Introduction

Jersey is a premier jurisdiction for the establishment of trusts and trust administration in Jersey is a cornerstone of the Jersey finance industry. Traditionally, those wishing to establish trusts in Jersey or have them administered within the island have utilised the services of one of the many regulated professional trust companies in the island. However, increasingly high net worth private clients are establishing private trust companies **("PTCs")** to act as the trustee of their family trust, rather than having the family wealth transferred to a Jersey service provider, or other offshore service provider.

In this note, reference to **"PTCs"** is a reference to companies that act as corporate trustees, albeit that it is possible for a foundation to act as a trustee.

Regulatory overview

PTCs are principally regulated by the Financial Services (Jersey) Law 1998, as amended (the **"FSJL"**). It is FSJL that requires any person who carries out trust company business as a business in Jersey to be registered by the Jersey Financial Services Commission (the **"Commission"**). However, since 2000 and the introduction of the Financial Services (Trust Company Business (exemption) (Jersey) Order 2000, a Jersey PTC is exempt from the requirement to register as a trust company service provider subject to certain conditions, namely:

1. It is a company (whether a Jersey company or a foreign company and whether with or without limited liability);
2. The trust company business services that it provides are only in respect of a specific trust or trusts;
3. It does not solicit or provide trust company services to the public;
4. The PTC is "administered" by a "registered person" i.e. a Jersey trust company licensed under FSJL to conduct trust company business; and
5. The name of the PTC is notified to the Commission;

Key features of the establishment of the PTC

The following points are noteworthy:

1. Other than the notification by way of a simple letter to the Commission of the establishment of the PTC, there is no formal application for exemption to be granted by the Commission under FSJL.
2. There is no need to pay any PTC fees or capitalise the PTC in a particular way (unlike a registered trust company business that is regulated by FSJL).
3. There is no requirement to submit to the Commission documents concerning the trusts in respect of which the PTC is to act as trustee.
4. The PTC does not need to be regulated by a Jersey trust company, the requirement being only that "administration" of the PTC is carried out by a regulated trust company.

What does "administration" mean?

There is no published guidance from the Commission on this matter but it is considered that the intention is that more than a company secretarial service is required but there is no obligation to necessarily have a representative from the regulated trust company on the board of directors of PTC (albeit that this often happens). Nevertheless, it will be important to the regulated trust company that it has an adequate flow of information about the management and governance of the PTC in order for it to discharge its own regulated obligations, not least of all in relation to anti-money laundering. It is therefore common for at least one of the board of directors of the PTC to be a member of the regulated trust company. It should be noted, on the issue of anti-money laundering obligations, that there are no requirements in Jersey for a PTC to have a dedicated money laundering or compliance reporting officer, but the Commission would look to the regulated trust company to ensure proper oversight in this respect, hence the importance of understanding the activities being undertaken by the PTC.

Ownership of a PTC

There are myriad options for structuring the ownership of a PTC and the choice will often boil down to professional advice received around the issues of tax and other considerations peculiar to the settlor.

Options include:

Individual

Whilst an individual could own the shareholding of a PTC, this may not be practical given concerns as to what would occur upon his death. Apart from the need to take out probate upon the death of the settlor in this situation, concerns could arise as to the suitability of successors in title to the PTC, especially if the PTC is being utilised to manage inter-generational wealth and avoid the strict effects of forced heirship applicable to the settlor. As such, it is not often that individuals will own a PTC.

Purpose Trust

The option for the PTC to be structured so that it is, in effect, "orphaned" and ownership is not attributable to any particular person is attractive.

Typically, a PTC is therefore held under the terms of a non-charitable purpose trust. Whilst the PTC could be owned by a charitable trust, it is considered that such an approach is less straightforward, because the issue could arise as to whether, absent a genuine charitable purpose, such as a trust could be described as a sham. On the other hand, the holding of shares in a company is a perfectly permissible purpose for a Jersey non-charitable purpose trust which could make the ideal holding structure for a PTC.

A feature of a Jersey non-charitable purpose trust is a requirement for an enforcer whose duties are to enforce the stated it purposes of the trust. The enforcer can be an individual or a legal person but the trustee cannot be the enforcer. There is no requirement for the enforcer to be licensed by the Commission.

An often workable solution is to select the settlor's professional adviser to act as an enforcer or another appropriate individual. There is no requirement for the enforcer to be based in Jersey, the requirements simply being that the administrator of the PTC (i.e. the regulated trust company) is based in Jersey.

Foundation

A foundation (whether a Jersey law foundation or one established under foreign law) can act as the shareholder of a PTC under Jersey law. The hallmark of a foundation is that it is incorporated on the instructions of a founder but it is not owned by the founder nor for that matter anyone else. Therefore, again, ownership issues will not arise in this situation.

Indeed, a foundation could act as the trustee in place of the PTC given that the exemption to the FSJL under the 2000 Order applies equally to Jersey foundations.

Control of the PTC

Assuming the PTC is structured using a company then, of course, the control of the PTC principally rest with its directors. The settlor may wish to control the composition of the board or be a member of the board so that he could actively participate in the PTC in relation to the underlining trusts and assets under administration. This is all permissible under Jersey law.

There are opportunities when drafting the constitutional documentation of the PTCs or the terms of the trust, to provide the bespoke powers to permit settlor involvement e.g. through the need to obtain the approval of the settlor or nominated person (perhaps the enforcer or the protector) in relation to the appointment or removal of directors of the PTC or, for that matter to require the trustee to follow directions of the settlor or the enforcer in relation to matters affecting the composition of the board of the PTC.

If the settlor or other foreign based persons are to become involved in the PTC or have powers under the terms of the trust, then regard needs to be had to, amongst other things, tax considerations and the protection of privacy. Issues can, in particular, arise if a director is subject to foreign legislation which can be used to obtain detailed information about the PTC, its underlining trusts and assets if, which would be usual, privacy is a concern. Equally, it would be usually undesirable for a settlor to retain extensive personal powers if a risk were to arise that an insolvency official could exercise such powers in the event of an ensuing insolvency of the settlor.

Another matter that requires address at the onset of establishment of the PTC, is that the matter of conflict of interests, if the structuring involves family members participating as directors of the PTC. These matters can be addressed by appropriate drafting of the documentation.

If a family member does wish to become a director of a PTC then they should remember that the directors of companies (including PTCs) can potentially incur personal liability if they breach their fiduciary duties. However, this concern can usually be addressed, if it is a concern, through the provision of indemnities and or appropriate director or officer insurance.

Funding of a PTC

The services provided by the regulated trust company to the PTC will typically be covered in an administration agreement under which the regulated trust company will be entitled to charge fees in accordance with the terms of that agreement or as otherwise agreed. If the PTC is "orphaned" structure or there are not in place other arrangements to make it clear as to how the PTC will fund its liabilities (including paying obligations under the administration agreement) then thought will be needed to funding arrangements for the PTC. It may be preferable for the PTC to be self-sufficient financially, not least of all for it to be kept in good standing. This could be achieved either through a PTC being sufficiently capitalised or having charging arrangements in place with the underlining trusts that it administers and invoicing appropriately for those services.

Conclusion

Jersey is now well established as a choice location for establishing a PTC given the ease with which this can be achieved and the availability of administrative and professional support in the island.

Those establishing PTCs appreciate that the structures avoid potential difficulties that can arise where there is a desire to change trustee including delay and costs and on the whole, a PTC is relatively portable in this regard. Equally, the structure provides for family members to be involved in a meaningful way in the management of underlining assets. However, a key issue is to ensure that there is family awareness as to how the PTC operates and its objectives. Indeed, it is often suggested that a "family charter" is considered which would document, by way of a formal statement, the role, investment principles, philanthropic intentions and other objectives of the PTC structure.

It is anticipated that PTCs will continue to be increasingly popular in Jersey.

For further information or specific advice, please contact Nigel Pearmain, Jeffrey Giovannoni, Daniel Walker or Frances Littler of Voisin.

This note is intended to provide a brief rather than a comprehensive guide to the subject under consideration. It does not purport to give legal or financial advice that may be acted or relied upon. Specific professional advice should always be taken in respect of any individual matter.