mandatory for Bermuda companies to appoint auditors unless all of the directors and all of the members agree not to.[39] At least five days' notice in writing of the meeting must be given to members, however this can be waived and in practice it usually is.[40] The Companies Act also specifies: (a) the requirements as to the content of the notice; (b) the quorum for the meeting (a majority);[41] (c) that only members who have met all calls are eligible to attend;[42] and (d) other procedural requirements.[43] The statutory meeting is mandatory and is deemed to be the annual general meeting for the year in which it is convened.[44]

2.017 Once the statutory meeting has been held, the company can commence its activities. In practice, the statutory meeting is often followed immediately by the first meeting of the board of directors.

(a) Incorporation and annual fees

2.018 A company must pay annual fees on incorporation and thereafter by 31 January each year.[45] The fees must be accompanied by a declaration stating the company's principal business and, if the company has share capital, details about its assessable share capital. Annual fees are levied on the basis of assessable share capital for the previous year.[46] The current annual government fees for exempted companies are as follows:[47]

Where the assessable capital of the exempted company is:	Fee (in Bermuda dollars)
$0–$12,000	$1,995
$12,001–$120,000	$4,070
$120,001–$1,200,000	$6,275
$1,200,001–$12,000,000	$8,360
$12,000,001–$100,000,000	$10,455
$100,000,001–$500,000,000	$18,670
$500,000,001 or more	$31,120

2.019 Additional annual fees will apply if a company's share capital is denominated in a currency other than Bermuda dollars and if it undertakes certain business.

2.020 If an exempted company fails to pay its annual fees by 31 January, then it will be liable for a fine, currently BM$300.

[39] Companies Act 1981, section 88(1).
[40] Ibid., section 70(2).
[41] Ibid., section 70(5).
[42] Ibid., section 70(3).
[43] Ibid., section 70 generally.
[44] Ibid., section 70(6).
[45] Ibid., section 131(1).
[46] Ibid., section 121(1)(a).
[47] Ibid., Fifth Schedule, Part II.

(b) Piercing the corporate veil

2.021 The general rule for limited companies (whether limited by shares or limited by guarantee) is that a member has no liability in its capacity as such for the debts and obligations of the company.[48] Accordingly, third parties cannot ordinarily bring an action against a member for recovery of the company's debts. In the case of a company limited by shares, the liability of its members is limited by the memorandum to the amount, if any, unpaid on the shares held by them,[49] and no contribution shall be required from any member in the event of a company being wound up exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member.[50] The liability of members of a company limited by guarantee is limited by the memorandum to such an amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of it being wound up,[51] and no contribution shall, subject to certain special provisions relating to mutual companies, be required from any member exceeding such in the event of winding-up.[52] In certain circumstances, however, a member may be held liable for the company's debts, either where the member has personally guaranteed those debts or otherwise undertaken responsibility for them, or where the Courts are prepared to 'pierce the corporate veil'.

2.022 It has long been recognised that the principle of corporate limited liability can cause hardship in certain extreme circumstances, as a result of which a line of case authority has qualified the doctrine to a limited extent. The situations in which the Court may be persuaded to lift the veil of incorporation are ordinarily divided into three, potentially overlapping, categories: (a) where the veil of incorporation is used for an illegal or improper purpose; (b) in the case of fraud by the shareholder; and (c) where the company is a mere façade or sham to facilitate a wrong by the shareholder.[53] It should be noted that, in all of the case authorities, the decisions are highly fact specific and depend on a claimant persuading the Court that it was equitable in the factual circumstances to override the fundamental principle enshrined in *Salomon v A Salomon & Co Ltd*,[54] and reiterated in statutory form under section 5 of the Companies Act 1981.

2.023 Where incorporation is used to facilitate an illegal or improper end, the Courts have shown themselves willing to lift the veil of incorporation. For example, where it was held that "the defendant company was formed and was carrying on business merely as cloak or sham for the purpose of enabling the [shareholder] to commit a breach of a covenant" given by the shareholder in his personal capacity, the Courts were prepared to impose direct liability.[55] Similarly, it has been held that the Courts may pierce the corporate veil where assets were deliberately transferred out of a company in order to

[48] Companies Act 1981, section 158(f).
[49] Ibid., section 5(2)(a).
[50] Ibid., section 158(d).
[51] Ibid., section 5(2)(b).
[52] Ibid., section 158(e).
[53] See *Prest v Petrodel* [2013] UKSC 34.
[54] [1896] UKHL 1.
[55] *Gilford Motor Co Limited v Horne* [1933] 1 Ch 935.

defeat known claims against the company by creditors.[56] The English Court of Appeal has also held that where a defendant shareholder had used a corporate structure as a device or façade to conceal his criminal activities, the Court could lift the corporate veil and treat the assets of the company as the realisable property of the defendant shareholder for the purposes of the relevant English statute.[57] Similarly, the English Court of Appeal has lifted the veil where a defendant in a company fraud case took elaborate steps to hide his assets by establishing an intricate network of companies and trusts. The veil of incorporation was lifted in order to locate and identify the defendant's assets.[58]

2.024 The Court may also consider lifting the veil of incorporation "where special circumstances exist indicating that [the company] is a mere façade concealing the true facts."[59] This is arguably the most complex area of the law relating to piercing the corporate veil. Generally, the Courts have looked to the legal and not the economic substance of transactions in determining whether or not such transactions are 'shams'. In *Snook v London and West Riding Investments Ltd,*[60] Diplock J indicated that "for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating." Shams were further considered in *Re Polly Peck International plc,*[61] as per Walker J: "where the law is looking for the substance of a matter, it is normally looking for its legal substance not its economic substance." This characterisation of the doctrine of shams and façades is most aptly applied where one person uses "a company in an unconscionable attempt to evade existing obligations or to facilitate some other deception."[62]

2.025 In the leading case on piercing the corporate veil, *Prest v Petrodel Resources Ltd,*[63] the English Supreme Court held that there was "a limited power to pierce the corporate veil in carefully defined circumstances"[64] such as when "a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control."[65] In such circumstances, the Supreme Court held, the veil could only be pierced for the purpose of "depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality."[66] On the facts, there was no evidence in *Prest* that the defendant had incorporated companies for the purposes of gaining any advantage in the divorce proceedings, and so there was no justification for piercing

[56] *Creasey v Breachwood Motors* [1993] BCLC 480.
[57] *Re H (Restraint Order: Realisable Property)* [1996] 2 BCLC 500.
[58] *Re a Company* [1985] BCLC 333.
[59] *Woolfson v Strathclyde Regional Council* [1978] SLT 159.
[60] [1967] 2 QB 786.
[61] [1996] 2 All ER 433.
[62] Walker J citing *Gilford Motor Co Limited v Horne* [1933] 1 Ch 935.
[63] [2013] UKSC 34.
[64] Ibid., paragraph 27.
[65] Ibid., paragraph 35.
[66] Ibid., paragraph 36.

the corporate veil. Lord Neuberger held that the Court would only have the ability to pierce the corporate veil when "all other, more conventional remedies have proved to be of no assistance."[67] He recognised that the inconsistencies in exercising the power to lift the corporate veil were not peculiar to England:[68] "In Australia, in *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 567, Rogers AJA in the New South Wales Court of Appeal observed that "there is no common, unifying principle, which underlies the occasional decision of Courts to pierce the corporate veil", and that "there is no principled approach to be derived from the authorities". In *Kosmopoulos v Constitution Insurance Co* [1987] 1 SCR 2, paragraph 12, Wilson J in the Supreme Court of Canada said that "The law on when a Court may...'[lift] the corporate veil'...follows no consistent principle". The New Zealand Court of Appeal in *Attorney General v Equiticorp Industries Group Ltd* [1996] 1 NZLR 528, 541, said that "'to lift the corporate veil'...is not a principle. It describes the process, but provides no guidance as to when it can be used." In the South African Supreme Court decision, *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790, 802–803, Smalberger JA observed that "The law is far from settled with regard to the circumstances in which it would be permissible to pierce the corporate veil"." Lord Neuberger also noted that "the doctrine has fared no better with academics."[69]

2.026 In *Adams v Cape Industries plc,*[70] the English Court of Appeal suggested that a subsidiary that was used solely as a corporate name by the parent and other subsidiaries of the parent on invoices, and which acted not through its own employees and officers but through those of other related companies, could potentially be a sham or façade. Accordingly, it seems that the sham or façade argument is only usually relevant as an additional gloss on illegal or improper purpose, or fraud exceptions: where a subsidiary has no officers or directors, or where parties to documents collude in failing to respect the documented legal substance of a transaction.

2.027 In *Adams v Cape Industries plc,*[71] the English Courts specifically considered whether an English parent company could be liable for the trading, by its U.S. subsidiary, of asbestos products. In that case, the Courts expressly dismissed the arguments that the parent and subsidiary were carrying on the same business and as such should be regarded as a 'single economic unit', and also that trading through a subsidiary simply to restrict the parent's liability was a 'sham' or 'façade'. The Court found that the subsidiary was an independent company, carrying on its own business and not the business of the parent and so did not constitute a sham, despite that company having been set up and paid for by the parent. In particular, the Court found that it was not entitled to lift the corporate veil "as against a [shareholder] which is a member of a

[67] [2013] UKSC 34, at paragraph 62.
[68] [2013] UKSC 34, 75.
[69] [2013] UKSC 34, 77.
[70] [1994] 1 BCLC 574.
[71] [1990] Ch 433 is the leading UK company law case on separate legal personality and limited liability of shareholders. The case also addressed long-standing issues under the English conflict of laws as to when a company would be resident in a foreign jurisdiction such that the English Courts would recognise the foreign Court's jurisdiction over the company.

corporate group, merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group … will fall on another member of the group rather than the [shareholder]. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law."

2.028 Staughon LJ in *Atlas Maritime Co SA v Avalon Maritime Ltd, The Coral Rose*[72] stated that "the creation or purchase of a subsidiary company with minimal liability, which will operate with the parent's funds and on the parent's directions but not expose the parent to liability, may not seem to some the most honest way of trading. But it is extremely common in the international shipping industry and perhaps elsewhere. To hold that it creates an agency relationship between the subsidiary and the parent would be revolutionary doctrine."[73] This must be consistent with the general tenor of Bermuda law; it takes something involving a significant degree of moral turpitude to generate sufficient opprobrium to justify expressly circumventing the clear intent of the legislature in the Companies Act.

2.029 However, in *Chandler v Cape plc,*[74] the English Court of Appeal held that a direct duty may be owed in tort by a parent company to a person injured by a subsidiary. The decision is significant because it represents the first time that an injured employee of a subsidiary company has established that his employer's parent company owed him a duty of care. Arden LJ dismissed any suggestion that the case involved piercing the corporate veil, but the outcome has an equivalent effect in that, through the application of tortious principles, it imposes liability upon a parent company despite the fact that the parent company is a legal entity separate from that of its subsidiary.

3. Company Name

2.030 In the cross border commercial world the name of the company can be of crucial significance. Particular significance may attach to names that are considered auspicious in certain cultures. Ultra-high net worth investors often like to have a name based on their own. On the other hand, the incorporators of special purpose vehicles used in securitisation structures will go out of their way to ensure that the name of the company is not easily associated with the name of the originator. Before a company can be incorporated, it is necessary to check with the Registrar that the proposed name is available. Typically an application will be made to the Registrar to reserve a name, and once reserved that name will be available for three months.[75]

2.031 A Bermuda company can be incorporated with any name that is not undesirable in the opinion of the Registrar.[76] In this respect, it appears that the Registrar has a wide discretion

[72] [1991] 4 All ER 769.
[73] Ibid.
[74] [2012] EWCA Civ 525.
[75] A name reservation form may be obtained from the website of the Registrar of Companies at www.roc.gov.bm.
[76] Companies Act 1981, section 8(1).

to refuse to register a company with a name of which he disapproves, and the Companies Act does not indicate that there is any way to appeal against the Registrar's decision, although a judicial review would probably be available. The Registrar also has the power at any time after incorporation, if it appears to the Registrar that the name under which it is registered is undesirable, to notify the company accordingly and direct the company to change its name. The company is then obliged to do so within six weeks.[77] There is, however, a statutory right to appeal to the Court against this decision, and the Court's confirmation or lack thereof regarding any direction given by the Registrar, is final and conclusive.[78]

2.032 The Companies Act also specifies certain objective criteria relating to company names:

(a) *Suffixes*: In the case of a company limited by shares of guarantee, the word 'Limited' must be the last word of its name.[79] Unlimited companies may not use the 'Limited' suffix;[80]

(b) *Similar names*: A company name must not be identical with the name by which a company is registered or incorporated under the Companies Act or any other Act, or so nearly resembles that name as to be likely to deceive, unless that company signifies its consent in such manner as the Registrar may require;[81]

(c) *Prohibited words*: The name must not contain:

(i) the words 'Chamber of Commerce', or words that in the opinion of the Registrar words suggest, or are likely to suggest, the patronage of Her Majesty or of any member of the Royal Family, or connection with any government whether of Bermuda or elsewhere;

(ii) the word 'municipal' or 'chartered' or words that in the opinion of the Registrar word suggest, or are likely to suggest, connection with any public board or other local authority or with any society or body incorporated by Royal Charter;

(iii) the word 'co-operative'; or

(iv) the words 'building society'.[82]

2.033 If, through inadvertence or otherwise, a company on its first registration or on its registration with a new name is registered with a name which in the opinion of the Registrar too closely resembles the name by which a company in existence is already registered, the first mentioned company may, with the sanction of

[77] Companies Act 1981, section 8(3).
[78] Ibid., section 8(4).
[79] Ibid., section 7(1)(a). There is an exception to this rule for companies formed for promoting art, science, religion, charity, sport, or any other useful object that has received an exemption by way of licence from the Minister of Finance under Companies Act 1981, section 9.
[80] Ibid., section 8(2)(g).
[81] Ibid., section 8(2)(a).
[82] Ibid., section 8(2)(b)-8(2)(e).

the Registrar, change its name, and shall, if the Registrar so directs within six months of its being registered by that name, change its name within six weeks of the date of such direction or within such longer period as the Registrar may think fit to allow. Failure to comply with this rule renders the Company liable to pay a default fine.[83]

2.034 All of the above rules apply equally where a company is changing its name, and to any secondary names. Subscribers and companies wishing to change their names will need to check first with the Registrar to ensure that the proposed name is available in the same way that they would on incorporation.

2.035 Since 2006 Bermuda companies have been permitted to apply to the Registrar to register a secondary name in a script other than roman script. This has proved particularly popular in Asia. On adoption of a secondary name, the company's existing name set out in its memorandum is considered its 'primary name'.[84] An application for registration of a secondary name, which is subject to the same restrictions specified above, shall be in the manner and form determined by the Registrar and shall be accompanied by:

(a) a certificate signed by a person authorised to administer oaths certifying the accuracy of the English translation of the secondary name and certifying that the person is fluent in the language and script used to express the secondary name; and

(b) a copy of the text of the secondary name in electronic form, suitable to be reproduced in a certificate of secondary name.[85]

2.036 Upon the Registrar being satisfied as to the matters above the Registrar shall enter primary and secondary names on the register, as well as register the effective date of registration of the secondary name, (which shall be the date of entry of the secondary name on the Register). The Registrar will then issue a certificate of secondary name.[86] The Registrar is not required to use the secondary name of a company in certifying any documents in the Register,[87] but the company needs to ensure that it uses its primary name in close proximity to its secondary name on all documentation.[88] It does not appear to be mandatory for a company to use its secondary name on all written correspondence.

2.037 The process for changing a company's name is straightforward: a company may, by resolution, change its name if the Registrar has approved the proposed name.[89] The company will need to submit a certified copy of the resolution and the prescribed

[83] Companies Act 1981, section 8(3).
[84] Ibid., section 10A(1).
[85] Ibid., section 10A(3).
[86] Ibid., section 10A(4).
[87] Ibid., section 10A(7).
[88] Ibid., section 10A(8).
[89] Ibid., section 10(1).

fee to the Registrar. The Registrar will enter on the Register the new name in place of the former name, the effective date of the change of name, which shall be the date of entry of the new name on the register, and issue a certificate of change of name.[90]

2.038 Neither the change of a company's name nor the adoption of a secondary name shall affect any rights or obligations of the company, or render defective any legal proceedings by or against it in its former or primary name, and any legal proceedings that might have been continued or commenced against it in its former name may be continued or commenced against it in its new name.[91]

4. Types of Company

2.039 Under the Companies Act it is possible to incorporate: [92]

(a) a company limited by shares;

(b) a company limited by guarantee; or

(c) an unlimited company.

2.040 In addition, a company may be formed:

(a) as an exempted company by stating so in its memorandum;[93]

(b) as a limited duration company, by fixing the duration of the company in its memorandum on incorporation;[94] or

(c) unless it is a company limited by shares or other company having share capital, as a mutual company by including in its memorandum an authorisation to engage in or carry on as a principal object insurance or re-insurance business of all kinds on the mutual principle (not to be confused with the mutual fund). [95]

2.041 Any company either engaged in insurance business or otherwise having the approval of the Minister of Finance may also apply to be registered as a segregated accounts company.[96]

2.042 There follows a summary of the type of companies that may be incorporated under the Companies Act:

[90] Companies Act 1981, section 10(3).
[91] Ibid., sections 10(4) and 10A(9).
[92] Ibid., section 5(2).
[93] Ibid., section 127(ii).
[94] Ibid., section 7(1)(h).
[95] Ibid., section 152(1); see further Chapter 9.
[96] Segregated Accounts Companies Acts 2000, section 3; see further Chapter 9.

Type of company	Company limited by shares	Company limited by guarantee	Unlimited company
Local company	✓	✓	✓
Exempted company	✓	✓	✓
Can carry on any business in Bermuda	✓	× Specified activities only	✓
Limited duration company	✓	✓	✓
Mutual company	×	✓	×
Segregated accounts company	✓	✓	✓

2.043 The Companies Act recognises the concept of an overseas company, i.e. any body corporate incorporated outside Bermuda other than a non-resident insurance undertaking. Overseas companies (other than exempted mutual funds) require a permit from the Minister of Finance to engage in or carry on any trade or business in Bermuda.[97]

(a) Companies limited by shares

2.044 A company limited by shares is one that can issue shares, and the members of which are the holders of such shares. Members have limited liability. The memorandum of a company limited by shares must:

(a) include the word 'limited' as the last word of the company's name;

(b) specify that the liability of its members is limited;

(c) state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount; and

(d) state that the persons who subscribe their names to the memorandum agree to take such number of shares of the company as may be allotted to them respectively by the provisional directors, not exceeding the number of shares for which they respectively subscribe, and that they agree to satisfy such calls as may be made on them by the directors, provisional directors or promoters in respect of the shares allotted to them.[98]

2.045 The subscribers to the memorandum of a company are deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members, but only if shares have actually been allotted

[97] Companies Act 1981, section 133(1).
[98] Ibid., section 7.

to them at the provisional directors' meeting immediately after incorporation.[99] The liability of the members for the debts of the company is limited to the amount, if any, unpaid on the shares held by them[100] and no contribution shall be required from any member in the event of a company being wound up exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member.[101] This is a statutory affirmation of the principle that the company has separate legal personality from its members and a creditor cannot generally sue a member of a limited company for the company's debts. It has been noted that "a fundamental principle of Bermuda Law is that a company has its own legal personality, that is, it is separate and distinct from its shareholders, owns its property and acts in its name in creating obligations and liabilities."[102]

2.046 Outside of specific scenarios where the Courts will permit piercing of the corporate veil,[103] a shareholder's liability to contribute to the company's assets is limited to the amount unpaid on shares held by him.[104]

(b) Companies limited by guarantee

2.047 A company limited by guarantee cannot issue shares to its members. Instead, the liability of a member of a company limited by guarantee (other than a mutual company) is limited to such an amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of it being wound-up,[105] and that amount must be specified in the memorandum[106] unless the company is a mutual company.[107] The memorandum also needs to include the word 'Limited' as the last word of the company's name and specify that the liability of its members is limited, as with companies limited by shares.

2.048 In Bermuda a company limited by guarantee can only be formed if:

(a) its purpose is to promote art, science, religion, charity, sport, education, or any other social or useful purpose, any profit, and other income is to be used in promoting its purposes, and no dividends are to be paid to its members;

(b) it is a mutual company; or

(c) it is a company that has been exempted by or under an exemption order made under section 10(2) of the Trusts (Regulation of Trust Business) Act 2001.[108]

[99] Companies Act 1981, section 19(1).
[100] Ibid., section 5(2)(a).
[101] Ibid., section 158(d).
[102] *Clark v Energia Global International Ltd* [2002] Bda LR 39.
[103] As to which, see Part 2 of this Chapter.
[104] Companies Act 1981, section 158(d).
[105] Ibid., sections 5(2)(b) and 158(e).
[106] Ibid., section 7(3).
[107] Ibid., section 154(1).
[108] Companies Act 1981, section 5(3).

must be a company limited by guarantee, and the provisions of the Companies Act relating to companies limited by guarantee will apply to mutual companies,[123] subject to certain key exceptions:

(a) a mutual company must create and maintain a reserve fund of not less than an amount approved by the Minister of Finance in respect of such company, it must state the amount of its reserve fund in its memorandum, and the reserve fund is then treated in all respects as if it were share capital;[124] and

(b) the liability of a member of a mutual company in the event of it being wound up, shall be limited to the premiums or any unpaid premiums or un-discharged portion thereof due to the company on the date of the commencement of the winding-up owing from such members.[125]

(iii) *Segregated accounts companies*

2.059 Insurance companies are permitted to incorporate, or register, as segregated accounts companies ("SACs"). SACs are permitted to compartmentalise specified assets and liabilities by operating segregated accounts. A segregated account is defined as a "separate and distinct account (comprising or including entries recording data, assets, rights, contributions, liabilities and obligations linked to such account) of a segregated accounts company pertaining to an identified or identifiable pool of assets and liabilities of such segregated accounts company which are segregated or distinguished from other assets and liabilities of the segregated accounts company for the purposes of the legislation."[126] A SAC may be incorporated by Private Act, but in practice most are incorporated under the Companies Act 1981 and then apply to be registered as a SAC under section 3(1) of the Segregated Accounts Companies Act 2000.

5. Memorandum and Bye-Laws

2.060 The constitutional documents of a Bermuda company are its memorandum and bye-laws; these regulate the relationship between the company and its members and directors. Historically, the purpose of the memorandum was to regulate the relationship between the company and outside world, whereas the purpose of the bye-laws was to regulate the internal management of the company. This distinction has been blurred in many jurisdictions but Bermuda companies retain this traditional demarcation between the memorandum and the bye-laws. The memorandum is a publicly available document; the bye-laws are not. Section 13(1) of the Companies Act makes it clear that the bye-laws are designed to regulate the administration of a company, which is an internal matter. The memorandum remains the more important of the two documents, and in the event of any consistency the memorandum would prevail.[127]

[123] Companies Act 1981, section 156(1).
[124] Ibid., section 153.
[125] Ibid., section 154(1).
[126] Segregated Accounts Companies Act 2000, section 2(1).
[127] *Ashbury v Watson* [1885] 30 Ch D 376.

The Companies Act specifies certain compulsory matters that must be included in the memorandum and bye-laws as follows: 2.061

(a) memorandum:

(i) the name of the company and, in the case of a company limited by shares or a company limited by guarantee, subject to section 9 of the Companies Act 1981, the word 'Limited' as the last word of the name;

(ii) in the case of a company limited by shares or a company limited by guarantee, that the liability of its members is limited;

(iii) the objects of the company or that its objects are unrestricted;

(iv) the secondary name of the company if it has adopted a foreign character name;

(v) the names, addresses, and nationalities of the persons who subscribe their names to the memorandum and which of them, if any, has Bermuda status;

(vi) whether the company is to be an exempted company;

(vii) the period, if any, fixed for the duration of the company, or the event, if any, on the occurrence of which the company is to be dissolved;[128]

(viii) in the case of a company limited by shares:

a. the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount; and

b. that the persons who subscribe their names to the memorandum agree to take such number of shares of the company as may be allotted to them respectively by the provisional directors, not exceeding the number of shares for which they respectively subscribe, and that they agree to satisfy such calls as may be made on them by the directors, provisional directors or promoters in respect of the shares allotted to them;[129]

(ix) in the case of a company limited by guarantee other than a mutual company, that each member undertakes to contribute to the assets of the company in the event of it being wound up while he is a member, or within one year after he ceases to be a member, for the payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges, and expenses of winding-up, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount;[130]

[128] Companies Act 1981, section 7(1).
[129] Ibid., section 7(2).
[130] Ibid., section 7(3).

(x) the memorandum must be signed by each subscriber and witnessed, or, if delivered electronically, authenticated to the satisfaction of the Registrar;[131] and

(b) bye-laws:

(i) for companies limited by shares, or other companies having a share capital, the transfer of shares and the registration of estate representatives of deceased shareholders;

(ii) the keeping of its accounts and making available the financial statements to the members;

(iii) an audit of the accounts of the company at least once in every year by an independent representative of the shareholders;

(iv) for companies limited by shares, or other companies having a share capital, the duties of the secretary to the company; and

(v) the number of members required to constitute a quorum at any general meeting of the members of the company.

2.062 Section 13(3) of the Companies Act goes on to suggest a number of other matters that a company may include in its bye-laws, such as rules regulating the transfer and issue of shares and the conduct of meetings of members and directors. Whilst it is not mandatory to incorporate these matters, it is unusual to see a set of bye-laws that fail to address them at all. The bye-laws become active once adopted at the statutory meeting.[132]

2.063 At common law the memorandum and bye-laws constitute a statutory contract between the company and its members in respect of the members' rights and liabilities as such, and they are binding between the members and the company and the members *inter se*.[133] The Companies Act provides that the memorandum of association when registered and the bye-laws when approved shall bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the bye-laws.[134]

2.064 Many of the ordinary remedies for breaches of a contract (such as declarations, specific performance, and injunctions)[135] will be available to members. However, the memorandum and bye-laws are at their heart a statutory contract and thus some remedies are simply not available (such as rescission, renunciation, and rectification).[136] It is not open to a member to seek to 'set aside' the memorandum and bye-laws on the grounds of undue influence, duress, misrepresentation, or mistake.

[131] Companies Act 1981, sections 7(4) and (4A).
[132] Ibid., section 13(4).
[133] *Hickman v Kent or Romney Marsh Sheep-Breeders' Association* [1915] 1 Ch 881.
[134] Companies Act 1981, section 16(1).
[135] *British Murac Syndicate Ltd v Alperton Rubber Ltd.* [1915] 2 Ch. 186.
[136] *Scott v Frank F Scott (London) Ltd* [1940] Ch 794.

2.065 When interpreting a provision in the memorandum or bye-laws the usual rules of contractual interpretation apply. However, the Courts have been known to be liberal in construing clauses and regulations: "the articles of association of a company should be regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible in the language of the articles, in preference to a resolution which would or might prove unworkable." [137]

2.066 The Court will not imply a new term into the bye-laws simply to give it business efficacy.[138] The Courts are prepared to sever any term of the memorandum and bye-laws which is illegal or contrary to public policy.[139]

2.067 Bermuda has no third parties legislation similar to England.[140] Accordingly, ordinary common law rules of privity of contract apply; the memorandum and bye-laws do not confer any rights on an outsider and this includes the directors of the company.[141] However, in relation to directors at least, the Courts have been prepared to use the memorandum and bye-laws to 'construe' a collateral contract for the employment of the director.[142]

(a) Amending the memorandum and bye-laws

2.068 Under the common law the memorandum and bye-laws of a company must be capable of being amended. Any provision which prohibits the amendment of the memorandum and bye-laws would be void under the principle espoused in *Russell v Northern Bank*[143] and that means, effectively, that the shareholders could effect change by voting to amend the company's constitution.[144] However, section 24A of the Companies Act 1981 provides that: "Notwithstanding anything in this Act or in any rule of law, and subject to its memorandum and bye-laws, a company may agree that any of the powers in section 10, 10A, 12, 13, 45, 46, 93, 106, 161 or 201 that are reserved to members of the company shall, in whole or in part, not be exercised."[145] Accordingly, pursuant to section 24A, a company (via its directors) may agree, that its members will not amend the memorandum or bye-laws. Of course, at least in respect to alterations to the memorandum, which can only be effected by the members in any case, the members could just go ahead and make the amendment anyway (risking breach of contract). However, due to the complications in requisitioning meetings this is likely to be quite difficult in practice.

[137] *Holmes v Keyes* [1959] Ch 199.
[138] *Bratton Seymour Service Co Ltd v Oxborough* [1992] BCLC 693.
[139] *Re Victoria Onion and Potato Growers Association Ltd v Finnignan, Ryan and Farrel* [1922] VIR 384.
[140] The relevant English legislation being the Contracts (Rights of Third Parties) Act 1999 and the CI Contract (RTD) Law 2014.
[141] *Re Richmond Gate Property Co Ltd* [1965] 1 WLR 335.
[142] *New British Iron Co, Re* [1898] 1 Ch 324.
[143] *Russell v Northern Bank Development Corp Ltd* [1992] 1 WLR 588.
[144] For a further discussion on this topic, see JG Hill, 'The Rising Tension between Shareholder and Director Power in the Common Law World', ECGI Law Working Paper No 152/2010.
[145] Companies Act 1981, section 24A.

Bermuda Monetary Authority, the two authorities coordinate to handle incoming requests from overseas authorities in order to apportion responsibilities in accordance with their respective roles.

4.014 The Attorney General is the legal advisor to the Government of Bermuda.[40] In certain instances, the Attorney General may assist the Bermuda Monetary Authority with its functions, most importantly in respect of applications to the Court to place companies into liquidation, where such action would be in the public interest.

(iii) *The Minister of Finance*

4.015 Under tax information exchange legislation the Minister of Finance is the competent authority to send requests to, and receive requests, from equivalent overseas authorities. The role of the Minister in this regard is set out in the International Cooperation (Tax Information Exchange) Act 2005 and the USA-Bermuda Tax Convention Act 1986. As financial institutions in Bermuda, such as corporate service providers, are among the prime recipients of notices in practice the Bermuda Monetary Authority and the Minister of Finance may, albeit on an informal basis, coordinate in order to divide responsibilities in this area appropriately.

(c) Relationship between the Bermuda Monetary Authority and Overseas Authorities

4.016 The authorities in Bermuda are required to liaise amongst themselves to determine whether a request from a foreign authority is criminal, regulatory, or tax-driven in nature. The Bermuda Monetary Authority acts as a focal point for such investigations.

4.017 In respect of regulatory enquiries, sections 30A to 31 of the Bermuda Monetary Authority Act 1969 specifically deal with the Bermuda Monetary Authority's duty to co-operate with foreign regulatory bodies and persons who possess functions in relation to the prevention of financial crime.[41] Upon receipt of a written request from a foreign regulatory authority,[42] the Bermuda Monetary Authority may issue a notice requesting information from a person,[43] or appoint an officer to investigate any matter.[44] Additional provisions in legislation governing each sector of the financial services industry in Bermuda are examined in more detail throughout the chapter.

4.018 In order for the Bermuda Monetary Authority to be entitled to provide any of the information or documents, or require an examination of any person referred to above, it must be satisfied that the information or documents to which the request relates, or to which the investigation is sought, is required by the foreign regulatory authority for the purposes of its regulatory functions.[45] The Bermuda Monetary Authority has considerable discretion as to whether or not to provide assistance and can provide such

[40] Bermuda Constitution Order 1968, section 71.
[41] Bermuda Monetary Authority Act 1969, sections 30A to 31.
[42] Ibid., section 30B(1).
[43] Ibid., section 30B(1)(a) to (c).
[44] Ibid., section 30B(1)(d).
[45] Ibid., section 30A(3).

assistance subject to such conditions as it considers appropriate.[46] It is also required to consider: whether corresponding assistance would be given to the Bermuda Monetary Authority in the country of the foreign regulatory authority concerned;[47] whether the alleged infringement of foreign law on which the investigation is based has a close connection in Bermuda;[48] the nature and seriousness of the matter to which the request for assistance relates;[49] the importance of the assistance to be provided in Bermuda and whether the assistance can be obtained by other means; [50] and whether it is in the public interest to provide the assistance sought. There is no express requirement for the Bermuda Monetary Authority to consider whether the foreign regulatory authority is subject to adequate legal restrictions on further disclosure of the information or documents, although this may be a consideration in practice.

4.019 The Bermuda Monetary Authority is not under a duty to disclose to an institution or other person that a foreign regulatory authority has made such a request, nor that the Bermuda Monetary Authority has in fact provided such foreign regulatory authority with any information that the Bermuda Monetary Authority already maintained. Consequently, should the Bermuda Monetary Authority receive a request of mutual assistance and comply with it, it may be difficult to assess whether it has in fact applied the mandatory considerations required of it by the legislation. Further, it is highly likely that the Court would place the burden of proof on the recipient of such a notice when determining whether the Bermuda Monetary Authority has acted in good faith.

(d) Requests for information

4.020 A notice issued by the Bermuda Monetary Authority under section 30B of the Bermuda Monetary Authority Act 1969 is a demand sent to a person over whom the regulator believes it has authority to provide copies of documents and information. As mentioned above, the Bermuda Monetary Authority may issue a notice only where it is required for the purpose of discharging the Bermuda Monetary Authority's functions.[51]

4.021 The Bermuda Monetary Authority's 'regulatory functions' are found in various locations in the Bermuda Monetary Authority Act 1969 itself[52] and in sector-specific legislation[53] as well as other legislation extending responsibility to the Bermuda Monetary Authority, such as under anti-money laundering legislation.[54]

4.022 Notices issued may be issued to any person in Bermuda that is presumed to have possession or control of the documentation or information requested.[55] It is not necessary for such person to be a person licensed or regulated by the Bermuda Monetary Authority for the purpose of undertaking financial services business in Bermuda.

[46] Bermuda Monetary Authority Act 1969, section 30A(5).
[47] Ibid., section 30A(5)(a).
[48] Ibid., section 30A(5)(b).
[49] Ibid., section 30A(5)(c).
[50] Ibid., section 30A(5)(d).
[51] Ibid., section 30B.
[52] Ibid., section 20A.
[53] Banks and Deposit Companies Act 1999, Corporate Service Provider Business Act 2012, Investment Business Act 2003 and Trusts (Regulation of Trust Business) Act 2001.
[54] Anti-Terrorism (Financial and Other Measures) Act 2004.
[55] Bermuda Monetary Authority Act 1969, section 30B(1).

4.023 Whilst a section 30B request from the Bermuda Monetary Authority would be binding on a recipient in respect of documentation or information within the jurisdiction, it is far less clear whether it has authority to extend its jurisdiction to information or documentation held outside Bermuda. Without express statutory language, legislation (in particular criminal offences created by legislation), does not usually apply extra-territorially.[56] In addition, the legislation does specify that the documentation or information should be under the possession or control of a person in Bermuda. However, ultimately notices are personal to their recipients. Failure to deliver documents in possession of a company incorporated in, but held outside of, Bermuda may lead to enforcement action being taken in Bermuda.[57]

4.024 An appeal against a section 30B request must be filed with the Appeals Tribunal. Where avenues of appeal to the Appeals Tribunal have been exhausted it may be possible to apply to the Court for judicial review or injunctive relief.

(e) The Appeals Tribunal

4.025 Each piece of sectoral financial services legislation in Bermuda establishes a dedicated Appeals Tribunal.[58] The Appeals Tribunal will hear appeals against any decision of the Board, the Bermuda Monetary Authority itself, or one of the Committees. In general, appellants must within fourteen days of the decision, file a notice of appeal against the decision to the Appeal Board.

2. Registration and Supervision of Businesses by the Bermuda Monetary Authority

4.026 Unlike other regulatory regimes, such as that encompassed by the UK Financial Conduct Authority Handbook, there is no single comprehensive handbook of Bermuda rules and regulations applicable to the financial services sector uniformly in Bermuda. Much of this reflects the fact that the regulatory regime in Bermuda has developed in piece meal fashion over time, as an additional financial services sector has been added to the growing portfolio of the Bermuda Monetary Authority, the last such sector being insurance which transferred from the supervisory watch of the Minister of Finance. Nevertheless many themes of regulation do overlap and whilst each sector maintains its own peculiarities and idiosyncrasies it is nevertheless possible, at a high level, to provide a summary of the sorts of supervisory requirements that the Bermuda Monetary Authority will expect of almost all registrants. With this in mind, the next few paragraphs attempt to outline what those requirements comprise.[59]

---

[56] *Cox v Army Council* [1963] AC 48.

[57] Bermuda Monetary Authority Act 1969, section 30D.

[58] Sectoral legislation refers to legislation specified in the Third Schedule of the Bermuda Monetary Authority Act 1969.

[59] For these purposes the focus made is in relation to licensees under the Investment Business Act 2003 and related Guidance Notes issued by the Bermuda Monetary Authority (2011).

4.027 The Bermuda Monetary Authority expects all applicants that conduct regulated business to have a thorough knowledge and understanding of applicable law and regulations which will impact the way that an applicant staffs itself, establishes appropriate and necessary systems and controls, and the dealings that the applicant will have with its customers.[60]

4.028 An applicant must be able to show to the Bermuda Monetary Authority that it has, or will have, a connection to Bermuda, so that the Bermuda Monetary Authority could comfortably conduct its supervisory duties. In practice, some degree of physical establishment in Bermuda will be mandatory for most registrants.[61] Whether a sufficient connection has been shown is, absent express requirements, a discretionary matter to be determined by the Bermuda Monetary Authority.

4.029 Applicable fees are set out in the Bermuda Monetary Authority Act 1969[62] and are payable on the occurrence of three different events: submission of an application for approval to the Bermuda Monetary Authority; approval by the Bermuda Monetary Authority of the application; and annual fees payable for as long as the licensee maintains its licence.[63] Additional fees, not related to licensing process itself, are payable on the occurrence of events such as appointment of a director, approval for a change of name, or approval for changes in significant interests.

4.030 Applications for registration must be made in accordance with the Bermuda Monetary Authority's approved forms for the given type of registration. The forms have been published by the Bermuda Monetary Authority under subsidiary legislation.[64]

4.031 The nature of supporting documents varies greatly depending on the type of registration application. However, certain themes are pervasive to all applications and these are outlined below. A detailed business plan is central to the application and is submitted along with the application completed in the approved form.[65] The plan has to cover the first three years of the operation of the applicant, including projected set-up costs. It must include a general description of the business proposed to be carried on, stating the types of business for which registration is required, and the applicant's short, medium, and long term objectives, how these objectives will be achieved, and why the applicant wishes to be licensed in Bermuda.[66] The plan should describe, in general terms, how it is proposed that the business will be marketed and the expected sources of business.[67]

---

[60] Ibid.

[61] Bermuda Monetary Authority Act 1969, section 20A. In addition sectoral legislation further specifies such requirements, for example section 4 of the Investment Business Act 2003.

[62] Bermuda Monetary Authority Act 1969, fourth schedule.

[63] Ibid.

[64] Investment Funds Act 2006, Investment Business Act 2003, Trusts (Regulations of Trust Business) Act 2001, Corporate Service Provider Business Act 2012, Money Service Business Regulations 2007.

[65] Money Service Business Regulations 2007, section 5; Corporate Service Provider Business Act 2012, section 10(2); Investment Business Act 2003, section 16(3; Trusts (Regulation of Trust Business) Act 2001, section 11(6).

[66] Ibid.

[67] See for example, Appendix 2 of the Guidance Notes (2011) on the Investment Business Act 2003.

4.032 The applicant must specify the human resources, including employees and outsourced expertise, and other non-financial resources, including premises and systems, that the applicant considers that it will require to carry on its business and indicate how it is anticipated that these will be obtained.[68]

4.033 The applicant will need to describe the governance structure, the risk management procedures, the internal controls, including with respect to the detection and prevention of criminal activities, the reporting arrangements, both internally and to the Bermuda Monetary Authority, that are in place, or will be put in place and, where appropriate, how liquidity will be managed.[69]

4.034 Directors, senior management, significant owners, and certain functionaries such as auditors, must prepare and complete application forms in their own right before they can be appointed or take an interest in a registrant.[70] A significant part of the application process will be dedicated to approving individuals who have a role to play in the governance, operation, or ownership of a registrant.

4.035 An applicant must satisfy the Bermuda Monetary Authority that it has at the time of application, or that it will have at the time the registration is granted, sufficient financial resources, taking into account the nature of its business, to support the licensed business.[71] The Bermuda Monetary Authority must be satisfied that the applicant will be in a position to, and intends to, comply with the anti-money laundering, compliance and risk management obligations.[72]

(a) 'Fit and proper' regime for certain individuals

4.036 Directors, senior officers including the compliance officer, and the auditor or other independent officer, of an applicant will need to be specifically approved by the Bermuda Monetary Authority before they can be appointed or carry on tasks for the applicant once the registration has been obtained.[73]

4.037 All such individuals must meet the Bermuda Monetary Authority's fit and proper criteria before being appointed a licensee, and on an ongoing basis. The fit and proper test is described in detail in subsidiary legislation and in the Bermuda Monetary Authority's policy documentation.[74]

4.038 Significant owners will also be subject to this test.[75] To this end, the Bermuda Monetary Authority is required to look behind the legal ownership to the beneficial ownership of the company. An ownership structure must be transparent, or at least disclosable,

[68] Ibid.
[69] Banks and Deposit Companies Act 1999, second schedule; Investment Business Act 2003, second schedule; Trusts (Regulation of Trust Business) Act 2001, first schedule; Money Service Business Regulations 2007, schedule.
[70] See for example, Appendix 2 of the Guidance Notes (2011) on the Investment Business Act 2003.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Banks and Deposit Companies Act 1999, second schedule; Investment Business Act 2003, second schedule; Trusts (Regulation of Trust Business) Act 2001, first schedule; Money Service Business Regulations 2007, schedule. Also Guidance Notes issued by the Bermuda Monetary Authority in relation to each sector.
[75] Ibid.

so that it would not impede the Bermuda Monetary Authority's mandate to supervise regulated entities. In fact the Bermuda Monetary Authority's policy on its supervision of ultimate beneficial owners of licensees is not dissimilar to the requirements on licensees to undertake 'know your client' due diligence on their own clients and customers.

4.039 Each present and potential officer of the licensee must demonstrate to the Bermuda Monetary Authority that he or she has the requisite honesty, integrity, reputation, competence, financial soundness, and capability to hold the position for which he or she applies.[76] Depending on the position being applied for, greater emphasis may be placed on one or more of the above mentioned qualities. For example, in assessing honesty and integrity of a director or senior manager, the Bermuda Monetary Authority will consider whether that director or senior manager has been dismissed from a position of trust, or is the subject of criminal proceedings. It is expected that an applicant would conduct its own due diligence on an intended officer, before applying to the Bermuda Monetary Authority for that officer's approval, and monitor that officer's fitness on an ongoing basis.

4.040 Directors and other senior officers may not be appointed or employed by a licensee without prior Authority approval.[77] Further, no disposition, charge, transfer (including an increase or decrease in the significant interest) by such person or licensee, as applicable, can be made without the Bermuda Monetary Authority's prior written consent.[78]

4.041 Unauthorised changes to owners, directors, and senior officers may be amongst the most common regulatory contraventions.

(b) Management of licensees

4.042 Licensees in Bermuda are regulated by way of separate pieces of legislation specific to the type of business. The Investment Business Act 2003, the Banks and Deposit Companies Act 1999, Trusts (Regulation of Trust Business Act) Act 2001, and Corporate Service Provider Business Act 2012 stipulate that investment providers conduct business in a prudent manner.[79] In conducting its business in a prudent manner, licensees must comply with applicable and relevant provisions including those consisting of:

(a) investment business legislation governing the licensee;

(b) the anti-financing of terrorism obligations as provided in the Proceeds of Crime Act 1997;

(c) the Anti-Terrorism (Financial and Other Measures) Act 2004 and the Proceeds of Crime (Anti-Money Laundering and Antiterrorist Financing) Regulations 2008;

[76] Ibid.
[77] Banks and Deposit Companies Act 1999, section 25; Corporate Service Provider Business Act 2012, section 22; Investment Business Act 2003, section 28; Trusts (Regulation of Trust Business) Act 2001, section 24; Money Service Business Regulations 2007, section 9.
[78] Banks and Deposit Companies Act 1999, s29; Corporate Service Provider Business Act 2012, section 26; Investment Business Act 2003, section 43; Trusts (Regulation of Trust Business) Act 2001, section 28;
[79] Banks and Deposit Companies Act 1999, second schedule, paragraph 4; Corporate Service Provider Business Act 2012, schedule 1, paragraph 3; Investment Business Act 2003, second schedule, paragraph 5.

(d) any codes of conduct or guidance notes issued by the Bermuda Monetary Authority under the Investment Business Act 2003;

(e) international sanctions in force in Bermuda;

(f) requirements to maintain minimum assets as the Bermuda Monetary Authority may require (which are commensurate with the nature and scale of the licensee's operations); and[80]

(g) requirements to maintain adequate accounting and other records of its business and adequate systems of control of its business and records;[81]

(h) requirements to maintain adequate liquidity as relevant to the particular licensee's circumstances under relevant legislation;

(i) development of policies and procedures pertaining to its obligations under the relevant legislation;[82] and

(j) carry on its business with integrity and the professional skills appropriate to the nature and scale of its activities.[83]

(c) Codes of conduct

4.043 The Bermuda Monetary Authority has issued codes of conduct/practice for general business conduct and practice in relation to licensees under the various legislation.[84] The objective of the various codes is to ensure that a licensed service provider acts with high standards of integrity and fair dealing in the conduct of the relevant business and to act with due skill, care, and diligence in providing any services which it provides or indicates a willingness to provide.[85]

4.044 The Bermuda Monetary Authority places the responsibility on the licensee to carry on its business in accordance with the principles for prudent and sound business.[86]

4.045 A licensee's business must be well structured, so that the roles of each officer are clear, well apportioned, and monitored.[87] The directors must monitor and control the business,

[80] See section 5 of the Second Schedule of the Investment Business Act 2003 in relation to licensees under that Act and section 2 of the Schedule of the Money Service Business Regulations 2007 in relation to licensees under that Act.

[81] See section 5 of the First Schedule of Trusts (Regulation of Trust Business) Act 2001 in relation to licensees under the Trusts Regulation.

[82] See section 3 of Schedule 1 of the Corporate Service Provider Business Act 2012 for licensees under this Act.

[83] See section 7 of the Second Schedule of the Investment Business Act 2003 in relation to licensees under that Act; section 6 of the Second Schedule of the Banks and Deposit Companies Act 1999, section 7 of Trusts (Regulation of Trust Business) Act 2001, section 5 of Schedule 1 of the Corporate Service Provider Business Act 2012, section 4 of the Schedule to the Money Service Business Regulations 2007 in relation to licensees under that Act.

[84] See, for example, Bermuda Monetary Authority Investment Business Act 2003 General Business Conduct and Practice Code of Conduct, issued on 30 June 2010; Bermuda Monetary Authority Investment Business Act 2003 Statement of Principles;

[85] See Bermuda Monetary Authority Investment Business Act 2003 General Business Conduct and Practice Code of Conduct; Bermuda Monetary Authority Code of Practice Corporate Service Provider Business Act 2012; Bermuda Banking Code of Conduct; Bermuda Monetary Authority Trusts (Regulation of Trust Business) Act 2001 Code of Conduct.

[86] Ibid.

[87] Ibid.

with the support of senior management. Systems and controls must be established, regularly reviewed and updated, and must take into account the nature, size, scale, and complexity of the licensee's business.[88] They must also take into account the risk associated with each area of the business.[89] For a period of at least five years the licensee will need to keep a record of how it has complied with these obligations.[90]

4.046 Licensees must at all times have an adequate number of directors capable of exercising due care and skill, with sufficient knowledge and time to undertake their duties diligently.[91] In any event, with the exception of licensees licensed pursuant to the Corporate Service Provider Business Act 2012, all licensees must have at all times at least two directors.[92] Licensees licensed under the Corporate Service Provider Business Act 2012 are required to appoint, as a minimum, qualified individuals who can apply informed and independent judgment to the overall governance of the corporate service provider. Where the corporate service provider is a company, the directors should include such number of non-executive directors, as the Bermuda Monetary Authority considers appropriate and such number will depend on the circumstances of the corporate services provider and the nature, size, complexity, and risk profile of the corporate services provider.

4.047 Further, a licensee's management structure must provide for sufficient checks and balances suitable to its business.[93] This would be satisfied where at least two individuals undertake the management of the business, similar to a 'four-eyes' policy.[94] Each individual is expected to have satisfied the fit and proper criteria, and neither should be able to have undue influence over the other.[95]

4.048 A licensee is required to establish systems and controls, as well as strategies and policies that are suitable for its business.[96] The systems, controls, strategies, and policies are, among other things, to clearly set the scope of the directors' and senior management's responsibilities to be clearly documented and communicated to staff.[97]

4.049 The code of practice/conduct or statement of principles, as relevant to a particular licensee, places the responsibility on senior management to ensure that all staff understand the licensee's business, and know of and understand the systems, controls, strategies, and policies in place. Specifically, the licensee must implement appropriate

[88] Ibid.

[89] Ibid.

[90] Ibid.

[91] Trusts (Regulation of Trusts Business) Act 2001, first schedule, paragraph 1A; Banks and Deposit Companies Act 1999, second schedule, paragraph 1A; Investment Business Act 2003, second schedule, paragraph 1A.

[92] Ibid.

[93] Ibid.

[94] Investment Business Act 2003 Statement of Principles, paragraph 2.4.Trust (Regulation of Trust Business) Act 2001 Statement of Principles, paragraph 2.4a; Statement of Principles Banking and Deposit Companies Act 1999, paragraph 2.3b; Investment Business Act 2003 Statement of Principles paragraph 2.4a

[95] Ibid.

[96] See Trusts (Regulation of Trust Business) Act 2001, first schedule, paragraph 5(4); Corporate Service Provider Business Act 2012, schedule 1, paragraph 3(3); Investment Business Act 2003, second schedule, paragraph 5(6); Banks and Deposit Companies Act 1999, second schedule, paragraph 4(7).

[97] See Investment Business Act 2003 General Business Conduct and Practice Code of Conduct issued 30 June 2010, section 2.3.

risk management strategy, policies, systems, and controls, which specify how risks are to be identified, measured, assessed, and reported.[98]

4.050 Additionally a licensee is under an obligation to put in place, in respect of its business, a business continuity plan so that when interruptions occur it is able to: continue to carry on its regulated business and to meet its regulatory and anti-money laundering obligations; ensure that losses to its functions, systems, and data are limited and any losses may be recovered in a timely manner; and where the severity of the interruption or disruption results in the licensee ceasing its regulated business, or any part of it, it is able to resume its business in a timely manner.[99]

4.051 A licensee must establish and implement an internal control framework that operates at all staff levels.[100] This framework must, among other things: ensure that the business is planned and conducted in an orderly manner; transactions are entered into after having received the requisite authorisations; assets are appropriately safeguarded and liabilities controlled; accounting and records are completed accurately and on a timely basis; relevant staff perform due diligence on customers and prospective customers to assess risk; tested business resumption and contingency arrangements are in place; and the board and senior management can identify and assess risks, and properly guard against any involvement in financial crime.[101] A proper internal control system requires the licensee to have reliable and secure information systems in place, which are independently monitored and supported by contingency arrangements.[102] Any deficiencies in internal control must be reported immediately to senior management and, if of a material nature, must be reported by the senior management to the board.[103] Internal controls must extend to any outsourced functions.[104]

4.052 The board is ultimately responsible for establishing the internal control system and ensuring its implementation.[105] The board is also responsible for monitoring the licensee's market conduct activities, approving new products and major risk management initiatives, and ensuring that senior management monitors the effectiveness of the system. Senior management is generally responsible for implementing, maintaining, and monitoring the internal control strategy, policies, systems, and controls.[106]

(d) Record keeping

4.053 A licensee will be required to retain a diverse range of records for its business operations, these principally include: records required under companies legislation the

[98] Investment Business Act 2003 General Business Conduct and Practice Code of Conduct, section 2.3; Code of Practice Corporate Service Provider Business Act 2012, paragraph 23.
[99] Corporate Governance Policy for Trusts (Regulation of Trust Business) Act 2001, Investment Business Act 2003, Investment Funds Act 2006, paragraph 41.
[100] Bermuda Monetary Authority Corporate Governance Policy for Investment Business Act 2003, paragraph 42.
[101] Ibid., paragraph 41.
[102] Ibid., paragraph 42.
[103] Ibid., paragraph 46.
[104] Ibid., paragraph 11.
[105] Ibid., paragraph 11.
[106] Investment Business Act 2003, schedule 2, section 5.

regulatory enactments, the compliance and anti-money laundering regime; records of its business transactions; and internal records.[107]

4.054 Such records must be kept for a period of at least five years, subject to the requirements of the anti-money laundering regime or companies legislation, which may require records to be retained for longer periods of time.[108] With respect to records relating to transactions with a customer, records must be maintained for the duration of the relationship and for five years following the end of the relationship.[109]

(e) Compliance

4.055 Bermuda's compliance requirements for licensees focus on compliance functions contained in the Bermuda Monetary Authority's Guidance Notes for AML/ATF Regulated Financial Institutions on Money Laundering and Anti-Terrorist Financing.

4.056 The requisite legislation relevant to each licensee stipulates that a licensee must establish, maintain, and implement a compliance policy and compliance systems and controls, as appropriate for the business.[110] The compliance systems and controls should ensure compliance by all board members, senior management, and employees and be sufficiently adequate to identify compliance breaches.[111] The board is responsible for approving the compliance policy, and must review and assess its effectiveness at least on an annual basis.[112]

4.057 A licensee is required to document these compliance policies in such a way to enable staff to refer to them as and when appropriate throughout their employment.[113] Compliance policies, systems and controls should be included in the documentation, and senior management and staff should be aware of their obligations under the appropriate regulations.[114] The documentation should include details about: the purpose and importance of the compliance function; the role of the reporting officer; description of the business of the licensee; an organisational chart indicating responsibilities of different entities (as applicable) along with the compliance reporting structure; and the procedures that would be used to test compliance and the manner in which breaches would be reported and recorded.[115]

[107] Investment Business Regulations 2004, section 5.
[108] Ibid., section 8.
[109] Ibid., section 8(4)(a).
[110] Investment Business Act 2003, second schedule, section 5(2)(b); Banks and Deposit Companies Act 1999, second schedule, section 4(1)(b); Investment Business Act 2003, second schedule, section 5(2)(b); Corporate Service Provider Business Act 2012, schedule 1, section 3(2)(b); Trusts (Regulation of Trust Business) Act 2001, first schedule, section 5(2)(b).
[111] Investment Business Act 2003 General Business Conduct and Practice Code of Conduct, section 2.5.
[112] Corporate Governance Policy for Trust (Regulation of Trust Business) Act 2001, Investment Business Act 2003 and Investment Funds Act 2006, paragraph 44.
[113] Guidance Notes for AML/ATF Regulated Financial Institutions on Anti-Money Laundering & Anti-Terrorist Financing, paragraph 7.12.
[114] Ibid.
[115] Guidance Notes for AML/ATF Regulated Financial Institutions on Anti-Money Laundering & Anti-Terrorist Financing, paragraphs 1.30 to 1.32 and section 7.

(f) Compliance and reporting officers

4.058 A licensee is required by law to appoint a compliance officer which is resident in Bermuda and required to register with the Bermuda Monetary Authority.[116]

4.059 A licensee is also required by law to appoint a reporting officer. The reporting officer is responsible for receiving disclosures under section 46 of the Proceeds of Crime Act 1997 and Schedule 1 Part 1 of the Anti-Terrorism (Financial and Other Measures) Act 2004, deciding whether these should be reported to the Financial Intelligence Agency and, if appropriate, making such external reports.[117]

4.060 The relevant controllers or officers of a licensee are required to have the appropriate skills and experience to perform his or her functions. The standards required of persons in these respects will vary considerably, depending on the precise position held by the person concerned.[118] In determining whether a controller or officer is fit and proper, relevant considerations include whether the person has relevant experience, sufficient skills, knowledge, and soundness of judgment to properly undertake and fulfill their particular duties and responsibilities. Also, he or she must be an employee of the applicant,[119] but nonetheless, must be able to perform his duties with sufficient independence and objectivity, and without undue influence from the senior management or directors.[120] The reporting officer should have unrestricted access to directors and senior management, the staff, and documents relating to the business of the licensee and its customers.

4.061 Senior management must also ensure that the licensee complies with its reporting obligations to the Bermuda Monetary Authority.[121]

(g) Client money

4.062 An investment business provider is required to comply with the terms of the relevant client agreement in all dealings with or on behalf of clients. Generally, client agreements are not required in respect of: (a) a contract by the operator of a fund as principal to sell or purchase units in that scheme; or (b) advising on and arranging transactions (not involving any element of discretionary management by the adviser or arranger) which are limited to units in funds where the client's requirements are reasonably believed by

[116] Guidance Notes for AML/ATF Regulated Financial Institutions on Anti-Money Laundering & Anti-Terrorist Financing, paragraph 3.1 and Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008, section 17.

[117] Guidance Notes for AML/ATF Regulated Financial Institutions on Anti-Money Laundering & Anti-Terrorist Financing, paragraph 3.2.

[118] Ibid.

[119] Ibid.

[120] Guidance Notes for AML/ATF Regulated Financial Institutions on Anti-Money Laundering & Anti-Terrorist Financing, paragraphs 3.2 and 3.3.

[121] Proceeds of Crime Act 1997, section 46 or Anti-Terrorism (Financial and Other Measures) Act 2004, Schedule 1 Part 1. Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008, sections 16 and 17.

the investment provider to be confined to that area of activity. In such cases, a separate agreement is required to be entered into with the client detailing the arrangements for handling client money, specifying how the money will at all times be separated from the investment provider's own money, and stating the arrangements for crediting interest to the client's account.[122]

(h) Audit requirement

4.063 Licensees must prepare financial statements in accordance with applicable accounting standards such as the United Kingdom Generally Accepted Accounting Principles ('GAAP') or International Financial Reporting Standards ('IFRS').[123] The financial statements must be approved by the licensee's directors. Once signed by the directors, the financial statements must be submitted within four months of the relevant financial year to the Bermuda Monetary Authority and accompanied by an auditor's report; and a report on the licensee's affairs must be made to the shareholders of the licensee.[124]

4.064 Licensees who are authorised to hold clients' money are required to appoint an approved auditor annually to audit its financial statements or accounts. The licensee's auditor will need to be approved by the Bermuda Monetary Authority as an approved person or companies as an appointable auditor, not just individuals.[125]

4.065 An auditor of a licensee is required to immediately report to the Bermuda Monetary Authority, any fact or matter of which he becomes aware which is likely to be of material significance: for the discharge, in relation to the investment provider of which he is an auditor, of the Bermuda Monetary Authority's functions under the applicable legislation; its resignation before the expiration of his term of office; or its intention not to seek to be reappointed.[126]

(i) *Fraud policies and disclosure obligations*

4.066 A licensee must also establish and maintain policies, systems, and controls that promote high ethical and professional standards that prevent the business from being used intentionally or unintentionally for fraud or other criminal activities, and enables the licensee to detect and remedy fraud or other criminal activities.[127]

[122] Investment Business Act 2003, General Business Conduct and Practice Code of Conduct, section 3.4.

[123] Investment Business Act 2003, section 38; Banks and Deposit Companies Act 1999, section 46; Trusts (Regulation of Trust Business) Act 2001, section 43; Insurance Act 1978, section 15.

[124] Investment Business Act 2003, section 38; Banks and Deposit Companies Act 1999, section 47; Trusts (Regulation of Trust Business) Act 2001, sections 43 and 46; Insurance Act 1978, sections 15 and 16.

[125] Investment Business Act 2003, section 41; Banks and Deposit Companies Act 1999, section 46; Trusts (Regulation of Trust Business) Act 2001, section 44; Insurance Act 1978, section 16.

[126] Investment Business Act 2003, section 41, Banks and Deposit Companies Act 1999, section 46; Trusts (Regulation of Trust Business) Act 2001, sections 45 and 47; Insurance Act 1978, section 16A.

[127] Corporate Governance Policy for Trust (Regulation of Trust Business) Act 2001; Investment Business Act 2003; Investment Funds Act 2006, Paragraph 42.

3. Enforcement Measures Available to the Bermuda Monetary Authority

(a) Enforcement action and censure

4.067 The nature and range of investigative or enforcement powers available to the Bermuda Monetary Authority largely depends on whether or not the Bermuda Monetary Authority considers that a particular person or entity has, or is presently, conducting unauthorised financial services business, or is otherwise in breach of certain obligations, set out under the legislation, of which it is responsible for supervising.[128]

4.068 In application of its regulatory powers, the Bermuda Monetary Authority will, in most cases, apply an ascending ladder of regulatory powers (increasing in their level of intervention and seriousness for non-compliance) with respect to a particular matter, which will usually commence with those powers to gather information, whether this be directly from the relevant person or from third parties. It should be noted that the Bermuda Monetary Authority will take a risk-sensitive approach towards the employment of its regulatory powers and will not always take action in an ascending order of seriousness, but may utilise a number of regulatory powers at the same time where it is of the view that such a response is necessary.

(b) Public censure

4.069 The Bermuda Monetary Authority is entitled to take enforcement and censure action against a licensee, or other person, including the issuance of a public statement in such manner as it considers fit, setting out the reasons for the enforcement action and the enforcement action that it intends to take, or has taken, against the licensee or former licensee.

(c) Suspension and revocation of licenses

4.070 The Bermuda Monetary Authority may restrict or revoke licences where it is entitled to take enforcement action.[129] Except in the case of urgency, where the Bermuda Monetary Authority proposes to restrict, vary or revoke a licence, it must give the investment provider concerned a warning notice under the Investment Business Act 2003.

4.071 The Bermuda Monetary Authority may restrict a licence by imposing such conditions as it thinks desirable for the protection of the investment provider's clients or potential clients. Any condition imposed may be varied or withdrawn by the Bermuda Monetary Authority. The Bermuda Monetary Authority may also revoke a licence of an investment business provider if, *inter alia*: (a) the Bermuda Monetary Authority is satisfied that any of the minimum criteria is not or has not been fulfilled, or may

[128] The Bermuda Monetary Authority has the power to impose civil penalties and advisory warning under the provisions of sectoral legislation, such legislation being specified in the Third Schedule of the Bermuda Monetary Authority Act 1969.

[129] Investment Business Act 2003, sections 20 and 21.

not be or may not have been fulfilled, in respect of the investment provider; (b) the Bermuda Monetary Authority has been provided with false, misleading or inaccurate information by, or on behalf of, the investment provider or, in connection with an application for a licence by, or on behalf of, a person who is, or is to be, an officer or controller or the investment provider; or (c) the interests of the clients or potential clients of the investment provider are in any way threatened.

(d) No unenforceable contracts

4.072 Under financial services legislation in Bermuda an agreement that is made by a person in the course of carrying on unauthorised financial services business is not to be treated as unenforceable against the other party to the agreement.[130]

4. Insurance Business

4.073 The insurance and reinsurance industries in Bermuda are world-renown and constitute the cornerstone of its financial services sector. A detailed exposition of insurance regulation is contained in Chapter 9. The purpose of this part is not to cover the Bermuda insurance industry in any detail, but rather to outline the registration regime that applies to insurers and insurance service providers in Bermuda under applicable legislation and regulatory measures.[131] The Bermuda regime in this regard is contained principally in the Insurance Act 1978.

4.074 The Insurance Act 1978 regulates a number of industry participants: insurance companies (general and long term);[132] insurance brokers;[133] insurance agents;[134] insurance managers;[135] and salesmen.[136]

(a) Definition of 'insurance business'

4.075 Under the Insurance Act 1978, no person may carry on or hold himself out as carrying on, insurance business of any kind in, or from within, Bermuda unless he registered with the Bermuda Monetary Authority.[137] Insurance business is defined as the business of: effecting and carrying out contracts protecting persons against loss, or liability to loss, in respect of risks to which such persons may be exposed; or to pay a sum of money, or render money's worth on the happening of an event.[138] Insurance business includes reinsurance business.[139] The Bermuda Monetary Authority sub-divides insurance business into three types: long-term business; general business; and special

[130] Investment Business Act 2003, section 15 (1).
[131] Insurance Act 1978, Part II.
[132] Ibid., Part IV.
[133] Ibid., Part V.
[134] Ibid., Part V.
[135] Ibid., Part V.
[136] Ibid., Part V.
[137] Ibid., section 3(1).
[138] Ibid., section 1.
[139] Ibid., section 1.

purpose business.[140] These distinctions are fundamental to the registration regime adopted by the Bermuda Monetary Authority.

4.076 Long-term business under the Insurance Act 1978 refers to the effecting and carrying out of contracts of insurance on a human life, or contracts to pay annuities on human life;[141] effecting and carrying out contracts of insurance against risks of the persons insured sustaining injury as the result of an accident, or of an accident of a specified class, or dying as the result of an accident, or of an accident of a specified class, or becoming incapacitated or dying in consequence of disease or disease of a specified class (subject to certain exceptions);[142] and effecting and carrying out contracts of insurance, whether effected by the issue of policies, bonds, endowment certificates, or otherwise, whereby in return for one or more premiums paid to the insurer a sum, or a series of sums, is to become payable to the persons insured in the future.[143]

4.077 Special purpose business refers to insurance business whereby an insurer fully funds its liabilities to the persons insured through the proceeds of: a debt issuance where the repayment rights of the providers of such debt are subordinated to the rights of the person insured; or some other financing mechanism approved by the Bermuda Monetary Authority; cash; and time deposits.[144]

4.078 General business is a 'catch all' category which refers to insurance business that is not special purpose business or long term business, but expressly includes the business effecting and carrying out contracts of insurance against risks of the persons insured sustaining injury or dying, where such contracts are contracts that are expressed to be in effect for a period of less than five years.[145]

4.079 Insurers registered with the Bermuda Monetary Authority under the Insurance Act 1978 are subject to considerable regulatory oversight and supervision covering capital adequacy (solvency) requirements;[146] conduct of business and fair dealing obligations;[147] governance and oversight functions covering compliance, actuarial assessments and other ongoing risk management. In addition, the owners and operators, including directors, of insurers are subject to extensive 'fit and proper' assessments by the Bermuda Monetary Authority.[148]

(b) Other insurance industry functionaries

4.080 Part V of the Insurance Act 1978 provides for the regulation of certain industry functionaries: insurance managers;[149] insurance brokers;[150] insurance agents;[151] and

[140] Insurance Act 1978, sections 1 and 4.
[141] Ibid, section 1, definition of 'long term business' sub-paragraph (a).
[142] Ibid., section 1, definition of 'long term business' sub-paragraph (b).
[143] Ibid., section 1, definition of 'long term business' sub-paragraph (c).
[144] Ibid., section 1, definition of 'special purpose business'.
[145] Ibid., section 1, definition of 'general business'.
[146] Ibid., section 6A(1) and schedule, section 4(2A).
[147] Ibid., schedule, section 4.
[148] Ibid., schedule, section 4.
[149] Ibid., section 1, definition of 'insurance manager'.
[150] Ibid., section 1, definition of 'insurance broker'.
[151] Ibid., section 1, definition of 'insurance agent'.

insurance salesmen.[152] These functionaries are, in their own right, subject to capital adequacy; conduct or business; and auditing requirements similar to licensees under other regulatory enactments:[153]

(a) *Insurance managers*: This is a person who, not being an employee of an insurer, holds himself out as a manager in relation to one or more insurers, whether or not the functions performed by him as such, go beyond the keeping of insurance business.[154]

(b) *Insurance broker*: An insurance broker is a person who acts as an independent contractor or consultant and who, for compensation, arranges or places insurance business with insurers on behalf of prospective or existing policy holders.[155]

(c) *Insurance agent*: Agents operate with the Bermuda Monetary Authority of an insurer to act on its behalf in relation to any, or all, of the following: initiation and receipt of proposals that relate to insurance business, and the issue of policies and the collection of premiums that relate to insurance business.[156]

(d) *Insurance salesman*: Salesmen are persons who, otherwise than as an employee, solicit applications for, or negotiate insurance business on behalf of an insurer, an insurance broker or agent. [536]

5. Investment Business Regime

4.081 The Investment Business Act 2003 regulates the carrying on of investment business in, or from within, Bermuda. It came into force on 30 January 2004 and replaced the prior regime under the Investment Business Act 1998.[157] The statute is intended to ensure that Bermuda complies with the norms and requirements on it as a member of the International Organization of Securities Commissions ('IOSCO')[158] and draws a large degree of inspiration from equivalent legislation in the United Kingdom.

4.082 Although investment business activities may be relevant and pervasive to much of the financial industry, the statute itself is complex and subject to numerous detailed definitions of key terms, exclusions, and safe-harbours. As such there can be ambiguity regarding precise scope of the regime for many stakeholders. We examine some of these complexities in the next few paragraphs.

(a) Definition of 'investment business'

4.083 Under the Investments Business Act 2003 no person may, by way of business in, or from within, Bermuda, carry on an investment activity in relation to an investment

[152] Insurance Act 1978, section 1, definition of 'insurance salesmen'.
[153] Ibid., sections 9, 10 and schedule and Guidance Notes issued by the Bermuda Monetary Authority.
[154] Ibid., section 1, definition of 'insurance manager'.
[155] Ibid., section 1, definition of 'insurance broker'.
[156] Ibid., section 1, definition of 'insurance agent'.
[157] Ibid., section 1, definition of 'insurance salesmen'.
[158] The Multilateral Memorandum of Understanding of May 2002 signed by the Commission in April 2007.

without a licence from the Bermuda Monetary Authority, unless one of the exemptions set out in the Investment Business Act itself 2003 or associated legislation applies.[159]

4.084 Whether an activity is carried on 'by way of business' is not further explored in the legislation and no guidance has been provided by the Bermuda Monetary Authority, however determining whether an activity is carried on 'by way of business' is likely to be a question of judgment taking into account several factors including: the degree of continuity; the existence of a commercial element; the scale of the activity; and the proportion which the activity bears to other activities carried on by the same person but which are not regulated. The nature of the particular regulated activity that is carried on will also be relevant to the factual analysis. Arguably, additional factors which should, in any event, be taken into account in this regard including: whether a person is remunerated for a service provided, and whether the activity is undertaken on a frequent or habitual basis.

4.085 The relevant 'investments' for these purposes are set out in Part 1 of the First Schedule to the Investment Business Act 2003 and include shares, partnership interests, debentures (debt instruments including loan notes), warrants, and other similar instruments which give entitlement to shares;[160] units in collective investment schemes;[161] debentures;[162] instruments giving entitlements to investments;[163] certificates representing investments;[164] options;[165] futures;[166] contracts for differences;[167] long-term insurance contracts;[168] and rights and interests in investments.[169]

(b) Investment activities

4.086 The investment activities are set out in Part 2 of the First Schedule to the Investment Business Act 2003 and include: dealing in investments as either principal or agent;[170] arranging deals in investments;[171] managing investments;[172] providing investment advice;[173] safeguarding and administering investments.[174]

(i) *Dealing in investments*

4.087 There are two sorts of regulated 'dealing' activity under the Investment Business Act 2003: dealing as principal, and dealing as agent. A person deals as principal or agent only if they: (a) hold themselves out as willing to enter into transactions involving

[159] Investment Business Act 2003, section 12.
[160] Ibid., first schedule, part 1, paragraph 1.
[161] Ibid., first schedule, part 1, paragraph 4.
[162] Ibid., first schedule, part 1, paragraph 2.
[163] Ibid., first schedule, part 1, paragraph 3.
[164] Ibid., first schedule, part 1, paragraph 5.
[165] Ibid., first schedule, part 1, paragraph 6.
[166] Ibid., first schedule, part 1, paragraph 7.
[167] Ibid., first schedule, part 1, paragraph 9.
[168] Ibid., first schedule, part 1, paragraph 10.
[169] Ibid., first schedule, part 1, paragraph 11.
[170] Ibid., first schedule, part 2, paragraph 1.
[171] Ibid., first schedule, part 2, paragraph 2.
[172] Ibid., first schedule, part 2, paragraph 3.
[173] Ibid., first schedule, part 2, paragraph 4.
[174] Ibid., first schedule, part 2, paragraph 5.

investments at prices determined by them generally and continuously, in effect as a market-maker; (b) hold themselves out as engaging in the business of buying investments with a view to selling them, in effect brokerage services; or (c) continuously solicits members of the public to induce them to enter into transactions.[175]

4.088 In essence, this activity is designed to capture brokerage businesses and businesses acting as liquidity providers in financial markets. It is less likely that it could catch simple holding company structures. This is particularly evident where such persons do not hold out to the public the provision of any sort of investment business activity, such as brokerage or the provision of liquidity. In other words, simply dealing as principal for a person's own account, but not as a liquidity provider, should not constitute dealing as principal under the legislation.

(ii) *Arranging deals in investments*

4.089 'Arranging deals in investments' is defined as making arrangements with a view to another person buying, selling, subscribing for, or underwriting a particular investment, being arrangements which bring about, or would bring about, the transaction in question, or a person who participates in the arrangements buying, selling, subscribing for, or underwriting investments.[176]

4.090 This definition is potentially very wide and may capture a number of activities and service providers. There is unfortunately little guidance on the precise scope of arrangements which are caught, however the equivalent rules in the United Kingdom, on which this part of the Investment Business Act 2003 is modelled, does offer some assistance on this question. The Financial Conduct Authority of the United Kingdom has stated that the equivalent regulated activity in the United Kingdom would apply where a person makes arrangements to enable or assist investors to deal with or through a particular firm, such as acting as an introducer;[177] or to facilitate the entering into of transactions directly by the parties, such as an exchange, clearing house or related service company.[178] Importantly, the Financial Conduct Authority has opined that providers of back-office administration services should not be caught by the regulated activity.[179] According to the Financial Conduct Authority's guidance, the back-office service provider deals with the aftermath of the transaction rather than execution of it and hence would fall outside the regulated activity.[180]

(iii) *Managing investments*

4.091 Management covers acting as a manager of another person's assets where those assets include investments.[181] Management requires the exercise of discretion by the manager over the account of another person. In practice this would be satisfied through the imposition of an investment mandate.

[175] Investment Business Act 2003, first schedule, part 2, paragraph 1(5).
[176] Ibid., first schedule, part 2, paragraph 2(1).
[177] Handbook of the United Kingdom Financial Services Authority, Perimeter Guidance, paragraph 2.7.7B G.
[178] Ibid., paragraph 2.7.7BB G.
[179] Ibid., paragraph 2.7.7BC G.
[180] Ibid., paragraph 2.7.7BC G.
[181] Investment Business Act 2003, first schedule, paragraph 3.

(iv) *Advising on investments*

4.092 Investment advice covers the giving or offering, or agreeing to give, to persons in their capacity as clients or potential clients, advice on the merits of their purchasing, selling, subscribing for, or underwriting an investment, or exercising any right conferred by an investment to acquire, dispose of, underwrite, or convert an investment.[182]

4.093 It is worth noting that this definition focuses on whether the investment advice itself is directed at a specific person where the person in question is a client. As such, it would seem that the investment adviser would need to review the circumstances or portfolio of the specified person in order to provide investment advice which is tailored to that specified person, and may not be relevant to another person or the public at large. For this reason, bulletins, recommendations, and other equivalent forms of advice directed to the general public may not fall within this definition of investment advice. However, it should also be noted that this is an ambiguous issue with little local guidance from the Bermuda Monetary Authority or the Court.

4.094 For the reasons specified above, it is important to understand whether the investment advice in question is addressed to specified persons, i.e. tailored to the financial circumstances of such persons, or whether it is addressed to the public at large.

(v) *Safeguarding and administering investments*

4.095 The offering or agreeing to safeguard and administer, or arrange for the safeguarding and administering of assets belonging to another person, where those assets consist of investments and where such arrangements have been held out as being arrangements under which investments would be safeguarded and administered.[183]

4.096 'Administration' is not specifically defined, but may sensibly extend to providing clients with services that involve providing registry or transfer agent services in respect of assets giving rise to entitlements in investments such as shares, partnership interests, or units in a unit trust; or accounting services, in particular asset valuation services, in respect of such investments, may well constitute 'administration services' for the purposes of the legislation. Safekeeping may refer to providing some form of custody service in respect of investments. Importantly, the regulated activity attaches to a person only where they provide both safekeeping *and* administration services.

(c) Territorial scope of the act

4.097 The Investment Business Act 2003 applies to investment business conducted 'in or from within Bermuda'. This terminology sets out the territorial scope of the regime and is consistent with other financial services laws of the jurisdiction. It may capture business carried on exclusively within Bermuda and cross-border business undertaken from a base in Bermuda. A person carries out business in, or from within, the jurisdiction where they either carry on the investment business from a place of business located in Bermuda; or engage in investment business which is deemed to be

[182] Investment Business Act 2003, first schedule, paragraph 4.
[183] Ibid., first schedule, part 2, paragraph 5.

conducted in, or from within, Bermuda on the specification of an order of the Minister of Finance.[184] A person maintains a place of business in Bermuda, in the case of an individual, where he or she occupies premises in Bermuda for that purpose, and in all other cases if he or she carries on such business from premises where it employs staff and pays salaries and other expenses in connection with that business.[185]

(i) *Unsolicited calls*

4.098 In general terms it will be difficult for a non-Bermudian to be found to have triggered the territorial scope of the Bermuda regime on investment business unless they form an establishment in Bermuda. However, under the unsolicited calls regime within the Investment Business Act 2003,[186] the territorial reach of the legislation will extend to persons based outside Bermuda.[187] In this instance, the regime prohibits persons from entering into investment agreements with individuals in the course of, or in consequence of, an unsolicited call.[188] An 'unsolicited call' refers to a personal visit or oral communication without express invitation.[189] Contracts entered into in consequence of an unsolicited call are not enforceable against the person to whom the call was made.[190]

(ii) *Key exclusions*

4.099 A host of exceptions and safe-harbours apply to dealing, arranging, safeguarding, and administration investment business. Fewer exceptions are relevant to the provision of advice and management services.

4.100 For these purposes the exemptions cover the following activities: sale of goods and supply of services;[191] group companies firms and joint enterprises;[192] conducting professional and non-investment business;[193] employee share schemes;[194] sale of a body corporate;[195] newspaper, broadcasting and information services;[196] trustees and personal representatives.[197]

4.101 More importantly, persons other than market intermediaries, who provide investment services exclusively to high net worth or sophisticated individuals, will benefit from safe-harbours under the regime.[198] Additionally, the following are outside the scope of the licensing parameters: investment funds; persons providing services to less than twenty persons; insurers and insurance intermediaries registered under the Insurance Act 1978; and the Government of Bermuda and other public authorities.[199]

[184] Investment Business Act 2003, section 4.
[185] Ibid., section 4(6).
[186] Ibid., section 27.
[187] Ibid., section 4.
[188] Ibid., section 27(1).
[189] Ibid., section 27(7).
[190] Ibid., section 27(2).
[191] Ibid., first schedule, part 3, paragraph 2.
[192] Ibid., first schedule, part 3, paragraph 1.
[193] Ibid., first schedule, part 3, paragraph 6.
[194] Ibid., first schedule, part 3, paragraph 3.
[195] Ibid., first schedule, part 3, paragraph 4.
[196] Ibid., first schedule, part 3, paragraph 7.
[197] Ibid., first schedule, part 3, paragraph 5.
[198] Subsidiary 'exemption' legislation to the Investment Business Act 2003.
[199] Ibid.

(a) Definition of 'trust business'

4.115 Under the Trusts (Regulation of Trust Business) Act 2001, no person may carry on any kind of trust business in, or from within, Bermuda unless that person is for the time being a licensed undertaking.[216] Trust business is defined as providing the services of a trustee as a business, trade, profession, or vocation.[217]

4.116 A trust, for these purposes, refers to a legal relationship created either *inter vivos*, or on death, by a person, known as a settlor, when assets have been placed under the control of a person, known as a trustee, for the benefit of a person, known as a beneficiary, or for a specified purpose. A trust has the following characteristics: the assets constitute a separate trust fund and are not part of the trustee's own estate; title to the trust assets stand in the name of the trustee or in the name of another person on behalf of the trustee; and the trustee has the power and the duty, in respect of which he is accountable, to manage, employ, or dispose of the assets in accordance with the terms of the trust and the special duties imposed on him by law.[218]

4.117 The Trusts (Regulation of Trust Business) Act 2001 imposes a requirement that a person acts in a professional (or equivalent) capacity in order to be regulated under the legislation as a trustee. As such, constructive or resulting trusts that arise through operation of law or through the unwitting or unintended performance of trustee and related services by a company, should not be caught by the regime.[219]

4.118 The restriction applies only where a person carries on trust business in, or from within, Bermuda.[220] The Trusts (Regulation of Trust Business) Act 2001 expressly provides that carrying on trust business outside the jurisdiction by a company incorporated or based in Bermuda is deemed to constitute trust business carried on from within Bermuda.[345]

4.119 Importantly, trust business carried on by a person incorporated or established outside the jurisdiction but in respect of a trust settled in Bermuda should not give rise to a requirement to licence, unless it can be shown that the trustee has a physical establishment in Bermuda.

(b) Private trust companies

4.120 Private trust companies are companies which act as trustee but do not require licensing under the Trusts (Regulation of Trust Business) Act 2001 pursuant to the Trusts (Regulation of Trust Business) Exemption Order 2002.[221] To qualify for the exclusion the private trust company must: (a) provide the services of a trustee only, to a number of identifiable trusts as specified in its memorandum of association; or, (b) in the case of an overseas company, in its permit; and (c) to such other trusts as the relevant

[216] Trusts (Regulation of Trust Business) Act 2001, section 9(1).
[217] Ibid., section 9(3).
[218] Ibid., section 2 and Trusts (Special Provisions) Act 1989, section 2.
[219] Albeit vocations are caught.
[220] Trusts (Regulation of Trust Business) Act 2001, section 4A.
[221] Trusts (Regulation of Trust Business) Exemption Order 2002, section 3.

minister may approve from time to time.[222] Such private trust companies do not offer their services to the general public. Within three months of its incorporation or grant of a permit, the private trust company must also certify to the Bermuda Monetary Authority in writing that it qualifies for the exemption from licensing by virtue of the above restrictions, and provide to the Bermuda Monetary Authority particulars of the nature and scope of its trust business.[223]

4.121 A private trust company can be incorporated as either a company limited by shares or as a company limited by guarantee pursuant to the provision of the Companies Act 1981.[224] Private trust companies 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.

4.122 In order to be incorporated as a private trust company, the Bermuda Monetary Authority must approve such incorporation, and a private trust company may use the word 'trust' or 'trustee' in its name. There is no statutory minimum authorised or issued share capital for a private trust company, and the minimum number of shareholders required is one. A private trust company is required to have at least one director who is ordinarily resident in Bermuda, or a secretary, that is an individual or company who is ordinarily resident in Bermuda, or a resident representative, that is an individual or a company who is ordinarily resident in Bermuda.

(c) Classes of trust companies

4.123 For persons carrying on 'trust business' within the parameters of the Trusts (Regulation of Trust Business) Act 2001, the licensing process and regulations imposed differ depending on the type of licence actually applied for. There are essentially two types of licences: unlimited trust licences and limited trust licences.[225]

(d) Capital adequacy and insurance requirements

4.124 Licensees under the Trusts (Regulation of Trust Business) Act 2001 must ensure at all times that they maintain capital resources at a level that is adequate to support the business, taking into account the nature, size, complexity, structure, and diversity of that business and the risk profile.[226] A licensee must also maintain adequate systems and controls to monitor and assess its capital adequacy requirements on an ongoing basis.[227]

4.125 A trust licensee must have contributed capital which satisfies the minimum capital adequacy requirements. Such licensee will meet the requirements if it has contributed capital of at least BM$250,000 (or its equivalent in foreign currency) in

[222] Trusts (Regulation of Trust Business) Exemption Order 2002, section 3(1).
[223] Ibid., section 3(2).
[224] Companies Act 1981, section 5(3)
[225] Trusts (Regulation of Trust Business) Act 2001, sections 11 and 11A.
[226] Trusts (Regulation of Trust Business) Act 2001, Statement of Principles, section 2.7.
[227] Ibid., section 2.8; Trusts (Regulation of Trust Business) Act 2001, first schedule, section 5(4) and (5).

assets are transferred to a trustee, the trust instrument may be in the form of a declaration of trust by the trustee or a settlement deed to which the settlor and trustees will both be parties.

8.013 Non-purpose trusts are known as private trusts where trust property is held for the benefit of either a named individual or a specified class of individuals. Bermudian private trusts may be discretionary or fixed interest in nature. However, in the main, the majority of professionally prepared trust instruments tend to be created as discretionary trusts. These are trusts where the distributions of trust capital and income between a class of beneficiaries are at the discretion of the trustee, with the result that no beneficiary can oblige the trustee to distribute trust capital or income. Discretionary trusts thus offer a high level of flexibility, especially, as is usual, where there is a power to add to, or remove from, the class of beneficiaries. Such power may be vested in the trustee, protector, or settlor.

(ii) *Protective trusts*

8.014 Protective trusts are something of a hybrid between fixed interests trusts and discretionary trusts. They occur where trust assets are held for the benefit of 'the principal beneficiary' such that he has a right to receive the income from the trust assets or otherwise enjoy them (i.e. a fixed interest). However, if he takes any action to deprive himself of these rights (for example by attempting to assign his beneficial interest), his beneficial interest will determine (technically it is forfeited) and instead the trust assets will be held on discretionary trust for the principal beneficiary, his spouse, children and remoter issue or, if none of these persons, other than the principal beneficiary are in existence, for those who would be entitled if the principal beneficiary were dead.[15] Protective trusts are therefore of particular appeal where a settlor is keen to ensure that a reckless beneficiary is not able to 'lose' his interest in a trust by his own financial imprudence or reckless actions.

(iii) *Purpose trusts*

8.015 Historically, trusts have also been established for the advancement or furtherance of charitable purposes, which are sometimes known as public trusts. However, it is now possible in Bermuda to constitute a trust for the benefit of non-charitable purposes. Such vehicles are often used in commercial contexts and are discussed in more detail below.[16]

(e) Requirements of a valid trust

8.016 The creation of a valid trust is largely regulated by the rules of common law. The principal requirements are often abbreviated to the 'three certainties'.[17] In order to create a trust the settlor must indicate certainty of intention, certainty of subject matter, and certainty of beneficiaries (or objects).

---

15 Trustee Act 1975, section 25.
16 See paragraph 8.082 below.
17 *Knight v Knight* (1840) 3 Beav 148.

(i) *The three certainties*

8.017 Firstly, the settlor must intend to create a trust, but there is no one prescribed way in which this must be achieved. This limb of the three certainties has also been termed 'certainty of words',[18] but a fundamental maxim of equity is that it will look to intent rather than to form and this may enable a trust to be inferred by the conduct of the parties involved and other circumstances relevant to the situation.[19] The position may be complicated in circumstances where a settlor expressed an intention to create a trust, but did not in fact have the intention to create a trust on the terms declared; such trusts may be disregarded as a 'sham'.[20]

8.018 Secondly, one must be able to ascertain exactly all the property which is subject to a trust. For example, 'the bulk of' the property[21] has been held as ineffective to create a trust, primarily because the subject matter was not ascertainable. If there is uncertainty as to subject matter, the trust assets will remain in the legal ownership of the settlor and no trust will be created.

8.019 Thirdly, a trust will fail if it is unenforceable because there is uncertainty as to the beneficiaries who are able to bring the trustees to account (unless it is a charitable trust or a non-charitable purpose trust). In the context of fixed interest trusts, this requires that the trustee(s) are able to draw up a complete list of those who are intended to benefit under the trust.[22] However, when one is dealing with a discretionary trust, the rule has been relaxed from a 'complete list test' to a 'class test' since the decision in *McPhail v Doulton*.[23] It is now sufficient to be able to say with certainty whether any individual is or is not a member of a class of beneficiaries. However, even with this in mind, a trust may still fail if a conceptually certain beneficial class is so large as to make it administratively unworkable.[24]

(ii) *Shams*

8.020 Where a settlor purports to declare assets to be held on trust, but in actual fact has no intention of doing so, such a declaration may be disregarded as a 'sham'. For example, in *Midland Bank v Wyatt*[25] the Court was satisfied that although the settlor had executed the relevant trust instrument, it was "not to be acted on but put in the safe for a rainy day". The implication being that the settlor intended to treat the property as his own, but should circumstances arise whereby he wished to demonstrate that he was not the beneficial owner of the relevant assets, the trust instrument could at that time be produced as evidence of this, but would otherwise never be revealed. Interestingly, applications to have a trust set aside as a sham are not infrequently made by the settlor himself, for example when assets are purportedly held on trust for a spouse, but the marriage subsequently breaks down.[26]

---

18 *Lewin on Trusts* (19th ed., 2015) at paragraph 4-04.
19 *Paul v Constance* [1977] 1 WLR 527, CA.
20 See paragraph 8.069 below in the context of reserved powers.
21 *Palmer v Simmonds* [1854] 2 Drew 221.
22 *Whitshaw v Stephens* [1970] AC 508 HL.
23 [1970] AC 424.
24 *R v District Auditor, ex p West Yorkshire County Council* [1986] 26 RVR 24.
25 [1997] 1 BCLC 242.
26 See for example *Minwalla v Minwalla* [2004] EWHC 2823.

8.021 Although the rules are relatively straightforward, ascertaining whether facts amount to a sham can present greater problems in practice. It is important to try and distinguish motive from intent. A settlor might well have the motive of seeking to put his assets beyond the reach of his creditors by declaring that they are held on trust for his family. The fact that this motive may be improper does not mean that the trust itself is invalid for this reason only.[27] So long as the party has a genuine *intention* to create the trust, their *motive* for doing so is not relevant to the validity of the trust.

8.022 Where a trust is found to be a sham, the general effect is that the trust is treated as absolutely void, and the property is regarded as beneficially owned by the settlor. However, there have been judicial comments which have indicated that where a trust is found to be a sham, the settlor may be precluded from pleading his own wrong against the revenue authorities.[28]

(f) Trustees

8.023 As with all fiduciary roles, the office of trustee carries with it many responsibilities. Commonly, the process of selection on the part of the settlor will involve a careful analysis of the experience of the potential trustee, whether individual or corporate, and their suitability to the specifics of the trust in question, in terms of the nature of the underlying trust assets, their administration and the ongoing relationship with the beneficiaries (and settlor).

8.024 Most commonly, a trustee's acceptance of the position will take place by signing the trust deed, although such acceptance may also be implied from conduct in relation to the trust assets, such as by receiving trust property. Trustees cannot be obliged to act and so are able to disclaim the office at any point prior to acceptance.

8.025 As soon as a trustee has accepted the position, the full spectrum of trustee duties will become applicable and must be discharged with the appropriate standard of care. As a result, a trustee is well advised to ascertain certain information about the trust, its assets, and its beneficiaries prior to accepting the office. It is also imperative that trustees ensure they are aware of how the trust operates, the personal nature of their responsibilities and that they are not going to be in a position of conflict as between their own personal self-interest and their fiduciary duties as trustees.

(i) *Appointment and discharge of trustees*

8.026 There are no restrictions on the number of trustees which may be appointed in relation to a trust. This remains subject to the overarching common law rule that the trust must not be administratively unworkable.

8.027 As a general rule the first trustees of a trust are appointed by the trust instrument. After the constitution of a trust, the settlor will no longer have power to appoint new trustees unless this is expressly reserved to him in the trust instrument. Such a reservation is common in Bermuda, although the power to appoint new trustees is also frequently

[27] *Miles v Bull* [1969] 1 QB 258.
[28] *Commissioner of Stamp Duties (Queensland) v Jolliffe* [1920] 28 CLR 178.

conferred on the protector. It is also increasingly commonplace for a power to remove the trustees to be reserved to the settlor or the protector.

8.028 The Trustee Act 1975 provides that, where a trustee dies or remains out of Bermuda for more than 12 months or wishes to be discharged, and where the trust instrument makes no provision as to the person nominated for the purpose of appointing new trustees, or where such person is unable or unwilling to do so, the continuing trustees, or the personal representatives of the last surviving trustee, may appoint a new trustee in his, her, or their place.[29] It is now common practice in trust instruments in Bermuda to exclude expressly the statutory provision that a trustee may be replaced if he has remained out of Bermuda for 12 months as modern practice has rendered this requirement overly onerous.

8.029 Trustees have a statutory power to appoint additional trustees, unless the trust instrument gives that power to another person. The power to appoint additional trustees may not be used to increase the number of trustees in office to above four.[30]

8.030 Where a trustee wishes to retire, he may do so by deed if his co-trustees and any person empowered to appoint trustees (pursuant to the trust instrument) consent by deed.[31] This is not necessary where the retiring trustee is being replaced by a new trustee. Additionally, the Court has the power to appoint new trustees or replace existing trustees in a variety of circumstances, such as when a trustee has become bankrupt or of unsound mind.[32]

8.031 Modern practice dictates that retiring trustees will now seek to be indemnified from the trust fund for any future liabilities in connection with the trust which they will suffer as a result of their former trusteeship. Importantly, however, the retiring trustee cannot be put in a better position than that which he enjoyed during his time as trustee and thus the indemnity provided by the new or continuing trustees cannot be more extensive than that which is provided in the trust instrument and which applies to the new and continuing trustees. It is therefore unusual nowadays for the deeds under which any change of trustees is affected not to contain a form of indemnity to any retiring trustees.

(ii) *Trustees' duties*

8.032 Trustees stand in a unique position in that they are legal owners of assets which they hold, not for themselves, but for the benefit of others or for the advancement of a purpose. The trustees are thereby responsible both to the beneficiaries and to the outside world. Although there is a certain degree of flexibility in relation to modifying trustees' duties in the trust instrument, there are certain duties which are said to form an 'irreducible core' under the general law.[33] If a trust instrument seeks to derogate from or exclude those core duties, then the offending provisions would be regarded as void, or the resulting relationship would not be regarded as a trust as it would be regarded

[29] Trustee Act 1975, section 26(1).
[30] Ibid., section 26(6).
[31] Ibid., section 29(1).
[32] See paragraph 8.099 below.
[33] *Armitage v Nurse* [1998] Ch 241.

remunerated for its services unless there is a contrary provision in the trust instrument,[47] although express wording which permits such payment is entirely commonplace in trust instruments governed by the laws of Bermuda. Moreover, the purchase by the trustee of any trust property is voidable by any beneficiary, unless the trust instrument expressly permits what is known as self-dealing. The rule against self-dealing was initially developed to combat potential profiting by the trustee and applied irrespective of whether the trustee paid a market price on fully commercial terms. However, it is now usual for self-dealing to be expressly authorised in trust instruments and this is of great benefit both in terms of flexibility and commerciality as it enables trustees, where there are a number of settlements involving the same family or beneficiaries, to take pragmatic decisions as to the potential exchange of assets between trusts which are in the interests of the beneficiaries overall, but which might not otherwise be commercially viable because the transactions would have been voidable.

(iii) *Trustee powers*

8.039 In order to carry out their duties and administer the trust property, trustees have a wide range of powers conferred on them. As a matter of legal principle, the distinction between a trust and a power, is that a trust is imperative (i.e. trustees must perform their duties), and a power is discretionary, giving the donee of the power a choice. However, in the exercise of their powers, trustees must discharge their duties by applying the appropriate standard of care which requires that powers are exercised in good faith taking into account the best interests of the beneficiaries.

8.040 Trust powers can be extended or restricted by provisions in the trust instrument and in Bermuda it is common for very wide powers to be conferred on the trustees (or settlor or protector in some cases) to enable them to deal with all manner of trust property. Trust powers can be divided between dispositive powers on the one hand, which concern distributions of trust capital and income to beneficiaries; and changes to the class of beneficiaries and administrative powers on the other hand, which concern the administration of the trust.

8.041 Although additional administrative powers can be provided in the trust instrument, the majority of them are conferred on trustees by statute or frequently by reference in the trust instrument to the schedule to the Trusts (Special Provisions) Act 1989.

8.042 Most importantly, section 55A of the Trustee Act 1975 confers a wide power of investment on trustees, under which they are expressly permitted to invest trust assets in any kind of property "whether or not situated in Bermuda, whether or not income-producing, with or without security and whether for the purpose of:

(a) receiving an appropriate total return from income and capital appreciation;

(b) controlling or limiting risk; or

(c) benefiting persons interested in any way whatsoever in the income produced by trust property;

or for a mixture of such purposes."[48]

[47] Trustee Act 1975, section 22A.
[48] Ibid., section 55A(3).

However, these powers are subject to any contrary provisions in the trust instrument.

8.043 The evaluation of whether a trustee has acted in accordance with section 55A of the Trustee Act 1975 in making investment decisions is to be made "in the context of the trust property as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust."[49] Accordingly, the Trustee Act 1975 provides some context to the standard of care which is to be expected of trustees when exercising powers of investment, and the factors to be taken into account when evaluating whether a trustee has discharged its duties to the requisite standard of care when exercising such powers.

8.044 Sections 3 to 17 (inclusive) of the Trustee Act 1975 confer a wide variety of specific powers on trustees, such as the power to insure trust property,[50] and power to delegate 'delegable functions'[51] to a delegate or one of the trustees.[52] Additionally, as mentioned earlier, the Trusts (Special Provisions) Act 1989 contains a schedule of commonly used administrative provisions and powers,[53] which can be incorporated in the trust instrument by reference.[54]

8.045 In circumstances where trustees hold trust assets for minor beneficiaries, during their infancy, the trustees may, at their discretion, pay trust income to their parent or guardian or apply such income for the minor's "maintenance or education, or otherwise for his benefit" as "may, in all the circumstances, be reasonable." When making such decisions, the trustees shall have regard to "the age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes."[55]

8.046 Trustees are also empowered by statute to pay or apply trust capital for 'the advancement or benefit' of any person entitled to trust capital, even if his interest is contingent, for example, on attaining a specified age or on the occurrence of a particular event. Before 1999, the power only extended to half of the beneficiary's share or presumptive share, in line with the equivalent statutory provision under English law,[56] but this restriction was removed by the Trustee Amendment Act 1999. That Act also confirmed that this statutory power of advancement could be used to create new trusts and to permit the delegation of duties, which highlighted the inherent flexibility of the power.

(g) Beneficiaries' rights

8.047 An 'irreducible core'[57] element of trust law is the beneficiaries' right to enforce the trust and bring the trustees to account. This has been considered earlier in this chapter in the context of the beneficiaries' rights to information about a trust. A fixed

[49] Trustee Act 1975, section 55A(5).
[50] Ibid., section 10.
[51] 'Delegable functions' are determined in accordance with Trustee Act 1975, section 15B.
[52] Trustee Act 1975, section 15A.
[53] Trusts (Special Provisions) Act 1989, schedule.
[54] Ibid., section 17.
[55] Trustee Act 1975, section 23.
[56] Trustee Act 1925 (England and Wales), section 32.
[57] *Armitage v Nurse* [1998] Ch 241 at 261.

interest beneficiary has an equitable interest in the trust property, which may be regarded as proprietary in nature under a wider interpretation. However, on the other hand, a member of a beneficial class of a discretionary trust has no such interest in the underlying trust property, but rather a right to require the trustees to consider the exercise of their power from time to time. Beneficiaries are entitled to enforce the due execution of the trust and can thus expect the trust to be administered by the trustees in their best interests and failure to do so will result in a breach of trust by the trustees.

(i) *The Rule in Saunders v Vautier*[58]

8.048 If the beneficiaries of a trust are all adult, of sound mind and between them absolutely entitled to the trust property, they may unanimously terminate a trust or vary its terms. This rule may be invoked even if ending the trust will contravene the wishes of the settlor.

8.049 However, the rule is not applicable if the beneficiaries include minors, unborns, and those of unsound mind. For example, if a remainderman (i.e. the beneficiary absolutely entitled to the trust property subject to any existing fixed beneficial interests in the trust income) is a minor, the beneficiaries will not be able to end the trust even if the adult beneficiary with the fixed interest in income wishes to do so.

8.050 The rule applies to discretionary trusts as well as fixed interest trusts and it is therefore possible for a class of beneficiaries to terminate a discretionary trust if between them they are absolutely entitled to the trust property (and all of age and sound mind). However, most discretionary trusts have a wide class of beneficiaries making it impractical, if not impossible, for the beneficiaries to terminate the trust. Likewise, the breadth of dispositive powers contained in many discretionary trusts (for example, the power of appointment and the power to add further beneficiaries) often means that the beneficiaries will not be able to invoke the rule because they will not at any stage be absolutely entitled to the trust property between them without some exercise of the dispositive powers in their favour.

(h) Breaches of trust

8.051 A breach of trust most commonly occurs when a trustee has not discharged his duty to the appropriate standard of care, such as failing to act with sufficient care and skill in the administration of the trust or by misapplying trust property. Consequently, a breach of trust may result from a trustee taking an action which he ought not to have taken or from failing to take an action which he ought to have taken. Beneficiaries may pursue a wide range of remedies against the trustees following a breach, but compensatory damages will often be sought.

8.052 In order to establish liability for a breach of trust, it must be shown that the breach has caused some loss to the trust and, as such, a breach of trust which has not resulted

[58] [1834] Cr & Ph 240.

in any loss will not result in any liability on the part of the trustee.[59] The methods employed to calculate the extent of a trustees' liability are beyond the scope of this text.

8.053 The Bermudian Court may relieve a trustee from personal liability for a breach of trust, but in such cases the trustee must have acted fairly and reasonably and demonstrate that he ought fairly to be excused. It is very unlikely that such a relief will be awarded to a corporate trustee. Additionally, if the beneficiary has instigated, requested, or consented in writing to the breach of trust, the Court may impound the beneficiary's interest as an indemnity to the trustees.[60]

8.054 The liability of the trustees may be restricted by express provision in the trust instrument. It is common for Bermudian trusts to contain such a provision which will seek to exonerate the trustees in this way in addition to providing an indemnity from the trust fund for any liabilities which the trustees, even as former trustees, suffer in connection with the trust. The decision in *Armitage v Nurse*[61] upheld the validity of such exemption clauses, which in that case covered all breaches of trust, unless the loss or damage caused by such breach "shall be caused by his own actual fraud." As a result, such provisions in trust instruments can exclude trustee liability as long as there is an absence of dishonest intention and no exclusion of liability can exist if the liability results from fraud or intentional wrongdoing on the part of the trustee.

(i) The perpetuity period

8.055 Section 3 of the Perpetuities and Accumulations Act 2009 removed the application of the common law rules against perpetuities concerning all future vesting of assets for all Bermudian trusts established after 1 August 2009. Accordingly, any Bermudian trust constituted after that date, except trusts holding Bermudian land,[62] may exist indefinitely. Additionally, trustees may accumulate trust income for such period as they consider suitable, free from any statutory restrictions.

8.056 The Perpetuities and Accumulations Act 2009 does not have any retrospective effect and the maximum permitted trust period for a trust constituted before 1 August 2009, other than charitable trusts and non-charitable purpose trusts, remains 100 years. However, it is not uncommon for trustees of pre-1 August 2009 trusts to apply to the Court to vary the terms of the trust so as to extend its trust period to more than 100 years.

8.057 All pre-1 August 2009 Bermudian trusts, other than charitable trusts and non-charitable purpose trusts, are subject to the rule against perpetuities such that all beneficial interests must be fixed and determined (so that no element of contingency or uncertainty remains) before the perpetuity period expires, typically 100 years.

[59] *Target Holdings v Redferns* [1996] 1 AC 421.
[60] In relation to both issues, see paragraphs 8.113 and 8.114 below.
[61] [1997] 3 WLR 1046.
[62] The pre-1 August 2009 law will apply only to the Bermudian real estate and not to any other assets held in the trust.

However, the Perpetuities and Accumulations Act 1989 also contains 'wait and see' provisions, such that any disposition creating a trust will be treated as valid unless and until it is certain that all trust assets will only 'vest in interest' after the end of the perpetuity period.[63]

8.058 If the provisions of a trust are ambiguous, then the Courts will normally strive to interpret the trust instrument in such a way as to not offend against the rule.[64]

(j) Governing law of the trust

8.059 The Trusts (Special Provisions) Act 1989 stipulates that a settlor may choose the governing law of a trust.[65] Such choice may be express or implied, but in the vast majority of Bermudian trusts, the trust instrument will contain an express provision that the governing law of the trust shall be Bermudian law. However, if there is no such statement in a trust instrument or the law chosen "does not provide for trusts or the category of trusts involved,"[66] its governing law will be determined in accordance with section 6 of the Trusts (Special Provisions) Act 1989. Section 6 provides that where no governing law has been selected, "a trust shall be governed by the law with which it is most closely connected."

8.060 The Trusts (Special Provisions) Act 1989[67] sets out the factors to which reference shall be made in making such a determination:

(a) the place of administration of the trust designated by the settlor;

(b) the *situs* of the assets of the trust;

(c) the place of residence or place of business of the trustees; and

(d) the objects of the trusts and the places where they are to be fulfilled.

8.061 The governing law of a Bermudian trust may be changed to that of another jurisdiction provided that:

(a) there is an express power in the trust instrument allowing for this to be done, and

(b) the new jurisdiction recognises the validity of the trust and the respective interests of the beneficiaries.[68]

8.062 When a trust is governed by a foreign law, the ability to change the governing law to that of Bermuda (or any other jurisdiction), is a matter to be determined by the governing law of the trust.

---

[63] Perpetuities and Accumulations Act 1989, section 5.
[64] *Re Leek* [1969] 1 Ch 563.
[65] Trusts (Special Provisions) Act 1989, section 5(1).
[66] Ibid., section 5(2).
[67] Ibid., section 6(1).
[68] Ibid., section 6(2).

2. Formalities

(a) Formalities and constitution of an express trust

8.063 The most simple method of establishing a trust just requires the settlor, as owner of the trust property, to declare himself as trustee for beneficiaries or a purpose. As a result, there is obviously no requirement to transfer legal title to the property. However, such declarations are relatively rare for a number of reasons in Bermuda, partly due to the fact that it requires an individual to divest himself of any beneficial interest in the underlying trust property (assuming he is not a beneficiary or within the beneficial class) whilst at the same time accepting the responsibilities of the office of trustee.

8.064 Therefore, in the far more common scenario that the settlor will not be the sole trustee, it is necessary to transfer legal title to the trust property to the trustees with the mode of transfer varying with the nature of the asset being transferred. The methods by which such property is so transferred is not within the scope of this book, but as property of all descriptions, located anywhere in the world, may be subject to a Bermudian trust (unless the property is inalienable or is land situated outside Bermuda where the terms of the trust are inconsistent which the relevant laws of the country in which the land is located), the trustees in each case will need to satisfy themselves, with the assistance of local legal advice as necessary, that they have taken ownership of the property in question.

8.065 In the case of failed transfers to trustees, the basic principle is that the gift will be ineffective and so no trust will be constituted. In general, the equitable maxim that equity will not aid a volunteer will apply and the Court will not "perfect an imperfect gift".[69] On the other hand, where the donor can do nothing more to transfer title and the 'every effort' rule applies, because he has made every effort to perfect the gift, the gift may not necessarily fail.[70] In such a case, until the transfer is fully completed, the donor will hold the property on trust for the donee.

(b) The trust instrument

8.066 Although most trusts are created by executing a written trust instrument, there is actually no legal requirement that a declaration of trust be in writing. However, most trust structures utilise a formal written instrument of trust (sometimes referred to as the trust deed or deed of settlement). By convention, most trust instruments are executed as a deed, although again, there is no legal requirement that this be done. There is also no requirement that the execution of a trust instrument be witnessed (although again, this is common practice), or that it be executed in front of a notary public.

(c) Exemption from registration

8.067 There is no central register of trusts in Bermuda and no obligation, nor ability in fact, to register publicly a Bermudian trust. However, where trustees wish to incorporate an exempted company or acquire shares in such a company, the existence of the trust

---

[69] *Milroy v Lord* [1862] 4 De GF & J 264.
[70] *Re Rose* [1952] Ch 499 (CA).

and details of the settlor or principal beneficiaries must be disclosed to the Bermuda Monetary Authority on a wholly confidential basis.

(d) Stamp Duty

8.068 No Stamp Duty is payable in Bermuda on the original trust instrument of a trust, nor on the transfer of non-Bermudian property, which includes shares in an exempted company.[71]

3. Reserved Powers

(a) Introduction

8.069 Under classic trust principles, trusts constituted under English common law or under the laws of a jurisdiction derived from English common law, such as Bermuda, will merely be regarded as bare trusts if such wide powers and rights have been reserved to the settlor that it cannot be said that he has given up any beneficial interests in the underlying trust assets. On the other hand, the Hague Convention on the Law Applicable to Trusts and on their Recognition (commonly referred to as the Hague Trusts Convention), which has been made been made applicable to Bermuda and the majority of which has been incorporated into domestic law in Bermuda, provides that "the reservation by the settlor of certain rights and powers ... [is] not necessarily inconsistent with the existence of a trust."[72] However, more importantly, the enactment of the Trustee (Special Provisions) Amendment Act 2014, which introduced what is now section 2A of the Trusts (Special Provisions) Act 1989, means that Bermuda has specific legislation concerning reserved powers to enhance its trusts offering. This legislation applies to all Bermudian trusts and as such has retrospective effect in relation to trusts established before 16 July 2014, in addition to applying to all trusts established after that date.

(b) Prudent investor problem

8.070 The familiar rule which requires a trustee to act prudently in relation to trust investments can have unintended consequences in the context of controlling interests in company shares.[73] This rule has particularly been in point where trusts are used as succession vehicles for family businesses. In a typical trust, the trustee is put under a duty to be prudent and monitor the conduct of directors of the company and to intervene where necessary in the company's business, for example, to prevent the company from entering into an unduly speculative venture.[74]

---

[71] Stamp Duties (International Business Relief) Act 1990.
[72] Hague Trusts Convention, article 2 and section 2(4).
[73] *Re Whitley* (1886) 33 Ch D 347.
[74] *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515; see also *Re Lucking's Will Trusts* [1967] 3 All ER 726, [1968] 1 WLR 866.

(c) Uses of reserved power trusts

8.071 Further, depending on how a trustee's powers of investment may have been amended in the trust instrument,[75] trustees are generally under an obligation to maximise the value of the trust assets, commonly the shareholding in a family business, and diversify risk which may be in conflict with the long term objectives of a family enterprise. There is often a clear conflict between the duties of trustees and the objectives of a settlor with a controlling interest in a company. By sophisticated use of the reserved powers legislation and amending the trustee's statutory investment powers, one is able to address a particular set of concerns which commonly influence the use of trusts as asset holding structures:

(a) The duty of prudence imposed upon trustees is often incompatible with the entrepreneurial flair of a settlor who believes risk taking to be an integral part of business practice.

(b) A settlor of a family business may have wider considerations than pure investment return. Family tradition, ethical and environmental issues together with employee concerns may all be relevant factors.

(c) The skill set of a trustee may not be appropriate for the wide range of business activities undertaken by a company.

(d) The cost involved in ensuring that the trustee is discharging his administrative and monitoring obligations may be prohibitively expensive.

(e) The settlor's desire to dictate who should be in charge of the company may lead to difficulties for the trustee when directors are underperforming.

8.072 Therefore for a number of reasons, a settlor may wish to retain a level of control over specific elements of the running of the trust for himself or another, commonly a protector. As a result, certain powers which are usually vested in a trustee may instead be conferred on the settlor or protector.

(d) Legislation

8.073 Section 2A(1) of the Trusts (Special Provisions) Act 1989 provides that the "reservation by the settlor to himself or to any other person in a trust instrument governed by the laws of Bermuda of ... any or all of the powers [listed in Section 2A(2)] shall not":

(a) invalidate the trust; or

(b) prevent the trust taking effect according to its terms; or

(c) cause any of the assets of the trust to be part of the free estate of the settlor for probate purposes.

---

[75] Trustee Act 1975, section 55A.

The position also applies where the settlor or another has retained a limited beneficial interest in the trust property.

8.074 The powers which can be reserved or granted are:[76]

(a) in the case of a reservation to the settlor or other donor of trust property, a power to revoke the trust in whole or in part;

(b) a power to vary or amend the terms of a trust instrument or any of the trusts, purposes or powers arising thereunder in whole or in part;

(c) a power to decide on or give directions to advance, appoint, pay apply, distribute, or transfer the trust property;

(d) a power to act as, or give directions as to the appointment or removal of directors or officers of companies owned by the trust, or to direct the trustees how to exercise voting rights with respect to shares of such companies;

(e) a power to give directions in connection with investments or the exercise of any powers or rights arising from such trust property;

(f) a power to appoint, add, remove, or replace any trustee, protector, enforcer, or other office holder or advisor;

(g) a power to add, remove, or exclude any beneficiary, class of beneficiaries, or purpose;

(h) a power to change the governing law and forum for administration of the trust; and

(i) a power to restrict the exercise of any powers, discretions or functions of a trustee by requiring that they shall only be exercisable with the consent, or at the direction, of any person specified in the trust instrument.

(e) Protection of trustees of reserved power trusts

8.075 Importantly, the Trustee (Special Provisions) Amendment Act 2014 has introduced express protection for trustees of reserved powers trusts by absolving a trustee who has acted or refrained from acting in compliance with or as a result of any of the powers listed above, from any potential liability for breach of trust or other fiduciary or equitable duty.[77]

8.076 Additionally, where a trustee is prevented from acting in accordance with the powers listed above, or any exercise of those powers by reason of any applicable law or because insufficient rights or powers are exercisable by the trustee in relation to the trust property, the trustee shall not, by reason alone of such non-compliance or failure to act, commit a breach of trust or other fiduciary or equitable duty.[78]

[76] Trusts (Special Provisions) Act 1989, section 2A(2).
[77] Ibid., section 2A(3)(a).
[78] Ibid., section 2A(3)(b).

(f) Nature of powers

8.077 The legislation also makes it clear that no power-holder of a reserved power will become a trustee by reason only of the power so reserved.[79] In other words, no trustee can be in office unless they are formally appointed as such. Furthermore, where it comes to dividing any reserved powers between fiduciary powers and personal powers, there are statutory default provisions such that if the trust instrument is silent on the categorisation of a particular reserved power, the power will be deemed to be personal if the power-holder is the settlor or a beneficiary, unless that person is also the sole trustee.[80] In all other cases the power will be deemed to be fiduciary,[81] but this is of course subject to any express provisions in the trust instrument which may specify that the reservation of any power shall not impose a fiduciary duty on that power-holder.[82]

(g) Limitation of trustee duties

8.078 Finally, the legislation also includes an interesting provision under which the duties of a trustee may be limited to one person and to no others, including beneficiaries. Where a person, who is not the sole trustee, has a power of revocation, a general power of appointment or a beneficial interest, the trust instrument may provide that the trustee has no duty or responsibility to any other person during that person's lifetime.[83] This provision introduces a very high level of flexibility that could be utilised in sophisticated ways for bespoke trust structuring, such as to restrict the disclosure of certain trust information to parties to whom the trustee owes no duties, which could potentially include beneficiaries.

(h) Sham trusts

8.079 As discussed above,[84] in recent years there has been increased concern, especially after the *Rahman* case,[85] about accusations that a trust is a sham because a valid trust has not in fact been created. This is often a concern raised in the context of the extent of the powers which can legitimately be reserved to the settlor or another. The *Rahman* case highlighted the requirement that, in order to substantiate an accusation of sham, one must demonstrate how the parties (most commonly the settlor and the trustee) had an arrangement which differs from that set out in the provisions of the trust instrument. A consequence of such an arrangement would be that there would have been no real intention on the part of the settlor to create a trust, but rather the arrangement would involve acts done or documents executed by the parties to the 'sham' which are intended by them to give third parties or the Court the appearance of creating legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intended to create.[86]

[79] Trusts (Special Provisions) Act 1989, section 2A(5).
[80] Ibid., section 2A(7)(a).
[81] Ibid., section 2A(7)(b).
[82] Ibid., section 2A(6).
[83] Ibid., section 2A(4).
[84] See paragraph 8.020.
[85] *Abdel Rahman v Chase Bank (CI) Trust Co Ltd* [1991] JLR 103.
[86] *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, later confirmed in *Re Esteem Settlement* [2003] JLR 1888.

8.080 The crucial test therefore is whether the intention to create a trust existed and that subsequently the provisions of that trust are being respected (for example, that the trustee does not simply make distributions to beneficiaries at the request of the settlor where decisions about such distributions are wholly at the discretion of the trustee). As a result, the debate about sham often takes place in the context of reserved power trusts and, although there is as yet no case law in the jurisdiction on the point, the key must be to ensure that all parties to the trust instrument act in accordance with its terms (whether or not those provisions contain powers reserved to the settlor or others).

(i) Practical applications of reserved power trusts

8.081 The concept of reserved power trusts has proved to be a particularly attractive vehicle for individuals from a civil law jurisdiction who may sometimes feel uncomfortable with the idea of relinquishing control over strategic decisions and investments. Such trusts, via appropriate allocation of investment duties and rendering relevant powers as personal if necessary, can be particularly useful where the settlor wishes particular assets not to be sold, for example property with sentimental value such as family heirlooms or shares in long established family companies. Furthermore, where assets or asset classes are viewed as being risky or unconventional, suitable structuring using the reserved power trust legislation may provide comfort to a trustee as their fiduciary responsibility and duty of care, in relation to the company shares, for example, may be diluted and thus serve to reduce their potential liability for actions brought by beneficiaries in the future.

4. Non-Charitable Purpose Trusts

(a) Introduction

8.082 Historically for a trust to be valid, with the exception of charitable trusts, it must have identifiable beneficiaries who are able to bring the trustees to account and enforce the trustees' duties against them. However, Bermuda has enacted legislation which enables the establishment of non-charitable purpose trusts under which trustees hold property on trust to carry out or further purposes which cannot be classed as charitable.

8.083 The relevant legislation is the Trusts (Special Provisions) Act 1989 as amended by the Trusts (Special Provisions) Amendment Act 1998. Non-charitable purpose trusts are termed 'purpose trusts' in the legislation.[87]

8.084 Practitioners in Bermuda often use trusts as a means of holding shares in special purpose vehicles as part of what are commonly called 'orphan structures'. The principal purpose of such structures usually revolves around the fact that as the ultimate shareholder holds the shares for a purpose rather than a person or class who

[87] Trusts (Special Provisions) Act 1989, section 12A(1).

is beneficially entitled, the ownership of the assets becomes 'orphaned'. This can be of specific use where a purpose trust is established to hold the shares in a private trust company and thereby circumvents the need for any individual to own the shares in their own name and the resultant problems which would arise on their death or incapacity.[88] For historical reasons, such trusts were invariably formed as charitable purpose trusts, although there seems to be no commercially good reason why non-charitable purpose trusts would not serve equally well.[89]

(b) Conditions

8.085 The legislation provides that valid non-charitable purpose trusts can be created if certain conditions are satisfied:[90]

(a) the purpose is sufficiently certain to allow the trust to be carried out;[91]

(b) the purpose is lawful;[92]

(c) the purpose is not contrary to public policy;[93] and

(d) the purpose trust may only be created in writing.[94]

8.086 Key features of purpose trusts are:

(a) they may last indefinitely[95] or for a specified number of years;

(b) unlike some other offshore jurisdictions, there are no additional restrictions as to who can be trustees of purpose trusts; and

(c) no interest in land in Bermuda may be held, directly or indirectly, in a purpose trust.[96]

(c) Enforcing a purpose trust

8.087 The legislation has removed the earlier requirement that an enforcer must be in office during the life of a purpose trust, although the appointment of an enforcer in the trust instrument is still relatively commonplace. However, instead, the Trusts (Special Provisions) Act 1989 prescribes a list of persons who have a right to apply to the Court to enforce the trust, as follows:[97]

[88] See paragraph 8.092.

[89] The one possible minor advantage to a charitable purposes trust is the greater familiarity with the concept of charitable purpose trusts in other common law jurisdictions, in the event that the validity of the trust falls to be considered by the Courts of a foreign jurisdiction.

[90] Trusts (Special Provisions) Act 1989, section 12A(1).

[91] Ibid., section 12A(2)(a).

[92] Ibid., section 12A(2)(b).

[93] Ibid., section 12A(2)(c).

[94] Ibid., section 12A(3).

[95] Ibid., section 12A(4).

[96] Ibid., section 12D.

[97] Ibid., section 12B(1).

(a) a person appointed under the trust instrument for this purpose (such as an enforcer or protector);

(b) the settlor, unless the trust instrument provides otherwise;

(c) a trustee of the trust;

(d) any other person whom the Court considers has sufficient interest in the enforcement of the trust; and

(e) the Attorney General, if he can satisfy the Court that no other persons are willing and able to make an application to the Court for enforcement of the trust.

(d) Variations

8.088 The legislation sets out a similar list of those who may apply to the Court for the approval of "a scheme to vary the purposes of the trust or to enlarge or otherwise vary any of the powers of the trustees of the trust."[98] These are: (a) a person appointed in the trust instrument for this purpose (such as an enforcer or protector); (b) the settlor, unless the trust instrument provides otherwise; and (c) the trustee.

(e) Hybrid trusts

8.089 Owing to the fact that there are so few express conditions attached to Bermudian purpose trusts beyond the nature of the purposes themselves when compared to other offshore jurisdictions, such as the lack of an additional requirement for an enforcer or in terms of the identity of the trustee, most practitioners consider that hybrid trusts, where the objects of the trust are non-charitable purposes as well as beneficiaries, are valid under Bermudian law. Additionally, via the use of bespoke drafting in a trust instrument pursuant to section 2A(4) of the Trusts (Special Provisions) Act 1989,[99] a purpose trust could potentially be established for beneficiaries without giving them any right to enforce the trust. This would offer additional flexibility to a settlor who wishes to benefit certain individuals whilst at the same time ensuring that the trusts assets, such as company shares, are held in trust for a specific purpose, such as the continuance of a business.

5. Private Trust Companies

(a) Introduction

8.090 As mentioned earlier, in order to hold the office of corporate trustee, a company incorporated in Bermuda will normally need to hold a licence to carry on trust business in or from within the jurisdiction under the Trusts (Regulation of Trust Business) Act 2001. However, there is an exemption from this licencing requirement for companies which will "provide the services of a trustee only to the trusts specified in its memorandum of association",[100] typically private trust companies. Private trust companies are companies which can act as trustees of trusts without a specific licence as long as certain conditions are satisfied. Individual clients may be directors and less commonly shareholders[101] of private trust companies.

[98] Trusts (Special Provisions) Act 1989, section 12B(2).
[99] See paragraph 8.078.

8.091 Private trust companies have proved popular, particularly with settlors from civil law jurisdictions who do not necessarily welcome the prospect of transferring their wealth to an independent third party. There is a danger however, that private trust companies can be viewed as a family friendly entity and the private trust company itself as trustee might not administer the trust to the requisite standard of care, which may open the door for breach of trust claims by beneficiaries in the future. The directors of a private trust company must therefore appreciate the fiduciary nature of the office and ensure it always acts in the best interests of the beneficiaries of the underlying trusts.

8.092 It would make little sense to put in place a trust structure, involving a private trust company as trustee, for succession planning reasons, if the shares in the private trust company are then owned by individuals outright (assuming therefore that the private trust company is not limited by guarantee). This would mean that a grant of probate must be obtained in Bermuda on the death of such an owner in order to realise the shares. Accordingly, a common structuring mechanism is for the private trust company shares themselves to be held in a purpose trust, where the purposes may be the promotion of the business of the private trust company and allowing it to act as trustee of the trusts listed in its memorandum of association.

(b) Requirements

8.093 Private trust companies are usually incorporated as exempted companies and are therefore subject to all the requirements of such entities.[102] The application to incorporate must be submitted to the Bermuda Monetary Authority for approval and will include information about the proposed shareholders of the company and the settlor of the trusts of which it is to be trustee. The names of the trusts for which the private trust company will act as trustee must be stated in the objects of the Memorandum of Association of the private trust company. However, the names of the trusts do not need to include the name of the family of principal beneficiaries and so this will not be a matter of public record despite the fact that the Memorandum of Association is a public document.

8.094 Private trust companies are required, under the Trusts (Regulation of Trust Business) Exemption Order 2002, to certify that they qualify for an exemption from licencing. In order to do this the private trust company must make a one-off filing to the Bermuda Monetary Authority in the form of a letter from its directors confirming:

[100] Trusts (Regulation of Trust Business) Order 2002, section 3(1).
[101] See paragraph 8.092.
[102] See Chapter 2.