

Registering security over trust property

One of the great attractions of the British Virgin Islands (“BVI”) as a jurisdiction for structuring finance transactions is the simple yet thorough security registration regime applicable to BVI companies. For the most part, where a lender advances money against security provided by a BVI company, registering the security and thereby protecting its priority and giving public notice of the secured party’s rights is a straightforward and effective system. However, the legal position becomes less clear when the company is acting not for its own account, but in its capacity as trustee of a trust.

The question of how to deal with trust property is not new. The statutory system for registration of company charges was first introduced in the BVI in 1991, and since that time practitioners in the jurisdiction have had to consider how best to address the problem of a company creating a charge over assets which it does not beneficially own. However, the last two to three years has seen a surge in the popularity of so called “private-trust companies”,¹ which are essentially companies which operate as trustees within certain restrictions and are thereby exempt from the normal requirements of a BVI company to obtain a trust licence. Whereas in years gone by lending against trust assets was a comparatively uncommon event, it is now something that occurs with increasing frequency.

Unfortunately, although the question has been around for years, it still seems to lack a satisfactory answer. Arguably the proper approach to take depends upon how one phrases the question: could such security be registered, should such security be registered or must such security be registered?

In the past, the question was admirably simple to answer. Sadly, with the passage of time things only appear to get more complex. Under the old International Business Companies Act, 1984 the relevant statutory provision indicated that a company could register a security interest which was created “over *its* assets.” That provision was normally interpreted as referring to the assets which the company owned exclusively of others,² and thereby precluded assets which were held on trust. Accordingly, until the BVI Business Companies Act, 2004 came into force the answer was simple - security over trust assets did not require to be registered.

¹ Private trust companies, or PTCs, were a construct which arose from the Financial Services (Exemptions) Regulations, 2007.

² Halsbury’s Laws of England (4th ed., vol 44(1) at para 1032) defines “property” as “that which belongs to a person exclusively of others.”

Under the BVI Business Companies Act things became more complex in two respects. Firstly, there were now two different registration systems which needed to be considered (the privately held register of charges which the company kept at its registered office, and the public register of registered charges maintained by the Registrar of Companies at the BVI Companies Registry). The relevant statutory sections under the BVI Business Companies Act appear at first blush to be much wider. Section 162 (dealing with the private register) refers to “a charge created by the company” and section 163 (dealing with the public register) refers to “[w]here the company creates a relevant charge.” On the fact of it, both registrations seem to be shorn of the former requirement that this needs to relate to property of the company, suggesting that the new registration regime ought to extend to property held upon trust.

However, it is arguably too artificial to construe those two sections alone without considering Part VIII of the BVI Business Companies Act as a whole. Part VIII essentially commences with section 161 which refers to the power of a company to “create a charge over *its property*.” Furthermore, section 166 (which expands upon the public registration regime) refers to a “relevant charge on property of a company.” Accordingly, although sections 162 and 163 when read alone suggest that charges over trust property may be registrable, when read in conjunction with sections 161 and 166, Part VIII as a whole seems to suggest that the company charges registration regime should still be construed as only applicable to charged property which the company owns beneficially, and not property held on trust.

When faced with difficult questions of statutory interpretation, lawyers often resort to seeking to ascertain the “purpose” of the relevant provision. With respect to the registration system under Part VIII, it appears that the two different registrations serve two different purposes. The private registration under section 162 appears to be simply a matter of corporate record keeping - it is not available for public inspection, and does not affect third party rights. Accordingly, if one accepts that it is simply a matter of the company’s records, much like the share register, the register of directors or even the accounts, then that would suggest that charges over property held on trust should not need to be recorded. After all they affect neither the company’s balance sheet (as the assets are not owned by the company beneficially anyhow), nor the rights and interests of the company’s shareholders.

However, arguably the position is different with respect to the public registration and section 163. Public registration serves two purposes - firstly, to give public notice of charges over the relevant assets, and secondly to fix priority of claimants in the event that more than one security interest is created over the same property. If one accepts that charges over trust property are not registrable, then that would mean that there would be no public record of them under the company charges registration system. Similarly, the mechanism for determining the higher ranking priority between

competing secured creditors would be absent with respect to charges over trust property.

Whilst those arguments do seem to suggest that there would be sensible reasons for interpreting section 163 in favour of registering such charges, realistically both of those arguments are somewhat limited. With respect to public notice - whilst it is true that non-registration would mean that charges over trust property are not readily knowable by the public, that is scarcely unique in British Virgin Islands law. There is, for example, no way of publicly registering security interests created by partnerships either. Is the argument that trusts should be interpreted to be more like companies any stronger than the argument that trusts should be interpreted to be more like partnerships? Furthermore, although section 163 is almost universally observed, it is important to remember that it is optional - the parties are not required to register security in the public register - but they may choose to do so. The fact that this is elective in any event means that it carries much less force as a reason for a particular construction.

Similar arguments can be made in relation to the determination of priority - there are lots of areas of British Virgin Islands law where priority is not regulated (again, the closest example would be partnerships), and the same point can be repeated - given registration under section 163 is not mandatory, why should any great weight be attached to establishing priority? Indeed a further argument can also be made which militates against reading section 163 to include charges over trust property - and that is found in the Trustee Act, 1961. Section 102 of the Trustee Act broadly provides that trustees may “opt-in” to a system, whereby they create “trustee statutory charges”. And, if they do so, then these trustee statutory charges have their priority regime specified by the Trustee Act. Accordingly, if a trustee does opt into that system, then there is already a priority regime, and one which might potentially conflict with the priority regime under the BVI Business Companies Act if both priority regimes were held to apply. As is seemingly the case with all the arguments in this article, one should not put undue weight on this: the trustee statutory charge regime is also optional, and does not affect all trusts; and furthermore, conflicts between the priority regime under the BVI Business Companies Act and other statutes certainly exist elsewhere.³ However, it is respectfully suggested that the existence of the trustee statutory charge priority regime should give greater weight to interpreting the company charges regime as excluding charges over trust property.

So what is the answer? It does not appear that a clear-cut answer exists, but we would respectfully suggest that the better view is that charges created over trust property should *not* be regarded as registrable either under section 162 (private registrations) or section 163 (public registrations). That seems to be both the more natural interpretation of the relevant sections, and is at least not inconsistent with the statutory purpose behind the relevant sections.

³ For example, with the Registered Land Act, 1970 and the Merchant Shipping Act, 2001.

Furthermore, it would avoid unnecessary conflict with the statutory priority regime under the Trustee Act.

However, in common with just about everything else in this article, that comes with a qualification. Just because a security interest over trust property may not require registration under Part VIII of the BVI Business Companies Act, that does not mean that such charges *cannot* be so registered or that they *will not* be so registered. In relation to section 162 (the private register), registering or not registering really only has one consequence - if a company fails to register a charge which ought to have been registered, it is potentially subject to a fine. Against that background, many companies which act as trustees may simply elect to include the charge over trust property in the register as a precaution.⁴ Similarly, any secured creditor has the power to register under section 163 (the public register); given that it is quick and inexpensive, many secured creditors will probably nonetheless elect to register charges over trust property as a precaution.

Further Information

The foregoing is for general information purposes only and not intended to be relied upon for legal advice in any specific or individual situation.

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⁴ The risk of a fine is probably remote. As noted above, the law seems particularly complex as to whether registration is required or not. Even assuming our view is wrong, and that security should be registered, because criminal penal provisions are construed in favour of the accused, the risk must be very small.