MAPLES GROUP

UPDATE

British Virgin Islands Trusts: the Inherent Jurisdiction of the Court to Remove and Replace a Trustee

In a recent *ex tempore* decision of the British Virgin Islands ("BVI") Commercial Court (the "BVI Court"), the Honourable Mr Justice Wallbank exercised the BVI Court's inherent jurisdiction to remove and replace the trustee of a BVI charitable purpose trust, upon an application by its settlor, for whom the Maples Group acted.

This decision saw the BVI Court apply English law principles on the exercise of its inherent jurisdiction, finding that "*the welfare of the beneficiaries*" is the paramount consideration in granting such relief.

Statutory Framework

BVI trusts are governed principally by their constitutional deeds and instruments, and also by statute (largely confined to the Trustee Act and Ordinance, respectively).

The BVI Court is empowered by the Trustee Ordinance to remove and replace the trustee of a BVI trust in certain circumstances, and upon application by a party with a beneficial interest in the trust assets. English jurisprudence which speaks to the equivalent English legislative provisions, namely sections 41 and 58 of the Trustee Act 1925, suggest that only an existing trustee or beneficiary will have standing to make such an application under the Act and, importantly, *not* a settlor or protector.

Inherent Jurisdiction

Where someone other than a trustee or beneficiary wishes to pursue an application to remove and replace an existing trustee, they may have recourse to petition the BVI Court's inherent jurisdiction.

The BVI Court has jurisdiction over all trusts governed by the BVI and its inherent jurisdiction might be invoked in certain exceptional circumstances, which were found to exist in this case, as: (i) the current professional trustee, a non-BVI company, was struck off the register of companies in its jurisdiction, and there was no prospect of the settlor or the beneficiaries of the trust being able to take steps to restore it; (ii) several attempts to contact the current trustee were futile; (iii) the current trustee was served with the application but had not engaged in the proceedings; and (iv) due to the trust benefitting charitable *purposes*, rather than individual charities, a remedy under the statutory regime was impracticable as there was no identifiable beneficiary that could bring the claim.

The BVI Court confirmed that the general principle guiding it in the exercise of its inherent, extra-statutory jurisdiction is the welfare of the beneficiaries and the competent administration of the trust in their favour.

In submissions, Scott Tolliss and Martha Ramtahal brought to the BVI Court's attention, and the BVI Court applied, leading Privy Council and English authorities which set out the following, non-exhaustive list of matters which fall to be considered on an application to remove a trustee:

(a) The BVI Court's main guide is the welfare of the beneficiaries;
(b) In cases of positive misconduct, the BVI Court will have no difficulty in removing trustees who have abused their trust;
(c) Where trustees are merely incompetent, that is not generally considered enough; trustees must breach the confidence which comes with a fiduciary relationship;
(d) Removal of a trustee will be appropriate when the continuance of the trustee's office would prevent the trust being properly executed; and
(e) Hostility between trustees and beneficiaries is not of itself a reason for removal.

Decision

Weighing the above considerations in the balance, Justice Wallbank was satisfied that a case had been made out to invoke the BVI Court's inherent jurisdiction, such that the BVI Court should remove the existing trustee and replace it with a suitable alternative.

Comment

This decision demonstrates the willingness of the BVI Court to ensure that trusts settled in the territory are administered properly and effectively, and to protect the welfare of beneficiaries by replacing ineffective, incompetent and / or abusive trustees where it is necessary to do so.

British Virgin Islands

Adrian Francis
+1 284 852 3016
adrian.francis@maples.com

Matthew Freeman
+1 284 852 3011
matthew.freeman@maples.com

Scott Tolliss
+1 284 852 3048
scott.tolliss@maples.com

Martha Ramtahal
+1 284 852 3047
martha.ramtahal@maples.com

February 2022