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The old repealed Trustee Act (Ch. 164) had been in effect since 1893.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 The schedules cover model trust provisions and list the two aforementioned repealed acts as having been repealed.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 not during the life of that beneficiary, or such lesser period as may be specified in the instrument or disposition, 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 quite 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 or 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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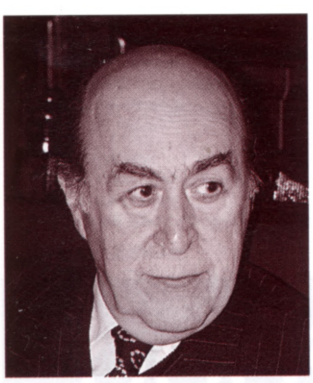
Comment

Pension problems: who owes whom?

by John A Franks



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 lowered 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 SERPS. 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 for mis-selling pensioners back into SERPS 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