



ANALYSIS

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1995-96, No. 27

An Act to amend the Trustee Companies Act 1981-82

(21 November 1996)

BE IT ENACTED by the Parliament of the Cook Islands in Session assembled and by the authority of the same as follows:

1. Short Title - This Act may be cited as the Trustee Companies Amendment Act 1995-96 and shall be read with and deemed part of the Trustee Companies Act 1981-82 (herein referred to as the "principal Act").
2. Interpretation - Section 2 of the principal Act is hereby amended by -
 - (a) inserting in the definition of "trustee company" after the words "under this Act" the following words -

"and, for the purposes of sections 11 to 26 (both inclusive), 29 to 42 (both inclusive), 44, 45 and 47, includes a wholly owned subsidiary of a trustee company nominated pursuant to section 4A of this Act.
 - (b) inserting after the words "trustee company" the following definition -

"trust instrument" or "instrument" means the deed, will, codicil, settlement or instrument establishing or creating the trust together with any variation or amendment to such deed settlement or instrument.

Price \$3.00

3. Revocation of registration - Subsection (1) of section 8 of the principal Act is hereby amended by -

- (a) adding after the words of this Act in paragraph (a), the words or any regulations made pursuant to this Act";
- (b) adding after the words any other Act in paragraph (b), the words or regulations;
- (c) adding after paragraph (c) the following paragraph -
- (d) has failed to conduct itself in a manner consistent with standards of conduct agreed or maintained from time to time by trustee companies in the Cook Islands in relation to the exercise of any powers, duties or discretions bestowed upon it by this Act or any other Act, or by regulations made pursuant to this Act or any other Act.

4. Trustee company's power to act as trustee with another - Section 17 of the principal Act is hereby amended by -

- (a) omitting the words "joint" and "jointly" where they appear in the heading and subsections (1) and (2);
- (b) adding in subsection (2) the words "prior or co-" before the words "trustee, executor or agent".
- (c) adding after subsection (2) the following subsections -
"(3) Where a trustee company has power to exercise its discretion subject to a prior veto or consent power held by another person, then the trust instrument may provide that the trustee company shall not be liable for any breach of trust or consequence arising from the exercise of the trustee company's discretion in accordance with that power of consent or veto.
(4) Subject to the terms of the trust instrument and to subsection (2), a trustee company which dissents or does not participate in a decision made by the majority of trustees shall not be liable for the acts of the majority of the trustees pursuant to such decision."

5. Trustee company's indemnity - The principal Act is hereby further amended by inserting after section 17, the following new section -

"17A Trustee company's indemnity - (1) A beneficiary may relieve a trustee company from liability to him for a breach of trust or indemnify a trustee company against any liability it may incur for a breach of trust.

(2) Sub-section (1) shall not apply if the beneficiary -

- (a) subject to Section 21 of the International Trusts Act 1984, is a minor or a person under legal disability; or
- (b) does not have full knowledge of all material facts; or
- (c) is improperly induced by the trustee company to act under sub-section (1)."

6. New sections - The principal Act is hereby amended by inserting after section 21 the following new sections -

"21A. Protection of trustee company - (1) Where an international trust has been deregistered under the International Trusts Act then -

- (a) notwithstanding the terms of the trust instrument, or that there would be no remaining trustee, a trustee company may resign immediately by giving notice to the Registrar of International Trusts and any one of the remaining trustees (if any), the settlor or any beneficiary, and upon resignation that trustee company shall have no further liability in respect of that trust for any acts or omissions relating to that trust from the date notice of resignation is delivered, posted or sent by facsimile or other electronic communication to the last known address of the recipient; and
- (b) the provisions of the International Trusts Act 1984 shall continue to apply in respect of that trust insofar as is required to retain the benefit of any rights or protections afforded to a trustee company, or its officers or employees, by that Act.

(2) Where an application has been made in respect of an entity containing statutory information which, in the reasonable opinion of the trustee company to which the information was given, was known to the informant at the time of the application to be materially inaccurate or untrue, the trustee company shall, notwithstanding any enactment or rule of law to the contrary, resign from all offices held in connection with that entity, including as trustee, donor, holder of power of appointment, protector, address for service, registered agent, director or secretary as the case may be, by giving 42 days written notice to the applicant, setting out the reasons for the resignation, and, unless otherwise ordered by the court on application by any applicant, upon expiry of that notice period, or such further period as the court may allow, that resignation shall be effective and the trustee company shall notify the Registrar of its resignation, and in these circumstances, subject to any order of the Court, no other trustee company, international company or registered foreign company may be appointed to hold any of the aforesaid offices.

(3) For the purposes of this section -

"applicant" means the person whom the trustee company considers to be the person primarily interested in the entity, or whom the trustee company has customarily been instructed by in relation to that entity, or in the case of an international trust, a protector, beneficiary or settlor (or any one of them) of that trust, or in the case of an international company, any one of the directors of that international company;

"entity" means an international company registered under the International Companies Act, an international partnership registered under the International Partnerships Act, a foreign company registered under the International Companies Act, an international trust registered under the International Trusts Act, an offshore bank licenced under the Offshore Banking Act, or an offshore insurance company licenced under the Offshore Insurance Act;

"application" means an application, including any documentation or correspondence supporting such application, by any person relating to the incorporation, establishment or registration of an entity ;

"statutory information means information relating to an application which is required by any statute or regulation to be provided as part of or incidental to that application;

(4) Notwithstanding any other rule of law or enactment to the contrary, any rights of indemnity, security, lien or contribution that a trustee company had in respect of an entity shall be unaffected by any resignation of that trustee company pursuant to subsection (2)."

21B. Liability of officers of corporate trustees - Except where the trust instrument expressly provides otherwise, an officer or employee of a trustee company shall not, in the performance of any obligation, duty, service or other activity for and on behalf of that trust, incur any tortious or any contractual liability or liability for any breach of trust or other equitable obligation in respect of that trust other than where the officer or employee of the trustee company acted dishonestly.

21C. Rights of third parties - (1) Except where expressly excluded by written agreement between a trustee company and a third party, this section shall apply to any action or proceeding commenced in the Cook Islands or which is determined in accordance with the law of the Cook Islands, including any action or proceeding to recognise or enforce a foreign judgement, in which a third party seeks any relief or remedy against a trustee company.

(2) In any action or proceeding where the cause of action is based in contract, the liability of a trustee company shall be limited to that trustee company's indemnity if -

- (a) the trustee company is described as a trustee in the contract the subject of the action or proceeding; or
- (b) the trustee company informs the third party that it is acting as trustee prior to the third party entering into that contract; or
- (c) that third party knew or ought reasonably to have known that he was dealing with a trustee; or
- (d) that contract was entered into by co-trustees of the trustee company, or in the name of the relevant trust, and the trustee company was not itself a party to that contract,

unless that trustee has acted in breach of trust in entering into that contract, and such action wholly or partly invalidates, or renders unenforceable the trustee company's indemnity, but in such a case the liability of the trustee company shall be limited to the loss caused to that third party by the invalidity or unenforceability of that indemnity .

(3) In any action or proceeding where the cause of action is based other than in contract, for acts or omissions arising in the course of or for the purpose of the management or administration of the relevant trust (whether authorised or empowered by the trust instrument or not), or by virtue of the ownership or control of property of the trust, the liability of that trustee company shall be limited to that trustee company's indemnity.

(4) For all purposes, where any action or proceeding is commenced by a bona fide third party against a trustee company in respect of an act, omission, contract or other matter consented to by the protector or the beneficiaries of that trust, or as a result of which a benefit was conferred on the property of the trust (but only to the extent of such benefit), that trustee company's indemnity shall not be wholly or partly lost, invalidated or rendered unenforceable in any way by any breach of trust or other act or omission of the trustee, or any other matter which would, except for this section, wholly or partly render unenforceable or invalidate the trustee company's indemnity.

(5) The resignation or removal of a trustee company as trustee of the relevant trust shall not affect the application of this section to that trustee company.

(6) For the purposes of this section -

- (a) "third party" means a person other than a person in their capacity as -
 - (i) a settlor, trustee, protector or beneficiary of the trust ; or
 - (ii) a creditor of, or other person claiming through, a settlor, protector or beneficiary of the trust, but shall include a co-trustee seeking to enforce a right of contribution or indemnity from a trustee company in respect of any obligations of that co-trustee to a third party;
- (b) the term "trustee company's indemnity" shall mean that trustee company's right of indemnity against the property of the relevant trust in respect of the relief or remedy claimed by a third party.

(7) Nothing in this section shall affect or limit the liability of a trustee company to beneficiaries for a breach of trust."

7. Application - (1) The provisions of the principal Act (as amended by this Act) shall be deemed to have come into force on the same date as the principal Act provided always that -

- (a) the provisions of this subsection shall not apply to or in respect of any matter, act, omission, or thing inconsistent with any of the provisions of the principal Act if validly done or omitted prior to the passing of this Act;
- (b) nothing in this subsection shall operate or be interpreted or construed to relieve any trustee from any liability arising prior to the coming into force of this Act or arising in respect of any matter, act, omission, or thing occurring prior to the coming into force of this Act.

(2) Nothing in this Act shall apply to or affect any proceedings commenced in the Court before the coming into force of this Act.

This Act is administered by the Cook Islands Monetary Board