

KEY POINTS

What is the issue?

Family-managed private trust companies (PTCs) and fiduciary committees appointed under trusts with a high level of non-professional involvement, coupled with inadequately drafted trust and constitutional documents, may find themselves embroiled in litigation or paralysed due to inadequate governance or succession mechanisms.

What does it mean for me?

Trustees and private wealth practitioners should consider undertaking a timely review of their clients' PTCs and fiduciary committees to mitigate litigation risk and optimise their proper management for years to come.

What can I take away?

A knowledge of governance and succession issues for family-managed PTCs and fiduciary committees that arise in emergency situations.



Robert Lindley *TEP* is a Partner and Head of Cayman Islands and BVI Private Client & Trust, and **Wesley O'Brien** is an Associate, at Conyers



The devil is in the detail

ROBERT LINDLEY AND WESLEY O'BRIEN DISCUSS THE UTILITY OF FAMILY-MANAGED PTCs AND FIDUCIARY COMMITTEES AND METHODS TO ENSURE PROPER MANAGEMENT

Recent world events have offered both individuals and businesses across the world an opportunity for introspection. In a period of constant change, the businesses that thrive will be those capable of rapidly adapting to new challenges and changing circumstances. For trustees and those operating in the private wealth sector, it is likely that recent events will accelerate and exacerbate existing challenges and trends. As such, there is no better time to review governing documents, corporate governance procedures and succession planning to ensure that they are fit for purpose.

It is in times of crisis that corporate governance procedures are put to the ultimate test. This applies across the spectrum of private wealth structures, such as private trust companies (PTCs) and fiduciary committees appointed under trust structures.

PTCs

PTCs have experienced varying degrees of popularity in previous years. At one stage, the establishment of a PTC to serve as trustee of one or more family trusts, particularly for Asian clients, was seen as

de rigueur in circumstances where wealthy families wished to retain a high degree of confidentiality or wanted to retain some control over the trust's administration. Some settlors, particularly those resident in civil-law jurisdictions and not familiar with trusts and the role of trustees, often preferred to use the more familiar corporate form of a PTC, appointing family members to its board of directors. However, there are often disadvantages with PTCs and, in recent years, their popularity for some client groups may have waned.

This may be due in part to the sometimes unnecessary complexity of a PTC, the annual costs of its administration, or the mismanagement of the PTC when in the hands of family members who may not fully understand or appreciate a trustee's administrative role. Moreover, professional licensed trust companies will often have the resources and expertise to undertake the trustee's administrative tasks, thus avoiding issues arising due to the PTC's mismanagement and the ever-changing family dynamics that can give rise to potential disputes at the PTC's board level.

This is not to say that a well-run PTC with suitably drafted constitutional documents is not a good option for some families. The devil is in the detail and each family will have bespoke requirements and needs, which may or may not suit the implementation of a PTC in the trust structure. However, it is in times of disruption and emergency events when the stark reality of a mismanaged PTC, and thus perilous trust administration, invariably comes to the fore.

PROTECTOR AND FIDUCIARY COMMITTEES

COVID-19 has been a two-pronged sword, threatening both health and financial security in its rapid spread across the globe. The uncertainty that has accompanied the virus has prompted many people to confront their own mortality and consider whether adequate succession planning is in place for whatever the future holds. With these issues at the forefront of people's minds, this is the ideal time for individuals and their advisors to review and, where necessary, revise existing arrangements; a matter often overlooked until it is too late.

The issue is whether adequate provisions exist with regard to automatic succession of key roles, such as the protectorship of any trusts, or members of any management or fiduciary committee associated with a trust in the event of death or incapacity. With good planning, individuals and family groups can ensure that wealth structures are not 'paralysed' by the loss of a key individual; an outcome that would invariably add to a family's difficulties in times of crisis.

GOVERNANCE

In times of crisis, it is important that a PTC's board and any fiduciary committee can continue to hold regular meetings that are recorded by accurate and appropriately detailed minutes. Given that litigation often follows periods of crisis, minutes of meetings will often become critical in the determination of any disputes and/or assessing the appropriateness of the board's (and its individual members') actions and conduct.

Even for entities and structures that consider themselves relatively unaffected by the current circumstances, it is a fitting time to review whether existing governance procedures are fit for purpose, in that they are capable of responding to a variety of challenges (both known and unknown). Where they are not, remedial action should be taken sooner rather than later.

Points for consideration and review include the following:

Meetings

Whether the governing documents, such as articles of association of a PTC or a

'It is in times of disruption and emergency events when the stark reality of a mismanaged PTC ... invariably comes to the fore'

committee's rules or by-laws, contain adequate provisions with regard to conducting meetings by electronic means. Although most modern documents contain provisions allowing attendance via phone or video, such provisions are not always fit for purpose, especially where meetings are to be conducted wholly electronically. This is unlikely to be an issue for recently incorporated PTCs, but for fiduciary committees appointed under trust instruments and perhaps with older-style rules and by-laws, it is timely to consider whether there are appropriate rules and procedures in place for the facilitation of virtual meetings, or to provide for meetings to be held through a combination of a physical and virtual format. In certain circumstances, it may also be appropriate to address matters such as how voting will take place and whether meetings should be recorded when conducted electronically.

Proxies

How to facilitate meetings where the governing documents (or some other legal requirement) stipulate that meetings must occur in a specific place. Because of the current restrictions on travel, questions may arise as to how such a requirement applies to attendance via electronic means, and whether a quorum can be achieved by appointing proxies to attend and vote at a meeting on a board or committee member's behalf.

Incapacity

Whether there are adequate rules and procedures in place in the event that a director or other office holder, such as a protector, is incapacitated. This can be particularly important in a private wealth context where PTCs (or indeed any underlying companies of trusts) are often controlled by a small number of people. A settlor's rationale for incorporating a PTC to act as trustee of a family trust may have been to ensure involvement of family members and/or close family advisors on the board of directors on the basis that such a board will be more familiar with the settlor's family than an institutional

trustee. Succession planning is therefore critical to ensuring that a company or committee is not paralysed at a time of crisis when it may need to act quickly.

In this context, it is important to review whether governing documents provide for the appointment of, in the context of a PTC, an alternative director or reserve director who can immediately act in the event of a vacancy due to death or incapacity of an incumbent director or office holder. It is worth noting that British Virgin Islands (BVI) VISTA trusts,¹ which are often used to establish a purpose trust to hold the shares of a BVI PTC, can expressly provide under their office of director rules to deal with such events should the need arise to appoint replacement directors to the board of the VISTA trust's underlying BVI company.

Protectors

Similarly, and of particular relevance to protectors, protector committees and other fiduciary boards established under the terms of a trust instrument, the definition of 'incapacity' contained in the trust instrument and the manner in which incapacity is determined and by whom should be reviewed to ensure that it is appropriate for modern purposes.

A review of the protector provisions contained in trust deeds is timely and relevant to ensure that there is adequate provision that the trustee's powers and duties may be exercised in the absence of a protector, due to death or incapacity, or at least to check if the express power to appoint a replacement protector is vested in someone other than the incapacitated or absent protector. Any trustee should have cause for concern upon realising that in the exercise of its powers and duties the appropriate consents had not been obtained, or were defective, thus jeopardising the validity of the trust's administration, particularly if the absent or defective consent has remained undetected for a significant period of time.²

CONCLUSION

With good planning, individuals and businesses in the private wealth sector can look to the future with optimism. Given recent global events, this is a good time for trustees and private wealth practitioners to review trusts' governing documents, PTC and fiduciary committee governance procedures and succession planning to ensure that they remain fit for purpose.

#FAMILY BUSINESS AND FAMILY OFFICE
#COMPANIES #BUSINESS PRACTICE
#TRUSTS

¹ VISTA trusts are subject to the *Virgin Islands Special Trusts Act 2003*, as amended. ² *Y Trust No.1* (2016 unreported) – Cayman Islands