

VIRGIN ISLANDS

VIRGIN ISLANDS SPECIAL TRUSTS ACT, 2003

ARRANGEMENT OF SECTIONS

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I Assent

THOMAS MACAN,
Governor.
17th October, 2003

VIRGIN ISLANDS

No. 10 of 2003

An Act to make special provision for trusts of shares in companies and for related matters, including provision for the retention by trustees of shares in a company irrespective of the financial advantages of disposal, for prohibiting trustees from intervening in the management of the company except in certain circumstances, and for the appointment and removal of directors of the company in accordance with the terms of the trust instrument.

[Gazetted 6th November, 2003]

ENACTED by the Legislature of the Virgin Islands as follows:

1. This Act may be cited as the Virgin Islands Special Trusts Act, 2003 and shall come into force on such date as the Governor may, by Proclamation published in the *Gazette*, appoint. Short title and commencement.

2. (1) In this Act, unless the context otherwise requires Interpretation.

"business" in relation to a company includes the holding of shares or other assets and non-commercial activities;

"business risk" in relation to a company includes

- (a) any risk attached to any business of the company, or any connected company, when conducted in the manner in which it has in fact been conducted; or
- (b) any risk which can be expected to be attached to any projected business of the company;

"court" means the High Court;

"designated shares" means Virgin Islands shares comprised in a trust fund and in respect of which a valid direction under section 4(1) has been made;

"designated trustee" means a holder of a trust licence under the Banks and Trust Companies Act, 1990; No. 9 of 1990

"interested person " in relation to a trust means

- (a) a beneficiary of the trust;
- (b) an object of a discretionary power over any of the capital or income of the trust;
- (c) a parent or legal guardian of any minor person falling within paragraphs (a) or (b);
- (d) where any of the purposes of the trust are exclusively charitable, the Attorney General;
- (e) an enforcer referred to in section 84A of the Trustee Ordinance; Cap. 303
- (f) a protector; or
- (g) an appointed enquirer.

"intervention call" means a call by an interested person under section 8(1) for a trustee to intervene in the affairs of a company;

"legal guardian " in relation to a minor person means a person legally recognised as his guardian in any jurisdiction with which the minor has a substantial connection;

"office of director rules" means rules referred to in section 7(1) and any amendments thereto for the time being in force;

"trust fund " in relation to a trust means property for the time being subject to the trust;

"Virgin Islands shares" means shares in a company incorporated under the Companies Act or the International Business Companies Ordinance which is not
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- (a) a company which has a licence under the Banks and Trust Companies Act, 1990;
- No. 15 of 1994 (b) a company which is licensed as an insurer under the Insurance Act, 1994 or which is authorised to act as an insurance manager under that Act;
- No. 6 of 1996 (c) a company which is registered as a public fund, or recognised as a private fund, under the Mutual Funds Act, 1996;
- (d) a company which is licensed as a manager or administrator of mutual funds under the Mutual Funds Act, 1996; or
- No. 8 of 1990 (e) a company which has a licence under the Company Management Act, 1990.

(2) In this Act,

- (a) references to voting powers in respect of shares shall be taken to include references to powers to direct the voting of shares held by a nominee;
- (b) references in relation to a trust to a protector are to any person or committee whose consent is requisite for the exercise of any powers;
- (c) references in relation to a trust to an appointed enquirer are to any person who by, or under any power conferred by, the terms of the trust is appointed to make intervention calls;
- (d) references to the memorandum and articles of a company are to its memorandum of association and its articles of association;
- (e) a company shall be taken to be connected with another company if
 - (i) that other company holds, directly or through a nominee, shares in it;
 - (ii) it is controlled directly or indirectly by that other company; or
 - (iii) it is connected with a company which is itself connected with that other company;
- (f) a ground for complaint concerning the conduct of a company's affairs is permitted if it is specified as such in the trust instrument,

and the expression “permitted ground for complaint” shall be construed accordingly.

(3) In this Act, the following definitions shall, where the context admits, apply in relation to, or in the context of a provision referring to, designated shares:

"company" means the company that has issued the designated shares;

"disposal" includes

(a) the exercise of voting powers leading, or capable of leading, to the liquidation of the company or the cancellation of the shares or of any rights attached to them;

(b) the creation of any legal or equitable interest in the shares,

and "dispose" shall be construed accordingly;

"settlor" means the person by whom the trust was created;

"trust" means the trust on which the designated shares are held;

"trustee " means the trustee for the time being of the trust;

"trust instrument" means the instrument containing the terms of the trust.

3. The primary purpose of this Act is to enable a trust of company shares to be established under which Primary purposes of this Act.

(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.

4. (1) Where a trust fulfils the conditions specified in subsection (4), the terms of the trust may, subject to subsection (3), direct that the provisions of this Act shall apply Designated shares.

(a) to all Virgin Islands shares comprised in the trust fund; or

(b) to such Virgin Islands shares comprised in the trust fund as may be specified in the direction.

(2) For the purposes of subsection (1), Virgin Islands shares comprised in the trust fund shall be taken to include Virgin Islands shares becoming so comprised at any time after the creation of the trust, whether added to the trust fund by way of additional settlement by the original settlor or any other person, acquired on a new issue by the

company or in the course of management or administration of the trust fund, or acquired in any other manner.

(3) A direction under subsection (1) shall not be made in respect of shares added to the trust fund by a trustee of another trust in the exercise of a power in that other trust.

(4) The conditions referred to in subsection (1) are

- (a) the trust is created by or on the terms of a written testamentary or inter vivos instrument;
- (b) a designated trustee is sole trustee of the trust;
- (c) the terms of the trust require that any successor trustee (mediate or immediate) is a designated trustee acting as sole trustee;
- (d) the trust is not created in the exercise of a power conferred by another trust.

(5) A direction under subsection (1) may identify the shares to which it relates either specifically or by any general description.

(6) Subject to subsection (7), where a person (“the first person”) is a settlor in relation to a trust of designated shares and additional property is settled on the terms of the trust by another person, the first person shall be considered for the purposes of this Act as the settlor in relation to the trust of the additional property.

(7) If the trust instrument provides that subsection (6) shall not apply, then, in the case of a trust comprising property which has been provided by more than one person, this Act shall apply as if each person had created a separate trust in relation to the property which he has provided.

5. (1) Subject to section 9, designated shares shall be held by the trustee on trust to retain them.

(2) The trustee's duty to retain designated shares shall have precedence over any duty to preserve or enhance the value of the trust fund.

(3) Without prejudice to subsection (2), the trustee shall not be accountable for losses arising directly or indirectly from holding, rather than disposing of, designated shares, including, in particular, losses arising from any of the factors specified in subsection (4).

Trustee's duties
in relation to
designated
shares.

(4) The factors referred to in subsection (3) are

- (a) the absence, or inadequacy, of financial return from any designated shares;
- (b) a decrease in value of any designated shares;
- (c) speculative or imprudent activities of the company or depletion of the company's assets by disposition;
- (d) any act or omission of the directors of the company, regardless of whether it is made or carried out in good faith;
- (e) liquidation or receivership of the company;
- (f) share market fluctuation;
- (g) the loss of opportunity to make gains from reinvestment of the proceeds of designated shares;
- (h) the liabilities and expenses of the company, including directors' remuneration and expenses.

(5) Every reference in subsection (4) to the company shall include a reference to any company connected to it.

6. (1) Subject to the terms of the trust and to sections 7 and 8, the obligations specified in subsections (2) and (3) shall apply to a trustee of designated shares.

Restrictions on trustee's powers.

(2) 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, and in particular, the trustee

- (a) shall leave the conduct of every such business, and all decisions as to the payment or non-payment of dividends, to the directors of the company,
- (b) shall not require the declaration or payment of any dividend by the company or exercise any power the trustee may have of compelling any such declaration or payment.

(3) A trustee of designated shares

- (a) shall take no steps to instigate or support any action by the company against any of its directors for breach of duty to the company;

- (b) shall take no steps to procure the appointment or removal of any of the directors;
- (c) subject to section 9, shall take no steps to wind up the company; and
- (d) subject to the provisions of this Act, shall not apply to the court for any form of relief or remedy in relation to the company.

7. (1) The trust instrument may contain rules for determining the manner in which voting and other powers attributable to designated shares should be exercised by the trustee in relation to

- (a) the appointment of directors of the company,
- (b) the removal of directors,
- (c) the remuneration of directors, or
- (d) any of the matters referred to in subsection (2),

and may make provision for those rules to be amended.

(2) The office of director rules may, in particular

- (a) require the trustee to ensure that a particular person holds or retains office as director;
- (b) require any person to be appointed to the office of director at some future date or upon some future event;
- (c) require the removal of a director in specified circumstances;
- (d) prescribe, subject to the requirements of the memorandum and articles of the company and the law of the Territory, the minimum and maximum number of directors (whether one or more) to hold office at any time or times;
- (e) require the trustee, in relation to the appointment and removal of directors, to act, generally or in any specified circumstances, on the decision of a third person or committee;
- (f) provide for the conferral of fiduciary duties on a person or committee referred to in paragraph (e); or
- (g) provide for the establishment, continuance, and procedures of a committee referred to in paragraph (e).

(3) Subject to subsection (9) and to section 8, the trustee shall at all times use its voting and other powers, so far as those powers allow, to ensure

- (a) that the company has at least the minimum number of directors to meet the requirements of its memorandum and articles and the law of the Territory; and
- (b) that, except in an exempted case, the identity of the directors of the company conforms with the office of director rules, if any, for the time being applicable.

(4) No person becoming or remaining a director of the company, whether in consequence of the office of director rules or otherwise, shall, in the capacity of director, owe fiduciary or other obligations under the trust, or have any fiduciary or other obligations to the trustee, but nothing in this subsection shall affect any duty which that person owes, as director, to the company.

(5) Persons for whose appointment the office of director rules may provide include

- (a) any settlor or protector of the trust;
- (b) both ascertained and ascertainable persons.

(6) A trustee shall incur no liability for securing, sanctioning or not opposing the appointment of a director where that appointment is in conformity with the office of director rules.

(7) Where there are no office of director rules, and in an exempted case, a trustee shall incur no liability for securing, sanctioning, or not opposing, the appointment of a director of the trustee's own selection, if

- (a) the trustee concludes in good faith that the appointment in question is consistent with the wishes of the settlor; and
- (b) the selection is not motivated by a desire on the part of the trustee to reduce business risk, except to the extent, if at all, that the trustee in good faith concludes that a reduction would be consistent with the wishes of the settlor.

(8) For the purposes of this section, an exempted case is any case in which either

- (a) the office of director rules make no provision in that case; or
- (b) the rules make provision but the trustee concludes in good faith that it would be impossible, unlawful, impracticable, or plainly

inconsistent with the wishes of the settlor, to ensure compliance with the rules in that case.

(9) A trustee shall have no duty

- (a) to act pursuant to subsection (3) unless and until it receives actual notice that circumstances requiring such action have arisen; or
- (b) to enquire as to whether circumstances requiring action pursuant to subsection (3) exist.

(10) Where, on any question concerning the appointment of a director, a trustee makes application to the court under section 6 of the Trustees' Relief Act, the court, in giving its opinion, advice, or direction, shall not seek to reduce business risk, except to the extent, if at all, that the court concludes that a reduction would be consistent with the wishes of the settlor.

8. (1) Where, in relation to a trust of designated shares, an interested person has a complaint concerning the conduct of the company's affairs, and the ground for that complaint is permitted, he may, in writing, call upon the trustee to intervene in the affairs of the company to deal with the complaint.

(2) A trust instrument may specify one or more permitted grounds for complaint, but need not specify any.

(3) Upon receiving an intervention call, 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.

(4) Action taken under subsection (3) may include

- (a) making or procuring changes in the directorship of the company in accordance with the provisions of its memorandum and articles and the law of the Territory, but otherwise on such terms as the trustee thinks fit, provided that in making, procuring or maintaining any such change, the trustee may disregard section 7(3)(b) if and for so long as, in the opinion of the trustee, it is expedient to do so for the purposes of dealing with the complaint;
- (b) procuring action by the company to recover any losses caused by the conduct giving rise to the complaint; or
- (c) seeking such advice on the complaint and the manner of addressing it as the trustee considers appropriate.

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Intervention by trustee in management in prescribed circumstances.

(5) In considering and taking action under subsection (3), the trustee shall

- (a) have regard to
 - (i) any wishes of the settlor; and
 - (ii) the efficient functioning of the company;
- (b) disregard business risk, except to the extent that
 - (i) the ground for complaint consists of or arises from any disagreement among the directors as to business risk, or
 - (ii) any wishes of the settlor require business risk to be considered.

(6) After acting pursuant to subsection (3), or deciding not to act, the trustee's obligation to intervene shall be at an end unless and until another intervention call is made.

(7) It shall be a ground for declining to act on an intervention call if, apart from any other reason for declining, the call is made on substantially the same ground as one previously made, and there appears to the trustee to be no reason to alter, or act further on, the decision previously taken by it.

(8) Where a trust instrument specifies one or more permitted grounds for complaint, the following provisions of this subsection shall apply:

- (a) an interested person may request the trustee to provide such information concerning the affairs of the company and any connected company as is reasonably required for that person to judge whether an intervention call is necessary, and the trustee shall use all reasonable endeavours to provide that information and may, if considered necessary for this purpose, procure the replacement of any of the directors with the trustee's own representative;
- (b) where there is an appointed enquirer he shall be under the following duties:
 - (i) a duty to make reasonable enquiries as to whether there is a permitted ground for complaint as often as appears appropriate in the circumstances, and not less than once in any period of twelve months;

- (ii) a duty to make an intervention call under this section, and provide the trustee with evidence of the relevant ground for complaint, whenever it appears to him to be appropriate;
- (c) where there is no appointed enquirer, the trustee shall use all reasonable endeavours to ensure that at all times at least one interested person of full capacity is given the following documents and information concerning the trust, but without prejudice to any right of that person to documents and information apart from this paragraph:
- (i) a copy of the trust instrument and other trust documents,
 - (ii) the name and address of the trustee,
 - (iii) the name, registered office, and principal place of business, of the company,
 - (iv) the names and addresses of all directors of the company,
 - (v) the nature of the current activities of the company,

provided that, where practicable, any person to whom information is given under this paragraph shall be a person who, in the reasonable opinion of the trustee, has acquired, or is likely to acquire, by appointment or otherwise, a substantial equitable interest in some or all of the designated shares or their proceeds or is the parent or legal guardian of such a person.

(9) All expenses incurred in dealing with an intervention call or considering the complaint on which it is based, including trustee remuneration where applicable, and the cost of any advice, shall be borne by the trust fund and its income in such proportions as the trustee decides, and if there is any deficiency in liquid funds the trustee may take such steps as are available to the trustee under the memorandum and articles of the company and the law of the Territory to make up the shortfall out of dividends from the company and may, if considered necessary for this purpose, procure the replacement of any of the directors with the trustee's own representative.

(10) The trustee shall, where practicable, procure the removal from office of a director appointed for the purpose specified in subsection (8)(a) or (9) when the purpose for which the director was appointed is achieved, if removal is appropriate for the purpose of any action decided upon by the trustee pursuant to subsection (3) or, subject to such action, for the purpose of compliance with the office of director rules.

9. (1) This section shall apply to a trust of designated shares.

Power to
dispose.

(2) Subject to subsection (3) and to the terms of the trust instrument, the trustee shall have power, in the management or administration of the trust fund, to sell or otherwise dispose of designated shares, but the existence of this power

(a) shall not carry an implied duty to exercise it for the purpose of preserving or enhancing the value of the assets of the trust or to consider its exercise for that purpose; and

(b) shall not render the trustee liable, in consequence of not exercising it, for losses of the kind referred to in section 5(3).

(3) Subject to section 11, the trustee shall not, unless the trust instrument otherwise provides, sell or dispose of designated shares in the management or administration of the trust fund without

(a) the consent of the directors of the company or of a majority of them if more than one; and

(b) such, if any, consents as are made requisite by the trust instrument.

(4) A sale or other disposal in exercise of the power conferred by subsection (2) shall be made in such manner, and upon such terms and conditions, as the trustee, acting in its fiduciary capacity, thinks fit.

(5) Section 59 of the Trustee Ordinance shall not apply to the trust to the extent that it permits the court to confer upon the trustee any power of sale or other disposal.

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10. (1) 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.

Enforcement.

(2) The court shall, if satisfied that the application under subsection (1) is well founded, grant relief by

(a) making such order as it considers appropriate to attain, as nearly as may be, the outcome that the court considers would have been, or would most likely have been, attained in respect of the trust, the company, its directors and generally if the breach had not occurred,

(b) making such, if any, supplementary or incidental order as the court deems, in the circumstance of the case, reasonably required having regard to the primary purpose of this Act stated in section 3,

provided that no order shall be made under this subsection to prejudice any interest in property which was acquired from the trustee in good faith, for value and without actual

or constructive notice of the trust, or from the company in good faith and for full consideration, or to prejudice any interest deriving from such an interest.

(3) The persons referred to in subsection (1) are

- (a) any interested person;
- (b) any director of the company;
- (c) any person who, under applicable office of director rules, would be a director if the trustee had complied with its obligations under section 7.

(4) Without prejudice to subsections (1) to (3), but subject to subsection (5), where in the case of a trust there is a breach of a duty or obligation imposed by this Act on its trustee, the breach shall be, and be actionable in civil proceedings as, a breach of the trust.

(5) Where civil proceedings are instituted in relation to a breach of a duty or obligation, the court shall, in granting any remedy, take account of any relief granted or available in respect of the breach on an application under subsection (1).

(6) References in subsection (4) to a breach shall be taken to include references to a prospective breach.

(7) Subject to the terms of the trust and to sections 7 and 8, where designated shares are held on trust, no act or omission of a director of the company shall be a ground for any person to seek intervention by the court in the affairs of the trust.

Power of court to order disposal.

11. (1) Where it is shown to the court that the retention of the shares is no longer compatible with the wishes of the settlor, the court shall have power, on the application of any interested person, to order or authorise a sale or other disposal of any designated shares, and a sale or other disposal so ordered or authorised shall not require any consent referred to in section 9(3).

(2) In making an order, or giving authority, under this section the court may impose such, if any, terms and conditions in relation to the sale or other disposal as it thinks fit.

Modification of rule in *Saunders v. Vautier*.

12. (1) Notwithstanding any rule of equity or practice of the court to the contrary, but subject to subsection (2), neither a beneficiary who is solely interested in any designated shares, nor all the beneficiaries who together are the persons interested in any designated shares, shall be entitled, although in existence and ascertained and of full capacity, to call for or direct a transfer of those shares or to terminate or modify the trust relating to them if and so far as that entitlement is, without offending any rule of perpetuity or remoteness, excluded by the trust instrument.

(2) No such exclusion of entitlement shall have effect, or continue to have effect, after the expiration of 20 years from the creation of the trust.

(3) Where a person who receives designated shares, or an interest in them, is a person who, by virtue of such an exclusion of entitlement, has no present right to receive the shares or that interest, he shall, without prejudice to the generality of subsection (1), hold those shares or that interest on trust to transfer the same to the trustee, and the court shall order him so to do on the application by the trustee or any person specified in section 10(3).

(4) During any such exclusion of entitlement, section 58 of the Trustee Ordinance shall not apply to the trust.

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13. A trustee of designated shares shall not be, or become, a director of the company.

Disqualification of trustee as a director.

14. (1) Where it is necessary under this Act for the court or a trustee to ascertain the wishes of the settlor, the following provisions of this section shall apply.

Ascertaining wishes of settlor.

(2) Where the settlor is alive, the settlor shall, where possible and practicable, be consulted as to his wishes.

(3) Where the settlor is dead, or it is not possible or practicable to consult him, his wishes shall be taken to be

- (a) such wishes as he has most recently communicated to the trustee, or
- (b) where no wishes or relevant wishes have been communicated, such as the court, or the trustee in good faith, believes most likely to have been his wishes from the evidence available to it.

15. (1) A trustee of designated shares shall have no fiduciary responsibility or duty of care in respect of the assets of, or the conduct of the affairs of, the company, except when acting, or required to act, on an intervention call.

Limitation of trustee's duties.

(2) Without prejudice to the generality of subsection (1), a trustee of designated shares

- (a) shall not be required to make any enquiry as to whether any facts exist which would, or may, whether with or without any other information, form the basis of an intervention call;
- (b) shall not be obliged to inform any interested person of any fact of which it becomes aware, or which it suspects, concerning the assets of the company or the conduct of its affairs;

- (c) shall not incur liability as accessory to a director's breach of duty by reason of any omission on the part of the trustee to take action where the trustee is aware, or suspects, that there has been or will be such a breach, or by reason of any act or omission in compliance with the provisions of section 7.

Regulations.

16. The Minister may make regulations for the purpose of carrying the provisions of this Act into effect.

Passed by the Legislative Council this 30th day of September, 2003.

V. INEZ ARCHIBALD,
Speaker.

DENNISTON FRASER,
Clerk of the Legislative Council.