



Isle of Man
Government

Reiltys Ellan Vannin



The Trusts and Trustees Bill 2022

Consultation

Yn Tashtey
Treasury

11 April 2022

Table of Contents

Consultation overview	3
Part 1 - Introductory	7
Clauses 1 & 2. Introductory Provisions	7
Part 2 - Amendment of the Trustee Act 2001	8
Clause 3. General.....	8
Clause 4. Disclosure of trust information	8
Clause 5. Power of trustee to contract with himself.....	11
Clause 6 - Liability of trustees to third parties	13
Clause 7. Validation of appointments where objects are excluded or take illusory shares ..	16
Clauses 8 & 9. Consequential amendments.....	18
Part 3 – Amendment of the Trustee Act 1961	19
Clause 10. General	19
Clauses 11, 12 & 13. Power to declare exercise of a power voidable	19
Part 4 – Other Amendments	24
Clause 14. Amendment of the Limitation Act 1984.....	24
Clause 15. Amendment of the Apportionment Act 1982.....	27

Consultation overview

The Trusts and Trustees Bill 2022

The Treasury invites comments on the draft Trusts and Trustees Bill 2022 (“the Bill”).

The main aim of the Bill is to provide greater clarity, certainty and convenience to users of Manx trusts and local trust practitioners. It further aims to provide greater competitiveness for the Island’s trusts sector. The Bill will do this through amendments to existing trusts legislation as well as a range of new additions to the Island’s law of trusts.

Background

The modern trust, being a historically English creation with its roots dating back to the Crusades, is a regular feature across common-law jurisdictions. In addition to its traditional testamentary usage in wills and family wealth planning, the trust also plays an integral role in the finance sector.

Trusts law in the Isle of Man has for well over a century remained close to that of England and Wales. This stands in contrast with Jersey, Guernsey and various other International Finance Centres further afield, which have witnessed – and ultimately benefited from – regular and proactive developments in their own trusts legislation to accommodate for the modern demands made of a trust.

Whilst the persuasive application of England’s voluminous and well-respected precedent has been of benefit to Manx practitioners, there is a growing consensus that the Island’s trust legislation needs updating to provide a landscape which is clearer, more competitive and more reflective of common practice in the sector.

It is worth noting that Manx practitioners are not alone in calling for an update to the English model of the trust; with the Law Commission of England and Wales set to examine the modernisation of English trusts law as part of its 13th Programme of Law Reform¹. It is understood

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/668113/13th-Programme-of-Law-Reform.pdf

that this review will focus partly on measures to make the English trust model more competitive in the global market².

How has the Bill been developed?

The Bill comprises of a set of proposals, the majority of which were originally put forward in 2015 by the Society of Trust and Estate Practitioners (“STEP”) to the Regulatory and Legislative Innovation Working Group: an industry liaison meeting featuring representative from across the Island’s finance sector. These original proposals were subject to a stakeholder consultation in August 2016.

The Treasury subsequently worked closely with internal partners and the Financial Services Authority in exploring the proposals further and preparing the policy that underpins the Bill.

In addition to this, the Treasury consulted with private sector stakeholders prior to the drafting of the Bill to ensure that the Treasury’s understanding of the relevant areas of trusts law was correct. This stakeholder engagement also enabled the Treasury to ensure its proposed policy was reflective of common practice in the sector and responsive to the requests for reform.

Some proposals that were originally considered have been subject to much debate between internal and external stakeholders. This draft Bill includes those proposals on which a degree of consensus has been reached.

Future trust reform

Other proposals regarding trusts law reform remain under consideration and Treasury is open to considering further changes to trusts law in future. In particular, a new proposal relating to Ethical, Social and (Corporate) Governance (“ESG”) matters is currently being developed and considered.

The aim of this proposal would be to enable trustees to have regard to the wishes and views of beneficiaries in respect of ethical, environmental and social investing. If you have any comments on this proposal or have any other suggestions regarding other areas of Trusts law that you feel should be considered for reform, these would be welcomed.

² Ibid, pages 16-17.

Consultation

The Bill provides for 7 distinct changes to Isle of Man trusts law, as well as ancillary provisions, and this consultation addresses each of these in turn —

1. Part 1 – Introductory
 - Clause 1 & 2 Introductory Provisions
2. Part 2 – Amendment of the Trustee Act 2001
 - Clause 3. General
 - Clause 4. Disclosure of trust information
 - Clause 5. Power of trustee to contract with himself
 - Clause 6. Liability of trustees to third parties
 - Clause 7. Validation of appointments where objects are excluded or take illusory shares
 - Clause 8 & 9. Consequential Amendments
3. Part 3 – Amendment of Trustee Act 1961
 - Clause 10. General
 - Clause 11 to 13. Power to declare exercise of a power voidable
4. Part 4 – Other Amendments
 - Clause 14. Amendment of the Limitation Act 1984
 - Clause 15. Amendment of the Apportionment Act 1982

The consultation includes 25 key questions, however, any additional comments or questions would be welcomed and an open text area is available at the end of this consultation accordingly.

Respondents are encouraged to submit their responses via the online form, however, comments may also be submitted in writing to:

Jo Coole, Policy Advisor
Policy Office
The Treasury
1 Floor, Government Office
Bucks Road, Douglas
IM1 3PU

Or by email to: Treasuryconsultations@gov.im

If you are submitting your comments via the Treasury consultations email address, please let us know whether we can publish your comments in full (including your name or the name of the organisation you are representing), anonymously, or not at all (noting that if you select this option your response will only be part of a larger summary response document).

The closing date for the receipt of comments is 9 May 2022

Confidentiality

The information you send may be published in full or in a summary of responses.

When submitting your comments please indicate whether you are responding on behalf of an organisation (and if so which organisation) or on your own behalf.

Please let us know whether we can publish your comments in full (including your name or the name of the organisation you are representing), anonymously, or not at all (noting that if you select this option your response will only be part of a larger summary response document).

All information in responses, including personal information may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 and the Data Protection Act 2018). If you want your response to remain confidential, you should explain why confidentiality is necessary and your request will be agreed to only if it is appropriate in the circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding.

All responses submitted will be held within the Isle of Man Government's consultation hub and will be treated in accordance with the [privacy policy](#).

Part 1 - Introductory

Clauses 1 & 2. Introductory Provisions

Summary of Proposals

Clauses 1 and 2 lay out the title of the Act – the Trusts and Trustees Act 2022 – and when it comes into operation. The Act will come into operation on any day or days that Treasury determines. This may involve some sections of the Act coming into force on different days.

Questions

1. Do you support this Part of the Bill as currently drafted?
2. Please provide any further comments you may have on clauses 1 and 2 of the Bill.

Part 2 - Amendment of the Trustee Act 2001

Clause 3. General

Clause 3 provides that Part 2 of the Bill amends the Trustee Act 2001.

Clause 4. Disclosure of trust information

Background

One of the obligations imposed on trustees is their duty to account to the beneficiaries for their stewardship of the trust. Trustees are under a duty to maintain accurate accounts of the trust property and, upon request, allow a beneficiary to inspect the accounts and supporting documents. This obligation ordinarily includes providing details of investments and allowing access to title deeds, share certificates and other such documents concerning the trust property.

This trustee duty and the right of beneficiaries to seek information were considered in the Isle of Man case of *Schmidt v Rosewood*³, which was ultimately heard in the Judicial Committee of the Privy Council. In *Schmidt*, the court restated the law. The result is that trustees who are faced with a request for information have to weigh up all relevant factors, rather than just accepting or denying the request based on the status of the person asking. It should be noted, however, that the underlying duty remains the same; trustees are obliged to account to the beneficiaries for their stewardship of the trust.

Within this underlying duty there remains uncertainty as to what extent trustees can restrict the information given to beneficiaries. Clearly trustees cannot restrict information to the effect that beneficiaries are unable to enforce the trust, however beneficiaries also do not have an absolute right to demand any and all information pertaining to the trust which is held by trustees.

It is quite common for settlors to wish to restrict their beneficiaries' access to trust information in the trust deed, especially where the beneficiaries are young or vulnerable. There is also a risk that access to trust information can be used by some recipients to 'attack' the trust via litigation. Both Jersey and Guernsey have introduced legislation to clarify and simplify the position in trusts law on the ability of a settlor to restrict beneficiary access to trust information

³ [2003] 2 WLR 1442

Additional Information

In order to more easily comply with the duty described above, it is advisable and usual for trustees to maintain a trust diary or minute book, recording decisions taken in the administration of the trust and possibly minutes of trustees' meetings.

Part of the decision in *Schmidt* was that a beneficiary has no absolute right to information concerning the trust simply by their being a beneficiary; this was not a proprietary right. Rather, the right to information was part of the court's inherent jurisdiction to ensure that, wherever possible, the trust is enforceable against the trustees.

Data Protection Implications

The recent UK case of *Dawson-Damer v Taylor Wising* has clarified the existence of a conflict between the trusts law principles on information disclosure and the ability of persons to seek information relating to themselves under data protection legislation.

The conflict essentially means that beneficiaries who are not entitled to receive certain trust information under trusts law can circumvent this by lodging data subject access requests to obtain documents in their trustees' possession which relate personally to the beneficiaries.

The need to resolve this conflict to protect longstanding trust principles has been recognised in the Isle of Man's implementation of the GDPR. An exemption is currently included at paragraph 21 of Schedule 9 to the GDPR and LED Implementing Regulations 2018 so as to prevent people relying on data subject access requests to obtain trust information which they would otherwise not be entitled to receive under trusts law.

Summary of Proposal

Clause 4 of the draft Bill inserts Part 1A (Duty to disclose trust information) to the Trustee Act 2001. Part 1A will add new section 2A (Disclosure of trust information) to the legislation.

The Treasury proposes that the ability of a settlor to validly restrict a beneficiary's access to trust information in the trust deed be recognised in statute, whilst ensuring that beneficiaries are able to access the information that they require in order to hold the Trustees to account. The arrangements provided in new section 2A essentially mean that a trustee who receives a request for disclosure should consider –

(a) who is making the request

(b) what the trust instrument provides in terms of –

- (i) to whom the trustee is authorised to disclose information,
- (ii) to whom the trustee is required to disclose information,
- (iii) what information the trustee must disclose, and
- (iv) what information the trustee may disclose.

New section 2A also enables a trustee to refuse to disclose information in specific circumstances – even if the terms of the trust give that person a positive right to receive that information.

Furthermore, it ensures that the court retains ultimate power regarding disclosure and, in the exercise of that power, the court can overrule a trustee’s decision on disclosure and can override the terms of the trust on disclosure.

Questions

3. Do you support this proposal as currently drafted?
4. Do you have any views on the temporal provisions, as drafted?
5. Please provide any further comments you may have on clause 4 (insertion of new Part 1A to the Trustee Act 2001) of the Bill.

Clause 5. Power of trustee to contract with himself

Background

It is currently unclear whether a trustee can validly enter into a contract with themselves in their capacity as trustee of two separate trusts.

It is often contended that a fiduciary should not place themselves in a position where duties to one beneficiary can conflict with their duties to another beneficiary. This conflict of duties was elevated to the status of a separate rule by the English Law Commission⁴, called the 'undivided loyalty' rule. The undivided loyalty rule has been relaxed in other fiduciary relationships, such as in cases where financial advisers act in a fiduciary capacity for multiple clients.

There are also broader constraints under contract law in the form of the 'two party rule'⁵, which generally prohibits one party from validly contracting with itself. The implications for trustees are rooted in the fact that the trust is not a legal person and cannot validly enter into a contract itself. The trustees, as holders of legal title in the trust property, must be the ones to contract in their own names.

Additional Information

There are common law rules that have been developed in respect of 'self-dealing' and 'fair-dealing' which are also relevant here.

The self-dealing rule is that any sale of trust property by the trustee to themselves is voidable at the discretion of any beneficiary⁶, however fair the transaction may be. The fair-dealing rule states that if a trustee purchases the beneficial interest of any of their beneficiaries, the transaction is not voidable as of right by the beneficiary, but can be set aside by a beneficiary unless the trustee can show that:

- they have not taken advantage of their position;
- full disclosure was made; and
- the transaction is fair and honest.

⁴ *Fiduciary Duties and Regulatory Rules*, Consultation Paper No 124 (1992) at 32.

⁵ *Ingram v IRC* [1997] 4 All ER 395 at 423 per Millett LJ

⁶ Legally referred to as '*ex debito justitiae*', meaning 'as of right'; the beneficiary is entitled to merely by asking for it.

These rules are founded on the wider principle that 'no person who has a duty to perform shall put themselves in a position where their interests conflict with that duty'⁷.

Summary of Proposal

Clause 5 of the draft Bill inserts new Part 3A (Contracts) to the Trustee Act 2001. Part 3A will add new sections 10A (Power of trustee to contract with himself) and new section 10B (Restriction, exclusion and application of this Part) to the legislation.

The Treasury proposes that statutory recognition is introduced in respect of contracts entered into by trustees with themselves in their capacity as trustee of another trust.

To that end, the arrangements provided in Part 3A to the Trustee Act 2001 will provide greater certainty for both settlors and beneficiaries.

Questions

6. Do you support this proposal as currently drafted?
7. Do you have any views on the temporal provisions, as drafted?
8. Please provide any further comments you may have on clause 5 (insertion of new Part 3A to the Trustee Act 2001) of the draft Bill.

⁷ Paraphrase of Vinelott J in *Movitex Ltd v Bulfield* [1988] BCLC 104 at 117.

Clause 6 - Liability of trustees to third parties

Background

When it comes to the liability of trustees, the starting point in trusts law is that trustees are personally liable for all their dealings as trustee. The trust itself is not a legal entity with its own separate legal personality and therefore it cannot contract or litigate in its own name; these responsibilities fall on the trustee.

This starting position under trusts law is, however, often deviated from in practice, either by the insertion of clauses in contracts with third parties that limit liability to the assets of the trust property, or by a court order indemnifying trustees for costs associated with trust litigation. The nature and usage of the modern trust, particularly in an International Finance Centre ("IFC") such as the Isle of Man, has changed considerably over the past century. The value of these trusts and the contracts made in relation to their assets is often very large, and the consequences for trustees of being held personally liable in relation to such contracts could prove catastrophic.

Indeed, it is for these reasons that trustee personal liability is often limited to the assets of the trust during the course of contractual negotiations with third parties. However, such limitations of liability are not always attainable, particularly when the other contracting party is based in a jurisdiction where trusts are alien concepts.

In respect of costs associated with trust litigation, there is already an avenue under case law for trustees to be reimbursed from the trust for their litigation costs.

Additional Information

Third Party Contracts

As with all contract terms, trustee liability limitations in agreements with third parties will be subject to the usual rules of interpretation and construction by the courts and so there is no absolute guarantee that this method of protection will work. Furthermore, trustees may not always be successful in negotiating such terms or they may forget to do so.

The personal liability of trustees in third party contracts can be problematic for modern trusts. The value of contracts involving trusts in IFCs can often be very large, and could prove catastrophic for trustees held personally liable in respect of them. This situation may also not always be to the

benefit of the third parties, the value of whose claim may not be satisfactorily met by the trustees' personal assets.

Litigation Liabilities

Trustees are often obliged to litigate, and in doing so they can find themselves personally liable to pay legal costs, even where they have acted reasonably and in good faith.

Currently there is an avenue to indemnity for trustees who commence or defend a legal action, called a 'Beddoe order'⁸. The key principle to be taken away from *Re Beddoe* is that:

*"a trustee who, without the sanction of the Court, commences an action or defends an action, unsuccessfully, does so at his own risk as regards the costs, even if he acts on counsel's opinion..."*⁹

Trustees generally have two choices when facing litigation with a third party:

- a) They can fight and risk losing, thereby suffering cost consequences; or
- b) They can choose not to fight, thereby risking a claim by the beneficiaries for breach of trust for choosing not to fight.

The Beddoe order is a way for trustees to address these concerns in advance of litigation; by securing a court order stating that the trustees will be entitled to be indemnified out of the trust for the costs of the litigation, irrespective of the outcome. The Beddoe order will not always be necessary, for example trustees could, in theory, get the express consent of all the beneficiaries to proceed with or defend the claim. In reality however, getting the consent of all the beneficiaries may prove impractical where the class is too wide or not closed.

Failure to obtain a Beddoe order before the action will leave the trustees potentially exposed to personal liability, even where they have defended or pursued a claim as trustee in a reasonable and responsible manner. The court will only grant a trustee indemnity retrospectively in exceptional circumstances.

⁸ *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547 (CA)

⁹ *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547 (CA), per Lindley LJ

Whilst this equitable jurisdiction does exist, it is founded in case law which by its nature makes it less certain than statute. Further, a Beddoe order will not assist if the trust assets are insufficient to meet the costs associated with litigation.

Summary of Proposal

Clause 6 of the draft Bill inserts Part 4A (Third Parties) to the Trustee Act 2001. Part 4A comprises of new section 27A (Liability of trustees to third parties).

The Treasury proposes that trustees' personal liability be statutorily limited to the assets of the trust. This will codify existing practice and case law whilst also offering clearer, more certain protection to trustees of Isle of Man trusts and those that do business with them.

To protect third parties dealing with trustees, the limitation of liability afforded by new section 27A of the Trustee Act 2001, as inserted by the draft Bill, is subject to the third party in question being aware that they are dealing with the trustee in their capacity as a trustee prior to the contract being entered into.

The proposed guarantee of limited liability for trustees, and the caveats that are attached to it under new section 27A, are consistent with provisions in other IFCs, such as Jersey and Guernsey, as well as larger jurisdictions such as the United States of America.

Questions

9. Do you support this proposal as currently drafted?
10. Do you have any views on the temporal provisions, as drafted?
11. Please provide any further comments you may have on clause 6 (insertion of Part 4A to the Trustee Act 2001) of the draft Bill.

Clause 7. Validation of appointments where objects are excluded or take illusory shares

Background

Prior to the Powers of Appointment Act 1874 (of Parliament) ("the 1874 Act"), appointments to Trusts were dealt through case law. The starting point in relation to the matter was recognised as being that, unless the power was specifically provided for the appointment to be exercised so as to exclude some of the objects of the power, the power had to be exercised in favour of all of the objects.

Over time, the case law developed two categories of power of appointment – "non-exclusive" powers whereby the power could be exercised to the exclusion of some of the objects, and "exclusive" powers of appointment, under which the power had to be exercised in favour of all of the objects. As a result, and as a way of avoidance of the full rigours of "exclusive" powers, the practice of giving some objects of power "an illusory share" (known as "cutting objects off with a shilling") was established. By giving "an illusory share", the exercise of power could not be challenged, even though other objects had significant appointments in their favour.

To address this problem, the 1874 Act provided a discretion to appointment to the total exclusion of some objects, unless the trust instruments expressly provided otherwise. The appointment provisions of the 1874 Act were replaced by section 158 of the Law of Property Act 1925 (of Parliament) ("the 1925 Act").

Section 158 of the 1925 Act contains provisions applicable to England intended to solve unworkable and inconvenient equitable jurisdictions relating to —

- a) the appointment of "unsubstantial", "illusory" or "nominal shares" upon the objects of a trust; and
- b) the exclusion of objects of a trust.

In short, section 158 provided that powers of appointment are to be considered "exclusive" powers unless the trust instrument expressly provides otherwise. The effect of this is that a power to appoint trust property between two or more objects of a trust is not invalidly exercised on the grounds that any object is excluded or takes illusory shares.

The Isle of Man never adopted a corresponding provision into its own legislation. It is possible that Manx courts would, in effect, adopt the position in England under s. 158 of the 1925 Act through the application of persuasive English case law stemming from that provision. This, however, is an uncertain assumption. Isle of Man trust deeds commonly state that any objects may be excluded but defectively drafted deeds are still in existence.

Summary of Proposal

Clause 7 of the draft Bill inserts new section 37A (Validation of appointments where objects are excluded or take illusory shares) to the Trustee Act 2001.

New section 37A provides that the effect of section 158 of the Law of Property Act 1925 (of Parliament) is incorporated into Isle of Man legislation.

Questions

12. Do you support this proposal as currently drafted?
13. Do you have any views on the temporal provisions, as drafted?
14. Please provide any further comments you may have on clause 7 (insertion of new section 37A to the Trustee Act 2001) of the draft Bill.

Clauses 8 & 9. Consequential amendments

Background

Clause 8 of the draft Bill provides for the amendment of section 39(1) (interpretation) of the Trustee Act 2001 by inserting a definition of the term "protector", aligning it with the meaning given in section 6 of the Trusts Act 1995.

Clause 9 of the draft Bill amends Schedule 1 to the Trustee Act 2001, by inserting new paragraphs 2A (Contracts) and 2B (Third Parties). The amendments provided under this clause interact with those provided by clause 5, which relates to the power of a trustee to contract with himself. Whilst the amendments proposed under clause 5 will give statutory authority for a trustee to contract with himself, this amendment to Schedule 1 of the Trustee Act 2001 makes it clear that the duty of care still applies in respect of such transactions.

Questions

15. Do you support these proposals as currently drafted?
16. Please provide any further comments you may have on the amendments to the Trustee Act 2001 as provided for in clauses 8 and 9 of the draft Bill.

Part 3 – Amendment of the Trustee Act 1961

Clause 10. General

Clause 10 provides that Part 3 of the Bill amends the Trustee Act 1961.

Clauses 11, 12 & 13. Power to declare exercise of a power voidable

Background

The 1974 case of *Re: Hastings Bass*¹⁰ created a principle in English trusts law that allowed trustees to apply to the court to set aside a decision made by the trustees in certain circumstances.

These circumstances included where the trustees had exceeded their authority under the trust in making the decision – also known as ‘excessive execution’ – and where it was clear the trustees would not have made the decision had they taken into account relevant considerations that they ought to have, or had refrained from taking into account irrelevant considerations which they ought not to have.

This principle, which despite subsequent refinement is known as the ‘rule in *Hastings-Bass*’, was revisited by the Supreme Court in the 2013 case commonly referred to as *Pitt v Holt*¹¹. In *Pitt* the Supreme Court restricted the availability of the rule in *Hastings- Bass* to situations where the trustees had breached their fiduciary duty.

These judicial developments are of very persuasive authority in the Isle of Man, however a subsequent case in the Manx courts cast doubt on the applicability of the reasoning in *Pitt* to the Island. In the Manx case of *AB v CD*¹² the court was clear that Isle of Man law does not automatically follow developments in the English common law, particularly where such developments are based on “English public policy considerations”¹³.

¹⁰ *Re Hastings-Bass (dec’d), Hastings v IRC* [1974] STC 211

¹¹ *Pitt v Holt; Futter v Futter* [2013] EWSC 13

¹² [2016] CHP 7

¹³ *Ibid*, at 40

Whilst the decision in *AB* was explicitly not a ruling on whether *Pitt* would be followed in the Island, the court did note that it had "serious reservations"¹⁴ as to whether the English decision was good law in the Island.

The decision in *AB* has been read by some practitioners as an indication that the pre-*Pitt* reading of the rule in *Hastings-Bass* still applies in the Isle of Man, though there remains a degree of uncertainty as to whether this is the case.

Additional Information

In *Hastings-Bass* the court provided for a power to set aside the decisions of trustees, on application, where either —

- (1) the trustee exceeded the authority given by the trust; or
- (2) it is clear that the trustee would not have acted as they did —
 - (a) had they not taken into account considerations which they should not have taken into account; or
 - (b) had they not failed to take into account considerations which they ought to have taken into account.

In the years following *Hastings-Bass* the second limb of the rule underwent several restatements, most notably in the case of *Mettoy Pensions Trustees v Evans* [1990] 1 W.L.R. 1587. The first limb of the rule ('excessive execution') largely escaped restatement, with the second limb ('inadequate deliberation') being the more novel and uncertain part of the ruling in *Hastings-Bass*. Despite the restatement in *Mettoy* the principle continues to be referred to as 'the rule in *Hastings-Bass*'.

The rule in *Hastings-Bass* was restated again in a much more restrictive form by the UK Supreme Court in the case of *Pitt v Holt; Futter v Futter*. The Supreme Court unanimously restricted the availability of the court power to intervene in situations where the trustees have breached their fiduciary duty. In *Pitt*, the trustees had sought professional advice on a transaction which turned out to be defective and led to a detrimental impact on the value of the trust. It was held that the trustees had acted properly in seeking advice and had not breached their fiduciary duties and so the court would not intervene to set aside the decision. Trustees must have regard to relevant considerations, and only those considerations, when exercising powers vested in them. Relevant

¹⁴ *Ibid*, at 47

considerations include the fiscal consequences, if any, of any proposed exercise of discretionary powers.

In his *Pitt* decision, Lord Walker noted a hesitation at assisting the trustees in *Futter v Futter*, where the decision related to flawed tax planning. Lord Walker noted that it was not an extremely artificial tax avoidance scheme but that it was “hardly an exercise in good citizenship”¹⁵. He went on to state that “in some cases of artificial tax avoidance the court might think it right to refuse relief”¹⁶.

The effect of the decision in *Pitt v Holt* is that it is now clear that in England the application of the narrowed second limb of *Hastings-Bass* leaves the exercise of a power voidable and not void. It should be noted that this does not affect circumstances such as fraud, want of formalities and certain other circumstances dealt with in the judgment which would render the exercise of the power void.

These judicial developments have occurred in a separate jurisdiction though they are of persuasive authority in the Isle of Man. Those Manx practitioners wondering if the decision in *Pitt* would be followed in the Isle of Man would have noted the comments of the court in the case of *AB v CD*. In this case the court made a series of comments *obiter dicta* on the topic of *Pitt* and its applicability in the Isle of Man. The court reiterated that Isle of Man law does not automatically follow English common law developments, especially where such developments are based on “English public policy considerations and revenue considerations”¹⁷. The judgement went on to state that the court had “serious reservations”¹⁸ as to whether *Pitt* was good Manx law.

Therefore, as far as the rule in *Hastings Bass* in the Isle of Man is concerned, there is substantial uncertainty over its application. By comparison, Jersey is amongst the IFCs that provide a statutory court power to set aside the defective exercise of trustee powers.

¹⁵ [2013] EWSC 13, at 135

¹⁶ Ibid

¹⁷ *AB v CD* [2016] CHP 7, at 40

¹⁸ Ibid, at 47

Summary of Proposal

Clause 11 of the draft Bill amends section 55 of the Trustee Act 1961. Clause 12 inserts new section 55A (Power to declare exercise of a power voidable) to the legislation. Clause 13 then amends section 61 of the 1961 Act.

It is proposed that the uncertainty over the position of the rule in *Hastings-Bass* in the Isle of Man is resolved by codifying the main elements of the pre-*Pitt* version of the principle. In particular, the amendments contained in new section 55A of the Trustee Act 1961 seek to incorporate the pre-*Pitt* version of the second limb of the rule in *Hastings-Bass* relating to inadequate deliberation.

New section 55A of the 1961 legislation will provide the court with the power to, on application, set aside the exercise of a power by a trustee or group of trustees where it is satisfied that:

- a) The trustee(s) failed to take relevant considerations into account, or took irrelevant considerations into account, when exercising the power;
- b) The result of this exercise has been or will be to the detriment of the beneficiaries or the trust property; and
- c) The trustee or group of trustees would not have exercised the power or would have exercised it in a different manner or on a different occasion, but for their failure to take into account relevant considerations or their taking into account of irrelevant considerations.

If the court is satisfied of the above, then it may set aside the exercise of power in question. The power to set aside is to be applied irrespective of any fault on the part of the trustee or any person advising the trustee in relation to the exercise of the power.

Where the court sets aside the action of the trustee(s), it is to be treated as being voidable and —

- a) has such effect as the court may determine; or
- b) is void altogether.

The amendments to the Trustee Act 1961 provided in clauses 11 to 13 of the draft Bill do not prejudice the operability of the equitable remedy of rectification of mistakes, which will continue to be available to practitioners irrespective of the proposed new legislation.

Questions

17. Do you support this proposal as currently drafted?
18. Do you have any views on the temporal provisions, as drafted?
19. Please provide any further comments you may have on clauses 11 to 13 of the Bill

Part 4 – Other Amendments

Clause 14. Amendment of the Limitation Act 1984

Background

A limitation period refers to the timeframe within which a claimant may bring a legal action. Failure to bring an action within the prescribed limitation period for that action usually means the claimant loses the right to do so.

The current limitation period in the Isle of Man for claims of breach of trust is set at six years, unless the breach is fraudulent in nature in which case there is no statutory limitation period. This limitation period is mandated by section 21(3) of the Limitation Act 1984, and mirrors the period applied to breach of trust claims in England and Wales.

The six year period in both the Isle of Man and England generally runs from when the breach is committed and is comparable to most actions in tort and contract law. In the case of a beneficiary entitled to a future interest, the six year period begins to run from the moment the interest falls into the possession of the beneficiary and therefore may well be longer than six years from the moment the breach occurred.

It is important to note that the six year period begins to run irrespective of whether the beneficiary is aware of the breach or not, and therefore the period could theoretically lapse before the beneficiary gets the chance to bring an action.

The current six year period is viewed by some trust practitioners as unnecessarily long, given the ability of beneficiaries to identify breaches of trust from trust accounts and documents that they regularly receive. There is also concern that it leaves them exposed to vexatious claims.

In light of these concerns, both Jersey and Guernsey have legislated to shorten their respective prescription periods from six to three years.

Additional Information

There is no limitation period for actions to recover trust property or proceeds from trust property from the trustee. In England, statutory limitation periods also do not apply to situations where the

trustee has breached their fiduciary duty of loyalty by violating the self-dealing or fair-dealing rules¹⁹.

The equitable doctrine of laches may act to bar actions brought against trustees where the statutory time limits do not apply, these being fraudulent breaches of trust and violations of the self-dealing and fair-dealing rules. Essentially, this doctrine will act to protect a trustee where a beneficiary is seeking to unconscionably assert a right against the trustee. Naturally, each case of the doctrine's use is very much reliant on the facts at hand.

Summary of Proposal

Clause 14 of the draft Bill provides that the current six year limitation period prescribed in the Limitation Act 1984 be shortened to three years through the amendment of section 21 of that Act.

Importantly, it is also proposed that the new three year period runs from the moment that the final trust accounts are delivered to the beneficiaries or the moment that the beneficiaries first had knowledge of the breach, whichever is earlier. This change should ensure that – despite the shortening of the limitation period – beneficiaries have sufficient time to identify and bring a claim where there is a breach of trust.

Section 21 of the Limitation Act 1984 (as amended) includes specific safeguards for situations involving beneficiaries who are disabled or are minors. Specifically, section 21(3) provides that in the case of beneficiaries who are legally disabled or minors, who are legally disabled or minors when the breach occurs, the three year period runs from the date on which the beneficiary's guardian first has knowledge of the breach or the date on which the beneficiary ceases to be legally disabled or a minor, whichever occurs first.

To provide overarching protection against vexatious claims, section 21 (as amended) also includes at subsection (6) an ultimate limitation period for actions not falling under subsection (1) (i.e. claims for breach of trust not involving fraud etc.) of 21 years, running from the moment of the breach.

¹⁹ *Tito v Waddell (No 2)* [1977] Ch 106 at 249.

Questions

20. Do you support this proposal as currently drafted?
21. It is intended that these provisions will apply prospectively only. Do you have any views on this?
22. Please provide any further comments you may have on clause 14 of the Bill (amendment of the Limitation Act 1984).

Clause 15. Amendment of the Apportionment Act 1982

Background

Trustees receive income periodically. Under the Apportionment Act 1870 (of Parliament) income is treated as accruing from day to day. This means that when there is a change in the beneficiary entitled to income, the income may need to be apportioned.

For example, trustees hold a trust fund on trust for A for life, remainder to B and –

- (a) A dies on 31st January 2021,
- (b) At the end of March 2021 the trustees may receive rent for the quarter January to March 2021. A's estate will be entitled to one third of the rent,
- (c) In 2022 trustees may receive dividends for the calendar year 2021. A's estate will be entitled to one twelfth of the dividends.

The income has to be apportioned between the respective estates and the apportionment rule is intended to operate fairly between the different beneficiaries (or their estates). Whilst the rule produces fairness, it is recognised to be an expensive fairness and the operation of the rules is cumbersome. Furthermore, the sums involved are usually small, and the calculations tedious. Against this background, it is common for trustees to ignore the apportionment rule.

Furthermore, the application of the rule can result in "unfairness". Apportionment on death may deprive a widow of income. Suppose H by his will leaves his estate to his widow for life with remainder to his children. After the death of H the trustees will receive income. They must apportion the income so that (a) income attributable to the period before the death of H will be apportioned to H's estate (and treated as trust capital) and (b) only income attributable to the period after the death of H will be payable to the widow. In other words, the apportionment rule prevents the widow from enjoying the full income from her husband's estate at a time when she may most need it - during the year after the husband's death.

A further example of the rule resulting in "unfairness" can arise when dealing with the apportionment on income upon a child attaining majority. Suppose there is a trust for X if he attains the age of 25 and the standard provisions of section 31 Trustee Act 1925 apply to trust income. After X attains the age of 18, the trustees must apportion income so that (a) income attributable to the period before X reaches 18 must be accumulated, and (b) only income attributable to the period after X reaches

18 is payable to him. In other words the apportionment rule prevents the child from enjoying the full income from the trust during the year after he attains 18.

As the Isle of Man's Apportionment Act 1982 follows the Apportionment Act 1870 (of Parliament), the same issues, difficulties and outcomes apply. Perhaps unsurprisingly, it is common for modern Isle of Man trust deeds to disapply the 1982 Act.

In recognition of these problems, and the fact that their Act was also commonly disapplied, England and Wales moved to abolish the apportionment requirements in their 1870 Act as applied to new trusts in the Trusts (Capital and Income) Act 2013²⁰. The Isle of Man has not followed this English development and the 1982 Act remains prima facie in effect as regards all trusts in the Isle of Man.

Summary of Proposal

Clause 15 of the draft Bill proposes the insertion of new section 2A to the Apportionment Act 1982.

The intention of this new section is that the Isle of Man moves to mirror the position in England and Wales, by abolishing the apportionment rules for new trusts.

Questions

23. Do you support this proposal as currently drafted?
24. It is intended that these provisions will apply prospectively only. Do you have any views on this?
25. Please provide any further comments you may have on clause 15 (amendment of the Apportionment Act 1982) of the Bill.

²⁰ Section 1.

Additional comments and Questions





ISLE OF MAN
TREASURY
Yn Tashtey



This document can be provided in large print or audio tape on request

The Treasury
Government Office
Bucks Road
Douglas
IM1 3PN