

Purpose trusts in Jersey

October 2015

The traditional elements of a trust involve a relationship between a settlor, a trustee and a beneficiary in respect of property. The settlor, as legal and beneficial owner of the property, gives the legal ownership of the property to the trustee who holds it for the benefit of the beneficiaries who have the beneficial or equitable ownership. Historically, English courts have repeatedly confirmed that there must be individuals who benefit from a trust. Therefore, as a general principle, it was not possible to have a trust for a purpose (albeit the law recognised an exception relating to charitable trusts on the basis of public policy).

However, some jurisdictions, mostly offshore, have developed their statutory laws to permit non-charitable purpose trusts, (i.e. trusts where trustees hold property to carry out specific purposes which do not qualify as charitable purposes). Jersey introduced non-charitable purpose trusts in 1996 by the Trusts (Amendment No 3) (Jersey) Law 1996, which came into force on 24 May 1996.

The concept

The concept of non-charitable purpose trusts is to establish a trust without ascertainable individual beneficiaries and instead to stipulate purposes, which need not be charitable. One important feature of a non-charitable purpose trust, which does not apply to beneficiary trusts, is the requirement for an “enforcer”. An enforcer is a person, who is separate from a trustee, whose duty it is to enforce the trust in relation to its non-charitable purposes. Otherwise, all other features of beneficiary trusts apply, such as inter alia an unlimited duration period, the lack of particular formalities for the creation of a trust, the lack of requirement for it to be registered and open to public inspection or for trustees of the trust to be resident in Jersey, and so on.

There is a duty upon the trustees to apply to court to remove an enforcer where the trustees have “reason to believe...the enforcer...is unwilling or refuses to act, or is unfit to act or incapable of acting

A lack of enforcer

An enforcer may voluntarily terminate his office by written notice delivered to the trustees (or may apply to court for his removal) or may be removed from office by the court, an event occurring (such as reaching an age limit stipulated in the trust) or he becomes a trustee. In addition there is a duty upon the trustees to apply to court to remove an enforcer where the trustees have “reason to believe...the enforcer...is unwilling or refuses to act, or is unfit to act or incapable of acting”. This trustees’ duty is seemingly to form a belief as a matter of fact that the enforcer is unwilling, refusing, unfit or incapable of acting rather than forming a subjective view of the same.

However, the trustees also have the duty, “at any time when there is no enforcer...[to] take such steps as may be necessary to secure the appointment of a new enforcer.” Therefore, in both cases, it must be assumed by implication that the trustees owe a fiduciary duty to the purposes to remove and/or appoint a new enforcer.

Purposes

The Law does not define or specify “purposes”. Often, purposes will be self serving like “to hold the shares in a private trust company”. There is a school of thought which suggests that such self serving purposes might fail for a lack of where the beneficial interest of the

trust belongs. This is because the self-serving purpose is more like a direction rather than a substantive purpose and it might be argued that the settlor failed to clearly specify where the beneficial interest of the trust belongs. Consequently, to avoid the risk of a resulting trust for failure of purpose, it is better to specify purposes to which the trustee is capable of applying the trust funds (or the income thereof), and also attempt to achieve an abstraction to the purpose to avoid background beneficiaries.

However, this author is not aware of any Jersey judicial authority to suggest that self serving purposes are in any way invalid and indeed is aware of many non- charitable purpose trusts used in commercial transactions, and as holding vehicles, which solely have self serving purposes. Consequently, it would be reasonable to take the stance that, provided that the trust complies with Article 12 of the Law, such self serving purposes are valid until either the Law or the Royal Court stipulates otherwise.

On the other hand, it might be vital to a particular structure that the non-charitable purpose trust be recognised as conclusively effective in other jurisdictions. To achieve an interpretation which is conclusively effective, it would be essential that the Royal Court recognises or the Law is amended to expressly stipulate that self serving purposes are effective.

Non charitable purpose trusts are common in Jersey and have been so for some time. Whilst the Law could benefit from being amended to expressly clarify certain aspects of its original drafting, the general provisions of the Law remain of the highest order and the purpose trust remains a valuable tool for Jersey in providing an orphan vehicle for structures which require a degree of separation from the beneficial owner.

A classic example is the utilisation of a non- charitable purpose trust to hold the shares in a private trust company

Due to the lack of individual beneficiaries who have beneficial ownership of the trust's property, a non-charitable purpose trust is very much an "orphan vehicle" or a "non- owed vehicle" which can be used for a number of different types of transactions. A classic example is the utilisation of a non- charitable purpose trust to hold the shares in a private trust company in an attempt to avoid the professional trustee being viewed as the beneficial owner of the private trust company. Therefore the non-charitable purpose trust provides a shield between the professional trustee and the private trust company to create some degree of protection from potential liability. Other examples of the use of non-charitable purpose trusts include special purpose vehicles and debt securitisation.

The trusts (jersey) law 1984 (as amended) ("the law")

The Law stipulates that for a trust to be valid, it must contain the traditional elements (i.e. a relationship between a settlor, a trustee and a beneficiary in respect of property) and expressly states that a trust created for a purpose (not being a charitable purpose) is invalid. However, Article 12 of the Law provides an exception to this rule so that "a trust shall not be invalid to any extent... if the terms of the trust provide for the appointment of an enforcer in relation to its non-charitable purposes, and for the appointment of a new enforcer at any time when there is none".

Is it essential to have an enforcer?

On face value you must have an enforcer. However, the Law uses the words "provide for the appointment (my emphasis) of an enforcer". It might be argued that these words only require the terms of the trust to provide the mechanics to appoint an enforcer rather than the actual appointment of an enforcer at any time. However, the Law stipulates that it shall be the duty of the enforcer to "enforce" the trust in relation to its non-charitable purposes. Enforce must include bringing legal proceedings where the trustee steals the trust fund or applies it to the wrong purposes, but it must also include those rights of a beneficiary (such as obtaining information). Otherwise an enforcer's ability to enforce the trust would be impaired. Therefore it would stand to reason that this duty to "enforce" includes and is

comparable to a beneficiary bringing the trustees to account. Therefore, on this reasoning, an enforcer, I would suggest, must be appointed from the outset because the enforcer is a replacement for the beneficiaries in bringing the trustees to account.

The Law also requires the trust to have the mechanics to appoint a new enforcer when none is appointed. Therefore if a trust does not provide the mechanics to replace an enforcer in due course, does the trust remain valid whilst the enforcer is in place, but become invalid when the enforcer dies or retires, or is the trust invalid from the outset because there is no mechanism in place to replace the enforcer? Which interpretation is correct will depend on whether an enforcer must be appointed from the outset. If we take the view that there must be an enforcer from the outset then the terms of the trust must contain mechanics for the appointment of a new enforcer from the outset or the trust will be invalid.

Who may act as enforcer?

The Law does not provide any assistance in this matter apart from to prohibit the trustee of the trust from also being appointed the enforcer (i.e. the law draftsman was clearly intending some degree of separation and independence from the trustee). However, the Law does not prohibit a person connected with the trustee (i.e. a wholly owned subsidiary) from acting as enforcer.

Whilst this would weaken the independence of the enforcer, which might not be recommended, it would save costs and the enforcer would still have the statutory duty to enforce the purposes imposed upon it. However, it should be remembered that the Law requires the trust to stipulate that an enforcer should be paid for his services because the position of enforcer is a fiduciary one, and hence, without specific authority, the enforcer cannot profit from the position.