

The Virgin Islands Special Trusts Act, 2003 (“**VISTA**”) is now a little under 5 years old, having come into force in March 2004, and it is perhaps an interesting point to consider how the Act has been used and applied by the trust industry in the British Virgin Islands (“**BVI**”).

VISTA was specifically designed to encourage owners of shares in BVI companies (now numbering some 833,000) to make greater use of trusts established in the BVI, and to this end the Act contains the following key features:

- the trustees of a VISTA trust are prohibited from interfering in the running of the company the shares of which are held in trust;
- a VISTA trust may contain rules to determine who will be the directors of the company, and in what circumstances they may be removed;
- a VISTA trust may hold the shares of a company indefinitely.

As shall be seen in the examples given below, VISTA has over the years been used to fulfil quite different family needs and commercial requirements.

The Family Trading Company

Shares in a family trading companies were not traditionally an asset that was placed in an offshore trust, this was principally because most professional trustees would not accept the liability risks associated with overseeing a business with which they had no skill or knowledge, and also because most business owners would not accept the level of interference and oversight that a trustee had to undertake in order to comply with their legal obligations.

VISTA has had a transformative affect on this area. Shares in family trading companies are now routinely placed in VISTA trusts.

VISTA is able to balance the competing interests and concerns of each party. For the business owner it is paramount that active control of the company is not lost to a third party trustee, and that the directors of the company are not determine by the trustee. VISTA achieves this is a number of ways, first, VISTA prohibits the trustee from being appointed a director of the company, and permits rules, termed “Office of Director Rules”, by which the business owner is given the power to

decide who will be the directors of the company, when they should be removed and how much they should be paid.

For the trustee, VISTA provides a number of protections against liability in the event there is a decrease in the value of the shares, and taken with the prohibition against trustee involvement in the running of the business of the company, easily addresses the traditional concerns about accepting shares in trading company.

The Single Asset Holding Company

It is thought that the majority of BVI companies hold a single asset, such as money held in an account opened in the name of the company.

Traditionally, such single asset holding companies were not held via trusts for the simple reason that the cost and expense were not justified; it was difficult to convince an owner of a company that their shares were better held under a trust, particularly where the trust deed was a lengthy document, conferring on the trustee wide discretionary powers to manage the (often quite modest) assets of the company.

VISTA has made a significant impact on this area. Certain BVI trust companies now offer a short form VISTA trust deed, the sole purpose of which is to enable owners of BVI company shares to avoid a public probate in the BVI in the event of their deaths.

Again, the main features of VISTA have been successfully utilised, in that the owner of the company is able to freely manage the assets of the company without trustee interference and the trustee is able to rely on statutory protections in the event there is a loss in the value of the shares, with the net result that costs of administration can be set and maintained at a modest level.

Private Trust Companies

The application of VISTA to the holding of shares in a BVI private trust company is by far and away the most significant recent development in the use of VISTA trusts in the BVI.

The BVI enacted private trust company legislation in the summer of 2007, by the Financial Services (Exemptions) Regulations, 2007 (“**PTC Regulations**”).

The PTC Regulations enable a company to be incorporated in the BVI the sole purpose of which is to act as trustee or protector of a trust, without the need to obtain a trust licence under the Banks and Trust Companies Act, 1990.

Wealthy families are increasingly using private trust companies to consolidate ownership and to provide succession to their various worldwide assets.

However, there was in the past one particular problem in the use of private trust companies for which industry had no single answer, the problem centred on ownership and control of the private trust company; whoever owned the shares of the company, would thereby indirectly have control and access to the entire family wealth.

In the past this problem was addressed in some cases by use of shareholder agreements, in others by use of a further trust (typically a purpose or charitable trust) to hold the shares of the private trust company, with a letter of wish providing non-binding guidance to the trustees as to the desired control of the private trust company; industry could not provide a single answer to the basic family requirement that ownership and control of the private trust company should also be adequately addressed.

VISTA has significantly simplified this problem. VISTA trusts are now being used to hold the shares of family private trust companies, with the trust deed typically prohibiting the trustee from selling or otherwise disposing of the shares in the company, and providing a number of attractive options to address control of the private trust company.

As mentioned above, VISTA permits rules, known as “Office of Director Rules”, to be included in the trust deed to govern circumstances in which directors may be appointed and removed. Use of Office of Director Rules has proved crucial in addressing the corporate governance issues that had previously been a problem in structuring ownership of private trust companies.

Typically in a private trust company scenario, the Office of Director Rules would provide that a named family member, usually the patriarch, would have fully discretion during his life to determine the directors of the private trust company, and then on his death or earlier incapacity, automatic mandatory rules would apply, which may provide that only certain named family members may be appointed directors, and provide mandatory grounds to remove such directors, for example if they are convicted of a criminal offence.

Another common approach is to establish an Office of Director Rule committee, comprising members of each branch of the family, which is given the power to appoint and remove directors of the private trust company; in this way a balance may be maintained between competing family interests.

In summary, VISTA has over the years proved extremely versatile in addressing the needs and commercial requirements of the modern BVI trust market, and can fairly be described as successful in meeting its primary objective to encourage use of trusts established in the British Virgin Islands.

This article was first published in *Private Client Practitioner* in October 2008. If you would like further information on VISTA trusts or any other BVI or Cayman Islands trust, please contact Zac Lucas at our BVI office or your usual Harney Westwood & Riegels lawyer. Alternatively, you may visit our website at www.harneys.com.

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