Different style

VANESSA KING LOOKS AT VISTA TRUSTS EIGHT YEARS ON

It was the start of a new era for the British Virgin Islands (BVI) when the *Virgin Islands Special Trust Act 2003* (VISTA) was enforced on 1 March 2004. The vision for VISTA came from the BVI trust industry and the need for BVI trust practitioners to meet the changing needs of their clients. The traditional trust structure was often seen as too rigid or the wrong fit for clients, so the industry sought to create an alternative product that would meet the legitimate needs of the client. VISTA became a reality following STEP BVI's proposals to the government and is a result of a working partnership between the private sector and the government.

VISTA was an innovative statute for many reasons, but perhaps the one that has had the most impact and drawn the most interest is its removal of the 'prudent man of business' rule. This rule placed an obligation on the trustee to monitor the affairs of the underlying company and to take steps as necessary to preserve and, where possible, enhance the assets of the company and by extension the value of the trust assets. It not only left the trustee with an onerous burden, but it also frequently conflicted with the settlor's intention for establishing the trust, which was often simply to retain the assets previously owned by the settlor.

By removing this rule, VISTA brought in a new regime. The trustee was no longer obliged to monitor and intervene in the affairs of the underlying company to preserve and enhance the trust assets, unless provided for in the trust instrument or required to do so by the beneficiaries. The trustee now had a simple duty to retain the shares of the underlying company.

VISTA USE

Over the past eight years, the VISTA trust has become a popular vehicle to meet both commercial and personal objectives. In particular, it has been widely used in the following scenarios:

1. Settlor maintaining management and responsibility of underlying assets

The VISTA trust has become an easily acceptable solution for the settlor who is not comfortable with losing control of their assets, as would be the position under a traditional discretionary trust. This is often true when the settlor is from a civil-law jurisdiction and is unfamiliar with the concept and workings of a trust. The idea of transferring control and responsibility over assets they may have built up over the years was often disconcerting to the settlor. The VISTA trust has proven to be a comfortable fit in such circumstances as the trustee is not required to intervene in the running of the underlying company and will leave management to the directors, who are duly appointed for this purpose. The settlor can therefore maintain administrative and managerial responsibility over the asset by being appointed a director of or advisor to the BVI underlying company in which the trustee holds shares.

It is important to note that a VISTA trust instrument may provide for circumstances in which a trustee of a BVI trust can be called upon to intervene in the business of the company. The trust instrument may provide for specific grounds of complaints with respect to the affairs of the company for which an interested person may call upon the trustee to intervene, and the trustee is obliged to act on such an intervention call.

2. Retention of assets

The VISTA trust has proved to be a good choice for a settlor who wants the assets settled on a trust to be retained and not disposed of by the trustee. VISTA places an obligation on the trustee to retain the shares and the trustee is not obliged to dispose of the shares as a way to enhance or preserve the value of the assets of the trust. The VISTA trust proves to be even more attractive to the settlor by providing that the trustee cannot sell or dispose of shares held under trust without the permission of the directors of the company, unless the trust instrument provides otherwise. The settlor's intention to keep family land or a family business in the trust for the benefit and use of future generations can therefore be fulfilled by using a VISTA trust.

3. Holding risky investments

The VISTA trust has been used to hold underlying assets that could be considered risky investments. Under a traditional trust, the holding of certain investments or assets could be considered risky and open up the trustee to potential liability for any

IMPORTANT VISTA FACTS

VISTA is only applicable where the trust instrument specifically provides for the Act to apply to designated shares held under the trust.

VISTA only applies to shares in a BVI company. It is, however, often the practice that the BVI company would hold shares in non-BVI companies or own the assets that the settlor wishes to be held under a VISTA trust.

A VISTA trust trustee must be a company licensed by the BVI Financial Services Commission to undertake trust business.

The VISTA trust instrument can expressly exclude the rule in *Saunders* v *Vautier* from applying to the trust for up to 20 years.

'VISTA WAS INNOVATIVE FOR REMOVING THE "PRUDENT MAN OF BUSINESS" RULE'

loss to the value of the trust as a result of such investments. VISTA removes such a risk to the trustee by removing the trustee's obligation to intervene and act to preserve the trust assets. The underlying company under a VISTA structure would hold the risky asset or investment and the directors of this company would manage such an investment. A settlor who wants to hold a risky investment under trust without the possibility of a trustee disposing of it would opt for a VISTA structure.

4. Trustee does not wish to be involved in the business of the underlying company
Where the proposed trustee does not want to be involved in the business of the company, a VISTA trust is an option.

5. Off-balance sheet structures
An originally unforeseen but welcomed use of VISTA has been the use of charitable and non-charitable purpose VISTA trusts for off-balance sheet transactions. The VISTA trust has become suitable for such purposes, as the intention is to hold shares in a special purpose vehicle for an extended period with minimum trustee involvement. The VISTA trust trustee's duty to retain shares without the requirement to intervene in the business of the company has made the VISTA trust a suitable fit in off-balance sheet structures.

Eight years on, the VISTA trust remains an attractive option that meets various client needs. And STEP BVI continues to submit proposals and recommendations to the BVI government about improving the BVI trust regime to ensure it stays modern and relevant for years to come.

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