

Trusts (Amendment) Act 2015

Reforms to Isle of Man trust law were introduced under the Trusts (Amendment) Act 2015 (the “**Act**”) on June 16 2015.

The reforms deal with three particular areas of Isle of Man trust law:-

1. Abolition of the “Two Trustees Rule” (by which a retiring trustee might not be discharged if the correct number of replacement trustees is not appointed).
2. Abolition of the rule against perpetuities going forward.
3. Updating of matters determined by Isle of Man law under the Trusts Act 1995 to bring the Island in line with competitor jurisdictions.

The reforms seek to ensure the Island’s trust legislation in these particular areas remains competitive. This note highlights the key changes arising from this new legislation which will have practical implications for the administration of trusts in the Isle of Man.

Abolition of the “Two Trustees Rule”

The “two trustees rule” originated in the Settled Land Act 1891, but its modern significance is in the Trustee Act 1961.

Section 36(1)(c) of the Trustee Act 1961 applies when new trustees are being appointed using section 35 of that Act. Section 36(1)(c) provided that “except where only one trustee was originally appointed and a sole trustee when appointed will be able to give valid receipts for all capital money, a trustee shall not be discharged from his trust unless there will be either a trust corporation or at least two individuals to act as trustees to perform the trust”. This provision sometimes meant that a trustee was not validly discharged, which can cause significant problems for the trust. For example, if two companies were originally appointed as trustees, this provision meant that they could

only cease to be trustees if two individuals or a trust corporation remained as trustees. Often this provision was overridden by the trust deed, but by no means in all cases. Section 4(3) of the Act will substitute this provision by providing that there need not be more than one trustee to perform the trust unless the instrument creating the trust provides otherwise. This change will be prospective and will only apply to changes in trustees after the Act becomes operational.

Section 38(1) of the Trustee Act 1961 is also amended by the Act. This section provided that in order for a trustee to validly retire under that section there must remain two individuals or a trust corporation in office. This is being amended, so that there need remain in office only a continuing trustee (whether or not a trust corporation) in order to validly retire under section 38(1).

It is important to note that the powers conferred by the Trustee Act 1961 generally apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument. Thus the trust instrument could create parallel powers of appointment and retirement of trustees, or could apply the statutory powers in an amended form. Thus Isle of Man law did allow one trustee to act alone, even before the Act, provided that the trust instrument permitted this.

Consistent amendments are being made in relation to the Settled Land Act 1891. That Act required two trustees in certain circumstances unless the trust instrument provided otherwise. However in circumstances where the trust instrument did not envisage or permit one trustee to act alone the statutory provisions would have to be relied upon. In circumstances for example where one of the trustees has died, it was burdensome to have to appoint an additional trustee to act before engaging in transactions relating to the settled land. After the Act comes into force, one trustee will be sufficient.

The above reforms are therefore welcome as the administration of Isle of Man law trusts is simplified and clarified as a consequence of the reforms.

Abolition of the Perpetuity Period

The rule against perpetuity is concerned with the vesting of future interests. The rule renders void future interests that could vest after the relevant time period (the perpetuity period). The rule was intended to prevent the tying up of property, particularly settled land, in trust indefinitely. At common law the rule is that:

“no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest”¹

¹ JC Gray, Gray on Perpetuities (4th edition, Little, Brown & Co 1942)

In many jurisdictions, (including the Isle of Man) a maximum fixed statutory period of years has been permitted instead of the common law period. Prior to the Act coming into force, under section 1(1A) of the Perpetuities and Accumulations Act 1968 (the “**1968 Act**”), the statutory perpetuity period for trusts in the Isle of Man could be (i) 80 years in the case of a testamentary trust or any other trust instrument made before January 1 2001; or (ii) 150 years in any other case.

The existing position is altered by the Act which amends the 1968 Act to abolish the rule against perpetuities for future dispositions.

Pursuant to the 1968 Act as amended, the perpetuity period applicable to a disposition (already made) under an existing trust established before the Act came into force, will remain unaltered. It is only new dispositions of property that are affected.

Section 1(A) of the 1968 Act as inserted provides that (i) for dispositions made after the Act comes into force or (ii) dispositions in trust (whenever made) the governing law of which is changed to the law of the Isle of Man after the Act comes into force, the rule against perpetuities is abolished.

Section (1A) provides however that a trust may be established with a defined perpetuity period if desired. It may well be necessary to continue to have a fixed trust period, at least in the case of instruments creating pure discretionary powers, in case there may otherwise be a resulting trust in favour of the settlor.

In terms of the consequences of amendments to the 1968 Act, finance centres including Bermuda, Jersey, Guernsey and the Bahamas, have all abolished the rule against perpetuities. The Island will therefore remain competitive with such jurisdictions. For those administering Isle of Man law discretionary trusts, standard trust precedents may need to be amended to take account of the changes to the 1968 Act.

Trusts Act 1995 amended

The Trusts Act 1995 was introduced to provide for the exclusion of foreign law in relation to trusts governed by Manx law, particularly in relation to (a) “forced heirship” rights (these are rights, conferred by certain jurisdictions, to a specified share of a deceased relative’s estate) and (b) in addition to protect Isle of Man trusts against the enforcement of foreign judgments made in connection with a foreign law divorce between one or more beneficiaries of the trust. The protections afforded by the 1995 Act are known as firewall provisions. The Trusts Act 1995 shields trusts settled under Isle of Man law from the impact of such foreign laws and judgments.

Section 6(2) of the Act amends section 5 of the Trusts Act 1995 by extending the protections afforded by the 1995 Act to trustees, protectors and beneficiaries (in addition

to a settlor of a trust) so that the capacity of such persons shall not be grounds to challenge a trust even if the laws of another jurisdiction do not recognise trusts, nor shall any person be subjected to an obligation or liability or deprived of a right, claim or interest, by reason that the law of a foreign jurisdiction does not recognise the concept of trusts.

Section 6(2) of the Act also adds a new sub-section 5(2) to the 1995 Act to provide that no judgment or order of a court outside the Island is to be recognised or enforced or to give rise to any right, obligation or liability or raise any estoppels if and to the extent that –

- (a) it is inconsistent with the Trusts Act 1995; or
- (b) the High Court so orders.

This provides Isle of Man law trustees with a means of clarifying the appropriate course of action if faced with a foreign judgment or order of court against them.

Section 6(3) of the Act adds a new sub-section 5(3) to the 1995 Act which provides that the new sub-section 5(2) has effect despite any other statutory provision or rule of law in relation to the recognition or enforcement of judgments. This means that sub-section 5(2) of the 1995 Act will override for example the provisions of the Judgments (Reciprocal Enforcement) (Isle of Man) Act 1968 which requires, subject to certain conditions being met, the Isle of Man High Court to recognise automatically the judgments of certain courts in certain jurisdictions namely the United Kingdom, Jersey, Guernsey, Italy, Israel, Suriname and the Netherlands.

The amendments to the Trusts Act 1995 are not as extensive as the amendments made to Guernsey firewall legislation under section 14 of the Trusts (Guernsey) Law 2007 which were primarily designed to resist against enforcement of orders made in the Family Division of the English Courts. However the amendments to the 1995 Act are measured, balanced and unlikely to have a negative impact on the Island's reputation internationally.

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