Private trust companies: how to obtain the best of all worlds

Christopher McKenzie*, Partner, O'Neal Webster (UK) LLP

Abstract

This article considers why private trust companies are currently so popular, various structuring issues which those setting up private trust companies should take into consideration, and the private trust companies regulations which came into force in the British Virgin Islands (BVI) in August 2007 and which were amended in 2013.

Introduction

Private trust companies (PTCs) have become increasingly popular offshore in the last 20–25 years. A PTC may be defined as a company which is incorporated with its main function being to act as the trustee of a specific trust or a number of 'related' trusts.[1] It should be contrasted with a professional corporate trustee, bank, or financial institution which offers its services to the general public for a fee. In contrast, PTCs tend to be less regulated.

PTCs operate within the framework of general company law and trust law, but they may also be subject to regulatory requirements.

Clearly when setting up a PTC, one of the most basic points to consider is that the company's memorandum (or constitution) must give it the power to act as trustee of the particular trust or trusts of the kind intended.

1 For example where trusts have the same settlor or one or more of their beneficiaries or objects of powers of appointment are the same.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

In addition, when structuring the company, it is always sensible to obtain advice from lawyers from the jurisdiction in which the company is incorporated, from where the trust is to be administered and from those from the jurisdiction the proper law of which is to govern the trust (or trusts). Tax advice on structuring issues should always be taken from qualified advisers in the relevant jurisdictions.

Disadvantages of individuals acting as trustees

Traditionally it was customary for trustees to be individuals who were generally unpaid.

It is often inappropriate for the settlor or members of a family to act as trustees of offshore trusts in view of tax concerns (which might arise, for example, because the trust fund or its income is taxed on the basis of the trustees' residence or the place from which the trust is administered).

Should one or more individuals in an offshore jurisdiction (such as a lawyer or accountant from the trust jurisdiction) therefore act as trustees?

In an article which appeared in *The Times* some time ago, a partner of one of the large accounting firms is quoted as saying, 'the one thing that I am not prepared to do in retirement is to be a trustee of anything: the risks are too awful' and in a well-known English decision[2] Brightman J said, 'trustees are above ordinary mortals'. Understandably, particularly in the offshore context, there is an increasing reluctance for individuals to take on trusteeships, since the values of trust funds tend to be very significant. In today's climate of increased trust litigation, times have changed from the days when the family's lawyers or accountants were prepared to be trustees.

Trust law imposes onerous duties on trustees. They must, for example, act in accordance with the express provisions of the trust instrument and in accordance with their fiduciary duties to the beneficiaries.

[2] Bartlett v Barclays Bank Trust Co. Ltd. See n 3 below.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

As a result of the decision in *Bartlett v Barclays Bank Trust Co. Ltd.*[3] if the trust is a traditional[4] trust, they also have duties to monitor and supervise the affairs of underlying companies. There is therefore considerable scope for breach of trust.

In the absence of any special provision in the governing law of the trust to the contrary (such as provisions which were enacted in the BVI)[5], trustees might also find themselves personally liable to third parties if they omit, say, to include in a contract with the third party a provision to the effect that third party may only have recourse to the trust fund—and not against the trustee personally.[6]

What can trustees do to protect themselves?

An element of protection might be provided by exoneration clauses (which it is now customary to include in trust instruments); however the English Court of Appeal decision in *Armitage v Nurse*[7] made it clear that these provisions will not be effective to protect trustees against deliberate breaches of trust.

Similarly it is possible for trustees to take out insurance policies to cover themselves against potential liability. However in the offshore context, where the value of the underlying trust funds may be in the tens or hundreds of millions or even billions of dollars, the cost of insurance may be prohibitive.

Liability concerns might also be alleviated to the extent that there are provisions in the trust's governing law exonerating a trustee from personal liability.

[3] [1980] Ch 515.

[4] That is a non-VISTA trust. A VISTA trust is one which has been set up under the Virgin Islands Special Trusts Act, 2003.

[5] Part X of the Trustee Act.

[6] See however Part X of the BVI's Trustee Act which may provide the trustee with some assistance.

[7] [1998] Ch 241. See also *Walker v Stones [2001] QB 902* which further limits the extent to which professional trustees can be protected: an exculpatory clause cannot protect them against liability for a breach of trust which is committed honestly if no reasonable professional trustee could honestly have done what it did.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

There are provisions in section 63 of the Trustee Act of the BVI, which are identical to those contained in section 61 of the English Trustee Act 1925, which relieve a trustee from personal liability if it appears to the court that the trustee has acted honestly and reasonably and ought fairly to be excused.

Section 64 of the BVI's Trustee Act[8] also provides that where a trustee commits a breach of trust at the instigation or request (or with the consent in writing) of a beneficiary, the court may, if it thinks fit, make such order as to the court seems just, for impounding all or any part of the benefit of the beneficiary in the trust estate by way of indemnity to the trustee or persons claiming through him.

Additionally provisions are often found in the trust's proper law (such as those contained in the BVI's Trustees' Relief Act) which enable trustees to apply to a judge for his or her opinion, advice or direction on any questions relating to the management or administration of trust assets—and which provide that any trustee acting on such opinion, advice or direction will generally be protected when doing so. In practice these provisions are used much too infrequently.

Perhaps most significantly, the BVI's VISTA trust legislation, which came into force in March 2004, enables special types of trusts, known as VISTA trusts, to be set up which disengage trustees from management responsibilities in relation to underlying companies. A great deal of use has been made of this legislation (since it effectively enables trustees to take a trusteeship of trusts where they would previously have been disinclined to do so as a result of liability concerns). VISTA can often provide an effective alternative to a PTC (and indeed PTCs can now provide sole trusteeship of VISTA trusts).

Trustees may also be able to obtain indemnities from settlors and beneficiaries, but, of course, indemnities may be of limited use since (i) those concerned may not be prepared to give them, (ii) unascertained, unborn, infant and incapacitated beneficiaries will not be able to give indemnities, (iii) indemnities are only worth what those that give them are worth and (iv) there may be difficulties in enforcing indemnities (especially in other jurisdictions).

8 The provisions of which are the same as those of s 62 of the English Trustee Act 1925.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

In view of the reluctance of individuals to act as trustees, it is generally considered advisable for trustees to avail themselves of the benefit of limited liability which is usually a feature of corporate vehicles.

Another disadvantage of appointing individuals as trustees is that they will generally need to be replaced at some stage, whereas a trust may exist for many years longer than the probable lifespan of adult individuals. Under BVI law, for example, a beneficiary trust can last 360 years or more and charitable and non-charitable purpose trust may last indefinitely. When trustees change, all the trust assets will need to be transferred to the new trustees, accounts to the date of the change of trusteeship will need to be prepared, and the terms of the retiring trustees' indemnities can give rise to disputes, delays and additional costs.

A company, on the other hand, will generally have perpetual existence. Changing its directors is much more straightforward.

Disadvantages of banks and other financial institutions as trustees

What alternative is there to the appointment of individual trustees? Obviously one alternative is to appoint a bank or a financial institution as the trustee. The appointment of a bank or financial institution can however suffer from a number of disadvantages.

First the settlor might be put off by the institution's charges which he or she might regard as disproportionate in terms of its perceived role. Its charges might be based on the value of the trust fund (which is likely to be significant) and/or its charges might be based on the amount of time spent by the institution's employees in administering the trust. If, for example, the trust fund comprises either directly or indirectly shares in the settlor's family company or business assets, a lot of time consuming work might need to be done and the trustees' fees could therefore be substantial. Alternatively the trustee may want a fiduciary-risk related element built into its fee.

These disadvantages (and these additional fees) can, however, be largely eradicated if a VISTA trust is set up since the legislation provides that the trustee cannot exercise its shareholder powers to intervene in the affairs of underlying companies unless a beneficiary (or another specified person) makes what is

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

defined in the statute as an 'intervention call.' This, combined with the exoneration provisions in the statute, should help to keep fees in check.

Settlors from onshore jurisdictions might also be reluctant to appoint as trustees institutions in jurisdictions with which they are not altogether familiar—especially given the very wide administrative powers which it is conventional to confer on trustees. These concerns will be exacerbated to the extent that, say, the trust is a discretionary trust and the trustees have been given an enormous amount of leeway in terms of making capital and income appointments, adding and removing beneficiaries, etc. (especially when they are told that letters of wishes are not legally binding). Settlors who are unfamiliar with trusts, such as those from the Asia Pacific, the Middle East, Latin America, and civil law jurisdictions are often particularly perturbed by the fact that they have to give up control over the underlying assets. Although the settlor's concerns regarding the *jurisdiction* might be alleviated by including powers to change the trust's proper law or 'flee provisions' in the trust instrument and his or her concerns about unfamiliar trustees might be alleviated by appointing a protector (who in appropriate cases might initially be the settlor) who has, say, the power to remove and appoint new trustees and to veto capital distributions (and/or—if this is advisable from a tax point of view—including a power to revoke the trust in the trust deed), the settlor might still feel reluctant to give up ownership of his or her treasured assets.[9]

Although it is likely to be a limited liability company, since it will also be a business concern with a reputation to protect, the institutional trustee will[10] also be anxious to protect itself against the liability risks which have been referred to, which will mean the expenditure of additional time and effort in administering the trust and the involvement of third party experts, and this will give rise to additional fees. These liability issues are increasingly a matter of concern for professional trustees (who generally have a higher duty of care than unremunerated lay trustees[11]) and will also affect the way in which the trust is administered. If the trust is a traditional (i.e. a non-VISTA) trust, institutional trustees are often reluctant to take on ownership of assets or to participate in activities involving risks. Normally a trustee

[9] These concerns can, of course, be further alleviated if a VISTA trust is set up, because the VISTA legislation effectively enables settlors (or family members or the settlor's appointees) to have more or less complete control over administrative, managerial and investment matters at the director (or company) level by inserting a BVI holding company into the structure.

[10] If the trust is not a VISTA trust.

[11] See n 7 above.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

would want to ensure that the trust fund is invested in a diversified portfolio of low risk investments such as government stocks and a narrow range of equities. However today's settlors want trustees to take on ownership of assets involving risks, such as real property, ships, aircrafts, venture capital or emerging market investments—or to participate in high risk activities.

Again VISTA offers a viable alternative in many cases, since speculative, risky or unusual investments (such as interests in hedge funds, options, ships, aeroplanes, shares in trading companies) can be held through a BVI holding company and the trustee will have no role in (or liability for) investment decisions (which would be the responsibility of the director or directors of the holding company).

In view of these liability concerns which arise where the trust is not a VISTA trust (and as a result of possible 'sham' and related considerations), professional trust companies also tend to be reluctant to allow settlors and members of their family to continue to be involved in the decision-making process. However the family might not be too happy about this when the underlying trust fund comprises the family business which its members have built up or which it has been involved in running for years.

Moreover it is often inappropriate for professional trustees to be involved in the running of a family business or trading company, since trustees invariably lack the necessary expertise. Additionally professional trustees cannot always deal with the affairs of a business as quickly and as flexibly as can a settlor—and these concerns will be augmented when the clearance of the institution's head office or legal department may be required for important decisions or when there are changes in the trustees' staff. (Of course these considerations would not apply if the trust is a VISTA trust—in which case the trustee is largely prevented from involving itself in management, administrative and investment decisions).

Advantages of private trust companies

The principal advantage of a family trust company is that (like VISTA) it generally enables the settlor and his family to exercise a significantly greater degree of control over the trustee's decisions by being the directors of the trust company. Similarly a structure involving a private trust company can be set up to enable beneficiaries to be empowered.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

The corporate structure will furthermore also be much more readily understood by non-professionals, especially those from non-trust jurisdictions and can be more readily integrated into a family office structure.

A further significant advantage of the incorporation of one's own company specifically to act as trustee of the trust which one has settled is that the trustees' charges may be lower, although it certainly would not be advisable for the trust to be administered in such a way to eliminate professional charges altogether.[12]

In general the trust company will enjoy the full advantage of limited liability and, since the company will be a 'shell' with no—or very few—assets of its own other than its paid-up share capital (which is likely to be minimal[13]) and will not be part of a group of companies with a reputation to protect, it would not necessarily need to adopt such a cautious approach when administering the trust as would a financial institution[14].

Another advantage is that confidentiality can be preserved and this is an issue which is of particular importance to the many families from jurisdictions where concerns over financial privacy are driven by issues of personal safety. The circulation of information in relation to the trust, the settlor's family affairs and his or her assets will be somewhat more limited than would be the case were an institutional trustee (with numerous staff members) to be involved. An additional tier of confidentiality could be imposed by holding shares through nominees or through other trust arrangements.

Private trust companies, with family members as directors, will often be able to respond more flexibly and in a more timely manner than can institutional trustees. They can also make decisions on the basis of their own personal knowledge and changing circumstances. It may, moreover, be far more appropriate if the settlor and his family were to be involved in the management of a family company business since such

12 See *'The sham risk—improved or worsened? '* below.
13 Depending on any local regulatory requirements.
14 The circumstances in which directors of a corporate trustee can be held liable are referred to in *'Who will be the directors, officers and managers?'* below.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

individuals will have much more expertise in dealing with matters relating to the business than the staff of an institutional trustee.

They can also continue to operate the 'family philosophy' in running the underlying business (This would also be possible under a VISTA structure with family directors of the underlying company).

If a PTC provides trusteeship, there is, however, no reason why professional trustees could not provide management and administration services (such as the provision of registered agents, principal office, record keeping, accounting and other administrative services pursuant to an administrative agreement) and possibly also provide directors and officers. This could very well have advantages. The professional trustee could also provide advice and act (with limited responsibility) as trustee of a purpose, charitable or beneficiary trust (see *'Use of purpose trusts'* and *'Other options for ownership'* subsequently) which is set up to own the shares of the private trust company. The provision of these services could very well enable the professional trustee to maintain a close relationship with the family without putting itself in a situation in which conflicts with the family arise or one involving unacceptable risks: it should allow the professional trustee to do what it does best and to charge for this at a level which settlors regard as acceptable, without constant concerns about liability.

Who will be the directors, officers and managers?

It is important to decide on the identity of the directors of a private trust company, since the directors will, in effect, make the decisions of the trustee and, as has been indicated, the trustee is likely to have numerous discretionary dispositive and (in the case of a non-VISTA trust) administrative powers. It is equally important that the power to appoint new directors is vested in the right people.

It may be appropriate for the settlor and/or members of his family to be directors and/or officers of the private trust company, in order to enable them to control or participate in the decision-making process. Trusted friends and advisers could also be appointed as directors and/or officers. This would alleviate concerns about passing control to unknown third parties.

O'Neal Webster (UK) LLP

*Christopher McKenzie, Partner – cmckenzie@onealwebster.com

31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

Tax considerations may also be relevant. It can sometimes (but not always) be best, from a tax perspective, for the family members to be a minority on the board.

It might also be appropriate for directors and/or officers to be provided by an institutional trustee, since this might involve a reduced risk to the institution (on the basis that directors generally owe a much lower standard of care than trustees).[15]

If there is to be a sole director of the PTC who is also its sole shareholder (which would usually be inadvisable for the issues considered below under the heading *"Other risks and disadvantages of private trust companies"*) it might well be prudent to take advantage of those of the provisions of the BVI Business Companies Act, 2004 which enable 'reserve directors' to be appointed so that their appointment is activated on the death of the sole director. This would be done with a view to avoiding the need to make an application to the BVI court to appoint another director in order to transfer the shares of the PTC to those entitled to them once a BVI grant of probate or letters of administration has been obtained.

Do remember to bear in mind statutory provisions forming part of the laws of jurisdictions such as the Turks and Caicos Islands (and, until relatively recently, Jersey) which make directors of trust companies liable as guarantors for breaches of trust committed by such companies (although the courts can relieve them from liability if they are unaware of the breach, have not acted recklessly or negligently and could not have prevented the breach by exercising their rights as directors/shareholders).[16]

Directors of trust companies (whether they be institutional trustees or private trust companies) should also be aware that, even in the absence of a specific statutory provision, there are circumstances in which personal liability can attach to them as a consequence of the decisions which they make as directors. In the *HR v JAPT*[17] case the court considered six possible grounds upon which a director of a corporate trustee could become potentially liable. Whilst detailed consideration of those grounds is beyond the scope of this article, the position can probably be summarized by saying that, in the absence of a specific statutory

15 Moreover certain jurisdictions require at least one director to have experience in trust administration.
16 Such provisions have never formed part of BVI law.
17 (1997) PLR 99.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

provision, directors and officers of corporate trustees are not automatically liable for breaches of trust committed by the corporate trustee, but that they may incur personal liability if they have been 'dishonest' or if they have breached a duty which is owed to the trustee company itself.[18] It has therefore been suggested that it is wise to include, in the trust deed's exoneration clause, a provision which specifically exonerates directors and officers of the corporate trustee as well as the trustee itself.[19] Director insurance should also be considered.

Directors should also be aware that they might be personally liable to third parties for entering into transactions on behalf of the trustee company (unless such liability is excluded) or liable under company and insolvency legislation.

There also exists the risk that if the directors of a PTC administer the trust so poorly that the beneficiaries have a significant claim for breach of trust against the PTC (which is merely a shell with no assets to satisfy the claim) liability could be pinned on the directors if the PTC is ruled (as a consequence) to be insolvent. The idea here is that reckless directors could face personal liability in an insolvency claim.

Who will own the shares in the private trust company?

One possibility is that the shares in the company might be owned by the settlor and/or members of his or her family (possibly through nominees). If they are not also directors, the company's articles of association will usually give the shareholders power to replace directors of the company and this might therefore enable them to exert an element of control. Again, however, tax considerations might be relevant.

On the other hand some settlors might not want to be connected directly with the trustee company or to be shareholders for fear that the trust might, as a result, be regarded as a sham or because local tax legislation might, as a consequence, regard the settlor as continuing to own the trust property as a result

18 Such a claim is known as a 'dog leg' claim and is probably unlikely to succeed against directors of a professional trust company which acts as trustee of a large number of trusts, although the possibility that such a claim will succeed against directors of a 'one-trust-no-asset company' created and administered solely for the purpose of administering a particular trust cannot be entirely ruled out.

19 Although the protection that such a clause purports to confer may be illusory.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

of his or her control (or because he or she might thereby have, or be entitled to, access to information about the trust which might be extorted from the settlor in the settlor's home jurisdiction).

As an alternative, if it is advantageous for there to be no beneficial owner of the shares, they might be held by the trustee of a charitable or non-charitable purpose trust.

Use of purpose trusts

Non-charitable purpose trusts are essentially creatures of modern statute (for example section 84 A of the BVI's Trustee Act which contains very comprehensive and well-thought out purpose trust provisions) and involve the extension of the charitable trust concept into the arena of non-charitable purposes. STAR trusts[20] are indigenous to the Cayman Islands[21] and very often take the form of purpose trusts.

The idea here is that, owing to the liability concerns which have been outlined (and also to concerns to the effect that settlors do not want to be connected directly with or to be the beneficial owners of it), the private trust company's shares will be held by the trustees of a purpose trust which has no beneficial owner.[22]

VISTA charitable or non-charitable purpose trusts are often considered ideal to own the shares of unremunerated private trust companies since, as has been mentioned, they largely disengage the trustee (the legal owners) from any responsibility for the management of the affairs of the PTC (leaving this to the directors) and can ensure that the shares in the PTC cannot be disposed of without the directors' agreement.

Since the identity of the directors of a PTC is usually critical, another reason why VISTA trusts are frequently established to own the PTC's shares relates to the 'office of director rules' which are a feature

---

[20] Although purpose trusts set up under s 84A of the BVI's Trustee Act can be very similar to STAR trusts: they can now be set up for the benefit of individuals who have no standing to enforce them.

[21] Trusts set up under Part VIII of the Trusts Law.

[22] Although careful consideration should always be given to the trust's purpose.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

of the legislation. These are rules which determine how trustee-shareholders must exercise their powers in relation to the appointment, removal and remuneration of the directors of an underlying company. When shares in a PTC are held by the trustee of a VISTA trust the advantage of the legislation is that it is unique in that it can provide an effective 'succession mechanism' for directorships in the company.[23]

Other options for ownership

Other alternatives for owning shares in private trust companies include companies limited by guarantee, civil law foundations and discretionary trusts in favour of beneficiaries.

Regulation

In most properly regulated offshore jurisdictions there are fairly robust licensing, audit and other regulatory requirements for companies which offer trustee services to the general public for a fee. And in at least some offshore jurisdictions PTCs, or some PTCs, also need licences from the regulatory authorities. The regulatory legislation of the BVI is (largely) to be found in its Banks and Trust Companies Act, 1990 ('BTCA').

Detailed consideration of the regulatory legislation of the offshore financial centres other than the BVI is beyond the scope of this article.

The BVI's private trust company regulations

[23] As Jeremy Arnold (formerly a partner of Withers LLP) indicated in a paper presented to the BVI Branch of STEP in November 2006, 'a family which is looking to retain control over the trust administration is going to look a little askance at a structure which permits a third party, such as a professional trustee, to remove family members as directors of the private trust company'. VISTA trusts are therefore particularly attractive in this context.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

Under the BVI's Financial Services (Exemptions) Regulations 2007 (as amended)[24] (the 'Regulations'), BVI companies which act as a trustees of trusts will obtain exempt private trust company ('exempt PTC') status, provided the following conditions have been met:

- The company must be a BVI company which is a limited company.
- The company's name must include the designation '(PTC)' and its memorandum of association must state that it is a private trust company.
- The registered agent of an exempt PTC must hold a class 1 trust licence under the BTCA[25] and the company must at all times ensure that the registered agent has such a licence.
- The company must not solicit trust business from members of the public.
- The company must carry on no business other than that of being the trustee, protector or administrator of trusts[26] (or of managing or administering trusts).
- All the company's trust business must be 'unremunerated trust business' or 'related trust business'. Although detailed consideration of the meaning of this term is beyond the scope of this article, and the term is defined widely to prevent potential abuse, a company will essentially be carrying on 'unremunerated trust business' where no remuneration is paid to the company or anyone associated with it in respect of the provision by the company of its trustee services. However it is permissible for professional directors who are not otherwise associated with the company to be remunerated and payments to the company to cover its legitimate expenses will not be regarded as remuneration for these purposes. A company will, on the other hand, be regarded as carrying on 'related trust business' where all the beneficiaries of the trust (or trusts) of

[24] The Financial Services (Exemptions) Regulations, 2007 which were made under the Financial Services Commission (Amendment) Act, 2006. The latter came into effect on 15 January 2007 and enabled regulations to be made exempting specified persons or classes of persons *inter alia* from the requirement to obtain a licence under the BTCA.
[25] The Regulations also apply to companies which are protectors or administrators of trusts.
[26] The Regulations also apply to companies which are protectors or administrators of trusts.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

which it is trustee are confined to (a) the settlor, (b) charities and/or (c) those who are related (as defined in the Regulations) to the settlor (and, in the case of multiple trusts, the settlors are related to each other).[27]

The Government's fees are very modest. The fee which is payable on incorporating a new exempt PTC which is authorized to issue no more than 50,000 shares is now $1,250 (rather than the usual fee of $350). The annual renewal fee thereafter is also now $1,250 (rather than $350). BVI service providers which provide registered agent services for exempt PTCs are likely to charge fees in excess of their usual fees to reflect the additional work which needs to be done and the added responsibility which the Regulations impose on them. However in most cases it is probable that these additional charges will be very competitive depending on the particular circumstances that prevail.

The Regulations impose on the registered agent of the exempt PTC the obligation to satisfy itself that the conditions which the PTC needs to comply with in order to be eligible for the exemption are met. It is required to do this both at the outset and on a continuing basis thereafter. It is also obliged to take all reasonable steps to ensure that up-to-date copies of documents such as the trust deed and any document varying its terms (in relation to each PTC for which it acts as registered agent) are kept at its office in the BVI. These documents do not need to be filed with the Financial Services Commission or the BVI authorities and are not available for public inspection. However the Financial Services Commission does have the power to require documents and information to be produced in order to enable it to discharge its statutory functions e.g., to prevent money laundering and to assist in the prosecution of criminal investigations: these provisions are unlikely to be invoked except in cases involving actual or suspected illegality. In order to protect the BVI's reputation there are also other provisions in the Regulations which are designed to prevent abuse.

The BVI is now considered the jurisdiction of choice in which to set up a PTC

Prospective settlors generally ask the following questions when 'jurisdiction shopping':

[27] The trusts' beneficiaries may also include charities.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

- Is a licence needed and how long does it take to set up a PTC? In the BVI, provided the conditions which are referred to at the commencement of section *'The BVI's private company regulations'* of this article are met, no licence is needed and a BVI company can be incorporated very quickly.[28]
- Is it necessary to have a local director or authorized representative (or a director with relevant qualifications or experience)? There is no such requirement in the BVI.
- Are there any capitalisation requirements? There are none in the BVI.
- Must the company establish a physical presence in the jurisdiction? There is no such requirement in the BVI.
- What are the costs of setting up and running the company? In most cases these fees, which are referred to earlier, should be extremely competitive.
- What information must be provided and to whom? Must it be provided to the regulator? In the BVI it is only the company's registered agent which must be provided with copies of the trust deeds and other documents referred to above.
- What documents of the PTC are a matter of public record? In the BVI only the company's memorandum and articles of association will be filed publicly.[29]
- To what extent are directors liable? The BVI has never had any equivalents to those of the laws of the Channel Islands and elsewhere which impose or which previously imposed on directors of PTCs potential liability as guarantors.[30]

The BVI's Regulations should therefore answer all or most of the above questions in a manner which is extremely satisfactory to most would-be settlors.

The exemptions have proven to be particularly popular since they create an unparalleled degree of certainty: this certainty is always something that potential settlors find highly attractive. Furthermore the

[28] That is assuming that all KYC requirements have been satisfied. This is especially the case following the introduction by the BVI Companies Registry of its 'VIRRGIN' system which provides for the electronic filing of documents.

[29] These are likely in most cases to be fairly standard documents which reveal little more than the company's name and the fact that it is a private trust company. Although BVI registered agents are required by s 96 of the BVI Business Companies Act, 2004 to retain registers of directors and shareholders at their offices, the latter do not have to be filed publicly (and are in fact very seldom filed).

[30] Although in the BVI, as elsewhere, potential liability for directors can never be entirely ruled out: see *'Who will be the directors, officers and managers?'*, above.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

BVI's regulations do not include any artificial protectionist features such as a requirement to the effect that at least one director must be a resident of the BVI or that a BVI resident representative of the company must be appointed. Nor do they include (technically meaningless) features, such as the need to list particular trusts (as if they were legal entities) in the company's memorandum. Rather they are tailored to the unique flexibility of the BVI company—and are serving to enhance the ever–increasing popularity of the BVI company and trust. Indeed the BVI is now considered to be market leader for PTCs.

It has recently been remarked that BVI law, in so far as it relates to corporate trusteeship, now strikes the right balance between proper and proportionate regulation for professional service providers (to which the BTCA continues to apply with its full vigour) and exemptions for private unremunerated companies (which might be family-run or family-owned) and which are usually set up specifically to be trustees of particular trusts.

VISTA trusts and PTCs

A great deal of use of VISTA is being made in the context of the new Regulations for PTCs. Exempt PTCs have since 2013 been able to be the sole trustees (or one of the qualifying trustees) of VISTA trusts (and of non-charitable purpose trusts). Furthermore VISTA charitable or non-charitable purpose trusts are frequently set up to hold the shares in exempt PTCs.[31]

The sham risk – improved or worsened?

Does setting up a PTC increase the risk of a sham?

Clearly a trust is capable of being set aside as a sham where the parties never intended it to operate in accordance with its terms and the *Rahman*[32] decision in Jersey shows that the court will admit *ex post facto* evidence of the manner in which the trust is administered as evidence of the parties' intentions. Thus if the terms of the trust are ignored and, say, the trust is treated as the settlor's 'personal money

[31] See *'Use of purpose trusts'*, above.

[32] *Rahman v Chase Bank (CI) Trust Co. Ltd.* [1991] JLR 103.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

box' to do what he or she likes with notwithstanding the terms of the trust instrument, the trust will be no more than a sham.

A lot used to be said about shams. It used to be thought that many—and, according to some, even the majority of—trusts were shams, but over recent years (partly as a result of case law developments[33] which suggest that for there to be a sham there has to be an intention to deceive third parties) it now seems likely that very few trusts are in fact shams.

It does not follow from the fact that a trust is poorly administered or that the trustees in practice follow the settlor's directions—and never exercise an independent discretion—that the trust is a sham. In these circumstances it is far more likely that the trustees will be regarded as being in dereliction of their duties in administering the trust and that the purported exercise by them of various discretions might be invalidated on the basis that they never turned their minds to the exercise of the power—or never consciously exercised it. This would not necessarily mean that there was an intention at the outset that the trust would never operate in accordance with its terms.

In order to avoid the sham risk particular care should be however taken when PTCs administer trusts (especially if all the trustees' decisions are taken by non-professional directors without proper advice).

The risk that the express terms of the trust will be disregarded altogether—and that the trust will be treated by the family directors as the settlor's or the family's personal money box—will, probably be exacerbated – lamentably sometimes exponentially, where a trust is administered by lay directors without proper advice. Care should, therefore, be taken and trustees should have regard to the express terms of the trust instrument. The proper formalities should always be observed and the trustees' fiduciary duties should be adhered to. Board meetings should be held, resolutions should be passed, and discretions should be properly exercised.

Risks, and the interests of the beneficiaries, should be considered—and the directors of the PTC should take into account all relevant and no irrelevant considerations. In other words the trustees must observe

[33] See eg *Mackinnon v Regent Trust Co. Ltd.* [2005] WTLR 1367.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

all their obligations as trustees. They should not treat themselves as the nominees of the settlor or of particular beneficiaries. If the terms of the trust and the fact that it exists are disregarded, this will obviously be indicative of the fact that it was never intended that the trust would operate in accordance with its terms and this will lay the trust wide open to challenge.

Other risks and disadvantages of private trust companies

If a trust is administered without professional advice (which is more likely when the trustee is a PTC and the decisions are being taken by non-professionals), liability concerns become more prevalent. And, as has been mentioned,[34] the risk that liability can be pinned on the directors cannot be altogether ruled out. It is, therefore, more or less imperative that the trustee seeks professional advice throughout the period of the trust's administration.

The PTC must also ensure that it does exercise an independent discretion when, say, exercising a power of appointment—or else the appointment could be held to be invalid pursuant to the decision in *Turner v Turner*[35]—and invalidity can have disastrous consequences.

In other cases, the settlor might wish the beneficiaries to have the ability to sue for breach of trust if things go wrong—and this option will generally be unavailable if the company has few assets which it owns beneficially: there will be no one with 'deep pockets' to hold to account.

Additionally a more complex structure involving a PTC might prove to be expensive for a trust with a relatively small trust fund and it might be cheaper to use a professional trust company instead.

The need to cater for succession issues

[34] In *'Who will be the directors, officers and managers?'*, above.

[35] [1984] Ch 100.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

In addition to the sham risk and the liability risk, care should be taken to ensure that succession issues are catered for. In other words if the shares in the trust company are held by the settlor or family members (or as nominees for them) the issue of who is to succeed to the shares on their deaths needs to be addressed.

This is the case for several reasons.

First, when the family members who hold the shares die, it is likely that grants of probate of letters of administration will be needed in the jurisdiction in which the company is incorporated and it might instead be preferable for the shares to be placed in trust to avoid the need for this.

Secondly, the settlor might be concerned to ensure that the shares will, on the shareholders' deaths, pass into the hands of the appropriate persons. This would particularly be so if, as would be fairly normal, the shares give the members the right to appoint directors of the company. As has been mentioned the directors of the company are likely, in effect, to have all the trustees' powers—and (as has also been mentioned) the trustees are likely to have a great deal of latitude in terms of, e.g., making capital distributions and (if the trust is not a VISTA trust) making decisions in relation to the assets of the trust fund.

Avoid unusual provisions

Care should also be taken to avoid including in a PTC's memorandum or articles of association unusual provisions which prevents the company from functioning when carrying out its trustee powers. Sometimes settlors press for provisions to be included in PTCs' articles stating that there can be no sale or disposal of the trust assets, and no distributions to beneficiaries, without the consent of all the company's shareholders (or of specified shareholders). Whilst no specific cases relating to the validity concerns which might arise from including provisions such as these in corporate trustees' articles appear (yet) to have been heard by the courts, they should probably best be avoided (at least until the courts have considered such provisions). A provision such as this would effectively incapacitate a trustee so that it could not do what was required of it without being fettered.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

If such a provision were to be included in the articles of a PTC which was taking over as trustee from another trustee, this might very well give rise to grounds to apply to the court for the trustee's removal on the basis that it could not function properly (i.e., in the same way as that in which an individual trustee would not be able to function properly if he or she became mentally incapable or went away for a prolonged period).

On the other hand were such a provision to be included in the articles of an initial trustee, one of two consequences could follow: either the court might remove the trustee or else the trust might be regarded as a sham, on the basis that there would be a real question mark over the settlor's intention to create a trust which was to operate in accordance with its terms.

Maybe the above analysis is over-cautious: the counter-argument would be that such a provision would be analogous, say, to providing in the trust instrument that the consent of a protector or protective committee is required for the disposal of trust assets or distributions to beneficiaries, but it is by no means clear that the courts would adopt such a view and, in the absence of judicial guidance, such provisions are probably best avoided and other alternative mechanisms should be used instead.

Similarly it might be unwise to include in a PTC's articles provisions to the effect that unanimous directors' decisions are needed.

Conclusion

If proper consideration is given to the terms of the trust and the structuring of the trust company, as with the VISTA legislation, PTCs can provide ideal vehicles for the many families who are unwilling to relinquish control. It is however essential that very careful consideration is given, not only to these structuring issues and to the drafting of the trust deed, but also to the day-to-day management and administration of both— and to tax issues — so that the many pitfalls for the unwary can be avoided.[36]

---

[36] This article is an updated version of an article entitled *'Private trust companies: the best of all words'* with the same title which was published by Oxford University Press in *Trusts & Trustees*, vol 14, No2, March 2008.

O'Neal Webster (UK) LLP
*Christopher McKenzie, Partner – cmckenzie@onealwebster.com
31, Southampton Row, London WC1B 5HJ ■ Phone +44 (0)203 078 7295 ■ Fax: +44 (0)203 008 6015

Christopher McKenzie
Partner – BVI Trusts & Estates/Private Client
O'NEAL WEBSTER (UK) LLP
31, Southampton Row
London WC1B 5HJ
Tel: +44 (0)203 078 7295 (office)
+44 (0)203 078 7297 (direct)
+44 (0)783 702 5118 (cell)
E-mail: cmckenzie@onealwebster.com

October 2016