

BVI Trusts and Private Client Legislative Updates

The British Virgin Islands ("BVI") have now passed, and brought into effect, significant and welcome changes to its trusts and probate legislation. This update summarises the principal features of these changes that may be of interest to private client practitioners and trustees globally.

The Trustee (Amendment) Act, 2021

This Act makes a number of changes to the Trustee Act law, namely:

The Duty to Maintain and Keep Trust Records

Existing section 2A is repealed and replaced with new section 92 A. The new duty is imposed upon all 'Relevant Trustees'. That term is defined as any company incorporated in the BVI, any foreign company registered under part XI of the Business Companies Act, any individual resident in the BVI and any other person who is a trustee of a trust administered in whole or in part in or from within the BVI.

The duty applies to all 'Applicable Trusts' which is defined as all trusts governed by the law of any jurisdiction (other than an implied, constructive or bare trust or the duties incidental to the office of a personal representative).

The duty itself is to maintain and retain for at least five years, and whether in or outside the BVI, records and underlying documentation of the trust "*in such form as is appropriate to the Trust and the trust property*".

This is a welcome reform clarifying who owes the duty, in respect of which trusts, and crafting

the content of the duty to fit the kind of trust and trust property in question.

New Power of Court to Vary Trusts

New section 58A allows newly created trusts whose governing law is that of the BVI and those, whenever created, whose governing law is changed to that of the BVI, to opt into, with or without modification of, a new jurisdiction conferred upon the Court to vary any provision of the trust.

The Court may exercise the jurisdiction in any case where the making of an order is expedient in the circumstances then existing, whether or not the terms of the order may adversely affect any person or purpose.

The Court must have regard, so far as within the Court's knowledge and so far as it considers material, to a number of factors namely: settlor's wishes, changes in any circumstances since creation of the trust and, in relation to the proposed extinguishment or curtailment of, or imposing any conditions on, any interest, the remoteness of the interest and the protective needs of the individual beneficiaries.

Any application may be made by the trustee, any person authorised by the trust instrument to apply or any object. No order may, however, be made which affects an interest that has vested absolutely and indefeasibly in possession.

Importantly, benefit (or lack of detriment) to persons who cannot consent is not required nor is the consent of any person who is capable of

consenting i.e. in existence, ascertained, and of full capacity.

This is a provision which may be of particular use for tax planning where objects who have full capacity (and who, therefore, under the previous law, would have had to consent to any variation) do not wish to consent to, or otherwise actively participate in, the variation but in whose fiscal interests such variation is nonetheless proposed.

Re-instatement of Hastings-Bass Jurisdiction

New section 59A empowers the Court in relation to the exercise of a fiduciary power, to set aside the exercise of the power, in whole or in part and on such terms if any as it thinks fit, and to make any consequential orders on so doing.

The jurisdiction may be invoked by the power holder, any trustee, any person beneficially interested in the trust, including the object of a power (or any person appointed for the purpose under section 84 (2) or 84 (A) (3) (d) of the Trustee Act in relation to statutory non-charitable purposes trusts), the Attorney-General in respect of charitable trusts and purposes or, with the leave of the Court, any other person.

The jurisdiction applies to exercises of power which predate the coming into effect of the section. It may be exercised if the power holder either did not take into account one or more considerations of fact or law, or both, that were relevant to exercise of the power, or took one or more such considerations that were irrelevant to exercise into account. It must also be established that, but for doing either, the power holder would not have exercised the power, or would have exercised the power on a different occasion or in a different manner.

If set aside, the exercise is treated as never having occurred but the Court may not prejudice a bona fide purchaser of any trust property if without notice of the matters that

allowed the Court to set aside the exercise of power.

This amendment re-instates the law of England and Wales as it was declared by the High Court and Court of Appeal in cases prior to the decision of the Supreme Court in *Pitt v Hot; Futter v Futter*.

The law of mistake is expressly left untouched and, therefore, is the same as declared by the Supreme Court in that case.

Strengthened Firewall Provision

Section 83A is the principal 'conflicts' provision of BVI trust law, settling choice of law questions and establishing the protective 'firewall' behind which BVI trusts exist.

It is now made clear that all questions arising in regard to a BVI trust, and not just those listed in subsection (12), are to be determined exclusively by reference to BVI law.

Furthermore, the category of 'personal relationships' forming the basis of claims against a BVI trust (and which it is an aim of the section to defeat) has been expanded in two ways. First, so that relationships to beneficiaries as well as settlors are now covered and, second, so that step-relationships and children born by artificial fertilisation and surrogacy are also covered.

These welcome reforms reduce the chances of success of claims to invalidate BVI trusts or dispositions into them by reference to foreign laws.

Strengthened Reserved Powers Legislation

New section 86 replaces and very significantly expands the existing provision on the validity of reserved powers trusts.

It expressly provides that the reservation or grant of any or all of a lengthy list of useful and typically reserved powers shall not invalidate the trust, prevent it taking effect according to its

terms, or vest the property in the settlor on death for the purposes of succession.

This provision applies to BVI trusts whenever created.

Application of Part X

New section 104 (2) usefully provides that the provisions of part X, formerly only applying to trusts created on or after 1 March 2004, may be applied by a deed of the trustees to a BVI trust whenever created.

This is particularly useful in that the clarification and / or reform of the bona fide purchaser rule as it applies to interests under BVI trusts, along with the novel and unique provisions allowing for truly limited recourse by a counterparty to trust assets, other than derivatively through the trustee, are routinely incorporated into all new BVI trusts and have proven very useful indeed, particularly in relation to transactional opinion giving.

They also achieve more equitable solutions for creditors of a trust whose claims against the trust assets can, in other jurisdictions, be wiped out by the quantum of unconnected indebtedness of the trustee to the beneficiaries through breach of trust. It is very welcome indeed that trustees of pre-2004 trusts should be able to extend this protection to creditors.

Probates (Resealing) Act, 2021

This Act replaces the former Act and is a most welcome clarification, and expansion, of the jurisdiction to reseat foreign probates.

Formerly, it was unclear which foreign jurisdictions came within the definition of "Her Majesty's dominions" although it was clarified in Registry practice post-1997 that Hong Kong no longer did so (despite a UK statutory instrument, which was not extended to the BVI, preserving the right to re-seal Hong Kong probates in the United Kingdom). Now, the Hong Kong Special Administrative Regions of the People's Republic of China is among the list of 67 scheduled probate jurisdictions whose grants of representation may be resealed in the BVI. Usefully, this list includes all of the United States (including District of Columbia).

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