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B.V.I. Purpose Trusts

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The amendment of the B.V.I. purpose trust legislation continues a trend adopted by other offshore jurisdictions. This article provides a comparative analysis between the current and the new BVI regimes as well as with other jurisdictions.

"There was a vital need of modernisation in order to maintain the success of the B.V.I. as an international financial centre ..."

"... the passage of these statutes will also provide this country with an excellent marketing opportunity ..."

"... shares in the company can be retained as a trust asset as long as the directors of the company think fit."

Many offshore jurisdictions have now enacted legislation providing for the validity of non-charitable purpose trusts.

Jurisdictions legislating in this area often follow earlier statutes enacted by other offshore centres such as Bermuda. As Adams wrote:

"It was the 1989 Bermuda legislation that brought the purpose trust into vogue. The Bermuda model has since formed the basis of purpose trusts legislation in Barbados, the British Virgin Islands, Anguilla and Nevis."¹

The British Virgin Islands initially legislated in this area in October 1993 with the enactment of the Trustee (Amendment) Act, 1993.

Prior to 1993, the trust legislation of the British Virgin Islands was entirely based on the English common law principles supplemented by the Trustee Ordinance, 1961. The Ordinance itself was based on the English Trustee Act, 1925.

The enactment of the Trustee (Amendment) Act, 1993 marked the issue of a lengthy process of review of the B.V.I. trust law. The Act was an important step in the modernisation of the B.V.I. legislation. Indeed, there was no amending legislation to the Ordinance before the Trustee (Amendment) Act, 1993² and the legislation of the territory was outdated. Thus, there was no correspondent Act to the English Perpetuities and Accumulation Act, 1964 or the Trustee Investment Act, 1961.

There was a vital need of modernisation in order to maintain the success of the B.V.I. as an international financial centre and to compete with other offshore jurisdictions in developing attractive legislation for international investments. The Trustee (Amendment) Act, 1993 was then passed to ensure the establishment of the Territory as a leading jurisdiction for offshore trusts.

The Territory further amended its legislation in October 2003. Three pieces of legislation were enacted to enhance the attractiveness of the Territory as a trust jurisdiction and thus increasing the range of services offered by the financial services sector.

Three new statutes were passed on the 30th September 2003 and assented to on the 17th October 2003. These are:

- The Virgin Islands Special Trusts Act, 2003;
- The Trustee (Amendment) Act, 2003; and
- The Property (Miscellaneous Provisions) Act, 2003.

According to Chief Minister Dr. the Honourable D. Orlando Smith, it is the hope of the British Virgin Islands Government that:

"the passage of these statutes will also provide this country with an excellent marketing opportunity, increase government revenue and as a result of all these factors, create further employment opportunities for B.V. Islanders."

At least the aim of the B.V.I. government in legislating in this area is clearly stated.

Mr. Smith further declared that:

"all in all, the three statutes will serve to demonstrate that the B.V.I. is in the forefront of jurisdictions which are able to introduce innovative measures to meet the needs of its international clientele."

The introduction of this legislation should also diversify the financial services of the Territory so that this sector is less dependent on the IBCs market.

The Property (Miscellaneous Provisions) Act, 2003 reforms the law of the B.V.I. in respect of the execution of deeds under seal. Prior to this reform, deeds executed by individuals still needed to be sealed. This is no longer necessary provided the document is drawn up so that it is expressed to be a deed and it is witnessed.

The Virgin Islands Special Trusts Act, 2003 introduces an innovative but controversial regime, enabling shareholders of B.V.I. companies to establish trusts whereby the trustee is not involved in the management and administration of the trust's underlying company.

The responsibility (and liability) of the management of the underlying company is left to the directors of the company and the shares in the company can be retained as a trust asset as long as the directors of the company think fit.

The provisions relating to purpose trusts are included in the Trustee (Amendment) Act, 2003. However, this Act is not only concerned with purpose trust provisions. It also contains other substantial provisions, such as:

- provisions relating to discretionary beneficiaries; the power of the trustee to appoint any property to one or more beneficiaries to the exclusion of others is clearly stated;
- provisions relating to variation powers; they enable a person to be appointed to approve variations on behalf of minors;

- provisions relating to conflict of laws issues;
- provisions relating to dealings between trustees and third parties. These have been introduced to promote the use of B.V.I. trusts in the commercial area; or
- provisions relating to charities. These follow the provisions of the English Charities Act, 1993.

These amendments seek to address several issues that were identified as possible abuse by the KPMG report, such as 'flee clauses' which, although still permitted under the Act, will not be allowed to operate following either a court order, the institution of criminal proceedings, or a regulatory investigation involving the settlor, the trustee, a beneficiary of the trust or the trust property.³

The amendments relating to the purpose trust are contained in Sections 11 and 12 of the Trustee (Amendment) Act, 2003. These Sections create a two world regime. Section 11 amends the existing Section 84 of the Trustee Ordinance, 1961 (as amended by the Trustee (Amendment) Act, 1993) and regulates trusts created before the date on which Section 84A comes into force.

Section 84A is created by Section 12 of the Trustee (Amendment) Act, 2003 and regulates trusts created on or after the date on which Section 84A comes into force.

These amendments are as follows:

I. Definitions of 'trust' and 'purpose trust'

The definition of the term 'trust' is not affected by the Trustee (Amendment) Act, 2003. Thus, Section 2(2) of the Trustee Ordinance, 1961 (as amended by the Trustee (Amendment) Act, 1993) states:

"For the purpose of this Act the term 'trust' refers to the legal relationship created, either inter vivos or on death, by a settlor when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a special purpose."

This definition is similar to the Bermuda definition.⁴ The only slight difference is that the Bermuda definition refers to "a person, the settlor" and to a "specified purpose," while the B.V.I. definition refers to "a settlor" and to a "special purpose".

The Bermuda definition also influenced in this respect the legislation of Grenada,⁵ Barbados,⁶ Montserrat⁷ and Saint Lucia.⁸

Furthermore, Section 2(3) is also not amended by the Trustee (Amendment) Act, 2003. Section 2(3) adds:

"a trust has the following characteristics:

- (a) the assets constitute a separate fund and are not part of the trustee's own estate;

- (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee; and
- (c) the trustee has the power and the 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."

These characteristics are similar to the Bermuda characteristics.⁹ There is not a split, as in the Grenada,¹⁰ Barbados,¹¹ Montserrat¹² and Saint Lucia¹³ provisions of characteristic (c), moving the accountability of the trustee into a separate provision (d).

The Trustee (Amendment) Act, 2003 however introduces a change in respect of the definition of a purpose trust.

The old definition contained in Section 84(1)(b) states that a "trust for any purpose" means:

"a trust other than a trust

- (i) that is for the benefit of particular persons whether or not immediately ascertainable, or
- (ii) that is for the benefit of some aggregate of persons ascertained by reference to some personal relationship."

Once again, this definition is based on the Bermuda definition¹⁴ (itself influenced by the Nauru¹⁵ definition). It is similar to the Barbados,¹⁶ Grenada,¹⁷ Seychelles,¹⁸ Cyprus,¹⁹ Montserrat²⁰ and Isle of Man²¹ definitions.

This definition is actually not removed from the Ordinance by the Trustee (Amendment) Act, 2003. It still applies to trusts created before the date on which Section 84A comes into force. However, the definition is omitted in Section 84A for trusts created on or after the date on which Section 84A comes into force. Section 84A(2) merely states:

"A person may create a valid trust for any purpose or purposes if the conditions set out in Subsection (3) are satisfied."

The same situation occurred in Bermuda. The definition of a trust for a purpose or purposes initially contained in Section 12(1) of the original Trusts (Special Provisions) Act, 1989 was actually removed by the Trusts (Special Provisions) Act, 1998.

Section 12A(1) of the Trusts (Special Provisions) Act, 1989 as amended by the Trusts (Special Provisions) Amendment Act, 1998 therefore states:

"A trust may be created for a non-charitable purpose or purposes provided that the conditions set out in Subsection (2) are satisfied; and in this Part such a trust is referred to as a 'purpose trust'."

"The Bermuda definition also influenced in this respect the legislation of Grenada, Barbados, Montserrat and Saint Lucia."

"The Trustee (Amendment) Act, 2003 however introduces a change in respect of the definition of a purpose trust."

Therefore the B.V.I. legislator followed the same trends as the Bermuda legislator. It chose to remove the notion of benefit. This demonstrated a change in comparison with the original drafting, which referred to what a purpose trust was not ie, a trust that is not for the benefit of particular persons.

An explanation of the rationale behind this amendment is given by Campbell QC as follows:

“The 1998 Act refers to a purpose trust in these terms, without reference to benefit or the absence thereof, stating that a trust may be created for a non-charitable purpose or purposes so long as certain conditions are satisfied. This does not mean that we are no longer with the issue of benefit. A benefit will always be present, but it must necessarily be directed towards the fulfilment of the purpose or purposes for which the trust was established. The fact that there may be an indirect, intangible benefit accruing to some third party (as in the nature of things, there will inevitably be) no longer presents a problem.”

This is a subtle rationale.

I would also add that by removing the original definition of a trust for a purpose or purposes the legislator avoids the difficulties of interpretation of the term ‘purpose’. For example, it could be argued that holding the shares of a private trustee company is not a purpose in itself but merely a direction as to the form in which the assets should be held. It could simply be seen as an investment clause. Thus, there might be a risk that such a trust would not qualify as a purpose trust and therefore it would be concluded that the settlor failed to allocate the beneficial ownership of the trust assets and there would be a resulting trust for the settlor.

Such a purpose is to be opposed to a substantive/consuming purpose, for example, a trust for the promotion of horse riding. Such a trust would be concerned about how to apply the trust assets and not about the form that the trust fund should take.

By removing the original definition, the legislator avoids, in my opinion, any issue in this respect.

2. Requirements

2.1 Certainty requirements

The certainty requirements have not been amended by the Trustee (Amendment) Act, 2003. Section 84A(3)(a) and (b) uses the same wording as Section 84(2)(a) and (b).

Both Sections state that a person may create a valid trust for any purpose or purposes if:

- (a) the purpose or purposes are specific, reasonable and possible;
- (b) the purpose or purposes are not immoral, contrary to public policy or unlawful.

Therefore there is no difference in this respect

between trusts created before and trusts created on or after the date on which Section 84A comes into force.

The B.V.I. wording again is based on the old Bermuda requirements as stated by Section 13(1) of the Trusts (Special Provisions) Act, 1989.

It is interesting to note that the B.V.I. legislator chose to ignore the new Bermuda requirements introduced by the Trusts (Special Provisions) Amendment Act, 1998). Indeed, Section 12A(2) of the Trusts (Special Provisions) Act, 1989 as amended provides that:

“The conditions are that the purpose or purposes are:

- (a) sufficiently certain to allow the trust to be carried out;
- (b) lawful; and
- (c) not contrary to public policy.”

The new Bermuda requirements appear more flexible. ‘Certain’ is not the same as ‘specific’: something quite general (as opposed to specific) can be certain.

2.2 Designated person

Certain jurisdictions require non-charitable purpose trusts to have a designated person defined in terms of being in that jurisdiction and being of appropriate standing (eg, lawyers, accountants).

This is done with the idea that the designated person will be within the jurisdiction of the court of the proper law applicable to the trust and will be of sufficient standing to properly cope with the enforcement of this kind of trust, which by their nature might not be enforced in the same way as trusts with beneficiaries.

2.2.1 Reference to a designated person

The legislation of the following jurisdictions expressly refers to a designated person:

- Grenada;²²
- Isle of Man;²³
- Montserrat;²⁴ and
- British Virgin Islands.

In the B.V.I., the new Section 84A adopts the same definition of a designated person as Section 84.

Indeed, both Section 84(1)(a) and Section 84A(1) provide that:

“A “designated person” means:

- (a) a barrister or solicitor practising in the Territory;
- (b) an accountant practising in the Territory who qualifies as an “auditor” for the purposes of the Banks and Trust Companies Act 1990;

“... by removing the original definition of a trust for a purpose or purposes the legislator avoids the difficulties of interpretation of the term ‘purpose’.”

- (c) a licensee under the Banks and Trust Companies Act 1990; or
- (d) such other person as the Minister of Finance may, by Order, designate.”

2.2.2 Duty to maintain a trust register within the jurisdiction

In some instances the resident person will have to maintain the trust documentation as well as a trust register within the jurisdiction. This is the case in Barbados,²⁵ the Isle of Man,²⁶ Grenada,^{26a} Montserrat,²⁷ Saint Lucia²⁸ and the B.V.I.).

In the British Virgin Islands, prior to the enactment of the Trustee (Amendment) Act, 2003, there was no provision in respect of the maintenance of a trust register within the Territory. This was changed by the 2003 Amendment both in respect of trusts created before and on or after the date on which Section 84A comes into force. This was one of the recommendations made by the KPMG report.

The Trustee (Amendment) Act, 2003 creates a new Subsection (21) to Section 84 of the Ordinance. Section 84(21) provides:

The trustee of a purpose trust “who is a designated person shall keep in the Territory a documentary record of:

- (a) the terms of the trust;
- (b) the identity of any other trustees and the person who has been appointed to enforce the trust;
- (c) all settlements of the property upon the trust and the identity of the settlors;
- (d) the accounts of the trust; and
- (e) all distributions or applications of the trust property.”

Trusts created on or after the date on which Section 84A comes into force are subject to the same requirements imposed by Section 84A(28).

These requirements are more demanding than, for example, in Barbados. The designated person must document not only the identity of the first settlor, but also the identity of all persons settling assets into the trust and the nature/extent of their settlement. Therefore, it would not be possible to keep in the jurisdiction only the identity of a first settlor settling, for example, £100 while the identity of the real settlor would be kept overseas.

Furthermore, the designated person also has to maintain in the Territory records of all distributions or application of the trust property as well as the terms of the trust. Keeping records of the terms of the trust would probably imply (if we add the other requirements) a copy of the trust deed.

These requirements may be considered as a problem. Although access to this information is not open to the public, certain private banks may be reluctant to maintain this information in the

jurisdiction. They would prefer to keep it at their head office (in Switzerland for example).

Trust companies in the B.V.I. must now ensure that their files comply with these provisions since they do not only apply to trusts created on or after the date on which Section 84A comes into force but also to trusts created before that date.

Usually, inspection of these documents is not open to the public. In Barbados, there is an exception for the protector or a person authorised by him.²⁹ In the 1989 Bermuda provisions, the exception was for the Attorney General, a person appointed by him or the person appointed to enforce the trust.³⁰ In the Isle of Man, the exception also concerns the Attorney General or a person authorised by him.³¹ In Grenada³² and Montserrat,³³ the exception concerns the Attorney General and the protector. In Saint Lucia,³⁴ the exception concerns only the protector.

In the B.V.I, the enforcer has more than a simple access to the trust documentation. Section 84A(15) (introduced by Section 12 of the Trustee (Amendment) Act, 2003) provides:

“A trustee of a purpose trust shall provide the enforcer of the trust with

- (a) the accounts of the trust;
- (b) copies of the trust instrument and of deeds and other written instruments executed pursuant to the trust instrument;
- (c) legal and other professional advice received by the trustees; and
- (d) such, if any, other documents and information as the trust instrument requires to be provided.”

These provisions only apply to trusts created on or after the date on which Section 84A comes into force. Anterior trusts continue to be subject to Section 84(11) of the Ordinance as amended by the Trustee (Amendment) Act, 1993. The Trustee (Amendment) Act, 2003 does not introduce any amendment in this respect for anterior trusts.

Section 84(11) of the Ordinance provides:

The enforcer “shall be entitled, in addition to any documents, information or other rights specifically provided for in the trust instrument, to

- (a) annual accounts of the trust;
- (b) copies of the trust instrument and deeds and other written instrument executed pursuant to the trust instrument; and
- (c) counsels’ opinions and legal advice received by the trustees.”

The scope of the provisions in Section 84A(15) seems to have been broadened in comparison with Section 84(11). The enforcer is not only entitled to the trust documentation (that implies

“In some instances the resident person will have to maintain the trust documentation as well as a trust register within the jurisdiction.”

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“In the B.V.I, the enforcer has more than a simple access to the trust documentation.”

that he will be communicated copy of the trust documentation upon request). The trustee shall provide the enforcer with these documents (automatic provision).

Moreover, Section 84A(15) refers to "accounts of the trust" while Section 84(11) refers to "annual accounts of the trust." This change was possibly introduced because certain trusts (where the trust fund is only a bank account for example, or shares in an IBC) do not actually require annual accounts. Also, the enforcer can be provided with other professional advice and not only counsels' opinions and legal advice.

2.2.3 Duty in relation to the incapacity of the enforcer

In the B.V.I, the situation is twofold.

Trusts created before the date on which Section 84A comes into force remain subject to Section 84(5) of the Ordinance as amended by the Trustee (Amendment) Act, 1993. Section 84(5) uses the same wording as the old Bermuda model.³⁵

Section 84(5) provides:

"Where a trustee who is a designated person has reason to believe that a person who is appointed to enforce the trust is dead, is unwilling, refuses or is unfit to act or is incapable of acting, then that trustee shall as soon as practicable inform the Attorney General in writing of the fact and send him a copy of the instrument creating the trust."

Trusts created on or after the date on which Section 84A comes into force are subject to Section 84A(10) of the Ordinance as amended by the Trustee (Amendment) Act, 2003.

Section 84A(10) provides:

"Where a trustee of a purpose trust who is a designated person has reason to believe that there is no enforcer of the trust, or no enforcer able and willing to act, and that no enforcer is likely in the immediate future to be appointed, that trustee shall as soon as practicable inform the Attorney General of the fact and send him a copy of the instrument creating the trust."

This new wording appears more suitable since it covered situations where no enforcer has actually been appointed.

The designated person is not given the right to apply to the court (as in Barbados). That right is exercised by the Attorney General.

2.2.4 Duty in relation to the designated person

The Trustee (Amendment) Act, 2003 also introduces certain provisions to deal with situations where there is no designated person being appointed. These provisions aim to ensure that a designated person always serves as the sole trustee (or as one of the trustees) of a purpose trust. These provisions apply to both trusts created before and on or after the date on which

Section 84A comes into force.

A new Subsection (12) is added to Section 84 by the Trustee (Amendment) Act, 2003.

This subsection provides that where a specified person has reason to believe that no trustee of a purpose trust is a designated person, or that no designated person is likely in the immediate future to be appointed as a trustee pursuant to the terms of the trust instrument, that person shall use all reasonable endeavours to secure the appointment of a designated person as a trustee of the trust and if such endeavours fail to result in such an appointment he shall make an application to the court for the appointment of a designated person.

Section 84(13) lists the specified persons. These are:

- any trustee of the trust who is not a designated person; and
- any person who has been appointed to enforce the trust.

Section 84(14) further provides that if a purpose trust does not have at least one trustee who is a designated person, on the application in relation to the trust by:

- (a) any existing trustee of the trust;
- (b) a person who has been appointed to enforce the trust, or
- (c) the Attorney General,

the court shall make an order appointing a designated person as a trustee of the trust.

Therefore, no consideration is given to the court. It has to appoint a trustee as a designated person.

Subsection (14) gives the Attorney General the power to apply to the court but he is not obliged under Subsection (12) to secure the appointment of a designated person as a trustee of the trust or to make an application to the court if such endeavour fails to result in such an appointment.

The provisions of Section 84(12), (13) and (14) apply to trusts created before the date on which Section 84A comes into force. Similar provisions apply in this respect to trusts created on or after the date on which Section 84A comes into force. They can be found in Section 84A(19), (20) and (21).

However, there is a slight difference between Section 84(14) and Section 84(21). Section 84A(21) uses the same wording as Section 84(14) but provides for a fourth category of persons who can apply to the court ie, the settlor, unless the terms of the trust instrument provides otherwise.

2.3 Enforcer provisions

Most of the relevant jurisdictions provide that for a non-charitable purpose trust to be valid the terms of the trust must contain provisions for the appointment of an enforcer. The role of the enforcer essentially is to ensure that the trustee is

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brought to account for any breach of trust.

2.3.1 Appointment of the enforcer

The orthodox provision in this respect is that the terms of the trust must provide for the appointment of an enforcer who is capable of enforcing the trust and for the appointment of a successor to any such enforcer.

This is the case in Anguilla,³⁶ Barbados,³⁷ Belize,³⁸ Commonwealth of Dominica,³⁹ Grenada,⁴⁰ Mauritius,⁴¹ Nevis,⁴² Niue⁴³ and St Vincent and the Grenadines.⁴⁴

The wording of this orthodox provision raises an issue with regard to the effectiveness of the appointment of the enforcer. Indeed, what does the legislator mean by "the terms of the trust provide for the appointment of an enforcer"? Does the enforcer need to be effectively appointed or is it enough if the terms of the trust provide for a mechanism by which the enforcer is to be appointed? In my view, the wider interpretation should be adopted.

The wording of the B.V.I. provision in this respect was amended by the Trustee (Amendment) Act, 2003.

Trusts created before the date on which Section 84A comes into force remain subject to Section 84(2)(d), which was not amended by the Trustee (Amendment) Act, 2003.

Therefore, Section 84(2)(d) provides:

"A person may create a valid trust for any purpose, whether charitable or not, if ... (d) the trust instrument appoints a person, who may be a protector, to enforce the trust and provides for the appointment of a successor to such person."

This provision is better as "the trust instrument appoints a person" instead of "the trust instrument provides for the appointment of an enforcer".

Trusts created on or after the date on which Section 84A comes into force become subject to Section 84A(3)(d) of the Ordinance as amended by the Trustee (Amendment) Act, 2003.

Section 84A(3)(d) provides:

A person may create a valid trust for any purpose or purposes ... if (d) "the trust instrument appoints a person as enforcer of the trust, and provides for the appointment of another enforcer on any occasion on which there is no enforcer, or no enforcer able and willing to act."

2.3.2 Who may be the enforcer?

In certain jurisdictions, the protector/enforcer of a trust may also be a settlor, a trustee or a beneficiary of that trust.

This is the case in Anguilla,⁴⁵ Belize,⁴⁶ Commonwealth of Dominica,⁴⁷ Cook Islands,⁴⁸ Nevis,⁴⁹ Niue,⁵⁰ Saint Lucia⁵¹ and St. Vincent and the Grenadines.⁵²

In some other jurisdictions, the protector/enforcer may be a settlor or beneficiary of a trust but he may not be the trustee.

This is the case in Jersey,⁵³ Grenada⁵⁴ and Montserrat.⁵⁵

Lastly, certain statutes merely state that the protector of a non-charitable purpose trust cannot be a trustee of that trust.

This is the case in Barbados⁵⁶ and Mauritius.⁵⁷ This is also the case in the British Virgin Islands where Section 84A(18) of the Trustee Ordinance, 1961 as amended by the Trustee (Amendment) Act, 2003 states that "a person may not be or become a trustee of a purpose trust while he is the enforcer of that trust." This Section only applies to trusts created on or after the date on which Section 84A comes into force. Anterior trusts are not subject to this requirement.

2.3.3 Powers of the enforcer

The enforcer is generally given an express right to apply to the court in respect of any matter concerning the trust.

In the British Virgin Islands, the enforcer is given certain rights of access/communication in respect of the trust documentation. This applies in respect of both trusts created before and on or after the date on which Section 84A comes into force. These provisions are contained in Sections 84(11) and 84A(15).

It is interesting to note in respect of trusts created on or after the date on which Section 84A comes into force that Section 84A(17) provides that an enforcer of a purpose trust shall have both the power and the duty of enforcing it. This might imply, since there is no similar provision applicable to trusts created before the date on which Section 84A comes into force, that an enforcer of a trust created under Section 84A has a duty to enforce while an enforcer of a trust created under Section 84 has just a power to enforce and is under no obligation to enforce the trust.

The enforcer is also given a power in respect of the variation of the trust purposes. Sections 84(15)(b) and 84A(22)(d) give the enforcer the power to make an application to the court to vary any of the purposes of the trust. The Trustee (Amendment) Act, 2003 changes the law on this area, both in respect to trusts created before and on or after the date on which Section 84A comes into force.

The Trustee (Amendment) Act, 2003 also introduces provisions in respect of the remuneration of the enforcer, both for trusts created before and on or after the date on which Section 84A comes into force. There were previously no such provisions in the Ordinance.

Thus, Section 84(19) provides:

"Where any costs incurred by the person who has been appointed to enforce the trust in connection with enforcement, the court

"The role of the enforcer essentially is to ensure that the trustee is brought to account for any breach of trust."

"In some other jurisdictions, the protector/enforcer may be a settlor or beneficiary of a trust but he may not be the trustee."

"... certain legislation merely states that the protector of a non-charitable purpose trust cannot be a trustee of that trust."

may make such order as it considers just as to payment of those costs, including payment out of the property of the trust.”

Section 84A(26) uses a similar wording in respect of trusts created on or after the date on which Section 84A comes into force.

2.3.4 A fiduciary position?

Certain legislation puts the enforcer in a fiduciary position.

This is the case in Anguilla where Section 16(5) of the Trusts Act 1994 provides:

“In the exercise of his office, a protector shall owe a fiduciary duties to the beneficiaries of the trust or to the purpose for which the trust is created.”

This is also the case in Belize,⁵⁸ Commonwealth of Dominica,⁵⁹ Jersey,⁶⁰ Montserrat,⁶¹ Nevis,⁶² Mauritius,⁶³ Saint Lucia,⁶⁴ St. Vincent and the Grenadines.⁶⁵

In the B.V.I., only enforcers of trusts created on or after the date on which Section 84A comes into force are in a fiduciary position.⁶⁶

2.3.5 Termination of office

Certain statutes contain provisions dealing with the termination of the office of the enforcer/protector. This is for example the case in Jersey⁶⁷ or in Mauritius.⁶⁸

The Trustee (Amendment) Act, 2003 does not introduce such provisions.

2.3.6 Resident enforcer

Most of the statutes do not require the enforcer/protector to be resident within the jurisdiction. This is the case in the B.V.I.

However, should the enforcer be the sole trustee (this is allowed in certain jurisdictions) he must then be resident in the jurisdiction. This is the case in Cyprus, Mauritius, Nevis, Saint Lucia, Samoa, St. Vincent and the Grenadines and Seychelles.

2.4 Termination/disposal of surplus assets

Another condition imposed by certain statutes for a non-charitable purpose trust to be valid is that the terms of the trust specify the event leading to the trust's termination and provides for the disposition of surplus assets of the trust upon its termination.

This is the case in Barbados,⁶⁹ Cyprus,⁷⁰ Grenada,⁷¹ the Isle of Man,⁷² Montserrat,⁷³ Nauru,⁷⁴ Saint Lucia,⁷⁵ St. Vincent and the Grenadines⁷⁶ and Seychelles.⁷⁷

In the B.V.I., the Trustee (Amendment) Act, 2003 does not amend the law for trusts created before the date on which Section 84A comes into force. Such trusts require a specific terminating event⁷⁸ and the wording is identical to the Barbados or Cyprus provisions.

However, the Trustee (Amendment) Act, 2003

introduces more flexibility in respect of trusts created on or after the date on which Section 84A comes into force. An option is offered.

Indeed, Section 84A(16) of the Ordinance as amended by the Trustee (Amendment) Act, 2003 provides:

“The instrument declaring or evidencing a purpose trust may, but need not, do any of the following:

- (a) specify any event or date upon the happening or occurrence of which the trust cease to be a purpose trust;
- (b) provide for the disposition of assets of the trust when the trust ceases to be a purpose trust; or
- (c) provide that, for so long as the trust is a purpose trust, the trustee owes no duty:
 - (i) to any persons entitled to such assets when the trust ceases to be a purpose trust; or
 - (ii) in relation to any purposes for which such assets are then to be applied.”

Here again, the Trustee (Amendment) Act, 2003 is keen to provide flexible and protective solutions for trustees.

Other statutes do not require a terminating event nor do they provide for the disposal of surplus assets on the termination of the purpose trust. This is the case in Anguilla, Belize, Bermuda, the Cayman Islands, the Commonwealth of Dominica, the Cook Islands, Jersey, Labuan, Nevis, Niue and Samoa.

Certain statutes provide for a cy-près mechanism. This is particularly helpful in the jurisdictions that allow purpose trusts to have an unlimited perpetuity period.

The usual wording is the following:

- “(1) Where a trust is created for a non-charitable purpose, the terms of the trust may provide that the doctrine of cy-près is, mutatis mutandis, applicable thereto.
- (2) For the purpose of Subsection (1), where a purpose that is reasonably similar to the original purpose cannot be found a purpose that is not contrary to the spirit and meaning of the settlement may be substituted to the original purpose.”

This wording can be found in the legislation of Barbados,⁷⁹ Grenada,⁸⁰ Montserrat,⁸¹ Saint Lucia⁸² and St. Vincent and the Grenadines.⁸³

In the British Virgin Islands, a cy-près mechanism was introduced by the Trustee (Amendment) Act, 2003.

Provisions relating to trusts created before the

“... an enforcer of a trust created under Section 84 has just a power to enforce and is under no obligation to enforce the trust.”

“In the B.V.I., only enforcers of trusts created on or after the date on which Section 84A comes into force are in a fiduciary position.”

date on which Section 84A comes into force may be found in Section 84(15), (16) and (17).

Subsection (15) states that the court may, in such manner as it thinks fit, vary any of the purposes of the trust, or enlarge or otherwise vary any of the powers of the trustees or other provisions of the trust on the application of a trustee of the trust or an enforcer.

Subsection (16) gives an indication of the kind of factors that the court will consider material in its ruling.⁸⁴

These may include:

- (a) such changes in circumstances since the trust was created as are in the opinion of the Court relevant; and
- (b) such factors and proposals as are set out in the application.

Furthermore, Subsection (17) develops and gives details in respect of the changes in circumstances set out in Subsection (16)(a).⁸⁵ Here the legislator was influenced in its drafting by the Cayman wording: The change in circumstances "may include the fact that the execution of the trust in accordance with its terms has become in whole or in part:

- (a) impossible or impracticable;
- (b) unlawful or contrary to public policy; or
- (c) obsolete in that, by reason of changed circumstances, it fails to achieve the intention of the settlor and the spirit of the gift."

Similar provisions have been enacted in respect of trusts created on or after the coming into force of the 2003 Amendment. However, Section 84A(22) broadens the list of persons who may apply to the court to vary the terms of a purpose trust.

Indeed, Section 84A(22) provides:

"On an application in relation to a purpose trust by

- (a) any person appointed by the instrument declaring or evidencing the trust for the purposes of this subsection,
- (b) the settlor, unless the trust instrument provides otherwise,
- (c) a trustee of the trust, or
- (d) the enforcer of the trust,

the court may in such manner as it thinks fit vary any of the purposes of the trust, or enlarge or otherwise vary any of the powers of the trustees or other provisions of the trust."

In both situations, the court may make such order as it considers just as to payment of those costs, including payment out of the property of the trust.⁸⁶

2.5 Role of the Attorney General

Certain jurisdictions give their Attorney General a safeguard role in relation to the appointment of a protector/enforcer.

In the British Virgin Islands, the Trustee (Amendment) Act, 2003 did not amend the law in this respect for trusts created before the date on which Section 84A comes into force.

Section 84(5) of the Trustee Ordinance, 1961 as amended by the Trustee (Amendment) Act, 1993 provides:

"Where a trustee who is a designated person has reason to believe that a person who is appointed to enforce the trust is dead, is unwilling, refuses or is unfit to act or is incapable of acting, then that trustee shall as soon as practicable inform the Attorney General in writing of the fact and send him a copy of the instrument creating the trust."

Section 84(6) provides that the Attorney General on being informed that there is no enforcer or that the enforcer is unwilling or incapable of acting, "shall within 90 days apply for the appointment of a person to enforce the trust and the court may, unless it feels that the person is not fit, by order declare that person to be the person to enforce the trust."

A slight change is introduced by the Trustee (Amendment) Act, 2003 for trusts created on or after the date on which Section 84A comes into force. Indeed, Section 84A(11) provides that: "The Attorney General shall, with all reasonable speed but in any event within 90 days" whereas Section 84(6) merely provides that "the Attorney General shall within 90 days". The change in the wording might imply that the Attorney General does not only intervene in a timely manner in this area.

Similar provisions exist in the Grenada legislation.⁸⁷ The Isle of Man also follows the same trend.⁸⁸ This trend was instituted by the old Bermuda Model.⁸⁹

Usually, the costs incurred by the Attorney General in these proceedings and applications can be reimbursed by order of the court out of the trust fund. This is the case in Anguilla,⁹⁰ Bermuda,⁹¹ British Virgin Islands,⁹² Grenada,⁹³ and the Isle of Man.⁹⁴

Conclusion

All these amendments introduced by the Trustee (Amendment) Act, 2003 provide the B.V.I. with a strong and comprehensive purpose trust regime. In comparison with other offshore statutes, certain provisions have been very detailed by the B.V.I. legislator. This is, for example, the case for the *cy-près* provisions. Also, the provisions relating to situations where there is no designated person being appointed trustee are innovative.

This exhaustive regime should, without doubt, enhance the attractiveness of the Territory in this field.

"Other statutes do not require a terminating event nor do they provide for the disposal of surplus assets on the termination of the purpose trust."

"Certain statutes provide for a cy-près mechanism."

"Certain jurisdictions give their Attorney General a safeguard role in relation to the appointment of the protector/enforcer."

Endnotes:

“Usually, the costs incurred by the Attorney General in these proceedings and applications can be reimbursed by order of the court out of the trust fund.”

1. Adams, *Transcontinental Trusts* (1997) p156.
2. Except The Hague Convention on the Law Applicable to Trusts and on their Recognition, which applied to the B.V.I. by virtue of the United Kingdom Recognition of Trusts Act, 1987.
3. Section 81 Trustee Ordinance, 1961 as amended.
4. Section 2(1) Trusts (Special Provisions) Act, 1989.
5. Section 3(1) International Trusts Act, 1996.
6. Section 3(1) International Trusts Act, 1995.
7. Section 3(1) Trust Act, 1998.
8. Section 3(1) International Trusts Act, 1999.
9. Section 2(2) Trusts (Special Provisions) Act, 1989.
10. Section 3(2) International Trusts Act, 1996.
11. Section 3(2) International Trusts Act, 1995.
12. Section 3(2) Trust Act, 1998.
13. Section 3(2) International Trusts Act, 1999.
14. Section 12(1) Trusts (Special Provisions) Act, 1989.
15. Section 6(4) Foreign Trusts, Estates and Wills Act, 1972.
16. Section 9 International Trusts Act, 1995.
17. Section 12 International Trusts Act, 1996.
18. Section 14(1) International Trusts Act, 1994.
19. Section 2 International Trust Law, 1992.
20. Section 22 Trust Act, 1998.
21. Section 9(1) Purpose Trusts Act, 1996.
22. Section 13 International Trusts Act, 1996.
23. Section 9 Purpose Trusts Act, 1996.
24. Section 23(1)(c) Trust Act, 1998.
25. Section 13 International Trusts Act, 1995.
26. Section 2 Purpose Trusts Act, 1996.
- 26a. Section 17(1) International Trusts Act, 1995.
27. Section 24(1) Trust Act, 1998.
28. Section 60(1) International Trusts Act, 1999.
29. Section 13(2) International Trusts Act, 1995.
30. Section 14(2) Trusts (Special Provisions) Act, 1989.
31. Section 2(2) Purpose Trusts Act, 1996.
32. Section 17(2) International Trusts Act, 1996.
33. Section 24(2) Trust Act, 1998.
34. Section 60(2) International Trusts Act, 1999.
35. Section 13(2) Trusts (Special Provisions) Act, 1989.
36. Section 15(1)(c) Trusts Ordinance, 1994.
37. Section 10(1)(c) International Trusts Act, 1995.
38. Section 15(1)(c) Trusts Act, 1992.
39. Section 8(1)(c) International Exempt Trust Act, 1997.
40. Section 14(d) International Trusts Act, 1996.
41. Section 19(2)(b) Trusts Act, 2001. This provision marks a change with the Offshore Trusts Act, 1992. Indeed, Section 15(4) of the 1992 Act only stated that “an offshore purpose trust may be enforced by the settlor or his personal representative or by any person specified in the instrument establishing the trust as being the person appointed to enforce the trust.” Therefore the Mauritius legislator seems to have moved from the Cook Islands/Cyprus approach to the orthodox approach introduced by Bermuda. Thus, the appointment of an enforcer was not compulsory under the 1992 Act.
42. Section 8(1)(c) Nevis International Exempt Trust Ordinance, 1994.
43. Section 16(1)(c) Trusts Act, 1994.
44. Section 12(1)(c) International Trusts Act, 1996.
45. Section 16(3) Trusts Act, 1992.
46. Section 16(3) Trusts Act, 1992.
47. Section 9(3) International Exempt Trust Act, 1997.
48. Section 20(3) International Trusts Act, 1984 as amended.
49. Section 9(3) Nevis International Exempt Trust Ordinance, 1994.
50. Section 17(3) Trusts Act, 1994.
51. Section 24(3) International Trusts Act, 1999.
52. Section 16(3) International Trusts Act, 1996.
53. Article 10B(2) Trusts (Jersey) Law, 1984 as amended.
54. Section 15(2) International Trusts Act, 1996.
55. Section 10(3) Trust Act, 1998.
56. Section 11(1) International Trusts Act, 1995.
57. Section 21(2) Trusts Act, 2001.
58. Section 16(5) Trusts Act, 1992.
59. Section 9(5) International Exempt Trust Act, 1997.
60. Article 19B(3) Trusts (Jersey) Law, 1984 as amended.
61. Section 10(4) Trust Act, 1998.
62. Section 8(5) Nevis International Exempt Trust Ordinance, 1994.
63. Section 21(4) Trusts Act, 2001.
64. Section 24(5) International Trusts Act, 1999.
65. Section 16(5) International Trusts Act, 1996.
66. Section 84A(17) Trustee Ordinance, 1961 as amended by the Trustee (Amendment) Act, 2003.
67. Article 10C Trusts (Jersey) Law, 1984 as amended.
68. Section 21(8) Trusts Act, 2001.
69. Section 10(1)(d) International Trusts Act, 1995.
70. Section 7(3) International Trusts Law, 1992.
71. Section 14(1)(e) International Trusts Act, 1996.
72. Section 1(1)(f) Purpose Trusts Act, 1996.
73. Section 23(1)(e) Trust Act, 1998.
74. Section 6(2)(iv) Foreign Trusts, Estates and Wills Act, 1972.
75. Section 22(1)(c) International Trusts Act, 1999.
76. Section 12(1)(d) International Trusts Act, 1996.
77. Section 14(3) International Trusts Act, 1994.
78. Section 84(2)(f) Trustee Ordinance, 1961 as amended by the Trustee (Amendment) Act, 1993.
79. Section 14 International Trusts Act, 1995.
80. Section 18 International Trusts Act, 1996. The Grenada provision does not contain a Subsection (2).
81. Section 25 Trust Act, 1998.
82. Section 23 International Trusts Act, 1999.
83. Section 15 International Trusts Act, 1996.
84. Section 84A(23) will use the same wording in respect of trusts created after the coming into force of the Trustee (Amendment) Act, 2003.
85. Section 84A(24) will use the same wording in respect of trusts created after the coming into force of the Trustee (Amendment) Act 2003.
86. Section 84(18) and 84A(25) Trustee Ordinance 1961 as amended by the Trustee (Amendment) Act 2003.
87. Section 16(1) and (2) International Trusts Act, 1996.
88. Section 3(1) Purpose Trusts Act, 1996.
89. Section 13(2) and (3) Trusts (Special Provisions) Act, 1989.
90. Section 15(4) Trusts Ordinance, 1994.
91. Section 13(5) Trusts (Special Provisions) Act, 1989.
92. Section 84(8) and Section 84A(12) Trustee Ordinance, 1961 as amended.
93. Section 16(4) International Trusts Act, 1996.
94. Section 3(4) Purpose Trusts Act, 1996.

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