

mourant

Regulatory Update

Jersey - Summer 2018

In a bid to persuade you that there is news out there that doesn't involve Brexit, Trump or football, here is our latest round up of regulatory developments in Jersey!

As you will see from the short summaries in this edition of our update, the last quarter has seen a real mix of legislative change, court judgments and new guidance and consultation from the JFSC, all of which should be of interest to the regulated community in Jersey.

In the rush for the publishing deadline, however, there are inevitably a few developments that arise at the last minute but are still worthy of a passing mention here.

The JFSC has published a guidance note on the application process for issuers of Initial Coin Offerings (ICOs), which is intended to 'illustrate [the JFSC's] commitment to fintech developments' in a manner that is 'permissive and promotes innovation and new enterprise', whilst also maintaining safeguards to protect investors.

The JFSC has also now published a further update in relation to Phase II of the Risk Data Collection Exercise, setting out a new timetable for data collection. Most regulated businesses can relax for the rest of the summer, until the end of August, by which time they will receive further details on data collection over the following months, but those who are supervised for AML purposes only, as well as FSB managed entities and certain specific standalone activities, will receive notice by end of July for reporting by end of September.

Finally, the JFSC has also published feedback on its themed visits in relation to revised Registry requirements on beneficial owners and controllers and, following the Francis case that we mention below, a new guidance note on integrity and competence. We'll take a closer look at all of these recent publications in our next update.

If you would like any more information about these matters or others mentioned in this update, please do get in touch with any of our team mentioned in the update.



Simon Gould, Partner

1. Z Trusts

What's it about?

On 3 July 2018, the Royal Court handed down its much anticipated judgment in the latest instalment of the Z Trusts case on the question of the order of priority of creditors of an insolvent Jersey trust ([2018] JRC 119). Justin Harvey-Hills (Partner), Luke Olivier (Counsel) and Bethan Watts (Associate), who act for a major creditor, successfully argued that such creditors should rank *pari passu* rather than on a first in time basis and successfully defeated a claim by a former trustee that it should have priority over all other creditors on the basis that its lien was equivalent to an all monies floating charge.

How does this affect you?

Trustees must give careful consideration to the incurring of liabilities generally, as their own claims will not rank ahead of creditors or later liabilities incurred by subsequent trustees. In particular, they must consider carefully the taking of security on retirement.

Our view: In our view, the Court has taken the logical step of establishing a regime which is practical and fair both for trustees and for counterparties dealing with trustees. It reflects a direction in which the Court has been moving in the area of insolvent estates (see *Re Hickman* [2009] JRC 040) and is consistent with the development of personal and corporate insolvency legislation. It should help to bring fairness and order to trust insolvencies.

Justin Harvey-Hills, Partner

2. Francis v JFSC

What's it about?

The Royal Court found the decision of the JFSC to ban an individual from the finance industry and issue a public statement to that effect to be reasonable. The Court carefully analysed the proposed directions and statement to ensure there was a proper basis on which to reach the conclusions set out. Whilst the Court made some observations to the JFSC to adapt certain practices to ensure transparency for those facing regulatory sanction, the Court ultimately strongly endorsed the JFSC's decision and procedure.

How does this affect you?

The public statement details the relevant conduct leading to the conclusion that Mr Francis lacked integrity and competence, including in particular regarding management of conflicts of interest and duties of transparency to clients.

Our view: Regulated persons should carefully review the public statement and the JFSC's new Guidance Note on Integrity and Competence to ensure the issues identified in it are not present in their business.

Mathew Cook, Counsel

3. Investec Trust (Guernsey) Limited and others v Glenalla Properties Limited & others

What's it about?

The court considered the application of article 32 of the Trusts (Jersey) Law 1984 and held there is a distinction between a trustee's personal capacity and capacity "as trustee". Further, a liability incurred "as trustee" may not be enforced against the trustee's personal assets. It was held that an unsecured creditor does not have a direct right of enforcement against trust assets but must exercise its claim against the trustee who will seek to use its right of indemnity against trust assets.

How does this affect you?

Trustees entering into documents in a trustee capacity should ensure the contract clearly states that the trustee is contracting in its trustee capacity. Any creditor entering into arrangements with a trustee should ensure that obligations are secured against the trust assets to enable direct enforcement.

Our view: This case clearly distinguishes a trustee's liability and limits enforcement by creditors to the trust assets which protects both beneficiaries and trustees but places a potentially significant burden upon unsecured creditors. While the case was not decided within the Jersey court structure, the Privy Council's views are likely to be a greatly persuasive authority to the Jersey courts.

Laura Dauny, Senior Associate

4. Draft Discrimination (Disability) (Jersey) Regulations 201-

What's it about?

From 1 September 2018, Jersey's equalities legislation will be extended to cover disability discrimination. The extended regime will introduce a new duty to make "reasonable adjustments" and protection against discrimination "arising from disability".

How does this affect you?

All organisations will be liable to employees and to customers in their capacity as service providers.

Workforce disability issues are already familiar to many employers, but customer disability issues are equally important to managing reputational and litigation risks. Recent examples of customer-based challenges in the UK have included:

- Website redesigns that made it hard for disabled customers, particularly those with visual impairments, to make full use of banking services online.
- A combination of branch closures and increased emphasis on mobile banking.
- Transactions that reduced effective access for disabled customers.

Our view: With workforce equality and access to services issues firmly on the agenda, Jersey-based providers must ensure that disability considerations are factored into planning and delivery across the business.

Laurie Child, Senior Associate

5. Professional Indemnity Insurance: JFSC Guidance Note

What's it about?

The JFSC has recently updated its 2014 Guidance Note on PII cover. This Guidance Note is relevant to all registered businesses, except deposit-takers.

How does this affect you?

There's no comparison available against the 2014 version, so it's necessary to consider this updated Guidance Note in full. In particular, you should be:

1. Checking that the language in your existing policy documents is appropriate for Jersey (eg does this cover Channel Island Financial Ombudsman complaints).
2. Requiring the Board to assess adequacy of PII arrangements (which might result in additional cover being required).
3. Ensuring that you have policies and procedures in place for PII cover, in particular relating to notification of insurers.

Our view: There's an interesting paragraph about whether it's appropriate to take out separate cyber insurance, in addition to PII. In the case of cyber insurance, it's likely to be even more important to check policy wording carefully, and to ensure that security procedures are followed so as to not invalidate claims.

Fiona Magee, Senior Associate

6. Capacity and Self-Determination (Jersey) Law 2016

What's it about?

In force from 1 October 2018, this law will enable over 18's to grant a lasting power of attorney to confer authority on a 3rd party to make decisions relating to their property and affairs in circumstances, including when the donor lacks capacity. It will also repeal the Jersey curatorship system and replace it with an option to appoint delegates.

How does this affect you?

If a customer has appointed an attorney using a lasting power of attorney then financial institutions will likely want to see a copy of the appointment, which should meet the requirements in this law and be registered with the Judicial Greffe in order to be valid. Enduring powers of attorney registered in the UK will continue to be recognised in Jersey in prescribed circumstances.

Our view: This long overdue law updates an outdated system and provides welcome certainty for financial institutions accepting instructions from certain attorneys.

Sarah Huelin, Counsel

7. Trusts (Amendment No.7) (Jersey) Law 2018

What's it about?

Some changes to the Trusts (Jersey) Law were made with effect from 8 June 2018. Many of the changes are minor/clarificatory in nature, but there are a few points of interest for legal practitioners, trustees and trust administrators.

How does this affect you?

If you work with trusts, you should familiarise yourself with the changes to Article 9A, which clarify the extent of powers which can be reserved to the settlor, as well as the new Article 29 (which confirms the extent to which third parties may require disclosure of information/documents about the trust) and Article 43A (which provides for a trustee's right to "reasonable security" on a change of trustee). You may wish to consider your policies, in particular regarding disclosure to third parties, in light of these changes.

Our view: We welcome these changes to the Trusts (Jersey) Law, which reflect the direction in which practice is heading and should also bring greater flexibility to Jersey trust structures.

Mathew Du Val, Senior Associate

8. Halabi v Wilson

What's it about?

On 22 June 2018, the Court of Appeal upheld a decision of the Royal Court to waive restrictions on the use of documents obtained by a UK trustee in bankruptcy from Jersey banks and trustees following the recognition of his appointment under Article 49 of the Bankruptcy (Désastre) (Jersey) Law 1990 ([2018] JCA 114). The purpose of the waiver was to enable the trustee to comply with a notice issued by HMRC under Schedule 36 of the Finance Act 2007 for the purposes of a tax investigation. Justin Harvey-Hills (Partner, Jersey) and Ben Thorp (Senior Associate, Jersey) represented a creditor of a trust who had an interest in preserving the confidentiality of the documents.

How does this affect you?

The decision affects the future of mutual assistance in insolvency. In future, where a foreign trustee or liquidator seeks recognition of its appointment and the production of documents, Jersey service providers will have to give serious consideration either to opposing such orders or seeking the imposition of restrictive conditions such as non-removal of the documents from Jersey).

Our view: In our view, the court did not have power to waive these requirements, given the clear terms of Article 49 and the existence of the TIEA legislation. However, unless the case is appealed, it will represent the law going forward and it is likely to jeopardise future mutual assistance in insolvency.

Justin Harvey-Hills, Partner

We've chosen a few topics which are likely to have a significant impact on the current legal and regulatory landscape in Jersey – we'll update this tracker every quarter with information on key developments.

BREXIT	
A key risk for Jersey's financial services industry, Brexit negotiations will be closely monitored and industry should feed into Government's work on Brexit where possible.	
21 March 2017	Justice Committee Report on the impact of Brexit for Crown Dependencies.
December 2017	Government of Jersey Research Report following its Business Survey on Brexit.
February 2018	Minister for External Relations Brexit Information Report – Update.
21 June 2018	Government publishes details of Jersey EU Settlement Scheme for EU citizens living and working in Jersey.
BENEFICIAL OWNERSHIP REPORTING AND REGISTER OF DIRECTORS	
Jersey continues to meet international transparency standards.	
Historically	Jersey has had a central register of beneficial ownership for over 20 years.
Jan to June 2017	Jersey's central register of beneficial owners and controllers was updated in response to an exchange of notes with the UK.
1 July 2017 to mid-2019	UK Government review of effectiveness of information sharing arrangements between UK and Crown Dependencies.
1 May 2018	UK House of Commons chose not to call for public registers of beneficial owners and controllers in the Crown Dependencies.
2018 to early 2019	Changes expected to companies, limited partnerships, limited liability partnerships and foundations laws, all in relation to disclosure of beneficial owner and controller information. A new "Registry Law" is expected to confirm the reporting regime and introduce a central register of directors.
DIGITAL ASSETS	
Collaboration between Digital Jersey, Jersey Finance, the JFSC, Government of Jersey and industry is ensuring that Jersey remains an interesting and viable option for digital asset investments and tech businesses.	
February 2017	Chief Minister's Digital Policy Unit published Jersey's Digital Policy Framework which set six key objectives.
June 2017	Channel Islands response to the EC Consultation on "FinTech: A More Competitive and Innovative European Financial Sector".
November 2017	JFSC issues a warning on Initial Coin Offerings (ICOs) which explains ICOs and highlights potential risks for investors and service providers.
December 2017	Government of Jersey sets out its position on ICOs involving Jersey entities.
February 2018	JFSC issues a statement to clarify the regulatory treatment of ICOs following misleading statements made in some articles.
June 2018	Digital Jersey signs memorandum of understanding with Binance, the world's largest cryptocurrency exchange.
July 2018	JFSC issues an ICO Guidance Note outlining Jersey's innovative and balanced approach to ICO activity.

JFSC's Consultation Paper No.4 2018 on Investment Business, June 2018

What's it about?

This Paper primarily proposes changes relating to conduct of business, covering reforms in relation to vulnerable clients, suitability and suitability letters, conflicts and best execution, which will all require some modification of internal procedures.

How does this affect you?

However, one more significant proposal would extend the prohibition on receipt of commissions for advice to Jersey resident retail customers, so that it applies wherever they are resident, unless commissions are permitted in that country. Businesses would have to confirm whether this is permitted before accepting

a commission payment. Commissions would include non-monetary benefits.

Responses to the Paper are sought by 3 September 2018.

Our view: The meaning of 'vulnerable clients' will require more clarity to achieve industry consistency. Businesses will also need to consider whether the proposed restriction on receipt of "hard" and "soft" commissions will be manageable in practice.

The Paper also flags proposals to regulate the 'arranging of deals' and a review of the Client Assets Order. Both of these changes will be significant, but we are told will be the subject of further consultation. **Simon Gould, Partner**

Mourant Community News

Upcoming Events & Seminars

An exciting new sponsorship

We're excited to announce that we will be an official sponsor of the newly formed **Super League Triathlon** which took the Island by surprise with its really successful inaugural event in September 2017.

"50 of the world's leading male and female triathletes, including 25 Olympians from around the world, will compete in Jersey for the Super League Triathlon crown in September 2018. Last year, more than 10,000 enthusiastic spectators watched the event, which ran around St. Helier's stunning Elizabeth Marina, with 10-hours of live television coverage in 147 countries, reaching an audience of over 375 million viewers across the globe."

www.superleaguetriathlon.com



L-R: Mark Chambers, Christo Van Der Spuy, Michael D'Hulst (CEO, Super League Triathlon), Jon Woolrich & Carly McIver.

CHANNEL ISLANDS CYBER SECURITY CONFERENCE 2018

Thursday 20 September 2018

CAPACITY AND SELF-DETERMINATION LAW: AN OVERVIEW

States of Jersey

Various dates to 27 September 2018

MOURANT OZANNES FINREG FORUM

Wednesday 17 October

9:00am - 5:00pm

MOURANT & QEB FINANCIAL SERVICES FORUM

Save the date

Tuesday 2 October

This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please contact one of your usual Mourant contacts.