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Are any two structures the same?

A look at Special Trust Structures under Cayman Islands and British Virgin Islands laws.

At the time of writing, the Labuan *Special Trusts Act* is before the Malaysian legislature and is being marketed as 'Asia's answer to VISTA.' This is just one of many recent developments in the trust laws of the various offshore jurisdictions to allow, for example, non-charitable purpose trusts (The *Trust (Guernsey) Law 2007*) and trusts for both persons and purposes (The *Purpose Trust Amendment Act 2007* of the Bahamas).

The original

But what of the original 'special' trusts? The *Special Trusts (Alternative Regime) Law (STAR)* became law in the Cayman Islands over 12 years ago in 1997 (now Part VIII of the *Trusts Law (2009 Revision)* of the Cayman Islands) and the *Virgin Islands Special Trusts Act (VISTA)* was enacted in the British Virgin Islands (BVI) in 2003. These two structures remain the leading trust structures of their type and remain as useful now as when they were introduced.

An important point to note is that whilst special trusts in the Cayman Islands and the British Virgin Islands may share a common name and may be used with similar goals in mind, they are not two versions of the same thing and the legislation in each jurisdiction was introduced to deal with different issues. VISTA is not the direct BVI equivalent of STAR; indeed the BVI had legislation permitting non-charitable purpose trusts from 1992, some five years before STAR was enacted. In addition, it is important to remember that STAR is not simply the Cayman Islands' non-charitable purpose trust legislation, (although an enforcer is required whether or not the trust is for purposes (see s100(2) of the *Trusts Law*)) it is far more than that and is frequently used to establish trusts for persons, with no purposes whatsoever, as a way, for example, to restrict information rights (See s100(1) of the *Trusts Law*). However, trusts under VISTA and trusts under STAR can be, and are, used to hold high-risk or non-bankable assets (including shares in family businesses and private trust companies) and this is the area in which the private client practitioner will most often encounter these special trusts.¹ This article will highlight the use of each trust structure to own such assets and also raise a number of issues, which trustees should be aware of.

Family business

Let us consider a family business which, for succession planning reasons, the settlor wishes to place into a trust. However, the surrender of, or the assumption of, control (as the case may be) is all too often a concern for both the settlor and the trustee. It is well-established law² that a trustee holding a controlling interest in a company has a duty to monitor the activities of the company and to intervene if appropriate to prevent the possible loss of the company's assets. A trustee is required to consider spreading financial risk and this may be incompatible with the major asset of the trust fund being the family business. In all likelihood a trustee may also have a duty to accept a financially attractive takeover bid in order to maximise financial returns for the beneficiaries, even though the settlor does not want the business to be sold. In practice, neither trustee nor settlor will want the trustee to be involved in the business.

Traditional solutions to this have tended to be based around two areas: attempts in the trust deed to override the duties referred to above, or attempts to pass the burden from the trustee to someone else via the reservation or granting of certain powers in the hands of a third party, often the settlor. For a variety of reasons these solutions are not ideal. For example, there is still concern that the trustee will always have a residual degree of responsibility and the retention or vesting of powers in a third party may lead to tax or regulatory issues and issues where the power holder is an individual (such as death or incapacity).

Management responsibility

VISTA was introduced to deal with one specific issue; to disengage a shareholder trustee from management responsibility in respect of the shares in an underlying company held as part of the trust fund. VISTA enables a trust to be established where the trustee has an express duty to retain company shares,³ whilst at the same time limiting the trustee's obligations to monitor and intervene. The trust deed may require the trustee to take action in certain prescribed circumstances (these are 'intervention calls' as set out in s8(1) of VISTA), but the basic position is that the shares are to be retained and that the management of the company is to be carried on by its directors without any power of intervention in the hands of the trustee (per s3 of VISTA). Indeed, one other feature of VISTA is that the trust deed can stipulate who should be the directors of the VISTA company, and the trustee as shareholder is required, so far as in its power, to make this happen (the 'office of director rules' per s7 of VISTA).

STAR was not specifically designed only to hold businesses in trust, but the flexibility of the law has resulted in trusts under STAR often being used with this in mind. One innovation of STAR (since followed in a number of jurisdictions) is that trusts may have a combination of persons and purposes as objects and the purposes need only be lawful and not contrary to public policy (Per s99(3) of the *Trusts Law*). There is no need for the purposes to be certain, reasonable or specific; and even then the law allows for cy-près reformation (Per s104(1) of the *Trusts Law*) to deal with changes of circumstance or impossibility.

It is therefore possible to have a trust, which is intended to benefit individual beneficiaries, but where the interests of those beneficiaries are subordinated to overriding purposes, such as the continuance of the settlor's business. This could be structured so as to include a specific purpose to leave management of the business of the underlying company to the directors of that company (and even to facilitate the appointment of successor directors, to replicate the VISTA 'office of director' rules). Such purposes can override the trustee's duties to sell and diversify trust assets and to monitor and intervene in the business of the company. Unlike VISTA, which has the framework in the legislation, STAR requires specific drafting to achieve the same goal. However, unlike VISTA, STAR does not require the underlying business to be a company incorporated in a certain jurisdiction.⁴

So having correctly drafted a trust under VISTA or STAR, does this mean that the trustee can sit back, take its fee each year and move on to the next client? The answer to this is an emphatic 'no', although

there are subtle differences between VISTA and STAR.

Due to the number of BVI companies as opposed to those incorporated in other jurisdictions, especially in Asia, VISTA has proven to be very popular as a trust vehicle to own family businesses.⁵ Whilst it is recognised that the statutory protection afforded by VISTA allows an otherwise normal trustee some degree of latitude with respect to shares in the VISTA company, it should not be mistaken as a form of statutory exoneration enabling a VISTA trustee to sit back and be completely passive. Neither should it be used as a means for a settlor or the director of a VISTA company to prevent a trustee from being involved and, as a result, reduce a trustee's fees to a nominal figure. It must be remembered that VISTA does not apply to property other than shares in a VISTA company, so that any other property in the trust fund (including dividends declared by the VISTA company) are subject to the long-standing rules relating to trust investments: i.e. the trustee still has a duty to monitor the assets and consider diversification.

VISTA trustees should also keep in mind their obligation and duty to account to the beneficiaries of the trust; an obligation which extends to the entire trust fund. In order to be able to provide such an account, a trustee needs to know the value of its holding in any VISTA company (usually this is the main asset in the trust fund). Therefore a VISTA company will need to provide the trustee with regular accounts and the directors of the VISTA company should be made aware of this as soon as possible. Whilst the terms of VISTA specifically allow the removal of a trustee's duty to intervene in the VISTA company's affairs (see s3 of VISTA); it does not remove the duty to be informed of its affairs (this is in addition to any statutory duties under relevant proceeds of crime legislation), a subtle difference which is often overlooked.

As far as STAR is concerned, the position is slightly different. The duties and obligations of the trustee are not dependent on the type or situs of the trust property and any enforcer has the right to be informed about the terms of the trust and to receive information concerning the trust and its administration (per s102(a)(ii) *Trusts Law* - again subject to the terms of an enforcer's appointment). The trust deed is free to allow beneficiaries (who are not enforcers) certain rights to information, depending on the wishes of the settlor. The trustee is committing an offence under STAR if it fails to keep proper records (including, *inter alia*, all settlements of property into the trust, the property subject to the special trust at the end of each accounting year and all distributions or applications of the trust property (per s105(1)(b) of the *Trusts Law*). Therefore, whilst well-drafted purposes may remove the need to diversify and intervene in the underlying business, the duty (and the need) to be informed, remain.

As for which structure to use, there are many features to be considered in addition to general familiarity with a certain jurisdiction, its service providers and its courts. Firstly there are certain requirements as to the trustee. The sole trustee of a VISTA trust must be a licensed trust company in the BVI; for STAR, the trustees must include a Cayman Islands trust corporation.⁶ Secondly, VISTA is subject to a 100 year trust period, whereas the rule against perpetuities does not apply to STAR (see s13(1) of the *Perpetuities Law* (1999 Revision) of the Cayman Islands). Thirdly, for the reasons

outlined in this article, it may be easier for a settlor to get comfortable with one regime over the other, VISTA is more statutory driven; STAR gives more freedom to the draftsman. In any case, there is, as always, no substitute for appropriate local advice.

- 1 For further details see *Holding High Risk Assets in Trust - A Comparison of VISTA and STAR* by A.Pursall and B.Mitchell in the *Offshore Banking and Trusts Guide 2007*.
- 2 See, for example: *Re Lucking's Will Trusts* [1968] 1 W.L.R. 866; *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch. 515 and *Jones & Ors v Firkin-Flood & Ors* (2008) EWHC 2417.
- 3 Only shares in a BVI company and only where an express designation has been made in respect of such shares (the 'VISTA Company').
- 4 Although there may be advantages in the trust property being shares in a Cayman Islands company - being Cayman situs property.
- 5 According to the author's information, the Labuan Special Trust will require 'designated shares' to be shares in a Labuan holding company.
- 6 For STAR this includes an unlicensed private trust company (see s105(2) of the Trusts Law).

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