THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

NINTH EDITION

Editor
John Riches

THE LAWREVIEWS

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

NINTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in September 2020
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
John Riches

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Gavin Jordan

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Louise Robb

SUBEDITOR
Carole McMurray

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-488-0

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

BGP LITIGATION

CONE MARSHALL LIMITED

CONYERS DILL & PEARMAN

DORDA RECHTSANWÄLTE GMBH

ELIAS NEOCLEOUS & CO LLC

ESTUDIO BECCAR VARELA

HANNAFORD TURNER LLP

HANNES SNELLMAN ATTORNEYS LTD

HASSANS INTERNATIONAL LAW FIRM LIMITED

HAYNES AND BOONE, SC

HIGGS & JOHNSON

IQ EQ (ISLE OF MAN) LIMITED

LEE HISHAMMUDDIN ALLEN & GLEDHILL

LENZ & STAEHELIN

MAISTO E ASSOCIATI

MARXER & PARTNER RECHTSANWÄLTE

NIJSDRAYE | ATTORNEYS AT LAW

O'SULLIVAN ESTATE LAWYERS LLP

P+P PÖLLATH + PARTNERS

PERCHSTONE AND GRAEYS LP

PERSPECTA TRUST LLC

POTAMITISVEKRIS

PRAXISIFM GROUP LIMITED

RECABARREN & ASOCIADOS

RETTER S.À.R.L.

RMW LAW LLP

RUSSELL-COOKE LLP

SOŁTYSIŃSKI KAWECKI & SZLĘZAK

SRS ADVOGADOS

STEP

STEPHENSON HARWOOD

SULLIVAN & CROMWELL LLP

UGGC AVOCATS

WITHERS LLP

WOLF THEISS

CONTENTS

PREFACE

I would like to focus my remarks on some of the key trends that might be expected to affect the world of high net worth individuals in the immediate aftermath of the covid-19 pandemic.

I ISSUES DURING THE PANDEMIC

During the pandemic, we have seen a relatively consistent pattern among OECD countries of measures that are mainly focused on delaying obligations to file tax returns and make tax payments to reflect the turmoil in some business and personal finances that these exceptional circumstances have wrought. Interestingly, at the beginning of April the OECD issued an analysis examining double tax treaties and the impact of the crisis on individuals' presence, which may have been constrained as a result of the pandemic. The following were notable conclusions.

i Permanent establishments

For individuals constrained to work in a different location and, in particular, for those working from home, provided the state of affairs is regarded as temporary and exceptional it would not generate the required degree of permanency to create a fixed place of business.

ii Corporate tax residence

The view from OECD is that the temporary relocation of board members to different locations will not generally impact a company's tax residence.

iii Personal tax residence generally

In considering where an individual's centre of vital interest may be, any exceptional circumstances generated by the covid-19 pandemic should not, by themselves, cause an individual's residence to change.

One specific area where countries have taken steps to introduce exceptional guidance is in the context of a day count test. Specifically, Australia, Ireland and the UK have given guidance in the context of disregarding days of presence where this is used as a factor in determining residence. Clearly in all these cases, significant care needs to be taken to ensure that a temporary, exceptional circumstance does not become a permanent state of affairs. Where any tax analysis is dependent upon an individual being constrained in their ability to travel, it is likely to be prudent to keep contemporaneous records of attempts to travel to show that an individual has not changed his or her behaviour or residence in consequence of

the crisis on a more permanent basis and taken the opportunity to leave the relevant country as soon as possible. Difficulties may arise if an individual in Country A is unable to travel to Country B but could have gone to other locations. Will it be possible to argue that all steps were taken to leave if the individual waited until it was possible to travel to Country B?

II POSSIBLE RESHAPING OF TAX POLICY POST COVID-19

There have been many pronouncements and speculations appearing in the media about how national governments will look to finance the deficits they have incurred during the crisis. A significant degree of speculation has focused on the extent to which high net worth individuals will be targeted with an increased tax burden as one of the mechanisms for financing government deficits. Speculation varies between the possible introduction of some form of annual wealth tax to increased estate taxes.

One interesting example is a proposal in Argentina for a one-off tax levy on ultra-high net worth individuals (UHNWI). The bill being promoted in Argentina proposes a one-time tax on wealth calculated on personal assets of Argentine residents as at 31 March 2020. For individuals with a personal asset base of US$3 million, the proposed rate of tax would fall in the range of 2 per cent to 5.5 per cent. This would be in addition to the current annual wealth tax burden of 2.25 per cent for individuals on wealth that is held outside of Argentina. An article published by an Argentine think tank in April 2020[1] sets out an interesting array of proposals that have been advanced, principally by opposition parties, in South America and Europe. One additional strand that has emerged in Europe is the exclusion from state aid programmes for companies that are headquartered in 'tax havens'. This has been promoted in countries including the United Kingdom, Denmark and France.

A pan-European tax for UHNWIs in the EU has been suggested by economists, Gabriel Zucman and Emmanuel Saez (University of California at Berkeley) and Camille Landais (London School of Economics).[2] The suggested parameters they advance would be to tax those holding assets of more than €2 million (the top 1 per cent) at 1 per cent, those holding assets of more than €8 million (the top 0.1 per cent) at 2 per cent above that threshold and those holding more than €1 billion at 3 per cent above that threshold. They also argue that by making the tax EU-wide, there will be no incentive for individuals to relocate within the EU to avoid the tax.

Historically, one of the objections that has been raised, certainly in Europe, to wealth taxes is the relative inefficiency in the collectability of wealth tax because of the significant degree of compliance work required in checking an individual's filings and valuing their net worth to calculate the levy.

Clearly there is a paradox for tax authorities in considering any form of one-off, or permanent, tax measures that are targeted on high net worth individuals, namely the concern that such measures do not detract from the efforts of business entrepreneurs to create employment and prosperity for others. Furthermore, there will clearly be concern about measures that could be seen as targeting wealthy individuals from other jurisdictions who are looking to locate in the relevant country where increased tax measures could both discourage

1 https://centrocepa.com.ar/files/informes/20200502-wealth-tax.pdf.

2 https://voxeu.org/article/progressive-european-wealth-tax-fund-european-covid-response.

high net worth migrants from relocating to the jurisdiction or, in some cases, might create an incentive for such individuals to give up their residence.

If new measures of this character are proposed, it will be very interesting to see, in countries such as the UK or Italy that have special regimes for non-domiciliaries, how those regimes will be impacted, if at all, by tax-raising measures targeted at wealthy individuals.

Turning to estate taxes, one recent proposal that is worthy of note in the UK is a report published in January 2020 by a cross-parliamentary group of politicians that considered the UK's inheritance tax policy in the context of intergenerational fairness.[3] Notable conclusions from the report were to highlight the extent to which the UK's rule exempting gifts between individuals that occurred more than seven years before the death of the donor as allowing the very wealthy to mitigate their estate tax burden in a way that is not open to those of more modest means who do not have significant surplus to donate to future generations. The central proposal from the report was to scrap a 40 per cent inheritance tax burden levied on gifts occurring on death or within seven years with a flat rate 10 per cent tax that would apply to all gifts giving each individual a lifetime allowance for gifts that were exempt. Part of the thinking behind switching to a donee-based tax system is to encourage senior generations to make wealth transfers to younger generations (potentially from grandparents to grandchildren) in a manner that rebalances the distribution of wealth towards the young. While such measures are unlikely to be central in financing any deficits arising from the covid-19 pandemic in the short term, it will be interesting to see whether a flat rate tax, at a lower level, will find favour with policy makers in the UK. The thinking of the group issuing the report was that the overall unpopularity of the current regime, where taxes are levied on death could be overcome by one that is levied at a much lower rate and is applied uniformly to gifts during the lifetime as well as on death.

Another notable initiative from the EU that is likely to, potentially, impact private clients are the proposals incorporated within the sixth version of the EU Directive on administrative cooperation (DAC6). DAC6 aims to provide the tax authorities of EU Member States with additional information to enable them to close potential loopholes in tax legislation and harmful tax practices. Intermediaries advising on cross-border arrangements involving EU jurisdictions are obliged to report details of the arrangements and the relevant tax payers involved to their Member States who will share the information with other Member States' tax authorities. If there is no intermediary with an obligation to report, the relevant taxpayer will be obliged to do so. For the purposes of DAC6, an arrangement is interpreted very broadly and a cross-border arrangement is reportable if it concerns at least one EU member state and satisfies at least one of the hallmarks described in the Directive.

The hallmarks are very broadly worded and describe certain characteristics which, if satisfied, make the arrangement reportable. The majority of the hallmarks cover arrangements with some form of tax 'benefit' but there are specific hallmarks relating to arrangements that undermine the application of automatic exchange of information agreements such as the Common Reporting Standard and attempts to conceal beneficial ownership. A key concern with this particular hallmark is that the test appears to be wholly objective and the intentions of the parties are arguably not relevant. Intermediaries acting for high net worth individuals

3 www.step.org/sites/default/files/media/files/2020-05/STEPReform_of_inheritance_tax_report_012020.pdf.

and their structures will need to consider the impact of these rules on any arrangements entered into that may concern one or more EU Member States.

Turning away from the tax arena, many jurisdictions have introduced measures during lockdown to facilitate the digital execution of documents, including wills. It will be interesting to see to what extent policymakers will be happy to allow such measures to prevail on a long-term basis. Historically, the very strict measures that prevail on the execution of wills are clearly designed as a protective measure to mitigate the impact of undue influence. It seems likely that such measures will become a permanent part of the overall landscape for the execution of wills going forward. In circumstances where wills are drawn up by professional advisers who have direct contact with a testator or testatrix without the intervention of family members, such measures could well be a welcome relaxation that will make it easier for individuals to make wills in the years ahead in circumstances where it is likely to be less easy to travel to meet, in person, with one's professional advisers for a significant period of time. Given that, in many circumstances, there is a significant degree of 'inertia' that stops individuals from engaging with estate planning, this can only be a welcome development.

In conclusion, we can expect a significantly changed paradigm to prevail to the planning arena for wealthy families in the months and years ahead once the primary crisis generated by the pandemic concludes. A key area of uncertainty at present is the extent to which enhanced tax measures will be targeted at the wealthy. The wider changes in business practice and greater use of video meetings could, however, provide something of a 'silver lining' in terms of making it easier for individuals to access reliable estate planning and succession advice and measures on digital execution could facilitate the easier execution of documents once that process is concluded. What is certain is that a combination of these various measures is likely to significantly impact the planning environment for wealthy families in the years ahead. It seems likely in this context in particular that the EU will become more assertive in its approach to wealthy individuals and their tax affairs as DAC6 is implemented.

John Riches
RMW Law LLP
London
July 2020

Chapter 9

BERMUDA

Stephanie C Bernard and Adam Johnson [1]

I INTRODUCTION

Bermuda has long been recognised as an attractive, sophisticated and secure jurisdiction for private wealth management for the international private client. It is the United Kingdom's oldest overseas territory and has been self-governing since 1622, with a strong economy primarily as a result of its trust, insurance and reinsurance, and investment fund sectors supported by a sophisticated and well-established advisory and financial services infrastructure.

Bermuda has an independent, stable legal and judicial system, and over the past 20 years has made regular and innovative reforms of its trust laws with trust legislation that are both modern and facilitative with regard to succession planning and asset protection. In implementing new trust legislation, Bermuda's legislature collaborates with private sector associations such as the Bermuda Association of Licensed Trustees and the Society of Trusts and Estate Practitioners, as well as the Bermuda Business Development Agency, an organisation created to support international business. Recent legislative initiatives in the trusts arena include new legislation on know-your-customer safeguards and record-keeping for trusts. This cooperative approach and innovative modernisation initiatives demonstrate the willingness and ability of Bermuda to adapt to changing product needs of clients around the world.

Bermuda's trust law is largely based on English common law, including the doctrines of equity, but it has been enhanced and amended by Bermuda trust-related legislation. English common law remains of highly persuasive authority in Bermudian courts. The Supreme Court of Bermuda is the court of first instance in Bermuda with the right of appeal in certain circumstances to the Court of Appeal in Bermuda. The ultimate right of appeal lies to the Privy Council of the United Kingdom.

The Court of Appeal for Bermuda has several very experienced English judges who previously sat on the English Court of Appeal. QCs may appear in Bermudian courts, whereas this is not the case in some offshore jurisdictions. In addition, the Bermudian courts will permit trust applications to be heard in private in appropriate circumstances. The reasoning behind this practice was set out by Chief Justice Kawaley, as he then was, in *The Matter of the G Trusts* [2017] SC (Bda) (15 November 2017) and the practice of anonymising and dealing with applications in private where there is no affront to the public interest was confirmed.

Two key pieces of legislation in Bermuda are the Trustee Act 1975 (the Trustee Act) (as amended by a number of statutory instruments, including the Trustee Amendment Acts of 1999, 2004 and 2014 and most recently the Proceeds of Crime Amendment (No. 3) Act

1 Stephanie C Bernard is counsel and Adam Johnson an associate at Conyers Dill & Pearman.

2017 and the Proceeds of Crime (Miscellaneous) Act 2018 and the Trusts (Special Provisions) Act 1989 (the Special Provisions Act) (as amended by the Trusts (Special Provisions)) Acts of 1998, 2004 and 2014). The Trustee Act is largely patterned on the English Trustee Act 1925. It grants certain powers to trustees of Bermuda trusts, which apply unless excluded by express terms in the relevant trust deed and, pursuant to the 1999 Amendment Act, also provides for delegation of certain trustee functions and modern trustee investment powers. The most recent changes introduced new rules concerning financial records and other information that must now be maintained for trusts that have individual and non-professional trustees. There are exemptions to these new rules where there is a co-trustee licensed under the Trusts (Regulation of Trust Business) Act 2001 (the Trust Business Act) or a licensed trustee under the Trust Business Act appointed to maintain the trust records. With the Special Provisions Act, Bermuda was the first offshore jurisdiction to introduce legislation permitting non-charitable purpose trusts with most other international financial centres subsequently following Bermuda's lead by incorporating the concept into their legislation. The Special Provisions Act also contains a number of other innovative and modern provisions that include some of the terms of the Hague Convention on the Recognition of Trusts 1987, which applies in Bermuda.

Bermuda was also one of the first offshore jurisdictions to introduce modern and flexible legislation on private trust companies (PTCs), with over 40 years' experience establishing and administering PTCs. Unlike PTCs in some other jurisdictions, Bermudian PTCs have never been required to be licensed and so the incorporation and conduct of their affairs has been straightforward, private and efficient.

Bermuda has robust anti-money laundering legislation and participates in the Convention on Mutual Administrative Assistance in Tax Matters (Convention). Bermuda is one of 137 jurisdictions currently participating in the Convention. This represents a wide range of countries including all G20 countries, all BRIICS (Brazil, Russia, India, China and South Africa), all Organisation for Economic Co-operation and Development (OECD) countries, major financial centres and an increasing number of developing countries and has taken over from the bilateral tax information exchange agreements (TIEAs). Thus, all countries that Bermuda has a TIEA or double taxation agreement with also have the Convention through which to request tax information exchange. Additionally, it committed to a wider exchange of information process with the G5 countries of the European Union and signed a Multilateral Competent Authority Agreement to exchange information using the Common Reporting Standard (CRS) framework since 2017.

In recent years, legislative changes have focused on the meeting of international standards for transparency set by the Financial Action Task Force and the OECD and enhancing Bermuda's anti-money laundering and anti-terrorist financing legislation. These include updating requirements with regard to the creation and maintenance of a beneficial ownership register for companies, partnerships and LLCs incorporated, formed or registered in Bermuda and the filing of information regarding their beneficial owners with the Bermuda Monetary Authority (BMA) and introducing Economic Substance legislation in 2018. This register is not available to the public and is required by statute to be kept confidential.

Bermuda's anti-money laundering legislation, along with the regulatory enforcement provided by the BMA, has ensured that Bermuda is a leader in international anti-money laundering measures, reinforcing Bermuda's status as a premier offshore jurisdiction.

II TAX

In Bermuda, there is no income or profits tax, withholding tax, capital gains tax, capital transfer tax or inheritance tax. There is no exit or similar tax based on a resident's wealth when ceasing to be resident, and there are no other consequences of leaving the jurisdiction. Customs duties and stamp duties are major government revenue earners, with stamp duties charged at different rates and in different manners on a variety of legal documents, excluding wills.

The Stamp Duties Act 1976 is the governing legislation. However, pursuant to the Stamp Duties (International Businesses Relief) Act 1990, no stamp duty is imposed on instruments to which international businesses are a party and there are certain exemptions in the trust area in respect of instruments dealing with foreign currency denominated assets so that generally the imposition of stamp duty is of minimal impact in relation to the international private client. Exemptions from stamp duty are applicable in respect of registered pension trust funds and trusts of non-Bermudian property that are executed by a local trustee, as well as trusts to which an international business is a party and in respect of transactions involving shares in Bermudian-exempted companies and publicly listed local companies. Non-Bermudian property basically refers to all assets except Bermudian currency-denominated assets, Bermuda land and shares in non-listed local companies. There is no *ad valorem* stamp duty on non-Bermudian property in the trust context.

There are no gift taxes in Bermuda on lifetime gifts, although stamp duty may be payable in respect of certain gifts or transfers of movable or immovable property where a transfer document is executed. In relation to any such property that is not Bermudian property for the purposes of the Act (if an applicable exemption is not available), the rate of stamp duty is 1 per cent of its value. The subject matter of voluntary transfers must be adjudicated as to value by the Tax Commissioner and stamped accordingly for the transfer deed to be deemed properly stamped.[2] Conveyances of Bermudian real estate attract stamp duty at a sliding rate related to value, as follows: 2 per cent on the first Bda$100,000, 3 per cent on the next Bda$400,000, 4 per cent on the next Bda$500,000, 6 per cent between Bda$1 million and Bda$1.5 million, and 7 per cent over Bda$1.5 million. Transfers of shares in publicly listed, exempted or foreign companies are stamp duty exempt.[3]

Transfers of non-Bermudian property to a charitable trust are stamp duty exempt and transfers of Bermudian property to such a trust will also be exempt if: (1) the trust constitutes a charity that is registered under the Charities Act 1978; or (2) the trust's purposes are in favour of a body of persons or institutions whose purposes, in the opinion of the Minister of Finance, are charitable. Exemption (2) principally applies to charities operating locally in Bermuda where the trust affords a benefit to Bermuda.

Although there is no inheritance tax as such in Bermuda, stamp duty may be payable in respect of affidavits of value filed on applications for grants of probate or letters of administration depending on the net value of any Bermudian property comprised therein. The first Bda$100,000 of the net estate value (i.e., assets less debts) is stamp duty free, the next Bda$100,000 attracts duty at a rate of 5 per cent, the next Bda$800,000 at 10 per cent, and the next million at 15 per cent, and 20 per cent duty is levied for everything over Bda$2 million.

2 Section 39(1) of the Stamp Duties Act 1976.

3 Head 15, Schedule to the Stamp Duties Act 1976, exemptions c and d.

As Bermuda does not impose income tax, it has not entered into any full double taxation treaties with other countries although, as noted earlier, it does have a number of tax information exchange agreements with various countries, some of which contain provisions relating to foreign taxes. Additionally, as alluded to above, Bermuda has signed a Model 2 agreement with the US Treasury under FATCA and has entered into a similar agreement with the United Kingdom. As noted above, CRS also applies in Bermuda.

Predominantly, the private client trust work in Bermuda involves settlors and families who are not residents of Bermuda. It is common for several jurisdictions to be involved if the various beneficiaries are resident in different countries or if the assets owned by the trust are located in different jurisdictions. Consequently, Bermudian lawyers regularly engage with onshore tax lawyers or tax accountants in the relevant jurisdictions to ensure the tax-efficient structuring of any Bermudian entities created for the international private client.

III SUCCESSION AND LAND OWNERSHIP

The concept of freedom of testation sets Bermuda apart from various civil law jurisdictions, where such freedom may be curtailed by compulsory inheritance provisions. Bermuda, as an established and forward-thinking jurisdiction for wealth management, has utilised and expanded on the concept of the trust for estate planning and asset protection purposes. The concept is, however, subject to statutory checks designed to preserve the integrity of the jurisdiction by avoiding dispositions to defeat eligible creditors as that term is defined in the Conveyancing Act 1983.[4] There are also laws to ensure that natural family obligations are met.[5] For the purposes of succession, Bermuda currently only recognises heterosexual marriages, domestic partnerships that require formalisation and registration in accordance with the Domestic Partnership Act 2018[6] and same-sex marriages entered into between 5 May 2017 and 1 June 2018. Accordingly, persons in relationships other than these have no rights to inherit from a deceased partner in the absence of a will.

Intestate succession is governed by the Succession Act 1974 (the Act), which specifies who can inherit the property (both real and personal, without distinction) of a person dying intestate. Section 5 of the Act contains various case scenarios based on who survives the intestate, and all offspring (whether born in or out of wedlock)[7] have equal rights to succession in the various cases. The rationale of Section 5 is that family members with the closest nexus are benefited in priority to those with a more remote connection.

The Act also contains provisions similar to the United Kingdom's Inheritance (Provision for Family and Dependants) Act 1975, giving certain family members and dependants the right to make a claim against a decedent's estate (whether dying intestate or not) on the basis that adequate provision was not made for them.

The Wills Act 1988 codifies the law relating to the formalities pertaining to, and validity of, wills. These provisions generally follow English law. Bermuda is not a party to the Hague Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions; however, to facilitate international estate planning, the salient provisions of the Convention have been inserted in the Act:

4 Section 36.

5 Succession Act 1974, Sections 13–23.

6 Section 2.

7 Children Amendment Act 2002.

a A will shall be treated as properly executed if its execution conformed to the internal law in force in the territory where it was executed, or in the territory where, at the time of its execution or of the testator's death, he or she was domiciled or had his or her habitual residence, or in a state of which, at either of those times, he or she was a national.[8]

b The Administration of Estates Act 1974 governs the scope of the duties and powers of executors and estate administrators. It also makes provision for the resealing of foreign probate or administration grants in the Bermuda court, under which reseal a foreign executor or administrator would derive his or her authority to administer any Bermudian property covered under the provisions of the foreign estate.

c The ability to reseal a foreign grant, however, is limited to grants that were made by a court in the United Kingdom or any British possession, colony or dependency, or a member nation of the Commonwealth or the District of Columbia or any state of the United States. In situations where a foreign national dies owning Bermudian property, the devolution of which is governed only by a foreign will, such will would have to be probated in the Bermudian courts.

d Where a person dies domiciled outside Bermuda, Rule 27 of the Non-Contentious Probate Rules 1974 allows the Registrar to issue a grant to the person entrusted with the administration of the estate by a foreign court, or to the person entitled to administer the estate by the law of the place where the deceased died domiciled.

e In the event a foreign national dies owning Bermudian real estate, then his or her estate representative is subject to a time limit within which to apply for permission from the Department of Immigration for a certificate entitling him or her to defer the application for a licence to hold the land.[9]

f Ownership of land by foreigners in Bermuda is closely regulated and each foreign owner must have a licence to own land. The ability of a foreign owner to pass real property on to heirs is subject to the property falling into a category that qualifies it for foreign acquisition. The main qualifying factor for foreign persons, with no special nexus to Bermuda by way of family ties or permanent residence, is that the real property in question must have an annual rental value over a certain value (Bda$153,000 for freehold properties).

IV WEALTH STRUCTURING AND REGULATION

Bermuda trusts are the primary legal vehicle of choice used to provide wealth-preservation structures to the high net worth international client. Bermuda trusts can be employed to achieve a variety of estate, personal, financial, tax or other business planning objectives including provision for inheritance by spouses and dependants; protection of assets from unforeseen, future personal liability; minimisation of estate or inheritance tax, income tax and capital gains tax; preservation of family wealth and continuity of family businesses; efficient and timely distribution of assets upon death; protection against exchange controls or political instability; making provision for charities or philanthropic purposes; and confidentiality of ownership of assets.

8 Section 37 of the Wills Act 1988.

9 Section 85 of the Bermuda Immigration and Protection Act 1956.

i Bermuda trusts

While the trust concept is well defined in the common law, statutory clarity as to the characteristics of a Bermuda trust is found in the Special Provisions Act, which codifies the common law position and states that the term 'trust' refers to the legal relationship created, either *inter vivos* or on death, by a person, the settlor, when assets have been placed under the control of the trustee for the benefit of a beneficiary or for a specified purpose.

The beneficiaries of a Bermuda trust may be individuals, companies and other legal entities. The settlor of a Bermuda trust may be an individual over the age of 18 years or a corporation if it has the corporate capacity to make a gift of its assets or otherwise dispose of them for the purpose of establishing a trust.

There are no Bermudian residency requirements with respect to the trustees of a Bermuda trust who may be individuals, PTCs or public trust companies. The property constituting the trust fund can be any type of real or personal property (e.g., cash, securities, real estate, personal effects or other tangible or intangible property). It is common in Bermuda trusts to designate a protector, who may be an individual or a corporation. There is no definition of a 'protector' in the statutes or case law of Bermuda or provisions specifying the functions and duties of a protector other than the Special Provisions Act, which provides that a protector or enforcer may be appointed to enforce a purpose trust. The general law treats protectors in accordance with their functions and duties as stipulated in the trust document itself. The nature of a protector's powers will determine how the court treats them. For example, a protector's power to appoint and remove trustees has been determined by the Bermudian courts to be fiduciary in nature (though the reserved powers legislation permits certain powers to be characterised by the trust instrument as non-fiduciary).

There are no public registration requirements or other disclosure requirements concerning the establishment of trusts in Bermuda. Trust records kept by a trustee are generally not disclosed to regulatory authorities or third parties unless required by law. All information passing from a settlor to the trustee is treated by the trustee as private and confidential. Such information will only be disclosed to beneficiaries on a case-by-case basis where permitted by the trust deed or as required by the trustee's fiduciary duties.

While Bermuda's trust law substantially reflects English law and principles of equity, Bermuda has enacted legislation designed to facilitate the use of trusts for modern commercial and private client applications.

Sections 23 and 24 of the Bermuda Trustee Act are almost identical to Subsections 31 and 32 of the English Trustee Act, with one notable difference in Section 24(1)(a) of the Bermuda Trustee Act, which (unlike the English Trustee Act) does not restrict the exercise of the power of advancement to one half of the presumptive share of a beneficiary. Section 24 of the Act confirms that the statutory power of advancement may be exercised by transfers to other discretionary trusts and to permit delegation of duties. This amendment provides flexibility to those trusts that do not contain express delegation powers.

The Trustee Amendment Act 2004 repealed Section 24(3) of the Trustee Act to enable the statutory power of advancement to apply to all trusts governed by Bermudian law whenever created and not just to trusts created after 1 March 1975. This change allows trustees, through the exercise of a power of advancement, to modify the terms of a trust to adapt to the modern environment, and thereby ensure that the trust continues to reflect the original intentions of the settlor.

Section 47 of the Trustee Act (Section 47) (which is a hybrid of the language of Section 57 of the English Trustee Act and Section 64 of the English Settled Land Act 1925) confers on

trustees and beneficiaries of Bermuda trusts advantages that are not available under English law. Like Section 57 of the English Trustee Act, Section 47 allows the court to authorise trustees to enter into otherwise restricted transactions where the court is satisfied that the transaction is expedient and for the benefit of the trust as a whole. The English court's jurisdiction under Section 57 is limited to matters of management and administration of the trust property and does not sanction changes in equitable interests or dispositive provisions. By contrast, the Bermuda court's jurisdiction under Section 47(4) broadens the ambit of authorised transactions by importing the provisions of Section 64(2) of the Settled Land Act 1925. 'Transaction' is defined in both Section 64(2) and in Section 47(7) to include any disposition, application of capital or other dealing or arrangement. The breadth of this definition of transaction assists the justification of the court's jurisdiction to approve the potential modification of the beneficial provisions under a trust.

The provisions of Section 47 may be employed by trustees wishing to secure authority to distribute income where failure to do so would incur tax penalties or approval of the exercise of a power of advancement that may technically be outside the scope of the power but that achieves a tax-driven restructuring.

Unlike applications to vary trusts under the English statute, under Section 47 the consent of all beneficiaries is not required. This proves beneficial where general consent by beneficiaries would trigger adverse tax consequences or where obtaining consent from a particularly broad beneficial class would be cumbersome.

Choice of governing law provisions may be inserted in trust instruments by virtue of the Special Provisions Act, with the ability to have a severable part of a trust (such as a part dealing with administration matters) governed by a different law.[10] The Special Provisions Act, in Section 11, also preserves the primacy of the Bermuda court in having sole jurisdiction with respect to trusts validly created in Bermuda and further precludes the recognition or enforcement of foreign judgments insofar as they are inconsistent with this particular section of the Act.[11]

Section 10 of the Special Provisions Act codifies the previously unclear common law position as regards capacity to create a trust by stipulating that in respect of movable property (not real estate) that the settlor is deemed to have capacity to create an *inter vivos* trust if he or she would have had capacity under the domestic laws of Bermuda. Where a trust of movables is created by a will, the question of capacity is determined by the law of the domicile of the testator. Where the trust property is land, the question of capacity is determined by the law of the jurisdiction in which the property is situated.

Section 10(2) also excludes the application of foreign rules of law to questions of capacity of a settlor of a trust governed by Bermudian law.

The Trusts (Special Provisions) Amendment Act 2004 amended Sections 10 and 11 of the Special Provisions Act to clarify that a trust validly created under Bermudian law can only be varied or set aside pursuant to the laws of Bermuda. This makes it clear that provisions of foreign laws giving rise to interests under marriage or analogous relationships, forced heirships and creditors' rights will not be permitted to vary Bermuda law trusts.

10 See *Re Star 1 (Revised) and Star II (Revised) Trusts, Von Knieriem v. Bermuda Trust Company Ltd and Grosvenor Trust Company Ltd*, 1994 Civil Jur. No. 154 [1994] Bda LR 50 (Bermuda).

11 Section 8 of the Trusts (Special Provisions) Act 1989.

Foreign judgments based on such laws or rights will not be recognised in Bermuda; for example, a foreign court order in a divorce dispute purporting to vary a Bermuda law trust in circumstances where the Bermudian trustee was not a party will not be enforced in Bermuda.

The Special Provisions Act also legitimates and regulates the use of non-charitable purpose trusts for estate planning. For such a trust to be valid under Bermudian law, it must: (1) be sufficiently certain to allow the trust to be carried out; (2) be lawful; and (3) not be contrary to public policy.[12]

The Act also requires such trusts to be made in writing and conveniently exempts them from the application of the rule against perpetuities,[13] although such trusts are precluded from owning any interest in land in Bermuda, directly or indirectly.

The Perpetuities and Accumulations Act 2009, which came into force in Bermuda on 1 August 2009, disapplied the common law rule against perpetuities in relation to all Bermudian law instruments taking effect on or after 1 August 2009, except in respect of trusts holding Bermudian real estate. For the purposes of the 2009 Act, instruments include *inter vivos* trusts settled on or after 1 August 2009 and trusts drafted under wills executed on or after 1 August 2009. The ability to create perpetual trusts provides greater flexibility and opportunity in multigenerational wealth and tax planning. The Act does not change the application of the rule to trusts created before the operative date of the Act (pre-2009 trusts). However, the perpetuity period of pre-2009 trusts can be extended under the existing law by application to court. The process of extending the perpetuity period of pre-2009 trusts was made even more streamlined and cost-effective by the Perpetuities and Accumulations Amendment Act 2015.

Further legislative modernisation includes amendments to the Special Provisions Act to introduce innovative reserved powers provisions.[14] Subsection 2A(2) of the Special Provisions Act lists certain interests and powers that can be retained by a settlor or granted to a third party (e.g., a protector or beneficiary) without prejudicing the validity of a trust (i.e., without laying the trust open to attack on the basis that it is a sham, or an allegation that its assets are not trust property but should be regarded as part of the settlor's personal estate).

The powers listed (which are non-exhaustive) include powers to:

a revoke the trust;
b vary or amend the trust;
c decide on distributions of trust property;
d direct investments;
e appoint, add, remove or replace trustees, protectors, enforcers or other office holders or advisers;
f add, remove or exclude beneficiaries or purposes; or
g change the governing law of the trust.

The Special Provisions Act (as amended) clarifies that the holder of such a power will not (unless formally appointed as trustee) be deemed to be a trustee by reason only of the grant or reservation of the power.

It also authorises a trust deed governed by Bermudian law to provide that the person who holds the powers listed in Subsection 2A(2) shall not be subject to a fiduciary duty. This

12 Section 11(2) of the Trusts (Special Provisions) Act 1989.

13 Section 12A(2) of the Trusts (Special Provisions) Act 1989.

14 See the Trust (Special Provisions) Amendment Act 2014, which became effective on 16 July 2014.

is helpful where, for example, powers are being given to protectors who are family friends. Further, it creates certain presumptions (which can be overridden by the terms of the trust) about when reserved power holders will or will not be fiduciaries.

Bermuda has also enacted legislation to restore the 'rule in Hastings-Bass' as it stood prior to the English Court of Appeal (2011) and Supreme Court (2012) decisions in *Pitt v. Holt* and *Futter v. Futter*.[15] Pursuant to Section 47A of the Trustee Act, if: (1) a fiduciary has failed to take into account a 'relevant consideration' or has taken an 'irrelevant consideration' into account; and (2) but for this flaw in his or her decision-making, the fiduciary would not have exercised the power; would have exercised it but on a different occasion to that on which it was exercised; or would have exercised the power, but in a different manner to that in which it was exercised, then the court has a discretion to set the exercise of the power aside in whole or in part. The legislation clarifies that breach of trust or fiduciary duty is not a necessary component in the exercise of the court's Hastings-Bass jurisdiction.

ii PTCs

Integral to multigenerational wealth planning requirements involving trusts is the use of PTCs, which offer a host of benefits to private clients and their families, including:

a the ability to have more involvement in or control over the administration of their trust assets, where tax considerations permit;

b the involvement of family members or close family advisers on the board of directors who will have more familiarity with the settlor's family and affairs than an institutional trustee, and will be able to provide more continuity in terms of management personnel (directors and administrators) than an institutional trustee that may have a high turnover of staff;

c greater control of the circulation and disclosure of confidential information relating to the trust and a family's affairs than might be the case with an institutional trustee; and

d administrative flexibility, as the PTC structure can be tailor-made to best serve the settlor's intentions.

PTCs allow for the harmonisation of trusteeship among a group of trusts that may be governed by laws of different jurisdictions and dispenses with the need to have trustees in each country. Grouping assets into one structure is a particularly convenient planning tool for multinational families.

A PTC may be incorporated in Bermuda if its objects are limited to acting as trustee or co-trustee of a single or specified group of related trusts. In Bermuda, a PTC can be incorporated either as a company limited by shares (which may have different classes of shares (i.e., voting and non-voting)) or as a company limited by guarantee pursuant to the provisions of the Companies Act 1981. Guarantee companies are the preferred structure for PTC formations because the directors and members can be the same individuals. This simplifies the structuring. In some circumstances, where ownership of shares by the settlor would be tax disadvantageous, a PTC may be owned by a non-charitable purpose trust as a means of orphaning ownership.

A PTC will typically be incorporated as an exempted company. Bermuda law distinguishes between local companies (those that are predominantly owned by Bermudians)

15 See the Trustee Amendment Act 2014, which became effective on 29 July 2014.

and exempted companies (those that are predominantly owned by non-Bermudians). Generally, with some exceptions, exempted companies may only carry on business from Bermuda in connection with transactions and activities that are external to Bermuda. PTCs are permitted to carry on their business wholly in Bermuda where the settlor is not ordinarily resident in Bermuda at the time of the creation of the relevant trust.

The application to incorporate a PTC is made to the BMA, which must approve the incorporation of all exempted Bermudian companies. It is a requirement that the identity of the ultimate beneficial owners must always be disclosed and each ultimate beneficial owner holding 5 per cent or more of the shares of the proposed PTC must sign a personal declaration attesting to his or her good standing in any other Bermudian operations or generally. Where, as is common, the company is owned by a purpose trust, the settlor of the underlying trusts should make the declaration. After the BMA's consent is obtained, the memorandum of association is filed with the Registrar of Companies to incorporate the PTC. The memorandum will set out the objects that specifically recite the name of the trust or trusts that the company is to be trustee of or the name of the family who will be beneficiaries of the trust or trusts. The incorporation process normally takes about one week from the date of submission of the complete application with supporting information to the BMA.

Every Bermuda exempted company is required to have: (1) at least one director who is ordinarily resident in Bermuda; (2) a secretary that is ordinarily resident in Bermuda; or (3) a resident representative that is an individual or a company that is ordinarily resident in Bermuda. If the PTC is incorporated as a company limited by shares, it must have a minimum of one shareholder, and the names of all shareholders must be maintained in a register of members that is maintained in the company's registered office.

Pursuant to the Companies and Limited Liability Company (Beneficial Ownership) Amendment Act 2017 (the Beneficial Ownership Act), Bermuda companies (including PTCs) are required to take certain steps including keeping a register of beneficial owners (register) and filing 'minimum required information' with the BMA. The information recorded on the PTC's register and filed with the BMA is not currently available for public inspection.

The Bermuda government passed legislation[16] with effect from 31 December 2018 requiring certain legal entities in Bermuda to have economic substance in Bermuda. This was in response to a scoping paper issued by the European's Code of Conduct Group (Business Taxation), which set out requirements that certain jurisdictions must meet to avoid being blacklisted by the European Union. PTCs are viewed as outside the scope of the legislation because they are not holding their own assets with a view to a profit, or carrying on any business other than holding assets upon trust.

iii Regulation and anti-money laundering

The Trust Business Act, which came into effect on 25 January 2002, was passed as a result of recommendations of the KPMG report on Bermuda. It covers the regulation of trust companies and individual trustees with a view to upholding international standards in the provision of trust services to local and international clientele. It provides that any person who carries on trust business in or from Bermuda must be licensed unless he or she is covered

16 The Economic Substance Act 2018 and the Economic Substance Regulations 2018 (as amended by the Economic Substance Amendment Regulations 2019 and the Economic Substance Amendment (No. 2) Regulations 2019).

by an applicable exemption. With the passing of the Trusts (Regulation of Trust Business) Amendment Act 2019 (Amendment Act) and the Trusts (Regulation of Trust Business) Exemption Amendment Order 2019 on 31 December 2019, trustees seeking to be exempted from the licensing requirement are now required to apply for an exemption. Additionally, all licensed undertakings must maintain a physical presence in Bermuda and trust business must be directed and managed from Bermuda. Trust business is defined as 'the provision of the services of a trustee as a business, trade, profession or vocation'.

There are two types of licences available: unlimited and limited. Only trust companies are permitted to hold unlimited licences whereas individuals or partnerships are restricted to limited licences. A limited licence trustee may only hold trust assets in an amount not exceeding an authorised amount. The underlying policy objective is that all trust business of significant size and complexity should be conducted inside a licensed, and therefore regulated, trust company. Trust licensees are regulated by the BMA.

As mentioned above, a PTC is exempted from the licensing requirements although it is required that trustees apply for an exemption and declare on or before 31 March of every year that they continue to qualify for the exemption. While it is understood that the BMA does not intend to introduce a licensing regime or an annual fee for PTCs, the BMA has made changes to better monitor the activities of PTCs without introducing burdensome regulation in order that Bermuda remains a competitive jurisdiction for the formation of PTCs.

Know-your-customer safeguards impose statutory duties on non-professional trustees, licensed trustees, professional legal advisers, professional accountants and corporate service providers. The Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008 (the Regulations) as amended by the Proceeds of Crime Amendment (No. 3) Act 2017 and the Trustee Act as amended by the Proceeds of Crime (Miscellaneous) Act 2018 necessitate verification of the identity of customers and beneficial owners (including settlors, protectors, beneficiaries and any other natural person exercising ultimate effective control over the trust), close monitoring of business relationships, recognition and reporting of suspicious transactions, maintenance of records for a prescribed period, assessment and management of risks based on criteria set out in the Regulations as amended, as well as training for employees and staff.

Corporate service providers in Bermuda are required to be licensed and are regulated under the Corporate Service Providers Business Act 2012 (the CSP Act as amended by the Corporate service Provider Business Amendment Acts 2014 and 2017). Undertakings that carry on company or partnership formation, nominee, registered office, secretarial and other similar services are required to apply for a licence from the BMA. The BMA has broad powers of supervision and the ability to impose penalties should a licensed entity fail to comply with its obligations under the CSP Act.

Also, pursuant to Section 9 of the Proceeds Of Crime (Anti-Money Laundering and Anti-Terrorist Financing Supervision and Enforcement) Act 2008, an 'AML/ATF regulated financial institution' (defined in Section 42A(1) of the Proceeds of Crime Act 1997) that is not otherwise licensed, registered or authorised by the BMA under any of the regulatory acts is required to register with the BMA as a non-licensed person (NLP). This applies to PTCs that are not serviced by a licensed CSP or a licensed trust company or business. Once registered, the BMA will monitor NLPs to ensure they are complying with the regulations. The BMA has the power to levy civil penalties and cancel the registration of an NLP for serious breaches of the regulations.

With effect from 20 January 2020, Bermuda has appointed its first Privacy Commissioner, a role established under the Personal Information Protection Act 2016 (PIPA). The commissioner will be tasked with fully implementing PIPA legislation.

PIPA sets out how organisations, businesses and the Bermuda government may use personal information. It applies to every individual, entity or public authority that uses personal information in Bermuda, including non-profits. The legislation reflects a set of internationally accepted privacy principles and good business practices for the use of personal information in the digital age.

'Personal information' is defined as any information about an identified or identifiable individual. 'Use' is defined very broadly and includes collecting, storing, disclosing, transferring and destroying information.

V OUTLOOK AND CONCLUSIONS

Bermuda continues to build on its established reputation as a centre of excellence for offshore trust and estate planning. Bermuda's trusts, corporate and other products can be used in a broad array of private and commercial transactions with its legislation reviewed and updated regularly to assist in meeting and adapting responsively but responsibly to changing client requirements, as demonstrated by the 2014 and 2015 legislation dealing with settlor reserved powers, the statutory Hastings-Bass rule and perpetuities. Looking forward, there will very likely be further legislative developments with a view to (1) amending the firewall provisions that defend validity of trusts against foreign law challenges and (2) generally upgrading and improving Bermuda's technical financial services and provide new vehicles to enhance the wealth planning options available to the international private client.

For many private clients affected by the current volatile economic climate, the events of recent years may have resulted in increased pressure on the clients personally and on their trust structures. This has resulted in an increase in trust-related applications to Bermuda's courts to seek amendment to the structures for tax efficiency purposes. Bermuda's courts are well equipped to deal expeditiously and cost-effectively with both contentious and non-contentious applications. There is robust judicial support for the quick and efficient resolution of such applications, with the courts showing a sensible pragmatic approach to assisting clients with a variety of matters including trust restructurings. With its responsive and cooperative approach to the demands of international initiatives in relation to regulation, transparency and anti-money laundering, as evidenced by the recent amendments to its know-your-customer Regulations and Trustee Act, as well as by joining the Convention, and in providing innovative solutions to the changing needs of the international client in light of such initiatives and tax policy and other developments in their home jurisdictions, Bermuda is well placed to maintain its position as a leading international financial centre for private wealth management and planning.

Appendix 1

ABOUT THE AUTHORS

STEPHANIE C BERNARD

Conyers Dill & Pearman

Stephanie Bernard is counsel in the private client and trust practice in the Bermuda office of Conyers Dill & Pearman. She joined Conyers in 2006.

Stephanie has extensive and in-depth experience advising individuals and fiduciaries on all aspects of trust law including international and local estate planning arrangements, wealth management structures, private trust companies and variation of trusts, as well as international and local pensions.

Stephanie co-authored the Bermuda chapter of *The World Trust Survey* (Oxford University Press). Since 2017, she has been recognised in *Legal 500 Caribbean*. Stephanie is a member of the Society of Trust and Estate Practitioners.

ADAM JOHNSON

Conyers Dill & Pearman

Adam Johnson is an associate in the private client and trust department in Conyers' Bermuda office. He also assists the litigation department with large complex trust litigation work. Adam joined Conyers in 2020.

Adam's practice covers all aspects of private client and trust law with a focus on local and international trusts, establishment of international trusts and private trust company structures, and providing advice on various trust administration matters.

CONYERS DILL & PEARMAN

Clarendon House
2 Church Street
Hamilton HM 11
Bermuda

PO Box 666
Hamilton HM CX
Bermuda

Tel: +1 441 295 1422
Fax: +1 441 292 4720
stephanie.bernard@conyers.com
adam.johnson@conyers.com

www.conyers.com

an LBR business

ISBN 978-1-83862-488-0