

UPDATE

BVI Trust Law Amendments

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The BVI Government has recently enacted a number of amendments to its trust and succession law designed to make the BVI more attractive as a jurisdiction for private clients and as a trust jurisdiction generally. The amendments are based on recommendations made by the Trust and Succession Law Review Committee¹ of the local branch of the Society of Trust and Estate Practitioners and this update outlines the main changes which have been made to BVI trust law.

Introduction

The Trustee (Amendment) Act, 2021 (the **Amendment Act**) came into force in the BVI on 9 July 2021².

- Variation of Trusts by the Court to allow variations without adult beneficiary consent
- The introduction of a no-fault Hastings-Bass rule
- Strengthening the firewall
- Reservation of powers
- Trustees dealings with third parties

1 Variation of Trusts without consent of adult beneficiaries

The Amendment Act introduces a new section 58B into the BVI Trustee Act 1961 (the Trustee Act). It allows the Court to vary a BVI trust without the consent of the beneficiaries. It applies to two types of trusts:

- (a) BVI law trusts established on or after 9 July 2021 where the trust instrument expressly so provides; and
- (b) trusts established at any time which were originally governed by a foreign law where the instrument changing the law to that of the BVI or a separate instrument taking effect at the same time as the change of governing law and executed by the person who has the power to change the proper law, so provides.

The Court has the same power to vary both dispositive and administrative provisions as is conferred by section 58 of the Trustee Act.³ The test to be met is that the variation must be expedient in the circumstances then existing,⁴ whether or not the terms of the variation order may adversely affect any person or purpose, but the order cannot affect an interest that has vested absolutely and indefeasibly in possession. In deciding whether to grant the order varying the trust, the Court must take into account:

- (a) the settlor's wishes;
- (b) changes in circumstances since the creation of the trust;
- (c) in relation to any proposed extinguishment or curtailment of any interest:

¹ Tony Pursall, the author of this update is a member of the Committee.

² SI No 75 of 2021

³ This is based on the English Variation of Trusts Act 1958, but with a number of refinements, including the fact that the test is whether the variation is not detrimental to the interests of those on whose behalf it is approving it (rather than having to be for their benefit).

⁴ This is based on the test for the authorisation of transactions which would otherwise not be permitted: section 59 Trustee Act.

- (i) the remoteness of that interest; and
- (ii) the protective needs of individual beneficiaries

Applications under section 58B may be made by the trustee, any person, office-holder or body (including a protector or protector committee) authorised to do so by the trust instrument or any beneficiary (which includes an object of a discretionary power).

It is anticipated that this might be a useful jurisdiction in a number of circumstances, such as

- (a) where some of the beneficiaries cannot be found, or
- (b) where the beneficiaries would like the variation to be made, but a formal consent may create a tax charge; or
- (c) the interests of the beneficiaries in question are so remote that it is not reasonable for them to be able to block a variation which is clearly for the benefit of those beneficiaries who are expected to benefit.

2 The rule in *Hastings-Bass*

The Amendment Act introduces a new section 59A into the Trustee Act, which puts the rule in *Hastings-Bass*⁵ onto a statutory footing and effectively reverses the decision of the Supreme Court in England in *Pitt v Holt*⁶ which required fault on the part of the trustee. Under the formulation of the rule set out in *Pitt v Holt*, a trustee that has, for example, obtained tax advice from someone they reasonably considered competent to give the advice but it subsequently turned out to be wrong, the trustee was not itself at fault, the rule would not assist, with the only likely remedy being an action for negligence against the tax advisers.

The new statutory rule applies to any fiduciary power. It is not therefore limited to the exercise of powers by trustees, but is, for example, wide enough to cover decisions of directors of a BVI company.

There are two conditions to be met, which are that:

- (a) the power-holder failed to take into account one or more relevant considerations (of fact, law or both) or took into account one or more irrelevant considerations; and
- (b) but for the failure to take into account relevant considerations or for having taken into account irrelevant ones, the power-holder either would not have exercised the power or would have done so on a different occasion or in a different manner.

An application may be made by:

- (a) the power-holder; or
- (b) if the power is in relation to a trust: a trustee, a beneficiary (which includes an object of a discretionary power) an enforcer of a purpose trust, the Attorney-General of a charitable trust or, with the leave of the Court, any other person.

If the Court is satisfied that the conditions have been met, it may set aside the exercise of the power, either unconditionally or on such terms and subject to such conditions as the Court thinks fit. To the extent the Court sets the exercise of the power aside, it is treated as if it had never been exercised. No order may be made which would prejudice a bona fide purchaser for value without notice.

Importantly, there is no need for the trustee to be at fault under the new statutory rule - section 59A expressly provides that there is no requirement for there to be any breach of trust or breach of duty by the power-holder or any adviser to the power-holder. Under section 59A, therefore, the fact that a trustee has received incorrect professional advice is not a bar to the statutory jurisdiction.

The jurisdiction applies to trusts and the exercise of fiduciary powers before, on or after 9 July 2021.

⁵ [1975] Ch. 25.

⁶ [2013] UKSC 26.

3 Strengthening the Firewall

Section 83A of the Trustee Act contains the BVI conflict of laws rules relating to trusts, which are commonly referred to as the 'firewall'. The Amendment Act modernises and strengthens the firewall in four key respects.

Personal relationship to beneficiaries

The first of these changes is to modernise and expand the definition of 'personal relationships'.

The current version of the firewall protects a BVI trust from being challenged on the basis that, amongst other things, it avoids or defeats rights conferred by a foreign law by reason of a 'personal relationship' to the settlor. That has now been expanded so that it also applies to protect a BVI trust from challenge on the basis that it avoids or defeats rights conferred by a personal relationship to any beneficiary.

The definition of 'personal relationships' has also been modernised so that it now expressly includes step-relationships and children born by artificial fertilisation and surrogacy.

All questions determined by BVI law

The second change is to make it clear that all questions arising in regard to a trust (not only those specifically listed in the relevant subsection) are to be determined by the proper law of the trust and, with regard to a BVI trust or an issue to be determined by BVI law, it is only BVI law which will apply to those questions.

Firewall extended to cover capacity of beneficiaries and office-holders

The third change deals with the issue of capacity. The firewall currently provides that the capacity of the settlor is not to be questioned by reason of either (a) a foreign jurisdiction prohibiting or not recognising trusts or (b) because the trust avoids or defeats any forced heirship rights or rights conferred by a personal relationship.

The Amendment Act expands this provision so that, in addition to the capacity of the settlor, it will also apply to the capacity of any trustee, protector, enforcer or other power-holder, as well as any beneficiary.

Variation of BVI trusts by foreign courts

The Amendment Act clarifies that any order of a foreign court purporting to vary a BVI trust without the consent of all the adult beneficiaries who have full capacity is inconsistent with the firewall and will not be recognised or enforced by the BVI courts.

4 Reservation of powers

Many settlors, particularly those from civil law jurisdictions, are understandably reluctant to entirely give up control over assets they settle on trust. As a result, it is common and is becoming increasingly common for settlors to want to retain powers under a trust. While it is generally thought to be possible to retain extensive powers under English common law rules⁷, recent cases in England⁸ have cast some doubt on that, and although those cases have received considerable criticism from commentators⁹, the statutory provisions in the key trust jurisdictions may therefore become more important.

The BVI has had reserved powers legislation since 1993¹⁰, when it introduced section 86 into the Trustee Act. It currently provides that any powers may be reserved by the settlor or conferred on another person including powers to change the proper law and forum for administration, to appoint and remove trustees, to add and exclude beneficiaries and to veto actions of the trustees.

⁷ For a discussion on this, see *Drafting British Virgin Islands Trusts* (Kessler, Pursall and Chand (Sweet & Maxwell, 2014) at 16.11 (Settlor reserved powers); see also *Lewin on Trusts* (19th ed, Sweet & Maxwell, 2015) at 1-015.

⁸ *Pugachev* [2017] EWHC 2426; *Webb v Webb* [2020] UKPC 22.

⁹ For a discussion of the decision in *Pugachev*, including references to a number of other commentaries, see *Guernsey Trust Law*, Pursall & Guthrie (Hart Publishing, 2020).

¹⁰ Trustee (Amendment) Act, 1993, s.10 adding, amongst other things, a new section 86 to the Trustee Act.

The Amendment Act will expand section 86 to provide for a more extensive list of specific powers which may be reserved, namely:

- (a) power to revoke the trusts in whole or in part;
- (b) power to vary or amend;
- (c) dispositive powers over income or capital or both;
- (d) power to direct investments;
- (e) power to appoint and remove other office-holders; and
- (f) power to specify which courts have exclusive jurisdiction over the trust.

The second change is that it now expressly provides that the reservation or grant of any or all of the specified powers will not invalidate the trust, will not prevent the trust taking effect in accordance with its terms nor will it cause any of the trust property to be part of the Settlor's estate on death for succession law purposes.

The new section 86 applies to all BVI trusts, whenever they were created.

5 Dealings with Third Parties

The BVI has had a detailed set of rules dealing with trustees' transactions with third parties and the limitation of trustee liability since March 2004.¹¹ These provisions were based on recommendations by the Trust Law Committee in England in its 1998 Report entitled *Rights of Creditors against Trustees and Trust Funds*.

Until now, these rules have only applied to trusts established after 1 March 2004 when the provisions came into force. It is now possible for trusts established before that date to opt into the provisions and a foreign law trust can also take advantage of the provisions by changing its proper law to that of the BVI (assuming there is power to do so) and then opting into the new provisions.

The provisions go further than a number of other jurisdictions¹² in providing commercial certainty for third parties and in terms of protecting trustees of BVI trusts from personal liability.

Breach of trust in relation to the transaction in question

As far as third parties are concerned, there are two key issues that cause third parties difficulties when entering into commercial transactions with trustees. The first of these is that the trustee may be acting in breach of trust in relation to the transaction in question either in entering into the transaction at all or entering into it on particular terms. If the trustee is acting in breach of trust, the third party may not be able to take any trust property free of the interests of the beneficiaries. It also gives rise to some surprising consequences:

"It is not far short of astonishing that if [a third party] C knows that [the trustee] T is a trustee but desires to be able to have recourse to the trust assets (in case T cannot personally satisfy a judgment obtained by C) then, if C believes he is clearly getting the better of the bargain with T, C has to disclose this to T in order that T does not become guilty of breach of trust for negligently failing to safeguard the interests of the beneficiaries. Creditors are thus effectively placed in the position of a fiduciary."¹³

A third party will be able to take free of the beneficial interests if it qualifies as a bona fide purchaser for value without notice. The problem is that it is not at all clear to what extent a third party will be fixed with constructive notice, that is notice of matters it would have known if it made appropriate enquiries and as to the extent of the enquiries it needs to make.

Part X of the Trustee Act makes it clear what enquiries a third party dealing with a trustee must make in order to protect itself. It does so by deeming a contract to be properly entered into by the trustee if it appears to the third party, after reasonable enquiry, that: (a) the trustee has power to enter into a

¹¹ Trustee (Amendment) Act, 2003, s.16, which added a new Part X (ss. 94-104) into the Trustee Act.

¹² For a discussion of the equivalent provisions in Jersey and Guernsey and a comparison with the BVI provisions, see *Limited Liability for Trustees of Jersey and Guernsey Trusts?* [2019] PCB, Issue 3, 92-94 and *Limited Liability for Trustees? Part II: Practical Implications of Investec v Glenalla for Trustees and Third Parties* [2019] PCB, Issue 5, 132-143.

¹³ *Rights of Creditors Against and Trust Funds*, Trust Law Committee Report (1998), para 3.9.

transaction of the kind in question (e.g. if it is granting security over trust assets, does it have the necessary power to charge those assets?) and (b) if there are any formal requirements for the exercise of that power, the trustee has complied with them (e.g. if protector consent is required, has it been obtained?).

Part X also expressly provides that 'reasonable enquiry' does not extend to enquiry as to whether the exercise of the power would be in breach of any duty of the trustee (other than a duty to comply with the formal requirements for its exercise). The third party does not therefore need to make any further enquiries or be concerned as to whether not the trustee might otherwise be acting in breach of trust.

Unconnected Indebtedness

The second key problem for a third party dealing with trustees is that the trustee may have committed an unconnected breach of trust and is liable to make good that loss to the trust. This is problematic because the third party does not normally have direct rights of recourse against the trust fund, but will only have rights by way of subrogation to the trustee's right. In other words, it effectively steps into the trustee's shoes and can have no greater rights than the trustee. It follows that if the trustee is indebted to the trust due to an entirely unconnected breach of trust, that reduces the third party's right against the trust fund.

A related problem arises if the contractual liability of a trustee to a third party is expressly limited to the extent of the trustee's right of reimbursement from the trust fund. In that situation, if the trustee's entry into the contract is itself a breach of trust, the trustee may have no right to be reimbursed at all, in which case, its liability to the third party under the contract is nil. That now appears to be the default position under Jersey and Guernsey law.¹⁴

This problem is addressed in Part X of the Trustee Act in two ways.

The default position is that, where a contract is properly entered into (or deemed to be properly entered into under the rules outlined above) any indebtedness of the trustee to the trust is disregarded, so even where the third party is relying on the trustee's right of indemnity, the third party does not need to be concerned about whether the trustee might have acted in breach of trust in relation to any unconnected matter in the past or indeed, that it might do so in the future. In those circumstances, the beneficiaries would still have a right to bring proceedings against the trustee to make good that loss to the trust fund.

Secondly, there are optional provisions (section 97) which, if they apply to the trust (a **Section 97 Trust**) the third party has direct rights of recourse against the trust fund, so the indebtedness problem does not apply and the third party's rights are asserted against the trustee in its fiduciary capacity only.

Limited liability for the Trustee

The default position is that, where the trustee discloses its fiduciary capacity (or the third party is otherwise aware of it) the trustee is personally liable only to the extent of the value of the trust fund when the payment falls due.

However, if the trust is a Section 97 Trust, the trustee is not personally liable at all under any contract with a third party properly entered into by the trustee.

Conclusion

Whenever a trustee is intending to enter into a commercial transaction with a third party, it is worth both parties giving some consideration as to whether it might be beneficial to take advantage of the BVI regime in Part X of the Trustee Act. That is now possible, whenever the trust was created and, subject to changing the governing law, whatever law currently governs the trust.

¹⁴ *Investec Trustees Ltd v Glenalla* [2018] UKPC 7; see also the discussion in *Limited liability for Trustees? Part II (n 10)* at 136 et. seq.

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