

No. of 2021

VIRGIN ISLANDS
TRUSTEE (AMENDMENT) ACT, 2021

ARRANGEMENT OF SECTIONS

Section

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- 10.. Section 91 amended.
- 11.. New section 92A inserted.
- 12.. Section 95 amended.
- 13.. Section 104 amended.

No. of 2021 Trustee (Amendment) Act, 2021 Virgin Islands

I Assent

Governor.
, 2021

VIRGIN ISLANDS

No. of 2021

A BILL for

An Act to amend the Trustee Act (Cap. 303) and for other matters connected therewith.

[Gazetted , 2021]

ENACTED by the Legislature of the Virgin Islands as follows:

Short title and commencement.

1. (1) This Act may be cited as the Trustee (Amendment) Act, 2021.

(2) Subject to subsection (3), this Act shall come into force on such date as the Governor may, by Proclamation published in the *Gazette*, appoint.

(3) Section 11 shall be deemed to have come into force on the 30th day of March, 2015.

Section 2 amended.

2. Section 2 of the Trustee Act (hereinafter referred to as “the principal Act”) is amended in subsection (4) by inserting after the word “reservation”, the words “or grant”.

Amendment of Heading.

3. The principal Act is amended by deleting immediately after the words “PART II”, the heading “TRUST RECORDS”.

Section 2A repealed.

4. The principal Act is amended by repealing section 2A.

5. Section 40 of the principal Act is amended by adding after subsection (2), the following new subsection – Section 40 amended.

“(3) For the avoidance of doubt, the reference in subsection (1) to “co-trustees” includes a single co-trustee and shall be interpreted to have always included such single co-trustee.”.

6. The principal Act is amended by inserting after section 58A, the following new section – New section 58B inserted.

“Powers of Court to vary trusts.

58B. (1) This section applies to the following trusts governed by Virgin Islands law –

- (a) a trust created on or after the date on which this section came into force where the trust instrument expressly so provides; and
- (b) a trust, whenever created, that was previously governed by the law of a jurisdiction other than that of the Virgin Islands, and either –
 - (i) the instrument effecting the change of the governing law to the Virgin Islands, or
 - (ii) an instrument taking effect at the same time as the instrument effecting the change of the governing law and executed by the person who has the power to change the governing law (“the power holder”),

expressly so provides.

(2) The instrument referred to in subsection (1) (b) (i) and (ii) may amend the terms of the trust to –

- (a) include any exclusion of, or restriction on, any of the Court’s powers under this section, or

- (b) confer power on any person to exclude or restrict any of the Court's powers under this section,

and the amendment may be made either pursuant to a power conferred by the trust or, whether or not there is any such power, by the power holder.

(3) Where this section applies to any trusts, the Court may upon application, if it thinks fit and the condition specified in subsection (4) is satisfied, by order –

- (a) vary, add to, revoke or replace all or any of the trusts;
- (b) enlarge, restrict or remove all or any of the powers of the trustee of managing or administering any of the property subject to the trusts or all or any other powers of the trustee; or
- (c) vary, add to, remove, or replace any or all of the other provisions of the trusts.

(4) The condition referred to in subsection (3) is that the making of the order is determined by the Court to be expedient in the circumstances then existing, whether or not the terms of the order may adversely affect any person or purpose.

(5) In making a determination under subsection (4), the Court shall have regard to the factors outlined in the following paragraphs in so far as the Court considers them material to the particular case and to be within the Court's knowledge –

- (a) any wishes or likely expectations of the settlor;
- (b) changes in circumstances after the creation of the trust, including (but not limited to) family, fiscal, financial, and commercial circumstances; and
- (c) in relation to the proposed extinguishment or curtailment of, or placing of conditions on, any interest –

- (i) the remoteness of that interest; and
- (ii) the protective needs of individual beneficiaries.

(6) An application to the Court for an order under this section may be made by –

- (a) the trustee;
- (b) any person, office holder or body, including (but not limited to) a protector or protective committee, authorised to apply by the trust instrument; or
- (c) any person beneficially interested under the trust, including any object of a discretionary trust or power of any nature.

(7) The Court's powers under this section are subject to any exclusions or restrictions imposed by –

- (a) the trust instrument referring, explicitly or implicitly, to this section; or
- (b) the exercise of any power in that behalf conferred by the trust instrument on the trustee or on any other person or on any office holder or body, including (but not limited to) a protector or protective committee.

(8) No order shall be made under this section which affects an interest that, apart from this section, has vested absolutely and indefeasibly in possession, and the reference to 'interest' shall be construed to exclude an interest in income which at the time of the order has not yet arisen.

(9) Nothing in subsections (1) to (8) shall apply to trusts affecting property settled by any other law of the Virgin Islands.

(10) Nothing in this section shall be taken to limit the powers conferred by section 58 or 59, or by section 6 of the Eastern Caribbean Supreme Court (Virgin Islands) Act.

(11) A reference in this section to a trust instrument relates to any document, including an instrument referred to in subsection (1) (b) (i) and (ii), that evidences and records the current terms of the trust in question.”.

New section 59A inserted.

7. The principal Act is amended by inserting after section 59, the following new section –

“Power of Court to set aside flawed exercise of fiduciary power.

59A. (1) If the Court, in relation to the exercise of a fiduciary power, is satisfied on an application by a person specified in subsection (5) that the conditions set out in subsection (2) are met, the Court may—

- (a) set aside the exercise of the power, either in whole or in part, and either unconditionally or on such terms and subject to such conditions as the Court may think fit; and
- (b) make such order consequent upon the setting aside of the exercise of the power as it thinks fit.

(2) The conditions referred to in subsection (1) are that—

- (a) in the exercise of the power, the person who holds the power did not take into account one or more considerations (whether of fact, law, or a combination of fact and law) that were relevant to the exercise of the power, or took into account one or more such considerations that were irrelevant to the exercise of the power; and
- (b) but for his failure to take into account one or more such relevant considerations or his having taken into account one or more such irrelevant considerations, the person who holds the power—
 - (i) would not have exercised the power;
 - (ii) would have exercised the power, but on a different occasion to that on which it was exercised; or

- (iii) would have exercised the power, but in a different manner to that in which it was exercised.

(3) If and to the extent that the exercise of a power is set aside under this section, to that extent the exercise of the power shall be treated as never having occurred.

(4) The conditions set out in subsection (2) may be satisfied without it being alleged or proved that in the exercise of the power, the person who holds the power, or any adviser to such person, acted in breach of trust or in breach of duty.

(5) An application to the Court under this section may be made —

- (a) by the person who holds the power;
- (b) where the power is conferred in respect of a trust or trust property, by any trustee of that trust, or by any person beneficially interested under that trust, or (in the case of a purpose trust) by any person appointed by or under the trust for the purposes of sections 84 (2) (d) or 84A (3) (d);
- (c) where the power is conferred in respect of a charitable trust or otherwise for a charitable purpose, by the Attorney-General; or
- (d) with the leave of the Court, by any other person.

(6) For the purposes of subsection (5) a person beneficially interested under a trust shall include a person who is a discretionary object of that trust or of a power conferred under the terms of that trust.

(7) No order may be made under subsection (1) which would prejudice a *bona fide* purchaser for value of any trust property without notice of the matters which allow the Court to set aside the exercise of a power over the trust property or in relation to it.

(8) The jurisdiction conferred upon the Court by this section may be exercised by the Court in respect of fiduciary powers, whether conferred or exercised before, on or after the date on which this section came into force.

(9) In this section—

- (a) “fiduciary power” means any power that, when exercised, must be exercised for the benefit of or taking into account the interests of at least one person other than the person who holds the power;
- (b) “power” includes a discretion as to how an obligation is performed; and
- (c) “person who holds the power” includes any person on whom a power has been conferred, whether or not that power is exercisable by that person alone, and any person to whom the exercise of a power has been delegated.

(10) Nothing in this section shall be taken to limit or otherwise affect the Court’s jurisdiction under the doctrine of mistake.”.

Section 83A amended.

8. Section 83A of the principal Act is amended—

(a) in subsection (1) by –

(i) inserting the following definitions in their appropriate alphabetical order –

"beneficiary" includes an object of a discretionary trust or power of any nature;

"office-holder" means any trustee, protector, enforcer or any other person who has any powers under a trust, whether or not such powers are fiduciary or whose exercise is otherwise subject to any duties;

"persons internal to the trust relationship" means any office-holder, settlor or beneficiary;

- (ii) deleting the definition of "personal relationship" and substituting the following definition –

"personal relationship" includes every form of relationship by blood, adoption, marriage or cohabitation, whether or not the relationship is recognised by law and, in particular, a personal relationship between two persons exists if –

- (a) one is the child or remoter descendant of the other, whether any such child or descendant is –
- (i) natural or adopted;
 - (ii) legitimate, legitimated or illegitimate;
 - (iii) a stepchild; or
 - (iv) born by means of artificial fertilisation or surrogacy.
- (b) one is married to the other or in any other relationship recognised under the laws of the Virgin Islands;
- (c) one cohabits with the other, enters into an arrangement with the other or otherwise so conducts himself or herself in relation to the other as to give rise in any jurisdiction to any rights, obligations or responsibilities analogous to those of a parent and child and husband and wife or of any other relationship recognised under the laws of the Virgin Islands;
- (d) personal relationships exist between each of them and a third person; or
- (e) any of the relationships referred to in paragraphs (a) to (d) has ended for any reason.”;

- (b) by repealing subsection (12) and substituting the following new subsection –

“(12) Subject to subsections (6) to (11) and the First Schedule, all questions arising in regard to a trust, whether the administration is conducted in the Virgin Islands or elsewhere, including all questions regarding the validity, construction, effect or administration of the trust and, in particular, but without limitation –

- (a) questions relating to any of the following matters, being matters specified in Article 8 of the Hague Trusts Convention –
- (i) the appointment, resignation and removal of the office-holders, the capacity to act of the persons internal to the trust relationship and the devolution of the office of the office-holders under the trust,
 - (ii) the rights and duties of the persons internal to the trust relationship among themselves,
 - (iii) the right of office-holders to delegate in whole or in part the discharge of their duties or the exercise of their powers,
 - (iv) the powers of the office-holders to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets,
 - (v) the powers of investment of the office-holders,
 - (vi) restrictions upon the duration of the trust, and upon the

power to accumulate the income of the trust,

(vii) the relationships between the office-holders and the beneficiaries, including the personal liability of any of the office-holders to the beneficiaries or to other office-holders or otherwise in relation to the trust,

(viii) the variation or termination of the trust,

(ix) the distribution of trust assets, and

(x) the duty of the office-holders to account for their administration or otherwise in relation to their duties under the terms of the trust, and

(b) to the extent that they do not fall under paragraph (a), questions as to –

(i) the fiduciary or non-fiduciary powers, obligations or duties of the office-holders or to the liabilities or rights of the office-holders,

(ii) the existence and extent of powers conferred or retained, including powers to vary or revoke the trust and powers of appointment, and questions as to the validity of any exercise of any such power,

are to be determined by the proper law of the trust or, where there are different proper laws for different aspects of the

trust, the proper law applicable to the area in which the question falls; and

- (c) to the extent that Virgin Islands law applies to the trust, or to the issue in question, no other rule of the law of any other jurisdiction shall be applicable to such questions.”;

(c) in subsection (13) –

- (i) by deleting the opening paragraph and substituting the following:

“Subject to any express provision to the contrary in the trust or disposition, no Virgin Islands trust, and no disposition of property to be held upon the trusts of such a trust, is void, voidable, liable to be set aside or defective in any fashion, nor is the capacity of any persons internal to the trust relationship in relation to the trust or disposition to be questioned, nor is any person internal to the trust relationship or any other person to be subjected to any liability or deprived of any right, claim or interest by reason that –”; and

- (ii) in paragraph (b) (i), by inserting immediately after the word “settlor”, the words “or any beneficiary”;

(d) in subsection (16), by inserting immediately after the word “settlor”, the words “or any beneficiary” and

(e) in subsection (19), by deleting the comma at the end of the subsection and adding the words "and, for the avoidance of doubt, a judgment of a foreign court varying a Virgin Islands trust without the consent of the adult *sui juris* beneficiaries shall be considered inconsistent within the meaning of this subsection.”.

Section 86 repealed and substituted.

9. Section 86 of the principal Act is repealed and substituted by the following new section –

“Reservation or grant of power to settlor or others.

86. (1) The reservation by the settlor to himself or herself or the grant to any other person or to any office holder or body, including (but not limited to) a protector or protective committee, in a trust instrument evidencing and recording a trust governed by

the laws of the Virgin Islands of any limited beneficial interest in the trust property, whether of income or capital, or any or all of the powers specified in subsection (2) or both such an interest and any or all of such powers, shall not —

- (a) invalidate the trust;
 - (b) prevent the trust taking effect according to its terms; or
 - (c) cause any of the trust property to be part of the estate of the settlor for the purposes of succession on death, whether testate or intestate.
- (2) The powers referred to in subsection (1) are—
- (a) in the case of a reservation to the settlor or other donor of trust property, power to revoke the trusts in whole or in part;
 - (b) power to vary or amend the terms of a trust instrument or any of the trusts, purposes or powers arising thereunder in whole or in part;
 - (c) a general, intermediate or special power to advance, appoint, pay, apply, distribute or transfer trust property (whether income or capital or both) or to give directions for the making of any such advancement, appointment, payment, application, distribution or transfer;
 - (d) power to act as, or give binding directions as to the appointment or removal of, a director or an officer of any company wholly or partly owned by the trust or to direct the trustee as to the manner of exercising voting rights attaching to any of the shares held in such company;
 - (e) power to give binding directions in connection with the purchase, retention,

holding, sale of or other commercial or investment dealings with trust property or any investment or reinvestment thereof or the exercise of any powers or rights arising from such trust property;

- (f) power to appoint, add, remove or replace any trustee, protector, enforcer or any other office holder or any advisor, including any investment advisor or any investment manager;
- (g) power to add, remove or exclude any beneficiary, class of beneficiaries or purpose;
- (h) power to change the proper law of the trust;
- (i) power to change the terms of the trust which specify which courts have exclusive or non-exclusive jurisdiction in any proceedings involving rights or obligations under the trust; and
- (j) power to restrict the exercise of any powers, discretions or functions of a trustee by requiring that they shall only be exercisable with the consent, or at the direction, of any person specified in the trust instrument.

(3) No person, other than a person in whom trust property or an interest in trust property is vested, shall be or become a trustee by reason only of the reservation or grant of any of the powers set out in subsection (2).

(4) Subject to any contrary provision herein, this section applies to any trusts governed by the laws of the Virgin Islands, whether created before, on or after the date on which this section comes into force, and to acts and omissions occurring while the trust was governed by the laws of the Virgin Islands.

- (5) In this section, “settlor” includes—
- (a) a testator who grants powers under a testamentary trust by the terms of his or her last will and testament; and
 - (b) a person who by a declaration of trust declares that assets held by him or her beneficially shall be held by him or her on the terms of the trust so declared.”.

10. Section 91 of the principal Act is amended –

Section 91 amended.

- (a) in subsection (1) (c), by deleting the words “pursuant to the powers and discretions specified in the instrument creating the trust” and substituting the words “pursuant to the terms of the trust”; and
- (b) by adding after subsection (2), the following new subsection –

“(3) A reference in this section to a “trust” shall be construed to include a trust the proper law of which is that of a jurisdiction other than the Virgin Islands.”.

11. The principal Act is amended by inserting immediately after section 92, the following new section –

New section 92A inserted.

“Duty to maintain records and underlying documentation.

92A (1) In this section –

“Applicable Trust” means a trust governed by the law of any jurisdiction other than –

- (a) an implied, constructive or bare trust; or
- (b) the duties incidental to the office of a personal representative; and

"Relevant Trustee" means –

- (a) a company incorporated in the Virgin Islands;
- (b) a foreign company registered under Part XI of the BVI Business Companies Act, 2004;

- (c) an individual resident in the Virgin Islands; or
- (d) any other person who is a trustee of a trust administered (in whole or in part) in or from within the Virgin Islands.

(2) Every Relevant Trustee (each a "Trustee") of an Applicable Trust (each a "Trust") shall maintain records and underlying documentation of the Trust whether within or outside the Virgin Islands and retain those records and underlying documentation for a period of at least five years from the date on which either –

- (a) they first came into the possession or under the control of the Trustee; or
- (b) they were prepared by the Trustee.

(3) The records and underlying documentation of the Trust shall be in such form as is appropriate to the Trust and trust property.

(4) A Trustee who fails to comply with this section commits an offence and is liable on summary conviction to a fine not exceeding ten thousand dollars.”.

Section 95 amended.

12. Section 95 of the principal Act is amended by adding after subsection (5), the following new subsection –

“(6) Subsection (1) shall not apply if the third party has acted dishonestly in entering into the transaction.”.

Section 104 amended.

13. Section 104 of the principal Act is amended by –

- (a) renumbering the existing section as subsection (1);
- (b) deleting the words “This Part” in subsection (1) as renumbered and substituting the words “Subject to subsection (2), this Part”; and
- (c) adding after subsection (1) as renumbered, the following new subsection –

OBJECTS AND REASONS

As part of the process of continually reviewing and reforming the laws relative to trusts, this Bill seeks to reform certain aspects of the Trustee Act (Cap. 303) (“the Act”) to modernize and strengthen the regime.

The Bill, apart from dealing with miscellaneous amendments considered necessary to streamlining and strengthening the trusts regime, empowers the High Court to vary trusts without the consent of adult beneficiaries in circumstances where such variation is considered expedient by the Court (clause 4). However, the exercise of this power applies only where there is an express provision (to the effect that it so applies) either in the terms of the trust or in one of the documents taking effect on the occasion of a change of the trust’s governing law to BVI law. It is envisaged that these amendments will make the establishment of BVI trusts attractive in circumstances where beneficiaries are unable to personally give their consent to variations which would be in their interests to make; or where beneficiaries with remote interests block variations that are clearly in the best interests of the trust’s principal beneficiaries.

Furthermore, the Bill seeks to empower the High Court to set aside the exercise by a person of a fiduciary power that has not been properly exercised (clause 5). This may arise in situations where, for example, a trustee fails to take into account relevant circumstances or where reliance has been placed on incorrect professional advice. These reforms are in line with those undertaken by competitive trusts jurisdictions.

The Bill also effects some reforms to the rules relating to conflicts of law for certain trusts and dispositions (clause 6). The current section 86 of the Act on reserved power trusts is considered to be out-of-date and needs to be reformed and modernized, hence the new section 86 outlined in clause 7 of the Bill (which deals with the reservation or grant of power to a settlor or other person). Provision is also made on the duty to maintain appropriate records and underlying documentation, which effectively falls in line with current international standards on record keeping (clause 9). With respect to transactions that are deemed to be properly entered into with trustees (designed mainly to facilitate dealings between trustees and third parties), the law is now clarified (by virtue of clause 10) that third parties who entered into transactions dishonestly will not benefit from the deeming provision legitimizing the transaction.

These proposed amendments are considered essential to ensuring that the Virgin Islands keeps attuned to developments in the trusts world. Accordingly, Members of the House of Assembly are kindly requested to lend support to the Bill.

Minister of Finance.