

Client Briefing September 2013

Establishment of Trusts In The Bahamas



RECOGNITION OF TRUSTS

The Bahamas is a common law country and accordingly Bahamian courts recognize trusts and the relationship they create.

The Bahamas is not a signatory of the Hague Convention on the law applicable to trusts and on their recognition of 10th January, 1986 and it is not anticipated that it will be.

TREATMENT OF FORCED HEIRSHIP RULES

Under the Trusts (Choice of Governing Law) Act, 1989 a settlor, whether or not he is resident in The Bahamas, may expressly declare in the trust instrument that the laws of The Bahamas shall be the governing law of the trusts, and such declaration shall be valid, effective and conclusive regardless of any other circumstances.

The Act further provides that all questions arising in regard to a trust which is governed by the laws of The Bahamas or in regard to any disposition of property upon the trusts thereof shall be determined in accordance with the laws of The Bahamas, including questions as to capacity of the settlor; as to any aspect of the validity of the trust or of the disposition; and the administration of the trust and the existence and extent of the powers contained in the trust instrument.

ASSET PROTECTION TRUSTS

A trust can be established in The Bahamas specifically as an Asset Protection Trust. Such a trust is designed to take advantage of the Fraudulent Disposition Act, 1991.

The Act provides that every disposition of property made with the intent to defraud and at an undervalue shall be voidable at the instance of the creditor thereby prejudiced; however the burden of establishing an intent to defraud shall be upon the creditor seeking to set aside the disposition and such action must be commenced in The Bahamas within two years of the date of the relevant disposition.

The disposition set aside pursuant to the provisions of the Act shall be set

aside only to the extent necessary to satisfy the obligation to the creditor at whose instance the disposition has been set aside, together with such costs as the court may allow.

Furthermore, unless the court is satisfied that a beneficiary of the trust has acted in bad faith, the disposition shall be set aside subject to the right of such beneficiary to retain any prior disposition made to him out of the trust by the trustee exercising a power or discretion vested in the trustee for such purpose and otherwise properly exercised.

PROTECTIVE OR SPENDTHRIFT TRUSTS

Assuming that the settlor does not become bankrupt within two years of the date of the settlement, and assuming that he is able to pay his debts at the date of the settlement without the aid of the property comprised in the settlements, protective trusts created for the benefit of the settlor would be effective to defeat the claims of the trustee in bankruptcy if they were carefully drafted. A settlor may not settle property upon trusts for himself subject to a proviso or condition that they will determine in the event of his bankruptcy as this would be a fraud on the creditors under the bankruptcy laws. A protective trust, however, is not invalid where the event which will trigger the creation of the protective trust is a forfeiture of the settlor's interest or the alienation or charge of that interest, whether voluntary or involuntary. An example of a voluntary charge would be the mortgage of the settlor's defeasible life interest. An involuntary assignment would be a judicial charge created by a judgement or an order for the appointment of a receiver by way of equitable execution. After forfeiture of the settlor's life interest and vesting of the property upon the protective trusts, the subsequent bankruptcy of the settlor would not invalidate the gift over which have already happened before bankruptcy.

PROTECTOR

It is becoming increasingly common to provide in the trust instrument for the appointment by the settlor of a Protector. The Protector is frequently appointed to act as a bridge between the settlor and the foreign trustee. The extent of this ability to act as a bridge depends on the powers that have been conferred on the Protector in the trust instrument.

Usually a Protector is given the power to remove and appoint trustees; to change the proper law of the trust; to remove and appoint beneficiaries; to instruct the trustee in respect of disbursements and investment of the trust fund; to receive information.

The appointment of a Protector usually provides the settlor a high degree of comfort as he is able to exert indirect control over the trust fund assets via the Protector. The Protector is typically a close confidant or advisor of the settlor. It is advisable that the Protector not be domiciled in the same jurisdiction as the settlor as he would be subject to the jurisdiction of the same court as the settlor which may not recognize the trust and may order the Protector to instruct the trustee to do something which would defeat the settlor's original objectives when the trust was established.

A company may be the Protector of the Trust.

STRUCTURE OF A BAHAMIAN TRUST

The assets of a trust are vested in trustees for the benefit of the beneficiaries. The assets may be held directly by the trustees or indirectly through holding companies whose shares are vested in the trustees. Trustees may be individuals or trust corporations. If a Bahamian company acts as trustee of a trust it must have a trust licence issued by The Central Bank of The Bahamas under The Banks and Trust Companies Regulation Act. Individual trustees do not require to be licensed.

To establish a trust as a Bahamian trust, the trust must be governed by the laws of The Bahamas, but there need not be any other nexus with The Bahamas i.e. none of the assets nor the settlor nor any of the beneficiaries need be resident in the Bahamas or located in The Bahamas.

In order to minimize the risk of an attack on the trust in the future by an aggrieved plaintiff on the grounds that the transfer of the assets to the trust was invalid it is recommended that the settlor first establish a holding company in The Bahamas and transfer the assets to the company in consideration for shares of the company. The settlor should then transfer the shares of the company to the Trustee of the trust. Provided the settlor owned or had valid dispositive power of the assets contributed to the holding company free of any proprietary interests of others, the challenge of the plaintiff should be defeated as the *lex situs* of the transfer of the shares to the trust would be the law of The Bahamas which would uphold the transfer of the shares to the trust.

A licensed trust company is subject to the strict confidentiality laws of The Bahamas and must respect the confidentiality of the trust. The penalties for transgression are severe, including fines and/or imprisonment.

A trust may be established as a strict settlement or as a discretionary settlement. In a strict settlement the beneficiaries and their shares in the

trust assets are definitively set forth in the trust deed. In a discretionary settlement the trust assets are vested in the trustees with a complete discretion vested in the trustees alone to determine how capital and income will be distributed amongst the beneficiaries. The beneficiaries must be identified in the trust deed or be capable of identification.

A trust is established by a settlor executing a settlement and vesting trust assets in the trustee; assets may later be transferred to the trustee by the settlor or by other persons. Alternatively a trust is constituted by the trustees declaring themselves trustees of the trust assets by a trust deed, in which case no settlor need be identified.

PERPETUITY PERIOD

The perpetuity period in The Bahamas is governed by the Rule Against Perpetuities Abolition Act, 2011. In summary:

- i. Trusts established after 30th December, 2011 are not subject to the Rule Against Perpetuities and can last for an indefinite period of time.
- ii. Trusts established prior to 30th December, 2011 are subject to the perpetuity period stated in the Trust Deed. The Court may however vary such period.

PURPOSE TRUSTS

Purpose Trusts in The Bahamas are governed by the Purpose Trust Act, 2004. Under this legislation a trust may be established for non-charitable purposes. The trust may also have beneficiaries that are persons (a "mixed" purpose trust). Purpose Trusts are not subject to the Rule Against Perpetuities.

TRUSTEE ACT, 1998

This Act was enacted into law with effect from the 27th day of July, 1998. It is in seven parts as follows:

- Part I - Preliminary.
- Part II - Investments.
- Part III - General Powers of Trustees and Personal Representatives.
- Part IV - Appointment and Discharge of Trustees.
- Part V - Powers of the Court.
- Part VI - Special Provisions.
- Part VII - Fiscal and Regulatory Provisions.

Part I – Preliminary

In this Act "trustee" includes a personal representative and "trust" includes implied, constructive and resulting trusts and the duties incident to the office of a personal representative.

Section 3 is new and is a very important provision having regard to the present debate concerning “sham” trusts. Section 3 provides that the “retention, possession or acquisition by the settlor of any of the matters referred to in subsection (2) should not invalidate a trust or the trust instrument or cause a trust created inter vivos to be a testamentary trust or disposition or the trust instrument creating it to be a testamentary document”. Matters in subsection (2) include the following:

- (a) Power to postpone the sale of real estate comprised in the Trust Fund which is held upon trust to sell the same.
- (b) Power to receive additional property into the Trust Fund.
- (c) Power to borrow on the security of the Trust Fund.
- (d) Power to lend any part of the Trust Fund to any person.
- (e) Power to vote securities held as part of the Trust Fund and to deposit such securities in any voting trust and to give proxies or powers of attorney in respect thereof.
- (f) Power to incorporate companies to hold the Trust Fund or any part thereof.
- (g) Power to apply the Trust Fund or the income thereof in policies of insurance.
- (h) Power to apply the Trust Fund in purchasing or acquiring or making improvements in or repairs to or on any land in the occupation or intended for occupation by any beneficiary.
- (i) Power to lay out part of the Trust Fund in the purchase of goods and chattels for the use of any beneficiary.
- (j) Power to grant options.
- (k) Power to hold bearer securities.
- (l) Power to pay duties, fees or taxes out of the Trust Fund notwithstanding that the same shall not be recoverable from the Trustees or from any persons interested under the trusts or that the payment shall not be to the advantage of such persons.
- (m) Power to institute prosecute and defend lawsuits and to compromise any matter of difference or to submit the same to arbitration.
- (n) Power to make any distribution of the Trust Fund in specie.
- (o) Power to obtain the opinion of counsel.
- (p) Power to engage an investment advisor.
- (q) Power to employ and pay out of the Trust Fund fees of any agent or agents in any part of the world.
- (r) Power to release, extinguish or restrict any power contained in the trust instrument or by law conferred on the Trustees.
- (s) Power to omit to register bonds or securities.
- (t) Power to act as a director, officer, manager or employee of any company whose shares or debentures may be comprised directly or indirectly in the Trust Fund and to retain fees paid for acting in such capacity.

Part II – Investments

Section 4 provides that trustees shall have the full power of investment or of changing investments of individual beneficial owners absolutely entitled. There is no need to spell out the trustees’ powers in the trust instrument, but such powers shall be subject to any consent or direction required by the trust instrument or of any written law, and apply only insofar as a contrary intention is not expressed in the trust instrument.

The trustees shall act as a prudent investor would in making and retaining investments. Section 5 amplifies upon the requirements of “prudent investor” standards.

Part III - General Powers of Trustees and Personal Representatives

This Part gives trustees wide powers to effect transactions, to contract, and to execute instruments, to manage, repair and maintain real estate, power of sale to sell by auction or private contract, power to postpone sale, to give receipts, to compound liabilities, to raise money by sale, mortgage or otherwise. A purchaser or mortgagee paying or advancing money on a sale or mortgage shall not be concerned to see that such money is needed or that no more than is needed is raised or otherwise as to its application.

Section 24 gives the trustees power to insure, and there is an interesting provision that the trustees may insure against personal liabilities which they may incur in the execution of the trusts.

Section 30 gives the trustees or personal representatives power to employ agents and to execute or exercise any discretion or trust or power vested in the trustees in relation to any trust property. Section 30 applies only if and so far as a contrary intention is not expressed in a trust instrument and shall have effect subject to the terms of that instrument.

By Section 31 the trustee may if expressly so permitted by the trust instrument delegate to any person outside The Bahamas or to any person in The Bahamas while the trustee is absent from The Bahamas the execution or exercise of any trusts, powers or discretions vested in the trustee.

Sections 32 through 36 contain the trustee’s indemnities and there is no need to provide for the same in the trust instrument. The trustee may upon resignation, retirement, removal or otherwise ceasing to be a trustee require a release and indemnity and may withhold such trust property as the trustee in good faith considers necessary to pay outstanding liabilities or to satisfy the indemnity. Such indemnity and right to withhold trust property do not extend to any liabilities for breach of trust.

Sections 37, 38 and 39 provide for maintenance, accumulation of income, advancement, and protective trusts, and there is no need to spell out the same or any of them in the trust instrument.

Section 40 provides that the trust instrument may contain restrictions against alienation, including provision that trust property may not be seized, sold, attached, or taken in execution by process of law, and may not be alienated by bankruptcy, insolvency or liquidation, but this provision may not benefit the settlor or any other person donating property to a trust.

Part IV - Appointment and Discharge of Trustees

Section 41 provides that there may not be more than four trustees holding land in The Bahamas, otherwise this Part essentially restates the provisions of the Trustee (1893) Act of The Bahamas.

Part V - Powers of the Court

Section 48 gives the court power to appoint a new trustee or new trustees in substitution for or in addition to any existing trustee or trustees, and where there is no existing trustee.

Section 50 permits the court to authorise the trustee to charge remuneration.

Sections 51 through 69 make provision for the vesting orders which may be made by the court. If any such vesting order affects any land or any interest therein an office copy of such vesting order shall be registered in the office of the Registrar General.

Section 70 provides for the jurisdiction of the court to vary trusts, and Section 71 empowers the court to authorise dealings with trust property.

Under Section 73 the court has power to relieve a trustee from personal liability.

By Section 75 the trustees may pay moneys or securities belonging to the trust into court where the same shall be dealt with according to the orders of the court.

By Section 77 trustees and personal representatives, without commencing an action may apply upon a written statement for the opinion, advice or direction of the court or Judge in Chambers.

Part VI - Special Provisions

The earlier drafts of the Bill for the Trustee Act made provision for purpose trusts of capital and income but these provisions have been omitted from the Act. They will be the subject of a separate Act dealing only with purpose trusts.

Section 81 recognises the role of the protector and provides that the trust

instrument may confer on the settlor or on any protector any powers, including without limitation power to do any one or more of the following:

- (a) determine the law which shall be the proper law of the trust;
- (b) change the forum of administration of the trust;
- (c) remove trustees;
- (d) appoint new or additional trustees;
- (e) exclude any beneficiary;
- (f) add any person as a beneficiary (including the settlor and any private and charitable trust or foundation);
- (g) give or withhold consent to specified actions of the trustee;
- (h) release any of the protector's powers;

and further provides that any person exercising any one or more of the powers set forth above shall not by virtue only of such exercise be deemed to be a trustee. A protector may not charge any remuneration for his services unless otherwise provided in the trust instrument.

Section 82 makes provision for a managing trustee and for the exercise of powers to be reserved by the trust instrument to the managing trustee.

Section 83 is an important section dealing with the subject of disclosure. The trustees must take reasonable steps to inform each beneficiary who has a vested interest of the existence of the trust and of the general nature of that interest, and if there is no beneficiary with a vested interest the trustees are under a legal obligation to take reasonable steps to ensure that at least one person who is capable of enforcing the trusts (whether as a beneficiary with a contingent interest, or as the object of a discretionary power or otherwise howsoever) is aware of the existence of the trusts and of the general nature of the interest entitling him to enforce them, but the trustees in their absolute discretion may determine that it is not in the best interest of the beneficiary to give such information and to withhold such information accordingly.

Generally trustees are under no legal obligation to disclose the interest of the trusts to any beneficiaries who are interested only contingently or who are only the objects of discretionary powers.

The Act sets forth in subsection (5) of section 83 detailed provisions with respect to the disclosure of documents. When disclosing any documents or information to any beneficiary or other person the trustees shall, if other beneficiaries have requested confidentiality, take all reasonable steps to secure the right to confidentiality of the other beneficiaries. Trustees shall not be bound or compelled by any process or discovery or inspection or under any equitable rule or principle to disclose or produce to any beneficiary or other person any memorandum or letter of wishes issued by the settlor, or any document disclosing any deliberations of the trustees as to the manner in which they should exercise any discretion, or disclosing the reasons for any particular exercise of any such discretion, or any other

document relating to the exercise or proposed exercise of any discretion of the trustees (including legal advice obtained by the trustees in connection with the exercise by them of any discretion).

No disclosure shall be made by trustees in breach of any prohibition or restriction of such disclosure contained in the trust instrument.

Section 85 provides that no power for trustees, settlors, protectors or others to add to the beneficiaries of a trust, or to appoint trust property among a class of persons, nor any discretionary trust, shall be invalid on the ground that it is not possible to ascertain with certainty all the potential beneficiaries of the power or trust, or on the ground that the class of potential beneficiaries is unlimited, or limited only by the exclusion of specified persons.

Sections 86 and 87 will nullify the rule in **Saunders v. Vautier**. Beneficiaries who would otherwise be entitled to put an end to the accumulation of income may no longer do so where the trust instrument expressly directs the accumulation of income for a period that does not contravene the Perpetuity Act, 1995. A beneficiary who is solely interested in the trust property, and all beneficiaries who together are all the persons interested in it may no longer terminate or modify the trusts affecting the property if this would defeat a material purpose of the testator or settlor in creating the trust, unless the settlor is living and also consents. The material purpose of the settlor or testator may be ascertained from the trust instrument (directly or by inference) or by collateral evidence.

The Act abolishes the rules of equitable apportionment between capital and income known as the **Rule in Howe v. Earl of Dartmouth**, the **Rule in Re Earl of Chesterfield's Trust**, and the **Rule in Allhusen v. Whittell**, and gives power to the trustees in their discretion to apportion income receipts to capital and capital receipts to income of the trust property as the trustees in their discretion consider necessary in order to restore a fair balance between beneficiaries interested in current income and other beneficiaries.

Section 90 is an important section and will, if used, considerably shorten the average Bahamian trust instrument. Section 90 provides that the trust instrument may incorporate by reference any of the provisions set out in the First Schedule to the Act. The First Schedule gives very wide powers to the trustees including the widest powers of investment, disposing of and dealing with the Trust Fund and of carrying out any transaction whatever in connection with the Trust Fund which is lawfully capable of being performed by beneficial owners to the same effect as if such powers were expressly conferred by the trust instrument and specified in extenso. More will be said about the First Schedule later in this Article.

Part VII - Fiscal and Regulatory Provisions

The Act provides, for the first time, for a "trust duty" in the sum of \$50.00 to be affixed by means of a Bahamas revenue stamp to every trust instrument of which the proper law is the law of The Bahamas, and which does not create a bare trust. A trust instrument not stamped and cancelled shall not be admissible in civil proceedings, but the Court has a discretion to admit the trust instrument into the proceedings on proof of the payment of the trust duty plus a penalty in the sum of \$100.00 for each calendar year from the execution of the trust instrument. A trust instrument shall be deemed stamped only when one of the persons executing the trust instrument cancelled the revenue stamp by writing the name or initials of the trustee or the person acting on behalf of a corporate trustee on the stamp and the date of cancellation. It is not necessary to produce any trust instrument to the Treasury, Post Office or any other public body for the purposes of payment of trust duty. This section applies only to trust instruments executed after the Act comes into operation.

Section 93 provides for exemptions from tax as follows:

- (a) No income tax, capital gains tax, estate tax, inheritance tax, succession tax, gift tax, rate, duty, levy or other charge is payable by any beneficiary who is treated as non-resident for Exchange Control purposes in respect of any distribution to him by the trustee of any trust.
- (b) Where all the beneficiaries of a trust are persons who are treated as non-resident for Exchange Control purposes the trust shall be exempt from the payment of stamp duty with respect to all deeds and other written instruments of appointment, and by which assets are transferred to or from the trustee of the trust, and all instruments relating to the transfer of beneficial interests in the trust, but the exemptions contained in Section 93 shall not apply to any trust which has as an underlying asset land in The Bahamas, or which carries on a business or trade in The Bahamas.

The Act provides for exemption from registration under the provisions of the Registration of Records Act for the following instruments:

- (a) Any deed creating a trust;
- (b) All deeds of appointment made pursuant to the terms of a trust; and
- (c) All other deeds (but not including conveyances of Bahamian real property or personally) executed by the trustees, settlors, beneficiaries or protectors of a trust, and such exemption shall apply to all deeds referred to therein executed before, on or after the date when the Act comes into operation.

Registration under the Registration of Records Act is necessary to preserve priorities of deeds effecting any disposition of "lands, goods and other effects" in The Bahamas; the only deed which is not valid unless it is recorded is a deed of assent in the estate of a deceased testator. The Act does not exempt from registration under the provisions of the Registration

of Records Act conveyances of Bahamian real property or personally executed by trustees, which must be recorded to preserve priorities, and does not exclude deeds of assent executed by personal representatives of a deceased testator, which must still be recorded to be valid.

The Act provides in Section 95 that the Exchange Control Regulations Act shall not apply to any settlor, grantor, donor or beneficiary who is treated under such Act as non-resident for Exchange Control purposes, and further that the provisions of this section shall apply to all trusts in existence at the time of the coming into operation of the Act as well as to those trusts coming into existence on or after the coming into operation of the Act. It is therefore no longer necessary for trustees to apply to The Central Bank of The Bahamas to have a trust designated as non-resident where it complies with the provisions of the Act.

The Act, except where otherwise expressly provided, applies to trusts, including executorships and administratorships, constituted or created before, on or after the commencement of the Act.

Section 98 provides that the Act and any order purporting to be made under the Act shall be a complete indemnity to all persons for any acts done pursuant to the Act, and further that it shall not be necessary to inquire concerning the propriety of the order or whether the Court by which the order was made had jurisdiction to make it.

The First Schedule (Section 90)

The First Schedule contains the trust provisions which may be incorporated by reference, either as to all the provisions, or selectively. In addition to wide powers of investment mentioned above, the First Schedule gives to the trustees (inter alia) the following powers:

- (a) Power to postpone the sale of real estate comprised in the Trust Fund which is held upon trust to sell the same.
- (b) Power to receive additional property into the Trust Fund.
- (c) Power to borrow on the security of the Trust Fund.
- (d) Power to lend any part of the Trust Fund to any person.
- (e) Power to vote securities held as part of the Trust Fund and to deposit such securities in any voting trust and to give proxies or powers of attorney in respect thereof.
- (f) Power to incorporate companies to hold the Trust Fund or any part thereof.
- (g) Power to apply the Trust Fund or the income thereof in policies of insurance.
- (h) Power to apply the Trust Fund in purchasing or acquiring or making improvements in or repairs to or on any land in the occupation or intended for occupation by any beneficiary.
- (i) Power to lay out part of the Trust Fund in the purchase of goods and chattels for the use of any beneficiary.

- (j) Power to grant options.
- (k) Power to hold bearer securities.
- (l) Power to pay duties, fees or taxes out of the Trust Fund notwithstanding that the same shall not be recoverable from the Trustees or from any persons interested under the trusts or that the payment shall not be to the advantage of such persons.
- (m) Power to institute prosecute and defend lawsuits and to compromise any matter of difference or to submit the same to arbitration.
- (n) Power to make any distribution of the Trust Fund in specie.
- (o) Power to obtain the opinion of counsel.
- (p) Power to engage an investment advisor.
- (q) Power to employ and pay out of the Trust Fund fees of any agent or agents in any part of the world.
- (r) Power to release, extinguish or restrict any power contained in the trust instrument or by law conferred on the Trustees.
- (s) Power to omit to register bonds or securities.
- (t) Power to act as a director, officer, manager or employee of any company whose shares or debentures may be comprised directly or indirectly in the Trust Fund and to retain fees paid for acting in such capacity.

The Schedule contains the equivalent of a Lucking clause in respect of the business or affairs of any "special entity" the shares of which, or some of the shares of which, form a part of the Trust Fund. "Special entity" means any company, partnership or other entity so designated in the trust instrument or subsequently in writing by the Settlor or the Protector (if appointed).

Trustees shall have power to determine what part of the receipts of the trust is income and what is capital.

The Schedule provides that if the Settlor becomes incapacitated then the rights or powers (if any) reserved to him during his incapacitation shall be exercisable by the Protector (if appointed) or by any person appointed for that purpose by the Court declaring him to be incapacitated. It further provides that if a Beneficiary shall become incapacitated the Trustees may during his incapacitation apply income or capital of the Trust Fund for his benefit by paying the same to a court appointed guardian, receiver or other such person without being liable to see to the due and proper application thereof by such person.

There is provision that no Trustee shall be liable for any loss to the Trust Fund arising by reason of any improper investment made in good faith or in consequence of the failure, depreciation or loss of any investment made in good faith or the negligence or fraud of any agent employed by the Trustee or by reason of any other matter or thing except wilful and individual fraud and wrongdoing on the part of the Trustee who is sought to be made liable.

The Schedule provides that the Trustees shall be entitled to exoneration

and indemnification out of the Trust Fund for liability, loss or expense incurred and for any judgment recovered against and paid by the Trustees as such other than liability, loss or expense or judgment arising out of the wilful misconduct or gross negligence of the Trustees in bad faith.

The Schedule provides that the Trustees shall have power to secure from the Settlor or any Beneficiary a full and complete release from and indemnity against any and all liabilities whatever attributable to any act or omission to act with respect to the investment of the assets of the Trust Fund, retention of such assets, and the sale or disposition of such trust assets, and any release or indemnity shall be conclusively binding on all Beneficiaries and other persons having an interest in the Trust Fund (including minors and unborn issue, heirs or appointees who may then have or thereafter acquire any interest in the Trust Fund).

The Act repeals the Trustee Act, 1893, (Ch. 164) and the Variation of Trusts Act, (Ch. 166).

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