Does the Virgin Islands Special Trusts Act achieve anything special?

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Abstract

This article examines and evaluates the Virgin Islands Special Trusts Act 2003 and, in particular, whether a settlor can achieve what VISTA allows by appropriate drafting.

This article has a simple aim: a short exposition and critical evaluation of the Virgin Islands Special Trusts Act 2003 (VISTA). In particular, it will look at the question whether a settlor can achieve what VISTA allows by appropriate drafting. As will be seen, there appears to be disagreement among two of the leading practitioners’ works on this question. This article looks at the nature of that disagreement and how it might be resolved. For those who think articles should not leave the reader in suspense for too long, the answer to the question posed in the title will be in the affirmative. The reasons for that answer now follow.

The primary purpose of VISTA

Section 3 of VISTA states what it calls the primary purpose of the legislation namely:

to enable a trust of company shares to be established under which (a) the shares may be retained indefinitely; and (b) the management of the company may be carried out by its directors without any power of intervention being exercised by the trustee.

It is not expressly stated but surely must be the case that the British Virgin Islands (BVI) courts are to have regard to this purpose when interpreting VISTA and, it is submitted, trust instruments to which VISTA applies. In addition, it captures well (i) the permissive nature of the legislation (it is entirely opt-in) and (ii) its two objectives.

The latter amount to a disapplication of the duties, which are incumbent upon the trustee of a controlling interest in an underlying company, namely: the duty to sell the trust’s shareholding if a prudent man of business would do so in order to make a profit or avoid making a loss and the duty to intervene in the management of the company including, if necessary, by effecting changes in the composition of the board in circumstances where the prudent man of business would intervene. Although capable of being stated separately as two duties, these are but aspects of the one duty upon trustees to behave in relation to investment of their trust fund as a prudent man of business would do. In the case of a controlling interest in a private limited company, where there can be no ready market in the shares, the duty of monitoring and intervening in management is likely to be the real focus of beneficiary complaint. That was certainly the case in Bartlett v Barclays Bank Trust Co Ltd where Brightman J ruled that:

The bank, as trustee, was bound to act in relation to the shares and to the controlling position which they conferred, in the same manner as a prudent man of

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business. The prudent man of business will act in such manner as in necessary to safeguard his investment. He will do this in two ways. If facts come to his knowledge which tell him that the company’s affairs are not being conducted as they should be, or which put him on inquiry, he will take appropriate action. Appropriate action will no doubt consist in the first instance of inquiry of and consultation with the directors, and in the last but most unlikely resort, the convening of a general meeting to replace one or more directors. What the prudent man of business will not do is to content himself with the receipt of such information on the affairs of the company as a shareholder ordinarily receives at annual general meetings. Since he has the power to do so, he will go further and see that he has sufficient information to enable him to make a responsible decision from time to time either to let matters proceed as they are proceeding, or to intervene if he is dissatisfied.

**Getting round Bartlett by drafting**

Settlors wishing to avoid the effects of this decision, so that a trust of a controlling interest in a company might be created without any duty on the trustee to intervene in its management, have had resort to various kinds of anti-Bartlett clauses. While the learned editors of Lewin on Trusts\(^2\) endorse the effectiveness of at least some of these kinds of clauses, including those ousting the duty to intervene in management save where the trustees have knowledge of dishonesty on the part of the directors, the learned editors of Underhill & Hayton’s: Law of Trusts and Trustees\(^3\) are more cautious arguing that in such case nonetheless:

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\ldots \text{the trustee does have power to obtain information and interfere (by virtue of its controlling shareholding) so far as necessary to protect beneficiaries’ interests, while it seems that the trustee has an over-riding duty to exercise its powers so as to safeguard and further the beneficiaries’ interests as a whole}^4 \text{ and that this duty at the core of the trust cannot be ousted.}^5
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Accordingly, the conclusion is drawn that

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[t]o exclude the trustee’s power to intervene and replace the directors of the company, the settlor would need to arrange for the company to be created under a foreign law\(^6\)
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and a footnote suggests: ‘[f]or example, British Virgin Islands’. Contrariwise, the learned editors of Lewin suggest VISTA as a mere alternative to an effective anti-Bartlett clause\(^7\).

It is respectfully submitted that Underhill is correct to conclude that, for effective ouster of the company law power of intervention, recourse must be had to a foreign system of law and equally correct to identify the BVI as a jurisdiction which achieves this end through the provisions of VISTA. It is submitted with no less respect that Lewin is correspondingly incorrect to present VISTA trusts as a mere alternative to an anti-Bartlett clause as though there were nothing really to choose between them. This submission is made, in each case, because it is only by statutory provision that a trustee can be deprived of the power which he has under a company’s articles and the general law of exercising the rights attaching to shares in a company of intervening in management: no provision of a gift in trust can deprive him of that power.

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4. Two authorities for this proposition are cited: *Cowen v Scargill* [1985] Ch 270 and *Beaumont v Ashburnham* (1845) 8 Beav 322.
5. *Underhill* (n 3) para 52.61. There is also a footnote appended to this sentence which is discussed later in this article: see the text at (n 11) below.
6. *Underhill* (n 3) para 52.62.
7. *Lewin* (n 2) 34–50, final sentence.
Distinguishing the company and trust law perspectives

But that reason, which is hinted at by the words in parentheses in paragraph 52.61 and may be regarded as a company law reason for choosing VISTA, is different from the reason advanced in the remainder of the cited portion of that paragraph which may be regarded as a trust law reason. The next section will attempt to unpack and assess the trust law reason.

The trust law reason

Two authorities

The first two authorities relied on in Underhill to establish the trust law reason are Cowan v Scargill and Beauclerk v Ashburnham. In the latter case, trustees were ‘authorized and required’ with the ‘consent and direction’ of the tenant for life to lay out trust monies on:

leasehold hereditaments for a term of years of which not less than sixty years shall... be unexpired, and either with or without requiring the production of, or enquiring into, the title of the lessor... in some convenient place or places in England or Wales.

The life tenant, while in his early 30s, gave a direction to the trustees to invest a substantial sum in a leasehold interest which would produce a reasonable income for him but, given his life expectancy, would be likely to leave little of value for the remainderman who was an infant. Two of the four trustees were of the view that the investment directed by the life tenant would be very much to detriment of the infant remainderman and refused to comply with the direction (having taken counsel’s advice on the matter which, apparently, supported their position). The life tenant therefore filed a bill:

to compel the trustees to make the investment in the leaseholds, and if necessary, for the removal of the two dissentient trustees.

The dissentient trustees’ answer to the bill records their belief that:

the terms of the power of investing the trust funds...authorized them and their co-trustees to use their discretion as to their compliance with such proposal (which suggests that the matter was approached purely as a matter of construction and that, as a matter of construction, they retained a discretion).

The argument of counsel for Ashburnham that:

[t]he trustees were intended to have a discretion, and they ought to have regard to the interests of all parties (which is the only reference in the report to anything like the duty contended for in Underhill) is consistent with the pleaded case in acknowledging settlor intention as the starting point. It is hard to read into this, therefore, an argument that no expression of settlor intent could oust the discretion to consider the interest of all parties. The argument was, rather, that this settlor had not intended to do so.

It is hard to read into this, therefore, an argument that no expression of settlor intent could oust the discretion to consider the interest of all parties. The argument was, rather, that this settlor had not intended to do so.

8. [1985] Ch 270.
The matter came before Lord Langdale MR on two occasions. The report of his judgments is tantalizingly brief. On the first occasion he said:

I must confess that if I had been in the situation of these trustees, I should have been just as unwilling to consent but made no ruling on the point. The report of the second hearing is recorded in indirect speech as follows:

The Master of the Rolls said, he was afraid of adopting the declaration asked by the Plaintiff for the trustees had many things to consider. What he conceived was this: That upon the requisition of the tenant for life, the trustees were bound to lay out the funds in the purchase of ‘leasehold hereditaments,’ in some convenient place, &c.: . . . That he did not mean to say anything about these particular houses, or as to their title, situation, description, &c., for he considered that the trustees had a most important discretion to exercise in respect to those matters, which he did not mean, in the least, to interfere with. That being brought before the Court, they had a right to have any of those matters now enquired into before the Master, because it must be agreed, at once, that it would not be fit for them lay out the trust monies in a low, bad, and deteriorating situation.

It can be seen, therefore, that Lord Langdale’s decision was that the declaration sought compelling the investment should be refused (the suit for removal of the trustees was, presumably, not pressed after his comments at the first hearing). Equally, the reason for the decision can be seen to be that there were important matters of discretion reserved to the trustees namely ‘title, situation, description &c.’ They, however, were matters expressly reserved by the settlement to the discretion of the trustees. The court’s reasoning did not touch the question whether, had the trustees been deprived of all discretion by the terms of the settlement, they might nonetheless have exercised a discretion inherent in them as trustees. While Lord Langdale’s comments at the first hearing suggest that he might have been receptive to an argument along those lines, no such argument was made. The case cannot therefore be regarded as authority for the proposition for which it is cited in Underhill11.

Cowan v Scargill is the well-known case in which Arthur Scargill, the celebrated union leader and miners’ pension fund trustee, tried to convince the High Court that the trustees of the pension fund as a body could lawfully adopt an ethically or politically motivated policy of investment even if it were to the financial detriment of some classes of pensioner. Ruling that they could not, Sir Robert Megarry V-C referred to the trustees’ duty to:

exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between the different classes of beneficiaries

and added, simply,

[th]is duty of the trustees towards their beneficiaries is paramount.

It is assumed that it is this aspect of the decision on which reliance is placed (the footnote reference in Underhill is not specific).

Paramountcy is a concept that may have either absolute or relative connotations. It can mean ‘of supreme importance’ (with the implication of indispensability, necessity and the like) or merely of greater importance than /of greatest importance amongst . . . . It is submitted, however, that Megarry V-C’s comments about the paramount nature of the duty to exercise powers in the best interests of the beneficiaries as a whole are most naturally to be read in a relative rather than absolute sense: in other

11. See n 4 above.
words, he was simply making the point that the duty to consider the (financial) benefit of the beneficiaries of the pension trust trumped the union’s moral and political views about investment. It is hard indeed to extract from this case any ruling or dicta about the excludability of trustee discretions.

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The case for an ‘overriding’ duty

Whether or not these two authorities establish the existence of an ‘overriding’ duty, importing an ineliminable discretion, to act in the interests of the beneficiaries as a whole, there is much to be said for the acknowledgment of such duty. While Beauclerk, if it is clear authority for anything, establishes that significant modification and restriction of a trustee’s discretion to select investments appropriate to hold a fair balance between income and capital beneficiaries will be tolerated, it must seriously be doubted (and not simply as a result of Lord Langdale’s expressed views) that total exclusion of any discretion in investment is consistent with the idea of trusteeship other than in the sense of custodian or bare trusteeship. Those sorts of trusteeship (along with resulting and constructive trusteeship) are peripheral to the central case of trusteeship which is that of the express trustee in whom not merely title but also key discretions are vested for the benefit of the beneficiaries. Strip out discretion completely and the central case of trusteeship simply disappears from view.

Two aspects of the irreducible core content of trusteeship

In a footnote, the learned editors of Underhill proceed from a consideration of Cowan v Scargill and Beauclerk v Ashburnham to assert that the overriding duty:

is surely part of the duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries.

The assertion of a constitutive relationship between the two duties cannot, with respect, be right since they are specifying very different things about discretion namely, in the case of the good faith requirement, a minimum standard or quality of judgment that must be met and, in the case of the overriding duty, the need for a minimum range or amount of discretion. A little loosely, one is a qualitative standard, the other quantitative. They are, therefore, best understood as independent but complementary aspects of the irreducible core content of trusteeship.

Another aspect

They are not, however, the entire story. It was in Armitage v Nurse that Millett LJ accepted the submission of counsel for the plaintiff, in turn very possibly borrowing from Professor Hayton’s seminal article ‘The Irreducible Core Content of Trusteeship’ that:

... there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts.

12. Underhill (n 3) 52.61, footnote 2.
14. In A Oakley (ed), Trends in Contemporary Trust Law (Oxford University Press, New York, 1996), 47 where view was expressed:

The beneficiaries’ rights to enforce the trust and make the trustees account for their conduct with the correlative duties of the trustees to the beneficiaries are at the core of the trust.
It is the need for enforceable trust obligations, rather than the good faith requirement, that is really central to the problem posed by anti-Bartlett clauses which attempt to exclude not merely the duty but also the power of intervention in management. If both are excluded, there is a complete denial of correlative right in the beneficiary and, a fortiori, of any enforceable right against the trustees in relation to the shares. It therefore follows that there is no trust of the shares (for the beneficiaries, at least).

Moreover, it is a mistake to think that an English settlor can take advantage of foreign law to establish a trust of shares valid under that foreign law but which denies the beneficiaries any enforceable rights in relation to the shares. To make good this submission, it is convenient now to look at just what VISTA allows a settlor to do.

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**VISTA—the detail**

The provisions of VISTA allow a settlor to specify in relation to ‘designated shares’ (that is, shares in a BVI incorporated company) that VISTA shall apply to save the extent specified in the trust instrument. Doing so in unqualified fashion has the effects, under section 5, that the designated shares are held ‘on trust to retain them’ (the duty to retain them having precedence over any duty to preserve or enhance the value of the trust fund) and that the trustee shall not be accountable for any losses arising directly or indirectly from holding rather than disposing of them. Although section 9 confers an administrative power to sell designated shares with the consent of a majority of the directors and any other persons specified, this power is excludable and thus by a combination of sections 5 and 9, it is possible to create a trust to retain designated shares with no power of sale.

As to intervention in management, section 6 provides that:

voting or other powers in respect of designated shares shall not be exercised by the trustee so as to interfere in the management or conduct of any business of the company. (Emphasis added.)

This provision allows a settlor to oust not merely the duty but also any power to intervene in management by exercise of company law rights attaching to designated shares. While the shares are held under VISTA, those company law rights must be regarded as unenforceable.

Most importantly, a VISTA trust may ‘but need not’ specify ‘office of director rules’ (section 7) and ‘permitted grounds for ‘intervention calls’ (section 8). These provide for exceptions to the provisions made by section 6 and, respectively, allow a settlor to specify in advance how appointments may be made to the Board (subsection (2)(e) specifically allowing a settlor to require the trustee to act on the decision of a third person) and under which circumstances the trustee may inquire into the company’s affairs. Outside any provision made under section 8, it would seem that neither the trustee nor the beneficiaries who claim under him can bring an action before the courts for relief in respect of the way the company’s affairs are being run. For good measure, section 15 makes clear that, except when acting or required to act on an intervention call, a trustee shall have no fiduciary responsibility or duty of care in respect of the assets or affairs of the company.

A perpetuity period of up to 100 years may be selected for the purposes of the rule against remoteness of vesting, although there is no rule limiting the duration of a non-charitable purpose trust with which VISTA may be combined. Further, any Saunders v Vautier rights arising under a VISTA trust may be

15. (1841) 4 Beav 115.
excluded for a period of up to 20 years from the creation of the trust.

A perpetuity period of up to 100 years may be selected for the purposes of the rule against remoteness of vesting, although there is no rule limiting the duration of a non-charitable purpose trust with which VISTA may be combined.

A potential difficulty

One only has to summarize the provisions of VISTA in this way, however, to see the potential difficulty: if full advantage is taken of these provisions to create a trust under which the beneficial interest in a company is purportedly alienated for 100 years by S on trust to T for the benefit of B such that (i) S and his appointees retain exclusive control of the company's assets and business, (ii) T, as a matter of company law, cannot control S's management of the company's affairs (including, for example, where defalcations have taken place) and (iii) B cannot call T to account in any way for failing to control S, is this really a trust 'for B'? The answer from the BVI legal point of view must be that it is since any other answer would require the BVI courts to decline to give effect to the plain meaning of a statute. But that is not the only point of view which is likely to concern potential BVI settlors. In particular, an English court properly seized of the question is likely—and ought—to find that that no endeavours on the part of the trustees (whose honesty and good faith let it be assumed are undisputed) would allow them to perform their duty of (what analysis reveals to be) mere custodianship in a way that can properly be described as being 'for the benefit of the beneficiaries'. Their custodianship, accepted on terms that allow S full use and control of the economic interest in the trust fund without accountability in general meeting to the trustees as shareholders nor (through them and before the courts) to B, is a form of property-holding which simply cannot be for B's benefit other than at S's whim. B is not even in the position of a beneficiary whose trustees are expressly authorized without liability for loss of the fund to 'invest' it all at one go in the National Lottery. Such beneficiary, unlike B, would at least have an enforceable right to any winnings.

If the foregoing analysis is correct, nothing in the Recognition of Trusts Act 1987 would require an English court to give effect to this arrangement as a trust for B despite the fact that this must be its effect under BVI law since under Article 18 of the schedule to the Act, the English court may disregard the provisions of the Hague Convention on the Law Applicable to Trusts and their Recognition—the adopted provisions of which have the force of law in the United Kingdom in virtue of the Act—where:

their application would be manifestly incompatible with public policy.

The enforceability of core trustee obligations is indisputably a matter of English public policy and the VISTA sanctioned arrangement between S and T falls foul of that policy in a way which might fairly be described as manifestly manifest.

Avoiding the difficulty

What this points to is the need for VISTA trusts always to specify permitted grounds for intervention calls. As a result, it has become common form to allow that departure from a written business plan agreed on by Board resolution and misapplication of company property in breach of director's duties to the company will justify an intervention call. VISTA specifies a non-alterable list of 'interested persons' who may make an intervention call if permitted
grounds are specified. They are any beneficiary, any object of a power over income or capital, any parent or guardian of any under age beneficiary or object, the Attorney-General where the purposes of the trust are exclusively charitable, any enforcer of a purpose trust established after 1 March 2004 under section 84A of the Trustee Act, any protector and any 'appointed enquirer' (that is, anyone else to whom the settlor wishes to afford a like right). Although the list is non-alterable, no trust need have beneficiaries or enforcers or involve the Attorney-General (though at least one of these must feature in every valid BVI trust) and certainly no trust need have any minor beneficiaries or objects, any protector or any appointed enquirer. Moreover, it is permissible for the enforcer and protector to be the same person. As a result, in the case, for example, of a pure non-charitable purpose trust only one person (the enforcer) need have the right to make intervention calls.

But what is the effect of making an intervention call? Under section 8(3), the trustee:

shall, if satisfied that the complaint is substantiated, take such, if any, action as the trustee considers appropriate to deal with the complaint in the interests of the trust.

This may include overriding the office of director rules to achieve a change in the composition of the Board and procuring the company to seek to recover losses caused by the conduct complained of. In considering action, the trustee must ‘have regard to’ the wishes of the settlor, the efficient functioning of the company and disregard ‘business risk’ (defined widely to include any risk attaching to the business or any projected business of the company) save to the extent that the ground for the complaint arises from any disagreement among the directors as to business risk or the settlor requires the trustee to consider it.

If the trustee decides not to act or indeed after any action taken, section 8(6) provides that:

the trustee’s obligation to intervene shall be at an end unless and until another intervention call is made and section 8(7) allows the trustee to decline to act on a subsequent call made on substantially the same ground where he sees no reason to alter his previous decision.

Section 8(3), however, necessarily requires at least one decision of the trustee and that is either the decision whether the complaint is ‘substantiated’ or the decision whether or not to act. Indeed, it is possible that the subsection on its true construction requires a minimum of two decisions on any intervention call. Whether or not that is the case, the duty to come to such decisions as are required of him clearly falls within the ambit of section 10 which provides that:

where in the case of a trust of designated shares there is a breach of a duty or obligation imposed by this Act on its trustee, any of the persons specified in subsection (3) may, subject to the terms of the trust, apply to the court for relief.

The specified persons are any ‘interested person’, any director and any person who would have been a director if the office of director rules had been complied with. Section 8(4) expressly provides that

where in the case of a trust there is a breach of duty or obligation imposed by this Act on its trustee, the breach shall be, and be actionable in civil proceedings as, a breach of trust.

The upshot of these provisions is that the trustee’s decision-making process in relation to the intervention call is subject to court review. At a minimum, the trustee’s duty will entail a duty of good faith in coming to his decision(s), but is likely and ought to entail considerably more than that—no less, it is submitted, than the full ‘fiduciary responsibility’ implicitly acknowledged by section 15 as attaching to the trustee when acting, or required to act, on an intervention call. As a result, the trustee ought to be accountable before the court and to the beneficiary for its decisions to the same extent that a trustee could seek to avoid his own decision qua fiduciary.
under the so-called rule in *Re Hastings-Bass*.\(^\text{16}\)

Naturally, a beneficiary or enforcer will face the usual evidential hurdle of establishing a sufficient case of improper reasons (and thus breach of duty) before being entitled to launch proceedings but if he can do so, then so long as the trust instrument does not oust his right, a beneficiary or enforcer can hold the trustee to account in respect of the decisions he makes in relation to the intervention call and, if satisfied that the complaint is ‘well-founded’, the court may make such order as it sees fit to attain, as nearly as may be, the outcome that the court considers would have been, or would most likely have been, attained if the breach had not occurred. It might be noted in passing that the phrase ‘well-founded’ is clearly to be contrasted with the use of ‘substantiated’ in section 8 in relation to the trustee’s initial decision. This suggests strongly that the standard of proof to be applied by the trustee is (i) different from and (ii) lower than the standard to be applied in civil proceedings. It is submitted that, in context, its meaning is no more or less than ‘has substance’.

The trustee’s decision-making process in relation to the intervention call is subject to court review

If, therefore, appropriate use is made of the intervention call regime, a VISTA trust is unlikely to fall foul of the enforceability requirement first identified by Professor Hayton as core to the trust concept but now also adopted as law in England and, it is to be expected, all jurisdictions where English decisions have persuasive authority.

**Conclusion**

But this merely underlines the fact that an English settlor, for example, does not really have a trust law reason for establishing a VISTA trust over, say, an English trust with a comprehensive duty and power excluding anti-*Bartlett* clause: inappropriate use of VISTA may well result in an arrangement that is as ineffective as such a clause. As between the trust law and company reasons advanced in Underhill for establishing a trust under VISTA, only the company law reason, therefore, is good. It is, however, both good and compelling since suspension of the rights attaching to shares while the shares are held in trust can be achieved only by statute. That is what VISTA achieves and, though simple, may fairly be regarded as special.