

**BRITISH VIRGIN ISLANDS VISTA TRUSTS**

**1 The Virgin Islands Special Trusts Act 2003**

The Virgin Islands Special Trusts Act 2003 ('VISTA') came into force in the BVI on 1 March 2004.

VISTA introduced a new form of trust for holding shares in companies which is designed, primarily, for a situation where shares are to be held indefinitely and the trust is not intended, other than in special circumstances, to intervene in the conduct of the affairs of the company.

**2 The 'prudent investor'**

As a matter of general trust law, where a trustee holds a controlling interest in a company, the '*prudent investor rule*' places trustees under an obligation:

- (1) to monitor the conduct of the directors of the company and to intervene in the company's business where this is considered necessary; and
- (2) to exploit the shareholding to its maximum financial advantage which may require the trustee to accept offers to purchase the shares in the company either because an offer is financially attractive or because the trustees are obliged to diversify their trust fund.

These obligations present professional trustees with difficulties and often they mean that conventional trusts fail to meet the requirements of the typical settlor of [family] company shares.

The duty of prudence required of trustees in monitoring a company's affairs means that they must, generally, be conservative in their decision-making which can be incompatible with the need for quick decision-making in entrepreneurial business. Further, professional trustees rarely have the skills necessary to take business decisions and the costs of the trust administration would be greatly increased if they were required to take professional advice to satisfy themselves they were taking decisions appropriately.

**3 The benefits and requirements of VISTA**

- VISTA removes the problems arising from the 'prudent investor rule' enabling the settlor of a trust to establish a trust of his company that disengages the trustee from management responsibility in respect of the company and permits the company and its directors to be retained in the trust for as long as the directors think fit.
- The trustee is required to leave the conduct of the company's business and all decisions as to the payment of dividends by the company to the company's directors.
- The trustee is expressly prohibited from exercising its voting or other rights in respect of the shares so as to interfere in the management of the company's business.
- VISTA seeks to limit the trustees' liability for the management of companies owned by the trustees. The trustees will not be liable for loss caused by them retaining the shares in the company rather

than selling them and the loss covered by this exclusion is expressly extended to cover losses caused by any imprudent activities of the company or any act or omission of the directors.

- VISTA also excludes liability for similar losses arising out of the management of any connected company. The application of VISTA is restricted to shares in BVI companies but these can have non-BVI subsidiaries.
- Company shares subject to a VISTA trust are held by the trustee on trust for their retention. The trustee is, however, given the power (subject to the terms of the trust) to dispose of the shares with the consent of the directors. There is also, it should be noted, a residual power for the court to order or authorise disposal when retention would be incompatible with the wishes of the settlor.
- Provision can be made for the settlor to lay down rules regulating the appointment, removal and remuneration of the directors of the company. These rules can permit the settlor to remain on the board of the company.
- Certain rights in respect of a VISTA trust are retained by 'interested persons'. Interested persons include beneficiaries (both with fixed interests and discretionary beneficiaries) and any supernumerary (e.g. a protector). It is also possible for the trust deed to nominate an appointed enquirer although this provision tends not to be used in practice. Certain rights are conferred upon these interested persons. Any interested person can call upon the trustees to interfere in the affairs of the company where he has a complaint about how the company is being run if his complaint is within grounds set out in the trust deed. An interested person may also request the trustees to obtain information about the company to judge whether he should be asking the trustees to intervene in its affairs.
- The trustee of a VISTA trust must be a BVI licensed trustee company regulated by the BVI Financial Services Commission.

#### 4 **Where might VISTA trusts be recommended?**

- **Wish to retain control in trading company**

A VISTA trust is appropriate as a vehicle to hold shares in a trading company particularly where the settlor is reluctant to hand over responsibility for the management of the company to a trustee.

Many settlors do, in practice, feel comfortable giving up control of decision-making to trustees of conventional discretionary trust structures. The VISTA trust can, however, allow the settlor to retain an important role within the structure as a director of the holding company without there being any suggestion of the integrity of trusts being undermined by the settlor continuing to have a role in the underlying business.

- **High risk assets**

A structure involving a VISTA trust might well be appropriate for holding assets perceived as high risk in respect of which professional trustees might not otherwise be willing to act. Professional trustees are often unwilling to hold aviation assets otherwise than through a VISTA trust because of the need to act as a prudent investor and the normal requirement for diversification of trust assets.

## 5 **Types of trusts to which VISTA can apply**

- **Discretionary trusts**

VISTA trusts can be discretionary trusts whereby the trust fund is held on discretionary terms for a range of beneficiaries. A power to add to the class of beneficiaries can be included in the trust deed to take account of changes in future circumstances. A power to amend the terms of the trust can also be included in the trust deed as can supernumerary functions (which can provide a useful check on the powers of trustees) such as the offices of:

- **Protector**

A Protector is often given the power to remove a trustee and to appoint a replacement. In some instances, the Protector is also required to give his consent to a distribution of capital from the trust.

- **Appointor**

- Where a trust has a Protector, it can be useful to also provide for an 'Appointor'. The Appointor will be given the power to remove the Protector and to appoint a successor Protector.

- **Purpose trusts**

A VISTA trust can be a trust for purposes rather than beneficiaries although, in practice, these trusts tend to be used for securitisation transactions or for holding shares in private trust companies.

## 6 **Legitimacy of the VISTA trust**

When the VISTA legislation was being drafted, consideration was given to whether the partial removal of the trustees' duty of care under a VISTA trust might be contrary to public policy meaning that a VISTA trust might not be recognised in some jurisdictions. As the VISTA concept is relatively new, there has been little practical opportunity for these concerns to be tested and it should be noted that recognition of a VISTA trust outside the BVI will rarely be an issue because the trustees of the VISTA trust will be a BVI company holding BVI shares such that there are only going to be limited instances in which the VISTA trust needs to be considered outside the BVI. If case law emerged that suggested that there was a problem with VISTA trusts (and the BVI legislators have strongly argued that this should not be the case), power can be included in the trust deed for the trust to be resettled in another jurisdiction.

For further information, please contact Palladium.

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Palladium Trust Services Limited | 07442667

23 Berkeley Square, London, W1J 6HE | [www.palladiumtrustservices.net](http://www.palladiumtrustservices.net)

Contact: Stephen Abletshauser

T: +44 20 3170 7169

F: +44 20 3178 2848

E: [stephen@palladiumtrustservices.net](mailto:stephen@palladiumtrustservices.net)

Note from Palladium:

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