



CONSULTATION

Trusts (Amendment)

Bill 2013

29 July 2013 to 9 September 2013

Issued by:
The Treasury
Isle of Man Government
Bucks Road
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For the Isle of Man to continue to survive and thrive in an increasingly competitive world, it is vital that it constantly re-evaluates its position. Central to this is ensuring that the legislation of the Island is updated to ensure that the Island maintains its competitive edge.

There are three main areas that it has been suggested are in urgent need of an update in the Isle of Man's trust law, in order to allow the Island to either remain competitive or regain ground lost to competitors. These are:

- **Abolition of the "Two Trustees Rule"**
- **Abolition of the Perpetuity Period going forward**
- **Matters determined by governing law under the Trusts Act 1995**

This Trusts (Amendment) Bill 2013 ("the Bill") addresses only these three points, as these have been identified as matters that require urgent attention. It is intended that there will, in due course, be a full review and consolidation of the various Trusts Acts. The full review cannot be undertaken at this point in time.

The Treasury is inviting comments on the draft Bill which can be found on the Treasury consultation page, using the link below:

Please note that submission of a response will not be a guarantee that a change will be made to the draft Bill.

A summary of the responses received will be posted on the Treasury website at <http://www.gov.im/treasury/consultations.gov>.

Respondents must please provide contact details with their submissions.

While the summary document will not contain sufficient information to permit identification of respondents, anonymous submissions will nevertheless be disregarded.

Responses should be sent in writing or by email (preferably as Word documents) to:

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Please ensure that comments are received by no later than Monday 9 September 2013.

1. Abolition of the "Two Trustees Rule"

The "two trustees rule" has its roots in the Settled Land Act 1892 ("the Act"). Section 2(3) of the Act defines settled land as "land, any estate or interest therein, which is the subject of a settlement, is for the purposes of this Act settled land".

This definition applies to any deed, will, agreement (or other document) by virtue of which instrument(s) "any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession".

When settled land is sold, the proceeds of the sale are considered to be "capital money". For trustees to be able to give valid receipt for capital money, unless the settlement provides otherwise, section 34 of the Act requires there to be either two individual trustees or a trust corporation appointed – hence the "two trustee rule".

Sections 36 and 38 of the Trustee Act 1961 perpetuate this situation.

There does not seem to be any valid reason why this position should be perpetuated. It seems that the historic rationale for appointing a trust corporation, as opposed to individual trustees, stemmed from the size of a trust corporation which meant that it would be expected to have accountants, legal counsel and other specialists within the same company. In the past, individual trustees may have had little practical experience in dealing with the types of assets that might be held in trust. It appears that the rule was prudently put in place on a "two heads were better than one" basis.

Since 2005, the provision of trust services in the Island has, subject to certain specified exclusions set out in the Regulated Activities Order 2009, been a licensable activity. Those who are permitted to provide trust services must, unless excluded from the requirement to do so, hold a Class 5 Licence for Trust Services, issued by the Financial Supervision Commission under section 7 of the Financial Services Act 2008.

Trust corporations and trust service providers ("TSPs") are subject to the same levels of oversight by the FSC – both being Class 5 licenceholders. The regulation of the trust services sector has led to the position of there being little practical difference between the standards expected of trustees providing services through TSPs and those providing services as trust corporations.

The regulation of the trust services industry on the Island means that all persons acting as trustee should undertake their duties as trustee applying the standard of care expected of a reasonable person with that particular skill. This is a higher test than would be applied to the "man on the Clapham omnibus".

Since there does not seem to be any particular risk in permitting a single, individual trustee to give valid receipt for capital money, it is proposed that amendments should be made to the Settled Land Act 1891 and Trustee Act 1961 to give effect to this proposal.

1.1 Do you agree that the "Two Trustee Rule" should be abolished?

1.2 *If you think that this requirement should be retained, please clearly set out the risks that you think the abolition of the "Two Trustee Rule" might pose.*

2. Abolition of the Perpetuity Period

The rule against perpetuity provides that beneficiaries' interests in a trust must vest (i.e. become certain) within a set time (known as the perpetuity period) in order to ensure that property (settled land) cannot be held in a trust indefinitely.

The current position in the Isle of Man, under section 1(1A) of the Perpetuity and Accumulations Act 1968 ("the Act") sets the perpetuity period as either 80 years in the case of a testamentary trust or in all other cases 150 years.

Clause 5 of the Bill proposes to amend the Act to abolish the rule against perpetuities for future dispositions. It is not intended that this provision will be applied retrospectively.

Under new section 1A(1)(b) the rule against perpetuities will not apply in respect of past dispositions where the governing law of an existing settlement is changed to that of the Isle of Man.

It is envisaged that the application of the new provisions only against future dispositions is likely to result in future dispositions and existing dispositions, within the same settlement, being subject to differential treatment. Put simply (and non-technically), this would result in a "two-tier" treatment of the assets within a trust.

There is no proposal to change the perpetuity period for purpose trusts created under the Purpose Trust Act 1996. The perpetuity period for purpose trusts will remain fixed at 80 years.

The position in relation to perpetuity periods in the Isle of Man's neighbouring jurisdictions and close competitors is as follows:

- Jersey and Guernsey have abolished the rule against perpetuities;
- The UK has extended the perpetuity period to 125 years;
- Republic of Ireland has abolished the rule against perpetuities.

2.1 Do you agree that the perpetuity period should be abolished?

2.2 If you think that the perpetuity period should either be retained at the current level or retained but increased, please give reasons for this.

2.3 Do you foresee any difficulty with the differential treatment of dispositions within the same settlement, arising from the lack of retrospective application of the abolition of the perpetuity period? If difficulties are foreseen, please give reasons for your answer.

3. Matters determined by governing law under the Trusts Act 1995

The Trusts Act 1995 contains provisions that are referred to as the “Firewall” provisions. “Firewall” provisions are designed to shield trust structures established under those laws from the impact of foreign laws and judgments.

Provisions of this kind originated in the Caribbean. Since the late 1980s they have been adopted in a large number of jurisdictions. The avoidance of forced heirship rules may have been the original impetus for the development of firewall rules but their potential impact is now much wider.

The Cayman Islands are credited with developing what has commonly been described as an “AFH” or Anti-Forced Heirship regime. Similar laws have been adopted in the Bahamas (1989), Jersey (1989), Guernsey (1989 and 1990) and the Isle of Man (1995).

The classic firewall had, as its primary object, protection of trusts from foreign forced heirship claims but it is clear that the actual terms of the legislation go further in terms of the scope of the protection afforded. In particular, the exclusion of foreign law claims that arise “*by reason of a personal relationship to the settlor or by way of forced heirship rights*” is sufficiently broad to cover adverse claims based on foreign matrimonial property adjustment orders.

The draft Bill proposes to extend the protections currently offered to the settlor to beneficiaries, trustees and protectors as well. This will mean that the definition of “*personal relationship*” is no longer confined to “*to the settlor*” – the existing definition under section 6 of the Act will now apply to the settlor, beneficiary, trustee and protector.

3.1 Do you foresee any problems with extending the protections currently afforded to settlor to the trustees, beneficiaries and protectors?

The draft Bill further proposes to follow the course of action taken in Guernsey under Article 14 of the Trusts (Guernsey) Law 2007 (“the Guernsey Law”), at least as respects the impact of foreign court proceedings. The new provision reflects those of Article 14(4) of the Guernsey Law. The provision prohibits the enforcement or recognition of a foreign court judgment or order to the extent that it is inconsistent with that law, or the High Court orders for the purposes of protecting the beneficiaries, or in the interests of the proper administration of the trust.

While the Isle of Man says that only Isle of Man law applies, it does not go as far as excluding the “automatic” application of foreign court orders. Guernsey is now being viewed as the jurisdiction with more robust defences against foreign attack because of section 14(4) in the Guernsey 2007 Act.

Introducing an equivalent provision would make it a little harder for trustees to be pursued. Effectively, anyone seeking to attack a trust would have to obtain an order from the High Court to confirm the position. The High Court would then have to direct the trustees to participate in the proceedings – provided they have the power to do so under the trust deed.

Policy Considerations

The Isle of Man needs to consider carefully whether or not these provisions should be enacted. On one level the answer may appear blindingly obvious – the provisions could be viewed as imperative to avoid being seen as lagging behind and to level the playing field when foreign private client advisers survey the range of options open to their clients.

On the other hand, giving the High Court a wide discretion over whether or not to enforce a foreign judgment affecting a Manx trust is, potentially, a recipe for more uncertainty and litigation.

Where a party (“the judgment creditor”) has obtained a foreign judgment against another party (“the judgment debtor”) there are three possible ways that they may be able to enforce that judgment in the Isle of Man:

- Firstly, it may be possible to commence registration proceedings under the Judgments (Reciprocal Enforcement) (Isle of Man) Act 1968;
- Secondly, if the registration procedure is not available, the judgment creditor may commence an action in the High Court of the Isle of Man based on the foreign judgment; and
- Thirdly, where the first and second options are not available or are inappropriate, the judgment creditor may commence a fresh action in the High Court of the Isle of Man, based on the underlying cause of action.

The potential for uncertainty arises out of the Judgments (Reciprocal Enforcement) (Isle of Man) Act 1968. Under this legislation, the Council of Ministers has the power, by Order, to recognise the judgments of certain courts, subject to certain conditions being met.

The following Orders are currently in place:

- SD 930/11 Judgments (Reciprocal Enforcement) (United Kingdom and Channel Islands) Order 2011;
- GC 76/82 Reciprocal Enforcement of Foreign Judgments (Suriname) Order 1982;
- GC 51/77 Reciprocal Enforcement of Foreign Judgments (Israel) Order 1977;
- GC 75/82 Reciprocal Enforcement of Foreign Judgments (The Netherlands) (Amendment) Order 1991;
- GC 50/77 Reciprocal Enforcement of Foreign Judgments (The Netherlands) Order 1977; and
- GC 49/77 Reciprocal Enforcement of Foreign Judgments (Italy) Order 1977.

Under these Orders, there is an expectation that the judgments of the Courts of the following jurisdictions will be recognised by the High Court:

- i. the United Kingdom (which includes England, Wales, Scotland and Northern Ireland);
- ii. Guernsey;
- iii. Jersey;
- iv. Suriname;
- v. Israel;
- vi. Italy;
- vii. the Netherlands; and
- viii. the Netherlands Antilles

It has been suggested that extending the protection afforded by the firewall provisions is likely to engage Article 1 of the First Protocol of the European Convention on Human Rights (as set out in Schedule 1 to the Human Rights Act 2001). The defence against this position could be that extending the scope of the firewall provisions will be both in the public interest and in accordance with the law.

These are not considerations that are necessarily easy to reconcile.

3.2 Do you think that the Isle of Man should be strengthening its firewall provisions to mirror those of Guernsey?

3.3 If you support this course of action, please consider how you think this might interact with the Isle of Man's obligations under the Judgments (Reciprocal Enforcement) (Isle of Man) Act 1968, and provide comments where possible.

3.4 Do you have any comments on the possibility that the proposed changes may engage Article 1 of the First Protocol of the European Convention on Human Rights?

4. Are there any other more general points that you would like to raise about the Trusts (Amendment) Bill 2013?