



Bermuda Corporate Update
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BERMUDA'S ELECTION RESULTS

The Progressive Labour Party ("PLP") won a second term with 22 of 36 legislative seats in the July 24, 2003 General Election in Bermuda. The 22 seats represent 51.65% of the votes cast while the 14 United Bermuda Party ("UBP") seats represent 47.98% of the votes.

Jennifer Smith, J.P., M.P. the then leader of the PLP, retained her seat by just eight votes and was later successfully challenged as party leader by a significant number of her former Cabinet colleagues who refused to accept positions in her new Cabinet.



Premier Alex Scott

On July 28, 2003, within days of the General Election, Jennifer Smith, J.P., M.P. resigned as Leader of the PLP thereby averting a Constitutional issue on leadership with the result that William Alexander Scott, J.P., M.P. (63), a public relations manager, was elected Leader of the PLP and was subsequently sworn in as Premier of Bermuda.

At the same time, the PLP elected Dr. Frederick Ewart Brown, J.P., M.P. (57) Deputy Leader of the PLP and he subsequently accepted the appointment to the Cabinet as Deputy Premier and Minister of Transport in the Scott Government.

Bermuda being one of the oldest Parliamentary Democracies in the Western Hemisphere proved once again that it is a mature democracy that can withstand such tests.

For more information on the election, please visit the Government website at www.bermuda-online.org/bdagovt.htm.

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COMPANIES – WINDING UP

In the broadest terms, there are two ways in which a company may be wound up under Bermuda law:-

- (1) **by order of the court; or**
- (2) **voluntarily.**

A voluntary winding up of a company may be initiated either by the members or by creditors of the company. It is a members voluntary winding up with which this article is concerned.

The effect of a members' voluntary winding up of a company is that the company must cease to carry on its business, save insofar as may be required for the beneficial winding up of the company, but this does not mean that the powers or the state of the company are in any way altered. They are not.

In addition, the powers of all officers of the company will cease, unless the company or the liquidator, as appropriate, sanction the continuation of those powers.

The procedure for a members' voluntary winding up of a company is relatively straightforward, however the time limits imposed by the Companies Act 1981 are, in most cases, critical. The failure to meet any statutorily imposed time frame may result in that step being ineffective, or a default fine imposed on the company and/or each and every officer of the company or, potentially and most drastically, all steps in the winding up taken to date becoming ineffective.

The procedure begins with a directors' meeting at which the directors (or the majority of them) resolve to recommend to the members at a Special General Meeting called for the purpose that the company be voluntarily wound up. The directors will also fix a meeting of all known creditors of the company for the same day as (but later in time) or the day following the Special General Meeting. A notice of creditors' meeting must also be published in an appointed newspaper on at least two occasions.

The directors, or if there are more than two of them, the majority of directors, must each make a statutory declaration to the effect that they have formed the opinion that the company will be able to pay its debts in full within some stated period, which must not exceed twelve months from the commencement of the winding up of the company. Such declarations will have no effect unless each declaration embodies either a statement of the company's assets and

Reasons For Incorporating In Bermuda

- § Respected International Business jurisdiction (built on the principle of “know your customer”);
- § Tax Neutral Business Environment (no income, capital gains, transfer or withholding taxes);
- § Business sensitive and well established Legal System (based upon English common law);
- § Minimal Government Annual Reporting except for Restricted Businesses;
- § Access to Capital Markets (through Bermuda Stock Exchange listings);
- § Access to one of the most successful Insurance/Reinsurance Markets in the world;
- § Reliable Banking System;
- § Efficient Support Services (legal, accounting, management, corporate and trust services);
- § State-of-the-Art Global Internet Services and Telecommunications (connecting Bermuda to the world); and
- § Friendly yet efficient business environment for holding Company Meetings.

liabilities as at the latest practicable date before the making of the declaration or the declaration states on its face that the opinion of the director is based on an indemnity, undertaking, or pledge made in favour of the company in respect of its liabilities. The declarations of solvency must be filed with the Registrar of Companies for registration and not more than five weeks must pass between the filing of the declarations and the Special General Meeting called for the purpose of considering whether to wind up the company, otherwise the declarations will be ineffective.

The business to be conducted at the Special General Meeting for the purpose of considering a resolution to wind up the company will be that business which is set out in the Notice of Special General Meeting but will include consideration of the appointment of one or more persons to act as liquidator for the purpose of winding up the affairs of the company and fix the remuneration of the liquidator, if any.

Once the members of the company have resolved to wind up the company and the liquidator has been appointed and remuneration fixed, in most circumstances there is nothing more for the members to do until the liquidator calls a final meeting to present an account of the winding up, showing how the winding up has been conducted and the property of the company disposed of and to give an explanation of what has transpired during the course of the winding up. That does not, however, mean that the winding up is finished.

Whether or not the members of a company resolve to wind up the company at the Special General Meeting, the directors are required to prepare a statement of affairs of the company for presentation to the creditors’ meeting which will follow the Special General Meeting. The directors must also appoint one of their number to attend and chair the creditors’ meeting; and it is the duty of the director so appointed to do so. The creditors will consider the statement of affairs presented to them together with the liquidator nominated by the members. Usually, the creditors will accept the liquidator (and level of remuneration) nominated by the members; but that is not always the case. It is open to the creditors to nominate a different liquidator and, if that happens, the creditors’ nomination will prevail. The creditors may also, at the creditors’ meeting, appoint a committee of inspection, but that is not usually the case.

Following his appointment, the liquidator must within 21 days cause to be published in an appointed newspaper a notice of his appointment and he must deliver a copy of the notice of his appointment to the Registrar of Companies.

Thereafter, the liquidator will conduct the liquidation of the company by getting in its assets and discharging its liabilities in accordance with established principles. The liquidator will eventually call final meetings of both the members and the creditors.

Notices of the Final General Meeting (members) and the final meeting of creditors must be published in appointed newspapers at least one month prior to each respective meeting. At those meetings (and they are separate), the liquidator will present an account of the winding up, showing how the property of the company has been disposed of. Within 1 week of the meetings (or the last of them, if not held on the same day), the liquidator must send to the Registrar of Companies a copy of the account of the winding up together with a return of the holding of the meetings described above and their respective dates.

Three months later, assuming nothing out of the ordinary, the company shall be deemed to be dissolved.

The information contained in this article represents general principles and is not intended to be exhaustive. There are certain types and/or classes of companies to which members' voluntary liquidation is not available. The liquidation of any company must be treated individually. Legal advice should be obtained in respect of any proposed insolvency or liquidation.

Articles on other aspects of insolvency and liquidation in Bermuda will appear in our newsletters over the coming months.

For information on insolvency in Bermuda please contact Paul A. Harshaw, Senior Associate at paharshaw@milligan.bm.

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THE BERMUDA SPECIAL PURPOSE TRUST (a vehicle for business purposes)

The Bermuda Special Purpose Trust was created under The Trust (Special Provision) Act 1989 as replaced by Trust (Special Provision) Amendment Act 1998 and there has been passive use of this vehicle to date.

What is a purpose trust and who are the parties? A purpose trust can be created by a declaration of trust made by the trustee or a person, that is the settlor, who transfers legal title of specific assets, that form the trust fund, to the trustee who holds and manages the trust fund for a term, up to one hundred years, or until the purposes are carried out or the trust terminates.

The Special Purpose Trust is flexible and could be put to many different commercial uses including securitizations, asset protection or holding shares in a company formed to engage in certain business transactions such as the purchase of an aircraft. This article will look at the features of a Special Purpose Trust in the context of a commercial use.

The Special Purpose Trust has the following features:-

- ✓ Purposes must be certain and lawful;
- ✓ It must be created in writing with the purposes defined in the trust deed;
- ✓ It can last for a maximum period of 100 years;
- ✓ The trustee does not need special credentials; and
- ✓ An enforcer or successor enforcers that protect the interest of the trust.

As you can see the Special Purpose Trust departs from the beneficiary principle in that it allows express purposes to stand in the place of a beneficiary. The purposes can be set out in the trust deed and can cover a number of commercial objectives. The trust exists to satisfy the purpose or purposes for which it has been settled.

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RICHMOND GROUP LIMITED AND ITS AFFILIATES

Richmond Corporate Services Ltd. - provides corporate administration and compliance services to Bermuda companies, partnerships and trusts.

Richmond Financial Managers Ltd. - provides a wide range of management services to its clients. It can also assist in advising insurance professionals on the Bermuda regulatory environment, particularly the capital requirements, solvency margins and liquidity ratios.

Richmond Investments (Bda) Limited - provides investment advisory services to clients of the Richmond Group of Companies who are institutional and high net worth clients.

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Let us take a scenario where the commercial objective of a transaction is to ensure lender security and borrower confidentiality. How can a Special Purpose Trust assist with accomplishing these objectives?

The provisions of the trust deed can include such purposes as agreed by the settlor and trustee. A debenture trust could provide security for lenders and the borrower. The trustees are the neutral party in the commercial transaction whose role is to ensure the borrower complies with the terms of the loan and that all the parties are dealt with fairly. This provides the borrower and lenders with a neutral party acting as fiduciary, the trustee, who will ensure that the terms of repayment are carried out without detriment to any of the parties involved. The trustee holds upon trust for each lender marketable securities and/or a pool of assets segregated into sub-trusts for each lender that could be applied by the trustee to enforce repayment of the loan. In further protection of the borrower's confidentiality only the trustee will need to know the financial standing of the borrower and will act accordingly to protect the interests of the lender.

The Special Purpose Trust is established as a trust (i.e. the legal title is vested in the trustees) with the equitable rights held by the enforcer, ensuring the purposes are fulfilled as the terms of the trust dictate or are varied where circumstances call for variation of the deed. As an added protection the enforcer can enforce the trust and provide for a succession of enforcers appointed by deed, which may include, unless the deed expressly excludes, the settlor.

The trustee ensures the enforcement of the purposes as opposed to duties to the beneficiaries that it would have under a traditional discretionary or fixed trust.

In conclusion the Bermuda Special Purpose Trust makes good business sense in a number of commercial transactions. In the case mentioned above, it provides for assets to be segregated representing each lender's interest and would not be subject to attack by beneficiaries or a creditor's claim against a party to the transaction.

For more information on Special Purpose Trust please contact Milchelle St. Jane at mstjane@richmond.bm.