

## **Enforcing Private Purpose Trusts**

*Mark Pawlowski and James Brown examine the possibility of using the mechanism of a residuary legatee in order to enforce a trust for non-charitable purposes*

As trust lawyers will be aware, a trust for non-charitable purposes is void under English law as having no human beneficiary capable of enforcing the trust. 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. If there are no beneficiaries with equitable interests in the trust assets, there is technically no one "in whose favour the court can decree specific performance": *Morice v Bishop of Durham* (1804) 9 Ves 399.

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. A trust, for example, for the repair and maintenance of a private country house will not be charitable as it does not fall readily within any of the recognised heads of charity set out in s.3 of the Charities Act 2011 and lacks the element of public benefit. In these circumstances, the trust (being for a private purpose) will be void as lacking a human beneficiary who is capable of enforcing the trust. To what extent, however, would it be possible to render such a trust valid despite the absence of beneficiaries vested with equitable ownership in the trust property? Is the existence of a beneficiary with an equitable proprietary interest in the trust property a necessary prerequisite to the enforcement of such a trust? What of the interest of a residuary legatee? Does he or she have a sufficient interest to act as enforcer of the trust purpose?

### **Interest of a residuary legatee**

In *Re Thompson* [1934] Ch 342, the testator left the sum of £1,000 to a friend to be used towards the promotion of foxhunting. The residue was to pass to Trinity Hall of the University of Cambridge. Clauson J held that the bequest was valid on the basis that the residuary legatee could apply to the court to compel performance should the trustee fail to carry out the trust purpose. There are other cases to the same effect, notably, the decision of Knight-Bruce VC in *Pettingall v Pettingall* (1842) 11 LJ Ch 176 and Roxburgh J in *Re Astor's Settlement Trusts* [1952] Ch 534: see also, *Mitford v Reynolds* [1848] 16 Sim 105.

The difficulty here, as discussed by one commentator (see, L. McKay, "Trusts for Purposes - Another View", [1973] 37 Conv. 420), is that a residuary legatee usually has no interest (equitable or otherwise) to give him standing to enforce the trust against the trustees. On the contrary, he may be more concerned to see that the trust fails since he will then stand to benefit from the trust assets. His only concern, in this regard, will be to prevent a misappropriation of the trust funds by the trustee. He has no interest in seeing that the purpose of the trust is actually carried into effect. But this need not necessarily be so in all cases.

To take our earlier example, suppose that the trust deed provides that the income from the trust fund is to applied towards the upkeep and maintenance of the settlor's private house for a period of 21 years. The trust is expressly confined to the perpetuity period so there is no issue here regarding the failure of the trust on the grounds of perpetual duration. Let us assume also, for present purposes, that the trust would not be saved on the basis that the settlor and his family (as occupiers of the house) are capable of enforcing the trust. In *Re Lipinski's Will Trusts* [1976] Ch 235, a gift to an unincorporated association to be used solely in the construction of new buildings for the association was upheld on the basis that, although a gift for a purpose, it was directly for the benefit of the members. Similarly, in *Re Denley's Trust Deed* [1969] 1 Ch 373, the employees of a company were conferred a direct benefit under the trust to use the facilities of a sports ground. As contractual licensees, they were held to be entitled to enforce the terms of the trust despite having no equitable proprietary interest in the land in question. It is not entirely clear, however, whether the test in these cases permits purely factual interests to qualify under the human beneficiary rule. If a factual interest is sufficient, what degree of factual benefit is sufficient to confer standing? The *Denley* approach presupposes that those with *locus standi* to apply to the court to enforce the trust must have, at the very least, some tangible or direct benefit from the carrying out of the trust purpose.

Given that the purpose of the trust in our example involves the repair and maintenance of the house, it is certainly arguable that the fulfilment of this purpose provides some real benefit to the occupants (or, at the very least, to the settlor as legal owner) of the property enough to give them sufficient standing to enforce the trust. On the other hand, there are cases where individuals with an indirect interest in the enforcement of the purpose of the trust have been denied standing to enforce the trust. Thus, in *Shaw v Lawless* (1838) 5 Cl & Fin 129, 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 to compel performance of the trust.

Given the difficulties associated with relying on a mere factual interest in enforcing the trust, would it be possible for the settlor to include in the trust deed a residuary legatee with a positive interest to compel performance of the trust? To return to our example again, what if the residuary legatee's entitlement to the residue is made expressly conditional on the private house being repaired and maintained in accordance with the terms of the trust? In these circumstances, it is submitted, the residuary legatee 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 the repair and maintenance of the private house for a period of 21 years and *if the trustees do so* then the fund (i.e., the capital) to pass to the residuary legatee. 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 house is repaired and maintained. Put simply, his entitlement to the capital is entirely dependent on the stated purpose being fulfilled: see generally, McKay, "Trusts for Purposes – Another View", [1973] 37 Conv. 420.

The device of a conditional gift is, of course, not novel and has considerable support in the established case law. In *Lloyd v Lloyd* (1852) 2 Sim NS 255, 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* [1928] Ch 464, 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 shall continue to maintain and keep" two specified graves in the cemetery in good order and condition. In both these cases, the donor had conferred a beneficial interest in favour of the donee and expressly provided that this interest shall be conditional (or contingent) upon that person carrying out a stated purpose: see generally, P. J. Smart, "Holding Property for Non-charitable Purposes", [1987] Conv. 415.

Who then, in our example, would be likely to be nominated as the residuary legatee? 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.

### **Interest of the settlor**

The settlor himself will, of course, have no proprietary interest in the trust fund once he transfers the money to the trustees to be held upon trust for the stated purpose. Moreover, his indirect interest to see that his wishes are performed (i.e., that the trust is carried out) will be insufficient to give him standing to enforce the trust. In the words of Roxburgh J in *Re Astor's Settlement Trusts*, above, at p.542: "if the purposes are valid trusts, the settlors have retained no beneficial interest and could not initiate [proceedings]." The same principle would apply in relation to a testamentary trust – the testator's executors would have insufficient interest (legal or factual) in seeing the trust performed.

There is no reason, however, why, in principle, the settlor himself should not be made residuary legatee under the trust. In this way, the settlor is himself given sufficient standing to compel performance of the trust with the added benefit that, at the end of 21 years, the trust capital reverts back to him in his residuary capacity. Moreover, to secure performance of the trust beyond his lifetime, it would be possible for the settlor to make a will leaving his residuary

interest to an appropriate beneficiary who would continue his role as enforcer of the trust until such time as the trust period came to an end. Here again, the settlor may be minded to identify his son or daughter (or other relative) as the appropriate successor to his residuary interest. In this connection, the interest of a residuary legatee falls to be treated as a vested interest (i.e., one that is already vested in the settlor) with the future element being limited only to the capital (i.e., the trust fund) which will fall into possession at the end of the designated period of 21 years.

Even if no will is made, the residuary interest would automatically pass to the settlor's spouse (or children) on his death upon an intestacy under the Administration of Estates Act 1925. Thus, even in the absence of a testamentary disposition, the settlor's interest as residuary legatee would pass to a family member capable of enforcing the trust.

### **Points for the practitioner**

1. A private purpose trust is normally void under English law as having no human beneficiary capable of enforcing the trust.
2. A residuary legatee will usually have insufficient interest to act as enforcer of a private purpose trust.
3. It may be possible for the settlor to include in the trust deed a residuary legatee with a positive interest to compel performance of the trust.
4. There is no reason, why, in principle, the settlor himself should not be made residuary legatee under the trust, so as to effectively re-activate his standing to enforce the trust qua residuary beneficiary.
5. To secure performance of the trust beyond the settlor's lifetime, the settlor should make a will leaving his residuary interest to an appropriate beneficiary so as to continue his role of enforcer of the trust until such time as the trust period comes to an end.
6. In the absence of a testamentary disposition, the settlor's interest as residuary legatee will, upon an intestacy, pass automatically to his spouse or child(ren) who will be capable of enforcing the trust.

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