STEP JOURNAL

Downloaded on 14th August 2024 - 09:05

Surveying the VISTA: part two

Chris McKenzie considers the application of the rule against perpetuities to VISTA trusts and the issue of the recognition of VISTA trusts by the courts of other jurisdictions.

Are VISTA trusts exempt from the rule against perpetuities?

No. There is no provision equivalent to that in Cayman's STAR trust legislation exempting trusts under the *Virgin Islands Special Trusts Act, 2003* from the rule against perpetuities, and the rule therefore applies to VISTA trusts to the same extent that it ordinarily applies. VISTA beneficiary trusts established after 14 May 2013 can have fixed perpetuity periods of up to 360 years. However, VISTA trusts can be, and indeed often are, established as charitable or non-charitable purpose trusts.

Doctrinal arguments against VISTA based on the novelty of its provisions would be impossible to maintain. Trust law is notable in having little in the way of an agreed theoretical basis

VISTA purpose trusts are often created to hold shares in private trust companies, to keep assets off the balance sheet and as a vehicle to hold management shares in mutual funds. Less commonly, VISTA purpose trusts are set up to remove the rights of enforcement that certain beneficiaries would otherwise have and/or in circumstances in which settlors wish to set up perpetual trusts to benefit family members. If a VISTA trust is set up as a charitable or non-charitable purpose trust, rather than a beneficiary trust, it can be set up as a perpetual trust.

Would VISTA trusts be recognised (as trusts) by courts outside the BVI?

When the VISTA trust legislation was in the process of being drafted (in the late 1990s and early 2000s), careful consideration was given to the question of whether the partial removal of the trustee's duty of care under a VISTA trust might in some way be incompatible with the trust concept. This issue was treated even more seriously than it would be today because, at the time at which the suggested legislative provisions (which were eventually to be incorporated in the statute) were being formulated, a rather heated debate that became known as 'STAR wars' was taking place in relation to the legitimacy of Cayman's STAR trust regime, and we were very anxious indeed to ensure, to the best of our abilities, that VISTA trusts would not be subject to similar controversy. Accordingly, a great deal of attention was given to this issue. Against this backdrop, the clear conclusion was reached that any suggestion to the effect that the provisions of the draft legislation that had been drawn up might be somehow incompatible with the trust concept would be completely ill-founded. Although there is insufficient space here to set out the main reasons for this conclusion in any detail, they are summarised below.[1]

- In terms of the history of the trust, today's preoccupation with the trustee's duty of care is of relatively recent origin, having evolved as recently as the 20th century. The trustees of early trusts were 'mere stakeholders, little more than nominees, with no serious powers or responsibility of management'.[2] VISTA trusts arguably, therefore, have much more in common

with early trusts than non-VISTA trusts do.

- The Court of Appeal of England and Wales, in the seminal case of *Armitage* v *Nurse* [1997] EWCA Civ 1279, has confirmed that the duty of care is not a core requirement for a trust. In that case, Millett LJ, as he then was, said: 'I accept that there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them, which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees, there are no trusts. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence. The duty of the trustee to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient.'
- A distinction clearly needs to be made between, on the one hand, an exclusion of duty arising from a clause in the trust deed and, on the other, an exclusion of duty that arises from statute. In the case of an exclusion arising from a clause in a trust deed, there is an argument that, if trustees actually have a power, by virtue of their shareholders' rights, to intervene in the affairs of a company, they may be in breach of the core trust duty of good faith if they fail to take action to prevent loss, especially loss arising from known or impending dishonest or reckless conduct by directors.3 In the case of exclusion arising from statute, this argument falls away, because the premise on which it is based (that the trustees are entitled to intervene by virtue of their shareholders' rights) has been removed by statute.
- The trustee's duty of care will invariably operate with full vigour in relation to rights attaching to the shares other than voting rights. Thus, their duties in relation to dividends when received and distributions on a winding-up, and their duties not to divest themselves of title to the trust assets (i.e. the shares) and not to retain any benefit from the holding of the shares (other than that expressly permitted by the trust instrument) remain intact. There is, furthermore, nothing in VISTA that affects in any way the duties of the directors of the company as a matter of company law. If the directors are dishonest, they will also remain subject to the sanctions of criminal law. The trustees will similarly be liable for any dishonesty on their part.
- Importantly, the trustee of a VISTA trust will continue to have all its dispositive (and ancillary) powers and duties under the trust.
- Even under non-VISTA law, trustees are often unable to intervene in the business of a company in which they have invested, e.g. because the trust shares are a small minority interest in a quoted company, or are non-voting. The non-intervention provisions of VISTA could be said, therefore, to do no more than extend (with certain qualifications) an existing state of affairs.
- VISTA plainly does not give rise to any question of sham, because a VISTA trust is precisely what it purports to be. Nor is a VISTA trust in any sense illusory, as, for example, a US 'living will' trust may be regarded in English and Welsh terms, since, on a proper analysis, the whole beneficial interest is retained by the settlor during their lifetime. Under VISTA, the interests of the beneficiaries other than the settlor are real and immediate, and, in the case of a discretionary trust, the trustee's fiduciary powers of disposition are unaffected.
- Any argument that a VISTA trust is a nomineeship disregards the distinction between, on the one hand, the assets of the company and, on the other hand, the shares in the company. While it is

true that the directors have control of the company's assets (subject to the constraints imposed by the trust instrument, by company law and by the company's memorandum and articles), the shares are at all times (apart from the voting rights) held equitably for all the beneficiaries. If the trustee misapplies the shares (e.g. depositing the certificates as security for a loan to itself), it will be accountable to the beneficiaries of the trust for any resulting loss (and, in contradistinction to a nomineeship, the trust would be enforceable by all its beneficiaries).

- It is abundantly clear that the VISTA trust system helps to fill a serious legal void. The modern world urgently needed a satisfactory succession mechanism for small companies – one that (a) offers a smooth and inexpensive transition on a death, and (b) addresses the need for effective management of the company, as well as the expectations of relatives. A mechanism cannot be satisfactory if, of its nature, it involves inhibiting the entrepreneurial spirit that created the company's wealth in the first place. There are extremely good reasons of policy why VISTA trusts should be upheld.
- Doctrinal arguments against VISTA based on the novelty of its provisions would be impossible to maintain. Trust law is notable in having little in the way of an agreed theoretical basis. As Professor Geraint Thomas points out: 'a trust is a human construct' and there is 'no Platonic form of trust' that has specified characteristics and no other characteristics.[4] The concept has developed through case law and legislation to meet society's changing needs. There is nothing exceptional about a new approach that is tailored to meet the requirements of particular social or other circumstances or to cater for particular types of assets (in the case of VISTA, shares in companies). In England and Wales, for example, both the *Settled Land Act 1925* and the *Trusts of Land and Appointment of Trustees Act 1996* are cases in point. In the US, by way of further example, the generally benevolent approach of the courts to another special category of trusts, namely those that reserve substantial powers to the settlor, is explained in part, it is said, by appreciation of the fact that they satisfy economic and social needs.
- The courts of jurisdictions that have adopted the relevant provisions of the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on Their Recognition*, such as England and Wales, Hong Kong and Switzerland, will, it is considered, be bound to recognise VISTA trusts as a result of the provisions of that convention.
- Significant comparisons can be made between VISTA and the *Settled Land Act 1925* regime in England and Wales (albeit that the latter was tailored to a different social structure and is now being phased out). Under the settled land regime, the role of the trustee of the settlement was highly circumscribed and the management of the land was vested primarily in the tenant for life, who was capable of being exonerated totally from any obligations in relation to the condition of the land.

There is, therefore, no good reason for judges in other trust jurisdictions to have any difficulty with the concept of a VISTA trust. Of course, recognition in other jurisdictions should seldom, in any event, be an issue, since at least one trustee of a VISTA trust will invariably be a BVI company, the trust will be governed by BVI law and the only assets that can be held (directly) subject to the provisions of VISTA will be shares in BVI companies, the *situs* of which will generally be in the BVI.[5]

1. *1These reasons are set out in greater detail in 'VISTA trusts', Trust Quarterly Review (2006, volume 4, issue 2), pages 10–19, an article which also appears in the third edition of David Hayton, The International Trust (Jordans, 2011)*
2. *2Professor John Langbein of Yale University*
3. *3There are also powerful counter-arguments, since the argument takes no account of the distinction, which has long been recognised by the courts, between preserving assets and preserving their value*
4. *4 In his chapter on 'Purpose trusts' in International Trust Laws at paragraph B4. 26/37*
5. *5As a result of s245 BVI Business Companies Act, 2004*

© 2024 STEP (Society of Trust and Estate Practitioners). All rights in and relating to the STEP Journal and Trust Quarterly Review and to content online at journal.step.org are expressly reserved.

https://journal.step.org/step-journal-october-2014/surveying-vista-part-two