RICHMOND CORPORATE SERVICES LTD. | Lynda Milligan-Whyte & Associates
Barristers & Attornevs

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BERMUDA'S MINISTER OF FINANCE DIES

The death of The Hon. Eugene Cox, J.P. on Friday, 9th January, 2004 marks the passing of one of the Progressive Labour Party's veteran politicians and one of the champions of democracy for Bermuda.

The Hon. Eugene Cox

After more than 40 years in politics, Mr. Cox's integrity, perseverance and loyal service assisted his Party to gain power in 1998 when he was appointed the Labour Party's first Minister of Finance.

Mr. Cox was an engineer by profession having received a bachelor's degree in engineering from McGill University in Montreal. He had a long and successful career at BELCO and upon retiring from BELCO held the post of Senior Vice President and Assistant to the President with responsibilities for engineering and operations.

Mr. Cox brought to his party and to Bermuda a very conservative and analytical approach to problem solving and will be greatly missed in this Community.

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CONVERSION TO A BERMUDA SEGREGATED ACCOUNT COMPANY

The Segregated Accounts Companies Act 2000

Bermuda now permits the registration of Segregated Account companies pursuant to the Segregated Accounts Companies Act 2000 ("the SAC Act") without the need to establish such facility by Private Act of the Bermuda Legislature as previously was the case.

This means that any company may register under the SAC Act or any existing company may convert into a SAC company (whether that company conducts insurance or non-insurance business) by registering under the SAC Act.

Segregated Accounts or "Cells"

The segregated account or "cell" established on behalf of each participant is protected by Bermuda law against claims asserted against the Company and participants in other cells. This means that a participant in the Company will only be responsible to pay for claims arising from its own losses, not those of other participants. However, if the cell is owned by more than one participant, then the participants will share pro rata in each other participant's losses or on some other agreed upon basis. If the segregated account company is properly structured and registered, in no circumstances will a general creditor of the Company be able to attach any participant's account.

The additional feature of this approach is that it provides not only for the issuance of Securities (example: preferred shares) in order to confer rights with respect to a Separate Account for purposes such as returning profits from that account but enables it to be done through contractual agreements (such as Participation, Accountholder and Contingent Agency Commission Agreements).

Conversion Process

Any existing company which wants the facility to operate segregated accounts may register under the SAC Act without

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.

having to incorporate as a new entity.

In the case of a conversion, it will be necessary to obtain the consent of the shareholders, creditors and the Bermuda Monetary Authority prior to the registration. It is also necessary that the required amendments to the Bye-laws of the Company or any Offering Document be approved by the appropriate parties to reflect the new structure and changes to the rights of shareholders.

Where such a company has registered, the Registrar of Companies may impose such conditions on the registration of the company as he considers necessary to ensure compliance with the SAC Act, the sufficiency of the vetting procedures for the beneficial owners of segregated accounts and the reputation of Bermuda.

E-Commerce companies have been established in Bermuda under the SAC Act to offer the facility of segregated accounts to users wanting to take advantage of Bermuda as a jurisdiction without the necessity to establish a separate Bermuda company. More recently, mutual funds have taken advantage of this facility by converting into segregated account companies offering its multi-share class of shareholders the protection afforded by segregated accounts for each class of shares.

Segregated Account Representative

A segregated account company shall appoint and maintain a segregated account representative in Bermuda. Such representative shall be included in the register of directors and officers of the company maintained under the Companies Act, 1981.

It is the duty of the Segregated Account Representative to make a written report to the Registrar setting out any particulars related to the insolvency, failure or involvement of the Company in complying with the Public Act or any other non-compliance under Bermuda law.

For further information on the procedures for registering under the SAC Act – please contact Lynda Milligan-Whyte at LMW@richmond.bm.

DIRECTORS' DUTIES IN CERTAIN CIRCUMSTANCES

The case of *Colin Gwyer & Associates Ltd v. London Wharf (Limehouse) Ltd* was reported last year and addresses the duties of directors of a company in the case of actual or apprehended insolvency of the company and the issue of directors who have an interest in transactions involving the company.

The facts of the case are complicated and are not relevant to this note. In a quite thorough judgment, Leslie Kosmin QC (sitting as a deputy judge of the High Court of England and Wales) reiterated a number of general principals relating to the duties of directors in various circumstances.

His Lordship began by pointing out that as a matter of general law, and except in special circumstances (which did not apply in that case) a director owes his fiduciary duty to the company only, not to any shareholder, and must exercise his discretion bona fide in what he considers is the interest of the company, not for any collateral purpose. His Lordship then went on to expand on what that general phrase meant (substantially repeating what was said in my note on the *Extrasure Travel Insurance* case in the December, 2003 newsletter).

His Lordship stated, however, that the general law applies when a company is solvent and a going concern. Where a company is insolvent or of doubtful solvency or on the verge of insolvency and it is the creditors' money which is at risk, when carrying out their duty to the company, a director must consider the interests of the creditors to be paramount and take those interests into account when exercising his discretion. In this particular case, the three directors were also the beneficial owners of the company. None of the three directors could get along with any of the other directors as a result of personal animosity. The company was embroiled in litigation and one of the directors, although motivated by what he considered to be the interest of the company in the sense of the shareholders, admitted that in deciding to settle the litigation on terms offered, without making

a counter proposal, he had had no regard to the interest of the creditors. When questioned, he was unable to explain how the company would pay the creditors, except that he assumed that the shareholders would eventually have to raise the necessary funds. His Lordship said in relation to an insolvent company the directors, when considering the company's interest, must have regard to the interest of the creditors. If they fail to do so and therefore ignore the relevant question, the Court would then view the decision of the directors applying the test: whether an intelligent and honest man in a position of a director of the company concerned could in the whole of the existing circumstances have reasonably believed that the transaction was for the benefit of the company *and of the creditors*. His Lordship reiterated that the well known test laid down in *Charterbridge Corp. Ltd v. Lloyds Bank Ltd* was of general application, subject to the modification just noted where the company is facing actual or apprehended insolvency.

On a separate issue, in relation to allegations by several of the directors, that some directors had acted in breach of their fiduciary duty to the company his Lordship said that he could well understand that in relation to a Board of Directors comprising several persons, the fact that one director acted in breach of his fiduciary duty when exercising his vote on a resolution should not invalidate the resolution if the other directors acted in accordance with their duties. His Lordship said that the vote of a single director would simply be disregarded. However, the position in this case was that if one of the directors who was alleged to have acted in breach of his fiduciary duty had in fact done so, no valid quorum would have been present at the meeting and the meeting itself would have been invalid. His Lordship agreed that the position would be clearly different if the offending director was an essential constituent for a quorum of the board meeting. It is well established that where a director is prohibited from voting, he cannot be taken into account for the purpose of ascertaining whether quorum of directors is present. So, his Lordship said, that where a resolution was passed at a meeting of three directors, two of whom were interested in the subject matter of the resolution and therefore could not vote, there was no quorum.

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 individuals.

Richmond Nominees Limited - provides nominee services to clients of the Richmond Group of Companies who are institutional and high net worth individuals.

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In summary then, where a director who is an essential constituent of the quorum of the board meeting is shown in retrospect to have acted in breach of his fiduciary duty in voting on a resolution, he should be treated as having been incapable of voting on the business before the board and therefore not taken into account for the purposes of ascertaining whether or not a quorum of directors was present. Furthermore, where the directors of a company are faced with insolvency or potential insolvency, their fiduciary duty to the company requires that they not only look at what is in the best interest of the company but also what is in the best interest of the creditors (including prospective or contingent creditors) of the company, should insolvency result.

The information contained in this note represents the author's view of certain aspects of the decision discussed. This note is not intended to be exhaustive. Legal advice should be obtained in respect of any particular question relating to the duties of the directors.

For further information on the duties owed by directors to a company, please contact Paul A. Harshaw, Senior Associate at **paharshaw@milligan.bm.**