Purpose trusts: the Nevis perspective

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The authors survey the legal nature and development of a non-charitable purpose trust, the laws of Nevis on the subject and the commercial application of purpose trusts. For a complimentary download of this article please visit www.JanAlexDash.com

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"Charity can be described as the use of private wealth for public benefit."

It is well recognised in all trust jurisdictions that for a beneficiary trust to be valid, three conditions, known as, "the three certainties" must exist: certainty of intention; certainty of subject matter; and certainty of objects.

The first certainty requires the words which are used in the trust deed to exhibit a clear intention to establish a trust. The second certainty necessitates that the property or subject matter of the trust be unambiguously identified. Finally, the third certainty requires that objects or persons who hold a beneficial interest in the trust property must be capable of being ascertained.

In light of the latter requirement it would seem that trusts which seek to achieve goals, rather than benefit individuals would violate the trust concept. However, there are trusts which do not hold assets for the benefit of beneficiaries, but have purposes for which assets are to be applied. These are known as purpose trusts.

While the intention to hold property can be easily proven in a purpose trust, under the common law there were no persons who were named in the trust deed who could bring an action to enforce the obligations of the trustee. A trust creates a duty on the part of the trustee, and any duty is meaningless unless there is someone who can enforce it. A goal or aim is not corporeal and cannot appear before the court, only a person or entity has the standing necessary to bring an action. "[T]here must be somebody in whose favour the court can decree performance".[1] It might at first sight appear that the settlor should have the ability to bring an action against the trustee to enforce its terms; however, once the trust has been settled, the settlor has no further interest in the assets. No duty is owed to the settlor by the trustee, and any obligation on the part of the trustee is now owed to the beneficiary or purpose only.

If there is no one who can force the trustee to comply with the settlor's wishes, a "resulting trust" is created and the property reverts to the settlor. "If there can be a clear trust, but for uncertain objects, the property... is undisposed of and the benefit of such trust must result to... the former owner".[2] This is the type of situation which one seeks to avoid when establishing a tr as it can have negative tax, estate planni and liability implications.

To avoid the need for a beneficiary, o approach is to consider a purpose trust a power, rather than as a trust. Although t view is followed in Ontario and Briti Columbia, it can prove quite problemati "The basic distinction between a trust an power is that a trust is imperative, whereas power is discretionary".[4] A trust requires t trustee to administer the assets in t manner dictated by the trust, whereas power enables the holder to act in t manner expressed, but does not require t holder to act. Since the grantor of a pow can never be absolutely certain that t trustee will honour his request, the settlor testator's estate planning can easily be ma ineffective. This is the view held by t English courts in their decisions. In ***Asto Settlement and Broadway Cottages***, t approach of viewing a purpose trust as power was rejected.[5]

Despite the requirement of a beneficia under the common law, purpose tru traditionally have been allowed if t purpose which the trust seeks to fulfill charitable. "A gift ... cannot be made tc purpose ..., [f]or a purpose cannot sue, b if it be charitable, the Attorney General c sue to enforce it".[6] Since a charital purpose trust seeks to assist the gene public, the Attorney General or princi law enforcement agency of the governme stands in place of the beneficiaries and c implement the trust on behalf of t community at large.

Charity can be described as the use private wealth for public benefit. Howev the mere use of property for the benefit the public is not enough to qualify t activity as charitable in the eyes of the l In order to qualify as a valid charital trust, the purposes must fall within one four recognised "heads" of charity. defined by the ***Pemsel*** case: "[c]harity in legal sense comprises four princi divisions; ... the relief of poverty, ... t advancement of education, t advancement of religion, ... and ... otl purposes beneficial to the community ... The fourth head of charity is guided by t preamble to the Statute of Elizabeth, 16

which provides that charities may be established for the following reasons;

> "the relief of aged, impotent and poor people; and
>
> the maintenance of sick and maimed soldiers and sailors; and
>
> the maintenance of schools of learning, free schools and scholars and scholars in universities; and
>
> the repair of bridges, ports, churches and highways; and
>
> the education of orphans; and
>
> the support of young tradesmen, handicapped men and persons decayed; and
>
> the relief or redemption of prisoners and captives."

The requirement of the charitable purposes delineated by ***Pemsel*** was strictly applied by the English courts. Mixed purpose trusts were not allowed. If by the express terms of the deed, any portion of the assets were to be used in the furtherance of a non-charitable goal, the trust would fail. However, the trustee would not commit a breach of trust if a non-charitable purpose was purely ancillary to the main charitable purpose. In ***London Hospital Medical College***, it was held that the college's student union's charitable status, in the advancement of education was not voided by the fact that the union also provided a personal benefit to individual students who used its facilities.[8]

It would seem that purpose trusts could only be established to fulfill certain defined charitable objectives; however, the English courts have upheld many cases in which trusts have been established for non-charitable purposes. These are anomalies; and although the goals of non-charitable purpose trusts did not fall within the definition of "charity", the courts did want to fulfill the settlor's wishes, and created loopholes which allowed these trusts to be interpreted as beneficiary trusts. "Where ... a trust is set up for a private purpose, it may be held void unless it can be interpreted as a gift for persons who can be treated as beneficiaries".[9] The courts allowed a purpose trust to be valid, although it does not benefit a charitable aim, if an identifiable class of persons can benefit indirectly therefrom.

The case which established the principle of indirect benefit was ***Re Denley's Trust Deed***. In this case, the trustee was required to maintain a plot of land, "... for the purpose of a recreation or sports ground primarily for the benefit of the employees of the company, and secondarily for the benefit of such other ... persons ... as the trustees may allow".[10] In upholding the trust as valid, the court reasoned that the beneficiary principle applies since the employees, albeit a changing body of persons, were beneficiaries with the locus standi to enforce the trust. "Where, then, the trust, though expressed as a purpose, is directly or indirectly for the benefit of an individual ... it seems to me that it is in general outside of the mischief of the beneficiary principle".[11]

In addition to the requirement of a benefit to an individual, there are three other requirements which must all be fulfilled before the English courts created loopholes to allow non-charitable purpose trusts. The purpose of the trust must be described with certainty, it must not be contrary to public policy and it must not violate the rule against perpetuities.

Any trust will fail if the objects are not described with exact precision. "[T]he trust must not be too vague for the court to enforce,... unless the trust can be defined the court cannot enforce it".[12] This requirement of certainty ensures enforcement as it allows the court to determine whether the trustee acted appropriately in administering the corpus. In ***Re Endacott***, the testator's gift to the local government was, "... for the purpose of providing some useful memorial to myself". The court held that the trust was void because the purpose was, "... far too wide and uncertain ...".[13]

A trust will also be declared invalid, if its purpose is capricious, useless, wasteful, harmful, illegal and otherwise contrary to public policy. In ***Brown v Burdett***, the executors were directed to brick up the doors and windows of the testatrix's house for a period of 20 years, so that it would remain exactly the way it was at the time of her death.[14] The request was declared to be void as it was eccentric and would serve no useful purpose and would seek only to satisfy the whim of the testatrix.

Trusts and other dispositions of property are subject to rules which prevent excessive restraints on their transfer. It is a general principle of trust law that an owner's right to convey their property must not violate the Rule Against Perpetuities. The rule is described as follows: "... no interest in property is good unless it must vest, if at all, not later than 21 years ... after some life ... in being at time of creation of interest".[15] The English courts will uphold a trust although it has a non-charitable purpose, for the maximum common law period of 21 years. In ***Re Hooper***, a testator bequeathed

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assets to trustees to maintain certain family graves and a tablet in the church window, for "... so long as they can legally do so".[16] The court upheld the trust for 21 years.

In recent years, there have been amendments to the law, primarily in offshore jurisdictions which are either current or former British colonies, to allow for the establishment of non-charitable purpose trusts. Such laws have been promulgated in many Territories, including Bermuda, the British Virgin Islands and Nevis.[17] These have recognised that non-charitable purpose trusts may have significant estate planning and commercial advantages because of the fact that a trust has no beneficial owners, since it has been established for a purpose instead of specified beneficiaries.

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The Caribbean Island of Nevis is part of the Federation of St. Kitts and Nevis. In addition to its tourism industry, the offshore financial services sector comprises a growing portion of its economy. In Nevis, both charitable purpose trusts and non-charitable purpose trusts may be established under the Nevis International Exempt Trust Ordinance, 1994 (As Amended) ("the ordinance").

The ordinance provides that at least one of the trustees must be either;

> "a corporation incorporated under the Nevis Business Corporation Ordinance; or a trust company licensed to do business in Nevis".[18]

The ordinance allows a purpose trust to have multiple trustees, no more than four for a non-charitable purpose trust and an unlimited number for a charitable purpose trust.

> "Except in the case of a trust established for a charitable purpose, the number of trustees shall not be more than four ...".[19]

"Although multiple trustees are allowed, there should only be one trustee for the ease of administration."

Although multiple trustees are allowed, there should only be one trustee for the ease of administration. If the settlor insists on having multiple trustees, one trustee should be the managing trustee and should have the power to veto the decisions of the others. The non-consenting trustees should be relieved of liability if the managing trustee's decision results in a breach of trust.

*"The ordinance eliminates the legal fiction created by **Denley** by providing for a protector."*

The ordinance codifies the requirement that a non-charitable purpose trust must not violate public policy. The law provides that such a trust must be created for an aim which is:

> "specific, reasonable and capable of fulfillment", but, "... is not immoral [or] unlawful ...".[20]

A charitable trust may be establishe assist the following purposes: the relie poverty, education, religion, environment, human rights, fundam freedoms and any other purposes whicl beneficial to the community.[21]

Under the common law, if the chari purpose could not be fulfilled becaus impossibility or impracticality, the c allowed the assets to be utilised for a sir charity. This doctrine which is know "cy-prés" is codified in the ordinanc applies to charitable purpose trusts and requires the trustee to apply to the c to vary the trust deed.

"Where ... trust property is held f charitable purpose, the court, on applica of the trustee, may approve arrangement which varies or revokes purposes ... or modifies the power management or administration of trustee ..."[22]

The ordinance eliminates the legal fic created by ***Denley*** by providing fc protector.

> "An international trust may be cre for a purpose which is non-chari provided that the terms ... provid the appointment of a protector wl capable of enforcing the trust an the appointment of a successor ...

This position which is known as an enfc in other Territories is a party to the deed and enforces the obligations of trustee.[24] With regard to who may appointed as protector, the Statute pro the following suggestions:

> "The protector ... may also be a se [or] a trustee ... of the trust".[25]

Although it is allowed by the ordinance, not a wise choice to appoint the settlc the trustee as protector. Neither should position be filled by a friend or fa member of the settlor. The trustee sh not act as the protector, because it woul a conflict of interest. Ideally, this should be filled by either a neutral p preferably a resident offshore professic either a person or an entity with knowl or expertise of Nevis' law.

A professional protector would be r appropriate since under the ordinance, position may involve fiduc responsibilities.

> "Subject to the terms of international trust, in the exercis his office, a protector shall ov fiduciary duty to the beneficiarie to the purpose for which the tru created"[26]

Unless it is expressly disclaimed by the trust, the protector may be subject to civil liability either because of a failure to act or because of alleged improper action. Although such an action may be unlikely to occur without beneficiaries, a professional protector may be better able to determine if an action or inaction would be subject to a lawsuit.

The ordinance suggests that the protector of a purpose trust can be granted the following powers:

> "(unless the terms of the trust shall otherwise provide) the power to remove a trustee and appoint a new or additional trustee;
>
> such further powers as are conferred on the protector by the terms of the trust ..."[27]

In addition to the powers suggested by the ordinance, the protector should have additional powers. The first two powers concern the right to approve the trustee's exercise of its power. The trustee's application to the protector to utilise some of its powers is sometimes referred to as "necessary sanction". The powers for which the trustee and the protector should both consent, should be limited to the following:

1. The power to approve or disapprove amendments to the trust deed; and
2. The power to approve or disapprove a trustee request for increase in fees.

The powers which the protector should have the sole authority to execute should be as follows:

3. The power to appoint his successor;
4. The power to remove and appoint the trustee. To effectuate this power, the protector should also have the following powers:
5. The power to change the governing law of the trust;
6. The power to change the forum of administration; and
7. The power to cancel a "flee clause".

Only a non-charitable purpose trust may be amended without the approval of the court, if such an action is allowed by the trust deed. The amendment of a charitable purpose trust requires the approval of the court. Any amendment to a non-charitable purpose trust would constitute a major change to a trust's function and aims; accordingly it should require the protector's necessary sanction.

Over the life of a trust, the costs of administration will increase and the trustee will need to raise the fees to ensure that the goal of the trust can be fulfilled. Although the trustee has a fiduciary responsibility to the trust's purpose, and is prevented from using trust assets for its own benefits, the protector's necessary sanction should be required to ensure that any fee increase is not exorbitant and is in keeping with market conditions of the industry.

The ordinance provides that there must be a mechanism for appointing a successor to the protector, but it does not suggest who should have this duty. It is the protector's function to ensure that the trustee's obligations to the trust's purpose are fulfilled. If the protector resigns, the trustee should have no input with regard to who should be appointed as successor to avoid a conflict of interest, and the concentration of power.

"In addition to the powers suggested by the ordinance, the protector should have additional powers."

The power to remove and appoint the trustee is the protector's ultimate power and should be used to ensure that the trustee fulfills its duties. The protector should have the power to fire the trustee, with or without cause, but should be prohibited from appointing himself on a full-time basis, to avoid a conflict of interest, or a mere appearance of one.

If a trustee is terminated, the trust may have to leave Nevis to find a new trustee. The protector alone should have the power to change the governing law and forum of administration. Since the trustee is being dispossessed of its powers, it may not be willing or able to relinquish control of the trust, therefore it may have to be forced to do so.

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In the case of sudden outbreak of violence in Nevis or if new legislation is enacted, the protector should have the power to cancel a "flee clause". Although such occurrences are unlikely due to Nevis' stable democracy and vibrant economy, such a power in the hands of the protector could comfort the settlor. In such a situation, it still may be desirable to have the trust remain in the jurisdiction, either because the outbreak of violence is temporary or because the new legislation will be repealed. The determination whether the trust should remain in the territory should be placed in the hands of the protector instead of the trustee. This would avoid the possibility or mere appearance that the trustee is placing its own economic interests ahead of the fiduciary interests of the beneficiaries.

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Under the standard expressed in ***Pemsel***, if a trust which was created with multiple purposes, a legitimate one and one which was invalid, the entire trust would be void.[28]

The ordinance did not follow that criterion and allows the separation of purposes.

> "Where an international trust is created for two or more purposes of which some are lawful and others are not where some of the terms of the trust and others are not, if the purposes...or the terms can be separated, the Court may declare that the trust is valid ...".[29]

The common law requirement that a trust must not violate the Rule Against Perpetuities is inapplicable to purpose trusts established under this ordinance, and therefore they may last in perpetuity.

> "An international trust established for a charitable or non-charitable purpose ... may have a duration exceeding one hundred years".[30]

"If a purpose trust is forced to end, and there are any assets remaining at that time, it could prove problematic."

Although it is likely that in a century, the corpus would have been depleted, the ordinance does not force the draftsperson of a deed to select a date or event which will determine the trust's ending. For example, legislation in the British Virgin Islands requires that a purpose trust have a maximum duration of 100 years or the deed must select a terminating event.[31] British Virgin Islands purpose trusts are required to name a person in the deed, known as an "ultimate beneficiary", who will receive any remaining assets at the trust's ending.

"The person who financed the trust does not sign the deed and the individual's identity is known only to the trustee. This person is referred to as the 'Source of Funds'."

If a purpose trust is forced to end, and there are any assets remaining at that time, it could prove problematic. If the corpus goes to an ultimate beneficiary, tax liabilities and reporting requirements may exist during the life and at the end of the trust. With no requirement of termination and the absence of the Rule Against Perpetuities, under the Nevis' ordinance, if the purpose is fulfilled, the assets could be decanted into a new purpose trust. If it would not be cost-efficient to begin a new trust, the assets could go to a beneficiary as long as the trustee believes that doing so would fulfill the trust's purpose. This person does not have to be named in the deed and as such would not have any responsibilities during the term of the trust.

"... non-charitable purpose trust can be utilised to hold shares of voting stock in a company so that no one shareholder controls the entity."

Purpose trust legislation is useful in the fields of estate planning and commercial transactions, since the assets of a purpose trust have no beneficial owners. Beneficial ownership is not vested in the trustees since the trust is not for their benefit, and there is no one else who is beneficially entitled to the property. A purpose trust can be "declared" if the trustee states in the deed that the assets are being held in furtherance of a particular purpose. The person who financed the trust does not sign the deed the individual's identity is known only t trustee. This person is referred to as "Source of Funds". Since there are beneficiaries and there may be no settlor structure is a "non-owned vehicle", w may be useful for many reasons. They c be used for quasi-charitable purposes separate voting control from the econc benefits of a company, owning the shar a private trust company, securitisa transactions and off balance s transactions.

If someone desires to effect a philanthr purpose which does not fall within the heads of charity, the non-charitable pur trust would be the appropriate structur non-charitable purpose trust can be util to hold shares of voting stock in a com so that no one shareholder controls entity. The power behind the company be controlled by the trust, and the econc benefits will flow to the non-vo shareholders.

One concern of someone who establishe offshore trust is the lack of control ove management, investment and distributio the assets. The legal ownership of the tru held by a trustee with whom the settl most likely unfamiliar. Although the se may desire to make suggestions with re to the administration, it is the trustee has full and complete discretion over trust assets, subject to any limits mand by the law and imposed upon them by deed. Many settlors are reluctant establish an offshore trust based on t parameters.

A solution which may allay the sett fears is the incorporation of a private t company which is owned by a r charitable purpose trust. A company ma incorporated in Nevis to act as the truste a trust. The settlor could act as the dire of this company, settle a trust with private trust company as trustee administer that same trust as well. strategy would allow the settlor to main control over his assets and perhaps purs more aggressive investment strategy tha professional trustee may be willing to ag

A non-charitable purpose trust may be u to hold orphan companies in off bal sheet transactions. In such transactions, structure can be used to provide security the lender or to keep the asset and liab from appearing on the purchaser's bal sheet. For example, a purchaser wishe buy an asset from a seller. To accomplish purchase, the purchaser settles a pur trust which incorporates an underl company. To finance the purchase,

underlying company borrows funds from a lender and gives the lender a pledge of its shares as security. The underlying company leases the asset to the purchaser and utilises any rental income received there from to discharge its debt to the lender. When the debt is repaid, the lender releases its security and any surplus assets could either go to the purchaser or be held in the trust until used up.

A purpose trust established under the laws of Nevis can be a valuable tool in the fields of estate administration, tax planning and commercial transactions. It is a vehicle which ensures that its assets have no beneficial ownership and can achieve a level of anonymity by removing beneficial ownership and insulating the source of funds. However it should have a specific defined purpose and should periodically distribute funds to fulfill that goal. Periodic distributions would prevent any allegation that the settlor or source of funds had no donative intent and that the trust is one which was not established for genuine reasons, but is a "sham". This would allow a purpose trust established under the laws of Nevis to enjoy international recognition.

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Endnotes:

1. ***Morice v Bishop of Durham,*** (1804) 9 Ves. Jun. 399.
2. ***Morice v Bishop of Durham,*** (1804) 9 Ves. Jun. 399.
3. The Perpetuities Act (1966) of Ontario, Section 16; Perpetuity Act of British Columbia 1976, Section 21.
4. *Caribbean Law of Trusts*, Gilbert Kodilinye, 1996, p.15.
5. ***Re Astor's Settlement Trusts*** [1952] 1 All E. R. 1067; ***Inland Revenue Commissioners v Broadway Cottage Trust*** [1954] 3 All E. R. 120.
6. ***Leahy v Attorney-General for New South Wales,*** (1959) 2 All E. R. 307.
7. ***Commissioners for Special Purposes of the Income Tax v Pemsel,*** (1891) A. C. 531.
8. ***London Hospital Medical College v Inland Revenue Commissioner*** [1976] 2 All E.R. 113.
9. *Caribbean Law of Trusts*, Gilbert Kodilinye, 1996, p.161.
10. ***Re Denley's Trust Deed*** [1968] 3 All E. R. 65.
11. ***Re Denley's Trust Deed*** [1968] 3 All E. R. 65.
12. ***Re Park*** [1932] 1 Ch. 580.
13. ***Re Endacott*** [1959] 3 All E. R. 562.
14. ***Brown v Burdett*** [1882] 1 Ch. 38.
15. *Black's Law Dictionary*, Sixth Edition, 1990, p. 1331.
16. ***Re Hooper*** [1932] 1 Ch. 38.
17. The Trusts (Special Provisions) Act 1989; British Virgin Islands Trustee Ordinance, 1961 (As Amended); Nevis International Exempt Trust Ordinance, 1994 (As Amended, 2000).
18. Nevis International Exempt Trust Ordinance, 1994 (As Amended, 2000), Section 2.
19. Nevis International Exempt Trust Ordinance, 1994 (As Amended, 2000), Section 34 (4) (a).
20. Nevis International Exempt Trust Ordinance, 1994 (As Amended, 2000), Section 8 (1) (a) and (b).
21. Nevis International Exempt Trust Ordinance, 1994 (As Amended, 2000) Section 7 (1).
22. Nevis International Exempt Trust Ordinance, 1994 (As Amended, 2000) Section 11 (2).
23. Nevis International Exempt Trust Ordinance, 1994 (As Amended, 2000) Section 8 (1) (c.)
24. Trusts (Jersey) Law 1984 (As Amended, 1996) Article 10B; The Trusts (Special Provisions) Amendment Act 1998
25. Nevis International Exempt Trust Ordinance, 1994 (As Amended, 2000) Section 9 (3).
26. Nevis International Exempt Trust Ordinance, 1994 (As Amended, 2000) Section 9 (5).
27. Nevis International Exempt Trust Ordinance, 1994 (As Amended, 2000) Section 9 (2).
28. ***Commissioners for Special Purposes of the Income Tax v Pemsel,*** (1891) A. C. 531
29. Nevis International Exempt Trust Ordinance, 1994 (As Amended, 2000) Section 23 (2) (b).
30. Nevis International Exempt Trust Ordinance, 1994 (As Amended, 2000) Section 5 (2).
31. British Virgin Islands Trustee Ordinance (1961) (As Amended), Section 84 (2)(f)