3) BVI issues: VISTA trusts and trustee record keeping

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VISTA trusts, as they are commonly known, came into existence in 2004 with the enactment in the British Virgin Islands ("BVI") of the Virgin Islands Special Trusts Act 2003 ("VISTA"). During these past 11 or so years, VISTA trusts have proved to be very popular and are strongly marketed by BVI service providers. As with all markets where there is a choice, there is strong competition and this has led to a certain degree of standardisation in respect of documentation, cost and client expectation.

It is, however, important to take a step back and to remember that a VISTA trust remains a trust and that trustees of VISTA trusts still have significant duties and liabilities.

VISTA was introduced to deal with one specific issue: to disengage a shareholder trustee from management responsibility in respect of the shares in an underlying company held as part of the trust fund. VISTA enables a trust to be established where the trustee has an express duty to retain company shares whilst at the same time limiting the trustee's obligations to monitor and intervene. Such limitations apply only to shares in a BVI company (the "VISTA Company") and only where an express designation has been made in respect of those shares.

Whilst the statutory protection afforded by VISTA allows an otherwise "ordinary" trustee some degree of latitude with respect to its VISTA Company shares, it should not be mistaken as a form of statutory exoneration enabling a VISTA trustee to sit back and be completely passive; nor is it a tool with which a settlor or the director of a VISTA Company can fend off a trustee looking to get involved (and as a result, seek to reduce a trustee's fees to a nominal figure).

For example, VISTA does not apply to property other than designated shares in a VISTA Company, so any other property in the trust fund (including dividends declared by the VISTA Company) would be subject to the long-standing rules relating to trust investments (i.e. the trustee still has a duty to monitor the assets and consider diversification).

Above and beyond the protection afforded the trustee in respect of the shares in the VISTA Company, a VISTA trust remains a trust and all of the other duties of a trustee remain.

Trustees should therefore ensure that they act appropriately, levy a realistic charge for their services from the outset, and resist any suggestion that they will have "less to do".

VISTA trustees should also keep in mind their obligation and duty to account to the beneficiaries of the trust; an obligation which extends to the entire trust fund, including the VISTA Company. There are also now the requirements of the Trustee Amendment Act, 2015 as further described below.

In order to be able to provide an account and to know the financial position of the trust, a trustee needs to know the value of its holding in a VISTA Company, so a VISTA Company will need to provide the trustee with regular accounts. Depending on the value and complexity of the VISTA Company these may not need to be audited, but they do need to be in a form capable of being understood by the trustee and anyone else who needs to see them.

In addition, VISTA enables an "interested person" with a permitted ground for complaint to call upon the trustee in writing ("an intervention call") to intervene in the affairs of the VISTA Company. The trustee must, if satisfied that the complaint is substantiated, take such action as it thinks appropriate. An interested person is also able to request the trustee to provide such information concerning the VISTA Company as is reasonably required for the person to decide whether an intervention call is necessary in the first place.
If there is an appointed enquirer, such person has a duty to make reasonable enquiries as to whether a permitted ground for complaint exists. The trustee must use all reasonable endeavours to ensure at all times that an appointed enquirer or, if there is no appointed enquirer, at least one interested person is given certain specified documents and information (which will include documents and information relating to the current activities of the VISTA Company).

Whilst the terms of VISTA specifically allow the exclusion of a trustee’s duty to intervene in the VISTA Company's affairs, they do not exclude the duty to be informed of the VISTA Company's affairs (or enable others to be so informed) - a subtle difference which is often overlooked.

On 30 March 2015, the Trustee (Amendment) Act, 2015 (the “Amendment”) came into force in the British Virgin Islands (“BVI”). This follows similar amendments in respect of partnerships and companies.

The Amendment provides that every trustee must maintain records and underlying documentation for each trust for at least five years. The records do not have to be kept in the BVI but need to be "sufficient to show and explain the trust's transactions" and "enable the financial position of the trust to be determined with reasonable accuracy". The date on which the five year period commences is not specified. On a natural meaning of the words, it would seem that it should commence on the date they are prepared, although in light of the potentially serious sanctions for non-compliance, a cautious trustee might wish to keep them for five years following the termination of the relationship.

Of course, this does not affect any duty the trustee has to keep financial records as a matter of trust law, which the trustee will need to consider separately. Failure to maintain the necessary records without lawful or reasonable excuse may result in liability to a fine not exceeding US$100,000 or to imprisonment for a term not exceeding five years.

The precise application of the legislation is not clear, in that it does not state whether this is dependent on the governing law of the trust or the residence, incorporation or place of business of the trustee. Given the potentially severe penalties for non-compliance, non-BVI trustees of BVI trusts and BVI trustees of non-BVI trusts would be well advised to ensure that they comply. In most cases, this should not be too onerous. It is of course settled law that a trustee must be ready with its accounts; it is not thought that the statutory duty will normally impose additional obligations in that regard, although it is possible that there may be circumstances in which it might do so.

It is worth emphasising, as set out above, that a trustee’s duty to be ready with its accounts, and the new statutory duty to maintain records, each applies equally to VISTA trusts. In the past, some trustees may have formed the view that they did not need to obtain detailed information about the business of the underlying company held under the VISTA regime.

That has, we believe, always exposed them to a risk of claims from beneficiaries. Now, there is the added risk of criminal sanctions. The silver lining is that, for those trustees wishing to get their house in order, the Amendment does at least give them a good reason to start asking for more information.