

### 3. Trusts (Amendment) Bill 2014 – First Reading approved

Mr Braidwood to move:

*That the Trusts (Amendment) Bill 2014 be read a first time.*

**The President:** Item 3 the Trusts (Amendment) Bill 2014 for First Reading.  
I call on the Hon. Member, Mr Braidwood.

**Mr Braidwood:** Thank you, Madam President.

I think this Bill will be a little bit longer in its First Reading.

Madam President, 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, although the presentation of this reading is a little longer than usual.

The first amendment is the abolition of the 'two trustee rule'. The second is the abolition of the perpetuity period for future dispositions of property. The 'rule against perpetuities', or 'perpetuity period', was introduced during the 17th century. This was a result of the Industrial Revolution which saw a shifting of the accepted social order. The rule 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 that of the matters determined by the Island's trust legislation as the 'law governing Manx trusts'. Madam President, 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.

Madam President, the two trustee rule ordinarily 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 there must usually be two trustees acting when land owned by the trust is sold.

Madam President, there are problems with this requirement. The first 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.

If we consider the following example: 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 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 best interests of the beneficiaries. However, while the two trustee rule stands, this situation could be a reality.

What makes the current position even harder to justify are the next two points: the first is that where a trust deed or instrument expressly allows a trustee to act alone, this is currently permitted under the law; the second is that the law currently makes provision for a trust corporation to act alone in these circumstances.

Madam President, Hon. Members should note that I said 'trust corporation', and not 'trust service provider'. Hon. Members may be well aware that there are many similarities between trust corporations and trust service providers. The business of providing trust services of any description in the Island is a licensable activity. This licence is granted by the Financial Supervision Commission under the Financial Services Act 2008. 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 Class 5 licences.

The business conducted by trust service providers and trust corporations is substantially similar. Trust service providers and trust corporations are, for the most part, subject to the same levels of oversight by the Financial Supervision Commission. However the FSC's own licensing policy confirms that:

'Class 5 licences do not automatically permit a licenceholder to act as a Trust Corporation'

and this is under the Class 5 subsection (4) of that licensing policy.

Basically, a trust corporation is able to undertake all the activities of a trust company plus functions reserved to the trust corporation. These functions include, but are not limited to: competence to undertake matters of probate; ability to act alone to give valid receipt for money arising under a trust; and being named as attorney in an enduring power of attorney.

Trust corporations pre-date the creation of the Island's regulated trust service industry. In recognition of the important nature of the work that they undertook, they were required to have substantial levels of issued share capital. In the United Kingdom this was £500,000; while the Isle of Man required £100,000 of issued share capital. The United Kingdom continues to require this amount.

At this point, Madam President, I would like to point out that the United Kingdom 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.

Madam President, 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 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.

Madam President, as mentioned earlier, the concept of the perpetuity period was introduced into the common law during the 17th century. 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 beneficiaries. This is what is known as a 'trust vesting'.

When a trust is created there are several players. It may be helpful, Madam President, and for Hon. Members, to provide a quick guide to who these people are.

First is the 'settlor': he is the man who has the money. He also has the idea that he wishes to secure the future of his descendants through the ages. Mr Settlor's solution is to create a trust. 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 eligible to benefit are known as his 'beneficiaries'.

Mr Settlor looks round to see where his dynastic trust can be created. The United Kingdom would be ruled out, as, Madam President, would the Isle of Man. 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 Hon. Members will agree with me that this is, from a Manx perspective, highly undesirable.

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

The reality is that the first generation of beneficiaries is 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 expiry of 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.

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, Madam President, has been made to quantify this. For this reason, the Bill restricts this provision to future dispositions only. This will ensure that the Island remains competitive but without the risk of invoking the old chestnut: the law of unintended consequences.

Madam President, the third amendment considers the scope of the matters 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 second change to the Trusts Act 1995 would see a change to the application of foreign court orders to trusts governed by Manx law. Hon. Members may be aware that trusts are not universally popular; they are particularly unpopular in countries where there are forced heirship rules in place.

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 raises the possibility that there may be a moral obligation to provide for the well-being of some person.

The Isle of Man 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 the trust to be overridden, to ensure that adequate provision is made for the well-being of some particular person. Indeed, it is right that they should have the power to direct that this should happen.

Madam President, the critical point here is that it is the Island's own judiciary that is empowered to determine what is just and equitable in respect of trusts subject to Manx governing law. 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.

Madam President, may I remind 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.

I apologise for the length of the First Reading, Madam President, but I felt it was most important to put all the facts to Hon. Members and, Madam President, I beg to move the First Reading of the Trusts (Amendment) Bill 2014.

**The President:** The Hon. Member, Mr Downie.

**Mr Downie:** Thank you, Madam President. I beg to second, and reserve my remarks.

**The President:** The Hon. Member, Mr Coleman.

**Mr Coleman:** Thank you, Madam President.

A point of clarification, if I may: am I to assume that these changes would not override specific requirements in the original trust instrument?

Secondly, with reference to the foreign courts possibly trying to attack trusts: this does prevent people from Sharia law countries, where the beneficiary would not be allowed to be a female. It would mean that the right of equality could be maintained by the courts of the Isle of Man – which I, actually, am very much in favour of.

So I am very happy to support this, with the clarification with reference to the instrument, in other words the specific request of the settlor, which is – and if there is a protector, the protector would be enforcing the specific requests of the settlor – cannot be overridden by what is happening here.

**The President:** The Hon. Member, Mr Turner.

**Mr Turner:** Yes, thank you, Madam President.

I think the mover has nothing to apologise for. I think we have heard a few times that sometimes the shorter the Bill, the greater the impact. So I think it was most interesting to hear his First Reading and to give us a background and a flavour, because we get quite a lot of legislation that comes through this place and, of course, most of it is in areas that none of us are experts in. So it is important that we get the background to the Bills.

I think what is quite warming to see is that we are moving to a time where we are looking at our regulation, and one of the points I have made time and time again is we have to watch we do not regulate ourselves out of existence, because the rest of the world moves on. Clearly, by the remarks of the mover, this has obviously come through, I would assume, quite a lot of liaison with industry, (**Mr Braidwood:** Yes.) and it is something that they have been pointing out that if we do not look at these provisions then quite clearly the business will go elsewhere, which is what was said in the mover's speech.

Any legislation that results in a better environment for businesses to adapt means that they will remain here on the Island rather than seeking to relocate elsewhere.

So, from the First Reading, I support this Bill.

**The President:** The mover to reply.

**Mr Braidwood:** Thank you, Madam President.

Madam President, the existing trusts remain subject to their current terms.

Mr Coleman mentioned about a protector, if there is one, and this is a person who is appointed to ensure that the trust is administered by the trustees to the best interests of the beneficiaries. The protector is normally a family friend or can be a professional adviser, Madam President.

And yes, in regard to Sharia law, that will indeed be overwritten by the Manx courts.

So I do thank Mr Coleman.

There are, of course, purpose trusts which the perpetuity period is for a time of 80 years and that, in actual fact, remains.

With regard to the question from Mr Turner, I thank him for his support. Yes, there was indeed a consultation period which ran from 29th July to 9th September last year, and we did receive eight responses which were very positive to the change in this trusts law.

Therefore, Madam President, I beg to move.

**The President:** The motion is that the Bill be read for a first time. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Hon. Members, that concludes consideration of our Order Paper this morning. Council will now adjourn to Tynwald Court on 20th May, and thereafter to this Chamber on 27th May.

**The Clerk:** Madam President, sorry to interrupt.

**The President:** Not the 27th?

**The Clerk:** I do not think it is the 27th.

**The President:** It may be Practice Week, and I have miscalculated.

**The Lord Bishop:** Yes, it is.

**Mr Braidwood:** There is no meeting. I have no meeting in my diary at all, Madam President.

**The Clerk:** It is 10th June.

**The President:** Right, we have got a reprieve: 10th June. *(Laughter)*  
Thank you, Hon. Members.