

Rationalising Private Purpose Trusts

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This article considers the various rationale underlying the enforcement of private purpose trusts and argues for statutory recognition of such trusts under English law.

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 trustees cannot be compelled to perform the terms of the trust if, for whatever reason, they are 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.

Requirement of a human beneficiary

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 MR in *Morice v Bishop of Durham*,¹ where the court was asked to determine if a trust for objects “of benevolence and liberality” was valid. The following extract 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.”²

¹ (1804) 9 Ves. 399.

² Ibid, at 404-405.

At first glance, this appears to suggest that the trust will fail only if the objects are uncertain. Subsequent cases, however, refer to the requirement for a beneficiary in order for the trust to be valid. In *Re Wood*,³ for example, Harman J held that a “gift on trust must have a cestui que trust”. Similarly, in *Re Astor’s Settlement Trusts*,⁴ Roxburgh J held that any non-charitable trust that did not have a beneficiary was not just unenforceable, it was void. Perhaps the clearest statement of this principle is to be found in *Re Endacott*⁵ where Lord Evershed MR stated:

“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.”⁶

Although these authorities are relatively recent in terms of trust law, at least one writer⁷ 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,⁸ 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 beneficiary, how can they be valid?

In *Re Endacott*, Lord Evershed MR 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 writer’s 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 writer’s view, therefore, the only truly “anomalous cases” are those where no explanation was given by the court for the purpose trust being upheld.

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*,⁹ 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

³ [1949] Ch. 498, 501.

⁴ [1952] Ch. 534.

⁵ [1960] Ch. 232

⁶ *Ibid*, at 246.

⁷ See, P. Matthews, “The New Trusts: Obligations Without Rights?” in *Trends in Contemporary Trust Law*, A.J. Oakley, Editor, (Clarendon Press, Oxford, 1996), at p. 2.

⁸ P. Baxendale-Walker, *Purpose Trusts*, (Butterworths, 1999), at p. 364, Appendix 2.

⁹ [1934] Ch. 342.

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 anomalous cases, particularly *Pettingall v Pettingall*¹⁰ (on which *Re Thompson* was based) and *Re Astor's Settlement Trusts*.¹¹ However, there are also 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*¹² 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.

Factual beneficiaries

Although some of the early decisions, as we have seen, suggest that a trust “must be for the benefit of individuals”,¹³ 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-Walker¹⁴ and judicially acknowledged in *Leahy v A-G for New South Wales*.¹⁵ More significantly, in *Re Denley's Trust Deed*,¹⁶ 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 arising by virtue of the trust deed itself. The employees had clearly no proprietary interest in the land but this was not fatal to the validity of the trust. The presence of factual beneficiaries also saved the gift in *In Re Bowes*.¹⁷ 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:

“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.”¹⁸

This rationale may also explain the so-called *Quistclose* trust cases. In *Barclays Bank v Quistclose Investments Ltd*,¹⁹ the directors of a company declared a dividend

¹⁰ (1842) 11 L.J. Ch. 176.

¹¹ [1952] Ch. 534. See also, *Mitford v Reynolds* (1848) 16 Sim. 105.

¹² (1838) 5 Cl. & Fin. 129.

¹³ *Bowman v Secular Society Limited* [1917] A.C. 406, 441, *per* Lord Parker.

¹⁴ P. Baxendale-Walker, *Purpose Trusts*, (Butterworths, 1999), at p.9.

¹⁵ [1959] A.C. 457.

¹⁶ [1969] 1 Ch. 373. See also, *Re Lipinski's Will Trusts* [1976] Ch. 235, (members of an unincorporated association).

¹⁷ [1896] 1 Ch. 507.

¹⁸ *Ibid*, at 511.

¹⁹ [1970] A.C. 567.

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 Peter Gibson J in *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd (In Liquidation)*²⁰ 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.”²¹

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.

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*.²² Here, the testator left 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 *A-G v Whorwood*²³ 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. His Lordship noted 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.”²⁴

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,”²⁵ his Lordship concluded²⁶ that “there is nothing, therefore, in my opinion to make

²⁰ [1985] Ch. 207.

²¹ *Ibid*, at 222.

²² (1889) 41 Ch. D. 552.

²³ (1750) 1 Ves. Sen. 534.

²⁴ (1889) 41 Ch. D. 552, at 556.

²⁵ *Ibid*, at 557.

²⁶ *Ibid*, at 560.

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,²⁷ 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.

Although "a valid power cannot be spelt out of an invalid trust",²⁸ 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.²⁹ 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*,³⁰ 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*,³¹ 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*,³² 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

²⁷ The writer is very grateful to Martin Dixon for his views in an exchange of emails.

²⁸ *IRC v Broadway Cottages Trust* [1955] 1 Ch. 20, 36, *per* Jenkins L.J.

²⁹ *Re Douglas* (1887) 35 Ch. 472.

³⁰ [1982] 1 W.L.R. 522.

³¹ (1852) 2 Sim. N.S. 255.

³² [1928] Ch. 464.

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.

Nominating a third party enforcer?

If, as we have seen, 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 DJ Hayton 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.”³³

Given the difficulties associated with relying on a mere factual interest in enforcing the trust, there seems no reason why a settlor could not include in the trust instrument (whether it be a deed or will) a residuary beneficiary with a positive interest to compel performance of the trust. If the residuary beneficiary’s entitlement to the residue is made expressly conditional on the purpose of the trust being performed, the residuary beneficiary would effectively have a sufficient interest in the trust not only to prevent a misappropriation of the trust funds, but also to ensure that the primary purpose of the trust is actually carried out. Simple drafting could achieve this - the relevant fund to be held by the trustees upon trust to apply the income in performing the terms of the trust for a period of 21 years and *if the trustees do so* then the fund (i.e., the capital) to pass to the residuary beneficiary. On this wording, the private purpose trust is saved because the residuary legatee has sufficient interest to see that the purpose of the trust is actually carried out - he does not receive the trust capital (at the end of 21 years) *unless* the trust is carried out. Put simply, his entitlement to the capital is entirely dependent on the stated purpose being fulfilled.³⁴ Who then would be likely to be nominated as the residuary beneficiary? This would depend, of course, on the wishes of the settlor – one would envisage a family member taking on this role (perhaps, the settlor’s son or daughter or other relative) who the settlor has also identified as the ultimate beneficiary of the trust capital at the end of the perpetuity period of 21 years.

Statutory reform?

What is needed, however, is a more 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). An obvious way forward is the enactment of legislation validating private purpose trusts under English law. One of the key features of such new law would be the adoption of the concept of an enforcer, along the lines mentioned above, appointed in the trust instrument. Failing that, there should 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

³³ D.J. Hayton, *Underhill & Hayton Law of Trusts & Trustees*, (16th ed., Butterworths), 2003), at pp. 73-74.

³⁴ See, McKay, "Trusts for Purposes - Another View", [1973] 37 Conv. 420, at pp. 430-432.

his will. The enforcer should have power to appoint a replacement, 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. The role of the enforcer should also 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 becomes unable to act for whatever other reason, 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.

Any such new legislation would permit the purpose trust to be created by an *inter vivos* trust deed or by will and provide for the usual perpetuity period to apply to purpose trusts, but with no restriction on the accumulation of income during the trust period. In this connection, the Perpetuities and Accumulations Act 2009, which introduced a single perpetuity period of 125 years, does not affect the rule of law which limits the duration of non-charitable purpose trusts.³⁵ The common law rule on the duration of such trusts still applies, namely, that such a trust cannot continue for longer than the life of an identified person in being plus 21 years. If no person is identified, the trust should last for only 21 years.³⁶

It goes without saying that the purpose of the trust 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.

Conclusion

The so-called "human beneficiary" principle is of long-standing and, although there are several notable (albeit limited) exceptions, the general principle remains that a trust must have beneficiaries who are capable of owning the trust property and enforcing the obligations and duties of the trustees. The reason for the rule is that a trust gives rise to obligations and so, consequently, there must be a beneficiary to whom the duties of a trustee are owed. Conversely, the beneficiaries have a correlative right to render the trustee accountable for his actions and so, if necessary, compel performance of his obligations by court order. The difficulty, of course, with this approach is that it frustrates the wishes of a settlor or testator, who may want to benefit a legitimate object or purpose which does not fall within the definition of a charity.

Given the problems associated with relying on a mere factual interest in enforcing the trust, there seems no reason, as we have seen, why a settlor could not include in the trust instrument (whether it be a deed or will) an enforcer with a positive interest to compel performance of the trust. Ultimately, however, a more robust approach is

³⁵ See, s.18.

³⁶ *Re Hooper*, [1932] 1 Ch. 38.

needed to the recognition of private purpose trusts under English law. It is hoped, therefore, that the debate surrounding the validity of private purpose trusts will continue by way of a formal consultation on this topic by the Law Commission in the not too distant future.