



## Article

# Nobody Remembers Normal

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When I last wrote in April, we were entering the uncharted waters of lockdowns. Now many of us are beginning to re-emerge ready to reset and rebuild, though it will surely be a long road. In the meantime, we have been keeping busy in Private Client and Trust in Bermuda. Like many of our clients and the onshore firms we work with, our working environments have successfully become virtualised. The new media for interacting with our clients is functioning well, although, in our world of close relationships, virtual meetings are not ideal. We are all looking forward to seeing our fellow advisors and clients again soon.

Here are a few of the current hot topics in the Bermuda private client arena:

### Economic Substance

Bermuda has approximately 15,000 foreign-owned companies, many of which are now subject to the regime of the Economic Substance Act 2018. Notwithstanding the manner of the imposition of this legislation by Brussels, our legislators, the Registrar of Companies, the private sector and, most of all, our clients should be commended for their Herculean effort to meet this new challenge, for which the first filings were due (for some entities) on 30 June. This is a very recent example of the resilience of our business community pulling together.

In the private client and trusts context many of our client structures were impacted in three important ways. First, private trust companies (PTCs) were early on excluded from scope. PTCs generally do not carry on business for profit (or core income generating activities, to use the parlance of the Act) so income is not typically that of the PTC, but rather the trust(s) of which it acts as trustee.

Secondly, in Bermuda it is now clear that carrying on business as a holding entity is only in scope if the entity is a pure equity holding entity (PEHE). Thus if a Bermuda company owns a diversified portfolio of assets including debt instruments, bonds or real estate, then it will not be a PEHE and consequently is out of scope.

Thirdly, the 'relevant activity' of financing has proved sticky for some private entities. Currently, the legislation catches any entity which provides financing for which it receives *any* consideration. We have seen a number of client structures with intra group loans which carry interest rates for various reasons. This can mean that a private client company can be caught by substance requirements. We will see if the law will be amended to exclude what often are essentially private arrangements between family entities.

Finally, Bermuda is increasingly being promoted as a jurisdiction to establish family offices, and we have seen some families adopting a physical presence on the island for their key staff and advisors, effectively preempting economic substance requirements regardless of whether or not they are in scope. With an excellent reputation, first class infrastructure and prime location, this will be an interesting space to watch. If you or any of your clients have any questions on establishing a footprint in Bermuda, please let us know.

### Litigation and privacy

Family and private wealth disputes can be particularly sensitive and unpleasant. One only has to follow the recent press reports of the conflict unfolding for a high profile English family and their prestigious London hotel to see this misfortune. Accordingly, we advise our clients of the critical importance of ensuring their wealth preservation structures are established in locations with the highest quality judiciary and a smooth-functioning and accessible court system. We are proud of Bermuda's judicial system, which in particular has a strong tradition of high quality and reasoned trust law judgments. In these times of public registers of beneficial ownership and other

assaults on the confidentiality of sensitive personal information, it is reassuring to know that the courts in Bermuda uphold the position of privacy and anonymised judgments for non-contentious civil proceedings. This position is anchored in constitutional principles and has been very clearly articulated in multiple cases by our former Chief Justice (who is now a highly regarded, sitting judge in the Cayman Islands) and upheld by our current Chief Justice. The importance of this to our clients cannot be overstated.

## Law Reform

We anticipate amendments to Bermuda's Trusts (Special Provisions) Act 1989, specifically in relation to our "firewall" provisions, as well as legislation to clarify the application of our Children's Act 1998. We will report promptly on these amendments once enacted.

On 12 July, the Bermuda Government announced that it will make its beneficial ownership register of Bermuda companies accessible to the public and proposes to bring forward legislation to that effect by January 2023. Here's some background. Bermuda has maintained its own register of beneficial owners of Bermuda companies for more than 70 years – a laudable example of due diligence ahead of its time which no doubt has been integral to Bermuda's reputation as a gold standard jurisdiction with no major money laundering scandals. Europe decided to impose the requirement for each of its member states to establish publicly accessible registers of beneficial ownership in its Fifth Anti-Money Laundering Directive of 2018 (AMLD5), requiring implementation by January 2020. However, as of March of this year, only five out of 27 member states have implemented centralised registers accessible to the public. The Bermuda Government, in line with commitments from the Crown Dependencies and the Cayman Islands, has said it will make its register available to the public in line with EU member states. So it could be some significant period of time before this actually happens. It is also interesting to note that the EU has begun enforcement proceedings against eight of its own member states (including Ireland, Luxembourg and the UK, still subject to EU law until December) for their failure to adopt the AMLD5 into their own legislation.

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