Trusts Other Than Trusts: Purpose Trust Legislation in Bermuda, the British Virgin Islands and Nevis

Jan Alex Dash, Herman Liburd, and Kensley McDowall take a comparative look at the statutory purpose trusts regimes available in three of the Caribbean jurisdictions

BACKGROUND

In the traditional trust relationship, a settlor transfers property to a trustee who administers the corpus for the benefit of specified persons, known as beneficiaries. The trustee is the legal owner and custodian of the assets, while the beneficiaries are the equitable owners and are entitled to use of the property. This type of trust is known as a beneficiary trust.

For a beneficiary trust to be valid, three conditions, known as, "the three certainties" must exist;

certainty of intention; and
certainty of subject-matter; and
certainty of objects.[1]

The first certainty requires the language of the trust deed must exhibit a clear intention to establish a trust. The second certainty necessitates that the property held in the trust be unambiguously identified. Finally, the third certainty requires that the beneficiaries must be capable of being ascertained.

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

PURPOSE TRUSTS AT COMMON LAW

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. "[T]*here must be somebody in whose favour the Court can decree performance*".[2] Once a trust has been settled, the settlor has no further interest in the assets, 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"*.[3] This is the type of situation which one seeks to avoid when establishing a trust as it can have negative tax, estate planning and liability implications.

Despite the requirement of a beneficiary, under the common law, purpose trusts have traditionally been allowed if the purpose which the trust seeks to fulfill is charitable. *"A gift... cannot be made to a purpose...*, [f]*or a purpose cannot sue, but, if it be charitable, the Attorney General can sue to enforce it"*.[4] Since a charitable purpose trust seeks to assist the general public, the principal law enforcement agency of the government stands in place of the beneficiaries and can implement the trust on behalf of the community at large.

Charity can be described as the use of private wealth for public benefit. However, the mere use of property to assist the community is not enough to render the activity as charitable in the eyes of the law. In order to qualify as a legitimate charitable trust, the purposes must fall within the one of four recognized "heads of charity". As defined by the *Pemsel* case: "[c]*harity in its legal sense comprises four principal divisions;... the relief of poverty,... the advancement of education, the advancement of religion,... and... other purposes beneficial to the community...*".[5] The fourth head of charity is guided by the preamble to the Statute of Elizabeth, 1601, which provides that charities may be established for a variety of the following aims. These reasons include; the relief of the aged, the maintenance of schools, the repair of bridges, the education of orphans, the support of tradesmen and the redemption of prisoners.[6];

- "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."

It would seem that purpose trusts could only be established to fulfill certain defined charitable objectives; however, the English Courts have upheld many trusts which have been established for non-charitable purposes.

> "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".[7]

The Courts allowed a purpose trust to be valid, although it did not benefit a charitable aim, if an identifiable class of persons can benefit indirectly therefrom.

> "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".[8]

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 would create 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 can fail if the objects are not described with precision. "[T]*he trust must not be too vague for the court to enforce...*".[9] 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...".[10]

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1 Lord Langdale MR in *Knight v Knight* (1840) Beav. 148 at 172
2 *Morice v. Bishop of Durham*, (1804) 9 Ves. Jun. 399.
3 *Morice v. Bishop of Durham*, (1804) 9 Ves. Jun. 399.
6 *The Charitable Uses Act (Statute of Elizabeth I) 1601* (U.K.)
7 Caribbean Law of Trusts, Gilbert Kodilinye, 1996, p.161.
8 *Re Denley's Trust Deed* [1968] 3 All E. R. 65.

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*[11], the executors were directed to brick up the doors and windows of the testatrix's house for a period of twenty years, so that it would remain exactly the way that it was at the time of her death. The request was declared to be void as it was eccentric and would serve no useful purpose except to satisfy the whim of the testatrix.

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*".[12] 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*[13], a testator bequeathed assets to trustees to maintain certain family graves and a tablet in the church window, for "*...so long as they can legally do so*". The Court upheld the trust for 21 years.

STATUTORY PROVISION FOR PURPOSE TRUSTS

In recent years, there have been amendments to the law, primarily in offshore jurisdictions to allow for the establishment of non-charitable purpose trusts. Such laws have been promulgated in many jurisdictions, including Bermuda, the British Virgin Islands and Nevis, which are either current or former British colonies.[14] These jurisdictions have recognized that non-charitable purpose trusts may have significant estate planning and commercial advantages.

BERMUDA

Since 1609, there has been a continuous British presence in Bermuda, a chain of islands approximately 600 miles east of, and along the same latitude as Charlest South Carolinathe on the Atlantic coast of the United States. The Territory has moved away from its tourism origins and now international business and financial services comprise the majority of its economy. Purpose trusts may be created by the *Trusts (Special Provisions) Act 1989 ("TSP Act 1989")* as amended by the *Trusts (Special Provisions) Amendment Act 1998 ("TSP Amendment 1998")*. This article refers to the legislation now in force as "the Bermuda Act".

THE BRITISH VIRGIN ISLANDS

The British Virgin Islands is a British Caribbean Territory comprised of 46 islands, many of which are uninhabited. The principal inhabited islands are Tortola, Virgin Gorda and Jost van Dyke. Yacht based tourism and financial services are the foundations of the economy. *s.84 British Virgin Islands Trustee Ordinance 1961* (as amended) ("the British Virgin Islands Ordinance") allows the establishment of purpose trusts.

NEVIS

The Caribbean Island of Nevis is part of the Federation of St. Kitts-Nevis, which gained its independence from Britain in 1983. In addition to its tourism industry, the offshore financial services sector comprises a growing segment 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 Nevis Ordinance").

WHO MAY BE TRUSTEE

With regard to who may be appointed as trustee, the *TSP Act 1989* had required that at least one trustee of a purpose trust must be a "designated person". This position which was defined as an attorney, an accountant or a Bermuda licensed Trust Company. The "designated person" requirement was removed by the *TSP Amendment 1998*, so that the trustee does not need to have any special qualifications and only one trustee is required.

On the other hand, The British Virgin Islands Ordinance states that at least one trustee of a purpose trust must be a "designated person". The law defines this designated person as follows;

> "a barrister or solicitor practicing in the territory, or
> an accountant practicing in the Territory who qualifies as an 'auditor' for purposes of the Banks and Trust Companies Act, 1990, or
> a licensee under the Banks and Trust Companies Act, 1990, or
> such other person as the Minister of Finance may by order designate."[15]

The Nevis 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".[16]

Although under the laws of all three jurisdictions, multiple trustees are allowed, for the ease of administration, there should only be one trustee. If the settlor insists on having multiple trustees, one Trustee should be the managing trustee and should have veto power over 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.

PURPOSE AND PUBLIC POLICY

All three statutes codify the common law requirement that a non-charitable purpose trust must not violate public policy. The Bermuda Act states that such a trust must be;

> "lawful, and not contrary to public policy."[17]

The British Virgin Islands Ordinance requires that;

> "the purpose is not immoral, contrary to public policy or unlawful".[18]

The Nevis Ordinance provides that a purpose trust must be created for an aim which is;

> "specific, reasonable and capable of fulfillment", but, "...is not immoral [or] unlawful...".[19]

CY-PRES

Under the common law, if the charitable purpose could not be fulfilled because of impossibility or impracticality, the Courts allowed the assets to be utilized for a similar charity. This doctrine which is known as "*cy-pres*" is not addressed by the British Virgin Islands statutes and would be covered by the common law, but is codified in the Bermuda Act and the Nevis Ordinance.

The Bermuda Act allows the doctrine to apply to both charitable and non-charitable purpose trusts. The law enables the Court, upon application of a stated variety of individuals, to vary a trust's purpose.

> "On... application... by... any person appointed by... the trust, or the settlor... or a trustee of the trust, the court may if it thinks fit approve a scheme to vary any of the purposes of the trust..."[20]

Under the law in Nevis however, *cy-pres* applies to charitable purpose trusts only, and allows the trustee to apply to the Court to vary the trust deed.

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11 (1882) 21 Ch D 667

12 Black's Law Dictionary, Sixth Edition, 1990, p. 1331.

13 [1932] 1 Ch. 38.

14 *The Trusts (Special Provisions) Act 1989* (As Amended, 1998); *British Virgin Islands Trustee Ordinance, 1961* (As Amended); *Nevis International Exempt*

16 *s.2 Nevis International Exempt Trust Ordinance, 1994* (As Amended)

17 *s.12A (2) (b) and (c) The Trusts (Special Provisions) Act 1989* (as amended, 1998)

18 *s.84 (2) (b) British Virgin Island Trustee Ordinance* 1961 (as amended)

19 *s.8 (1) (a) and (b) Nevis International Exempt Trust Ordinance, 1994* (as amended)

"Where... trust property is held for a charitable purpose, the Court, on application of the trustee, may approve any arrangement which varies or revokes the purposes... or modifies the powers of management or administration of the trustee...".[21]

ENFORCEMENT

The statutes of all three jurisdictions eliminate the legal fiction created by Denley by providing for someone who ensures that the trustee fulfills its duties.

Prior to 1998, the legislation in Bermuda required a purpose trust to appoint an enforcer, who ensured that the trustee fulfilled its duty. This office was made optional by the *TSP Amendment, 1998*. The Bermuda Act now allows the Court to make an order for enforcement of a purpose trust upon the application of any of the following persons:

"any person appointed by... the trust
for this purpose, [or]
the settlor, [or]
a trustee of the trust, [or]
any other person whom the court considers has a sufficient interest in the enforcement of the trust...[or]
... the Attorney-General [if he] satisfies the court that there is no such person who is able and willing to make an application".[22]

The British Virgin Islands Ordinance states the deed of a purpose trust must;

"... appoint a person... to enforce the trust and provides for the appointment of a successor...".[23]

The person who acts as enforcer must either sign to the trust deed or,

"...consent in writing...".[24]

in a letter addressed to the Trustee.

The Nevis Ordinance provides;

"An international trust may be created for a purpose which is non-charitable provided that the terms... provide for the appointment of a protector who is capable of enforcing the trust and for the appointment of a successor...".[25]

Although it is allowed by the laws of all three jurisdictions, it is not a wise choice to appoint the settlor, or the trustee, as the protector. Neither should this position be filled by a friend or family member of the settlor. The trustee should not act as the protector, because it would be a conflict of interest. Ideally, this role should be filled by either a neutral party, preferably a resident offshore professional, or a person or an entity with knowledge or expertise of the law of the jurisdiction.

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.[26]

The Bermuda Act does not directly address the issue of separation of purposes, however the Court does have the power to enforce a purpose trust under *s.12B(1)* or to vary its purpose under *s.12B(2)*. If the person who is allowed to bring an action under those sections does so, the Court could use its powers to ensure that the trust fulfills its purpose.

The British Virgin Islands Ordinance is silent on the issue of separation of purposes and the common law standard expressed in *Pemsel* applies. The Nevis 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 are lawful and others are not, if the purposes...or the terms can be separated, the Court may declare that the trust is valid...".[27]

PERPETUITY

The Bermuda Act allows purpose trusts to continue in perpetuity; however assets must be vested in the trustee within either, the common law perpetuity period of lives in being plus 21 years or within the statutory period of 100 years.

"...the rule against perpetual trusts... shall not apply to a purpose trust"
"The rule against perpetuities (also known as the rule against remoteness of vesting)... shall apply to a purpose trust".[28]

Purpose trusts in the British Virgin Islands cannot last in perpetuity as the Ordinance requires that the deed must select a terminating event. An ultimate beneficiary, a person, a charity or charitable purpose who will receive the remaining assets at the trust's end, must also be named in the deed.

"...the trust instrument specifies the event upon the happening of which the trust terminates and provides for the disposition of surplus assets...".[29]

The common law requirement that a trust must not violate the rule against perpetuities is inapplicable to purpose trusts established under the Nevis Ordinance, and therefore they may last perpetually.

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

Although it is likely that in one hundred years, the corpus would have been depleted, the Nevis Ordinance does not force the draftsperson of a deed to select a date or event which will determine the trust's ending. The British Virgin Islands Ordinance is the most restrictive of the three laws since it requires the selection of a "terminating event". However, the draftee could select an event which is unlikely to occur to allow the trust to last in perpetuity.

British Virgin Islands Trusts could be problematic since they are required to have an ultimate beneficiary. If an individual, rather than a charitable purpose, this person could have tax liabilities and reporting requirements 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 believed 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. The assets could only be decanted into a new trust under the Bermuda ActTrust is if such an action is taken during the perpetuity periods.

USES OF PURPOSE TRUSTS

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 and the individual's identity is known only to the trustee. This person is referred to as the source of funds. Since there are no beneficiaries and there may be no settlor, the structure is a "non-owned vehicle", which may be useful for many reasons. They could be used for quasi-charitable purposes, to separate voting control from

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21 *s.11 (2) Nevis International Exempt Trust Ordinance 1994* (as amended)
22 *s.12B (1) The Trusts (Special Provisions) Act 1989* (as amended, 1998)
23 *s.84 (2) (d) British Virgin Island Trustee Ordinance 1961* (as amended),
27 *s.23 (2) (b) Nevis International Exempt Trust Ordinance, 1994* (as amended)
28 *s.12A (4) and (5) The Trusts (Special Provisions) Act 1989* (as amended,

the economic benefits of a company, owning the shares of a private trust company, securitization transactions and off balance sheet transactions.

If someone desires to affect a philanthropic purpose which does not fall within the four heads of charity, the non-charitable purpose trust would be the appropriate structure. A non-charitable purpose trust can be utilized to hold shares of voting stock in a company so that no one shareholder controls the entity. The power behind the company will be controlled by the trust, and the economic benefits will flow to the non-voting shareholders.

A concern of someone who establishes an offshore trust is the lack of control over the management, investment and distribution of the assets. The legal ownership of the trust is held by a trustee with whom the settlor is most likely unfamiliar. Although the settlor may desire to make suggestions with regard to the administration, it is the trustee who has full and complete discretion over the trust assets, subject to any limits mandated by the law and imposed upon them by the deed. Many settlors are reluctant to establish an offshore trust based on these parameters.

A solution which may allay the settlor's fears is the incorporation of a private trust company which is owned by a non-charitable purpose trust. In all three jurisdictions; Bermuda, the British Virgin Islands and Nevis, a company may be incorporated in to act as the trustee of a trust. The settlor could act as the director of this company, settle a trust with the private trust company as trustee and administer that same trust as well. This strategy allows the settlor to maintain control over his assets and perhaps pursue a more aggressive investment strategy than a professional trustee may be willing to agree to.

A non-charitable purpose trust may be used to hold orphan companies in off balance sheet transactions. In such transactions, the structure can be used to provide security for the lender or to keep the asset and liability from appearing on the purchaser's balance sheet. For example, a purchaser wishes to buy an asset from a seller. To accomplish the purchase, the purchaser settles a purpose trust which incorporates an underlying company. To finance the purchase, the 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 utilizes 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 Bermuda, the British Virgin Islands or 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 the 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 the 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 any of the three Territories, Bermuda, the British Virgin Islands or Nevis, to enjoy international recognition.

Jan Alex Dash, Esq., L.E.C., TEP
Law Office of Jan Alex Dash
www.JanAlexDash.com
jad@JanAlexDash.com

Herman W. Liburd, L.E.C., M.A.
Barrister-at-Law and Solicitor
Charlestown, Nevis, West Indies
hwl@caribsurf.com

Kensley A. McDowall, L.E.C., CAMS, TEP
Bank of Bermuda Limited
Kensley.McDowall@bankofbermuda.com