The Bahamas

The new Trustee Act

by Peter D Maynard

Over the past decade, the Bahamas has continued to take steps to polish and update its image as a major international financial centre. These steps include the enactment of a wide array of statutes and their associated regulations, such as the Trusts (Choice of Governing Law) Act 1989 and the Fraudulent Dispositions Act 1991, the first of which helps resist forced heirship claims and both of which help to establish so-called asset protection trusts. Then, there are the International Business Companies Act 1989, the Companies Act 1992, the Perpetuities Act 1995, the Mutual Funds Act 1995, the Exempted Limited Partnership Act 1995, the Securities Board Act 1995 and the Securities Industry Act. There is also a new Limitation Act 1995, and the Money Laundering (Proceeds of Crime) Act 1996 which discourages money laundering in the Bahamas.

Another such step is the introduction of a new comprehensive code governing trustees, the Trustee Act 1998 (the 'Act'). This article deals with some of the important provisions of this new legislation.

Trusts frequently own companies or international business companies as another level of confidentiality or for other reasons associated with financial or estate planning.

The old repealed Trustee Act (Ch. 164) had been in effect since 1893. The Act came into force on 27 July 1998 and not only replaces the 1893 Act but also repeals the old Trustee Appointment Act as well as the Variation of Trusts Act. The Act consists of 99 sections and 2 schedules, as compared with the 54 sections of the old Trustee Act. It is divided into seven parts: preliminary; investments; general powers of trustees and personal representatives; appointment and discharge of trustees; powers of court; special provisions and fiscal and regulatory provisions. The schedules cover model trust provisions and list the two aforementioned repealed acts as having been repealed.

'Sham' trusts are dealt with in the well known Rahman v Chase Bank Trust Company case, where the Jersey Court held a trust to be a 'sham' because the settlor retained full control over the trust assets during his lifetime. There is also a danger that such a trust could be construed as a will, and, if not executed in accordance with the Wills Act of the settlor's country of domicile, be held invalid.

Section 3 of the Act should adequately protect all trusts created in, and having their assets in, this jurisdiction. Where such trusts have assets located in another jurisdiction, which is quite often the case, there is a risk that the courts of such other jurisdiction might not recognize the relationship as a trust, but instead hold the relationship to be an entirely different legal relationship, such as a bailment, nominees or an agency.

While trustees may, in their discretion, invest trust funds in the same manner as individual owners absolutely entitled, s. 5 adopts 'the prudent investor rule' commonly used in the USA and some other jurisdictions. Sections 4 through 12 of the Act deal with investments by trustees.

Many sections in the Act apply only when a contrary intention is not expressed in the trust instrument, in which case trustees should, where appropriate, give settlors of new trusts the opportunity to express such a contrary intention.

Trustees shall not be liable for breach of trust by reason only of their continuing to hold investments which have ceased to be authorised investments. They are empowered to insure against personal liabilities which they may incur in the execution of their trusts, and they may effect fidelity insurance for a person whom they employ in their capacity as trustees. The premiums for any such insurances may be paid out the capital or income of the trust property at the discretion of the trustees. However, this shall not extend to insurance against any personal liabilities which the trustees may incur to any beneficiaries as such for breach of trust or otherwise.

Regarding the powers of trustees to employ agents and to delegate trusts, the power to appoint agents is quite extensive. Section 30(5) allows trustees to recover all charges and expenses paid to agents from the capital or income of the trust fund and subsections (6) and (7) provide that:

'Trustees who make reasonable efforts to satisfy themselves that an agent has appropriate knowledge, experience and integrity shall not be chargeable with breach of trust or being responsible for any loss by reason only of their having appointed the agent or joined or concurred in that appointment.' (s. 30(6))

and

'Trustees who have made reasonable efforts to keep themselves informed concerning the performance of an agent shall not be liable or responsible for any default or wrongful act of the agent which occurs at a time when the agent appeared to the trustees to be performing honestly and competently.' (s. 30(7))

A trustee may, notwithstanding any rule of law or equity to the contrary, but only if expressly so permitted by the trust instrument, by power of attorney or any other written instrument, delegate, to any person outside the Bahamas or to any person in the Bahamas while the trustee is absent, the execution or exercise of all or any trusts, powers and discretions vested in him as such trustee either alone or jointly with any other person. Any delegate so appointed shall be considered an agent of the trustee for the purposes of subsections (6) and (7) of s. 30.

Alienation is not presently allowed. Section 40(1) provides that, notwithstanding any rule of law or equity to the contrary, it shall be lawful for an instrument or disposition to provide that any estate or interest in any property given to any individual as beneficiary shall be lawful for an instrument or disposition to provide that any estate or interest in any property given to any individual as beneficiary shall not during the life of that beneficiary, or such estate or interest shall be alienated or pass by bankruptcy, insolvency or liquidation or be liable to be seized, sold attached, or taken in execution by process of law and where so provided such
provision shall take effect accordingly. However, neither the settlor nor any other person donating property to a trust may benefit from the provisions of s. 40.

Regarding the vesting of trust property in new or continuing trustees s. 47 provides that where a corporate trustee is merged or amalgamated with another corporate trustee then on the date when such merger or amalgamation takes effect all trust property held by the non-surviving trustee shall automatically and without any action on the part of either trustee vest in the surviving trustee unless the trust instrument specifically prohibits the removal of a trustee and the appointment of a new trustee or requires the consent or approval of a person and such consent or approval shall not have been obtained or such vesting would result in the abrogation of any rights, conditions, terms or provisions contained in such instrument or any instrument effectively amending such instrument.

The Court may vary trusts in much the same way as it could under the repealed Variation of Trusts Act except that, unlike the latter Act which required the applicant to prove that the proposed variation is for his benefit, the new s. 70 merely provides that the Court shall not approve an arrangement on behalf of any person if carrying it out would be detrimental to that person. In the past it has often been difficult to show a precise benefit in every instance.

Regarding purpose trusts, which have been quite popular in Bermuda and the Cayman Islands, among other jurisdictions, for a number of years, the main requirements are that they be for some abstract and impersonal purpose or purposes other than an exclusively charitable purpose, that it is not for the direct or indirect benefit of any particular ascertainable persons or class of persons (whether or not immediately ascertainable), that it be enforceable in the manner specified in the relevant section by a person duly appointed to enforce it and that a designated person is a trustee of the trust. ‘Designated persons’ include licensees under the Bank and Trust Companies Regulation Act as well as local accountants and attorneys.

Regarding disclosure to beneficiaries or their right to be informed of the existence of a trust and to receive trust information and copies of trust documents, it is now well established at common law that beneficiaries of fixed or express trusts, i.e. beneficiaries with vested or contingent interests, as well as beneficiaries of discretionary trusts, because of their proprietary rights or the obligation of trustees to account to them, are entitled to be informed of the existence of the trust and to receive trust information and copies of trust documents, including accounts. Discretionary beneficiaries are not entitled to see minutes of meetings or any other documents containing the deliberations of the trustees in connection with the exercise of their discretions. Also, trustees are not required to disclose the existence of a discretionary power of appointment to the objects of the same or to provide them with any trust information or documents as the trustees are under no obligation whatsoever to exercise such power in their favour and may choose never to do so.

While there is no objection to making disclosures to beneficiaries with vested interests and providing them with trust information and documents, there are some circumstances when it is not desirable to do so, in the case of discretionary beneficiaries or beneficiaries having contingent interests. Settlors do not always wish discretionary beneficiaries to be informed of a trust’s existence, especially when they are concerned about forced heirship rights in their own country, the class of beneficiaries is extremely broad and the settlor does not intend many of them to receive benefits under the trust, or the trust is a ‘blind’ trust with charities named but whom the settlor never intended to benefit. Section 83 seeks to help settlors in this area by providing that trustees shall be under no legal obligation to disclose the existence of the trust to beneficiaries having no vested interest, or an interest that is contingent upon the occurrence of some event, if the trustees deem such disclosure not to be in the interest of the trust.

CONTRARY INTENTION

Many sections in the Act apply only when a contrary intention is not expressed in the trust instrument, in which case trustees should, where appropriate, give settlors of new trusts the opportunity to express such a contrary intention.

Furthermore, the obligation to disclose the existence of the trust to minor or mentally incapacitated beneficiaries (or their legal representatives) having vested interests is subject to the caveat that the trustees may choose not to disclose if they deem such disclosure not to be in the best interests of such beneficiaries.

The information that must be disclosed to beneficiaries having a vested interest in the trust is specifically detailed in subsection (5). In disclosing information express provision is made for preserving the right to confidentiality of the other beneficiaries. For the avoidance of doubt, subsection (8) specifically provides that the trustees shall be under no obligation to disclose to any person who is the object of a discretionary power, the existence of such power or to disclose any information concerning such power (or the trust) to any such person.

Section 83 also requires trustees to effect disclosure where the trust instrument so provides and to deny requests for information from beneficiaries having no vested or contingent interests where so required by the trust instrument. Provision is also made for the non-disclosure of documents which would reveal the deliberations of trustees and the reasons for the exercise or non-exercise of any power or discretion, the non-disclosure of memoranda or letters of wishes and for trustees not to be forced by any process of discovery to make any such disclosure.

Any attempt, by statute or otherwise, to restrict the information rights of beneficiaries could be held by a court of law to be repugnant to the original intention of settlors to confer equitable rights upon the beneficiaries and also repugnant to the trustee’s basic duty of accountability. A possible way around this might be to appoint a protector to exercise or enforce such rights to information. However, this might not work as the protector could be held to have a fiduciary obligation to pass such information on to the beneficiaries. One has to wait and see how this innovative section of the Act holds up in our courts and those of other common law jurisdictions.

Regarding the problem which arose as a result of the well-known case of Saunders v Vautier [1835–42] All ER Rep 58, the rule in this case allows a beneficiary, having attained his majority and not being incapacitated, or all of the beneficiaries,
being more than one and having attained their majorities and
not being incapacitated, to call for the distribution of his or their
share or shares in the trust even though the settlor required
distribution at a later age but did not provide for a gift over in
the event of the prior death of the beneficiary or beneficiaries.

Trust duty is payable in the sum of $50.00 on each trust
instrument instead of stamp duty. Beneficiaries who are treated
as non-residents for exchange control purposes are exempted
from income taxes and other similar taxes on trust distributions.
Where all of the beneficiaries of a trust are so treated, the trust
instrument and other trust documents described in s. 93 will be
exempt from stamp duty unless the trust property includes land
in the Bahamas or the trust carries on a business or trade in the
Bahamas.

Trust instruments and certain other trust documents are
exempt from registration under the Registration of Records Act.
The Exchange Control Regulations Act shall not apply to
any settlor, grantor, donor or beneficiary who is treated as
non-resident for exchange control purposes. The ECRA, except
where otherwise expressly provided, applies to trusts, including
executorship, constituted or created either before or after the
commencement of the Trustee Act.

The Act helps to move the Bahamas to the cutting edge of
innovative international trust legislation. It dramatically
improves the image and reputation of the country as an
important international financial centre and is another
important reaffirmation of the country's interest in and
commitment to responsibility, clean money and good trust
business.

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Comment

Pension problems: who owes whom?

by John A Franks

Much has been made in
the media by the
present government
of the alleged mis-selling of
private pension schemes to
individuals.

The problem arises because there
may be a shortfall in the value
and, therefore, the ultimate
return which individuals had
been led to expect. If so, loss can
be measured in the difference in
value so long as what is now the entitlement is less. The cause
of the shortfall in this context appears to be twofold:

(1) the way charges for selling and managing the policy and the
funds it represents were deducted from the premiums at
the outset. The policy earnings, particularly in the first
years, were lower and this would mean early surrender
values were depressed. It is said that this should have been
explained;

(2) in many cases, the fact that the employee who committed
to a staff pension scheme may have been disadvantaged
when he took out a private pension in place of an
occupational pension because of the loss of the employer's
contribution (which would not be made to the individual's
personal policy scheme) and the employee could no longer
rely on the employer's legal duty to subvent the staff fund
if the pension fund was inadequate.

However, there are other considerations of which account
should be taken. There is the cost of portability of the rights to
the corporate-funded pension. The individual scheme is wholly
outwith the control of the employer and the company pension
fund trustees. Moreover, there are no ‘Maxwell-type' risks
where the pension fund may be raided or particular assets
alienated or hypothecated. Even to this day, 'stock lending' by
pension fund trustees has not been outlawed. Also, where the
pension fund has surplus value, this can be tapped by the
employer taking a contribution holiday. With individual
schemes, growth is likely to benefit the pensioner. For
individuals who switch to a personal scheme, there is, therefore,
not only a greater feeling of security, but no hassle over transfer
values to be passed from the fund of the old employer to that of
the new employer. Where an employer no longer makes a
contribution, this may well be taken into account in dealing
with the employee's emoluments at review in some other way.

Another factor is 'mis-selling' on the part of the government
in regard to its treatment of individuals over SERFS. The market
for switching to private pensions was stimulated by the desire of
government to be relieved of the future unfunded liabilities for
state additional pension schemes. A premium was offered by
government as a contribution to private schemes to encourage
change by individuals. If the current government campaign has
any validity, the government was at fault not to issue at least
'health warnings' against the mischiefs which are said to justify
claims for mis-selling being made. Will the government accept
liability to mis-selling pensioners back into SERFS or will they
resile from the reduction in widows' pensions?

At the same time as releasing what might be regarded as
divisive allegations to thousands, the government is taking care
to withdraw the Legal Aid and Advice Scheme. This will mean