



Guide to Authorised Purpose Trusts

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Preface

The Higgs & Johnson Guide to Authorised Purpose Trusts (“PTs”) in The Bahamas explores the unique nature of PTs, their characteristics, and their most common uses. The Guide demonstrates the flexibility offered in The Bahamas for the creation of non-charitable purpose trusts and other special trusts and powers. This Guide is not intended to be exhaustive and does not purport to be a complete review of issues pertaining to PTs. For further information please contact the Private Client & Wealth Management team at Higgs & Johnson.

A trust instrument is a unique legal relationship whereby the settlor of the trust transfers the assets of any type, representing the trust property, to the trustee, who holds legal title of the trust property, to be administered for the benefit of the beneficiaries, who hold equitable title to the trust property, in accordance with the provisions of the trust instrument. Bahamian law recognizes trusts, and the Supreme Court of The Bahamas has a long history of upholding the principles of equity. Recent developments in trust legislation have strengthened The Bahamas' position as an international financial centre.

What is an Authorised Purpose Trust ("PT")?

One of the most recent additions to the products and services in the Trusts Sector in the Bahamas is the PT. A PT is, as its name suggests, a trust set up for the achievement of a particular purpose authorised by the trust instrument. Prior to 2004, the Bahamas did not recognize a non-charitable purpose trust. Traditionally, private trusts had to have named beneficiaries or classes of beneficiaries. Purpose trusts do not fit this mould and are often compared to charitable trusts.

Conventionally, the beneficiaries of a charitable trust had to be either persons or charitable purposes. Trusts are only considered charitable if they are for the relief of poverty, the advancement of religion, the advancement of education or some other purpose beneficial to the community. Like many other international jurisdictions, with its enactment of The Purpose Trust Act, 2004, the Bahamas now recognizes trusts for non-charitable purposes.

PTs may be declared by a trust instrument for a non-charitable purposes, including, exclusively or otherwise, the purpose of holding, or investing in shares in a company or any other assets constituting the trust property. Moreover, in the context of a PT, there is no requirement that beneficiaries be named, although authorised applicants have to be appointed to ensure the trustees are fulfilling their obligations under the trust. An amendment which became effective April 3, 2007 provides that a trust may create an authorised purpose trust of capital or income of any property which may have fixed interests, discretionary interests, or a combination of both. Further, the capital or income of the authorised purpose trust may be disposed of in any of the following ways:

- to persons who may be of any number;
- for purposes which may be of any number or kind, charitable or non-charitable; or

- to any combination of persons or purposes aforementioned.

An authorised purpose trust may not hold land or an interest in land in The Bahamas directly or indirectly but it may lease office premises for the purpose of its business.

PTs are subject to the Trustee Act, 1998 and general equitable principles of law if the Purpose Trust Act, 2004 ("the PT Act") is silent in any respect.

Authorised Applicants

In The Bahamas, there is no provision for an "enforcer" as such but rather for authorised applicants who would carry out similar functions, i.e. persons appointed as such under the trust instrument. Authorised applicants have the following rights:

- standing to make application by originating summons to the court in respect of the allocation of income and capital amongst the different purposes of the trust.
- standing to apply to the court to resolve an uncertainty as to the administration of the trust.
- standing to apply to the court to reform the trust *cy-près*.
- the same rights *inter alia* as beneficiaries of an ordinary trust to bring and prosecute administration proceedings and proceedings for the recovery of trust property.
- the right to such accounts and inquiries and such other personal and proprietary remedies and relief, for the benefit of the trust, as could be obtained by a beneficiary of an ordinary trust.
- standing to apply to the court for an opinion, advice or direction in connection with the trust.
- in addition to rights specifically conferred in the trust instrument, the right to inspect and make copies of the instruments, registers and documents of the trust kept by the trustee, all other records and documents of the trust, and the opinions and legal advice of counsel in the general administration of the trust.
- the same rights to information and access to documents as the authorised applicant would have if the authorised applicant were a beneficiary with a vested interest under the trust.

Advantages of PTs

Flexibility

A PT enables greater flexibility with regard to the objects of the trust. It allows the objects of the trust to be individuals

and corporations, purposes, or both. There may be any number of beneficiaries and any number of authorised purposes, whether charitable or not, provided that the purpose[s] of the PT meet the requirements of the PT Act. If the trust instrument of a PT has more than one authorised purpose, it may provide for the trustee to have absolute discretion to allocate capital and income among the different purposes or objects of the trust, and to devise and determine the methods to be used to pursue the purposes of the trust.

Uncertainty of the Trust

A PT is never rendered void by uncertainty as to the administration of the trust. Any uncertainty as to the administration of the trust may be resolved by the trustee or any other person the trust instrument so specifies. If the trustee or the other person fails to resolve the uncertainty, the Court may resolve it by reforming the terms of the trust. Therefore, it is very improbable that a PT would be declared void on grounds of uncertainty, as would be the case with a traditional trust.

Tax Neutral

The Bahamas has no income, capital, or estate taxes; therefore, the trustees and the trust planner, in establishing a Bahamian PT, do not need to take any form of local taxation into account.

Litigation Avoidance

The PT Act provides for authorised applicants, who enforce the trust, rather than the beneficiaries. Authorised applicants are individuals appointed as such under the terms of the trust instrument, or persons appointed by the court. Authorised applicants have the standing to enforce the terms of the trust by making certain applications to the court, which include administrative proceedings, proceedings for the breach of trust, and also rights to information.

Individuals who are beneficiaries of the PT or who may benefit indirectly from the PT are not authorised applicants unless they are named or appointed. In effect, there is a clear distinction between the ability to benefit from the trust and the actual ability to enforce the terms of the trust.

Commercial Context

A frequent use of a PT is in the commercial trust context,

where the separation of legal ownership from control is often employed. For example, the PT Act enables a trust to be set up with the objective of corporate ownership whilst the retention of control is in the hands of the directors. What this does is allow the trustee to mitigate the assumed risk of owning shares in companies which it does not manage, or is perhaps not capable of managing due to the nature of the business involved.

A settlor may wish to create a trust vehicle which allows him to own the shares of companies without any corresponding exposure to potential liability to the trustee that may derive from such share ownership. PTs may be also used for the purpose of owning special purpose vehicles in securitisation transactions and the ownership of founder shares of mutual funds.

Reformation – Cy Pres

The PT Act empowers the trustees or any other person to reform the trust or to make a cy-pres application to the court in the event that it becomes in whole or in part:

- impossible or impracticable;
- unlawful or contrary to public policy; or
- obsolete in that, by reason of changed circumstances it fails to achieve the general intent of the trust.

Further Uses of PTs

The PT has been a popular trust vehicle in recent years and has numerous estate planning and commercial uses, such as:

- Acting as a vehicle to hold shares of a Private Trust Company
- Creating a trust which has both philanthropic and charitable purposes
- Asset purchase or financing transactions to provide security for an entity which finances the purchase or to keep the asset and corresponding liability from appearing on a purchaser's balance sheet
- Creating dynasty-style trusts for multiple generations in the family for the purpose of holding treasured family assets, investments, and/or preserving shares in family-owned businesses

- Creating trusts which benefit individuals or corporations while at the same time achieving additional objectives such as the continuation of a professional business
- Forming “Special Purpose Vehicles” for a wide range of commercial transactions in a safe, flexible, and bankruptcy remote manner
- Separating voting from economic control
- Creating trusts that are formed for the purpose of liquidating particular assets and distributing the assets transferred to it
- Creating an escrow trust for the purpose of holding funds from a purchaser in escrow for the seller
- Holding a single asset, such as a valuable piece of artwork, or an airplane
- Forming mutual funds as unit trusts, where hedge fund managers wish to eliminate any obligation to attend meetings of the companies in whose securities they invest
- As a part of orphan structures in bond issues where the trustees wish to divorce themselves from supervising the issuing vehicle

Requirements of PTs

A PT must satisfy the following requirements:

- the purpose must be possible and sufficiently certain to allow the trust to be carried out;
- the purpose must not be contrary to public policy or unlawful under the laws of The Bahamas; and
- the trust instrument must specify the event upon the happening of which the trust terminates, and provide for the disposition of surplus assets of the trust upon its termination.

Qualifications of Trustees

A trustee of an authorised purpose trust who carries out trust business in The Bahamas must be either a licensed bank or trust company or an individual who is licensed as a financial and corporate service provider.

Role of the Attorney General

The Attorney-General is empowered to make an application to the Court to enforce the PT, produce documents relating to the PT, or perform any activities that an authorised applicant is privileged to do in respect of a PT, so long as the Attorney-General is unaware of any person who would be able or willing to pursue such an application or course of action. The Attorney General may also apply to the Court

for the appointment of an authorised applicant in relation to the trust and the Court may appoint a person who is able and willing to act as an authorised applicant. All trustees that administer a PT must also permit the Attorney-General to make copies of the instruments, registers and documents relating to the PT.

Regulations Specific to PTs

The records that a trustee must keep in The Bahamas are the following:

- a copy of the trust instrument which created or evidenced each PT of which he is a trustee, copies of amending and supplemental instruments and all other written instruments executed pursuant to any of them;
- a register of each such trust specifying in respect of each trust, the name of the person who created the trust, a summary of the purpose or purposes of the trust and the name and address of any authorised applicants named as such in the trust instrument; and
- such documents as are sufficient to show the true financial position of each such trust at the end of the trust's financial year together with details of all applications of principal and income during that financial year.

Anti-Money Laundering Obligations

In 2000, the government of The Bahamas enacted nine new laws relating to anti-money laundering. These new laws provide for more comprehensive and enhanced supervision of financial institutions, corporate service providers and international business companies and establish a more coordinated system of deterrence against money laundering and other criminal abuses within the financial sector and provide for greater international cooperation in the oversight of the financial system. The new laws are as follows:

- The Banks and Trust Companies Regulation Act, 2000
- The Central Bank of The Bahamas Act, 2000
- The Financial Intelligence Unit Act, 2000
- The Proceeds of Crime Act, 2000
- The Financial and Corporate Service Providers Act, 2000
- The Financial Transactions Reporting Act, 2000
- The International Business Companies Act, 2000
- The Evidence (Proceedings in other Jurisdictions) Act, 2000 and
- Criminal Justice (International Cooperation) Act, 2000

Key features of the enactments included: enhanced powers of the Governor of the Central Bank in respect of licensees; operational independence of the Central Bank in supervision and regulation of banks and trust companies; increased information sharing with other regulators for supervisory purposes. In addition the legislation upgraded banking supervision, including, but not limited to, on-site examination of banks and trust companies, as well as examinations by appropriate overseas supervisory authorities; know-your-customer requirements and suspicious and unusual transactions reporting were enhanced. A Financial Intelligence Unit was established and the legislation introduced the licensing of financial and corporate service providers such as lawyers, accountants and management companies.

In 2003, the Government enacted amendments to the Financial Transactions Reporting Act and the Financial Transactions Reporting Regulations which provided the basis for financial institutions to implement a risk-based approach to customer due diligence and antimoney laundering procedure. The amendments realign The Bahamas' know-your-customer regime with the Financial Action Task Force's Revised 40 Recommendations issued in June 2003 with specific regard to the implementation of a risk rating framework for assessing the money laundering risks that client relationships pose to licensees.

Additionally, in 2004 Parliament enacted the Anti-Terrorism Act, 2004, which addresses several of the Financial Action Task Force's Special Recommendations. The law defines the offence of terrorism and criminalising the financing of terrorism and provides for

the seizure and confiscation of terrorist assets; reporting of suspicious transactions related to terrorist financing; and strengthening of existing mechanisms for cooperation in this regard between The Bahamas and other countries.

The anti-money laundering legislation in The Bahamas is considered to be as advanced as that of any Organisation for Economic Co-operation and Development member country.

A trust company, like other financial institutions, has specific duties with regard to (a) identification (b) record keeping and (c) internal reporting procedures. These duties exist irrespective of whether it accepts appointments to a new trust or it administers an existing trust. Under the Financial Transactions Reporting Act, a trust company must "verify" the identity of beneficiaries with a vested interest under a trust. A trust company must disclose information to the appropriate supervisory authority if it knows or reasonably suspects that another person is engaged in money laundering. A trustee is given protection from criminal or civil liability for bona fide disclosure of information; however, he should exercise caution regarding the extent of the information divulged.

Conclusion

The PT adds to the versatility of The Bahamas' trust tool kit which provides trust planners with increased flexibility in trust planning. It has proven to be a popular trust mechanism and is a progressive step forward in trust and estate planning.