary has refused consent or where the cost of obtaining the consent of all the beneficiaries would be disproportionate.

2.16 **Section 63**

2.16.1 Section 63 provides for settlement of actions against trustees by Alternative Dispute Resolution ("**ADR**") to be binding on beneficiaries in certain circumstances. ADR is broadly defined in section 63(5) but section 63(1)(c) requires ADR to result in a settlement which is recorded in a document signed by, or on behalf of, all parties in order to be binding. Not all forms of ADR will result in a document signed by, or on behalf of, all parties, notably evaluation, adjudication, expert determination or arbitration. It is therefore proposed that section 63 should be amended to remove the requirement in section 63(1)(c) and to permit wider use of ADR where the terms of a trust so provide, or the Court so orders.

2.16.2 At present section 63 only provides for binding settlement by ADR of any claim against a trustee founded on breach of trust. This is a fairly limited class of disputes. It is thought desirable to increase the types of disputes which may be determined by way of arbitration, to include internal trust disputes between trustees, beneficiaries and/or other power holders. A trust is created by a settlor who endows the trust with its assets, decides who the beneficiaries are and how they benefit, and grants powers to the trustee(s) and others. If the settlor wishes to do so on the basis that disputes between those parties must be resolved by arbitration, then the Committee does not believe that this should always be prohibited and, on the contrary, that the Trusts Law should provide a basis for the recognition and enforcement of such a provision, subject to appropriate safeguards. As such it is recommended that the Trusts Law and the Arbitration (Guernsey) Law, 2016 (the "**Arbitration Law**") should be amended in order to provide as comprehensive a code as possible for the arbitration of trusts disputes, with such ancillary amendments as may be necessary. In particular, it is recommended that an arbitration clause in the terms of a trust should, subject to any order of the Royal Court to the contrary, be deemed to be an arbitration

agreement for the purposes of the Arbitration Law. This would be necessary as the relationship between the parties, in relation to a trust, is non-contractual and so an arbitration clause in a trust instrument would not otherwise be recognised, and enforceable, as an arbitration agreement. It is proposed that an interested party who has not expressly agreed to arbitration should have a right to apply to the Royal Court for an order preventing an arbitration clause in a trusts instrument from having effect as an arbitration agreement for the purposes of the Arbitration Law. The class of disputes that may be subject to such an arbitration clause should also not extend to disputes involving third parties, as they are not parties to the trust and it would not be acceptable to exclude their right of access to the Court.

2.17 **Section 69**

Section 69 makes provision regarding the general powers of the Royal Court. Section 69(2) identifies those parties who can make certain applications to the Royal Court. Section 69(2)(e) provides that a person described in section 32(2) may make such an application. Section 32(2), in turn refers to those persons whom a trustee is required to consult, or whose consent a trustee is required to obtain. Other sections of the Trusts Law cross refer to the list of parties in section 69(2) for the purpose of permitting those parties to make other specific types of application.

As a result, at present a trust official (e.g. a protector) who has positive powers under the terms of the trust, but who is not required to consent, or be consulted by a trustee, under the terms of the trust instrument before the trustee exercises their powers, would not be able to make an application under section 69 without first obtaining the leave of the Royal Court pursuant to section 69(2)(g) as they would fall within the category of "any other person". The Committee believes it is appropriate for all trust officials to have the right to make such applications and so recommends that section 69 is amended to include a reference to "trust officials".

2.18 **Section 76**

Section 76 addresses limitation and prescription, i.e. the period within which certain actions must be commenced. The provisions of section 76 vary from the provisions of the equivalent in the 1989 Trusts Law (section 71). Section 76(2) of the Trusts Law provides for a general prescription period of three years (subject to the provisions of sections 76(1) and 76(3)) and sets out the time from which the period of three years starts to run in respect of (a) a claimant and (b) a claimant who was, at the time of the breach, a minor or a person under a legal disability. In respect of (a) above, it prescribes that the period of three years runs from the date on which the claimant first has knowledge of the breach. The 1989 Trusts Law had provided, in section 71(2) that the period ran from either (a)

delivery of the accounts of the trust to the beneficiary or (b) the date on which the claimant first had knowledge of the breach. The Committee believes that it is appropriate to reintroduce the alternatives of prescription running from the earlier of (a) the date of delivery of the accounts of the trust (provided those accounts are complete and accurate) to the beneficiaries or (b) the date on which the claimant first has knowledge of the breach and recommends that the Trusts Law be amended accordingly.

2.19 **Section 80**

2.19.1 Section 80 is the interpretation section of the Trusts Law and defines "trust official" as meaning "…a person having a function or holding an office in respect of the trust other than a settlor, trustee, enforcer, or beneficiary". The Committee understands that the office of "protector" is often created and defined by the express terms of a trust instrument and would fall within the definition of "trust official". The Committee further understands that, in many cases, a settlor or a beneficiary might serve as a protector. Under the current definition, such a settlor or beneficiary would not be considered to be a trust official in their capacity as protector.

The Committee considers that the definition of "trust official" in the Trusts Law should be reviewed and revised as necessary to address this issue.

2.19.2 The Committee also considers that the definition of "trust official" should be amended to clarify that only a person who has a function, or holds an office, under the Trusts Law or the terms of trust instrument is considered to be a trust official and not a person who provides a contractual service to a trust, such as an accountant or other professional services provider.

2.20 **Hastings-Bass**

The rule in the case of *Hastings-Bass* is a principle of English trusts law, which has been recognised by the Royal Court as applying in Guernsey. The rule was, traditionally, considered to allow a court to set aside the exercise of a trustee discretion where its effect was different from that intended, and the trustees would not have acted as they did, had they not failed to take account of something relevant or taken into account something irrelevant. However, in a judgment of the UK Supreme Court in 2013 (*Futter v. HMRC*[12]) the rule was reformulated such that the inadequate deliberations of the trustees must have been sufficiently serious as to amount to a breach of fiduciary duty before the Court will intervene. It is not, in itself, sufficient that the trustees' deliberations fell short of the highest possible standards, or that the Court would have acted in a different way had it been the Trustee. It may therefore, for example, not be

[12] Futter and another v. HMRC; Pitt and another v. HMRC [2013] UKSC 26.

possible to set aside a decision of a trustee where they have relied on advice which turns out to have been partial or incorrect, albeit the law of mistake may provide another basis for the setting aside of a decision of the trustees where the decision would not have been taken but for a causative mistake of sufficient gravity which makes it unjust to allow the decision to stand.

In the light of the restatement of the rule in *Hastings-Bass*, a number of jurisdictions have enacted legislative provisions to reinstate the rule as it had been understood before the UK Supreme Court decision in *Futter v. HMRC* and the issue has been the subject of considerable debate in Guernsey. At its heart is the question of how much Guernsey should prioritise the protection of beneficiaries against aberrant conduct by trustees, over the interests of legal certainty and the protection of the interests of trustees, in not imposing too stringent a test.

In Jersey, an amendment to the Trusts (Jersey) Law, 1984 has addressed both the consequences of inadequate consideration and mistake to put these on a statutory footing. In the case of inadequate consideration, Jersey has rejected any requirement for such to amount to a breach of fiduciary duty and has thus reverted to the former, less stringent, test for decision of trustees to be voidable and liable to set aside by a Court.

In Guernsey, the decision of the UK Supreme Court in *Futter v. HMRC*, and legislative amendments in other jurisdictions, have been the subject of considerable comment and discussion amongst trusts law practitioners. It appears that, in the absence of statutory intervention, the Courts in Guernsey would be likely to follow the principles of English law as set out in *Futter v. HMRC*.

The trusts law sub-committee has recommended, and the Committee agrees, that amendment is desirable to reinstate the rule as it had been understood before the decision in *Futter v. HMRC,* to the effect that it is not necessary for there to have been a breach of fiduciary duty on the part of the trustees, in order for the Court to have the power to set aside the exercise of a fiduciary power in circumstances where there was inadequate consideration by the holder of the power within the meaning of the rule in *Hastings-Bass*.

The Committee also believes that the opportunity should be taken to provide that the exercise of a fiduciary power in such circumstances may be declared by the Court to be void, or of such effect as the Court may determine, or of no effect from the time of its exercise.

The Committee recommends that an application for relief may be made by a wide range of persons to be specified in the legislation including, inter alia, the trustee and the beneficiary.

Finally, in order to ensure consistency of application to the exercise of fiduciary powers over time, the Committee believes that the amendment should apply to fiduciary powers conferred or exercised before, on or after the commencement of the amendment.

2.21 **Ability for trust administration proceedings to be heard in private**

The Royal Court has a supervisory jurisdiction, in respect of Guernsey trusts, meaning that matters relating to the interpretation and administration of the trust may be referred to the Court for the Court to assist and, for example, to make orders in respect of the execution, administration or enforcement of a trust[13]. Such applications typically involve administrative matters concerning only the trustees, beneficiaries and trust officials. These are typically not adversarial proceedings but rather they concern the internal mechanics of a trust. It is not uncommon for applications to be made for such hearings to be held in private and for decisions to be anonymised to respect the privacy of the parties. The case of *Re Delphi Trust* in the Isle of Man established some principles on the categories of applications which will typically be heard in private and those which will usually be heard in public. However, the Trusts Law does not make any provision to that effect, and the principle of open justice means that there is a presumption that justice will be administered in public except where justice itself would be frustrated, or where there is some statutory derogation from the principle[14].

This means that there is a degree of uncertainty in any individual matter as to the approach the Court will adopt, which the trusts law sub-committee advises has prevented some applications from being made to the Court. The need to apply for a hearing to be in private, and for a judgment to be anonymised, can also lengthen the court process and lead to significant additional expense.

Whilst acknowledging that private hearings represent a departure from the principle of open justice, the Committee believes that it is appropriate, in the context of the Royal Court's supervisory jurisdiction, for the Trusts Law to expressly permit the Royal Court to make provision in respect of private hearings and ancillary matters (such as anonymisation of the names of parties, the name of the trust and the details of trust assets) in Rules of Court. This will provide a pathway for greater certainty to be provided and for cost and time to be saved, in appropriate cases, while allowing the Royal Court to retain control over practice and procedure.

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[13] See sections 68 and 69 of the Trusts Law.

[14] See for example the judgment of the Royal Court in Tchenguiz, Rawlinson & Hunter Trustees S.A v. Akers, Hamedani & Fort Trustees Limited, Balchan Management Limited, Court of Appeal, Judgment 2/2018.

2.22 **Minor non-substantive and typographical amendments.**

In addition to the above substantive proposals, the Committee recommends that the Trusts Law be reviewed to ensure that any minor, consequential, non-substantive and typographical issues are addressed in the amending legislation.

3 Compliance with Rule 4

3.1 Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees sets out the information which must be included in, or appended to, motions laid before the States.

3.2 In accordance with Rule 4(1):-

a) The propositions contribute to the States' objectives and policy plans by growing economic competitiveness and supporting finance sector development.

b) In preparing this policy letter and the propositions, the Committee has engaged with the Guernsey Bar and the Guernsey Association of Trustees.

c) The propositions have been submitted to His Majesty's Procureur for advice on any legal or constitutional implications.

d) There are no financial implications to the States of carrying the proposal into effect.

3.3 In accordance with Rule 4(2):

a) The propositions relate to the Committee's purpose and policy responsibilities to advise the States and to develop and implement policies on matters relating to its purpose, including the promotion and development of all sectors of business, including financial services.

b) The propositions have the unanimous support of the Committee.

Yours faithfully

A Kazantseva Miller
President

A Niles
Vice President

H Camp
R Humphreys
L van Katwyk

B Duerden
Non-States Member