

Private Trust Companies

Introduction

A private trust company ("PTC") is a useful vehicle to consider in the planning and establishment of trust structures for wealthy families. Rather than transferring assets to an offshore service provider's professional trustee company, certain families may prefer to establish their own corporate trustee (a PTC) to act as the trustee of the trusts which they plan to create.

Depending upon the circumstances of the individual client, a variety of factors may influence such a decision: these may include a desire to retain a measure of control in relation to the structure being created; a wish to preserve confidentiality; or a focus on ensuring that the trustee will have a working knowledge in relation to the assets held within the structure (such as a family business) and will be able to respond speedily whenever commercial decisions need to be taken.

In this Briefing, references to PTCs are to companies which operate as corporate trustees. However, it should be noted that it is also possible for a foundation to act as a trustee, where that is considered appropriate to meet the requirements of a particular family, and that the exemption from registration (as referred to below) is available to foundations as well as to companies.

Insofar as regulation is concerned, a PTC is able to operate in Jersey pursuant to an exemption from the registration requirements which apply in relation to financial services business pursuant to the terms of the Financial Services (Jersey) Law 1998 (the "1998 Law").

The 1998 Law provides that no person shall carry on (or hold itself out as carrying on) financial services business in or from within Jersey, and that a Jersey incorporated company shall not carry on (or hold itself out as carrying on) financial services business anywhere in the world, unless that person is acting in accordance with the terms of a registration under the 1998 Law. A breach of this provision is punishable by imprisonment for a period of up to seven years, or a fine, or both.

Trust company business

Financial services business is defined in the 1998 Law to include trust company business.

A two-stage test applies in relation to trust company business for the purposes of the 1998 Law. Article 2 of the 1998 Law provides that a person will be considered to be carrying on trust company business when that person:

1. carries on a business that involves the provision of company administration, trustee or fiduciary services, or services to foundations; and
2. in so doing, provides one or more of the services which are listed at sub-clause (4) of Article 2 of the 1998 Law.

The services listed at sub-clause (4) of Article 2 of the 1998 Law are as follows:

- " (a) *acting as a company formation agent, a partnership formation agent or a foundation formation agent;*
- (b) *acting as or fulfilling the function of or arranging for another person to act as or fulfil the function of director or alternate director of a company;*

- (c) *acting as or fulfilling the function of or arranging for another person to act as or fulfil the function of a partner of a partnership;*
- (d) *acting as or fulfilling the function of or arranging for another person to act as or fulfil the function of a member of the council of a foundation;*
- (e) *acting or arranging for another person to act as secretary, alternate, assistant or deputy secretary of a company;*
- (f) *providing a registered office or business address for a company, a partnership or a foundation;*
- (g) *providing an accommodation, correspondence or administrative address for a company, a partnership or a foundation or for any other person;*
- (h) *acting as or fulfilling or arranging for another person to act as or fulfil the function of trustee of an express trust;*
- (i) *acting as or fulfilling or arranging for another person to act as shareholder or unitholder as a nominee for another person. "*

Private trust company business exemption

Whilst the activities of a PTC might otherwise (in view of the above list) require registration, PTCs are able to operate without registering under the 1998 Law pursuant to the terms of the private trust company business exemption which is contained within the Financial Services (Trust Company Business (Exemptions)) (Jersey) Order 2000. The exemption is worded in the following terms:

"Private trust company business

A person being a company –

- a) *the purpose of which is –*
 - (i) *solely to provide trust company business services in respect of a specific trust or trusts, or*
 - (ii) *to act for that purpose and to act as a member of the council of a foundation or of foundations (otherwise than as a qualified member, as that term is defined by the Foundations (Jersey) Law 2009);*
- (b) *that does not solicit from or provide trust company business services to the public; and*
- (c) *the administration of which is carried out by a registered person registered to carry out trust company business,*

when providing a service specified in Article 2(4) of the Law where the name of the company is notified to the Commission."

Where this exemption applies, there is no requirement for a PTC to register under the 1998 Law and no licence fee is payable in Jersey in order to conduct the proposed trust company business.

The private trust company business exemption is categorised as a limited exemption. Consequently, although there is no registration requirement, certain provisions of the 1998 Law will nevertheless apply so that the Jersey Financial Services Commission (the "Commission") is able to exercise a supervisory role in relation to those PTCs which operate under the exemption.

Conditions

In relation to the availability of the private trust company business exemption, the following are key points to note:

1. A company, wherever incorporated, can operate pursuant to the exemption as it is not limited to Jersey companies. (Indeed, as noted above, the exemption is also available to Jersey foundations, following the introduction of the Foundations (Jersey) Law 2009 (the "Foundations Law").

2. There is no requirement to insert particular language into the constitutional documents of a company which will act as a PTC in order to comply with the conditions of the exemption and standard private company memoranda and articles of association can be used. However, for the exemption to be available, the PTC's purpose must be only to provide trust company business services in respect of trusts (and not also in relation to companies) and, if appropriate, to act as a council member of a Jersey foundation.
3. It is a condition that the PTC does not solicit from or provide trust company business services to the public. The intention underlying this requirement is that the PTC will be acting as trustee in relation to one or more trusts established for a particular family and will not be providing or marketing its services to third parties.
4. The administration of the PTC must be carried out by an entity which is itself a registered person under the 1998 Law, registered to carry on trust company business.

There is no definition or published guidance from the Commission in relation to what constitutes "administration" for the purposes of the exemption. A question which often arises in this context is whether it is necessary for the registered trust company service provider to supply one or more of the directors of the corporate trustee. In so far as the 1998 Law is concerned, this is not prescribed as a requirement and the Commission's approach is to rely upon the registered trust company service provider to ensure compliance with the terms of the exemption (including the requirement in relation to administration) and the Commission will routinely check the structuring of PTCs in the course of its regulatory visits.

In practice, whilst there is no statutory or regulatory requirement in this regard, the board of a PTC will typically include one or more directors provided by the registered trust company service provider.

5. There is no formal or prescribed application procedure to be completed in order to obtain the exemption; all that is stipulated is that the name of the PTC must be notified to the Commission.
6. There is no requirement to submit to the Commission copies of documents in relation to the trust or trusts in respect of which the PTC is to act as trustee. There is also no requirement that the constitutional documents of the PTC should name or refer to the trust or trusts which will be involved in the structure.
7. In relation to anti-money laundering ("AML") legislation, a PTC which operates pursuant to the exemption (and provides the services specified in the exemption) is not required to appoint its own money laundering officer and to comply in its own right with AML procedures, as responsibilities in this regard will be focused on the registered service provider which administers the PTC.

Directors' liability

The board of directors of a PTC will frequently be comprised of a mix of the settlor's family members and professionals. For those contemplating becoming directors of a PTC, the existence of Article 56 of the Trusts (Jersey) Law 1984 (the "Trusts Law"), which was repealed in the Autumn of 2006, was historically regarded as a potential cause for concern. Article 56 of the Trusts Law effectively operated as an exception to the general rule that a director's fiduciary duties are owed only to the company and not, for example, to the beneficiaries of a trust in respect of which the company discharges the role of trustee.

Article 56 of the Trusts Law was expressed to apply to a corporate trustee which was a trustee of a Jersey trust, was resident in Jersey, or was carrying on business in or from a Jersey address and provided that every director of such a trustee which had committed a breach of trust would automatically be deemed to be a guarantor of the corporate trustee in respect of any pecuniary damages and costs awarded by the Royal Court against the trustee in respect of such breach, unless the court ordered otherwise.

This statutory guarantee provision, which does not have an equivalent in other offshore jurisdictions (save for Guernsey) had rarely, if ever, been used in practice since its introduction in the 1980s.

Following the repeal of Article 56 of the Trusts Law, the potential liability of the directors of a Jersey PTC will fall to be assessed and determined in accordance with general principles and so might, for example, encompass liability for dishonestly assisting a PTC to commit a breach of trust or, possibly and in an exceptional case, liability to beneficiaries under what is known as the "dog-leg" claim.

The possibility of a "dog-leg" claim has been put forward on the basis that a director owes a duty of care to the company and that, where there is a breach of that duty which causes loss, the company has a right of action against the director. On the premise that this cause of action constitutes trust property (which may be easier to establish in circumstances

where a PTC acts exclusively as the trustee of one trust than in other situations), the suggestion is that the beneficiaries of the trust should be able to enforce it if the trustee is not prepared to do so.

This type of claim was considered by the Royal Court in *Sheikh Mohamed Alhamrani & Others v. Sheikh Abdullah Ali M Alhamrani & Others* [2007] JRC 026 where, following the repeal of Article 56 of the Trusts Law, leave was sought to amend so as to allow "dog-leg" claims against two directors of the corporate trustees involved in ongoing proceedings. In circumstances described as "wholly unexceptional", where the corporate trustees acted in respect of a multiplicity of trusts, their duties were not confined to one trust and were ordinary statutory duties, and where there was no evidence of a lack of insurance on the part of the trustees, Page Commissioner could see "no prospect whatever" of a "dog-leg" claim succeeding. The judicial authorities and the academic and practitioner comment which had been referred to the court did not disclose any consensus of opinion that a claim of this kind was logically sustainable and necessary or desirable and Page Commissioner was "strongly confirmed" in his decision by the repeal of Article 56 of the Trusts Law. In the Commissioner's opinion, it would be wrong for the Jersey courts to start "re-fashioning a head of liability that the legislature has so comprehensively and recently renounced and declined to replace."

Whilst this Royal Court judgment accordingly provides clear authority in an "unexceptional case", the theoretical possibility nevertheless remains that, in Jersey or elsewhere, a "dog-leg" claim might conceivably succeed in an "exceptional case" where that is necessary in the interests of justice in the particular circumstances and where, as a matter of fact, it is determined that the right to enforce the director's duties at issue is indeed a trust asset rather than a general asset of the corporate trustee.

However, it is the case that, following the repeal of Article 56 of the Trusts Law, the potential liability of directors of Jersey PTCs will be determined in accordance with general principles and will not be increased by the existence of the statutory liability which applied prior to the autumn of 2006.

Ownership structures

The ownership structure selected for a PTC will be influenced by the particular circumstances (including family dynamics and tax considerations) and wishes of the individual client. One option for consideration is for the PTC shares to be held directly by the settlor and other family members; alternatively, the PTC may be owned by a trust or by a foundation.

The settlor or his family

Whilst direct ownership by the settlor and/or other members of his family may be the simplest ownership structure to put in place, it may not necessarily be advisable or suitable. In addition to taxation or confidentiality issues, there may be concerns within one or more branches of the family that the PTC should not be owned by only certain individuals within the family. In order to address such issues, it may be preferable to consider an alternative ownership structure.

Another consideration which may weigh against this ownership option is that of succession planning. Whilst a partial solution may be to structure the ownership of the shares in the PTC so that these are held jointly and pass by survivorship outside the ambit of a probate procedure, this is not likely to provide a complete solution. Again, it may therefore be preferable to consider alternative options.

Purpose trust

An alternative to the above is to establish either a charitable or a non-charitable purpose trust to hold the shares in the PTC.

With a non-charitable purpose trust, an enforcer is required and thought will therefore have to be given as to who should fulfil this role. The requirement of the Trusts Law is that the enforcer must be a separate entity from the trustee and it may be that an established professional family adviser is considered appropriate.

All Jersey law trusts, whether charitable or not, can be drafted so as to continue in existence for an unlimited period. Accordingly, either a charitable or a non-charitable purpose trust can be used as a vehicle to hold the shares in a PTC on an unlimited duration basis where that is required (for example, in the case of a "dynastic" structure being put in place for a wealthy family).

Foundation

Following the introduction of the Foundations Law, a further possibility for consideration is the incorporation of a Jersey foundation to hold the shares in the PTC. As with a trust, it is possible to create such a foundation for an unlimited

period of existence and, unlike a company, it will not have shareholders so that ownership issues will not arise in that context. For further information in relation to foundations, please see our Briefings on the [Bedell Group website](#).

For further information in relation to the above, please contact:

Zillah Howard

T +44 (0) 1534 814735

zillah.howard@bedellgroup.com

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