

## Non-Charitable Purpose Trusts in Jersey

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### Introduction

Historically a trust could be defined as a relationship between a settlor, a trustee and a beneficiary in respect of property. The settlor, as legal and beneficial owner of the property, gave the legal ownership of the property to the trustee who held it for the benefit of the beneficiaries who had the beneficial or equitable ownership. The courts repeatedly confirmed that there had to be individuals who benefited from the trust.

Therefore, as a general principle, it was not possible to have a trust for a purpose (albeit the law recognised an exception in relation to charitable trusts on the basis of public policy). However, a number of jurisdictions, mostly offshore, developed their statutory laws to permit non-charitable purpose trusts (i.e. trusts where trustees held property to carry out specified purposes which did not qualify as charitable). Jersey introduced the concept of the non-charitable purpose trust in 1996 by the Trusts (Amendment No 3) (Jersey) Law 1996, which came into force on 24 May 1996, which effectively introduced specific new provisions into the Trusts (Jersey) Law 1984 (TJL).

The rationale for introducing non-charitable purpose trusts was two fold; firstly, to enable high net worth settlors to establish inter vivos trusts for purposes which were philanthropic in nature but which did not meet the narrow definition of "charitable" under Jersey law, which definition was at the time based solely on the test in the old English authority known as Pemsel's case and the Statute of Queen Elizabeth (and which test now sits alongside the new charity test under the Charities (Jersey) Law 2014) and secondly, because it was thought the non-charitable purpose trust would be a more appropriate vehicle for owning the shares of orphan companies used in securitisation arrangements which were popular in the late 1990s and early 2000s. Whilst non-charitable purpose trusts have been popular in these areas, they have been more frequently used in either a private client or employee benefit context, for the purpose of holding the shares of private trust companies or special purpose companies to be used in specific commercial transactions.

### What is a "purpose"?

Until 2012 the TJL did not define or specify "purposes". There was a school of thought which suggested self serving purposes (such as to hold the shares in ABC Limited) failed for lack of a true purpose external to the trust. Consequently, to avoid the risk of a resulting trust for failure of the purposes, it was better to specify a purpose to which the trustee was capable of applying the trust funds (or the income thereof), such as in the case of a private trust company (PTC), to provide trustee services to defined trusts, which purpose could be achieved by incorporating a company and holding the shares of the same and allowing the PTC to carry out trustee services.

However, the TJL was amended in 2012 to introduce a definition of purpose which now permits a self serving purpose.

The definition states as follows:

"Purpose" means any purpose whatsoever whether or not-

*(a) involving the conferral of any benefit on any person; or*

*(b) consuming or capable of consuming the income or capital of the trust,*

including without limitation the acquisition, holding, ownerships, management or disposal of property and the exercise of functions."

### **Principal features of Jersey non-charitable purpose trusts**

With a non-charitable purpose trust established under Jersey law, the following are key points to note:

#### **Duration**

The trust may exist indefinitely. If there is a termination date, the trust property would be exhausted in pursuing the specific purposes in the trust instrument and, in default, could be distributed to persons or charities.

#### **Formalities**

There are no particular formalities for the creation of a purpose trust. There is no requirement for the trust to be in writing, registered in Jersey or for any trust document, or its particulars, to be filed with any governmental or other authority. Typically the trust would be created via a trust deed.

#### **Enforcer**

A non-charitable purpose trust must have an enforcer.

The TJL imposes the duty of enforcement in relation to non-charitable purpose trusts upon the

person holding the office of enforcer. The enforcer's statutory duty is to enforce the trust in relation to its non-charitable purposes.

Subject to the qualification that the enforcer of a non-charitable purpose trust cannot also be a trustee of the trust, there are no other limitations with regard to the choice of the enforcer. An enforcer may voluntarily retire from his office by written notice delivered to the trustees, apply to court for his removal or be removed from office by the court, upon an event occurring (such as reaching an age limit stipulated in the trust) or on becoming a trustee.

## **Information**

An enforcer may request and must be provided with documents which relate to or form part of the accounts of the trust.

## **Trustees**

There is no requirement that the trustees have to be resident in Jersey.

There is a duty upon the trustees to apply to court to remove an enforcer where the trustees have "reason to believe... the enforcer... is unwilling or refuses to act, or is unfit to act or incapable of acting". The trustees' duty therefore is to form a belief as a matter of fact that the enforcer is unwilling, refusing, unfit or incapable of acting rather than strictly forming a subjective view of the same. However, the trustees also have the duty, "at any time when there is no enforcer... [to] take such steps as may be necessary to secure the appointment of a new enforcer." Therefore, in both cases, it can be assumed by implication that the trustees owe a fiduciary duty to the purposes to remove and/or appoint a new enforcer.

## **Beneficiaries vs the purpose/s**

One element which is often overlooked by practitioners is the need to have a very well drafted, conceptually clear and ascertainable purpose. In the same way that the beneficiaries of a traditional trust must be conceptually clear and certain, the purpose or purposes of a non-charitable purpose trust must also be. Whilst there is no case law in this area, practitioners and settlors alike should err on the side of caution. Like beneficiaries, purposes can be added or excluded, subject to the terms of the trust instrument. This is useful as it can allow the trust to adapt as needs arise.

## **Cy-près**

In the event that the non-charitable purposes of the trust can no longer be met for any reason, the Royal Court has power to declare that the trust property (or the remainder of the trust property) shall be held for such other non-charitable purposes as the Royal Court considers to be consistent with the original intention of the settlor.

## **Mixed trusts**

While clients may wish to provide for a non-charitable purpose trust alone, it is possible under Jersey law to create one trust for a combination of charitable purposes, non-charitable purposes and beneficiaries (or any two). Such trusts can be drafted so that the purposes and beneficial interests run concurrently or consecutively or both.

## **Uses of Jersey non-charitable purpose trusts**

It is said above that non-charitable purpose trusts have a valuable role to play as "quasi charitable" trusts where a client wishes to create a trust for philanthropic or good causes which are not strictly charitable. Examples here are trusts with certain humanitarian, ecological, environmental or research objects, which do not qualify as charitable under Jersey law.

Such trusts are also used to provide for the ownership of corporate vehicles in a variety of circumstances. An example is that of a non-charitable purpose trust which owns the shares in a private trust company in order to facilitate the administration of a series of private family trusts.

There is also a range of commercial uses for non-charitable purpose trusts. Examples are to hold the shares in a Jersey or non-Jersey company as part of a financing scheme where there is a need to hold assets off balance sheet, or for use in employee benefit arrangements where, once more, it is necessary for a corporate vehicle to be owned separately from any employer company and where the corporate vehicle is to be used in a transaction of some sort.

## **Tax treatment**

Although specific tax advice would need to be taken, purpose trusts should be entirely free of tax in Jersey whether or not the trustees are resident in Jersey provided only that no Jersey resident (other than a charity) has an interest in the purpose trust, whether during or at the end of the trust period, and save on certain limited types of Jersey source income.

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