

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

Mr Braidwood to move:

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

The President: We turn now to Item 2 on our Order Paper, the Trusts (Amendment) Bill 2014, the Second Reading and clauses stage.

I call on the Hon. Member, Mr Braidwood.

Mr Braidwood: Thank you, Madam President.

Madam President, Hon. Members will remember from the First Reading that the purpose of this Bill is to address three small areas of trust law.

Trusts originated in the Middle Ages, dating to the time of the Crusades. Relatively recently, in this context at least, some matters have been addressed by legislation. This Bill seeks to make amendments to three small areas of the Island's trust law. These three small areas will have a big impact as they will bring the Island's legislation in line to that of its near neighbours and competitors. The Bill will ensure that the Isle of Man remains competitive.

It should be noted that great care has been taken to ensure that this is not at the expense of good practice or the Island's reputation.

The three areas that are considered by this Bill are: the abolition of the 'two trustee rule'; the abolition of the perpetuity period in respect of future dispositions of trusts; and the matters determined by governing law where a trust is settled subject to the law of the Isle of Man.

Madam President, to refresh the memories of Hon. Members I will provide a brief explanation as to what each of these is intended to achieve.

The first amendment is to the two trustee rule, which requires that there must be either two individual trustees or a trust corporation – *not* a trust service provider – in place to give valid receipt for capital money. The current law already makes provisions for one individual trustee to act where the trust instrument permits this; therefore, there appears to be no reason not to change this in all cases.

The current law sits across several Acts. In order to abolish the two trustee rule, the two Acts need to be amended – these are the Settled Land Act 1891 and the Trustee Act 1961.

The second area to be amended considers the abolition of the perpetuity period in respect of future dispositions of trusts. The courts developed what is known as 'the rule against perpetuities' during the 17th century. This common law rule restricts a person's power to control the ownership and possession of his or her property in perpetuity.

When trusts are created, it is likely that the settlor wishes the trust to last indefinitely. The reality is that the trust will survive into a second and possibly third generation, but often not past then. Beneficiaries have their own reasons for ensuring a trust vests.

Madam President, the Bill contains seven clauses, and I wish to move the Second Reading of the Trusts (Amendment) Bill 2014.

The President: The Hon. Member, Mr Downie.

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

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

Trusts (Amendment) Bill 2014 – Clauses considered

The President: We turn to clauses. Perhaps we could take clauses 1 and 2 together?

Mr Braidwood: Certainly, Madam President.

Madam President, clause 1 provides the short title of the Bill.

Clause 2 provides for the Bill to come into operation on one or more days appointed by the Treasury. Provision is made to allow the Treasury to make saving and transitional provisions by order.

Madam President, I beg to move that clauses 1 and 2 stand part of the Bill.

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

The President: The motion is that clauses 1 and 2 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 3.

Mr Braidwood: Thank you, Madam President.

Clause 3 amends the Settled Land Act 1891. In this clause, new sections 34 and 34A replace existing section 34 of the Settled Land Act 1891.

New section 34 expressly considers that any reference to the trustees of a settlement will include the remaining trustee or trustees. The effect of this is that any references to trustees in the plural can be read as applying equally to a sole trustee.

New section 34A considers the subject of the payment of capital money to trustees. The law currently requires that there are two trustees in place to give valid receipt for capital moneys on the sale of settled land. The exception to this rule is where the trustee is a trust corporation, or the trust instrument expressly authorises a sole trustee to act. The effect of this new section will be to widen the scope of application of the definition of trustees of the settlement to include sole trustees.

Madam President, I remind Hon. Members that the provision of services of trustee by way of business is an activity that is licensable by the Financial Supervision Commission. Individuals who are licensed by the Financial Supervision Commission to act as trustees may, in most instances, and despite being licensed, not act as sole trustees.

The effect of this clause will be to address an existing anomaly. This anomaly sees trust corporations and trust service providers, both being holders of class 5 licences, not being afforded equal treatment under the law.

Clause 3(3) repeals section 40(2) of the Settled Land Act 1891. The effect of this is to remove a further reference to a requirement that there are either two trustees in place or a trust corporation, unless, Madam President, the trust instrument expressly provides for a sole trustee.

Madam President, I beg to move that clause 3 stands part of the Bill.

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

The President: The Hon. Member, Mr Butt.

Mr Butt: Thank you, Madam President.

Can I just ask for a clarification from the mover? Presumably in the past when there was more than one trustee, the idea was that the trustees could keep an eye on each other and actually hold each other to account. Now we have sole trustee.

Is the only way they can be held to account now through the licensing system through the Financial Supervision Commission?

Is that the change that is being made?

The President: The mover to reply.

Mr Braidwood: Thank you, Madam President.

The change basically is to bring us in line, as I have already said, with our competitors because if there had been two trustees in the trust instrument and one trustee had died, we then had to appoint another trustee. However, what we have to do even if they are licensed by the Financial Supervision Commission, now a trust corporation can act as individually, but a person who is licensed by the Financial Supervision Commission *cannot* unless it is specifically expressed in the trust instrument. So therefore, yes, they would be governed by the Financial Supervision Commission.

Mr Butt: Thank you.

Mr Braidwood: And I am getting some more clarification here, Madam President. *(Laughter)*

The President: Maybe this is it.

Mr Braidwood: Yes, sorry.

A sole trustee at the moment unlicensed can already act; but a sole trustee who is licensed by the Financial Supervision Commission cannot.

Mr Butt: Yes, that is right. Thank you.

Mr Braidwood: I hope that clarifies what I have already said as well?

Mr Butt: It does, yes. The question is: where is the supervision going to fall?
Thank you.

The President: Mr Acting Attorney General, do you want to add to that?

The Acting Attorney General: Madam President, just a very brief note for the guidance of Members, that it is not just the Financial Supervision Commission who will control the trustees under a licence, there is the control of the court. So any beneficiary, or anybody interested in the trust, could take an issue to the courts for directions and, in essence, to control a trustee who perhaps is not complying with what he ought to be doing.

So there is the ultimate control of the courts as well.

The President: Thank you.

Mr Braidwood: If I could just come in there and say to the learned Acting Attorney General: if the courts, with the trustee – and I am just trying to get this in my own mind now – would it be the beneficiaries who would have to go to the court, then, and say that the trustee is not acting in their benefit?

The Acting Attorney General: Madam President, certainly beneficiaries can do that, they can take a trustee to the court if they are not acting in accordance with the terms of the trust. It may not necessarily be a question of acting in their *interest*, but certainly the terms of the trust deed itself.

The President: Sorry, Hon. Member, the Member has replied so if you want to speak about a clause do it early before we come to the reply.

Mr Coleman: It was just the Attorney General's comments, Madam President.

I would imagine that protectors also have the ability to take things to courts as well?

The Acting Attorney General: That is correct, Madam President.

The President: Thank you.

I think we are now ready to look at the clause. The motion is that clause 3 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 4.

Mr Braidwood: Thank you, Madam President.

Clause 4 amends the Trustee Act 1961.

Clause 4(2) repeals existing section 12(2) of the Trustee Act 1961. This removes an additional reference to a sole trustee other than a trust corporation being unable to give valid receipt for capital money under the Settled Land Act. Members will remember that the previous clause dealt with two trustees under the Settled Land Act.

Clause 4(3) amends section 36 of the Trustee Act 1961. A new subsection (1)(c) makes express provision for a sole trustee to act. It also removes the requirement to replace trustees that are no longer in office for any reason. That is, as I have explained before, the requirement to fill up the original number of trustees. Finally, it expressly permits a sole trustee to act alone in circumstances which would previously not have been permitted.

New subsection (2) proposes that new subsection (1) will not apply if the terms of the trust instrument require two trustees to be in place. This means that there is still the option for the trust instrument to stipulate that there must be two trustees in place, essentially there is a choice to maintain the status quo if desired.

Clause 4(4) amends subsection (1) of section 38. The references to two trustees or a trust corporation are removed. The amendments reflect the changes to consider that there may indeed be a sole trustee in place.

Madam President, I beg to move that clause 4 stands part of the Bill.

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

The President: The Hon Member, Mr Crowe.

Mr Crowe: So whilst this allows existing trusts who have two trustees and one dies, or ceases to operate, they can continue with the one trustee, but it does not prevent a new trust deed being prepared to allow two trustees to act for the trust?

A new trust would allow two trustees to act; it is not compulsory to have just one trustee, is it?

Mr Braidwood: No.

Mr Crowe: And in the death of a sole trustee do the executors of his estate become an automatic trustee of the settlement?

The President: I think we need the advice of the learned Acting Attorney here. *(Laughter)*

Mr Braidwood: I will let the learned Acting Attorney go first, Madam President.

The Acting Attorney General: Madam President, the position is simply, as you have quite rightly concluded, that there is no requirement to actually have *one* trustee, so you can have more than one. So that is the first point.

The second point is not quite easy to answer, because it all depends what the trust deed says. Quite often any properly drafted trust deed will make provision for there being a vacancy in the trust deed, and it will then usually provide a mechanism for someone to appoint a trustee to fill that vacancy. So it is not the estate of the deceased trustee that necessarily has that power, it is usually in the trust deed itself.

Mr Crowe: Thank you.

The President: Any other Member wish to speak before a reply?
The Hon. Member.

Mr Braidwood: Thank you, Madam President.

Again, if the trust instrument specifically expresses that there has to be two trustees and one dies, then there has to be another trustee appointed. One of the reasons we have amended this legislation is because it could be under the Settled Land Act where they wanted to sell land and one trustee had died. The other trustee had had to go round – he might have been given a very beneficial price for the land and he was not able to sell it because there has to be two trustees in place.

It is just the same clarification: it is only in reality an issue where there is a property – real estate – in the trust, so that would be the settled land – which was the previous clause.

Mr Crowe: Right, thank you.

Mr Braidwood: I hope that gives clarification to the Hon. Member.

The President: The motion is, then, that clause 4 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Now, we come to clause 5 and Mr Downie will be moving an amendment, so I presume someone else will be seconding?

Mr Braidwood: Yes, we have arranged them, Madam President. *(Laughter)*

The President: Right, clause 5, Hon. Member.

Mr Braidwood: Thank you.

Clause 5 amends the Perpetuities and Accumulations Act 1968.

Subsection (2) of clause 5 makes consequential amendments that will be needed after the insertion of new section 1A.

New section 1A is inserted by subsection (3) of clause 5. This abolishes the rule against perpetuities for future dispositions. Madam President, may I remind Hon. Members that at the previous reading of this Bill I gave an explanation of what the perpetuity period is. You will be happy to know, Madam President, that I will recap only briefly.

The perpetuity period is the maximum amount of time for which assets can be owned by a trust. On expiry of this period, the trust ends and the trust property must be distributed. The rule was put in place to prevent property, particularly settled land, being held in trust in perpetuity. This rule is the common law rule against perpetuities.

Perpetuity periods used to be set for the period of a life in being. This is roughly 80 years. More recently, perpetuity periods have been enshrined in statute and have been lengthened. This is currently set at 150 years in the Isle of Man. The abolition of this rule does create the potential for land to be held in trust indefinitely. However, there is good evidence to suggest that trusts which are settled with the intention of funding a dynasty are usually broken up by the second or third

generations of beneficiaries. The realities of life today are different to those in the 17th century when this rule was created.

This clause makes it clear that the abolition of the rule against perpetuities does not affect the quality of provenance of property. Property that is not unencumbered, and that was previously unavailable for the settlor to settle into the trust, will remain so. No change is being made to anything other than the potential maximum time for which property can be held in trust.

Members should also note that perpetuity periods in respect of existing trusts will not be affected by this amendment. It is only new dispositions of property that can be put in trust for an indefinite period. This may well result in some property in a trust being subject to a perpetuity period and other property not.

Hon. Members may have noted that I said 'can' and not 'must' be put in trust for an indefinite period. This is because subsection (7) of new section 1A considers that a trust may still be settled subject to a defined perpetuity period if desired. It is also worth noting that the perpetuity period applying to trusts settled under the Purpose Trusts Act 1996 is unaltered by this amendment. A perpetuity period of 80 years applies in respect of purpose trusts and will remain in place in respect of existing and future dispositions of property.

Madam President, I beg to move that clause 5 stands part of the Bill.

The President: The Hon. Member, Mr Corkish.

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

The President: Mr Downie.

Mr Downie: Yes, thank you, Madam President, Hon. Members.

This Bill was the subject of much consultation and scrutiny before it was introduced into the branches. As is often the case, representation was made after the official consultation period had ended. In this case it was at the eleventh hour.

The Bill seeks to amend a highly complex and technical area of the law. It is critical that there is complete certainty of the intention of the effect of the amendments. It has become apparent that the Bill would benefit from three small further amendments. This should achieve the outcome of certainty which is so fundamental to this area of the law. I will provide a brief explanation of what the amendments that we are proposing to clause 5 will achieve.

Paragraphs 1 and 3 must be moved together or not at all. They relate to the perpetuity period which is being abolished under the Bill. They deal with one small area that remained in respect of easements and options over land which in certain circumstances remain subject to a period of 21 years, unless registered as a deed. The reasons for the 21-year period have been lost in time. The rule of 21 years now appears to be entirely arbitrary, as it was intended that the Bill would abolish the perpetuity period for all future Manx trusts in all circumstances.

The amendment to clause 5 appears to be necessary.

The second amendment to clause 5 is set out in paragraph 2. This clarifies the definition of 'disposition' by making sure that it is absolutely clear that there was no intention to alter the meaning of the existing definition. The Bill sought only to provide additional certainty to what is within the scope of the definition, since it appears that this might be interpreted one of two ways paragraph 2 seeks to bring certainty.

Madam President, I beg to move the amendments standing in my name.

Amendments to clause 5

1. Page 7, line 8, for "section 10(2)" substitute "section 10(2) and (3)".

2. Page 7, line 32, for "In subsection (1) "disposition" includes —" substitute "Without limiting the application of section 13(2), in subsection (1) "disposition" further includes —"

3. Page 8, line 5 —

(a) re-number paragraph (4) as paragraph (5); and

(b) immediately before paragraph (5) insert —

“(4) In section 10 (options relating to land) —

(a) at the beginning of subsection (2), for “In” substitute “Subject to subsection (3), in”; and

(b) after subsection (2) insert —

“(3) In relation to a disposition referred to in subsection (2) which is made after section 1A comes into operation —

(a) subsection (2) does not apply; and

(b) the rule against perpetuities is abolished”.

Mr Coleman: I beg to second, Madam President, and reserve my remarks.

The President: If no Hon. Member wishes... Lord Bishop?

The Lord Bishop: Thank you, Madam President.

I had always understood that in cases of trust law 21 years was there to cover a trust held in the interests of a minor, when the age of majority was 21.

The President: Is there a question or just a statement?

The Lord Bishop: That was just a statement, *(Laughter)* merely opening my mouth for the benefit of the wider world really... *(Laughter)*

The President: Perhaps it is 18 now. Perhaps the learned Acting Attorney can tell us? Or 16 even... 18, presumably?

The Acting Attorney General: It is 18, Madam President.

Mr Braidwood: 16 to vote.

Mr Crowe: Can I just ask Madam President, this ‘options relating to land’. Will that mean that options relating to land will continue as at present, there will be rights for the person either selling the option or buying the option will remain as is?

As I am saying, if you buy an option to buy land or sell an option to sell land we are not changing the law in any way, this amendment leaves the status quo?

The Acting Attorney General: Yes, I can confirm that is the position, Madam President.

Mr Downie: The status quo.

Mr Crowe: Thank you.

The President: The mover to reply.

Mr Braidwood: Is there anything to reply on, Madam President? I do not think so... apart from the Lord Bishop.

The President: The motion is that clause 5 do stand part of the Bill. To that we have an amendment in the name of the Hon. Member, Mr Downie. I will put to you the amendment first.

Those in favour of the amendment, please say aye; against, no. The ayes have it. The ayes have it.

I will now put to you the clause as amended. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Clause 6.

Mr Braidwood: Thank you, Madam President.

Madam President, the Trusts Act 1995 contains what are known as the firewall provisions. These provisions shield trusts that are settled under Isle of Man trust law from attack or the impact of foreign laws and judgments. The changes proposed are relatively modest and have been undertaken to ensure that the Island's law contains provisions equivalent to those in competitive jurisdictions. In keeping with our inherently conservative approach to matters that engage with the laws of other jurisdictions, it is not proposed that the law goes as far as it does in some jurisdictions.

Clause 6(2) amends section 5 of the 1995 Act. It does this by making a logical extension to the protections under Manx law. Section 5 provides that a validly constituted trust must be recognised, even if the law of another jurisdiction does not recognise trusts.

Section 5 currently only expressly protects the settlor from attack on grounds that a settled trust is not recognised by the law of his jurisdiction. This overlooks the other parties to trusts. These are the trustees, beneficiaries and protectors of trusts. The amendment in new subsection (1) of section 5 extends the protections to these parties.

New subsection (2) of section 5 deals with the perceived problem of the automatic application of foreign court orders to trusts that are governed by Manx law. The amendment expressly requires that, in order for a foreign court judgment to be recognised in the Isle of Man, application must be made to the High Court of the Isle of Man. This does not enable parties to shirk their responsibilities by hiding behind the trust. It does, however, mean that parties to a validly constituted trust will have the certainty that the trust is recognised and protected by Manx law.

Hon. Members will be aware that the issue of the Judgments (Reciprocal Enforcement) (Isle of Man) Act of 1968 was raised at consultation. This Act requires the High Court to recognise the judgments of certain courts, subject to certain conditions being met. It is not anticipated that the amendment will engage the Act. It should also be noted that the Island's courts are well regarded: they have a reputation for acting fairly and conservatively. There is no reason to suspect that the courts will not continue to act as they have always done.

Madam President, I beg to move that clause 6 stands part of the Bill.

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

The President: The motion is that clause 6 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Finally, clause 7.

Mr Braidwood: Thank you, Madam President.

Clause 7 makes provision for the automatic expiry of the resultant Act on either the day following its day of promulgation or the day after the last of the amendments have taken effect. This will not affect any amendments that have been made by the Bill. This is simply a matter of housekeeping.

Madam President, Hon. Members, this Bill will ensure that the Island's trust practitioners are given the tools that they require to permit them to compete on a level playing field.

Madam President, I beg to move that clause 7 stands part of the Bill.

Mr Downie: I beg to second, Madam President, and reserve my remarks

The President: The motion is that clause 7 do stand part of the Bill. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Hon. Members, that concludes our business for this morning. Council will now adjourn to Tynwald on 17th June and thereafter to this Chamber on 24th June.

Can I say, it is very nice to have visitors from America with us in the gallery this morning.

Two Members: Hear, hear.