The BVI VISTA legislation: refining the law to promote flexibility

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Introduction

The concept of the VISTA trust was introduced in March 2004 by the Virgin Islands Special Trusts Act, 2003 (VISTA). The primary purpose of VISTA is to enable a BVI trust containing BVI company shares to be established under which the shares may be retained indefinitely and the management of the BVI company may be carried out by its directors without any power of intervention being exercised by the trustee.[1] The BVI company held by the trust will itself often be a holding vehicle for other assets, such as further BVI and/or non-BVI companies.

While the trust has always been regarded as one of the best succession vehicles, using a trust to cater for the succession of company shares has historically been impeded by a rule of English trust law which is designed to help preserve trust investments and maintain/increase their value. This rule, which is known as the 'prudent man of business rule', diminishes the attractiveness of the trust as a vehicle for holding assets which settlors intend their trustees simply to retain (such as private company shares or family heirlooms) because it places duties on trustees to maximise the value of the assets they are holding and to diversify against risk. In order to observe these duties trustees may feel obliged to sell or reinvest the assets against the wishes of the settlor who may be driven by factors other than pure and safe investment return.

Another aspect of the rule which creates difficulties where company shares are held in trust is that it requires trustees to monitor the conduct of the company's directors to ensure they are acting judiciously, and to intervene if they are not. This obligation can cause friction between a settlor, who, as a director of the company, may have an intricate understanding of the activities carried on by the company and believes risk taking to be an integral part of business practice, and his trustees, who may have much less knowledge of the company's affairs and adopt a more conservative attitude to risk.

VISTA was enacted to circumvent these issues. It enables a shareholder to establish a trust of BVI company shares which, depending on the terms of the trust instrument, partially or completely disengages the trustees from their usual administrative and managerial responsibilities and permits the shares to be retained for as long as the company directors think fit.

In the 11 years since VISTA was introduced it has proved very popular. Given that BVI trusts are private arrangements and as such there is no register of trusts or similar in the BVI, there are no publicly available statistics detailing how many VISTA trusts have been established. Nevertheless, it is the authors' opinion that VISTA is the BVI trust industry's flagship product and, in the authors' experience, it has become the leading option on the BVI trusts market.

Fine-tuning the law

As part of their on-going attempts to ensure that the BVI remains one of the most attractive trusts jurisdictions globally, the BVI's legislature implemented a number of changes to the BVI's

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1 VISTA s 3.

trust laws in May 2013. A central element of these changes was the Virgin Islands Special Trusts (Amendment) Act, 2013 (the 2013 Act) which sought to fine-tune and further improve certain elements of the VISTA regime.

The main changes implemented by the 2013 Act were:

(1) A VISTA trust may now have more than one trustee, providing at least one 'designated trustee' (see below) is in office at all times.[2] Previously, VISTA trusts were obliged to have a single trustee which was a designated trustee. This amendment will be welcomed by those settlors who wish to appoint themselves, or other trustees of their choice, to act as trustees of their trusts alongside the designated trustee.

(2) The definition of 'designated trustee' was widened so that BVI Private Trust Companies (PTCs), and not only licensed corporate trustees (as was previously the case), can act as trustees of VISTA trusts.[3] PTCs are a special type of BVI company which can be family controlled and, although subject to the same fiduciary and other duties as any other trustee, may act as trustee without being licensed by the BVI's Financial Services Commission. Including PTCs within the definition of 'designated trustee' has proved very popular, as it is now possible to create and administer a VISTA trust without a third party corporate trustee being involved.

(3) The VISTA regime can now apply to BVI company shares which are added to a VISTA trust by the trustee of another trust (the donor trust) via the exercise by that trustee of powers in the donor trust, providing that the donor trust is a BVI trust and that at least one of its trustees is a designated trustee[4] (the donor trust need not be a VISTA trust). Before the 2013 Act VISTA could not apply to shares added to a VISTA trust in this way. This amendment has broadened the availability of VISTA by making it possible for the assets in existing non-VISTA trusts to be moved into the VISTA regime.

(4) Similarly, VISTA can now apply to BVI trusts which have been created via the exercise of a power in another VISTA or non-VISTA trust providing that trust is a BVI trust and that at least one of its trustees is a designated trustee.[5] Again, this was not possible before the 2013 Act and thus the benefits of VISTA can now be more widely enjoyed.

(5) The concept of 'trigger directions' was introduced.[6] VISTA trusts are not required to contain trigger directions but the terms of the trust may specify a date, event or other circumstances in which VISTA is to apply and/or cease to apply (this is a trigger direction). Equally, the trust may confer on a specified person or committee (this power may not be vested in the trustees) the power to make trigger directions via written instrument delivered to the trustees. In the absence of any stipulation to the contrary in the terms of the trust, it will be presumed that the decision to make or refrain from making a trigger direction is fiduciary. The ability to move into and out of the VISTA regime is clearly an attractive feature, especially to those settlors who wish their trusts to have the utmost flexibility to accommodate changing circumstances.

(6) It was made clear that the rights of a trustee to inspect and receive certain documents, records and accounts of the company held by the trust, as provided for by BVI companies legislation or by any provision in the company's articles of association, are not intended to

2 Ibid, s 4(4)(c), as amended.
3 Ibid, s 2(1), as amended.
4 Ibid, s 4(3), as amended.
5 Ibid, s 4(4)(d), as amended.
6 Ibid, s 4(5)–(5C), as amended.

be limited by the provisions of VISTA.[7] However, the mere fact that a trustee is entitled to receive this information does not impose any obligation on it to use its powers as a shareholder of the company to interfere in the management of the company or the conduct of its business, other than when implementing 'office of director rules' (see (7) below) or acting on an 'intervention call' (see (8) and (9) below).

(7) The 'office of director rules' (ODRs) feature of VISTA was rationalised.[8] The ODRs enable the trust instrument to contain provisions which determine the manner in which the trustees are to exercise their powers as shareholders of the BVI company held by the trust in relation to the appointment, removal and remuneration of the company directors.

Previously, a trustee was permitted to ignore the ODRs and appoint directors of its own choice if the trustee concluded, in good faith, that to follow the ODRs would be 'plainly inconsistent with the wishes of the settlor'. The 2013 Act removed this wording such that now a trustee must follow the ODRs in all cases unless it would be 'impossible, unlawful or impracticable' to do so. Consequently trustees must follow the ODRs to the letter, they no longer have any duty to consider the settlor's wishes, either at the time the trust was created or from time to time. Opinion as to whether this is a good thing will no doubt differ from party to party and from case to case, but overall the increased clarity in this area is likely to be viewed positively. Certainly this rationalisation of the ODRs can only reduce any risk there might be that a family judge or a trustee in bankruptcy might be tempted to conclude that the corollary of too little control in the trustee is too much power (and therefore 'property') in the settlor. There is now a recognisable danger that, in the world of trusts, the flexible principles of equity may lead to the conclusion that a settlor's power over the trust assets (if far-reaching enough) may be tantamount to his ownership of them.[9] Together with the practical enhancement of the regime for making an intervention call, this change would seem to provide some clear obstacles in the way of such reasoning.

(8) Under the original VISTA legislation, unless a trustee had actual notice that (a) the BVI company held by the trust had less than the minimum number of directors required by its constitution and/or by law, or (b) the composition of the company's board of directors did not reflect the requirements of the ODRs, it had no duty to exercise its powers as a shareholder of the company to remedy the situation or enquire whether those circumstances existed. This remains the case following the 2013 Act, unless the terms of the trust expressly provide otherwise. In other words, settlors may now prescribe the degree to which their trustees should monitor the constitution of the company's board of directors from time to time.[10]

In similar vein, a settlor may now use the trust instrument to eschew some or all of the general exculpatory provisions of VISTA in favour of imposing specific and varying fiduciary duties and duties of care on the trustee.[11] Previously, a trustee had 'no fiduciary responsibility or duty of care in respect of the assets of, or the conduct of the affairs of, the company'[12] held by the trust unless an 'interested person' had made an 'intervention call',[13] in which case the effect of VISTA would be suspended and the full range of trustee duties would apply.

7 Ibid, s 6(4), as amended.
8 Ibid, s 7(8)(b), as amended.
9 J Russen QC, 'The BVI VISTA: just how unspoilt is it?' [2011] JTCP 89, at p 107, and see now *Tasarruf Mevdati Sigornata Fonu v Merrill Lynch Bank and Trust Co (Cayman) Limited* [2011] UKPC 17, [2012] 1 WLR 1721 (discussed in J Russen QC, 'The reserved powers trust: when might power be property?' [2013] JTCP 239).
10 VISTA s 7(3), (9), as amended.
11 Ibid, s 9, as amended.
12 Ibid, s 15.

Taken together, these amendments allow a settlor to set the level of fiduciary responsibility and duty of care which should apply to his trustee in any given circumstances. This makes VISTA a far more sophisticated animal as it may now be used to create bespoke trust solutions sitting anywhere on the spectrum between 'non-VISTA' and 'full VISTA'.

(9) In trusts which include permitted grounds for complaints, it is possible for an 'appointed enquirer' to be appointed and paid out of the trust assets. The introduction of s 8(8A) places an obligation on trustees to provide the appointed enquirer with documents and information about the trust. The intention is to make the appointed enquirer's job easier and perhaps to extinguish any concerns trustees may have had about their duty to keep trust documents confidential. Previously, the appointed enquirer was to consider, at least once every 12 months (as is still the case), whether there might be grounds for such complaint, but the onus was upon the enquirer (like any other class of 'interested person') to make a request of the trustees for the trustees to use all reasonable endeavours to provide information about the affairs of the company and trust. Now the flow of information should be more continuous, and forthcoming from the trustees, and the 2013 Act makes it clear that the primary purpose in s 3 of VISTA should not undermine a trustee-shareholder from exercising statutory rights to inspect, make copies or take extracts from certain of the company's records or any rights there may be under its articles in relation to access accounting recordings. This goes a considerable way to addressing the 'information block' that previously appeared to provide a practical fetter upon the exercise of any right to make an intervention call.

Some potential difficulties may still lie in the way of the trustee seeking redress as a shareholder in relation to the trust's shareholding. As previously noted in this Journal,[14] these exist where the perceived harm to the value of the trust's shareholding arises out of action taking place at the level of a subsidiary. However, these potential difficulties arise out of the language of the BVI companies legislation and are ones faced by any shareholder – whether a fiduciary or a beneficial holder – whose membership interest is once removed, or more, from the action.

The changes in context

The aim of the 2013 Act was to further enhance the VISTA offering by building on the strengths and attractions of the existing model and as such the primary purpose espoused in s 3 of VISTA (summarised at the beginning of this article) remained unaffected. So too did the provisions of s 5 of VISTA, and the original provisions of s 6.

Section 5 overcomes the difficulties presented by the prudent man of business rule (discussed above) by stating that: (1) a trustee of a VISTA trust holds the BVI company shares in the trust on a 'trust to retain them';[15] (2) the duty to retain takes 'precedence over any duty to preserve or enhance the value of the trust fund'; and (3) the trustee will 'not be responsible for losses arising directly or indirectly from holding, rather than disposing of' the shares. Section 5

13 A VISTA trust instrument may list circumstances, known as 'permitted grounds for complaint', in which any person who is 'interested' in the trust (broadly speaking, a stakeholder in the trust – a precise definition can be found in VISTA s 2(1)) may approach the trustees in writing if that person believes that the affairs of the company held by the trust are not being carried out as they should, and request that the trustees intervene in the management of the company in order to deal with the complaint (an 'intervention call').

14 Russen (2011) op cit n 9, above.

15 By s 9 of VISTA the trust to retain contains a limited power of sale, although this power may be excluded altogether by the terms of the trust. Unless the trust instrument provides otherwise a trustee may only exercise the power of sale with the consent of the majority of the directors of the BVI company (and any other consents required by the trust instrument), a trustee is not obliged to exercise or consider exercising the power of sale for the purpose of enhancing the value of the trust fund and will not face any liability for failing to do so.

expands on this provision by providing a non-exhaustive list of factors which may result in losses for which the trustee cannot be held liable.[16]

Section 6 complements s 5. It states that, subject to the terms of the trust, unless a trustee is implementing the ODRs or acting on an intervention call, it shall not use its powers as a shareholder of the BVI company in the trust to 'interfere in the management or conduct of any business of the company' and 'shall leave the conduct of every such business, and all decisions as to the payment or non-payment of dividends, to the directors of the company'. Likewise, save in the circumstances mentioned, the trustee must not take any steps to, inter alia, 'instigate or support any action by the company against any of its directors for breach of duty to the company' or 'procure the appointment or removal of any of the directors'.

Conclusion

The core and enduring features of VISTA have made it attractive to settlors and trustees alike since it was enacted, and thus the amendments introduced by the 2013 Act needed only to refine and improve the existing model.

Indeed, the recent decision of the BVI Commercial Court in *Appleby Corporate Services (BVI) Limited v Citco Trustees (BVI) Limited*[17] could be seen to highlight the strength of the VISTA legislation in comparison to 'anti-*Bartlett*' clauses,[18] which also seek to relieve trustees from the duty to observe the prudent man of business rule. In that case the court held that even where investment management has been validly delegated the trustee is under a duty to ensure that appropriate risk management procedures are in place so as to satisfy itself that such delegated powers and functions are observed and not abused. Additionally, the trustee is duty-bound to respond to information about the management of investments which may give cause for concern, and inform itself at appropriate intervals of the value of the company's assets and the manner in which they are being managed.

In other words, the trustee is under a duty to oversee the investment of the trust's assets and take appropriate action to ensure they are preserved and, where possible, enhanced. A trustee of a VISTA trust does not face such obligations because the effect of VISTA is to take investment and management decisions and responsibilities out of the trustee's hands and place them in the hands of the directors of the BVI company held by the trust. There is of course a potential argument that the BVI court would have taken a similarly dim view had the trust in the *Appleby* case been within the VISTA regime. However, it is submitted that such a stance would be difficult for the court to substantiate given that VISTA is black letter law, whereas anti-*Bartlett* clauses are not.

In light of these points, it is anticipated that such cases will further enhance the popularity of the VISTA regime. This is particularly so given the improvements implemented by the 2013 Act, which relaxed the former restrictions on who may act as trustees of VISTA trusts, allowed non-VISTA trusts to move into the regime, offered scope for VISTA trusts to switch out of the regime and come back in again, and made it possible for a settlor to select the level of fiduciary responsibility he wishes to impose on his trustees.

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16 The factors include: inadequate financial return on the BVI company shares; a decrease in value of the shares; acts or omissions by the directors of the company; liquidation or receivership of the company; and lost alternative investment opportunities.

17 BVIHC (COM) 0156 of 2011, 20 January 2014.

18 See *Bartlett v Barclays Bank Ltd (No 1)* [1980] Ch 515.

These features, allied to the other benefits of creating a BVI trust,[19] mean that the VISTA trust will continue to be an attractive vehicle for the prospective settlor who wishes to provide for succession to BVI company shares on terms which ensure that effective control of the company and the assets it holds remains with its directors.

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19 For example, since May 2013 newly created BVI trusts (except charitable and non-charitable purpose trusts, both of which can be perpetual) may exist for a maximum of 360 years whereas previously the maximum lifespan of such trusts was 100 years.