

OBJECTS AND REASONS

The Bill is designed to meet the growing international need for a satisfactory legal mechanism to facilitate the succession planning of family corporate businesses. Careful succession planning is often required to guard against the risk that a business will fall victim to conflicts between the successors of the founder of the business. Traditionally, the trust has been regarded as one of the best vehicles for succession planning in common law jurisdictions, since it can be moulded to meet the peculiar needs of any family business.

The use of the trust to cater for the succession planning of companies is, however, currently impeded by a rule of trust law known as "the prudent man of business rule". This rule is designed to help preserve the value of trust investments and imposes on the trustee of shares in a company the following obligations:

- (a) the obligation to monitor the conduct of the directors of the company and to intervene where necessary, which may involve preventing the company from entering into an unduly speculative venture;
- (b) the obligation to exploit the shareholding to its maximum financial advantage, which may involve accepting a financially attractive takeover bid for the company, irrespective of the wishes of the settlor; and
- (c) the obligation to look for opportunities of spreading the financial risk by diversification, which may involve a sale of the company or its underlying assets, regardless of the wishes of the settlor.

These obligations often conflict with the wishes of the typical owner of a family corporate business and raise significant difficulties for trustees holding shares in such a business.

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

The enactment of the Bill will attract reputable company and trust business to the British Virgin Islands and will enable the Territory to compete in the special trust market with the Cayman Islands, which enacted similar legislation since 1997. The proposed legislation would increase government revenues from company registration, trust licensing fees and trust duty. It would expand the business of service providers and create local employment opportunities. It would also provide the Territory with another marketing opportunity and cement the Territory's image as a reputable and progressive trust jurisdiction.

By clause 1, the proposed Act would come into force on such date as the Governor may, by Proclamation, appoint. Clause 2 contains certain interpretative provisions. Clause 3 sets out the primary purpose of the proposed Act, which is to enable a trust of company shares to be established under which the shares may be retained indefinitely and the management of the company may be carried out by its directors without any power of intervention being exercised by the trustees.

Clause 4 sets out the conditions that would need to be fulfilled in order to establish a special trust of company shares (hereafter referred to as "a special trust"). The shares that are subject to a special trust are referred to as "designated shares".

By clause 5, the trustee of a special trust would be under a duty to retain the designate shares and that duty would have precedence over any duty to preserve or enhance the value of the trust fund.

Clause 6 would restrict the trustee of a special trust from using the voting or other powers associated with the designated shares to interfere in the management or conduct of the business of the company. The trustee would, for example, be required to leave the decisions on the payment or non-payment of dividends to the directors and would be prevented from taking steps to procure the appointment or removal of directors. The power of the trustee to apply to the High Court for any form of relief or remedy in relation to the company would also be restricted.

Clause 7 would enable the trust instrument of a special trust to contain rules known as "office of director rules", which could provide for the manner in which the voting or other powers attributable to designated shares should be exercised by the trustee in relation to the appointment, removal or remuneration of directors and other specified matters.

Clause 8 would enable the trustee of a special trust to intervene in the affairs of the company to deal with a complaint concerning the conduct of the company's affairs, provided that the ground for the complaint is specified in the trust instrument as a permitted ground for complaint and the complaint is made by an interested person as defined in clause 2. The trustee's ability to intervene would, however, be subject to certain conditions and restrictions.

Clause 9 would confer on the trustee the power to dispose of designated shares, but the trustee would not have an implied duty to exercise or consider the exercise of that power for the purpose of preserving or enhancing the value of the assets of the trust. Further, the exercise of the trustee's power to dispose of designated shares would be subject to the terms of the trust instrument and the consent of all, or a majority, of the directors.

Clause 10 would provide for the granting of relief by the High Court where the trustee is in breach of a duty or obligation imposed by the proposed Act. Clause 11 would enable the High Court to order or authorise the disposal of designated shares where it is shown that the retention of the shares is no longer compatible with the wishes of the settlor.

Clause 12 would modify the application of the rule in *Saunders v. Vautier* to special trusts. The rule in *Saunders v. Vautier* enables a sole beneficiary of full age and capacity, or a group of beneficiaries of full age and capacity entitled between them to the trust fund, to put an end to the trust, even if this would be inconsistent with the wishes of the settlor. Clause 12 would enable the trust instrument to exclude the right of any such beneficiary to call for or direct a transfer of designated shares or to terminate or modify the special trust.

Clause 13 would prevent a trustee of designated shares in a company from being a director of the company.

Clause 14 would make provision for ascertaining the wishes of the settlor of a special trust.

Clause 15 would relieve the trustee of designated shares in a company from any 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 under the proposed Act.

Finally, clause 16 would provide for the making of regulations by the Minister.

Chief Minister.