

Bermuda abolishes the rules against perpetuities and accumulations

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Abstract

This article looks at the new Perpetuities and Accumulations Act 2009 focusing particularly on the impact on pre-August 2009 trusts, charities and purpose trusts.

Key points

- The rule against perpetuities and accumulations has been abolished in Bermuda
- The formation of dynastic and perpetual trusts are now permitted from 1 August 2009 (subject to limited exceptions)
- Review of the how the reform applies to pre-August 2009 trusts and wills
- Review of the special rules that apply regarding charitable and purpose trusts

Abolition of the rules against perpetuities and accumulations

Bermuda has enacted legislation that will permit the formation of dynastic or perpetual trusts. The long awaited Perpetuities and Accumulations Act 2009 (the '2009 Act') provides that the rules against perpetuities and excessive accumulations¹ ('the Rule') will not apply in relation to instruments taking effect on or after 1 August 2009, except to the extent that the instrument or power of appointment relates to the land in Bermuda.² In practice, since the ownership of land in Bermuda by non-Bermudians is severely restricted and controlled,³ the continuation of the Rule for Bermuda land is unlikely to impact the vast majority of international trusts which are created for the benefit of non-Bermudians.

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Section 3 of the 2009 Act provides:

- 3 (1) The rule against perpetuities applies (and applies only) as provided by this section in relation to instruments taking effect on or after the commencement day.
- (2) If an instrument limits property in trust so as to create successive estates or interests, the rule against perpetuities applies to each of the estates or interests only to the extent that the property is land in Bermuda.

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1. 'The rule against perpetuities' is defined in the 2009 Act as

the rule of law by that name, also known as the rule against remoteness of vesting, which restricts the time within which future interests in property must either vest or take effect, or within which certain powers may be exercisable, and includes any other rule of law which limits the period during which income may be accumulated or for which capital may remain unexpended or inalienable.

2. Subsection 3(7) of the 2009 Act provides that land in Bermuda does not include income or proceeds from the sale of land in Bermuda.

3. Bermuda Immigration and Protection Act 1956, Part VI 'Protecting Land in Bermuda for Bermudians'.

- (3) If an instrument limits property in trust so as to create an estate or interest which is subject to a condition precedent and which is not one of successive estates or interests, the rule against perpetuities applies to the estate or interest only to the extent that the property is land in Bermuda.
- (4) If an instrument limits property in trust so as to create an estate or interest which is subject to a condition subsequent, the rule against perpetuities applies to any right of re-entry exercisable if the condition is broken only to the extent that the property is land in Bermuda.
- (5) If an instrument creates a power of appointment, the rule against perpetuities applies to the power only to the extent that it is exercisable over land in Bermuda.
- (6) In this section 'instrument' does not include a will executed before commencement day.
- (7) For the avoidance of doubt, the reference to land in Bermuda does not include—
 - (a) the income from any land in Bermuda; or
 - (b) the proceeds of sale of any land in Bermuda.

Pre-August 2009 trusts

The legislation does not abolish the Rule in respect of existing instruments or trusts.⁴ The 2009 Act does seek to provide a mechanism whereby a trustee or other interested party may apply to the Bermuda

courts to extend the perpetuity period of a pre-August 2009 trust, section 4 provides:

Existing instruments

- 4 (1) Nothing in section 3 is to be taken as *limiting* the power of the court to extend—
- (a) the duration of a trust;
 - (b) the time within which an interest in property must vest or take effect; or
 - (c) the time within which certain powers are exercisable, under an existing instrument.

It remains unclear how this section will be applied in practice. Although the 2009 Act does not limit the power of the court to extend the perpetuity period, there is nothing in the 2009 Act that actually grants the courts the power to extend the perpetuity period of existing trusts. Also the Bermuda courts will need to consider how to balance a selfish narcissistic settlor's desire to exercise dead hand control over property against the personal dignity and self determination of future generations.

Other mechanisms will be designed by crafty lawyers to bring pre-August 2009 trusts under the new regime. For example, it would seem that a post-August 2009 instrument exercising a 'general' power of appointment⁵ in respect of a pre-August 2009 trust could create⁶ a new perpetual trust under the 2009 Act.⁷ It is less likely that the same could be said for the exercise of a 'special' power of appointment. Unfortunately, the 2009 Act does not provide any assistance, as other jurisdictions such as Delaware or England⁸ have done.

4. The total abolition approach has been used in other jurisdictions, eg Manitoba's Perpetuities and Accumulations Act CCSM c P33; South Australia's Law of Property Act 1936 s 61; and Nauru's Foreign Trusts, Estates and Wills Act 1972 s 3

5. Pursuant to s 9 of the old Perpetuities and Accumulations Act 1989 (the '1989 Act'), a power of appointment shall be treated as a 'general' power if—

- (a) in the instrument creating the power it is expressed to be exercisable by one person only, and
- (b) it could, at all times during its currency when that person is of full age and capacity, be exercised by him so as immediately to transfer to himself the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of exercise of the power.

6. Section 10 of the 2009 Act amends the definition of 'power of appointment' in the old 1989 Act to include the word 'create', so that 'power of appointment' includes any discretionary power to 'create' or transfer a beneficial interest in property without the furnishing of valuable consideration.

7. Conclusion results from interaction between s 3 of the 1989 Act and s 3 of the 2009 Act, and *Re Thompson* [1906] 2 Ch 199, 202; *Muir v Muir* [1943] AC 483; and *Pilkington v IRC* [1964] AC 612, 641.

8. See s 5(2) HL Bill 35, 'A Bill to amend the law relating to the avoidance of future interests on grounds of remoteness and the law relating to accumulations of income.'

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It is expected that the 2009 Act will be amended within the next year to clarify the application to pre-August 2009 trusts.

Bermuda Wills

Wills executed prior to August 2009 will not benefit from the 2009 Act.⁹ Accordingly, it may be prudent to re-execute wills, or perhaps review the existing structure to determine if a testamentary dynastic trust would better suit the testator's wishes.

Charities and purpose trusts

The 2009 Act contains additional provisions related to charitable and purpose trusts:

- For both pre- and post-August 2009 charitable and purpose trusts, the settlement may impose on the trustees a duty, or confer on them a power, to accumulate income for any duration (including an unlimited duration), whether or not the duty or power extends to income produced by the investment of income previously accumulated.
- Subsection 12A(5) of the Trusts (Special Provisions) Act 1989 (which applies the Rule to a purpose trust) is repealed. While the repeal was necessary so that a purpose trust created

post-August 2009 can take advantage of the 2009 Act, it does however raise an interesting question how the repeal will impact pre-August 2009 purpose trusts.

- Section 5 codifies that the Rule does not apply (i) to an estate or interest created so as to vest in a charity on the occurrence of an event or (ii) to a right exercisable by a charity on the occurrence of an event, if immediately before the occurrence of the event, an estate or interest in the property concerned is vested in another charity.

Conclusion

From the level of interest already expressed by onshore advisors, it is clear that many Bermuda trusts will be formed as perpetual or dynastic trusts. Only time will tell if abolition of the Rule shall prove to be effective in the competition among international financial centres for trust business.

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In short, it is anticipated that the enactment of the 2009 Act will make Bermuda more attractive as a trust jurisdiction to persons, including wealthy families, who may wish to establish offshore dynastic trusts for their families.

9. See s 3(6).