

**VISTA, SISTA & TRADITIONAL TRUSTS:**

***‘O LE FOGAVA’A E TASI***

**LAWS 542: OFFSHORE TRUST LAW**

**RESEARCH PAPER**

**FACULTY OF LAW**

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI



**VICTORIA**  
UNIVERSITY OF WELLINGTON

**2018**

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**STUDENT ID: 300463444**

Word count: 7458

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## ***I Introduction***

When the Panama papers were released, the British Virgin Islands (“BVI”) and Samoa were implicated as the first and sixth most popular tax havens for companies. The BVI are a self-governing overseas territory of the United Kingdom located in the Caribbean. The BVI are home to about 35,000 people and a lucrative offshore finance centre. Offshore financial services generate more than half of the total of Government revenues.<sup>1</sup>

Over 12,000 kilometres away from the BVI are the Samoan islands, an independent nation in the South Pacific Ocean. Samoa is home to about 200,000 people and a modest offshore finance centre.

The BVI and Samoa have many similarities, besides being popular tax havens. Both islands nations follow the Westminster system of Parliament, both recognise English common law and equity as a source of law and both have enacted legislation creating special investment control trusts. In 2003, the BVI enacted the Virgin Islands Special Trusts Act (“VISTA”) creating investment control trusts, commonly known as VISTA trusts. This special type of trust was unique to the BVI until Samoa enacted the Trusts Act in 2014, creating the Samoan International Special Trust Arrangement (“SISTA”) which is similar to VISTA.

The aim of this research paper is to analyse the investment control trust arrangements in the BVI and Samoa and to determine whether these statutory creations fall under the scope of the traditional English trust.

Part II of this paper focuses on investment control trusts in the BVI. This section will discuss the development of the VISTA as well as its key provisions. Part III of this paper will focus on Samoa. It briefly discusses the Samoan Offshore Finance Centre and its relation to SISTA trusts. Part IV of the paper focuses on special trusts in practice. The advantages and criticisms of these investment control trusts are also discussed. Part V will first, briefly discuss some basic trust principles before addressing the crux of this research: are the special investment control trusts still trusts? This paper concludes by arguing that these special investment control trusts, if carefully and well drafted, retain the irreducible core of trusteeship and therefore, should fall within the scope of ‘traditional’ English trusts.

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<sup>1</sup> Government of the Virgin Islands “Our Economy – Financial Services” <<http://www.bvi.gov.vg/content/our-economy>>.

## II *Special Trusts in the British Virgin Islands*

### A *The Prudent Investor Rule*

A fundamental concept in trust law is that trustees are required to act in the best interest of the trust beneficiaries. Under English law, trustees are required to act prudently regarding trust investments; in other words, trustees are to act as a prudent man of business would regarding his own property. This rule is known as the ‘prudent man of business rule’ or ‘the prudent investor rule’.<sup>2</sup>

*Bartlett v Barclays Bank*, an English case, illustrates the prudent investor rule in practice.<sup>3</sup> Barclays Bank was the sole trustee of a trust that held the controlling share in Bartlett Trust Limited, a family company incorporated to manage the properties of Sir Herbert Bartlett and his wife. The shareholding was the only asset placed on trust. When the board of the company invested in a speculative development project which caused the trust to suffer significant financial losses, the beneficiaries of the trust sued the trustee for the losses sustained. The High Court of England found for the beneficiaries and held that under the duty of prudence, the trustee should have been ‘actively involved’ in the affairs of the company.<sup>4</sup> The High Court further elaborated that ‘active involvement’ placed two specific obligations on the trustee. The first obligation required trustees to monitor the conduct of the directors of the company and to intervene in company affairs where necessary for the benefit of the beneficiaries.<sup>5</sup> The second obligation requires trustees to “exploit the shareholding to maximum financial advantage”.<sup>6</sup>

There are several reasons why the prudent investor rule creates significant difficulties for the trustees, particularly concerning trusts that hold the controlling interest of companies. For one, trustees may not possess the skills to adequately assess the decisions that the company directors make regarding the administration and management of the company.<sup>7</sup> Secondly, a trustee’s duty to act prudently conflicts with the need to take risks which is associated with the running of a successful company.<sup>8</sup> A prudent trustee, who is unwilling to take risks could potentially hinder the growth and success of the company. Thirdly, high administrative and

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<sup>2</sup> Christopher McKenzie “Vista Trusts” in Geraint Thomas and Alastair Hudson (eds) *The Law of Trusts* (2nd ed, Oxford University Press, New York, 2010) at 42.23.

<sup>3</sup> *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515.

<sup>4</sup> *Bartlett v Barclays Bank Trust Co Ltd*, above n3 at 516.

<sup>5</sup> *Bartlett v Barclays Bank Trust Co Ltd*, above n3 at 525.

<sup>6</sup> *Ibid.*

<sup>7</sup> Christopher McKenzie “VISTA Trusts”, above n2 at 42.24.

<sup>8</sup> *Ibid.*

indemnity insurance costs may be incurred by a prudent trustee who is actively involved in the company affairs.<sup>9</sup> Finally, common law has not clarified the scope of the duty of prudence. The lack of clarification on the scope of the duty of prudence creates a legal conundrum for trustees. If a trustee who has not acted prudently is liable for losses incurred from a failed investment, what happens if on the other hand, losses are incurred because a prudent trustee is unwilling to make a risky investment?<sup>10</sup> These difficulties illustrate how the prudent investor rule discouraged settlors and trustees from wanting to use the trust as a vehicle of succession.

### *B Non-Legislative Alternatives to VISTA Trusts*

There are several non-legislative alternatives to VISTA. However, there has been academic debate on the whether these non-legislative alternatives effectively address the difficulties created by the prudent investor rule. The most important alternative, involves inserting a non-intervention or ‘anti-*Bartlett*’ clause into the trust instrument. On one hand, non-intervention clauses are identified as an effective method to oust the trustee’s duty to intervene and mentions a VISTA trust as an alternative.<sup>11</sup> On the other hand, it has been argued that non-intervention clauses are ineffective because:<sup>12</sup>

...the trustee does have *power* to obtain information and interfere (by virtue of its controlling shareholding) so far as necessary to protect beneficiaries interests, while it seems that the trustee has an overriding duty to exercise its powers so as to safeguard and further the beneficiaries’ interests as a whole and that this duty at the core of the trust cannot be ousted.

The latter argument concludes that statutory regimes such as the VISTA are the only solution to effectively excluding a trustee’s power to intervene.<sup>13</sup> Davern agrees with this proposition and states that it is incorrect:<sup>14</sup>

to present VISTA as a mere alternative to an anti-*Bartlett* clause as though there were nothing really to choose between them...it is only by statutory provision that a trustee can be deprived of the power which he has under a company’s articles and the general law of exercising the rights attaching to shares in a company of intervening in management.

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<sup>9</sup> Ibid.

<sup>10</sup> Christopher McKenzie “VISTA Trusts”, above n2 at 42.24

<sup>11</sup> Raymond Davern “Does the Virgin Islands Special Trusts Act achieve anything special?” (2010) *Trust and Trustees* at 2.

<sup>12</sup> Ibid. See also, DJ Hayton, PB Matthews and CCJ Mitchell (eds) *Underhill & Hayton’s: Law of Trusts and Trustees* (17th ed, Lexis Nexis Butterworths, London, 2006) at 52.60ff.

<sup>13</sup> Raymond Davern “Does the Virgin Islands Special Trusts Act achieve anything special”, above n11, at 2.

<sup>14</sup> Ibid.

The 2014 decision of the BVI Commercial Court in *Appleby Corporate Services (BVI) Limited v Citco Trustees (BVI) Limited* sheds an interesting light on this debate. The settlor in this case was Mr. Mamorek, an Argentinian millionaire who had decided to place a large amount of his wealth into a special purpose limited company in the BVI. After some time, Mr. Mamorek opted to put the entire issued share capital of the company into a trust.<sup>15</sup> Bannister J, who presided over the case, was quite sceptical of the reasons behind Mr. Mamorek's decision and questioned in *obiter* why Mr. Mamorek decided to use the trust structure; his view of the arrangement was indeed quite bleak. The company was placed into a discretionary trust, naming Citco Trustees Limited ("Citco Ltd") as the trustee and Mr. Mamorek's wife and four children as the trust beneficiaries. The trust deed contained a clause that granted Citco Ltd the power to delegate the management of investments, which is similar to an anti-*Bartlett* clause; Citco Ltd eventually delegated the management of trust investments to a third party investment company.<sup>16</sup> During Citco Ltd's eleven year tenure (from December 2000 to July 2011) as trustee, the value of the trust went from about US\$7 million to US\$142,000; this was a substantial loss and an obvious problem.<sup>17</sup> After Citco Ltd retired as the trustee in July 2011, the new trustee Appleby Corporate Services Ltd ("Appleby Ltd") commenced action against Citco Ltd for losses sustained by the trust.<sup>18</sup>

Bannister J held that although Citco Ltd had been given the power to delegate the management of investments and did in fact, validly exercise this power nonetheless<sup>19</sup>:

any person, such as a trustee, holding property on behalf of others who delegates dispositive powers and functions such as the management of investments ... is under the duty to have in place appropriate risk management procedures...to satisfy himself that such delegated powers and functions are adhered to and not abused by the agents whom they have delegated.

Therefore, even if there is a clause which allows for trustees to delegate its functions, there a fiduciary duty to oversee the investment continues to exist. A trustee, in performance of this duty to oversee investment, is required to take appropriate action to ensure the preservation and if possible, the enhancement of the trust assets.<sup>20</sup> This case therefore supports the proposition

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<sup>15</sup> *Appleby Corporate Service (BVI) Limited v Citco Trustees (BVI) Limited* [2014] BVIHC (COM) 0156 of 2011 at [3] – [4]; Bannister J estimated that Mr. Mamorek had placed USD\$10 million of his wealth into the company.

<sup>16</sup> *Appleby v Citco Ltd*, above n15 at [7].

<sup>17</sup> *Appleby v Citco Ltd*, above n15 at [19], [21].

<sup>18</sup> *Appleby v Citco Ltd*, above n15 at [27].

<sup>19</sup> *Appleby v Citco Ltd*, above n15 at [31].

<sup>20</sup> Jonathan Russe QC, Henry Mander and William Burnell "The BVI VISTA Legislation: Refining the Law to Promote Flexibility" (2015) 22 *Journal of International Tax, Trust and Corporate Planning* 251 at 255.

that VISTA trust arrangements are the best, and possibly the only, solution that truly removes the trustee's obligation and powers to intervene in the affairs of the company. There is the conceptual argument that even if the trust in *Appleby v Citco* had been a VISTA trust, the BVI Commercial Court may still have viewed the special trust with some scepticism, practitioners disagree and submit that "such a stance would be difficult for the court to substantiate given that VISTA is black letter law, whereas anti-*Bartlett* clauses are not".<sup>21</sup>

### *C Key Features of the Virgin Islands Special Trusts Act 2003*

The creators of the VISTA recognised that the duty to act prudently unintentionally created difficulties for the trustees of trusts that held the controlling interest of companies. Furthermore, they also recognised that the non-legislative solutions to the problems created by the prudent investor rule were inadequate in truly stripping trustees of their obligations and powers to intervene in company affairs. In order to avoid these difficulties altogether, the Parliament of the BVI enacted the VISTA, which consequently created VISTA trusts. VISTA trusts are a specialized type of statutory trust that can only hold the shares of BVI companies.<sup>22</sup> A VISTA trust may be set up for beneficiaries or for a charitable or non-charitable purpose.

On 6 November 2003, the VISTA came into force.<sup>23</sup> The long title of the VISTA gives insight into the purpose and aims of the VISTA<sup>24</sup>

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, 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.

According to s 3 of the VISTA, the primary purpose of the Act is to allow VISTA trusts to retain the shares indefinitely and allow the directors to continue managing the company without interference from the trustee.<sup>25</sup>

The VISTA provides several key features which make the special trusts attractive vehicles of succession. The first key feature of the VISTA is that it does not generally apply to all BVI trusts; the VISTA arrangement is optional. In order for VISTA to apply, the trust instrument

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<sup>21</sup> Ibid.

<sup>22</sup> Until it was amended by the Virgin Islands Special Trust (Amendment) Act 2013 (BVI), s 2(b).

<sup>23</sup> Virgin Islands Special Trusts Act 2003 (BVI), s 1.

<sup>24</sup> Virgin Islands Special Trusts Act, above n23.

<sup>25</sup> Virgin Islands Special Trusts Act, above n23, s 3.

must contain a ‘VISTA direction’. This is a provision that specifically states that the VISTA applies to the trust assets, the ‘designated shares’ of a BVI company.<sup>26</sup>

Secondly, a trustee of a VISTA trust has the ‘duty to retain’ the designated shares.<sup>27</sup> The VISTA provides that duty to retain is given precedence over any duty that the trustee may have to preserve or enhance the value of the trust.<sup>28</sup> The VISTA provides the trustee with statutory protection from liability for losses, caused by specified factors, incurred from retaining the designated shares instead of disposing of them.<sup>29</sup> The factors specified by the Act are:<sup>30</sup>

- (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.

In practice, this provision operates to prevent trustees from exercising their administrative powers to dispose of the designated shares unless allowed under s 9 or s 11 of the VISTA.<sup>31</sup> Section 9 stipulates that the trustee may only dispose of the designated shares if specifically provided for in the trust instrument and when the directors of the company consent to the sale.<sup>32</sup> Section 11 grants the Court power to order the sale of the designated shares if it decides that the retention of the shares would contravene the wishes of the settlor.<sup>33</sup>

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<sup>26</sup> Virgin Islands Special Trusts Act, above n23, s 4(1).

<sup>27</sup> Virgin Islands Special Trusts Act, above n23, s 5(1).

<sup>28</sup> Virgin Islands Special Trusts Act, above n23, s 5(2).

<sup>29</sup> Virgin Islands Special Trusts Act, above n23, s 5(3).

<sup>30</sup> Virgin Islands Special Trusts Act, above n23, s 5(4).

<sup>31</sup> Christopher McKenzie “VISTA Trusts”, above n2 at 42.34.

<sup>32</sup> Virgin Islands Special Trusts Act, above n23, s 9(2); However, trust instrument may also provide an exception allowing trustees to sell the share without the approval of the director(s).

<sup>33</sup> Virgin Islands Special Trusts Act, above n23, s 11.



The third key feature of VISTA is the limitation of trustee powers. It is imperative to understand that the limitations on the trustee duties are only in relation to duties associated with the management and administration of the trust. Section 6 essentially restricts the trustee from participating in the management of the company. Under s 6, a trustee cannot exercise any powers associated with the designated shares (such as voting), instigate or support any company actions against directors for breach of duty, procure the appointment of a company director or wind up the company.<sup>34</sup>

In addition to the restrictions in s 6, further limitations are placed on trustee power by s 15 of the VISTA, which states that:<sup>35</sup>

a trustee...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.

Section 6 and 15 are relatively similar in effect but differ in application. The application of s 6 is subject to ss 7 and 8 of the VISTA; these sections provide that the trust instrument may grant to the trustees powers that would otherwise be restricted by s 6.<sup>36</sup> On the other hand, s 15 has been deliberately drafted to ensure that it applies generally to all VISTA trusts.<sup>37</sup> In a sense, the VISTA can be viewed as a template that offers the basic minimum standard, which can then be customised to suit the needs and wishes of each individual settlor. There is the conceptual question concerning these two particular sections of the VISTA: if a trust instrument does grant the trustee more powers and obligations, how does this increased responsibility read in light of s 15, which removes fiduciary duties except when acting on an interventional call? Theoretically, if the plain meaning of the statute is to be taken, then the increased responsibility will not mean increased fiduciary duties for the trustee.

The fourth key feature of the VISTA is found in s 7 which permits 'office of the director' rules to be incorporated into the trust instrument. This particular section allows individual settlors to permit trustees to exercise voting rights and other powers associated with the designated shares. The powers that may be granted relate to the appointment, removal and

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<sup>34</sup> Virgin Islands Special Trusts Act, above n23, s 6.

<sup>35</sup> Virgin Islands Special Trusts Act, above n23, s 15(1).

<sup>36</sup> Virgin Islands Special Trusts Act, above n23, ss 6-8.

<sup>37</sup> Virgin Islands Special Trusts Act, above n23, s 15(1).

remuneration of the underlying company directors.<sup>38</sup> The Act further provides that the office of the director rules may:<sup>39</sup>

- (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 the director in specified circumstances;
- (d) prescribe...the minimum and maximum number of directors...to hold office at any time or times;
- (e) require the trustee, in relation to the appointment and removal of directors, to act...on the decision of a third party or committee.

The fifth key feature of VISTA, and arguably the most crucial to the offshore function of VISTA trusts, is the intervention call which is provided for in s 8.<sup>40</sup> The Act defines this term in s 2 as:<sup>41</sup>

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

The intervention call is a mechanism that allows an 'interested person' to call upon the trustee to intervene in the management of the company if they have a complaint concerning how the company is being run.<sup>42</sup> An interested person, as defined in s 2, can be<sup>43</sup>:

- (a) a beneficiary of the trust;
- (b) an object of a discretionary power over any of the capital or income of the trusts;
- (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;
- (f) a protector; or
- (g) an appointed enquirer.

The circumstances in which an intervention call can be made is to be provided for in the trust instrument. The intervention call in s 8 is the exception to the limitation of fiduciary duties and obligations of the trustee.

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<sup>38</sup> Virgin Islands Special Trusts Act, above n23, s 7(1).

<sup>39</sup> Virgin Islands Special Trusts Act, above n23, s 7(2).

<sup>40</sup> Virgin Islands Special Trusts Act, above n23, s 8(1).

<sup>41</sup> Virgin Islands Special Trusts Act, above n23, s 2.

<sup>42</sup> Virgin Islands Special Trusts Act, above n23, s 8(1).

<sup>43</sup> Virgin Islands Special Trusts Act, above n23, s 2.

The main question regarding intervention calls is whether in practice, they are an effective mechanism for ensuring trustee accountability. By virtue of s 15 of the VISTA, the trustee clearly owes a fiduciary duty to the beneficiary of the trust when acting, or deciding to act on an intervention clause.<sup>44</sup> When an intervention call is made to the trustee, the trustee is required by s 8(3) to make two decisions: (1) to decide whether the claim is substantiated and (2) whether or not to take action.<sup>45</sup> When the trustee is satisfied that the complaint is substantiated, they are required to take action as they deem appropriate.<sup>46</sup> If the trustee is not satisfied that the claim is substantiated, or decides not to act upon the intervention call, then their duty to intervene ends until another intervention call is made.<sup>47</sup> The trustee is also given the right to reject an intervention call, if they are satisfied that the grounds upon which the intervention call is being made, is similar to one that has already been addressed. Interestingly, the Act specifically provides that the trustee is not under the duty to actively seek issues that would constitute the basis of an intervention call and is not required to disclose to the beneficiaries of such information. When considering whether to take action, a trustee must consider the wishes of the settlor and the efficient functioning of the company; the trustee must also disregard any business risks related to their decision, unless otherwise provided by the trust instrument.<sup>48</sup> Furthermore, s 10(1) and 10(4) of the VISTA stipulates that any interested person, company director or person who would have been director had the trustee acted in accordance to s 7 of the Act may, in the event that a trustee breaches the duties and obligations imposed on them by the Act, apply to the Court for relief.<sup>49</sup> The effect of these provisions is that the decisions of trustees made in relation to intervention calls, are subject to review by the court.<sup>50</sup> Therefore, it can be argued that intervention calls are in fact an effective mechanism that can be used by beneficiaries to ensure trustee accountability.

It is important to remember that both ss 7 and 8 of the VISTA are optional; it is up to each individual settlor to decide whether to incorporate office of the director rules or an intervention call mechanism into the trust instrument. Although the sections are optional, it would be in the

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<sup>44</sup> Virgin Islands Special Trust, above n23, s 15(1); Trusts Act 2014 (Samoa) s 62.

<sup>45</sup> Virgin Islands Special Trust, above n23, s 8(3); Trusts Act, above n44, s 55(3); Raymond Davern “Does the Virgin Islands Special Trusts Act achieve anything special”, above n11, at 8.

<sup>46</sup> Ibid.

<sup>47</sup> Virgin Islands Special Trusts Act, above n23, s 8(6); Trusts Act, above n44, s 55(5); Raymond Davern “Does the Virgin Islands Special Trusts Act achieve anything special”, above n11, at 8.

<sup>48</sup> Virgin Islands Special Trusts Act, above n23, s 8(5).

<sup>49</sup> Virgin Islands Special Trust Act, above n23, s 10(1)(4); Trusts Act, above n44, s 57 (1)(4); Raymond Davern “Does the Virgin Islands Special Trusts Act achieve anything special”, above n11, at 8.

<sup>50</sup> Raymond Davern “Does the Virgin Islands Special Trusts Act achieve anything special”, above n11, at 8.

best interest of the trust, that these clauses are included into the trust instrument. The reason why incorporating office of the director rules into the trust instrument is important is because,<sup>51</sup>

... such rules, if carefully drafted, will help to ensure that the company, at any given time, has a functioning board of directors (or sole director when required) and that the persons appointed as directors meet the criteria laid down by the settlor.

The intervention call mechanism should also always be included because it is the only way, under the VISTA scheme, to hold the trustees accountable to the beneficiaries of the trust and ultimately, prevent the trust from being invalidated by the court.<sup>52</sup>

There are a number of other provisions in the VISTA and the subsequent amendment of VISTA in 2013 that are also important. The VISTA suspends the rule in *Saunders v Vautier*, an English case that held that beneficiaries could collectively decide to terminate the trust, for up to 20 years.<sup>53</sup> The 2013 amendments to the VISTA also introduced new features such as, permitting for co-trusteeship, which now allows for the establishment family-controlled VISTA trusts and permits a non-BVI trustee company to be named a co-trustee of the trust.<sup>54</sup> Further amendments also grants powers to the trustee to request for information regarding the company and its subsidiaries and allows the transfer of property from another trust to a VISTA trust (a process that has been coined as ‘VISTA-ising the property’).<sup>55</sup>

In its entirety, the VISTA and its key features make special trusts an attractive vehicle for succession.

### ***III Special Trusts in Samoa***

#### ***A Background on the Samoan Offshore Financial Centre***

When the Panama papers were released in 2016, Samoa was implicated as the 6<sup>th</sup> most favoured tax haven by international companies.<sup>56</sup> In 2017, Samoa was placed on the European Union’s tax haven blacklist for failing to take measures to address its status as a tax haven.<sup>57</sup> Overlooking this recent bout of bad publicity, the Samoa International Finance Authority, the

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<sup>51</sup> Christopher McKenzie “VISTA Trusts”, above n2, at 42.49.

<sup>52</sup> Further elaboration on this concept can be found in Part V of this paper.

<sup>53</sup> Virgin Islands Special Trusts Act, above n23, s 12; *Saunders v Vautier* (1841) 41 ER 482.

<sup>54</sup> Virgin Islands Special Trust (Amendment) Act, above n23, s 2(b).

<sup>55</sup> Virgin Islands Special Trust (Amendment) Act, above n23, s 4.

<sup>56</sup> Aamna Mohdin, “The Five Most Important Charts from the Panama Papers Leaks” *Quartz* (online ed, London, 4 April 2016).

<sup>57</sup> Daniel Boffey “EU blacklist names 17 tax havens and puts Caymans and Jersey on notice” *The Guardian* (online ed, London, 4 April 2016).

government organization that oversees the Samoa's international financial transactions, has logged modest returns from the offshore financial centre. In 2001, the offshore financial was the fourth largest source of foreign income earnings for Samoa.<sup>58</sup> Van Fossen identified an interesting trend amongst the offshore financial centres in the Pacific Islands, where one island nation would have specialize in a certain offshore financial aspect. The Cook Islands are popular for their asset protection trusts, the Marshall Islands in its issuance of flags of convenience and Samoa in international companies.<sup>59</sup> According to Van Fossen, Samoa is popular for its flexible company laws<sup>60</sup>:

Samoa is excellent for registering international companies, which can hold stocks, bonds, real estate and other assets so that taxes can be avoided on incomes from dividends, interest, rents or profits when holdings are sold.

In 2008, there were 27,039 active international companies registered in Samoa in comparison to 182 international trusts. The reason for the dramatic discrepancy between the two was attributed to a “lack of legal innovation, such as asset protection legislation”.<sup>61</sup> The popularity of international companies in Samoa is worth mentioning because it may link as to why the Government of Samoa decided to introduce the special trust arrangement into Samoa.

### *B The Samoan International Special Trust Arrangement*

The first question that came to mind when researching on the SISTA was: what was the Samoan Parliament's rationale for introducing this this special trust arrangement into Samoan law? Interestingly, after searching through Parliamentary Hansards for an answer to this question, the discussion on the Trusts Bill and the SISTA could not be found; notably, on the same day that the Trusts Bill was passed by Parliament, 11 other Bills were passed. One reason that the Government of Samoa may have introduced the special trust arrangement was to capitalize on the flexibility of the Samoan company laws and its popularity as a location for international companies. The Government may have recognised the success of the VISTA for the BVI and saw the introduction of the special trust arrangement as an opportunity to provide another type of service for these companies in Samoa. Hypothetically, these special trusts will potentially generate much needed foreign income, through the registration and other fees

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<sup>58</sup> Anthony Van Fossen *Tax Havens and Sovereignty in the Pacific Islands* (University of Queensland Press, St Lucia (QLD), 2012) at 90.

<sup>59</sup> Anthony Van Fossen *Tax Havens and Sovereignty in the Pacific Islands*, above n58 at 1.

<sup>60</sup> *Ibid.*

<sup>61</sup> Anthony Van Fossen *Tax Havens and Sovereignty in the Pacific Islands*, above n58 at 90.

associated with setting up and maintaining the trusts. However, without the transcript of the discussion on the Trusts Bill, one can only speculate as to why the Parliament of Samoa decided to introduce this arrangement.

In 2014, Samoa enacted its Trusts Act introducing the Samoan International Special Trust Arrangement (“SISTA”) and subsequently, SISTA trusts.<sup>62</sup> Until 2014, the VISTA trust was an arrangement that was unique to the BVI. International settlors wishing to use the VISTA structure had no choice of jurisdiction because the only choice available to them was the BVI. Nowadays, settlors wishing to use the VISTA arrangement have the luxury of choosing another location. The geographical location of the Samoan islands makes it more convenient for clients from Asia, Australia and New Zealand to access the special trust structure. Furthermore, the Samoa International Finance Authority (SIFA) identified the Trusts Act as the first product that removes “ring-fencing” because it allowed both residents and non-residents of Samoa to use the Act.<sup>63</sup> Prior to the enactment of the Trusts Act, international trusts were governed by the International Trusts Act.<sup>64</sup> Under ss 16 and 17 of the International Trusts Act, all international trusts created in Samoa had to be registered. The introduction of the Trusts Act was significant because it repealed the International Trusts Act, subsequently removing the requirement that all international trusts in Samoa be registered.<sup>65</sup>

The SISTA was based on and has all of the key features of the VISTA and the 2013 amendments such as: the optional nature of the arrangement<sup>66</sup>, the purpose of the Act<sup>67</sup>, the duty to retain<sup>68</sup>, the removal and limitation of trustee duties and obligations<sup>69</sup> and the intervention call mechanism.<sup>70</sup>

#### ***IV Special Trusts in Practice***

##### ***A Setting up a Special Trust***

Setting up a VISTA or SISTA trust is a fairly simple process. A settlor wishing to create a special trust first has to decide on the jurisdiction they would like the trust and underlying

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<sup>62</sup> Trusts Act, above n44 ss 48-62.

<sup>63</sup> Samoa International Finance Authority *Annual Report 2014* (Ministry of Finance, AR 9/2014, December 2015) at 18.

<sup>64</sup> International Trusts Act 1988 (Samoa).

<sup>65</sup> International Trusts Act, above n56, s 4.

<sup>66</sup> Trusts Act, above n44, s 50.

<sup>67</sup> Trusts Act, above n44, s 51.

<sup>68</sup> Trusts Act, above n44, s 52.

<sup>69</sup> Trusts Act, above n44, s 53, 62.

<sup>70</sup> Trusts Act, above n44, s 55.

company to be domiciled in. Secondly, the settlor would have to set up the underlying company, which is usually generic, and then transfer the assets to be held on trust, to the company. In the trust instrument, the VISTA/SISTA direction must be made. Once the settlor is satisfied with the trust instrument, the shares of the company are transferred to a BVI or Samoan registered trustee thus creating the trust. The process of setting up a special trust is fairly quick and cheap. In 2012, it cost about USD \$10,000 to set up the trust and USD \$3500 in annual fees.<sup>71</sup> In Samoa, the fees for incorporating an international company are much less.<sup>72</sup>

### *B Advantages of Special Trusts*

VISTA trusts have been well received by, and extremely successful amongst the international business community.<sup>73</sup> Since SISTA trusts are still relatively new, having only been introduced 4 years ago, there is no data to measure how successful they have been in Samoa.

Practitioners and academics have identified several situations where establishing a VISTA or SISTA trust may be beneficial. The ‘classic situation’ for a special trust to be used is “when there are advantages to holding shares in private companies and in particular, trading companies” and to hold assets, such as family company shares or heirlooms, that the settlor would like to remain in the trust until distributed.<sup>74</sup> The trust to retain feature of the special trust arrangement prevents the trustee from selling the shares unless approval from the directors (or as required by the trust instrument) is given and the company on trust will continue to be managed by its directors, without intervention from the trustee.<sup>75</sup> Special trusts, by removing the duty of prudence, has also allowed these special structures to be used to hold “high-risk assets” such as airplanes, ships and investments.<sup>76</sup> Special charitable and non-charitable purpose trusts are also used in practice for securitizations and off-balance sheet transactions.<sup>77</sup>

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<sup>71</sup> Collin Riegels “British Virgin Islands VISTA Trusts” (25 September 2012) DLA Piper <[http://files.dlapiper.com/files/Uploads/Documents/Harneys\\_VISTA\\_trust\\_presentation\\_25\\_Sept\\_2012\).PDF](http://files.dlapiper.com/files/Uploads/Documents/Harneys_VISTA_trust_presentation_25_Sept_2012).PDF)>

<sup>72</sup> As per the Fee Schedule issued by the Samoa International Finance Authority at <[https://www.sifa.ws/index.php/fee\\_schedule/](https://www.sifa.ws/index.php/fee_schedule/)>.

<sup>73</sup> Christopher McKenzie, “A New and Improved VISTA: May 2013 Amendments to Virgin Islands Special Trusts Act” (2003) *Trusts and Trustees* 996 at 997.

<sup>74</sup> Christopher McKenzie, “VISTA Trusts”, above n2 at 42.36, 42.67, 42.68

<sup>75</sup> Unless when the trustee is acting on an intervention call; *Ibid*.

<sup>76</sup> High risk assets, from the perspective of a prudent trustee; Christopher McKenzie, “VISTA Trusts”, above n2 at 42.66.

<sup>77</sup> Christopher McKenzie, “VISTA Trusts”, above n2 at 42.69.

Finally, a special trust can be established is where a settlor is uncomfortable relinquishing control over the administration and management of the company to a trustee.<sup>78</sup>

There are several reasons why the special trust arrangement is attractive to both settlors and trustees. The creation of a special trust in the BVI or Samoa allows the settlor, who can also be the sole director of the underlying company, to remain in control of the corporate structure whilst enjoying the benefits of the trust structure. The benefit of using trust structures include the security and protection of assets, maintaining the privacy of the settlor and beneficiaries and the time that the trust structure allows for succession planning. The settlor also benefits from having the company and the trust situated in one jurisdiction. This ensures that in the event of a dispute, the laws of that one jurisdiction will govern the dispute. Furthermore,<sup>79</sup>

this innovative legislation, by excluding the trustees from management of the underlying companies and removing their discretion to sell the shares of the company, except in prescribed situations, allows settlor control to be retained at the director/company level without running the risk that the trust will be considered a sham.

Overall, VISTA and SISTA trusts, and the advantages that they offer, are truly something ‘special’.

### *C Criticisms of Special Trusts*

The VISTA and SISTA trust arrangement has not been popular with everyone. The special trust arrangement has been the recipient of harsh criticism from academics and professionals alike who argue that the special trusts arrangement allows settlors to “have their cake and eat it too”.<sup>80</sup> The scheme has also been accused of having the potential to further negative goals; this is the same criticism afforded to offshore trusts in general:<sup>81</sup>

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<sup>78</sup> Christopher McKenzie, “VISTA Trusts”, above n2 at 42.63.

<sup>79</sup> An offshore trust will be declared a sham if there is evidence that the settlor retained control; Glibert Kodilinye and Trevor Carmichael *Commonwealth Caribbean Law of Trusts* (3<sup>rd</sup> ed, Cavendish Publishing Limited, London, 2012) at 238; Rose-Marie Bell Antoine “The Offshore Trust: A Catalyst for Development” (2007) *Journal of Financial Crime* at 274.

<sup>80</sup> Financial Secrecy Index 2018 *Narrative Report on the British Virgin Islands* (Tax Justice Network, London, 2018) at 6.

<sup>81</sup> Ronen Palan, Richard Murphy and Christian Chavagneux *Tax Havens: How Globalization Really Works* (Cornell University Press, Ithaca (NY), 2010) at 93.



[T]rusts are not set up only for tax reasons. Individuals may wish to hide assets from their spouses; family or business partners may use the trust facility as well. Trusts may also be used to avoid inheritance laws. Some may be seeking to avoid regulation.

The reason why the special trust arrangements, along with offshore trusts in general, have been said to aid negative goals is because of the secrecy surrounding them. The Financial Secrecy Index contends that “VISTA trusts enable deep secrecy: there is no need to have a physical presence in the BVI”.<sup>82</sup> In some sense, this statement is true. Christopher McKenzie, who is credited as being the ‘mastermind’ behind the VISTA trusts once speculated in 2014 that<sup>83</sup>:

[T]here are ... probably at least 5,000 and possibly more than 10,000 VISTA trusts around. The numbers are increasing rapidly...I myself have been involved in the establishment of around half a dozen structures in each of which the value of the underlying assets exceed USD\$1 billion. On this basis, I do not think that it would be wildly off the mark to speculate that assets worth dozens (or possibly hundreds) of billions of dollars are held in VISTA trust structures.

VISTA trusts, in fact trusts in general, are confidential arrangements. There is no mandatory requirement to register trusts in the BVI and, as of 2014, in Samoa. This means that there is no way of knowing who the parties in a trust relationship are, how many trusts exist within the jurisdiction and how much these trusts are worth. The secrecy surrounding these structures are one of its main selling points, however this also makes the structure vulnerable to abuse. In practice, this means that the special trust arrangement may act as another layer of protection for those wishing to exploit the structures for nefarious purposes such as tax evasion, money laundering and funding terrorist activities.

These potential negative uses of the special trusts are serious and should be addressed through constant review of the legislation and related policies to ensure conformity with international standards. However, to condemn these trusts as a mere façade, is harsh and require one to make the assumption that all trusts were set up for nefarious purposes. These negative criticisms should not, and do not, overshadow the special function and advantages of these special trusts.

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<sup>82</sup> Financial Secrecy Index 2018 *Narrative Report on the British Virgin Islands*, above n62 at 6.

<sup>83</sup> “VISTA Trusts 10 years on – Your Questions Answered: Part 1” (September 2014) O’Neal Webster <<http://onealwebster.com/vista-trusts-10-years-on-your-questions-answered-part-1/>>.

## V *Are Special Trusts still Trusts?*

### A *Traditional Trust Principles*

A fundamental principle of trust law is that a settlor, transfers ownership of the property to be placed on trust to the trustee, to be held for the beneficiary.<sup>84</sup> A traditional trust consists of four significant elements: “that it is equitable, that it provides the beneficiary with rights in property, that it also imposes obligations on the trustee, and that those obligations are fiduciary in nature”.<sup>85</sup> In trust law, the fiduciary obligations owed by the trustee to the beneficiaries is called the “irreducible core of trusteeship”; this irreducible core is required in order for the trust to be valid. The concept of the irreducible core was approved of by the Court in *Armitage v Nurse*. There, the Court held that:<sup>86</sup>

the duty of trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts.

### B *Questioning the Validity of Special Trusts*

There has been much debate on whether the special trusts under VISTA or SISTA should still be considered ‘trusts’. There are several criticisms of the special trusts scheme from a normative perspective. Critics in onshore jurisdictions have suggested that the provisions of the specialised trusts fundamentally undermine the nature of a trust to a point that they should not be recognised in an onshore jurisdiction.<sup>87</sup> Critics further argue that special trusts “considerably distort the concept of a trust” and “are hardly trusts at all but are instead means to disguise the ownership of assets”.<sup>88</sup> In other words, special trusts are a sham. When viewing the provisions of the VISTA and SISTA holistically, an argument could also be made that the main obligation of the trustee of a special trust is to simply hold the shares of the company as a mere custodian, supporting the accusation that the trust is a sham.<sup>89</sup> Davern illustrates the conceptual difficulty that the provisions of a special trust arrangement create for those attempting to argue that VISTA trusts are still valid ‘trusts’<sup>90</sup>:

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<sup>84</sup> Geraint Thomas and Alastair Hudson (eds) *The Law of Trusts* (2nd ed, Oxford University Press, New York, 2010) at 1.01.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Armitage v Nurse* [1998] Ch 241 at [254].

<sup>87</sup> Glibert Kodilinye and Trevor Carmichael *Commonwealth Caribbean Law of Trusts*, above n79, at 238.

<sup>88</sup> Ronen Palan, Richard Murphy and Christian Chavagneux *Tax Havens: How Globalization Really Works*, above n63, at 93.

<sup>89</sup> Paolo Panico *International Trust Laws* (2nd ed, Oxford University Press, New York, 2017) at 1.76.

<sup>90</sup> Raymond Davern “Does the Virgin Islands Special Trusts Act achieve anything special”, above n11, at 7.

if full advantage is taken of these provisions to create a trust under which the beneficial interest in a company is purportedly alienated for 100 years by S on trust to T for the benefit of B such that (i) S and his appointees retain exclusive control of the company's assets and business, (ii) T, as a matter of company law, cannot control S's management of the company's affairs and (iii) B cannot call T to account in any way for failing to control S, is this really a trust *'for B'*?

In answer to this question, Davern correctly points out that in the BVI and Samoa, the answer would have to be "Yes" because, to answer otherwise, would be requiring the courts in those jurisdictions to go against the plain meaning of the statute.<sup>91</sup> Furthermore, a trust structure that allows the settlor to remain in control of the company and where there is no mechanism to hold the trustee accountable to the beneficiaries, simply cannot be for the benefit of the beneficiaries, but instead for the settlor.<sup>92</sup> Simply, as stated by the Court in *Armitage v Nurse*, "if the beneficiaries have no rights enforceable against the trustees, there are no trusts".<sup>93</sup>

### C *Special Trusts are still Trusts*

However, VISTA and SISTA trusts should still be encompassed within the scope of the traditional trust. Firstly, the limitations on the fiduciary duties of the trustee are only in relation to the management and administration of the trust. These limitations on the administrative powers of a trustee does not invalidate the trust itself.<sup>94</sup> Furthermore, a VISTA or SISTA trust provided that it is well drafted, will include a clause that includes the intervention call mechanism and the specific circumstances in which the beneficiary can make such a call. The inclusion of the intervention call is crucial to ensuring that the trust will not be invalidated.<sup>95</sup> The importance of the intervention call has been stressed by both academics and practitioners alike.<sup>96</sup> The inclusion of this clause will ensure that the special trust retains the irreducible core of trusteeship because it can be used by the beneficiaries to hold the trustee accountable.<sup>97</sup>

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<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Armitage v Nurse*, above n86, at [253].

<sup>94</sup> Paolo Panico *International Trust Laws*, above n89, at 1.105.

<sup>95</sup> Paolo Panico, *International Trust Laws*, above n89, at 1.108.

<sup>96</sup> Paolo Panico, *International Trust Laws*, above n89, at 1.108; Raymond Davern "Does the Virgin Islands Special Trusts Act achieve anything special", above n11, at 7.

<sup>97</sup> As discussed in *Part I(C)* of this paper.

## ***V Conclusion***

In conclusion, the special trust arrangements that exist in the BVI and Samoa, were created to remove the difficulties that were created by the prudent man of business rule, when the trust property consisted of the controlling shareholding in a company. These special trusts are arguably the only way to truly remove a trustee's power to intervene in the affairs of a company. The legislation that establishes these special trusts give the trust special features which make them attractive to both settlors and trustees alike. Setting up these special trusts is relatively simple and cheap and there are several benefits of utilizing the trust structure. However, these trusts are often criticised for so fundamentally undermining the concept of a traditional trust. Furthermore, the secrecy surrounding these trust make them vulnerable to be misused for nefarious purposes. However, these criticisms should not overshadow the important functions that special trusts have.

Special trusts are an evolved form of the offshore trust. However, this does not mean that it is not a trust. VISTA and SISTA trusts, provided that they are carefully drafted, still fall under the scope of a traditional trust. The title of this paper contains the Samoan proverb: '*O le fogava'a e tasi*'. When translated literally, it means "the canoe has one deck". However, its proverbial meaning, is used to refer to things that are apart of 'one family', which is an apt reflection of the overall conclusion of this paper: special trusts though different from the traditional trust in many ways, is still a trust.