3.1. Trusts (Amendment) Bill 2014 –
Second Reading approved

The Deputy Speaker: So we now move on to Item 3, Bills for Second Reading – 3.1. Trusts (Amendment) Bill 2014. I call upon Mr Henderson.

Mr Henderson: Gura mie eu, Lhiass-loayreyder.

Lhiass-loayreyder, Hon. Members, this Bill is the Trusts (Amendment) Bill 2014. The Bill seeks to address three small areas of trust law which will bring the Island into line with its near neighbours and competitors. The amendments are modest and conservative. The first of the amendments is the abolition of something known as the 'two trustee rule'. The second is the abolition of the perpetuity period, for future dispositions of property. The perpetuity period is the time limit for which any property can be held in trust.

Hon. Members, for clarity, I will give a definition of 'perpetuity period' or as it is also known, the 'rule against perpetuities'.

This concept was introduced in the common law during the 17th century. This was as a result of the industrial revolution which saw a shifting of the accepted social order. It restricts the amount of time for which property can be held and tied up in a trust. At its most basic, it prevents too much money from being tied up for too long in too few hands.

Another concept that would benefit from definition at this point is that of the 'disposition of property'. This is fundamental to the concept of the trust. It is the act of disposing of property by transferring it to the care or possession of another. It can also be described as the parting with, alienation of, or giving up of property.

The third area that is being revised is the matters determined by the Island's trust legislation as the law governing Manx trusts. Hon. Members, it may be appropriate to explain what is meant by the phrase the 'law governing Manx trusts'. In short, this is accepted trust language for the Isle of Man law that governs trusts. When a trust is created in a country under the law of that country, the law of that country is said to be the governing law of that trust.

Lhiass-loayreyder, the 'two trustee rule' requires two trustees to be in place in order to give valid receipt for capital moneys on the sale of settled land. In essence this means that there must be two trustees acting when land owned by the trust is sold.

There are problems with this requirement. The first problem is that the trustees must act in the best interests of the beneficiaries. A quick sale of land might be optimal for the beneficiaries. However, this might not be possible. It is probably easiest to understand why this needs to be changed by means of an example.

Consider the following circumstances: Trust A is required by the terms of the trust deed or instrument to have two trustees in place. Trust A now only has one trustee in place due to the death of the second trustee. The remaining trustee is actively seeking a second or replacement trustee but it is taking time to find a suitable replacement.

Trust A has some land which is for sale. An excellent offer is made for the land, but this is conditional on the transaction taking place very quickly. All trustees have a duty to act in the best interests of the beneficiaries of the trust. The remaining trustee would be unable to act on his own. The sale might be lost before a replacement trustee could be found.

Clearly this would not be in the interests of the beneficiaries. However, while the two trustee rule remains in place, this situation could be a reality.

What makes the current position even harder to justify are the next two points:

Point one is that if a trust deed or instrument does expressly allow a trustee to act alone, this is permitted under the current law. The second point is that the law currently makes provision for a trust corporation to act alone in these circumstances.

Lhiass-loayreyder, Hon. Members should note that this is a trust corporation and not a trust services provider here. I will now explain the similarities and differences between these two

concepts. Hon. Members will see that there are far more similarities than differences, despite which they are afforded very different treatment.

The business of providing of trust services in the Island is a licensed activity. The FSC's policy is that both trust service providers and trust corporations must be companies. Trust corporations and trust service providers must both hold a class 5 licence.

The business conducted by trust service providers and trust corporations is substantially similar and is, for the most part, subject to the same levels of oversight by the FSC. The FSC's own licensing policy confirms that class 5 licences do not automatically permit a licenceholder to act as a trust corporation.

Basically, a trust corporation is able to undertake all the activities of a trust company plus functions reserved to a trust corporation. These functions include: competence to undertake matters of probate; ability to act alone to give valid receipt for money arising under a trust; being named as attorney in an enduring power of attorney.

Trust corporations pre-date the creation of the Island's regulated trust services industry. In recognition of the important nature of the work they undertook, they were required to be well capitalised. In the UK, the required level of issued share capital was £500,000. The Isle of Man required £100,000 of issued share capital.

The UK continues to require this amount. The UK does not regulate its trust services industry. With the advent of licensing in the Isle of Man, the capital requirements reduced to £25,000. The legislation also provided an alternative to the original safeguard of a large issued share capital. This is the requirement for all providers of trust services to carry professional indemnity insurance.

Lhiass-loayreyder, over time, the distinctions between trust corporations and trust service providers have been eroded. Despite all of this, trust service providers are still not able to act alone to give valid receipt for settled land unless the trust instrument allows this. Trust corporations by way of contrast can.

This Bill seeks to further reduce the differences between trust corporations and trust service providers. I am sure that the Hon. Members will agree that the abolition of the two trustee rule is a small amendment that has the potential to make a big impact on the regulated trust services sector.

As mentioned earlier, the concept of the perpetuity period was introduced into the common law during the 17th century. It was designed to restrict the amount of time for which property could be held and tied up in a trust. The perpetuity period in the Isle of Man is currently ordinarily 150 years. This is the maximum amount of time for which assets can be held in trust. Within this time, the trust must end and the trust property must be distributed to the people entitled to benefit under the terms of the trust deed or instrument. This is what is known as the trust 'vesting'.

Hon. Members, when a trust is created, there are several players. It may be helpful to give a quick guide to some of these people.

First is the settlor. This is, for example, a person who has made a pot of money that he wants to leave to his descendants – and I am using 'he' here, by way of ease of definition, Lhiass-loayreyder. He has, however, made so much money that he wants to ensure that several generations into the future, the money will still be funding his remote descendants.

Mr Settlor's solution is to create a trust that is going to be for the benefit of his descendants through the ages. Being a man of modest aspirations, he intends that this will last several hundred years or until the money runs out. Those whom he has identified as being able to benefit are known as his beneficiaries.

With this aspiration in mind, Mr Settlor looks around to see where his dynastic trust can be created. The UK would be ruled out, as would the Isle of Man as both still have perpetuity periods in place. By way of contrast, Ireland, Jersey and Guernsey do not. So, Mr Settlor is likely to take his business to one of these three jurisdictions and not the Isle of Man. I am sure that Hon. Members will agree that this is, from a Manx perspective, highly undesirable.

Now, if the perpetuity period were to be abolished in the Isle of Man, as proposed by this Bill, is it likely that the Isle of Man would assist with tying up too much money, for too long, in too few hands?

Mr Settlor's first generation of beneficiaries are likely to respect his wishes and be grateful to benefit from the trust. The second generation may also respect his wishes. However, the harsh reality is that by the third generation at the latest, the beneficiaries will probably want to see that the trust vests. This will be with a view to all property being distributed.

It is because it is unlikely that the trust will last in perpetuity, or even until the current 150-year perpetuity period, that this is probably more about perception than reality. Nonetheless, the perception exists and the Island is losing business on the back of it. This is a good reason for seeking to abolish the perpetuity period – it is a business-friendly initiative.

Lhiass-loayreyder, I am coming to the end of the Second Reading, Members will be pleased to know. (**Mr Watterson:** Hear, hear.)

The Island has retained the concept of settled land. This is quite literally land that has been put into a trust. There is no reliable means of ascertaining how much property in the Island is held as settled land. No attempt has been made to quantify this. For this reason, the Bill restricts the provision to future dispositions. This will ensure that the Island remains competitive but without the risk of invoking our old friend, the law of unintended consequences.

The third amendment considers the scope of what is determined by the governing law, under the Trusts Act 1995.

The Trusts Act 1995 contains what are known as 'firewall provisions'. These are designed to shield trusts from the impact of foreign laws and judgments. As it currently stands the legislation affords protection only to the settlor of a trust. The Bill proposes to extend these protections to other parties to the trust, such as the beneficiaries and trustees, as well as the protector if there is one. The protector should 'do what it says on the tin' – he really is there to protect the interests of the beneficiaries and make sure that the trustees act properly.

The second change to the Trusts Act 1995 would see a change to the application of foreign court orders to trusts governed by Manx law.

Lhiass-loayreyder, Hon. Members may be aware that trusts are not universally popular, particularly in countries where there are forced heirship rules in place. Under the rules of forced heirship there is a list, defined in law, of who should inherit what property and in what proportions. This is in direct contrast to common law countries which permit testamentary freedom. The IOM is a common law jurisdiction. Essentially, if you own the property or money, you are free to give it to whomever you wish – this being common law.

The two distinct approaches to matters of inheritance obviously create the potential for tension and conflict. This can result in disgruntled relatives of the testator mounting a legal challenge. This is often referred to as 'attacking a trust'. While the attack is more likely to be from a country that has forced heirship provisions, it is not unheard of for attacks to be mounted from common law countries.

This introduces the concept that there may be a moral obligation to provide for the well-being of some person. The Isle of Man's courts are well regarded. They have a reputation for acting fairly and conservatively. It is assumed that they will continue to do so. This may mean that they make an order that requires the terms of a trust to be over-ridden, to ensure that adequate provision is made for the well-being of some person. Indeed, it is right that they *should* have the power to direct that this should happen.

The critical point here is that it is the Island's judiciary who are empowered to determine what is just and equitable under trusts that are subject to the governing law of the Isle of Man. The courts of foreign jurisdictions should not be able to dictate what happens in the Island. The Bill seeks to make it absolutely clear that the power lies within the Island.

This brings me to the final point, Lhiass-loayreyder. Hon. Members should note that the Island does have the Judgements (Reciprocal Enforcement) Act 1968 in place. Under this Act, there is an

expectation that, subject to certain conditions being met, the judgments of the courts of certain other countries will be recognised by our Isle of Man High Court. They would be the United Kingdom, Guernsey, Jersey, Suriname, Israel, Italy, Netherlands and the Netherlands Antilles. It is possible that the new provision may potentially be seen as creating a conflict within the Island's legislation.

The Bill has been drafted in the full knowledge of this. It is suggested that in most instances the High Court will agree to the foreign judgment being recognised in the Island. However, in respect of this one small area, the courts will be given the power to determine whether or not a foreign judgment is reasonable and should be recognised. Provided that the courts continue to act in a responsible and conservative manner, there should be no reason to suspect that there will be in reality any conflict in this area.

Vainstyr Loayreyder, I remind the Hon. Members that in an increasingly competitive market, it is critical that our industry is given the tools to allow it to compete. This Bill, with its modest aspirations, will ensure that the Island competes on a level playing field.

Lhiass-loayreyder, I beg to move the Second Reading.

The Deputy Speaker: Hon. Member for Ayre.

Mr Watterson: That made hard work of that Bill!

Mr Teare: Thank you, Mr Deputy Speaker. I beg to second and reserve my remarks, sir.

The Deputy Speaker: No-one indicated they wished to speak.

Hon. Members, the motion therefore is as on the Order Paper at Item 3.1. All those in favour, say aye; those against, no. The ayes have it. The ayes have it.

Hon. Members, that concludes the business of the House for today. The House will now stand adjourned until next –

Mr Quirk: Sorry, Mr Deputy Speaker, if I could just ask, I did not hear at the beginning there – I thought… Was Mr Robertshaw withdrawing his Bill?

A Member: Yes.

Mr Robertshaw: No.

The Deputy Speaker: He did not wish to move it today.

Mr Quirk: I thought he was withdrawing it.

Several Members: No. *(Laughter)*

Mr Watterson: Nice try, David!

The Deputy Speaker: To make that clear, I repeat again, that concludes the business of the House today. The House now stands adjourned until the next sitting, which will take place at 10.30 a.m. on 8th April in Tynwald.

The House adjourned at 10.54 a.m.