

GUIDE TO VISTA TRUSTS IN THE BRITISH VIRGIN ISLANDS

CONTENTS

PREFACE	1
1. Introduction	2
2. Why was VISTA needed?	2
3. What Solution does VISTA provide?	3
4. Key Features of VISTA	3
5. Other Features of the Act	4
6. When will VISTA apply?	4
7. Opportunities for the Use of VISTA	5
8. Types of VISTA Trust	5
9. Regulation and Registration	6

PREFACE

The Appleby Guide to VISTA Trusts in the British Virgin Islands addresses the unique nature of the VISTA trust, its characteristics and its most common uses. The Guide demonstrates the flexibility and security that a VISTA trust offers as a vehicle for holding company shares and for corporate succession planning.

It is recognised that this Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. If any such questions arise in relation to the contents, they should be addressed to any member of the team using the [contact information](#) provided at the end of this Guide.

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British Virgin Islands

January 2016

1. INTRODUCTION

On 1st March 2004, the Legislative Council of the British Virgin Islands (the **BVI**) introduced the ground-breaking Virgin Islands Special Trusts Act, 2003 (the **Act**). The regime was most recently amended in May 2013. The concept of the VISTA trust (**VISTA** being an acronym for the Act) is entirely a creation of statute and the VISTA trust is a type of trust which is unique to the BVI.

In this Guide, we discuss the background to the Virgin Islands Special Trusts Act 2003, its key features and the areas in which it could be most usefully employed.

2. WHY WAS VISTA NEEDED?

The question of why VISTA was enacted can best be illustrated by firstly outlining the key problem which VISTA seeks to address.

(a) The Problem

The “prudent man of business” rule (the **rule**) is a principle of general trust law which evolved over the nineteenth and twentieth centuries, having been gradually developed by the English courts. Essentially, the rule provides that a trustee has the duty to take due care and to act prudently when making decisions concerning the investments comprised in a trust fund, including a regular monitoring of their performance.

Referring to the rule, Lindley LJ in the case of *Re Whiteley* in the English Court of Appeal commented that

“the duty of the trustee is not to take such care only as a prudent man would take if he had only himself to consider, the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide”.

A statutory reinforcement of the rule (as enunciated by case law) can be found in Section 3 of the BVI Trustee Ordinance (Cap. 303) which provides that a trustee may invest any portion of the trust funds in any kind of investment wherever that investment may be situate “as long as he exercises the diligence and prudence that a reasonable person would be expected to exercise in making an investment as if it were his own money”.

Trusts have traditionally been regarded as one of the most effective succession planning vehicles. However, where a trust fund specifically consists of, or includes, a controlling interest in a family company, the imposition of the rule raises significant obstacles for both trustee and settlor to overcome.

(b) Application of the Rule

Applying the rule, trustees are under a general duty to monitor the activities of any such company comprised in the trust fund and, for example, to intervene, where appropriate, to prevent the company from entering into an unduly speculative venture or to ensure that, whenever the opportunity arises, they fully exploit the shareholding in the company to the trust’s maximum financial benefit, for example, by accepting a financially lucrative takeover bid for the company. Generally, the trustees’ overriding duty will, ultimately, be to ensure that the trust fund investments are sufficiently diversified whilst taking advantage of any available opportunities to enhance the value of those investments. This may well lead to the trustees having to consider a sale of the company or for them to have to reject the opportunity of entering into a risky (although potentially very profitable) venture.

In practice, the imposition of the rule may lead to a set of circumstances which may be (and often are) in direct contrast to the wishes and the preferred course of action of the typical owner of a corporate family

business who, in essence, needs to retain the inherent ability to be free to exercise the skilful judgement necessary to run a thriving business without being subjected to trustee-shareholder interference. Fundamentally, the typical owner will have an overriding desire to retain the business indefinitely rather than to have to consider selling it to satisfy short term considerations.

(c) **Conflict**

As one can see, where shares in a family company are concerned, there is an inherent conflict between the trustees' obligations pursuant to the rule and the need for them, on occasion, to act in a manner, as a result of commercial pressures, which would ordinarily be regarded as acting in direct contravention of the rule. Because of the restraints imposed by it, the rule has historically impeded the use of trusts as mechanisms for holding controlling interests in companies both during the life of the settlor and posthumously when seeking to achieve an orderly succession of the business to his or her heirs.

These problems were, of course, by no means new to trustees and a number of non-legislative solutions which involved the use of bespoke drafting techniques had previously been advanced as a means to counter the difficulties. However, in practice, such techniques met with significant drawbacks and, against this background, legislation was called for to provide a more effective remedy to cater to the special requirements of trusts comprising company shares.

3. **WHAT SOLUTION DOES VISTA PROVIDE?**

A statutory solution to circumvent the specific difficulties faced by trustees in the context outlined above is now provided by VISTA which permits the creation of a special (and separate) type of trust regime in the BVI.

VISTA is seen as a highly innovative legislative measure and establishes a trust system in the BVI specifically designed for company shares. The intention is for there to be a system whereby the corporate owner of a family business is able to set up a trust comprised of the shares of his or her company under which:

- the company shares can be retained in trust indefinitely; and
- the trustee's monitoring and intervention obligations under the general law are removed and it is disengaged from all management responsibility in the company which can instead be carried out by the directors without concern for any unwanted interference in the company's affairs by the trustee.

4. **KEY FEATURES OF VISTA**

- 4.1 The trustee has a statutory duty to retain the shares which are the subject of the VISTA trust (known as "designated shares") and any duty to preserve or enhance the value of the trust fund will be subservient to this duty. The duty to retain is, however, qualified by a limited power to dispose of the shares in the circumstances expressed by the terms of the trust deed.
- 4.2 The trustee cannot intervene in the management of the company except in order to resolve specific problems and then only in a prescribed number of circumstances which need to be outlined expressly in the trust deed (e.g. in the case of a deadlocked board).
- 4.3 "Office of director" rules in the trust deed specify how the trustee must exercise its voting powers in respect of the appointment, removal and remuneration of directors. The trustee will be obliged to follow these rules and this, effectively, enables the settlor to retain a say in who becomes a director in the company. (Bear in mind that these rules will always be subject to the company's memorandum and

articles of association and, therefore, one should be careful to ensure that the rules are compatible with the relevant provisions in the memorandum and articles).

- 4.4 The trustee cannot appoint directors of its own choice (thereby reducing the trustee's ability to influence the management of the company) except in accordance with the terms laid down by the trust deed. Thus, the management of the company's business is left to those who have the skills necessary for this, namely the directors, who may well include the settlor of the trust.
- 4.5 An "intervention call" may be made by any "interested person" (e.g. a beneficiary, a protector, etc.) which calls upon the trustee to intervene in the affairs of the company, but only in circumstances specified in the trust deed (known as the "permitted grounds for complaint").
- 4.6 The trustee has no fiduciary duty in relation to the assets or the affairs of the company unless there is an intervention call.

5. OTHER FEATURES OF THE ACT

- 5.1 VISTA only applies to BVI governed trusts and then only where there is an express provision in the trust deed directing VISTA to apply. Thus, non-BVI governed trusts and BVI governed trusts which are not expressed to be subject to VISTA remain entirely untouched by the Act. (VISTA can, however, be applied to any existing BVI governed trust, provided that the terms of the trust enable it to be amended appropriately).
- 5.2 VISTA trusts are permitted to have more than one trustee. At least one of the trustees must be a "designated trustee" which is defined by the Act as a trustee which must be able to carry on trust business in the BVI under the territory's Banks and Trust Companies Act, 1990, i.e. the trustee must be licensed to carry on trust business in or from within the BVI or a private trust company incorporated in the BVI (**PTC**). This allows individuals or non-BVI companies to be co-trustees.
- 5.3 The VISTA regime is strictly confined to a trustee holding shares only in a BVI incorporated company (i.e. no other asset can be held directly by the VISTA trustee). However, there is nothing preventing the ownership of other assets by the trust (e.g. cash, property, equities, etc.) which can be held by the underlying BVI company (as opposed to directly by the trustee).
- 5.4 A VISTA trust deed may expressly exclude the rule in *Saunders v Vautier* (for a maximum of 20 years) whereby beneficiaries acting as a whole can vary or terminate a trust if they all agree to do so (as long as they are not impaired by any incapacity).

6. WHEN WILL VISTA APPLY?

VISTA will only apply to a trust where:

- (a) The terms of the trust specifically direct that the provisions of the Act shall apply to some or all of the shares in BVI-incorporated companies (defined by the Act as "Virgin Islands shares") which are comprised in the trust fund (provided they have not been added to the trust by the trustee of another trust in the exercise of a power in that other trust); and
- (b) The following conditions listed under Section 4 (4) of the Act are met:
 - (i) the trust is created by or on the terms of a written testamentary or *inter vivos* instrument;
 - (ii) the terms of the trust require that any successor of the designated trustee must also be a "designated trustee" (see above); and

- (iii) the trust has not been created pursuant to the exercise of a power conferred by another trust.

Section 4 (4)(d) prohibits VISTA trusts from being created by the exercise of a power by the trustee of another trust contained in that other trust with the consequence that the appointment from any other trust including, strangely, from one VISTA trust to another VISTA trust, is statute barred. The rationale for this is unclear other than perhaps it being the case that the legislators of VISTA intended to highlight the fact that a trustee of a traditional trust should never ordinarily contemplate a transfer of trust assets into a VISTA trust, following which their powers over the management of those assets would be severely curtailed if not extinguished altogether (although in doing so the legislators inadvertently included transfers from other VISTA trusts).

7. OPPORTUNITIES FOR THE USE OF VISTA

- (a) **Speculation:** VISTA is generally an invaluable tool for a settlor who does not wish to have the trust assets diversified, wishes to retain the company indefinitely and desires to be free to speculate in ventures which would generally be regarded as inappropriate by trustees of a traditional trust;
- (b) **Personal Succession Planning:** VISTA offers a degree of certainty for shareholders and provides a framework for the succession of shares in a family company on the settlor's death by facilitating the transfer of the business to the settlor's family without any concern for interference from the trustee which, under a traditional trust, may have been obliged to dispose of the company as a result of the rigidity of the prudent man of business rule;
- (c) **Risk Management:** VISTA reduces the level of risk faced by the trustee who will be more inclined to hold high risk assets and enter into speculative transactions as its obligation to monitor and manage the trust fund investments or intervene in highly complex financial transactions (and any liability for any resultant losses for its failure to do so) is removed by the Act;
- (d) **Blind Trusts for Politicians:** VISTA is extremely useful in protecting individuals who hold political office from accusations that they could have used their position to influence a company in which they had a financial interest for personal gain by taking away the trustee's responsibility in the management of the company.
- (e) **Matrimonial Settlements:** VISTA serves to protect the family company from being exploited by an ex-spouse or the new family of the ex-spouse as it is possible for the settlor to retain absolute control of the company without any danger of interference in the company's affairs from the ex-spouse.

Other more sophisticated applications of VISTA include trusts for commercial purposes such as holding voting shares of mutual funds, special purpose vehicles and other structured finance vehicles.

8. TYPES OF VISTA TRUST

It should be noted that VISTA is only concerned with the administration of a trust and not the trust's dispositive provisions. Thus, one is able to accommodate VISTA into any type of trust, be it a discretionary trust or a fixed interest trust, without necessarily making changes to the form of the beneficial provisions under the trust. In fact, it is also possible to establish a VISTA trust for purposes such as securitisations and off-balance sheet transactions. Furthermore, it is possible (and considered ideal) for a VISTA trust to own the shares of a PTC under certain circumstances.

9. **REGULATION AND REGISTRATION**

9.1 **Regulation**

VISTA trusts are not subject to any form of public regulation, as is the case with non-VISTA trusts.

9.2 **Registration**

There is no mandatory requirement to register any trust including a VISTA trust with the regulatory authorities in the BVI and, in fact, all trust deeds are exempt from registration. Therefore, the details of a BVI trust will ordinarily remain confidential subject only to disclosure as may be required by an order of the BVI court.

For more specific advice on VISTA trusts in the British Virgin Islands, we invite you to contact:

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For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found [here](#).