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Modernisation of the British Virgin Islands Trust legislation

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Legislative amendments to the British Virgin Islands (“BVI”) trust legislation took effect on 9 July 2021 under the Trustee (Amendment) Act, 2021. The reforms introduce welcome improvements to the BVI’s Trustee Act and ensure that the BVI remains a leading offshore jurisdiction for the establishment, administration, and maintenance of trusts.

The legislative amendments to the Trustee Act, 1961 (the “Trustee Act”), which is the main source of legislation concerning BVI trusts, are part of a process of fine-tuning the legislation by way of reforms brought under the Trustee (Amendment) Act, 2021 (the “Amendment Act”) which has introduced the following key changes:

1. **Power of the BVI Court to vary trusts:** making it easier for the BVI Court to approve a variation to a trust without the consent of adult beneficiaries and where such variation is “expedient”.
2. **Codifying the “Hastings-Bass” principle:** providing a clear statutory framework to apply for relief where the Trustee (or other power holder) or any other person beneficially interested in the trust, including the object to the power, has made a mistake in the exercise of their powers.
3. **Extending the “firewall” provisions:** extending the “firewall” or foreign element provisions which protect against a foreign law applying to a BVI trust so that all questions arising are to be determined exclusively by reference to BVI law and expanding the category of “personal relationships” forming the basis of claims against the BVI trust.
4. **Strengthening reserved powers provisions:** introducing a comprehensive set of powers reserved to settlors and “any other person or to any office holder or body, including (but not limited to) a protector”.
5. **Duty to maintain and keep trust records:** amendment of the record keeping obligations imposed on trustees of BVI trusts.

Power of BVI Court to vary trust

The Amendment Act introduces a new section, 58B, which provides that an application may be made by the following parties: the trustee, any person authorised by the trust instrument to apply, or any beneficiary to vary the terms of a BVI trust established after 9 July 2021, or a foreign trust that has changed its governing law to BVI law after such date.

The BVI Court may grant an order varying the trust without the requirement to obtain the consent of the adult beneficiaries if it is “expedient in the circumstances then existing, whether or not the terms of the order may adversely affect any person or purpose”.¹

The BVI Court must have regard, in so far as in the Court’s considers them material and within the its knowledge, to factors such as:

- the wishes of the settlor.
- changes in any circumstances, such as family, fiscal, financial or commercial circumstances, since the trust’s establishment.
- the remoteness of the interest and the protective needs of the individual beneficiaries.

This new standard makes it easier to vary a BVI trust, while still offering the appropriate level of protection to those relevant persons and objects who have full capacity but do not wish to consent to the variation affecting their interest under the trust.

¹ Section 58B(4)

Codifying the Hastings-Bass Rule

Where a trustee or other fiduciary makes a mistake in the exercise of its powers, it stands to reason that innocent beneficiaries, for example, should have relief from the consequences of that mistake. Traditionally, common law courts had recognised wide powers in this regard, relying on the rule in *Re Hastings-Bass*² which concerns the ability or otherwise of a trustee's exercise of their powers in reaching a fiduciary decision.

In reliance on this principle, common law courts had held that trustees' exercise of their power was invalid not only where the power was exercised in bad faith or excessively, but also where the trustees, in exercising their powers, had taken into account relevant matters. The recent line of authority (originating from a UK Supreme Court decision)³ had severely restricted the court's ability to correct such mistakes. If the UK authority was followed in the BVI, it would require the applicant to prove a breach of fiduciary duty in order for the court to set aside a mistaken decision. This would have the potential to set an unreasonably high threshold and deny relief in circumstances where the trustee or other fiduciary had made their decision based on incorrect professional advice. As many exercises of dispositive powers by trustees in the BVI are based on professional advice, this would make it impossible for the BVI court to exercise its corrective jurisdiction.

Fortunately, the recent reforms to the Trustee Act inserts a new section, 59A, which provides a statutory framework for the setting aside of the exercise of fiduciary powers on the grounds of inadequate deliberation by trustees or any other power holder such as a delegate, or indeed a director of a BVI company, a beneficiary of a trust, the enforcer of a purpose trust, or the Attorney-General (where the trust is a charitable trust). Importantly, it is not necessary to prove that the person who exercise the power acted in breach of trust or duty rather, the focus (as in *Hastings-Bass*) is on:

- a) whether in exercising their powers, the power holder did not take into account one or more considerations of fact or law, or both, that were relevant to the exercise of the power, or took one or more such considerations that were irrelevant to exercise into account;
- b) but for that failure, the power holder would not have exercised the power, or would have exercised the power on a different occasion or in a different manner.

As a result of the recent amendments to the Trustee Act, the BVI Court is now empowered to set aside the exercise of a fiduciary's powers with the effect that it will be treated as having never occurred, either in whole or in part, and either unconditionally or on such terms and subject to such conditions as the Court may think fit. The BVI Court can also make such consequential orders as it considers necessary. However, protection is granted to ensure that any orders do not prejudice a bona fide purchaser for value of any trust property who did not have notice of the circumstances behind the exercise of such a power. As such, innocent third parties should not suffer as a result of any orders made under the new section 59A.

The amendments expressly provide that there is no limit or other affect on the law of mistake.

Extension of the “firewall” foreign element provisions

The BVI's firewall legislation in section 83A of the Trustee Act was originally drafted to protect trusts which are governed by the BVI law which are being attacked because a foreign law concerns a party with an interest in the trust assets by virtue of their personal relationship with the settlor (for example, persons claiming as a result of forced heirship).

Questions have therefore arisen as to the application of the firewall provisions and the protection afforded to settlor's descendants once the settlor was no longer living. In order to avoid any technical difficulties in this regard, section 83A of the Trustee Act has been amended by extending the reference to a “personal relationship to the settlor” to include a personal relationship to any beneficiary and personal relationships including stepchildren, or children born by means of artificial fertilisation or surrogacy.

Also, the revised section 83A extends the “firewall” or foreign element provisions which protect against a foreign law applying to a BVI trust so that all questions arising are to be determined exclusively by reference to BVI law.

Reserved powers provisions

A revised section 86 has been introduced which expands the existing provisions on the ability of reserved powers trust. The amendment expressly provides that the reservation or grant of any or all of a comprehensive set of powers reserved to settlors and “any other person or to any office holder or body, including (but not limited to) a protector” shall not invalidate the trust, or prevent the trust taking effect according to its terms, or cause any of the trust property to be part of the settlors estate on death.

² [1975] Ch 25

³ *Pitt v Holt and Futter v Futter* (2011) EWCA Civ 197

Trustee's duty to maintain and keep trusts records

A new duty is imposed on "Relevant Trustees" (defined as any BVI incorporated company and any foreign company registered under the BVI's Business Companies Act, any individual resident in the BVI and any other person who is trustee of a trust administered in whole or in part from the BVI). The duty applies to all "Applicable Trust" (defined as all trust governed by the law of any jurisdiction but excluding implied, constructive or bare trusts or the duties incidental to the office of a personal representative of a deceased estate). The amendment provides that the trustee's duty is to maintain and retain books and records for at least five years whether in or outside the BVI "in such form as is appropriate to the Trust and the trust property".

Conclusion

The recent reforms are a positive step towards the modernisation of the trust legislation in the BVI. This will ensure that the BVI remains an attractive and leading jurisdiction for wealth structuring and management well into the future.

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