



## Major Amendments to BVI's Trusts Laws

15 July 2021

The Trustee (Amendment) Act, 2021 came into force on 9 July 2021 introducing a range of important new and updated provisions into the BVI's Trustee Act, 1961 ("TA"). The amendments move the BVI's trusts regime into line with, and in certain aspects ahead of, its competitor jurisdictions in the offshore trusts marketplace. The principal changes are summarised below.

### Powers of the Court to vary trusts without beneficiary consent

A new section 58A TA confers on the Court broad powers to vary the terms of a BVI trust without the requirement to obtain the consent of adult beneficiaries if the variation is considered by the Court "to be expedient in the circumstances then existing, whether or not the terms of the order may adversely affect any person or purpose". The Court's powers extend to varying, adding to, revoking or replacing any or all dispositive provisions, management and administrative powers, and any other provisions of the trust.

The new powers are "opt-in" in the sense that they will apply to a trust only if there is express provision in the trust instrument or, in the case of a trust the governing law of which is being changed to the BVI, express provision in the deed changing the governing law.

It is thought that these powers will be useful in circumstances where it would be in the interests of a beneficiary to make changes to the trust, but the beneficiary is unable to give consent (whether for tax or any other reason), or where a beneficiary with a remote interest is seeking to block changes unjustifiably.

### Setting aside the flawed exercise of a fiduciary power

A new section 59A TA preserves in BVI law what has become known in the trusts world as the "Rule in Re Hastings Bass": the wide jurisdiction of the Court to set aside the exercise of a fiduciary power on the grounds of inadequate deliberation by the power-holder when exercising the power. The application of the rule in England and Wales had been severely curtailed back in 2013 by the UK Supreme Court's decision in the cases of *Pitt v Holt* and *Futter v Futter*: it was held that the remedy would be available only in instances where the power-holder had acted in breach of its duties.

Any concern that the BVI Courts might follow the Supreme Court's lead is removed by the introduction of section 59A TA. The section confers on the Court the discretion to set aside, wholly or in part, the exercise of a fiduciary power if it is satisfied that:

- in exercising the power, the power-holder did not take into account one or more relevant considerations (whether of fact or law), or took into account one or more irrelevant considerations; and
- but for that failure, the power-holder would not have exercised the power at all, or would have exercised it at a different time or in a different manner.



Significantly, there is no requirement that the power-holder, or any advisor to the power-holder, be found to have acted in breach of trust or breach of duty in order for the remedy to be available. Fiduciary power is defined in very broad terms and would include most dispositive, administrative or investment powers. An application under section 59A may be brought by the power-holder, the trustees, any beneficiary (including a discretionary object), the enforcer of a purpose trust, the Attorney-General in respect of a charitable trust, and any other person with leave of the Court.

## Extending the firewall

BVI trusts are created by settlors from all over the world to hold property and benefit beneficiaries in many jurisdictions. No trust exists in a legal vacuum and it is vitally important that trustees, settlors and beneficiaries of BVI trusts should be able to resist claims, or attempts to have a trust set aside or varied, by a foreign court applying foreign law principles which conflict with BVI trust law. Typically, such attacks may arise in the context of succession or matrimonial disputes. Section 83A TA was introduced in 2004 to address these conflicts of laws issues. The new amendment updates and reinforces the section bringing it into line with equivalent legislation in competitor jurisdictions.

The previous section 83A(12) prescribed a list of questions concerning a trust which would fall to be determined exclusively by BVI law. This has now been revised to make it clear that the list is not exhaustive and, consequently, all questions arising in regard to a BVI trust are to be determined by BVI law.

Section 83A(13) imposes what is commonly referred to as the "firewall": previously this provided that no BVI trust or settlement of property into a BVI trust would be set aside or compromised in any way, nor would the capacity of the settlor to make the trust be questioned, by reason of the laws of a foreign jurisdiction not recognising the trust concept or the arrangement offending a person's rights arising under foreign law as the result of a personal relationship to the settlor or heirship rights.

The new amendment extends the application of the firewall in the following ways:

- the definition of "personal relationship" is revised by adding step-children and children born by means of artificial fertilisation or surrogacy;
- in addition to the capacity of the settlor, the capacity of trustees, protectors, enforcers, other trust power-holders, and beneficiaries will now fall to be determined under BVI law; and
- the firewall now protects against rights arising under foreign law as the result of a personal relationship to the settlor or any beneficiary (previously, this was only the settlor).

## Reserved powers

A revised section 86 TA introduces comprehensive provisions addressing the reservation of trust powers to the settlor or the granting of such powers to other parties such as a trust protector or protective committee.

In recent years it has become common practice for settlors to retain varying degrees of controls over the management and administration of their trust. It was considered that the BVI's laws in this regard were somewhat out of date in comparison to those of competitor jurisdictions. The new provisions make it clear that a settlor of a BVI trust may reserve to him- or herself both a limited beneficial interest in the trust property and a wide range of powers in connection with the trust (or grant such powers to any other office holder or committee) in the terms of the trust deed without invalidating the trust or preventing it from taking effect according to its terms, or causing the trust deed to be regarded as a testamentary instrument which would come into effect only on the settlor's death.

Section 86(2) TA contains a list of permitted reserved powers, including:

- power to revoke the trust;
- power to amend the trust deed,
- dispositive powers over trust capital, income or both;
- power to appoint and remove the directors of underlying companies, and to direct how they vote;
- power to direct trust investments;
- power to appoint and remove trustees, protectors and any other office holders;
- power to add and remove beneficiaries;



- power to change the governing law and courts with jurisdiction over the trust; and
- power to apply directions or consent requirements to any of the trustees' powers and functions.

The settlor may (in theory) reserve any or all of the above powers, and the new section applies to any BVI trust, whenever created.

## Trustee record-keeping obligations

A new section 92A requires trustees which are resident in the BVI, whether corporate or individual, to maintain records and underlying documentation of the trust and retain them for at least five years. The records and documentation must be in such form appropriate to the trust and the trust property. Failure to comply with these obligations is an offence leading to a fine of up to ten thousand dollars. This section replaces the previous record keeping obligations for trustees in section 2A TA which have been repealed.

Other more minor tidying-up amendments have also been made to the TA by the new Act.

## Contacts

For further information please contact



David Pytches  
Partner - British Virgin Islands, Cayman Islands  
T. +1 345 814 6831  
M. +1 345 925 6831  
E. david.pytches@walkersglobal.com



Lucy Diggle  
Senior Counsel - British Virgin Islands, Cayman Islands  
T. +1 345 914 4250  
M. +1 345 936 4250  
E. lucy.diggle@walkersglobal.com

### Disclaimer

The information contained in this advisory is necessarily brief and general in nature and does not constitute legal or taxation advice. Appropriate legal or other professional advice should be sought for any specific matter.