A guide to non-charitable purpose trusts in Guernsey

Briefing Summary: Non-charitable purpose trusts ("Purpose Trusts") have an increasingly important part of the Trusts (Guernsey) Law, 2007 (the "Trusts Law"). Unlike traditional trusts, Purpose Trusts do not have beneficiaries. Instead they are established for specified non-charitable purposes ("purposes"). The uses of Purpose Trusts are varied and are described in greater detail below.

Service Area: Trusts and Private Wealth, Family Office

Location: Guernsey

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Creation and validity

A Purpose Trust is created when assets are vested in trustees for specific purposes.

Purpose trusts must have the same legal certainties as are required in relation to any Guernsey law trust, namely:

- there must be certainty that the settlor intended to establish such a trust;
- the property to be held on the trust must be certain; and
- the objects (in this case the purposes) for which the trust has been established must be clear so that at any time it is possible to state with certainty whether or not a proposed use of trust funds is within the scope of the stated purposes of the trust.

The purposes for which trusts are established must also be consistent with public policy and not contrary to the law of Guernsey.

Duration

As with other Guernsey law trusts, a Purpose Trust can continue in existence for an unlimited period of time, unless the terms of the trust provide otherwise.

The trustees

A Purpose Trust, like any other trust, must have trustees. The trustees are required to administer the trust in accordance with the terms of the trust instrument and are subject to the general fiduciary duties under the Trusts Law.

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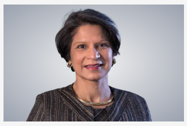

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The terms of the trust usually provide for the trustees to be remunerated for their services and reimbursed for all expenses and liabilities properly incurred by them out of trust property.

Role and rights of the enforcer

Unlike traditional trusts, a Purpose Trust is required to have an enforcer whose duty it is "to enforce the trust in relation to its non-charitable purposes".

Accordingly, the role of the enforcer is to ensure that the trustees utilise the trust funds for the specified purposes. This involves monitoring the activities of the trustees and being prepared to bring the trustees before the Royal Court of Guernsey if necessary, for instance where there is concern that trust funds are not being used properly. The duties of the enforcer are usually described in the terms of the trust instrument so that the enforcer is certain about what he is required to do to fulfil his role.

The Trusts Law provides that an enforcer must not profit, directly or indirectly, from his office unless the terms of a trust permit such profit or such profit is sanctioned by the Royal Court of Guernsey. Express provision is usually made in the terms of the trust instrument for payment of a professional enforcer's fees and expenses.

An enforcer's statutory rights to documents and information concerning the trust are limited. Under the Trusts Law the enforcer has the same rights as a beneficiary to see documents which relate to or form part of the trust accounts. It is possible to include express provision in the trust instrument whereby an enforcer has more extensive rights to trust documentation if this is considered to be appropriate or desirable in particular circumstances.

Under the Trusts Law the resignation of an enforcer given in order to facilitate a breach of trust is of no effect. This can be problematic for an enforcer where he wishes to resign because of disagreement over a particular course of action on the part of the trustees. Where the actions of the trustees might constitute a breach of trust, the enforcer may be in difficulty in tendering a valid resignation and specific advice should be sought where such circumstances arise.

An enforcer of a Purpose Trust can be a corporate entity or an individual, but cannot also be the trustee of the trust. There is however nothing to prevent one being a subsidiary of the other if care is taken about the role each is to play in the trust structure.

The purposes

A "purpose" is defined in the Trusts Law and means "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".

In all cases, it is important that the purposes are clearly drafted so that the trustees and the enforcer can fulfil their duties under the trust.

Some purposes are simple and obvious to identify whilst others are not. Examples of purposes permitted under the Trusts Law include maintaining and preserving a historical artefact and holding shares in a company.

Subject to any changes authorised by the Royal Court of Guernsey, if a Purpose Trust is created for one specific purpose, such a trust will terminate when that purpose has been fulfilled. In such circumstances, unless the terms of the trust instrument provide otherwise, the trust fund will be deemed to be held by the trustees on resulting trust for the settlor or his estate. This may give rise to significant tax and/or other consequences.

Variation

In the circumstances set out in the Trusts Law, including where "the purpose has been, as far as may be, fulfilled", the Royal Court of Guernsey may make an order for the property in the Purpose Trust to be held for such other purpose as the court considers is consistent with the settlor's original intention.

The Royal Court of Guernsey may also approve any arrangement to vary or revoke the purposes of a Purpose Trust or to modify the trustees' powers, providing it is satisfied that such arrangement is "suitable or expedient" and is "consistent with the original intention of the settlor and the spirit of the gift". Where such an application is brought, the court must be "satisfied that any person with a material interest in the trust has had an opportunity to be heard."

Applications for these types of orders can be made by the trustees or Her Majesty's Procureur in Guernsey.

Uses of purpose trusts

Purpose Trusts can be used in a number of ways for commercial, succession or tax planning reasons, including:

- to hold the shares in a special purpose vehicle ("SPV") used in connection with securitisations or off-balance sheet transactions where there is often a preference for the SPV to be "orphaned" from the parties to the transaction;
- to hold the shares of a private trust company which acts as trustee of a settlor's family trust. Such an arrangement provides a greater degree of comfort for the settlor about the composition of the board of directors of that private trustee than would otherwise be the case if an unconnected trust company acts as trustee of such family trust. Such a private trust company can also be useful for family offices, as it can act as trustee of a number of linked family trusts;
- to hold shares in a family business to aid with succession, with the trustees acting neutrally and independently of family dynamics;
- for investing in family companies where economic performance is likely to be poor or uncertain; and
- for social benefit projects (both public and private) to enable certain community facilities or areas to be maintained, for the preservation of monuments, to provide financial support and to fund particular political purposes.

Conclusion

The use of Purpose Trusts has evolved over recent years and it is anticipated that the role of such trusts in offshore transactions and arrangements will continue in both a commercial and private wealth context.