

INTRODUCTION

In order to be valid a traditional trust is required to comply with what are known as 'the three certainties'.

- Certainty of Intention
- Certainty of Subject
- Certainty of Objects

Certainty of Objects requires that a trust must be formed for the benefit of one or more identifiable individuals (beneficiaries) or else it will fail.

Beneficiaries acquire the 'equitable interest' in trust property and will ultimately benefit from it and from any income generated. They also have the power under law to hold the trustee to account.

However, Common Law has traditionally allowed an exception to this rule where the trust is formed for one of four recognised 'heads of charity' which are:

- The advancement of education
- The relief of poverty
- The advancement of religion
- Other purposes beneficial to the community

The widely used term 'Charitable Trust' describes such arrangements, which are well established.

A desire to create trusts for purposes that fall outside the four heads of charity, coupled with an increasing use of trusts for commercial transactions and business, led to the development of Non-charitable Purpose Trusts.

PURPOSE TRUSTS UNDER GUERNSEY LAW

Charitable Purpose Trusts have been available and used under Guernsey law for many years.

In addition, the Trusts (Guernsey) Law, 2007 ("TGL07") introduced the ability to include non-charitable purposes, under section 12(1) which provides that:

"A trust for or including non-charitable purposes created by an instrument in writing and the terms of which provide for: (a) the appointment of an enforcer in relation to the trust's non-charitable purposes; and (b) the appointment of a new enforcer at any time when there is none, is valid and enforceable in relation to its non-charitable purposes."

It is therefore possible to hold property or to exercise functions without conferring a benefit on any person, although care should be taken that the purpose must be sufficiently certain to avoid rendering its performance impossible.

Purpose is defined as "any purpose whatsoever, whether or not involving the conferral of any benefit on any person, and includes, without limitation, the holding or ownership of property and the exercise of functions."

USES OF PURPOSE TRUSTS

There are a multitude of uses for purpose trusts, for example:

- Charitable trusts continue to be appropriate where a settlor wishes to provide for a lasting bequest to charities during life and/or following death.
- Quasi-charitable purposes where there is uncertainty as to whether said purpose is covered by the heads of charity can now be created without the previous doubts as to the validity of the purpose. An example would be, to create a trust for environmental purposes.
- Enduring ownership of family businesses can be assured by use of a purpose trust to hold voting shares in a company, leaving participating shares to be issued to descendants, allowing them to benefit from the ongoing success of the company, without their ability to sell it or wind it up.
- Purpose trusts are important in a wide range of commercial transactions and refinancing schemes that require the presence of a so-called 'orphan' company, being one owned separately from any of the parties to the transaction. Ownership of the orphan by a purpose trust can achieve this aim.

ENFORCERS

Any trust that includes a non-charitable purpose must appoint an enforcer.

The enforcer may be an individual, a group of individuals or a corporate entity but must not be the same person as the trustee.

The enforcer has a fiduciary duty to enforce the trust in relation to its non-charitable purpose.

An enforcer may profit from his appointment so long as expressly permitted to do so by the terms of the Trust Instrument or by approval by the Royal Court of Guernsey (reimbursement of expenses and liabilities is automatically allowed by TGL07).

THINGS TO BE WARY OF

As with any structure or entity, purpose trusts can be open to abuse or poor management.

Purposes should be sufficiently well defined to enable their identification and performance. For example, a trust created with the purpose of "saving the planet" may fail, while a more specific purpose such as "the funding of research into renewable energy sources" might be capable of being performed.

It is important that the trust instrument and any ancillary documentation is drafted in an appropriate way to enable the trustees to fulfil their duties towards the purpose without unduly fettering their ability to react to changing circumstances.

With no beneficiaries to hold the trustee to account, the duties of the enforcer are potentially more onerous than those of a protector of a 'normal' trust and any individual contemplating accepting appointment as an enforcer should ensure they are familiar with their duties and responsibilities.

GUERNSEY TRUST COMPANY
("GTC")

GTC can advise on the creation and ongoing administration of both charitable and non-charitable purpose trusts.

We are experienced in the administration, record keeping and general governance of all types of trusts.

We can provide trustees or co-trustees for trusts or we can provide the services of an enforcer where required.

Our experienced and professional staff are well used to dealing with wealthy individuals, their families and their professional advisors as well as in handling the distribution of funds to charities. They will ensure that the appropriate matters are dealt with in a timely and efficient manner.

Our colleagues at Collas Crill, one of the leading providers of legal services in the Channel Islands, can provide first class legal advice and drafting services either to settlors looking to create a purpose trust or to trustees or enforcers seeking advice on their fiduciary duties.

We are always happy to discuss potential solutions to clients' needs and concerns, whether of a general or specific nature.

For further information or professional advice, please contact:

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