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Articles

THE BVI VISTA: JUST HOW UNSPOILT IS IT?

Jonathan Russen QC[*]

INTRODUCTION

Practitioners in the area of offshore trusts will appreciate that the title of this article derives not from any OED definition of a word connoting a particular perspective, even of the idyllic Caribbean type, but instead from the acronym which emerges from the Virgin Island Special Trusts Act 2003 (VISTA). Some commentators would nevertheless say that the VISTA trust – like the STAR trust permitted under the Cayman Islands Trust Law and statutory provisions in other jurisdictions that permit a non-charitable purpose trust to be used as a vehicle for the medium-to-long-term retention of the family business – is the product of real vision on the part of certain professionals within the offshore trust industry. They appreciated the need to make provision for a trust structure that would permit the retention of the family business – and ensure the settlor's continuing involvement in that business – while at the same time meeting the attributes, and securing the essential fiscal advantages of, a valid offshore trust.

Such trust vehicles were perhaps the inevitable result of so much of the wealth in the modern world being attributable to corporate success in business. It is perhaps unsurprising that the strong will and skill of the particular businessman who is responsible for such success may well be the very reasons why he will not easily relinquish control of the corporate structure which has generated the family fortune. Nevertheless, as family patriarch and putative settlor undertaking advance planning for his family's succession to the business (or the proceeds of its eventual sale), he would ordinarily have to contemplate at least some surrender of control. The VISTA trust addresses the apparently conflicting aims of achieving an effective lifetime settlement of a significant shareholding interest, while at the same time securing the settlor's stewardship of the business for the remainder of what he determines to be the length of his working life.

[*] Jonathan Russen QC practises at Maitland Chambers, Lincoln's Inn, London and is called to the Bar in the BVI.

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By accommodating the second of those aims the VISTA trust continues to provoke some basic reactions on the part of any trusts lawyer schooled in principles of equity which are themselves founded upon the assumption that a trust originates when a settlor parts once and for all (and as often as not after his demise) with an initial trust *fund* and which, thereafter, acts as both the source and the repository of a potentially wide range of *investments* undertaken by prudent trustees. The principles of equity and the provisions of statutes based upon the traditional English model rest upon an assumption that the ultimate financial success or failure of a trust does and should rest upon the diligence and skill of the trustees in the reasonably active exercise of their fiduciary powers and obligations. It is therefore counter-intuitive to contemplate a trust where the trustee is disengaged from responsibility for the financial performance of the trust's principal asset and where any duty to preserve or enhance the value of the trust fund is overridden by the purpose of simply retaining shares in a corporate vehicle which pursues its own business objects under the direction of others. A private law purpose trust which ordains those consequences would seem to do so despite, rather than by reason of, the involvement of the trustee from whose office it derives its very name and existence. Yet the VISTA trust is just such a vehicle.

The equity lawyer's intuition is at least temporarily offended because he needs reminding that, under a VISTA trust, the trustee's responsibilities to his beneficiaries do indeed reflect those of a passive shareholder rather than those of an active trustee. It is important also to recognise that this regime of non-intervention by the trustee is one that is imposed upon, rather than chosen by the trustee. There is therefore no question of the trustee – by reason of any act of investment of the trust fund in the 'designated shares' of a VISTA trust on terms that lead him not to be accountable for any adverse consequences – being at risk of what, outside a VISTA, might be a breach of his indisputable, ongoing fiduciary duty to protect the value of the trust fund. The direction (whether general or specific) under s 4(1) of the VISTA which identifies the 'designated shares', and any accretions thereto, is that of the settlor.

THE POINT FOR DISCUSSION

From the summary of its key attributes set out below, it will be appreciated that under the VISTA trust the concept of 'trusteeship' is really defined by that most basic hallmark of a trust – the separation of the legal and beneficial ownership of the trust fund – without much in the way of attendant duties arising out of that separation. Even then, the concept of beneficial ownership – assuming, perhaps a little unrealistically, that the identity and extent of the respective interests do not lie concealed and uncertain under the terms of a discretionary trust – is qualified by a

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provision in the VISTA (s 12) which permits the trust instrument to exclude the rule in *Saunders v Vautier*[1] for the first 20 years of the trust's life.

The purpose of this article is to ask whether, having achieved that basic separation of legal and beneficial ownership, the VISTA trust really can be said to be much more than a bare trust when analysed from the perspective of the suggested duties of the trustee in relation to the designated shares. Does the trust really work in protecting the interest of the beneficiaries when considered against the benchmark of effective fiduciary obligations or (given that the subject matter of the trust is shares in a holding company) when tested against some fundamental principles of company law? And to what extent does the trust's bareness expose the settlor to the risk that other jurisdictions will not pay too much respect to its existence and terms?

HOW DOES THE VISTA TRUST WORK?

Practitioners in the BVI are of course now very familiar with the basic structure of this popular vehicle whose principal components have been crafted by their territory's legislature. The following is a summary of its key attributes.

Non-intervention in the Business

The assets of the VISTA trust will be the 'designated shares' (ie those shares in any BVI company – 'Virgin Island shares' – which are comprised in the trust fund and in respect of which the trust instrument has directed that the VISTA shall apply). The BVI company in which the designated shares are held ('the company' for the purposes of the VISTA) will invariably be a holding company owning, along with any other assets, shares in a trading subsidiary which is incorporated outside the BVI. The trust may therefore be used as a vehicle for holding controlling interests in one or more trading subsidiaries. The sole trustee – the 'designated trustee' – will be a licensed corporate trustee under the BVI Bank and Trust Companies Act 1990 which will accordingly charge a fee for such services as it is able to provide in a manner consistent with the VISTA regime. Despite the nature of the trust asset, corporate control does not lie with the licensed trustee. The trustee itself cannot be a director of the company and its exclusion from management of the company forms part of the primary purpose of the VISTA.

The provisions of a VISTA apply directly to the designated shares but, of course, their effect filters down to the control of any foreign subsidiaries owned by the company. The essentially residual nature of the trustee's powers in relation to the

[1] (1841) Cr & Ph 240.

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company, reflecting a basic regime of non-intervention by the trustee, is such that the subsidiaries are also necessarily beyond his immediate control and influence.

Unlike the trustee, the settlor (or a person or persons nominated by him) may be on the board of the company as well as the underlying trading subsidiary. The trust instrument will invariably include 'office of director rules' (of the kind envisaged by s 7) as to how the trustee will vote the designated shares on resolutions affecting the composition of the company's board; and they may well reserve to the trustee power to replace the board should apparent maladministration by the existing directors justify that step. Nevertheless, whatever the content of the rules, the trustee is under no duty to exercise the voting rights so as to ensure that the current composition of the board conforms to them unless it has actual notice that circumstances requiring such action has arisen. There is, moreover, no duty upon the trustee to enquire whether such circumstances exist.

So far as the ongoing management of the company is concerned, and subject to the express terms of the trust, the trustee is not to exercise the voting rights attached to the designated shares so as to interfere in the management or conduct of the company's business. It is required to leave all decisions over the payment or non-payment of dividends to the company's directors. Section 6(3) of VISTA provides that a trustee of designated shares 'shall take no steps to instigate or support any action by the company against any of its directors for breach of duty to the company' and 'shall not apply to the court for any form of relief or remedy in relation to the company'. Again, this is subject to the terms of the trust, any applicable office of director rules and to the provisions of s 8 addressed next.

Intervention Calls

Section 8 of VISTA (which therefore forms part of the proviso to the general admonition in s 6 against trustee interference) makes provision for an 'interested person' to call upon the trustee to intervene in the affairs of the company to deal with that person's complaint. The definition of 'interested person' extends to beneficiaries of the trust (who include objects of a discretionary power), an enforcer and a protector. However, the complaint has to be on one or more permitted grounds specified by the trust instrument. If no such grounds are specified then s 8 will have no application. An 'intervention call' under s 8 requires the trustee, if he is satisfied that the complaint is substantiated, to 'take such, if any, action as the trustees considers appropriate to deal with the complaint in the interests of the trust'. Section 8(4) says that such action may include changing the directorship of the company, procuring action by the company to recover any losses caused by the conduct giving rise to the complaint and taking appropriate advice about how to address the complaint. In considering and taking action the trustee is to have regard to any wishes of the settlor – which must surely mean previous express wishes

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rather than those manifested in any conduct on his part that may have given rise to the complaint – and the efficient functioning of the company but, subject to any disagreement among the directors as to such risk and to any contrary wishes of the settlor, should disregard 'business risk' (as defined). The section goes on to say – though only in a case where the trust instrument does specify one or more permitted grounds for complaint – that an interested person may require the trustee to provide him with information concerning the affairs of the company and any subsidiary, and that the trustee's reasonable endeavours to provide it shall extend to replacement of the directors. Where there is no 'appointed enquirer' under a duty to make reasonable enquiries about the existence of a permitted ground for complaint, the trustee is required to use all reasonable endeavours to ensure that a least one interested person (and, where practicable, it should be a person who has or is likely to acquire a substantial equitable interest in the designated shares) is given certain information about the trust and the nature of the company's current activities.

Of course, a well-drafted VISTA trust should define with some specificity and foresight the permitted grounds that would justify an intervention by the trustee (including grounds which may not have been foreseen by the settlor and, therefore, in respect of which he may not have expressed any wishes to which the trustee would be obliged have regard).

The Trust to Retain

Section 5 is the express opposite of a trust for sale. Under the section, the designated shares are held by the trustee 'on trust to retain them' and this duty takes precedence over any duty to preserve or enhance the value of the trust fund. Importantly, and predictably from the commercial perspective of a trustee willing to occupy what might be described as a passenger seat in the VISTA vehicle, the trustee shall not be accountable for any losses which may arise out of their retention, including those attributable to speculative or imprudent activities by the company or the acts or omissions (bona fide or otherwise) of its directors.

The s 5 trust to retain the designated shares is subject to the provisions of s 9 of VISTA which confers a limited power of sale upon the trustee. The section says that, subject to the express terms of the trust, the trustee shall have the power (in the management or administration of the trust fund) to sell or otherwise dispose of the designated shares. It goes on to provide that the existence of the power does not carry with it any implied duty to exercise it for the purpose of preserving or enhancing the value of the trust assets and will not render the trustee liable for its non-exercise. Further, unless the trust instrument provides otherwise, the trustee shall not exercise the power of sale or disposal without the consent of the company's director or board (acting by a majority) and any further necessary consent that may be stipulated by the trust instrument. Section 11 of VISTA permits an 'interested

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person' to apply to the court for an order authorising or ordering the sale of the designated shares (notwithstanding the absence of stipulated consents) on the ground that their retention is shown to be no longer compatible with the wishes of the settlor.

The Trustee's General Immunity

The statutory immunity of the trustee under s 5 is further reinforced by s 15 which states that 'a trustee of designated shares shall have no fiduciary responsibility or duty of care in respect of the assets of, or conduct of the affairs of the company, except when acting, or required to act, on an intervention call'. The section then reinforces this removal of the usual incidents of fiduciary office by providing, in effect, that the trustee is relieved of any obligation to inquire into possible grounds for an intervention call or to tip off any interested person in relation to any fact or suspicion concerning the assets of the company and, on that basis and again rather inevitably, also excludes potential liability of the trustee as an accessory to any breach of duty by a director of the company.

Only s 10 of VISTA uses language of enforcement against the trustee by referring to circumstances where there is a 'breach of duty or obligation imposed by this Act' on the trustee. In such cases an interested person, or a director, or person who would be a director had the trustee complied with any s 7 office of director rules, may apply to the court for relief. If the court is satisfied the application is well-founded it may grant relief by making an order which is designed to achieve, as nearly as it might be, the outcome that would have prevailed had the trustee not been guilty of the breach. Section 10 goes on to say that the breach is actionable in civil proceedings as a breach of trust and proceedings may be brought in anticipation of such a breach. However, unless the trust instrument expressly permits, complaints about acts or omissions by a director of the company cannot be used as the basis for such proceedings so as to side-step the implementation (by the trustee) of any office of director rules or the intervention call procedure under s 8.

THE TRUSTEE'S DUTIES AND OBLIGATIONS

All of the statutory provisions mentioned above are designed to support what s 3 of VISTA identifies as the primary purpose of the Act: to enable trusts to be established under which the designated shares may be retained indefinitely and where the management of the company may be carried out by the directors without any power of intervention being exercised by the trustee.

This essential purpose goes far beyond the more familiar appearance within a traditional trust deed of an exclusion clause which (subject usually to a proviso that covers any wilful default on his part) relieves the trustee of liability for failing to

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observe the 'prudent man of business' rule and the standards laid down in *Bartlett v Barclays Bank Trust Co Ltd*[2] in relation to the monitoring of, and, as appropriate, intervention in the affairs of any trading company in which the trust has a controlling interest.

Section 10 of VISTA nevertheless proceeds on the basis that the trustee has *some* duties and obligations of a fiduciary nature (albeit statutory in their origin) because it expressly contemplates that they are susceptible to enforcement and may lead to trustee accountability. That said, the reader of s 10 might perhaps be forgiven for thinking (in the light of the sections which precede it) that he has missed something significant in his scrutiny of the earlier provisions.

Of course, there is the possibility that s 10 might be invoked to restrain the trustee from seeking to intervene, without justification, in the management or control of the company (or its subsidiary) in a way that offends the basic VISTA regime. But what *positive* duties and obligations imposed by the Act did the statutory draftsman also have in mind as the potential basis for an application to the court for relief or for civil proceedings against the trustee? The candidates are the following:

(1) The duty to retain designated shares: s 5. However, as observance of this duty carries with it express protection against accountability for any loss resulting from their retention, and s 9(3) reinforces the primary purpose of retention by providing that the trustee shall not dispose of the shares without the designated consents, it seems inconceivable that the professional, licensed trustee would take it upon itself to breach this duty in a way that would trigger the operation of s 10.

(2) The duty, triggered only by actual notice that things are not as they should be, to exercise voting and other powers to ensure both that the company has the requisite number of directors and that their identity conforms to any office of director rules: s 7(3) and (9). As already noted above, however, the trustee is not obliged to make inquiries as to the current state of affairs that might warrant a change. And if there are no applicable office of director rules or the trustee concludes in good faith that it would, among other reasons, be impracticable or plainly inconsistent with the wishes of the settlor to ensure that any such rules are complied with ('an exempted case') then the second limb of the duty does not apply. What appears to be the first positive duty upon the trustee under the VISTA, requiring some action on its part, is therefore a very heavily qualified one.

(3) The obligations – noted above – which arise under s 8 where the trust

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[2] [1980] Ch 515.

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instrument specifies permitted grounds for complaint and are designed to facilitate an interested person or appointed enquirer obtaining information that might inform any decision whether or not to make an intervention call upon the trustee.

(4) The obligation, upon receiving an intervention call, and 'if satisfied that the complaint is substantiated', to take 'such, if any, action as the trustee considers appropriate to deal with the complaint in the interests of the trust': s 8(3). The provisions of s 8 have been summarised above. They are significantly qualified by the direction that, unless disagreement at board level or the settlor's wishes requires otherwise, the trustee shall disregard 'business risk' in relation to the company or its trading subsidiary and need not be concerned with risks attached to the business 'when conducted in the manner in which it has in fact been conducted'.

The reference in s 10 to any duty or obligation 'imposed by this Act' appears to exclude the possibility of its provisions being invoked in support of proceedings based upon provisions of the trust instrument itself: for example, office of director rules which put the trustee upon inquiry as to the existence or otherwise of a certain state of affairs. Statutes sometimes contemplate the enforceability of obligations 'imposed by *or under* this Act' in order to embrace any secondary legislation, or rules, made pursuant to its principal provisions but VISTA does not do so expressly. Unless s 10 is to be given a liberal interpretation, a complainant cannot invoke against the trustee requirements placed upon it under office of director rules that are more onerous than the qualified s 7 obligation to act only when the trustee has actual notice of matters justifying that course.

The inclusion, if only for the protection of the trustee's professional reputation, of bespoke provisions in the trust instrument which enable the trustee to demand full information about the activities of the underlying companies – often in support of particular rules for the removal of directors from office upon the discovery of specified prohibited activity – will, therefore, probably not carry with them any legal accountability of the trustee to his beneficiaries. Indeed, the trustee would think twice about the wisdom of stipulating for such terms if their inclusion was seen to jeopardise the protection afforded by s 15.

Of the obligations enumerated above, only the second and last bear some resemblance to the traditional concept of an active trustee taking steps to protect the assets of the trust when their value is thought to be in jeopardy. Yet the first of those is vulnerable to the trustee having a blind eye which does not see the relevant trigger events and, whatever may transpire so far as the particular composition of the company's board is concerned, it must also be read subject to the regime of non-interference prescribed by s 6. As to the obligation to act on an intervention call,

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s 8 leaves much to the subjective opinion of the trustee as to whether the complaint is substantiated and what if any action is appropriate in the light of it. Nevertheless, the section does at least assume that one of the specific steps which a trustee may take in response to a well-founded intervention call is that of 'procuring action by the company to recover any losses caused by the conduct giving rise to the complaint'.

PROBLEMS OF ENFORCEMENT

In view of the significant qualifications upon the trustee's obligations one has to question whether s 10 really introduces more in the way of gums than teeth to the essentially passive environment of the VISTA trust.

This part of the article addresses the obstacles which a beneficiary of a VISTA trust is likely to face in seeking to hold his trustee properly accountable for the performance of such duties as the trustee owes.

The Purpose behind s 10

Even though it would fall within the scope of s 10, the rather unrealistic scenario of the trustee taking it upon itself to offend the provisions of s 6(3), by interfering in the affairs of the company or the composition of its board – when that step is neither justified by actual notice on the part of the trustee nor by a well-founded intervention call – can probably be put to one side. It would be a bizarre step for the licensed trustee, whose remoteness from the affairs of the company carries with it the protection under s 15, to act in such a way. Whether the directors would permit such officious interference by the trustee to go unchallenged and have deleterious consequences for the company (and, thereby, the value of the designated shares) is an entirely separate question. Further, although s 10(2) does specifically provide for protection of any bona fide purchaser from the trustee, it seems equally unlikely (for the reason already addressed above) that the trustee would decide to sell the designated shares without first obtaining the consents which, subject to the provisions of the trust instrument, are required under s 9(3) even if the purchaser was prepared to run the risk (assuming it exists under the company's articles) that the board might later refuse to register his transfer.

The more obvious scenario in which s 10 might be invoked is, therefore, clearly one where it can be shown that the trustee *should have acted* to implement any office of director rules or acted upon an intervention call. One of the situations in which the protection of the trustee under s 15 is lifted is where the trustee is 'acting, or required to act, on an intervention call'. So the question then arises as to how likely it is that the trustee might, if necessary, be compelled to act on the basis of what he has discovered or what has been made known to him in relation to the affairs of the

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company (s 10(1) and (2)) or, if it is too late for such remedial steps to be taken, be held accountable for breach of trust on the ground of its failure to act (s 10(4) and (5)). For the purpose of addressing this question it is presumed that the trust instrument contains relevant office of director rules and specifies permitted grounds for complaint and that the relevant trigger for action under s 7(9) or s 8(3) has arisen.

Whether the application to court under s 10 is made in anticipation of a breach by the trustee or as a result of a past breach, the reference point for any complaint against the trustee must be its failure to procure change in the composition of the company's board or to take action to redress the wrong to the company. So far as the latter is concerned, s 8(4) refers to action by the company to recover loss caused by those running the company.

Section 7(4) of VISTA makes it clear that a director of the company does not owe fiduciary or other obligations either under the trust or to the trustee but states 'nothing in this subsection shall affect any duty which that person owes, as a director, to the company'. It obviously follows that the directors of any trading subsidiary do not owe the trust or the trustee any duties though, again, the directors of that subsidiary will owe it (the subsidiary) whatever substantive duties may be owed under its law of incorporation.

As explained above, the real value of the company shares subject to the VISTA trust will derive from the assets and business of that trading subsidiary. Actual or anticipated harm to the value of the trust asset will therefore ultimately be traceable to things done by (or to) the subsidiary, whether or not the directors of the BVI company have given them their blessing or turned a blind eye to them.

If the trustee is itself to be held accountable under s 10, it therefore becomes necessary to establish how, and upon what basis, it can be said that the trustee ought to have procured action by the BVI company, in the manner envisaged by s 8(4), so as to recover losses caused by the activities of the trading subsidiary.

It is as this point that difficulties in the way of anticipated enforcement against the (supposedly) defaulting trustee begin to emerge.

Difficulties in the Implementation of s 10

Let it be assumed that the trading subsidiary has been the victim of what an English (or BVI) lawyer would describe as a breach of fiduciary duty by one or more of its directors through the misappropriation of its assets for personal benefit. This is, of course, ordinarily a matter that would cause the right-thinking members of the subsidiary's board to act by causing their company to bring legal proceedings to redress the breach. If, however, there are no such innocents, or there are but they are in the minority, then – assuming the law of the relevant jurisdiction so permits – a

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minority shareholder may seek permission to bring a derivative action on behalf of and for the benefit of the subsidiary. This would enable the company in the BVI (in which the trust may hold only a minority shareholding) to initiate action against the wrongdoers. But what if the directors of the BVI company are also the wrongdoing directors of the subsidiary, or at least allied with them, so that the wrongdoers have influence at every level of the corporate chain and the board of the parent will not sanction such litigation?

What steps can the trustee (as a minority shareholder) actually take under s 8(4) to 'procure action by the company to recover any losses caused by the conduct giving rise to the complaint'? And how is the loss to the BVI company (as a shareholder in the subsidiary which is the direct victim of the wrongdoing) to be quantified? Still more so, how is the loss to the trust (through its shareholding in the BVI company) to be quantified for the purposes of s 10(4) on the assumption that the trustee can be shown to be accountable because it has failed in its duty to act?

The answers to these questions are fraught with difficulty and together they suggest that there may be little comfort for beneficiaries of the VISTA trust outside the protection of any office of director rules included within the trust instrument. The problems include the following:

(1) The permissive language of s 8(3) and (4). The trustee is given a degree of discretion in deciding how to respond to a well-founded intervention call. Procuring action by the company to recover loss is listed as one form of action 'if any . . . as the trustee considers appropriate'. Section 8(6) reinforces the trustee's discretion to decide 'not to act' on an intervention call. This suggests that any claim seeking to make the trustee accountable for his inaction may need to establish something approaching bad faith on the trustee's part.

(2) The obstacles in the way of what might be described as a double or multiple derivative action ('double' or 'multiple' according to whether or not the wronged company is a direct subsidiary of the BVI company or a sub-subsidiary). The provisions of the VISTA apply to a trust fund comprising the shares in the BVI company. This shareholding enables the trustee to complain about the manner in which the affairs of the company are being conducted; and that could extend to a complaint that its board has condoned the wrongdoing at the subsidiary. The board's inaction may justify the trustee itself applying for relief on behalf of the company under the relevant BVI company legislation. Section 6(3) of VISTA provides that the trustee shall not apply to the court for such relief unless that step is justified by an intervention call (or office of director rules). Even if there are excepted circumstances permitting such action by the trustee, the trust's holding of designated shares may nevertheless fail to provide the trustee with any standing to apply (to

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whichever court has jurisdiction over the subsidiary) for relief to redress the wrongs at subsidiary level which have adversely affected the value of the trust's shareholding. The material points are as follows:

(a) Under Part XA of the BVI Business Companies Act 2004 (the 2004 Act), as amended, the trustee may seek leave to bring proceedings in the name of and on behalf of the company *of which it is a member*. Section 184C makes provision for such a derivative action by a member subject to factors enumerated within the section which affect the grant of leave, such as the prospects of success of the proposed proceedings, the views of the company's directors 'on commercial matters' and whether an alternative remedy is available. Importantly, however, s 184C(6) states that '[E]xcept as provided in this section, a member is not entitled to bring or intervene in any proceedings in the name of or on behalf of a company'. This provision is the equivalent of s 260(2) in the English Companies Act 2006 and therefore differs from the Hong Kong companies legislation which was considered by the Court of Final Appeal of Hong Kong in *Waddington Ltd v Chan Chun Hoo*.[3] In *Waddington* the court noted that but for its 'unusual' preservation of the common law derivative action in parallel with the one created by statute, the plaintiff could not have maintained a multiple derivative action. The provisions of the Hong Kong legislation (referring only to proceedings on behalf of 'the specified corporation' by a member of that corporation) sustained only a simple derivative action and – unlike legislation in Australia, New Zealand, Canada and Singapore – would not have supported the pursuit of a double or multiple derivative action in relation to related or affiliated companies. It may well be that the VISTA trustee, as a member of the parent company, may be able to pursue a multiple derivative action if the defrauded subsidiary is incorporated in a jurisdiction whose legislation so permits but those jurisdictions do not include England or the BVI. So far as English law is concerned, Lord Millett (who was a member of the court in *Waddington*) has since observed '[t]he moral for would be fraudsters is simple; choose an English company, and be careful to defraud its subsidiary and not the company itself'.[4]

(b) Part XA of the 2004 Act also permits a member of a company to apply to the court for relief where the company or any director is engaged in conduct that contravenes the Act or the memorandum or articles of the

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3 (2008) 11 HKCFAR 370.

4 See 'Multiple derivative actions'. *Gore-Browne on Companies*, August 2010 Bulletin (Jordan Publishing Ltd).

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company. Section 184B contemplates an order that the company or its director shall take steps to remedy the contravention. This might be argued to include a failure by the directors to fulfil their duty under s 120 to act in the best interests of the company by causing it to pursue legal proceedings against the directors of the subsidiary. However, even if the subsection can be invoked to compel observance of such substantive or fiduciary duties, as opposed to ensuring compliance of what might be described as more administrative functions of the company such as filing accounts, it seems very unlikely that the court would be persuaded to grant relief under s 184B that would circumvent the difficulties in the way of a double derivative action by the member. That would be the effect of any order, made on the application of a member, which compelled the company's board to bring proceedings against the immediate subsidiary's directors. In any event, such novel relief would provide no solution to the problem which might arise (in a relevant jurisdiction like England or the BVI) where the proposed defendants are directors of a sub-subsidiary of the BVI company so that even the ultimate parent company falls foul of obstacles in the way of a double derivative action.

(c) Section 184I of the 2004 Act also enables the BVI court to grant a member of the company relief on the ground that the acts of the company have been, or are likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him in that capacity. As Lord Millett NPJ observed in *Waddington*, there is some overlap between unfair prejudice proceedings and the derivative action but they serve essentially different functions. The former are concerned to bring mismanagement to an end whereas the latter are concerned to provide a remedy for misconduct. While a failure by the board of the BVI parent to take steps to render the directors of its subsidiary (or sub-subsidiary) financially accountable for their actions may well itself be unfairly prejudicial to the members of the BVI company, the type of relief that may be granted under s 184I – including, perhaps most obviously, a buy-out of the complainant's shareholding at proper value – is neither so obviously justified nor attractive from the viewpoint of a trustee with an overriding duty to retain the designated shareholding. Unlike the equivalent English statutory provision (which also does not purport to contain an exhaustive list of the available remedies) s 184I(2)(b) does contemplate that the trustee, as member, might be paid financial compensation in respect of the prejudicial conduct, otherwise than part and parcel of the price payable on a share buy-out. However, such private compensation might well be said not to be 'just and equitable' because it overlooks the interests of creditors and risks offending the principle against the recovery of reflective loss

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mentioned below.[5] And, as with s 184B, there must be real doubt as to whether the court would be persuaded to 'regulate the future conduct of the company's affairs' by directing that it brings its own derivative claim against the subsidiary or (assuming the law of the relevant jurisdiction permits it) the sub-subsidiary. There will of course always be scope for exceptions but the English case-law generally favours a 'clean break' solution where the aggrieved petitioner has made out his case.[6]

(d) The above difficulties in the way of a derivative claim brought by or at the instance of the VISTA trustee nevertheless leave open the possibility of the trustee seeking to recover loss (in the value of the designated shareholding) by bringing proceedings against any director of the company who has condoned the wrongdoing at subsidiary level, and possibly doing so by invoking s 184I(2)(b). However, under principles of English company law, such loss is generally irrecoverable by a shareholder because it involves recovery at the expense of the company (and its creditors and other shareholders) whose assets include its own claim to compensation of which the shareholder's loss is only partly reflective: see *Johnson v Gore Wood & Co (a firm)*.[7] The derivative claim, when and where permitted, is an exception to that principle. On the facts assumed here the reflective nature of the trust's loss might even be described as refracted loss given that direct loss is one suffered by the company's subsidiary rather than the company itself.

(3) The issue as to how any financial relief based upon the trustee's culpable failure to act in accordance with s 8(4) of VISTA is to be reconciled with the provisions of ss 5 and 15. The following points fall to be considered in connection with this particular issue:

(a) As already noted, s 5 imposes upon the trustee the obligation to retain the designated shares and observance of that obligation carries with it a considerable degree of immunity. It is true that, in conferring such immunity, it is the *disposal* of the shares which is identified by the section as the counterpoint to their retention and as the event which would have

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5 See the comments of the Hong Kong Court of Final Appeal in *Re Chime Corp* [2004] 7 HKCFAR 546, at paras [25] and [46] upon *Re Brightview Ltd; Atlasview Ltd v Brightview Ltd; Atlasview Ltd v Reedbest Properties Ltd* [2004] EWHC 1056 (Ch), [2004] 2 BCLC 191, paras [55], [58]–[64].

6 For such an exception see *Hawkes v Cuddy; Re Neath Rugby Ltd* [2009] EWCA Civ 291, [2009] 2 BCLC 427.

7 [2002] 2 AC 1, pp 62–63. There may be exceptions to the rule – see the review of the authorities in *Webster v Sanderson* [2009] EWCA Civ 830, [2009] 2 BCLC 542, paras [26]–[37] – but outwitting legislative obstacles to a double or multiple derivative action is almost certainly not one of them.

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avoided any loss for which a trustee would otherwise be liable: the trustee is not to be liable for not having sold them. However, the specific causes of loss arising, directly or indirectly, from the retention of the shares include a 'decrease in [their] value' and 'any act or omission of the directors of the company, regardless of whether it is made or carried out in good faith'. By s 5(5) the trustee's immunity is extended to these same causes of loss within the affairs of any subsidiary of the company. Although it will be said that s 5 contains no express protection for a trustee who fails to exhaust the legal rights of an aggrieved shareholder while the shares are retained, its provisions do not lie very happily alongside an assumption that the trustee might in some circumstances be financially liable for its failure to cause the company to redress the wrongs directly or indirectly done to it. Unlike s 6 (which restrains the trustee from instigating action by the company against its directors for breach of duty) s 5 is not expressly made subject to ss 7 and 8. The argument is an unattractive one, and was surely not contemplated by the draftsman of the VISTA, but the language of s 5 does appear to provide the trustee with at least an argument that the mere retention of the shares without further action on his part – including any action which might have been taken in response to an intervention call – carries with it the full s 5 immunity. The argument is reinforced by permissive language in which the trustee's 'obligations' under s 8 are expressed.

(b) Section 15(2)(c) expressly provides that the trustee is not to be liable 'as accessory to a director's breach of duty' for a failure to take action even where he is aware of such a breach. This, of course, addresses the trustee's potential liability – as a passive accessory rather than, of course, as a wrongful recipient – in respect of the director's ill-gotten gains, and it is to be noted that s 15(1) assumes that the trustee may be under a 'fiduciary responsibility or duty of care' – giving rise to a claim for equitable compensation or damages – when it is 'required to act' on an intervention call. However, it is at this point that the permissive language of s 8 again raises a question mark. Under s 8, the trustee is not necessarily obliged to act upon an intervention call even if it is satisfied the complaint has been substantiated. How can the trustee be liable in damages for breach of a 'duty of care' when any objective standard of care is expressly displaced by a discretion to 'take such, if any, action as the trustee considers appropriate'?

(c) Even if the last two points are not thought to present any objection in principle to holding the VISTA trustee financially accountable for its failure to act, the difficulties highlighted above in connection with the double or multiple derivative action raise questions as to the proper

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> measure of accountability. The premise behind s 10 for compensation against the trustee is that, as a shareholder, the trustee was indeed competent to procure financial redress for the subsidiary, or its parent, and yet failed to act to achieve that result. Yet the highlighted difficulties indicate that the premise may not be a sound one: the exclusionary rule confirmed by *Johnson v Gore Wood & Co* is founded upon the principle that only the trustee may sue for a breach of duty resulting in damage to the trust assets but, in relation to damage to corporate interests caused by wrongdoing directors, it is the company (not the VISTA trustee) which occupies that position. There may therefore be real force in the trustee's riposte that it cannot be held liable for a failure to pursue what in truth was a 'non-claim'.

The problems identified above suggest that the only effective action which may be available to a trustee who has knowledge that something is amiss within the corporate structure may be limited to the invocation of office of director rules (if any) incorporated in the trust deed. However, procuring change in the composition of the parent's board may not necessarily lead to redress for past wrongs done to the company by the outgoing directors.

POTENTIAL RECOGNITION ISSUES

The above analysis suggests that, whether or not full advantage is taken of statutory provisions permitting an entirely supine trusteeship, a VISTA trust may well prove to be an extremely lightweight vehicle when it comes to establishing the trustee's accountability to its beneficiaries.

However, that is not to suggest with any real seriousness that it cannot properly be categorised as a trust at all.

Under the provisions of s 83A of the Trustee Ordinance 1961 (the 1961 Ordinance) – the BVI's principal piece of legislation governing trusts – it is the internal law of the BVI which (to the exclusion of any choice of law rules under principles of private international law) will determine whether or not the designated shares in the BVI company have been effectively settled on trust. Despite the trustee's essentially passive control of the designated shareholding, the VISTA trust does at least meet the basic criterion of achieving a separation of the legal from the beneficial interest in the trust asset. Section 2(2) of the 1961 Ordinance – reflecting Art 2 of the Hague Convention on the Law Applicable to Trusts and on their Recognition 1985 (the Hague Convention) – refers to the trust assets being under the control of the trustee 'for the benefit of a beneficiary or for a special purpose'.

Section 2(3) goes on to identify the third characteristic of a trust as follows:

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> 'the trustee has the power and duty in respect of which he is accountable to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed on him by law.'

Tested against that benchmark and the assumptions which the traditional trusts lawyer brings to the issue, the VISTA trust is shown to be wanting, though the point has been made elsewhere that the language of Art 2 is actually wide enough to extend to situations where the trustee's accountability is to *the settlor* (or an enforcer).[8] Subject, therefore, to the risk that any trust which creates only accountability to the settlor might be viewed as a sham, the rather marginal nature of the beneficiary's rights under a VISTA trust is not a reason for striking it down.

There ought not to be any serious dispute that, even where the terms of the trust instrument incorporate office of director rules or create a springboard for an intervention call under s 8, the VISTA trust stretches to their very limit the concepts of 'control', 'management', 'employment' and 'disposal' as those are identified in the 1961 Ordinance and the Hague Convention. However, whatever criticisms may be made about the adequacy of the VISTA trust from the perspective of beneficiaries being able to hold their trustee satisfactorily to account, it equally cannot sensibly be suggested that the High Court of the BVI might seriously question the essential validity of this vehicle expressly recognised by statute.

Whether other jurisdictions would be so benign in their consideration of the VISTA trust perhaps remains to be seen, especially where its terms appear to undermine the enforceability of the so-called 'irreducible core of obligations owed by the trustees to the beneficiaries' which is treated in English law as fundamental to the concept of a trust.[9] The absence of any specified grounds for an intervention call or of an appointed enquirer under s 8 would only heighten this concern. One experienced trusts lawyer now practising in the BVI has held out the possibility that, if full advantage is taken of the provisions of the VISTA to minimise the scope for the trustee being called to account to his beneficiaries for the actions of those in control of the company, an English court might refuse to recognise it as a trust by acting upon the public policy exception to recognition which exists under the Hague Convention.[10]

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8 See *Underhill & Hayton's Law of Trusts and Trustees* (Butterworths Law, 18th edn, 2010), at para 100.59.

9 *Armitage v Nurse* [1998] Ch 241, at p 253H.

10 See the article by R Davern, 'What "special" means in the context of the Virgin Islands Special Trusts Act' (September 2010) to be found online at http://www.conyersdill.com/publications. *Underhill & Hayton* op cit n 8, above, at para 100.209, has raised the same question in relation to a Cayman Islands STAR trust where the beneficiaries are not expressly appointed as enforcers.

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It would, however, be a very ambitious argument which rested upon the assertion that the VISTA trust (in its most bare form) offends English public policy because, when tested against principles of English trust law, it is somehow a 'sham' because it is not what it purports to be; namely a trust. Any challenge which is aimed at what might be described as 'a piercing of the fiduciary veil', to the detriment of its settlor and by reference to English law principles of 'sham', would have to recognise that the mere presence of some third party beneficial interest distinct from the settlor's own interests, will probably be fatal to the claim.[11] One therefore comes back to the point that, exiguous though they may be under a VISTA trust, the existence of *some* rights in the beneficiaries is an indication that there is indeed a valid trust. Moreover, there is a fundamental difference between a situation where the trustee appears to have full fiduciary powers under the trust deed, but they are said to be illusory because it was always intended the trustee would act as the settlor's stooge, and one where the real complaint is that the trustee has been endowed with precious little in the way of powers in the first place. It is more often than not the case that trust deeds which are said to conceal the true ownership of the trust fund tend to be fulsome, rather than manifestly wanting, in their enumeration of a set of fiduciary powers which, at least at first blush, appear to put distance between the settlor and the fund.

An English court would also be extremely wary about reaching a finding (as it would have to) that the professional trustee was privy to a sham arrangement in agreeing to become trustee of a vehicle which is expressly recognised by the BVI statute; and one assumes the same caution might arise in any consideration of the Hague Convention's public policy exception to recognition.

Apart from the risk of it simply not being recognised as a trust in foreign proceedings, the legislators in the BVI have otherwise done their best to ensure that the VISTA trust should not be vulnerable to the substantive provisions of certain foreign laws. Section 83(A) of the 1961 Ordinance makes provision that no BVI trust is to be treated as void, voidable or liable to be set aside by reference to any foreign law which recognises heirship or other 'personal relationship' rights and that no trustee or beneficiary shall be exposed to a liability on the basis that the trust avoids or defeats a claim against the settlor based upon such rights (unless the foreign law in question is contained in a UK statute, or secondary legislation, which has been incorporated into the law of the BVI). Any foreign judgment based upon such rights shall not, on public policy grounds, be recognised or enforced in the BVI.

This provision is similar to statutory provisions in other offshore jurisdictions which (from the perspective of an English lawyer who may happily ignore forced heirship

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[11] See the principles summarised by Munby J in *A v A* [2007] EWHC 99 (Fam), [2007] 2 FLR 467, at paras [14]–[21], [32]–[54].

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issues) are designed to discourage orders being made in matrimonial ancillary relief proceedings which purport to vary trusts governed by a foreign law and under which one of the parties to the proceedings is said to have an interest. While it obviously cannot deprive the English court of its own statutory power, in ancillary relief proceedings, to vary any overseas trust which may be categorised as 'nuptial' or to treat the trust assets as part of the financial resources of the individual before it, the provisions of s 83A are likely to fortify the BVI trustee in its likely conclusion that (whether or not it is joined as a party to the matrimonial proceedings for the purpose of being given judicious and judicial encouragement to fund the divorce) the English proceedings may safely be ignored as lacking teeth when it comes to enforcement.[12]

Nevertheless, and this is a serious point from the perspective of a settlor of a VISTA trust who is unfortunate enough to suffer a later divorce, the basic nature of the trust is such that the divorce court may well be persuaded that his inclusion within the class of its discretionary objects, coupled with his retention of control over the company which creates the value in the trust's shareholding, are such as to justify the trust fund being treated as part of his own financial resources; rather than as assets of a dynastic trust and, on that basis, perhaps truly beyond his reach.[13] The risk of it doing so would seem to be heightened if the trust instrument specifies that it is the settlor/divorcee who, for s 9 purposes, may provide consent to a sale of the designated shareholding that would unlock such value. If the risk materialises, it would then be for the trustee – no doubt acting at the direction of the BVI court – to decide whether the use of any discretionary, dispositive powers (which does not offend the underlying though qualified trust to retain) might alleviate the consequences of such a finding against the settlor.

Both English matrimonial law and its general law of property have long been astute to protect victims of what used to be described as 'fraudulent conveyances'.[14] Clearly, there is no reason to assume that a VISTA trust will be any more susceptible

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12 See the observations of Holman J in *Mubarak v Mubarik* [2007] EWHC 220 (Fam), [2007] 2 FLR 364, at paras [139]–[149] in relation to potential issues of enforcement of an English order varying a Jersey trust. In the event, the Royal Court held that the provisions of the Jersey statute precluded enforcement, as such, of the order made in the matrimonial proceedings; though the court might, in a particular case and having regard to the interests of beneficiaries, give directions to the trustees to achieve its objective: see *In re IMK Family Trust* (2008) JLR 250, at para [76]. The enforcement point was not addressed on the appeal: *Mubarik v Mubarak* (2008) JLR 430, at paras [132]–[133].

13 Compare *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246.

14 See s 37 of the Matrimonial Causes Act 1973 and the more general s 423 of the Insolvency Act 1986 which despite using slightly different language (see *Trowbridge v Trowbridge* [2002] EWHC 3114 (Ch), [2003] 2 FLR 231) are of substantially the same effect in respectively addressing challenges to transactions that are designed to defeat an ancillary relief claim or the claims of creditors.

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to these provisions that any other type of BVI or other offshore trust unless, of course, the general freedom from trustee interference provides an additional temptation for a settlor with an ulterior purpose to opt for the VISTA vehicle.

Any English settlor/beneficiary of a BVI trust acting with any such improper motive ought to be aware of the risk, should he ever become bankrupt, that the courts in the BVI ought to recognise an English order setting aside a trust created for that wrongful purpose, at least if the order has been sought by his trustee in bankruptcy. Reciprocal arrangements between the UK and the BVI provide for co-operation in cross-border insolvency matters. So far as assistance within the BVI to overseas 'insolvency officers' is concerned, these are to be found in Part XVIII of the Territory's Insolvency Act 2003. They were inspired by the UNCITRAL Model Law on cross-border insolvency (later adopted by the BVI on the basis of reciprocity so that the counterparty jurisdiction must also have adopted the Model Law) and they provide for a result which is both consistent with Art 15(e) of the Hague Convention and the general principle of English private international law that 'bankruptcy, whether personal or corporate, should be unitary and universal'.[15] The trustee of the BVI trust ought, of course, to have had an opportunity to be heard in the English proceedings and it is important to emphasise that the English order must be capable of being analysed (from the BVI viewpoint) as part of some foreign *insolvency* proceedings. Moreover, the BVI court may refuse its co-operation on the ground that it would be contrary to public policy (a ground of refusal expressly contemplated by s 439 of the 2003 Act) and it would be very likely to do so if the foreign court was proceeding not on the basis that the VISTA trust was an otherwise valid transaction to be set aside in the interests of creditors but instead, and on the kind of reasoning at least contemplated above, never a valid trust at all.

CONCLUSION

By rules which marginalise the role of the trustee, the VISTA trust undoubtedly achieves for the settlor the kind of control to which he has grown accustomed in his onshore corporate structure. Whether there has, on a higher level, been a full appreciation of the true extent of the price which beneficiaries of the trust have to pay as a result of such control is less clear.

Despite the potential issues raised by the last section of this article, the VISTA trust will no doubt overcome the basic hurdles presented on any test of its essential validity. However, the pre-ordained subservience of the trustee – in relation to the management, employment and disposal of the subject matter of the trust – is such that the operation of company law principles may well undermine the rights of the

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[15] See *Rubin v Eurofinance SA* [2010] EWCA Civ 895, [2010] NLJR 1192, at para [62], per Ward LJ.

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beneficiary further than the draftsman of the VISTA has perhaps foreseen. The true extent of the potential pitfalls and weaknesses of the VISTA trust structure remain to be fully explored.

Jonathan Russen QC
Maitland Chambers
7 Stone Buildings
Lincoln's Inn
London WC2A 3SZ

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