

Guernsey - Private Trust Companies

Introduction

A settlor, when establishing a trust, will typically draw from the following categories of potential trustees:

1. individuals who they know and trust, who are familiar with the settlor's affairs and who typically have a relevant professional background (eg lawyer, accountant, family business etc.);
2. professional trust companies, whether bank-owned, private equity-backed or independent, who provide trust services to clients as their business; and
3. private trust companies, that is, companies incorporated purely for the purposes of acting as trustee of a particular trust or trusts.

The purpose of this note is to look at this last category in more detail.

What is a private trust company?

Commonly known as a "PTC", a private trust company is a company whose sole purpose is to act as trustee in relation to a specific trust or trusts. PTC's have been widely used in international structured finance transactions for many years and they are now being increasingly used by high net worth private clients who prefer to establish their own PTC to act as a trustee of their family trusts rather than transferring assets to a professional trustee. It is now also possible to use a foundation for this purpose instead of a company. Foundations are corporate entities like companies but do not have any owners, and this can have advantages over the more traditional company option.

Who owns the private trust company?

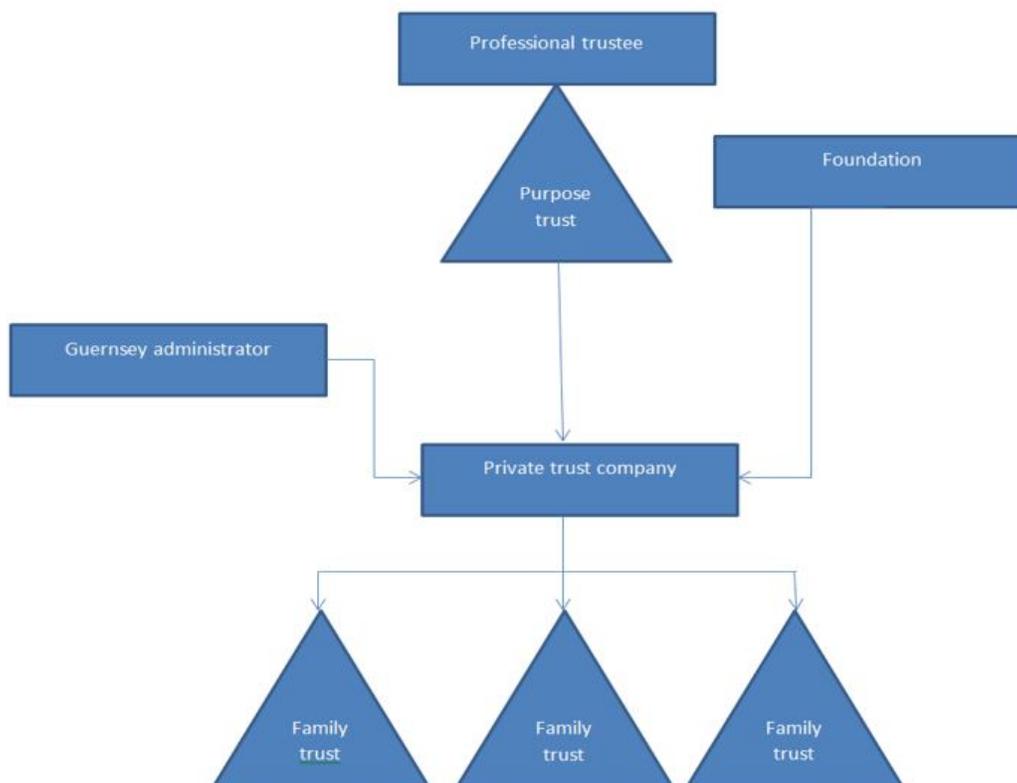
Shares in a PTC can be owned by the settlor or his family. However, ownership will generally be recommended to be through a purpose trust (or possibly a foundation) - direct ownership may be unattractive for reasons relating to taxation, confidentiality or asset protection. It would also require thought to be given to the devolution of the shares in the PTC on the death of the shareholder. Therefore, it is often desirable to "orphan" the structure so that its ownership is not attributable to any one person and this is where the purpose trust becomes useful.

A purpose trust in this context means a trust that is established to further non-charitable purposes. In the present case this is likely to centre around the provision of trusteeship services to a particular group of trusts. While in the past charitable purpose trusts were also used for this purpose, the current view among many practitioners is that this raises questions as to whether there can be said to be any genuinely charitable intent, and so non-charitable purpose trusts are generally preferred.

The purpose trust will have a trustee but will also need to have an enforcer, whose role it is to ensure that the trustee carries out the purposes of the trust. This is because the trust does not have beneficiaries who would otherwise be able to hold the trustee to account. The enforcer must be a separate entity from the trustee but there is no requirement for it to be licensed by the Guernsey Financial Services Commission (the "**GFSC**"). For example, a settlor or his or her professional adviser could act as the enforcer. The trustee of the purpose trust may be unconnected with, and located in a different jurisdiction from the administrator of the PTC.

A foundation can be established with the sole object of holding the shares in a PTC. A foundation is incorporated on the instruction of a founder, but is neither owned by the founder or by anyone else. Therefore, ownership issues will not arise in that context. If a foundation is used, a guardian must be appointed to ensure that the purpose of the foundation is carried out. The guardian need not be licensed by the GFSC if the guardian is not acting as guardian by way of business.

A typical holding structure is illustrated in the diagram below, which shows a foundation as a possible alternative to the more traditional purpose trust option and the PTC being administered by a Guernsey-regulated entity.



Why would you use a private trust company?

In a private wealth context PTC's are most commonly incorporated for the purposes of acting as trustee of a trust or trusts set up for the benefit of a particular family. Whereas most professional trust companies will not allow individual family members to act as directors of the trustee (because the trustee provides services to a range of other clients as well), the principal advantage of a PTC is that this is indeed possible. The PTC acts as trustee only for that family's set of trusts and so it is possible to have family members sitting on the board of the PTC.

A related advantage over a professional trust company is that the latter will often be wary of allowing the trust assets to become too heavily weighted in one asset. There are ways of drafting trust instruments so as to provide the professional trustee with comfort on this front, but a PTC is often used where, for example, the trust's principle asset will be shares in the family business and it is intended that the shares be held in the trust for the foreseeable future.

For a settlor, the attraction is often the additional element of control that a PTC can provide. Control is often an issue where the settlor is from a jurisdiction unfamiliar with the trust concept; settlors are, understandably, often unwilling to give away control of the assets to strangers in another jurisdiction. With a PTC, the settlor and/or his or her family could serve as directors and/or be the shareholder or shareholders of the PTC or otherwise be provided with a mechanism for being able to appoint and dismiss the directors to the PTC. On a practical level, a PTC also ensures more privacy in relation to the trusts and allows for rapid commercial decisions to be made because the directors of the PTC will often be people who are involved in the management of the underlying assets. The constitutional documents of the PTC need not mention the names of the trust(s) that will be involved in the structure.

PTCs have advantages not just for the settlor but also for the persons who would otherwise be acting as individual trustees. Liability of directors of a PTC falls to be assessed in accordance with normal company law principles. The duties

of the directors are owed to the PTC, not to the trust of which it is the trustee or the beneficiaries of that trust. Accordingly, while the PTC itself may have significant potential liability in the event of a breach of trust claim from the beneficiaries or a third party with whom the PTC as contracted, such liability will rarely flow through to the directors.

Another advantage that both a PTC and a professional trust company have over individual trustees is continuity of ownership. When an individual trustee retires and a successor is appointed, any assets directly held by the trustees will need to be re-registered accordingly. Changes to directors of a PTC or a professional trust company do not cause this issue and are relatively easy to arrange. That said, the problem can also be largely assuaged by having a nominee hold the relevant assets to the order of the individual trustees, or alternatively by using an intermediate holding company that in turn then holds the more substantive assets.

On a similar note, it is often easier to open bank accounts and contract with third parties where there is a single corporate trustee.

What regulatory regime applies?

Guernsey has strict regulatory requirements for the conduct of trust company business. The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000, (the "**Fiduciaries Law**") as amended is the principal legislation which regulates Guernsey's fiduciary industry. Amongst other things, a Guernsey PTC that provides its services "*by way of business*" (ie it charges a fee for acting as a trustee) will be carrying on a regulated activity under sections 1(2) and 2(1) of the Fiduciaries Law.

The GFSC has issued guidance that a PTC may be acting by way of business even if it is merely acting as a conduit and paying fees on to a third party.

A PTC may apply to the GFSC for an exemption from the requirement to obtain a licence. While the GFSC has a discretion whether or not to grant an exemption, its usual practice is to adopt requirements analogous to those adopted in Jersey. Accordingly, provided:

1. the purpose of the PTC is solely to provide trust company business services in respect of a specific trust or trusts;
2. the PTC does not solicit from or provide trust company business services to the public; and
3. the administration of the PTC is carried out by an entity regulated to carry out trust company business (such as a Guernsey corporate services provider),

an exemption from licensing under the Fiduciaries Law is likely to be granted. A small one off fee is payable with an application. When an exemption is given, there are no annual fees to pay and no requirement to capitalise the PTC in a particular way. There is also no requirement to submit to the GFSC copies of documents in relation to the trust or trusts in respect of which the PTC is to act as trustee.

Provided the GFSC grants an exemption, and the PTC does not engage in any other "regulated activities" as defined in the Fiduciaries Law then it should not be subject to any further regulation under that law. It is worth noting that a PTC is not a "financial services business" for the purposes of Guernsey's anti-money laundering legislation and there is no requirement for a PTC to make annual returns to the GFSC in relation to its activities or to have a dedicated money-laundering or compliance reporting officer.

What are the disadvantages?

The main disadvantage of a PTC is the cost in establishing the PTC structure, both initially and then in terms of annual administration. On top of the creation of the family trust or trusts themselves, a company or foundation must be incorporated to act as the PTC and then administered over the following years. The cost would be further increased if a purpose trust or foundation were used to hold the shares in the PTC. That said, if a foundation were to be the PTC, there would be no need to have any layer of ownership above that, as the foundation would be ownerless.

Conclusion

As a result of the cost, PTCs are likely only to be attractive where the value of the trust assets is sufficiently large that the initial and ongoing costs are in proportion and represent good value. However, the costs may be justified by the advantages of having a dedicated trustee to look after a complex structure and the control and rapidity of response that a PTC enables. In any event, a client considering using a PTC should ensure he or she has carefully assessed not only the costs of the options available but also the tax consequences.

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For further information please refer to your usual contact or:

Guernsey - **Rupert Morris**, Partner | rupert.morris@walkersglobal.com | +44 (0) 1481 748 936

Guernsey - **Rajah Abusrewil**, Group Partner | rajah.abusrewil@walkersglobal.com | +44 (0) 1481 748 945

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