

Recent Amendments to the Trustee Act, 1998

BULLETIN: 10 March 2017

The Trustee (Amendment) Act 2016 (“TAA 2016”), which recently came into force, has amended the Trustee Act (the “Principal Act”) (a) to clarify that an outgoing trustee is restricted from claiming a release in respect of liabilities for breach of trust or for which he would not have been entitled to a release had he remained a trustee, (b) to clarify that a release given by any continuing or new trustees is limited to the trust property in their possession or under their control from time to time, and (c) to allow settlors and donors of property to a trust to benefit from non-alienation provisions in the trust.

Restriction on an outgoing trustee’s claim for release and limitation on release given by new or continuing trustee

In order to understand the contextual background of the amendment to sub-section 36(4), it should be noted that sub-section 36(3) of the Principal Act confers on an outgoing trustee the right to claim not only an indemnity but also a release from and against all liabilities arising from his administration of the trust.

However, an anomaly existed whereby sub-section 36(4) of the Principal Act restricted the outgoing trustee’s right to claim an indemnity in respect of, but did not expressly restrict the outgoing trustee’s right to claim a release from, (i) liabilities for breach of trust; and (ii) liabilities for which the outgoing trustee would not have been entitled to be indemnified out of the trust property had he remained a trustee.

The TAA 2016 amendment to sub-section 36(4) clarifies that an outgoing trustee is restricted from claiming a release (and indemnity, or withholding property) in respect of liabilities arising from breach of trust or for which he would not have been entitled to a release and indemnity had he remained a trustee.

As with the equivalent section in the Principal Act, any release and indemnity given by the continuing or new trustees must be limited to the trust property in their possession or under their control from time to time.

Settlor or Donor’s Non-alienation Rights

Sub-section 40(5) of the Principal Act expressly precluded a settlor or donor of property to a trust from benefiting from non-alienation provisions in the trust. Non-alienation provisions are restrictions in an instrument or disposition which limit the circumstances in which trust property may be seized, sold, attached, or taken in bankruptcy, insolvency or liquidation proceedings or in execution by process of law (the “restrictions on alienation”). Based on this prohibition, if a settlor who was also a beneficiary became insolvent, restrictions on alienation contained in the trust instrument would not protect trust property from being used to meet the claims of creditors.

Notably, the TAA 2016 amends sub-section 40(5) to allow settlors and donors of property to a trust the benefit of restrictions on alienation, provided they do not contravene the Fraudulent Dispositions Act. Such contravention could occur if the Bahamas Supreme Court finds, in proceedings commenced within two years of the relevant disposition, that the property was transferred to the trustee with intent to defraud creditors.

Note: The TAA 2016 also adds a new section 91C to the Principal Act. This new section codifies the Rule in Re Hastings-Bass. For more information on this new section, please refer to our Bulletin entitled “The Bahamas Codifies the Rule in Re Hastings-Bass”.

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