

Jersey & Guernsey Law Review – February 2008
NON CHARITABLE PURPOSE TRUSTS IN THE CHANNEL ISLANDS

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Introduction

1 Under orthodox principles of trust law, trusts for purposes, unless exclusively charitable, are not ordinarily valid. The most comprehensive exposition of this “beneficiary principle” can be found in the decision of Roxburgh J in *Re Astor’s Settlement Trusts*.¹ In that case, which concerned a settlement of shares The Observer Limited, His Honour found attempted trusts of income for a variety of non-charitable purposes, including “the improvement of good understanding, sympathy and cooperation between nations” and “the preservation of the independence and integrity of newspapers” invalid. In so doing, His Honour reaffirmed a general principle running through *Morice v The Bishop of Durham*,² to *Bowman v Secular Society*³ and *In re Wood*,⁴ that a trust must be for the benefit of individuals who can enforce it, or be charitable and therefore enforceable by the Attorney-General. Stated negatively: a court of equity will not recognize a trust that it cannot enforce. As there is no-one having standing to enforce non-charitable purpose trusts, the trusts purported to be created for that purpose cannot be recognised. The anomalous cases of purpose trusts that have been created for “horses and dogs, graves and monuments”, are exceptions to the general rule.

2 The additional appellate authority in England and Wales is *Re Endacott*.⁵ In that case a testator gave his residuary estate to the local parish council “for the purpose of providing some useful memorial to myself”. In finding that the trust sought to be created was invalid, Lord Evershed MR, with whom the rest of the Court of Appeal agreed, stated that -

“no principle perhaps has greater sanction or authority behind it than the general proposition that a trust by English law, not being a charitable trust, in order to be effective, must have ascertained or ascertainable beneficiaries.”

3 In the course of his decision, Lord Evershed noted the then recent advice of the Privy Council in *Leahy v Attorney-General of NSW*,⁶ which had also approved the principle, and that case is likely to be the more directly relevant authority in the offshore context.

¹ [1952] 1 Ch 534.

² (1804) 9 Ves 399.

³ [1917] AC 406.

⁴ [1949] Ch 498.

⁵ [1960] 1 Ch 232.

⁶ [1959] AC 457.

4 The principle was recognized in Guernsey law in the Trusts (Guernsey) Law, 1989, under which, by section 11, a trust is (at the time of writing) invalid and unenforceable unless it has identifiable or ascertainable beneficiaries, or is created for a charitable purpose. Since 1989, however, a number of offshore jurisdictions have legislated for non-charitable purpose trusts, including, of course, Jersey, by the Trusts (Amendment No 3)(Jersey) Law 1996.⁷ The Jersey provisions remain largely unchanged since introduction.⁸

5 Recent proposals, however, will ensure that non-charitable purpose trusts governed by Guernsey law will cease to be invalid and unenforceable, providing they are established in accordance with legislative requirements. Although “non-charitable purpose” is not defined in the new *Projet de Loi*,⁹ “purpose” is stated to mean “any purpose whatsoever, whether or not involving the conferral of any benefit on any person”.¹⁰ It includes the holding of property.

6 This article describes and analyses the new provisions, and contrasts them with those of the *Special Trusts (Alternative Regime) Law* (“STAR”) adopted in the Cayman Islands for non-charitable purpose trusts. The new Guernsey regime has closely followed that of Jersey. The article concludes that the Cayman regime has some advantages in terms of providing for certainty as to the validity and enforcement of non-charitable purpose trusts. Both Channel Islands’ legislation could benefit from the insights of the Cayman STAR model, while improving on that model in respect of the regulation of enforcers, by adopting insights gained from the regulation of company auditors.

DESCRIPTION OF THE NEW PROVISIONS

Mixed trusts

7 It is clear that a trust can be for a mixture of persons and purposes (both charitable and non-charitable) under the *Projet*. Subsection 11(2)(c) of the *Projet* speaks of a trust being invalid and unenforceable only *to the extent* that:

- (a) it does not have a beneficiary that is identifiable or ascertainable; *and*
- (b) is not for a charitable and/or valid non-charitable purpose.

Furthermore, subsection 12(1) speaks of a trust “for or including” non-charitable purposes. Accordingly, where a trust instrument includes non-charitable purpose trusts which are valid in terms of the Law, along with other trusts for beneficiaries or charitable purposes, the trusts as a whole may remain valid.

⁷ As to which, see Matthews, *Trusting on Purpose: The Trusts (Amendment No 3) (Jersey) Law 1996* (1997) 1 JL Review 6.

⁸ But for amendments to those provisions relating to *cy-près* schemes, which were extended by the Trusts (Amendment No 3)(Jersey) Law 2006.

⁹ Entitled “The Trusts (Guernsey) Law, 2007”, and referred to in this article as “the *Projet*”.

¹⁰ “charitable” is not defined, but the meaning can be assumed to be consistent with that of the English common law: *Re Insinger Trust (Guernsey) Limited* (unreported) Guernsey Court of Appeal 10 June 1999.

Requirements for validity

8 The terms of the non-charitable purpose trust must provide for the appointment of an enforcer in relation to its non-charitable purposes; and the appointment of a new enforcer at a time when there is none.¹¹ This is the basic constitutional requirement for a non-charitable purpose trust. Failing this requirement it will be invalid and unenforceable. So while a trust need not fail for lack of provisions for appointment of trustees,¹² the same does not apply in relation to enforcers. It is not clear why this should be so, when the Royal Court clearly has power to appoint enforcers¹³ and the trustee has both the right to apply for and the statutory duty to secure appointment of an enforcer when there is none.¹⁴ The constitutional requirements appear to be a vestige of thinking grounded in the beneficiary principle, which is of little continuing relevance once the court has jurisdiction to appoint an officer to enforce the trust.

9 However if the lack of provision for an enforcer has fatal consequences in relation to the validity of a non-charitable purpose trust, it will be important to know what a non-charitable purpose trust is. The wide definition of “purpose” suggests that the scope of this concept, taken literally, might extend to some trusts conventionally thought to be beneficiary trusts. This may be thought to raise a question as to the validity of such trusts. This issue is discussed further below.

Trustee’s duties

10 As suggested above, the trustee of such a trust must take “such steps as are necessary” to secure the appointment of a new enforcer when there is none.¹⁵

11 Where the right under the settlement to appoint a new enforcer has been reserved to the settlor or a third party – a legal device which is clearly possible by reference to s 15(1)(e) - and is taking action to appoint a new enforcer, the trustee will not find it necessary to take any steps itself. However, as indicated above, the new provisions make clear that, where it is necessary, the Royal Court has the power to make an order in respect of the appointment of an enforcer, on the application of a trustee.

12 An enforcer is said to have a fiduciary duty to enforce the trust in relation to its non-charitable purposes.¹⁶ To whom this fiduciary duty is owed – or, to put it another way, the identity of the person who has the right to enforce this duty - is an important question. It appears that the trustee, HM *Procureur*, the settlor, and any other person granted leave by the Royal Court may apply for orders as to the exercise by the enforcer of its functions in relation to the non-charitable purpose.¹⁷ However only the trustee has a duty to police the

¹¹ s 12(1)(a) and (b).

¹² ss 18(1)(a) and (b) of the *Projet*.

¹³ ss 12(9) and 69(1)(a)(v).

¹⁴ ss 12(8) and 69(2)(b).

¹⁵ s 12(8).

¹⁶ s 12(2).

¹⁷ ss 69(1)(a)(v) and (2). Conferral of standing on a settlor (by s 69(2)(c)) is a Guernsey innovation dating from 1989, and is not present in the Jersey Law. Under orthodox trust law, of course, a settlor with no proprietary interest in the trust fund has no

duty of the enforcer, at least in certain (extreme) circumstances. Where the trustee has reason to believe that the enforcer is unwilling, refusing, unfit or incapable of acting, it must apply to the Royal Court for the removal of the enforcer and the appointment of a new one.¹⁸ Apparently, in these circumstances it has a duty to act - whether or not a settlor or other donee of a power of appointment and removal may already be in the process of taking steps to achieve this end. Indeed, where the trustee has been put on notice of, say, the enforcer's unfitness to act, by steps the settlor is taking to remove the enforcer, the trustee may have no option but to duplicate these steps, in order to comply with the provision. There is an argument for bringing the duty of the trustee into line in ss 12(8) and 12(9).

Qualifications and duties of the enforcer

13 As might be expected, an enforcer cannot also be the trustee of the trust.¹⁹ Nothing however prevents an associate of the trustee being appointed enforcer, and this reflects the position in Jersey.²⁰ The drafters have apparently taken the view that the fiduciary duty of the enforcer mentioned above is sufficient control on the conflict of interest such association would produce. Further, apparently with a view to reinforcing the fiduciary nature of the enforcer's duties, s 13 applies proscriptive rules relating to profiting from the appointment. An enforcer must not derive profit, cause any other person to derive profit, or enter into any transaction in relation to the trust which may result in such profit, without the sanction of the Royal Court, or permission under the Law or the trust instrument.

14 Apart from the provisions explained above, the provisions for resignation or removal of enforcers are very similar to those for trustees under s 20.

Rights of the enforcer

15 An enforcer, subject to the terms of the trust, has power to request from the trustee full and accurate information as to the state and amount of the trust property: s 26. Where the terms of the trust are more restrictive, the enforcer may apply to the Royal Court for an order authorizing or requiring the provision of the information, having shown such provision is necessary or expedient for enforcement of the trust. It appears that an enforcer might also apply for an order for disclosure of confidential documents in the possession of the trustee.²¹

16 However, Guernsey courts have made clear that these statutory rights are not a complete codification of the rights of beneficiaries to information and documents in relation

equitable or legal interest in the trust property and therefore no standing to enforce the trust. In the proposed new law, the new definition of "settlor" is very wide. It means a person "who directly or indirectly provides trust property". Doubtless, the new wide definition is intended to facilitate recognition of the real settlor behind a "dummy" provider.

¹⁸ s 12(9).

¹⁹ ss 12(3) and 12(7)(d).

²⁰ See *Matthews, op. cit.* n 7.

²¹ s 38(3)(c).

to a trust.²² A beneficiary's rights are supplemented by those under the common law of Guernsey in relation to trusts. The difficulty in relation to enforcers is that there is no common law as to the rights of an enforcer, the officer not yet being recognized as a matter of conventional trust law, and therefore merely a creature of statute. The new amendments to the trust law, therefore, should make clear that the enforcer has all the rights of a beneficiary under common law in relation to information. While there is an argument that those rights may be implied from the duty of the enforcer to enforce the trust, coupled with the reference to the key right of an enforcer to accounts from the trustee,²³ that is a large implication to make in the circumstances.

17 Where a non-charitable purpose has been fulfilled, or cannot be carried out at all, or at least not effectively, the enforcer has the right to bring an application for declarations by the Royal Court as in a *cy-prés* scheme.²⁴ Again, this substantially reflects the position in Jersey, as extended by amendment in 2006.²⁵

18 More generally, s 67(2)(f) makes clear that applications for orders may be made by an enforcer in relation to non charitable purposes, including an order as to the exercise of its functions, its remuneration, and conduct.

COMPARISON WITH THE CAYMAN STAR

19 The STAR legislation does not apply to all Cayman trusts. It applies to a trust or power where the trust or power (called a "special" trust or power) is created by a written instrument that contains a declaration to the effect that the Law is to apply.²⁶ Trusts and powers which do not meet these requirements (called "ordinary" trusts or powers) are not subject to the Law.²⁷ The objects of a special trust or power may be persons or purposes or both, and the purposes of a special trust may be charitable or non-charitable, provided that they are lawful and not contrary to public policy.²⁸ In any case, the "enforcer" is the officer by which any special trust is enforced. The enforcer is (or enforcers are) appointed by or pursuant to the terms of the trust, or by order of the court.²⁹

20 The constitutional requirements in relation to appointment of enforcers for Guernsey non-charitable purpose trusts have already been noted and questioned. Under the STAR regime no such requirements exist, and it appears that the duty of the trustee to apply for appointment of an enforcer is relied upon.³⁰ It is submitted that this mechanism should be mirrored in the *Projet*. The invalidity of a trust is a drastic result which is unnecessary where a more flexible mechanism exists for ensuring that non-charitable purpose trusts

²² *Stuart-Hutcheson v Spread Trustee Limited* (2002) 5 ITELR 140; *Countess Bathurst v Kleinwort Benson (Channel Island) Trustees Limited* (unreported) Royal Court 9 August 2004. These decisions should continue to be relevant if the new statute is treated as, in substance, amending legislation.

²³ Matthews, above, n 7.

²⁴ s 59.

²⁵ Above, n 8.

²⁶ s 3(1).

²⁷ s 3(3).

²⁸ ss 6(1), s 6(3).

²⁹ s 7(2).

³⁰ ss 7(4)(c) and (5).

are enforced. Under the *Projet* the duty of a trustee currently has no specific sanction, although failure to discharge the duty would constitute a “breach of trust” as defined in the statute. The application of a penalty, as applies under the STAR regime, might be considered.

21 A further notable difference between the Cayman STAR regime and the new Guernsey model is the deliberate distinction in the Caymans between STAR trusts and ordinary Cayman trusts,³¹ and the vesting of all rights in relation to enforcement of STAR trusts (of both purpose and beneficiary varieties) in enforcers.

22 The intention of these features is apparently to prevent difficulties where a trust is for mixed purposes and persons, or where purpose trusts cannot be readily distinguished from trusts for persons. In a Guernsey “purpose” trust, by contrast, the beneficiaries and enforcer may conceivably find themselves in dispute over which of them has the right to enforce a trust. Take for example a trust “for the cultural education of my grandchildren”, in relation to which an enforcer is appointed. It may be unclear whether this is a trust for purposes or persons, or, even if it is a trust for purposes, whether beneficiaries may nonetheless have standing to enforce it.³² That being the case, the enforcer’s right to receive information about and to bring proceedings in relation to the trust may be contested by the grandchildren, and *vice versa*. If the trust is found to be a trust for beneficiaries, the enforcer has no duty to perform in relation to the trust under the *Projet*, and possesses no rights under the *Projet* by which to fulfill any duty. The enforcer has no statutory basis at all for its standing in relation to the trust. It must, if anything, rely on untested arguments about the intention of the settlor, to ground its standing.³³ In a STAR trust, by comparison, it is clear that beneficiaries may not exercise rights in relation to the trust unless they are also appointed enforcers.³⁴

23 It might be argued that the answer to this apparent problem is the wide definition of purpose – which may deem trusts to be purpose trusts **whether conferring a benefit on a person or not**.³⁵ If any ambiguous trust is likely to be caught by the wide definition of a (non-charitable) purpose trust this is conclusive of the issue. For this reason the powers and obligations of the enforcer at least will be ensured. This may not be an appropriate solution however, if the definition of purpose is liable to be so wide as to capture trusts that were assumed to be orthodox beneficiary trusts. Take for example ordinary superannuation trusts “for the sole purpose of making provision for retirement benefits for persons”.³⁶ Are these trusts caught by the definition of “purpose” trust and invalidated for

³¹ As noted above, the distinction is achieved by declaration in the trust instrument that the trust is subject to STAR.

³² *McKnight v Ice Skating Queensland (Inc)* [2007] QSC 273; *Yeomans v Yeomans* [2006] 1 Qd R 390; *Re Denley* [1969] Ch 373; *Re Grant’s Will Trusts* [1979] 3 All ER 359.

³³ Professor David Hayton “*Developing the Obligation Characteristic of the Trust*” in D.Hayton (ed) *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds*, Kluwer International 2002, pp 189-201, at 191

³⁴ s 7(1) of STAR.

³⁵ The emboldened aspect of the definition is principally intended to permit trusts for the purpose of holding particular assets, such as shares.

³⁶ See s 40(o)(ii) and 150(2)(c) of the Income Tax (Guernsey) Law, 1975.

not having an enforcer, even though conferring benefits on persons?³⁷ Even if the constitutional requirements for non-charitable purpose trusts are removed, as is recommended above, a trustee charged with the duty to apply for an appointment of an enforcer in relation to a non-charitable purpose trust might arguably have to consider whether it had discharged its duty in relation to these trusts, unless the wide definition of “purpose” is read down.

24 It seems reasonably clear, having regard not only to the results suggested by the literal view of the definition, but the reference to any “person” rather than to “beneficiary” in the definition, and the distinction between trusts with ascertainable beneficiaries and those for purposes in s 11 (2)(c) of the *Projet*, that a purposive view of the definition would be adopted. If that is so, a purpose trust would not include a trust for the purpose of conferring particular benefits on persons having standing to enforce the trust.

25 But the issue demonstrates the virtue of the very different Cayman regime. The segregated STAR regime has only one designated repository for enforcement powers and duties in relation to purpose or persons trusts. By creating this segregated regime the Caymans have ensured that no ordinary trust will be inadvertently voided for not having an enforcer, and no enforcer of a special trust is able to be challenged as to its standing by a beneficiary.

26 Moreover, the STAR regime includes provisions to resolve the uncertainty of a STAR trust, in addition to a *cy-près* regime similar to that found in the new Guernsey proposals. This is another means by which the parameters of such a trust can be determined (for the benefit of an enforcer acting in relation to a settlement containing a number of trusts) without resort to an overly wide definition of “purpose”.³⁸

27 Another respect in which the STAR regime appears to have some advantages is in relation to specifying the rights of enforcers. The lacuna in relation to the rights of enforcers to disclosure has been noted above. Certainly, the rights of enforcers to indemnity and the availability of orders in relation to the exercise of enforcers’ functions and remuneration have been set out in the *Projet*.³⁹ The STAR regime spells out in detail the rights of an enforcer in relation to this and other key matters:

“9. Subject to the terms of his appointment:

(a) an enforcer has the same rights as a beneficiary of an ordinary trust:

³⁷ Baxendale-Walker goes so far as to argue that such trusts are purpose trusts: *Purpose Trusts*, Butterworths 1999 pp 80-84. That is not the generally accepted view: see *Schmidt v Air Products Ltd* [1994] 2 SCR 611; and Glasson J and G Thomas (eds) *International Trust Laws* Jordans, Bristol, at B4.26/19-35 for broader commentary on Baxendale-Walker’s thesis. However, the question is not whether such trusts are purpose trusts, but whether they are trusts for “any non-charitable purpose whatsoever, whether or not involving the conferral of any benefit on any person”, bearing in my mind that they must be “for the sole purpose of making provision for retirement benefits for persons” in order to achieve tax advantages.

³⁸ See s 10 of STAR.

³⁹ Ss 13(2) and 69(1)(a)(v).

- (i) to bring administrative and other actions, and make applications to the court, concerning the trust; and
 - (ii) to be informed of the terms of the trust, to receive information concerning the trust and its administration from the trustee, and to inspect and take copies of trust documents;
- (b) in the performance of his duties, if any [sic], an enforcer has the rights of a trustee of an ordinary trust to protection and indemnity and to make applications to the court for an opinion, advice or direction or for relief from personal liability; and
- (c) in the event of a breach of trust an enforcer has, on behalf of the trust, the same personal and proprietary remedies against the trustee and against third parties as a beneficiary of an ordinary trust.”

Beyond STAR: international recognition of the position of enforcers

28 Whether non-charitable purpose trusts, at least as engineered under offshore statutes, may be recognized “onshore” as a matter of private international law remains unresolved.⁴⁰ The argument developed by Professor Hayton that a settlor’s intention should be taken into account for the purpose of determining the standing of an enforcer, has much to commend it in terms of principle.⁴¹ However, practical arguments about the motivation of an enforcer to enforce the trust are likely to be just as important as a basis for recognition of an enforcer’s standing by courts.

29 While the proposed new conflict of laws provisions of the Law may have the effect of insulating non-charitable purpose trusts from foreign proceedings in which their constitution is not recognized as valid, beyond this protection there are questions of international acceptance and perhaps “respectability” in relation to the place of non-charitable purpose trusts.⁴²

30 Every current non-charitable purpose trust regime principally relies on the trustee to take action against an enforcer who is failing in his task. Is this credible? To use an analogy, could one seriously expect a company to remove an auditor for failing in his duty to take action against the company he audits?⁴³ The analogy with company auditors is appropriate because, in the same way as the beneficiaries of a non-charitable purpose trust, the members of a company have very limited, if any, rights to bring actions against

⁴⁰ Professor Paul Matthews “*From Obligation to Property, and Back Again?*” in D.Hayton (ed) *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds*, Kluwer International 2002 pp203-241, at 222-224; Antony Duckworth *Star Wars: Smiting the Bull* (1999) *Trust Law International* v 13 n 3 pp159-168; Matthews, *Shooting Star: the new special trusts regime from the Cayman Islands* (1997) *Trust Law International* v 11 n 3 pp 67-71.

⁴¹ Above, n 33.

⁴² Duckworth, above n 40, at 164.

⁴³ The question is adapted from Professor Matthews’ *Shooting Star: the new special trusts regime from the Cayman Islands*, above n 40, at 69 “One cannot seriously imagine the case of a trustee bringing an action against an enforcer for failing in his duty to bring an action against the same trustee for breach of trust”.

the directors or auditor, because of the legacy of the rule that the company is the “proper plaintiff”.⁴⁴

31 It would be an advance on existing models of non-charitable purpose trust if enforcers were statutorily required to be rotated after a fixed period, in the manner of company auditors in many jurisdictions, so that no close relationship may develop between trustee and enforcer, to compromise the enforcement of the purpose trust.

Conclusion

32 The Guernsey *Projet* has followed the non-charitable purpose trust regime of Jersey fairly faithfully, and the new law will be an improvement on its predecessor, which had trailed behind that of Jersey for over a decade in respect of non-charitable purpose trusts. There are obvious benefits for the two jurisdictions in applying cognate laws. It is submitted, however, that both jurisdictions could steal the march on other jurisdictions by incorporating the insights of the Cayman STAR model, while improving on that model in respect of the regulation of enforcers, by adopting insights gained from the regulation of company auditors.

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⁴⁴ *Foss v Harbottle* (1843) 67 ER 189.