Big changes in the Isle of Man

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Abstract

On 16 June 2015, the *Manx Trusts (Amendment) Act 2015* came into force. For a piece of amending legislation, it makes a significant impact, introducing three major changes to Manx trust law:

- The rule against perpetuities is abolished.
- The 'two-trustees rule' is abolished.
- The firewall legislation is enhanced to match the leading standard.

Rule against perpetuities

There has for some time been an interest in the creation of 'dynastic' trusts: trusts that can continue indefinitely to hold and manage wealth for all of the issue of a wealthy individual. Prior to the *Manx Trusts (Amendment) Act 2015* ('2015 Act'), this was not possible under Manx law because of the Manx rule against perpetuities. This was (as regards trusts) similar to that in England:

- It was based in common law.
- It meant that interests under trusts had to vest within an allowable perpetuity period.
- At common law, this was a relevant life or lives plus 21 years.
- Income could be accumulated throughout the perpetuity period.
- Under the *Perpetuities and Accumulations Act 1968* (equivalent to the similarly named English Act of 1964), a fixed perpetuity period of up to 80 years could be selected, although this was increased to 150 years with effect from 1 January 2001 by the Trustee Act 2001.
- Appointments under a trust were 'read back' into the original disposition on trust, and accordingly interests under them had to satisfy the perpetuity period applicable to the original settlement.

The rule arose under English law and addressed a concern that too much property in England might forever be tied up in trust. A number of jurisdictions have abolished the rule, however, without apparent disaster. One of the problems for English and Manx law trusts was that the inability to escape from the original perpetuity period may prevent a change in the applicable law of the trust to one with a more lenient (or no) rule against perpetuities, or at least a transfer of trust property direct to a foreign law trust with no or different rule against perpetuity.

The most dramatic change in English law in recent times was the increase of the maximum fixed perpetuity from 80 to 125 years and relaxation of the rule against accumulation of income. The Isle of Man had already increased the maximum fixed perpetuity period to 150 years but has now taken the more-bold step to abolish the rule entirely.

A particularly interesting aspect is the ability to escape the rule for existing trusts: section 1A(1) of the *Perpetuities and Accumulations Act 1968* provides that the rule against perpetuities is abolished for:

> a. disposition made after this section comes into operation; or
> b. a disposition in trust (whenever made), the governing law of which is changed to the

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> law of the Island in accordance with section 3 of the *Trusts Act 1995* after this section comes into operation.

Section 1A(6)goes on:

> 'disposition' further includes—
>
> a. a disposition made in exercise of a power of appointment, whether or not a perpetuity period is specified in the instrument creating the power; and
> b. a disposition in trust, whether or not—
> i. a previous disposition has been made in relation to the trust; and
> ii. section 1 applies in relation to the previous disposition.

Hence, section 1A(6) is designed to extend the abolition of the rule against perpetuities to interests created under trusts under which a power of appointment is exercised. What is required for such a power of appointment to have that effect?

First, the exercise of the power must amount to a 'disposition'.

Secondly, there must be an exercise of a power of appointment. While the legislation refers to 'a power of appointment', it is thought that the treatment is also intended to apply to powers of advancement, to re-settle or to transfer to other trusts too.

Thirdly, the 2015 Act does not interfere with the interpretation of an existing trust, so an appointment effectively extending the perpetuity period will still need to be within the powers of the trustees. For example, a restriction in a trust instrument to the effect that an appointment must comply with the perpetuity period applicable to the original trust may preserve the effect of rule in relation to a trust, in spite of the 2015 Act, if, on a proper construction, it restricts the very power under which the appointment is made.

The abolition of the rule against perpetuities is a major change in Manx law. While Manx law generally closely follows English common law, this change represents a major departure in Manx law from English law. Also of particular importance is the potential for removal of the perpetuity period for existing trusts.

Two-trustees rule

The second change made by the 2015 Act (in sections 3 and 4) breaks with the ''two-trustees rule'', introduced originally in the English *Trustee Act 1925* and copied into Manx law by the *Trustee Act 1961*.

The rule never sat well under Manx law anyway: the requirements under English law were designed to mesh with the provisions of section 2 of the *Law of Property Act 1925* (coupled with section 14 of the *Trustee Act 1925*), which provides for overreaching of equitable interests in land where the purchase price is paid to two persons (formerly two individuals), or a trust corporation, acting as trustees. The restrictive provisions of sections 37(1)(c) and 39 (see below) of the *Trustee Act 1925* were irrelevant under Manx law except in a very limited circumstance,[1] and the reproduction of section 14(2) (imposing minimum requirements on the statutory power of trustees to give receipt) were likewise inappropriate.

The restrictions on replacement or retirement of trustees, copied from English law, were set out in sections 36(1)(c) and 38 of the *Trustee Act 1961*. Section 36(1)(c) (broadly equivalent to section 37(1)(c) of the English Act) applies to replacement of trustees and, in a roundabout way, required two individuals or a trust corporation to be left in office after the replacement unless there was 'originally' only one trustee and a sole trustee could give a valid receipt. Section 38 applies to retirement of trustees and point-blank required that there be two individuals or a trust corporation left in office for a retiring trustee to be discharged.

No doubt, the rule was thought to protect beneficiaries from the vagaries of individuals and companies

1. That is, where a strict settlement of land arose under the *Settled Land Act 1891* and the statutory power of trustees to give receipts for capital money arising from settled land had not been explicitly widened to allow an individual or non-trust-corporation company acting as trustee to do so.

not deemed to be trustworthy. Perhaps that was true in England at the time, but in the Isle of Man in 2015, it was not: trustees acting in the course of business were regulated in a more thorough manner than the blunt requirements for trust corporation status. In any case, careful drafting could effectively circumvent the rule.

The negative consequences of the rule on the contrary were dramatic: a failure to discharge a trustee in an attempted retirement or replacement potentially rendered invalid any trustee actions taken without that trustee's participation, in spite of general belief that that trustee had been discharged. In reality, the rule then served as no more than a trap for the unwary and a hindrance to the cautious.

It has been abolished with effect from 16 June 2015. The abolition has no retrospective effect, so previous failures to discharge retiring trustees are not automatically cured. Still, where failures are identified for existing trusts, they should now be easier to cure.

Again, the terms of the trust still need to be considered before concluding that only one trustee, of whatever kind, is required: the 2015 Act does not, in itself, override a provision in a settlement to the effect, for example, that 'there shall always be at least two individuals or a trust corporation to act as trustees of this settlement'. At least now, though, readers of a trust instrument are on notice of the requirements facing them.

Firewall legislation

An innovation in the 1990s among 'offshore' jurisdictions was the introduction of legislation designed to protect trusts established under their laws from the laws of the jurisdictions affecting the settlors. This was, to a great extent, to meet concerns regarding the forced heirship rules of those caught by civil law countries. Such laws can direct individuals to leave specified proportions of their estate to their spouses and issue. The laws of some places provide for a 'claw back' in case the settlor had made (even lifetime) gifts in excess of a freely disposable portion of their estate. The legislation was designed to protect trusts and gifts made to them from such laws.

Perhaps owing to the success of such legislation in those contexts, the cases concerning the legislation in succession law have been rare. Their prominence in the courtroom has tended to be in the matrimonial sphere: can such legislation protect offshore trusts from court orders made in foreign places, purporting to vary or set aside trusts, or gifts into trust, declaring them to be a sham, or directing trustees to take particular actions in relation to them (eg to make a distribution, to retire in favour of a named person)?

The legislation in the Isle of Man was already similar to that in most offshore trust centres but, having been passed earlier, had not kept up-to-date with more recent innovations. The *Recognition of Trusts Act 1988* already permitted the selection of the governing law of a trust under Manx law, as well as a change of governing law to Manx law. It provided that (i) a selection of Manx law was to be regarded as conclusive and (ii) that most matters concerning a trust (listed in the section) would be governed exclusively by Manx law. The amendments by the 2015 Act made several key changes:

- Claims based on personal relationships not only with the settlor but with beneficiaries are excluded—this is particularly important in relation to matrimonial claims based on the interests of beneficiaries under trusts.
- Enforcement or recognition is denied to foreign court orders designed to give effect to foreign law on matters to be governed by Manx law.
- The capacity of settlor, trustee, beneficiary, or protector is not to be questioned under foreign law, but only under Manx law.

The amended section of the relevant legislation (the *Trusts Act 1995*) reads as follows, with the amendments highlighted in bold:

> 5 Exclusion of foreign law
>
> (1) Without prejudice to the generality of section 4, no trust governed by the law of the Island 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 a settlor, **trustee, protector or beneficiary** to be questioned, **nor is any person to be subjected to an obligation or liability or deprived of a right, claim or interest**, by reason that—

a. the law of any foreign jurisdiction prohibits or does not recognise the concept of a trust; or
b. the trust or disposition —
   i. avoids or defeats any right, claim or interest conferred by foreign law upon any person by reason of a personal relationship to a settlor **or beneficiary** or by way of heirship rights; or
   ii. contravenes any rule of foreign law or any foreign judicial or administrative order or action intended to recognise, protect, enforce or give effect to such a right, claim or interest.

(2) **No judgment or order of a court outside the Island is to be recognised or enforced or give rise to any right, obligation or liability or raise any estoppel if and to the extent that—**

a. **it is inconsistent with this Act; or**
b. **the High Court so orders —**
   i. for the purpose of protecting the interests of the beneficiaries of the trust; or
   ii. in the interests of the proper administration of the trust.

(3) **Subsection (2) has effect despite any other statutory provision or rule of law in relation to the recognition or enforcement of judgments.**

(4) **This section applies—**

a. **whenever the trust or disposition arose or was made; and**
b. **despite any other statutory provision**.

6 Interpretation

'In this Act—

. . .**'beneficiary' means a person entitled to benefit under a trust or in whose favour a power to distribute property may be exercised;**. . .

. . .**'protector' means a person other than a trustee who, as the holder of an office created by or under the terms of a trust, is authorised or required to participate in the administration of the trust;**. . .'

Care needs to be taken in this potentially controversial area: when the provisions were first introduced in Jersey, faced immediately with a case in which application of these were relied upon, the court said (*Re B Trust* [2006] JRC 185) that:

> We find [the provisions] rather obscure, but we do not need to decipher their meaning. We are quite clear what they do not mean and that they do not exclude the application of the doctrine of comity. It would, in our judgment, take very clear and express words to persuade us that the legislature intended to deprive this court of the flexibility to do justice in a wide range of cases on the basis of a principle of almost universal applicability.

The Jersey court felt differently, however, in the later case of *Mubarak v Mubarik* [2008] JCA 196.

Conclusion

The legislation took a long time to come to fruition. It arose from proposals that the author first advanced on behalf of the Isle of Man branch of STEP around nine years ago! It is hoped that future developments can move ahead more swiftly, although pressure on legislative time rarely seems to let up. It is hoped that the legislation will make the Isle of Man more attractive for trust business, but will also, moreover, amount to a genuine improvement to Manx trust law.

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