Private purpose trusts - a reform proposal

Mark Pawlowski and Jo Summers

Table of Contents

Journal Article

Conveyancer and Property Lawyer

Conv. 2007, Sep/Oct, 440-455

Subject
Trusts

Other related subjects
Legislation

Keywords
Beneficiaries; Legislation; Non-charitable purpose trusts; Offshore trusts; Validity

Legislation cited
Trusts (Jersey) Law 1984 Art.10(2)(a)(iv)
Special Trusts (Alternative Regime) Law 1997 (Cayman Islands)
Virgin Islands Special Trusts Act 2003 (British Virgin Islands)
Trustee Act 1925 (c.19)

Conv. 440 A recent survey of probate solicitors in practice in England and Wales conducted by J. Brown [1] reveals that imperfect obligation trusts continue to provide a frequent vehicle for the making of testamentary gifts for a variety of non-charitable purposes, notably, the maintenance of pet animals, the erection and maintenance of graves, and the conduct of private religious ceremonies, after the testator's death. As Brown points out, English law does not permit private purpose trusts except in very limited circumstances. Thus, trusts for the care of particular animals, the erection and maintenance of monuments, graves

and tombs, the saying of masses or the performance of other religious rites, and the promotion of sports (notably, foxhunting) have been upheld provided the relevant purpose is sufficiently certain and not capricious (or useless) and confined to the perpetuity period. Such trusts, however, although valid, remain unenforceable in the sense that the trustee cannot be compelled to perform the terms of the trust if, for whatever reason, he is unwilling to do so.

Despite the obvious anomaly of a trust which is valid but not enforceable, it is also apparent that the cases are frequently conflicting or contradictory and there is little in the way of a sound basis for understanding why some trusts for non-charitable purposes have been upheld. This article, therefore, seeks to re-examine the rationale for the requirement of the so-called "human beneficiary rule" and to advocate a more radical change in the law than that put forward by Brown by the introduction of a statute validating purpose trusts along the lines of the legislation already in force in various off-shore jurisdictions.

*Conv. 441 Requirement of a human beneficiary

As Brown observes,[2] there is a long line of cases where trusts for benevolent or public purposes have been held to be void for lack of a human beneficiary. The decision which is most cited in textbooks is that of Sir William Grant M. R. in *Morice v Bishop of Durham,*[3] where the court was asked to determine if a trust for objects "*of benevolence and liberality*" was valid. The following extract[4] is quoted as the basis for the human beneficiary rule:

"There can be no trust over the exercise of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership and not trust. If there be a clear trust but for uncertain objects, the property, that is the subject of the trust, is undisposed of and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody, in whose favour the Court can decree performance."

At first glance, this appears to suggest that the trust will fail only if the objects are uncertain. As McKay[5] points out, the case "was often construed as indicating that the objects must be certain, rather than certain *and* human." Other cases, however, refer to the requirement for a *cestui que trust* in order for the trust to be valid. In *Re Wood*[6], for example, Harman J. held that a "gift on trust must have a cestui que trust". Similarly, in *Re Astor's Settlement Trusts*[7], Roxburgh J. held that any non-charitable trust that did not have a *cestui que trust* was not just unenforceable, it was void. Perhaps the clearest statement of this principle is to be found in *Re Endacott*[8] where Lord Evershed M. R. stated[9]:

"No principle perhaps has greater authority behind it than the general proposition that a trust, not being a charitable trust, in order to be effective, must have ascertained or ascertainable beneficiaries."

*Conv. 442 Although these authorities are relatively recent in terms of trust law, at least one writer[10] has argued that the cases merely confirmed a rule that had been in existence "for centuries". There are also, however, many early decisions where non-charitable purpose trusts have been upheld despite the absence of a human beneficiary to enforce them. Baxendale-Walker,[11] in his seminal book, lists 65 cases where purpose trusts have been upheld by the English courts, of which 52 were decisions of the higher courts. So how can these cases be reconciled with the statements of principle set out above? If non-charitable purpose trusts have no *cestui que trust,* how can they be valid?

In *Re Endacott,* Lord Evershed M. R. referred to such cases as being "exceptions" or "anomalies" to the human beneficiary rule. He grouped them under (what have become) five well-known headings: (1) trusts for the erection of monuments or graves; (2) trusts for the saying of masses (unless charitable); (3) trusts for the maintenance of particular animals; (4) trusts for unincorporated associations; and (5) miscellaneous cases. In the writers' view, however, this classification (by subject-matter of the trust) is not particularly helpful because it does not explain why such trusts were upheld when there was apparently no beneficiary. A better approach, it is submitted, is to examine the cases by reference to their stated rationale where the court either (1) identified an acceptable method of enforcement of the trust, or (2) relied on the existence of "factual" beneficiaries who saved the trust. In the writers' view, therefore, the only truly "anomalous cases" are those where no explanation was given by the court for the purpose trust being upheld.

(a) Acceptable method of enforcement

It is apparent that enforceability was the stated rationale in at least some of the anomalous cases, most notably, *Re Thompson,* [12] where a testator bequeathed a legacy of £1,000 to a friend to be applied towards the promotion of foxhunting. Despite the absence of a human beneficiary, Clauson J. upheld the bequest because of the willingness of the residuary beneficiary to apply to the court in the event that the trustee failed to apply the legacy for the stated purpose. Similar reasoning can be found in other ***Conv. 443** anomalous cases, particularly *Pettingall v Pettingall* [13] (on which *Re Thompson* was based) and *Re Astor's Settlement Trusts.* [14]

If a private purpose trust merely requires an appropriate enforcement mechanism, this can easily be achieved by the nomination of an enforcer in the trust document itself. As Professor D. J. Hayton [15] points out:

"… there is scope for the courts to uphold non-charitable purpose trusts if the settlor's trust instrument provides for a person with *locus standi* to enforce the purpose trust, assuming it to be workable and restricted to a valid perpetuity period."

the right or capacity to bring an action or to appear in a court.

However, enforcement alone does not explain all the so-called "anomalous" cases. Moreover, there are cases where individuals with an indirect interest in the enforcement of the purpose have been denied *locus standi* to enforce the trust. Take, as an example, the case of *Shaw v Lawless* [16] where the headmaster of a school could not enforce a trust for the education of the settlor's daughter, even though the trust deed specified she should be educated at that particular school. The headmaster had only an indirect interest in ensuring the trust was enforced, as it would benefit his school (and, hence, indirectly benefit the headmaster), but this was not sufficient to give him standing to enforce the trust. It seems odd, however, that a residuary beneficiary can enforce a trust (contrary to his personal interest), whereas an individual cannot enforce a trust under which he indirectly benefits.

(b) Factual beneficiaries

Another commentator, P.Matthews [17] refutes the suggestion that a *cestui que trust* is merely an enforcer of the trust provisions. His argument that a *cestui que trust* must be a right-holder is obviously attractive. He states that "the right-duty relationship" in a trust is crucial. Hence, "the beneficiary's right to information is the reciprocal right to the trustee's duty to account." [18] If ***Conv. 444** Matthews is correct and enforceability is not the governing factor, must there actually be a human beneficiary with an equitable proprietary interest in the trust assets? Although some of the early decisions, as we have seen, suggest that a trust "must be for the benefit of individuals", [19] it is apparent that this rule is not absolute--charitable and discretionary trusts provide prime exceptions. There also appears to be nothing to prevent a trust being created for a corporate beneficiary, as noted by Baxendale-Walker [20] and judicially acknowledged in *Leahy v A-G for New South Wales.* [21]

More significantly, in *Re Denley's Trust Deed,* [22] Goff J. held that a gift of land for use as a sports ground was valid as the persons entitled to use the ground had a sufficient factual interest in its enjoyment. The employees had clearly no proprietary interest in the land but this was not fatal to the validity of the trust. In other cases, there may be factual beneficiaries in the form of members of an unincorporated association. [23] However, the difficulty here is that the members may change from time to time. Are the beneficiaries of the trust confined to those individuals who were members of the association at the time the trust was created? This would prevent future members having the benefit of the trust funds and could cause problems when members leave and demand their share of the fund. The alternative is to define the class of beneficiaries as the existing members of the association from time to time. A similar approach is taken with employee benefit trusts, where the class of beneficiaries is defined by reference to current or previous employment with a named employer. Provided there is certainty as to which individuals are within the class of beneficiaries, a valid trust will be created. If there is any uncertainty, however, the trust will fail. [24]

The presence of factual beneficiaries also saved the gift in *Re Bowes.* [25] Here, a will contained a gift of £5000 "upon trust to expand the same in planting trees for shelter on the Wemmergill estate." The gift was held valid on the basis that it was really to the benefit the owners of the estate. North J. said [26]:

***Conv. 445** "I think the fund is devoted to improving the estate, and improving the estate for the benefit of the persons who are absolutely entitled to it. Then is there a mere power to the trustees to lay out a sum or is there a trust to lay it out? I think there is clearly a valid trust to lay out money for the benefit of the persons entitled to the estate."

This rationale may also explain the so-called *Quistclose* trust cases. In *Barclays Bank v Quistclose Investments Ltd* [27] the directors of a company declared a dividend payment but then found that they had insufficient funds to pay it out. They therefore borrowed funds from a financier on the condition that the funds would be used to pay the dividend. The borrowed funds were paid into a separate bank account opened specifically for the purpose. Before the dividend could be paid, the company went into liquidation. The House of Lords held that the loan gave rise to a trust to pay the dividend and the lender had an equitable right to see that the funds were used for that stated purpose. However, because the purpose could not be carried out, the funds were held to revert back to the lender on a resulting trust. Interestingly, there was no discussion as to whether the trust to pay the dividend was valid as a private purpose trust. The point, however, has been referred to briefly by the House of Lords in *Carreras Ltd v Freeman Mathews Ltd* [28] in the following terms:

"In none of the many reported cases in the *Quistclose* line of cases … has any consideration been given to the question whether the person intended to benefit from the carrying out of the specific purpose which created the trust had enforceable rights. Thus, the existence of enforceable rights in such persons has not been treated as crucial to the existence of a trust."

Although enforceability was, clearly, not the rationale for the *Quistclose* ruling, it seems that the House of Lords considered the existence of a factual beneficiary (i.e. the creditor who supplied funds for the specific purpose) as sufficient to give validity to the trust.

(c) No enforcement mechanism or factual beneficiary

In several of the so-called anomalous cases, no explanation is given to support the validity of the purpose trust. This is, perhaps, most clearly seen in the case of *Re Dean.* [29] Here, the testator left ***Conv. 446*** funds to his trustees for the upkeep of his eight horses and hounds for a period of 50 years. In upholding the trust, North J. noted that in *Attorney-General v Whorwood* [30] a gift to feed sparrows failed because of non-compliance with the rule against perpetuities. But for that technicality, in his view, the gift would have been allowed. North J. noted [31] that there was no human beneficiary to enforce the trust, but felt this was no obstacle:

"… it is said there is no cestui que trust who can enforce the trust, and, that the Court will not recognise a trust unless it is capable of being enforced by someone. I do not assent to that view."

Citing cases where trusts for the erection of monuments had been upheld "although it would be difficult to say who would be the cestui que trust of the monument", [32] his Lordship concluded [33] that "there is nothing, therefore, in my opinion to make provision for the testator's horses and dogs void." The trust was, therefore, upheld without any need for an enforcement mechanism or a factual beneficiary. Was the decision then based entirely on something else, such as social need? This is certainly the view of some commentators, including Martin Dixon, [34] who explains these cases as "policy driven exceptions validated because ordinary people expect them to be valid." In *Re Dean,* therefore, the court felt it was socially acceptable for testators to leave gifts in their will to look after their favourite pets. Otherwise, presumably, the cost would fall on the testator's family or the public. Perhaps, therefore, the explanation is that a private purpose trust can be upheld if the courts feel there is a social need to do so, notwithstanding the absence of an enforcement mechanism or a factual beneficiary. If that is correct, then clearly the types of acceptable purpose trusts will vary as the needs of society change (or, at least as the court changes its view of social need).

Alternative mechanisms

Given that most private purpose trusts are void for want of a human beneficiary, several alternative approaches have been used to uphold gifts of this nature.

Conv. 447 Although "a valid power cannot be spelt out of an invalid trust", [35] there is no reason why an express power to apply property towards a non-charitable purpose (provided it is limited to the perpetuity period) should not be valid. [36] Of course, if the power is not exercised, there will be a resulting trust for the persons entitled in default of appointment. Another approach has been to apply the mandate or agency principle. In *Conservative and Unionist Central Office v Burrell,* [37] contributions to the treasurer of the Conservative Party were upheld on the ground that they were subject to an authority (or mandate) to use the money in a particular way. If the contributions were not spent, the contributor was entitled to their return unless it was agreed that his donation was irrevocable. If, on the other hand, the treasurer misappropriated the money for other purposes, the

contributor would be entitled to sue for breach of fiduciary obligation based on general principles of agency law. Because the relationship is based on agency, there is no question of any trust arising and, hence, no infringement of the beneficiary rule. An alternative (but related) mechanism is to adopt the law relating to gifts which are made subject to conditions subsequent. Here, the donor confers a beneficial interest in favour of the donee and expressly provides that this interest shall be conditional (or contingent) upon that person carrying out a stated purpose. In *Lloyd v Lloyd,* [38] for example, an annuity was given upon condition that the testator's tomb be kept in repair. The court held that the repair of the tomb, although not a charitable purpose, could be validly imposed as a condition subsequent attached to the annuity. Similarly, in *Re Chardon,* [39] the testator gave a sum of £200 to his trustees upon trust to invest it and to pay the income to a cemetery company "during such period as they shall continue to maintain and keep" two specified graves in the cemetery in good order and condition. The disposition was upheld as a valid contingent gift.

In his article, Brown [40] proposes a similar scheme involving a monetary incentive (for example, an annual fee) payable to the executor/trustee conditional on him applying the trust money towards the fulfilment of the stated purpose. By analogy with *Pettingall v Pettingall,* [41] he argues that the residuary legatees ***Conv. 448** could be given an express right (by deed) to enforce the trust if the trustee refused or failed to perform the terms of the trust. Although such a scheme would, admittedly, provide the trustee with an obvious incentive to comply with the testator's wishes, it is less clear why the residuary legatees would wish to enforce the trust given that, in the event of a default by the trustee, they would become entitled to the trust money under a resulting trust. As McKay points out, [42] a residuary beneficiary will rarely have a sufficient interest in the trust assets to compel performance of the trust--on the contrary, he has everything to gain by the failure or, under Brown's proposed scheme, termination of the trust.

What is needed, it is submitted, is amore robust approach to the reform of private purpose trusts involving a general recognition that such trusts are valid (save in exceptional cases where the purpose is clearly unlawful or contrary to public policy). The answer to reform, therefore, it is submitted, lies in the approach already recognised in several offshore jurisdictions involving the use of an enforcer mechanism which is not limited to any particular category of persons.

The offshore approach

Many offshore jurisdictions have legislated for the validity of purpose trusts. There are now well over a dozen jurisdictions with specific purpose trust legislation, avoiding the conceptual problems under English law detailed above. Liechtenstein enacted purpose trust legislation as long ago as 1926. Lesser-known jurisdictions followed suit: Nauru in 1972 and the Cook Islands in 1984. It was not until the 1990s that more established offshore jurisdictions introduced their own statutes. Purpose trust legislation is now in force in Anguilla, Barbados, Bermuda, BVI, the Cayman Islands, Cook Islands, Cyprus, Isle of Man, Jersey, Liechtenstein, Mauritius, Nauru and the Seychelles. In addition, the Perpetuities Acts of Ontario and British Columbia were amended in 1966 and 1979 respectively, to permit the validity of non-charitable purpose trusts for a maximum period of 21 years. [43] The Bill for the Bahamian purpose trust legislation was originally intended to be part of the 1998 Trustee Act but it was ***Conv. 449** withdrawn when so-called STAR trusts were introduced in the Cayman Islands. A further bill to introduce purpose trusts in 2000 was delayed to allow the introduction of more urgent laws such as anti-money laundering legislation. The Bill was finally introduced in 2004. It deliberately follows the Bermuda purpose trust legislation, not the Cayman Islands' approach.

It will be convenient, for the purpose of this article, to focus on five offshore jurisdictions, namely: Bermuda, the British Virgin Islands (BVI), the Cayman Islands, the Isle of Man, and Jersey. The reason for this choice is two-fold. First, each has only recently introduced purpose trust legislation, which means a deliberate policy decision was made to introduce a change in the law to meet current commercial needs and specific client requirements. The second reason is that these five jurisdictions are extremely well respected offshore service providers. They are at the forefront of money laundering regulations and have updated their exchange of information provisions. None of them are blacklisted by the OECD, FATF or any other supra-national organisation. It is submitted, therefore, that these jurisdictions should serve as appropriate role models for the introduction of new legislation in England.

(a) Definition of purpose trusts

Perhaps the most fundamental question is how to define a non-charitable purpose trust. Most jurisdictions have opted for a negative definition. Thus, art.10(2)(a)(iv) of the Trusts (Jersey) Law 1984 provided (in its original form) that:

"A trust shall be invalid to the extent that it is created for a purpose in relation to which there is not a beneficiary not being a charitable trust."

This provision was amended in 1996 to allow for the validity of non-charitable purpose trusts by the insertion of a new clause:

"A trust shall not be invalid to any extent by reason of Article 10(2)(a)(iv) if the terms of the trust provide for the appointment of an enforcer in relation to its non-charitable purposes…"

This negative definition has been adopted in many of the other jurisdictions, including Bermuda, where the new purpose trust legislation is treated as an "add-on" to existing trust law. This approach, however, has its difficulties because the negative definition presupposes that the particular trust is non-charitable in nature in order to acquire validity under the new rules. There *Conv. 450* is also the danger that, if human beneficiaries are included in the trust (or if they benefit indirectly from the purpose), this brings the trust back into the scope of the non-purpose trust rules. It appears, for example, that a Bermudan purpose trust must not have ascertainable human beneficiaries.[44]

The Cayman Islands, on the other hand, has adopted a more radical approach. The Special Trusts (Alternative Regime) Law of 1997 (STAR) introduced an entirely new trust regime. This applies whenever it is expressly invoked by the trust deed or, in certain cases, where its application can be deemed to apply. It can, therefore, apply to trusts for human beneficiaries, charitable or non-charitable purpose trusts, and trusts for both purposes and beneficiaries. Moreover, the legislation permits an unlimited life span for the trust, as the rule against perpetuities does not apply to STAR trusts.

(b) Enforcer

There are also differences between the methods of enforcement for a purpose trust in the five jurisdictions. In most regimes, the enforcer must be named in the trust instrument or, at least, the instrument must contain the mechanism for appointing an enforcer. Bermuda, however, adopts a different approach. Here, anyone with a sufficient interest may enforce the purposes and, in default, the Attorney General has the power to enforce. There is, therefore, no need to appoint an enforcer in the instrument itself.

(c) Perpetuities

The usual perpetuity period of 80 years in English law does not apply to non-charitable purpose trusts,[45] which can only endure for (human) lives in being plus 21 years. Certain jurisdictions (e.g. Isle of Man) have chosen to subject purpose trusts to their usual trust perpetuity period. Others (e.g. Jersey, BVI, and Cayman) have opted to exempt purpose trusts from the perpetuity rule altogether. This does not necessarily mean, however, that purpose trusts can continue indefinitely. In some jurisdictions, notably the BVI, the legislation[46] gives the option of specifying *Conv. 451* a terminating event or date providing for the disposition of the trust assets. The approach taken in the Isle of Man is, perhaps, more restrictive. Here, the 80-year perpetuity period specifically applies to purpose trusts, but the trust instrument must also specify a "termination event" and what happens to the trust assets on the happening of this event.

(d) Definition of purpose

One fertile area of debate has been whether a purpose trust can have purely "internal" purposes, for example, to hold the shares of a particular company. Some commentators have argued that this does not satisfy the requirements of any purpose trust legislation. If the question is posed: "for what purpose is the trust property held?", it is no answer simply to say: "to hold the trust property". The trust must indicate why, or with what objective, the trust property is being held. This view, however, has not prevented a purpose trust being created in some jurisdictions for the sole purpose of holding shares. For example, Bermuda purpose trusts are apparently frequently used to hold shares in private trust companies.

The BVI has specifically recognised this problem and its solutions was to introduce a new concept of "VISTA" trust. The Virgin Islands Special Trusts Act of 2003 came into force on March 1, 2004, which allows trusts to be set up solely to hold shares in a BVI company (either an international business company or a local company). It also restricts the role of the trustees in the management of the company so that their role is to hold the shares rather than be involved in the business of the company.

(e) Type of trust instrument

Significantly, certain jurisdictions permit the creation of a purpose trust by will. The Isle of Man specifically permits purpose trusts to be created by an *inter vivos* trust deed or by will, provided the latter is admitted to probate. The Cayman Islands' STAR trusts can also be set up by trust deed or will. Moreover, art.7 of the Jersey Trusts Law expressly provides that a trust (which would include a private purpose trust) can be created by will or codicil.

On the other hand, the BVI legislation specifies that the enforcer must be a party to the trust deed creating the purpose trust. In this connection, it is hard to see how an enforcer could be party ***Conv. 452** to someone else's will or how the testator could act as enforcer after his death! It would, presumably, be necessary to create the purpose trust during the settlor's lifetime, but then for his will to contain a gift of assets to that pre-existing purpose trust.

New purpose trust legislation

As intimated earlier, there may be sound reasons of public policy for refusing validity to a purely purpose trust. Clearly, the trust should be invalid if it attempts to pervert justice, breach the law, or is against public morality. These considerations aside, it is the writers' view that there is no clear policy reason why non-charitable purpose trusts should not be recognised under English law. An obvious way forward is the enactment of legislation validating private purpose trusts under English law. The key features of the new law should, it is submitted, comprise the following:

(a) Type of trust instrument

The new legislation should permit the purpose trust to be created by an *inter vivos* trust deed or by will. To avoid any difficulties in the latter case, there should be no requirement that the enforcer must be a party to the trust instrument creating the purpose trust.

(b) Definition of purpose trust

As mentioned earlier, the negative definition adopted in many offshore jurisdictions can cause problems. The STAR and VISTA approach is preferable, giving the settlor/testator the opportunity to choose a specific trust to be subject to the new legislation. The chosen trust vehicle would have to be stated within the trust instrument. This would also force the settlor/testator to consider carefully the type of trust being created.

(c) Perpetuity period

There does not appear to be any reason for a non-charitable purpose trust to be exempted from the rule against perpetuities. The new legislation could, therefore, provide for the usual 80-year perpetuity period to apply to purpose trusts, but with no restriction on the accumulation of income during the trust period.

Conv. 453 (d) Determination events

The idea of a non-charitable purpose trust being required to have a specified determination event appears sensible. The perpetuity period of 80 years is a long stop. The earlier determination should be when the purpose has been fulfilled, or if the enforcer determines that the purpose is no longer possible. This requires that the enforcer be independent of the trustees and default beneficiaries to avoid conflicts of interest.

(e) Purpose

The purpose should not be contrary to public policy, should be certain and not conflict with any existing law. An obligation could be imposed on the enforcer to satisfy himself that the purpose is legitimate--if, for example, the purpose becomes impossible to fulfil, this would be a determination event triggering the default trust provisions.

(f) Default beneficiaries

The trust instrument would have to specify how the trust assets are to be distributed on determination or at the end of the trust period. Having a charitable purpose (or human beneficiaries) as default beneficiaries does not conflict with current English trust law and should, therefore, be permitted in the new purpose trust legislation. However, what about a corporate settlor benefiting

when the purpose trust terminates? This might be vital to ensure assets are returned once the purpose has been completed or has failed, although in some cases it may be appropriate to name a charity as default beneficiary. There appears to be no policy reason preventing companies receiving back assets. Certainly, if a settlor creates a trust which fails and does not name a default beneficiary, a resulting trust arises in the settlor's favour. There is no reason why this should apply solely to human settlors and, indeed, it appears to have already been acknowledged that a company can be a settlor and a beneficiary of a trust.

At the end of the trust period or on determination, it should not be possible to pass the assets into a new trust, unless it is a charitable trust that is exempt from the rule against perpetuities.

(g) Disclosure

Should the default beneficiaries be informed of their interest under the trust, so as to ensure they can enforce their rights? ***Conv. 454*** Some jurisdictions have taken the view that, as long as an enforcer has been appointed, there should be no reason to force disclosure onto the default beneficiaries. However, the default beneficiaries would have the right, under English law, to see trust documentation and accounts even before they were entitled to benefit. It would, therefore, seem sensible to have an obligation to inform all beneficiaries of the existence of the trust and their potential interests. The law in this area is not, however, clear, and it is hard to see why trustees of a purpose trust should have an obligation to inform beneficiaries of their rights, if trustees of non-purpose trusts do not have the same obligation.

An obligation to disclose should not cause any difficulty in practice. If the default beneficiary is the corporate settlor, it will already be aware of the trust. If a charity is to benefit, the choice of charity could be left to the discretion of the trustees. This would prevent a particular named charity knowing confidential information before the determination event.

It has been said that one of the attractions of STAR trusts in the Cayman Islands is the ability of the settlor to prevent disclosure of information to beneficiaries. This could be particularly attractive to individual settlors who wish to provide for young children, without those beneficiaries being aware of the existence of the trust. However, many practitioners have now questioned whether STAR trusts can be used in this way, and there is little to support the view that English purpose trusts should be used to prevent disclosure of information to beneficiaries.

(h) Enforcer

The Bermudian concept of allowing anyone with an interest to act as enforcer is attractive, but this could lead to no one acting as enforcer. An independent person (an individual rather than a company) should, it is submitted, be appointed as the enforcer. The enforcer must not be in a position of conflict and must, therefore, be independent of the trustees and beneficiaries.

Ideally, the enforcer should be appointed in the initial trust instrument. If not, there must be a mechanism in the trust instrument for the enforcer to be appointed, say by the settlor during his lifetime or by the trustees under his will. The enforcer should have a power to appoint a replacement, again with the trustees being required to appoint a new enforcer if there ceases to be an enforcer in place at any time or for any reason. As with most jurisdictions, there should be penalties to ensure that the trustees act to appoint an enforcer.

Conv. 455 The role of the enforcer should be clearly defined as a fiduciary (as opposed to personal) obligation. The court would, therefore, have the power to remove an enforcer in the event of a breach of fiduciary duty, or if the enforcer becomes incapable of fulfilling the role, in the same way as the courts can remove or appoint trustees under the Trustee Act 1925. An application to the courts could, therefore, be made if the enforcer loses capacity, becomes bankrupt, or is sentenced to prison, but it may be more practical for the enforcer to be deemed to retire automatically upon any such event occurring. The trustees would then be required to appoint a new enforcer if there is no replacement enforcer.

(i) Trustees

Many jurisdictions state that only designated trustees can be appointed as trustees for a purpose trust. The main difficulty with this is that in England there is no registration or licensing of trustees. This contrasts sharply with offshore jurisdictions where licensing of trustees is now common place. Instead, the new legislation could follow the Trustee Act 1925 approach--the purpose trust must have as trustee a trust corporation or two trustees (this could be one company and one individual). An unfit individual (e.g. a bankrupt or person of unsound mind) would not be able to act as trustee.

Conclusion

The writers are conscious that it may be some time before purpose trust legislation is enacted in this country. However, a growing number of commentators are now arguing for a change in the law. It is the writers' hope that this debate will continue by way of a formal consultation on this topic by the Law Commission in the not too distant future.

Barrister, Professor of Property Law, Department of Law, University of Greenwich

Solicitor, Partner and Head of the Private Client Department, Howard Kennedy

Footnotes

1 J. Brown, [2007] 71 Conv. 148.
2 *ibid.*, at 150-151.
3 (1804) 9 Ves. 399.
4 *ibid.*, at 404-405.
5 L. McKay, [1973] 37 Conv. 420, at 421.
6 [1949] Ch. 498, 501.
7 [1952] Ch. 534.
8 [1960] Ch. 232
9 *ibid.*, 246.
10 See P. Matthews, "The New Trusts: Obligations Without Rights?" in *Trends in Contemporary Trust Law,* A. J. Oakley, (ed), (Clarendon Press, Oxford, 1996), at p.2.
11 P. Baxendale-Walker, *Purpose Trusts,* (Butterworths, 1999), at p.364, App.2.
12 [1934] Ch. 342.
13 (1842) 11 L. J. Ch. 176.
14 [1952] Ch. 534. See also, *Mitford v Reynolds* (1848) 16 Sim. 105.
15 D. J. Hayton, *Underhill & Hayton Law of Trusts & Trustees,* 16th edn, (Butterworths, 2003), at pp.73-74.
16 (1838) 5 Cl. & Fin. 129.
17 P. Matthews, "From Obligation to Property and Back Again? The Future of the Non-Charitable Purpose Trust" in *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds,* D. J. Hayton, (ed), (Kluwer Law International).
18 *ibid.*, at p.213.
19 *Bowman v Secular Society Ltd* [1917] A.C. 406, 441, *per* Lord Parker.
20 P. Baxendale-Walker, *Purpose Trusts,* (Butterworths, 1999), at p.9.
21 [1959] A.C. 457.
22 [1969] 1 Ch. 373.
23 *Re Lipinski's Will Trusts* [1976] Ch. 235.
24 *Re Wright's Will Trusts,* unreported, July 21, 1982.
25 [1896] 1 Ch. 507.
26 *ibid.*, at 511.
27 [1970] A.C. 567.
28 [1985] Ch. 207.
29 (1889) 41 Ch. D. 552.
30 Ves. Sen. 534
31 (1889) 41 Ch. D. 552, at 556.
32 *ibid.*, at 557.
33 *ibid.*, at 560.
34 The writers are very grateful to Martin Dixon for his views in an exchange of emails.
35 *IRC v Broadway Cottages Trust* [1955] 1 Ch. 20, 36, *per* Jenkins L.J.
36 *Re Douglas* (1887) 35 Ch. 472.

37 [1982] 1 W.L.R. 522.
38 (1852) 2 Sim. N.S. 255.
39 [1928] Ch. 464.
40 *ibid.*, at 159-160.
41 (1842) 11 L.J. Ch. 176.
42 [1973] 37 Conv. 420, at 431.
43 See also the Law Reform Commission of British Columbia Report of November 1992 advocating further reform to permit non-charitable purpose trusts to have a longer duration, (LRC 128, available online at *http://www.bcli.org* [Accessed August 23, 2007]).
44 See, Appleby, Spurling and Kemp, *Guide to Trusts in Bermuda,* at p.8, a copy of which can be obtained online at *http://www.applebyglobal.com* [Accessed August 24, 2007].
45 See s.15(4) of the Perpetuities and Accumulations Act 1964. The "wait and see" provisions also do not apply.
46 See s.12(16) of the Trustee (Amendment) Act 2003.

