

# Articles

## Of protectors and enforcers

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### Abstract

This article considers the legal issues that face those who act as protectors to private trusts and enforcers to non-charitable purpose trusts across a number of common law jurisdictions where such roles are commonplace. It looks at the issues which are likely to give rise to fiduciary duties on protectors and sets out a list of considerations for persons setting up purpose trusts. It examines the issue of conflicts of interests affecting protectors and enforcers and questions whether, in a new age of transactional transparency and a reduced appetite for risk, these roles should not more often be filled by independent professional companies which specialize in providing the services of protectors and enforcers.

concerned, this concept is largely unrecognized save for a few isolated cases. That being the case, no doubt some purist English lawyers might recoil in horror that anyone might attempt to deal with the role of protectors and enforcers in the same article. However, from the point of view of clients and their professional advisers who are regularly involved in setting up trust structures and professional trust companies which act as trustees it is suggested that, in a practical sense, the roles of protector and enforcer may often require similar considerations. Both roles generally exist to ensure that the trust operates in accordance with the constitutive documents and in the manner intended by the settlor and both roles usually have the potential to exercise substantial influence over the operation of the trust in question. Furthermore, both roles are likely to need to be filled by persons who have the confidence of the settlor (at least during the settlor's lifetime).

### Introduction

The role of the enforcer in relation to purpose trusts (known as STAR trusts in the Cayman islands) is a concept which is likely to be very familiar to trust practitioners working in offshore financial centres but less so to those working onshore. The reason being, that enforcers are connected with non-charitable purpose trusts and, so far as English law is

### Protectors—fiduciary or beneficial powers?

Protectors fundamentally derive their powers from the terms of the trust instrument. There is considerable case law and academic authority on the classification of powers<sup>1</sup> and indeed as to their application in relation to protectors.<sup>2</sup> Without wishing to

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1. See for instance *Re Gulbenkian's Settlement* [1970] A.C. 508; *McPhail v Doulton* [1971] A.C. 424; *Mettoy Pensions Trustees Ltd v Evans* [1991] 2 All ER 513; *Lewin on Trusts*, (Sweet & Maxwell) 18th edn, para 29-14 et seq; Underhill and Hayton, *Law of Trusts and Trustees*, (Butterworths) 17th edn, paras 1.76 and 1.77.

2. *Re Osiris Trustees Limited* [1999–2001] MLR 206 (IOM); *Re Circle Trust* [2006] CILR 323 (Cayman); *Re Bird Charitable Trust* [2008] JLR 1 (Jersey); Underhill and Hayton (see fn 1) paras 1.78 to 1.92 and *Lewin on Trusts* (see fn 1) para 29-35–29-51.

oversimplify the position, in so far as the issues have been before the Courts concerning the powers vested in protectors, the question has largely turned on whether the powers in question are beneficial powers or fiduciary powers.<sup>3</sup> In the case where the powers are beneficial powers, then the donee of the power is entitled to exercise the power selfishly and in his own interests if he so wishes. On the other hand, a fiduciary power carries with it an obligation to act in good faith in the interests of the beneficiaries as a whole and a duty to consider, from time to time, whether or not to exercise the power. That said, even where a power is clearly a fiduciary power, there is some debate as to what the extent of those duties are. It can certainly be argued that the duties that might be placed on an unpaid friend or relative of the settlor occupying the role of protector are not the same as would be applied to a company or an individual offering professional services as a protector.<sup>4</sup>

The powers which may be vested in protectors are many and varied and range from the power to appoint and remove trustees, the power of veto over distributions of capital and income, a power of veto over the appointment and removal of beneficiaries to powers to amend or vary the trust instrument or to veto such amendments and variations. It is beyond the scope of this article to consider the issues relating to the exercise of all such powers which may be vested in protectors but it is possible to make some general comments in relation to them.

It is quite possible that some powers vested in a protector by a single trust instrument may be fiduciary and others beneficial.<sup>5</sup> Indeed, it is perfectly possible for a trust instrument to state

whether certain powers vested in a protector are to be exercised by the protector beneficially or in a fiduciary capacity. That said, it seems questionable whether a provision in a trust instrument stating that a protector's powers are all to be exercised beneficially, would be enforceable if the powers in question were vested in an independent protector who had no beneficial interest in the trust and were plainly to be exercised for the benefit of the beneficiaries as a whole.<sup>6</sup> Provisions in the trust instrument which are likely to be indicative of a fiduciary duty being imposed upon the protector are provisions providing for (i) the appointment of a successor protector, (ii) the remuneration of the protector and for the protector to be able to retain commissions and fees and (iii) for the protector to release or suspend their need for consent.<sup>7</sup> Also of relevance will be whether the protector is (or can be) a beneficiary of the trust.

Interestingly, it has been held that, if the powers of a protector are of a fiduciary nature, then a power to appoint a protector is also fiduciary and therefore must be exercised in good faith in the interests of the beneficiaries.<sup>8</sup>

## Purpose trusts and enforcers—the legal background

As mentioned above, so far as English law is concerned, the concept of non-charitable purpose trusts (hereinafter referred to as “purpose trusts”) is largely unrecognized save for a few isolated cases. Examples of the classes of cases where English law purpose trusts have been held to be valid are trusts for the erection or maintenance of monuments or graves,<sup>9</sup>

3. See *Von Knierman v Bermuda Trust Co Ltd* (1994) Butterworths Offshore Cases and Materials Vol. 1, pp 116–125 (Bermuda); *Steele v Paz* (10 October 1995) B.O.C.M Vol. 1, pp. 338–418 (IOM); *Re Papadimitriou* [2001–2003] MLR 287 (IOM); *In the Matter of the Z Trust* [1997] CILR 248 (Cayman).

4. See *Re Papadimitriou* (see fn 3); *Re Osiris Trustees Limited* (see fn 2) and Underhill and Hayton (see fn 1) para 1.81 and see the judgement of Brightman J in *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515 at 534 which concerns the level of the duty of care by a professional trustee as compared to a lay trustee which would seem to apply by analogy to the case of a professional protector.

5. *In the Matter of the Z Trust* (see fn 3); *Re Bird Charitable Trust* (see fn 2) and Thomas and Hudson, *The Laws of Trusts*, Oxford, para 23.35.

6. *Re Skeats' Settlement* (1889) 42 Ch D 522; *Re Circle Trust* (see fn 2) at p. 331; *Re Bird Charitable Trust* (see fn 2) at p. 33 and 34 quoting Underhill and Hayton (see fn 1) para 1.83 with approval.

7. *In the Matter of the Z Trust* (see fn 3), *Re Bird Charitable Trust* (see fn 2) at p. 36 and Thomas and Hudson (see fn 5) para 23.35.

8. *Re Circle Trust* (see fn 2).

9. *Masters v Masters* (1718) 1 P Wms 421; *Mellick V President and Guardians of the Asylum* (1821) Jac 180; *Trimmer v Danby* (1856) 25 LJ Ch 424; *Musset v Bingle* [1876] WN 170; *Pirbright v Salwey* [1896] WN 86; *Re Hooper* [1932] 1 Ch 38 and *Hongkong Bank Trustee (Singapore) Ltd v Tan Farrer* [1988] 1 SLR 227.

for the saying of masses<sup>10</sup> and in certain circumstances unincorporated associations.<sup>11</sup>

These exceptions aside, the generally accepted rule of English law is that, in order for a trust to be valid (excepting charitable trusts) the trust must have an ascertainable beneficiary in whose favour performance of the trust may be decreed.<sup>12</sup> As Roxburgh J stated in *Re Astor's Settlement Trusts*, there is the problem with non-charitable purpose trusts: 'In theory, because having regard to the historical origins of equity it is difficult to visualize the growth of equitable obligations which nobody can enforce, and in practice, because it is not possible to contemplate with equanimity the creation of large funds devoted to non-charitable purposes which no court and no department of state can control, or in the case of maladministration reform'.<sup>13</sup> Charitable trusts are an exception to this rule, the rationale being that they are enforceable by the Attorney-General.<sup>14</sup>

Recent mainstream English judicial decisions have, by and large, maintained the view that there is a clear principle against purpose trusts and that the few exceptions to the principle are anomalies.<sup>15</sup> On the other hand, academic views have ranged from a general position of support of the current judicial position, through to the view that there is no general

principle against purpose trusts in English law.<sup>16</sup> Certainly there are examples of relatively recent cases, such as *Re Denley*,<sup>17</sup> where the Courts have taken a very liberal approach in relation to beneficiary principle and a recent contrary case is not without some issues of its own.<sup>18</sup>

It has also been argued that *Quistclose* trusts<sup>19</sup> are examples of purpose trusts.<sup>20</sup> However, this debate seems to have been resolved by the judgement of Lord Millet in *Twinsectra v Yardley*<sup>21</sup> who states that a *Quistclose* trust is nothing more than a resulting trust for the lender pending distribution for agreed purposes by the borrower.<sup>22</sup>

It may be argued that the current law of purpose trusts in England cannot be taken any further forward than as formulated in *Re Denley* without statutory intervention. This essentially means that, in the so-called 'exception' purpose trust cases, there are always persons who can be identified as having 'an interest' in the trust which allows them to apply to the Court to enforce the trust if necessary.

Even if purpose trusts are accepted as being valid as a matter of English law, it would seem that the description of the purpose must be sufficiently certain<sup>23</sup> and the trust must be administratively

10. *Bourne v Keene* [1919] AC 815 874-875 and *Re Caus* [1934] Ch 162 although in light of *Re Hetherington* [1990] Ch 1 it seems doubtful whether *Bourne* was not really decided on the basis that the trust was charitable; *Re Gibbons* [1917] 1 Ir R 448; *Re Khoo Cheng Teow* [1932] Straits Setts LR 226 and *Bermuda Trust (Singapore) Ltd v Wee Richard* [2000] 2 SLR 126.

11. *Leahy v Attorney-General (NSW)* [1959] AC 457; *Neville Estates Ltd v Madden* [1962] Ch 832 at 849 where Cross J stated that provided a gift is for members as joint tenants or for members as per their contractual rights and liabilities then the trust is valid. The trust will fail if it is a trust for the purposes of the unincorporated association as a quasi-corporate entity. See also *Re Recher's Will Trusts* [1972] Ch 526 at 538.

12. *Morice v Bishop of Durham* (1804) 9 Ves 399 at 404; *Bowman v Secular Society Ltd* [1917] AC 406 at 441; *Re Diplock* [1941] Ch 253 at 259; *Re Wood* [1949] Ch 498; *Re Astor's Settlement Trusts* [1952] Ch 534; *Leahy v Attorney-General (NSW)* [1959] AC 457 at 478; *Re Denley's Trust Deed* [1969] 1 Ch 373 and *Re Vandervell's Trusts (No 2)* [1974] Ch 269 at 319.

13. *Re Astor's Settlement Trusts* [1952] Ch 534 at 542.

14. *Leahy v Attorney-General (NSW)* [1959] AC 457.

15. *Re Astor's Settlement Trusts* [1952] Ch 534; *Re Endacott* [1960] Ch 232; *Armitage v Nurse* [1997] 2 All ER 705 at 713.

16. P Baxendale-Walker, Purpose Trusts (Butterworths Tolley, 1999); Glasson, International Trust Laws (Chancery Law Publishing) para B4.2, B4.3 and B4.27 to B4.31 and Underhill and Hayton, Law of Trusts and Trustees 17th edn, (Butterworths) para 8.144 to 8.156 and Lewin on Trusts (Sweet & Maxwell) 18th edn, para 4-37 to 4-41.

17. *Re Denley's Trust Deed* [1969] 1 Ch 373. See also *Re Lipinski* [1976] Ch 235. In these cases, the question of who was regarded as a beneficiary of a trust was interpreted broadly to include anyone who might potentially benefit from the trust property seemingly ignoring the question of what the nature of that benefit was.

18. *Re Grant's Will Trusts* [1980] 1 WLR 360; Glasson (see fn 16) para B4.19 and Thomas and Hudson (see fn 5) paras 6.19 and 6.20.

19. See *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.

20. P Baxendale-Walker, Purpose Trusts (Butterworths Tolley, 1999) paras 2.110-2.118.

21. *Twinsectra Ltd v Yardley* [2002] 2 WLR 802.

22. *Ibid*, para 100. Glasson however argues that a *Quistclose* trust is not a resulting trust; it is an express trust in favour of the lender with a power vested in the borrower to pay the funds for the agreed purpose, see Glasson (see fn16) para B4.26/18.

23. *Morice v Bishop of Durham* (1804) 9 Ves 339; *Fowler v Garlike* (1830) 1 Russ & M 232; *Kendall v Granger* (1842) 5 Beav 300; *Harris v Du Pasquier* (1872) 26 LT 689 and; *Re Astor's Settlement Trusts* [1952] Ch 534; *McPhail v Doulton* [1971] A.C. 424.

workable.<sup>24</sup> Likewise, if the trust is pointless, harmful or illegal then the trust is likely to fail for being contrary to public policy.<sup>25</sup> Any purpose trust would also need to comply with the law relating to perpetuity.<sup>26</sup>

However, the preponderance of academic authority tends to the view that the problem with purpose trusts as matter of English law, is not one of their essential validity, but a lack of someone to enforce them; in the same way as the Attorney-General is available to enforce a charitable trust and a beneficiary can enforce a trust of which they are a beneficiary.<sup>27</sup> As Lord Wilberforce affirmed in *McPhail v Doulton*,<sup>28</sup> a trust should be upheld if there is sufficient practical certainty in its definition for it to be carried out, if necessary with the administrative assistance of the Court.

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## Purpose trusts and enforcers—the offshore financial centres' solution

Numerous offshore jurisdictions including Jersey, Guernsey, the Isle of Man, Bermuda, Cyprus, the British Virgin Islands, the Bahamas and the Cayman Islands, have enacted legislation to permit the creation of purpose trusts. It is beyond the scope of this article, to consider the specific legislation relating to

purpose trusts for all these jurisdictions; however, some general points can again be made.

It is tempting to assume that the legislation permitting the creation of purpose trusts in the various offshore jurisdictions will all be more or less the same and, as between some jurisdictions, this is certainly the case. However, as between other jurisdictions the approach to the legislation is noticeably quite different. Whilst all the jurisdictions considered above, effectively provide for some form of 'enforcer'<sup>29</sup> it is not always the case that the enforcer need be named or appointed by a mechanism set out in the trust instrument.<sup>30</sup> Some jurisdictions are clear in their legislation that mixed trusts for beneficiaries and non-charitable purposes are possible whereas in others the position is less clear.<sup>31</sup> Likewise, the statutory rights and duties of the enforcer in relation to their functions as enforcer can vary considerably between the different jurisdictions.

As to the question of enforcement of purpose trusts that have been validly established in the jurisdictions mentioned above before the English Courts, it seems likely that they would be recognized under the Recognition of Trust Act 1987, incorporating the Hague Trusts Convention.<sup>32</sup>

In light of the above observations on the genesis of offshore purpose trusts, it is possible to provide a series of questions that should be considered by anyone setting up a trust which is solely for, or includes, non-charitable purposes. In some jurisdictions, the following issues may already be dealt with comprehensively in the relevant legislation but, if not, consideration should be given as to whether they can

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24. *McPhail v Doulton* [1971] A.C. 424 at 457; *R v District Auditor ex parte West Yorkshire Metropolitan County Council* [1986] RVR 24 and Thomas on Powers (1998) (Sweet & Maxwell) pp. 285–287.

25. *Brown v Burdett* (1882) 21 Ch D 667; *M'Caig v University of Glasgow* (1907) SC 231; *Aitken's Trustee v Aitken* (1927) SC 374; *Lindsay's Executor v Forsyth* (1940) SC 458.

26. *Re Moore* [1901] 1 Ch 936; *Re Astor's Settlement Trusts* [1952] Ch 534; *Re Khoo Cheng Teow* [1932] Straits Setts LR 226 and Thomas and Hudson (see fn 5) para 6.26–6.29.

27. See P. Matthews 'The New Trust: Obligations without rights?', in Oakley, *Trends in Contemporary Trust Law*, 1996; Glasson (see fn 16) para B4.29, Underhill & Hayton (see fn 16) para 8.157–8.167, although by comparison it is noticeable that the authors of Lewin seem less enthusiastic on this issue, *Lewin on Trusts*, 18th edn, 4-37–4-48.

28. See *McPhail v Doulton* [1971] A.C. 424 at p. 450.

29. The name given to the person with the power to enforce the purpose trusts varies from jurisdiction to jurisdiction. In the Purpose Trusts Act 2004 of the Bahamas, for instance, 'authorised applicants' is used to define a series of possible persons who may enforce the trust as provided for in the legislation.

30. See Purpose Trusts Act 2004 of the Bahamas and the Trusts (Special Provisions) Amendment Act 1998 of Bermuda, for instance.

31. See for instance, section 99(1) of the Trusts Law 2007 Revision of the Cayman Islands and section 12(1) of the Trusts (Guernsey) Law 2007 where there are express provisions permitting mixed trusts in contrast to the Trusts (Jersey) Law 1984 (as amended) where there are not.

32. See Underhill and Hayton (see fn 16) para 8.158 and Lewin (see fn 16) at para 11–84.

or ought to be dealt with in the trust instrument or in some other way.

- i. If required, are multi-object trusts permissible in the relevant jurisdiction, that is to say trusts for non-charitable purposes and for the benefit of beneficiaries and/or charitable purposes?
- ii. Are the purposes of the relevant trust likely to be valid in the jurisdiction in question? In particular, if the purpose trust is to have a benign function (such as only holding shares) rather than an active function, is this a permissible purpose in the relevant jurisdiction? Also, is there a possibility that the purposes might not be valid for reasons of public policy or because they are harmful or pointless?
- iii. Is the trust administratively workable in light of the particular purposes so that it will not fail for this reason?
- iv. Is the question of perpetuities dealt with adequately so that the purpose trust will not fail for perpetuity?
- v. Are there any applicable *cy pres* type laws in the jurisdiction which might be available to assist in preventing the invalidity of the trust if this is in doubt.
- vi. What happens to the trust assets on the termination of the trust if they have not already been applied?
- vii. Does the trust have a named enforcer and are there suitable provisions available which provide for the resignation or retirement of the enforcer and the succession of the enforcer? Ideally there should be appropriate provisions in this regard.
- viii. If there should be no enforcer, are there default provisions available which allow an enforcer to be appointed by, say, the trustees, the Attorney-General (or equivalent) or the court?

- ix. Are there provisions which provide that the enforcer shall not be a trustee of trust as this should be the case?
- x. What are the duties of the enforcer, is it just to 'enforce' the trust or is this defined in some way? Is the enforcer obliged to engage in active monitoring of the trust's activities or is it purely a passive role? Does the enforcer have particular rights, such as the right to see trust documents and, if so, what are those rights? Does the enforcer have the same rights as beneficiaries of an ordinary trust to bring proceedings relating to the trust, such as proceedings for administration, applications for directions and the right to inspect certain trust documents?
- xi. Are there provisions for the remuneration of the enforcer?

### The duty of the enforcer

It is by no means clear what the true nature of an enforcer's office is but it is suggested that it is likely to carry with it duties of a fiduciary nature. The office of enforcer could not sensibly be regarded as giving the enforcer some unascertained beneficial interest in the trust assets from which his right to enforce the trust emerges (which might arguably be the case if direct parallels were made with a beneficiary's right of enforcement in a trust for beneficiaries); as this could give rise to all sorts of unintended consequences for the enforcer and, perhaps, the settlor. Furthermore, there is clearly no difficulty with beneficiaries (with whom the enforcer's position could be equated in relation to the enforcement of the trust) holding powers which they must exercise as fiduciaries.<sup>33</sup>

In some jurisdictions, attempts have been made to put the question regarding the nature of the enforcer's duty to rest by specifically stating in the relevant legislation that the enforcer's duty is to be 'fiduciary'.<sup>34</sup>

33. *In re Skeats' Settlement* (1889) 42 Ch D 522; *In the Matter of the Z Trust* [1997] CILR 248 and *Re Papadimitriou* [2001–2003] MLR 287.

34. S.101(2) Trusts Law (2007 Revision) of the Cayman Islands states: 'Subject to evidence of a contrary intention, an enforcer is deemed to have a fiduciary duty to act responsibly with a view to the proper execution of the trust'. Section 12(2) of the Trusts (Guernsey) Law 2007 states: 'It is the fiduciary duty of an enforcer to enforce the trust in relation to its non-charitable purposes'. See also, Tsun Hang Tey, 'Trust Enforcer', *Trust Law International*, 2009, Vol. 23, No. 3.

However, defining the duties of the enforcer as 'fiduciary' in some ways raises more problems than it solves, as the concept is generally considered in the context of owing a duty to a person, which clearly does not apply in the case of a purpose trust.<sup>35</sup> Given that a charitable trust is a form of purpose trust, arguably the duties of the enforcer, whether properly described as fiduciary or not, might be ascertained by reference to the duties which apply to trustees of charitable trusts. If so, and subject to the laws of the jurisdiction in question, this might require the enforcer to ensure that the trustees carry out the trust in accordance with statute and the trust instrument, and promote the purposes of the trust.<sup>36</sup> Presumably, also by analogy with the position of fiduciaries generally, the office of enforcer also carries with it an inherent duty to act in good faith and not to place itself in position where its office and personal interests conflict.<sup>37</sup> Doubtless a similar result could be arrived at by making an analogy with the fiduciary duties owed by trustees of a trust for beneficiaries to the beneficiaries of that trust. Also by analogy with the obligations on charitable trustees, where the law of the relevant jurisdiction provides for it, there may also be a duty on the enforcer, when the main purpose of the trust cannot be accomplished without departing from the terms of the trust, to apply to the court for an order in relation to a *cy pres* type scheme if the trustees are not willing to do so.<sup>38</sup>

Following on from this, a further question arises as to whether an enforcer's duty is generally active

or passive. At the one extreme, one might argue that the enforcer is under a duty to continually monitor the activities of the trustees of the trust, whereas at the other, the argument might be that the enforcer need only react if and when they are alerted to some activity by the trustees, which requires intervention. By analogy with the enforcement role of a beneficiary of a trust for beneficiaries, the role of enforcer might be entirely passive, as a beneficiary is not generally under an obligation to enforce the trust in which he has an interest. However, given that the office of the enforcer may well be fiduciary (or at least involve statutory duties of a fiduciary-like nature) it is suggested that the role is unlikely to be entirely passive and some degree of enquiry into the actions of the trustees will be placed on the enforcer.<sup>39</sup> No doubt, in practice, much will turn on the interpretation of the relevant trust instrument and the legislation relating to purpose trusts of the jurisdiction concerned. It will be interesting for practitioners to see how the law develops in this area.

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35. Glasson (see fn 16) at para 4.80 comments as follows in relation to the potentially fiduciary position of the enforcer under the Trust Law (2007 Revision) of the Cayman Islands: 'To whom this fiduciary duty is owed is unclear. In the case of a pure purpose trust, it cannot sensibly be said to be owed to the trust's purposes; nor does it make any sense to say that an enforcer owes such a duty to himself; and there is no indication that the duty is owed to the settlor. Presumably what is meant is that an enforcer is subject to a statutory duty to act and conduct himself with the same degree of responsibility as if he had been appointed an enforcer of a trust for persons.' The issues with the Cayman Islands legislation in this regard appear to be assisted by section 102 which defines the rights of the enforcer.

36. *Harris v Church Comrs for England and Wales* [1993] 2 All ER 300 and Picarda, *The Law and Practice Relating to Charities*, (Butterworths) 3rd edn, 1999, pp. 478, 479.

37. In *Bristol & West Building Society v Mothew* [1998] Ch 1 at 18 Millet L. J. describes a fiduciary as follows: 'A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of the fiduciary. ... A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of third person without the consent of his principal. he is not subject to fiduciary obligation because he is a fiduciary; it is because he is subject to them that he is a fiduciary'. This same passage of the judgement of Millet L. J.'s in *Bristol v Mothew* was cited with approval recently in *Temple Legal Protection Ltd v QBE Insurance* [2009] EWCA Civ 453, See also Snell on Equity, Sweet & Maxwell 31st edn, paras 7-01-7-04.

38. Picarda, *The Law and Practice Relating to Charities*, 3rd edn, 1999, p. 479; *Andrews v M'Guffog* (1886) 11 App Cas 313 at 329. In Guernsey, however, s.69 of the Trusts (Guernsey) Law 2007 would seem to place the primary obligation to apply to the Court for a *cy pres* type scheme on the enforcer whereas in Jersey and the Cayman Islands the obligation would seem to be primarily on the trustee, see Article 47A Trusts (Jersey) Law 1984 (as amended) and s.104 Trusts Law (2007 Revision), respectively.

39. *Re Hay's Settlement Trusts* [1982] 1 WLR 209 at 209; *Edge v Pensions Ombudsman* [2000] Ch 602 at 627 and *Scott v National Trust* [1998] 2 All ER 705 at 717.

## Conflicts of interest—protectors and enforcers

It would clearly be inappropriate to draw clear parallels between the role of a protector to a trust for beneficiaries and an enforcer to a purpose trust, when it comes to their obligations in managing conflicts of interest. However, in the circumstances where an enforcer is occupying a fiduciary position and perhaps even if they are not, it seems obvious that, in the same way as with a protector who occupies a fiduciary position, the enforcer will need to be 'alive' to the possibility of conflicts of interest.<sup>40</sup>

The recent Jersey case of *Centre Trustees*,<sup>41</sup> although a fairly extreme example, highlighted the problems that can potentially arise with the office of protector, particularly when the protector also holds direct or indirect interests in businesses in which the trust is also invested. The following principles can be extracted from the judgement.

- i. When a conflict of interest first comes to light, it is for the protector to disclose the conflict to the trustees and to the beneficiaries (in the case of a fixed trust) or to the principal beneficiaries if practicable (in the case of a discretionary trust).
- ii. How that conflict of interest is managed by the protector will depend upon the protector's powers and the nature of the conflict and how pervasive its effect. The protector may be able to

remain in office if it is in the interests of the beneficiaries for them to do so and if they honestly and reasonably believe that they can discharge their duties in the interests of the beneficiaries. If so they must, like trustees in a position of conflict, run the risk of having to justify the exercise of their powers in hostile litigation and satisfy the Court that any decision taken was not influenced by the conflict. If not, it is their duty to resign and if they fail to do so it is the duty of the trustees to apply to Court for their removal.

- iii. Where the protector is actively pursuing claims against the assets of the trust of which they are a protector, the protector is under a clear duty to resign from the moment it is contemplated that claims would be advanced by them against the trust.
- iv. If the protector also holds a power to appoint a new protector and there is no provision in the trust instrument for the resignation of the person holding this power, they should formally acknowledge that the conflict requires their resignation and cooperate with the trustees in the appointment of a successor protector and an application to the Court for their replacement.

A further example where the position of a protector was potentially compromised is the Jersey case of *Re X's Settlement*.<sup>42</sup> This case concerned an application

40. See Snell (see fn 37) para 7-25-7-30 and the dicta of Lord Herschell in *Bray v Ford* (1896) AC 44 at 51 as quoted with approval in *Public Trustee v Cooper* (2001) WTLR 901 as follows: 'It is an inflexible rule of the court of equity that a person in a fiduciary position...is not, unless otherwise expressly provided...allowed to put himself in a position where his interest and duty conflict ....I regard it rather as based on the consideration that, human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect'.

41. *Centre Trustees (CI) Limited v Jacques Van Rooyen* [2009] JRC 109. *Centre Trustees* concerned family trusts including the VR Family Trust settled by Mr Van Rooyen for the benefit of certain members of his family which held interests in South African mining operations via a holding company, Terret. The protector to the VR Family Trust was a Mr Pabst. Mr Pabst held powers of veto in respect of most of the significant powers relating to the trust which were vested in the trustees. Mr Pabst held substantial interests in Terret himself through his own trust and became a director of Terret. Over a number of years, substantial disputes arose between the trustees of the VR Family Trust and Mr Pabst concerning their respective interests in and the business dealings of Terret. The result of this was, among other matters, that Mr Pabst sought to influence events by exercising his powers as protector of the VR Family Trust to appoint additional trustees to the trust who Mr Pabst felt would be sympathetic to his personal interests. Notwithstanding the very clear and obvious conflicts of interest which arose in Mr Pabst's position as protector to the VR Family Trust, Mr Pabst remained in office and indicated up to the point of the Court hearing that his personal voluntary decision not to exercise his powers of veto as protector were sufficient to manage any potential conflict of interest. The Royal Court disagreed relying, in part anyway, on an analogy with the duties of trustees as set out in *Public Trustee v Cooper* (2001) WTLR 901. It held that regardless of whether the powers vested in Mr Past as protector were fiduciary powers or limited powers that Mr Pabst was obliged to resign his position.

42. *Re X's Settlement* (1994) B.O.C.M Vol. 1, p. 600 (Jersey RC). *Re X* concerned an application by a Jersey trustee to make disclosure of the existence of a trust to the deceased US resident beneficiary's executors. The application was resisted by the protector to the trust who was UK solicitor and seemingly acting in best interests of deceased beneficiary and her family. The protector sought to be indemnified and remuneration in relation to application. In the judgement, the Bailiff made the following comments 'We are bound to say that some of his [the protector's] actions came very close to intermeddling' and that the 'Respondent as protector will not attempt to remove trustees without further order of the Court'. The protector was indemnified up to date of hearing for his expenses but the Court held that any further expenses were not justified.

for an order by the trustees that they be entitled to disclose information concerning the trust to a third party which the protector was resisting. The actions of the protector, although apparently well-intentioned, were seemingly not well received by the court and the court described the protector's activities as coming close 'to intermeddling'.

It would be inappropriate to suggest that, in relation to purpose trusts, the references to the 'protector' in the principles arising from *Centre Trustees* highlighted above concerning conflicts of interest could simply be replaced by references to the 'enforcer'. This is so, not least, because a purpose trust has no beneficiaries whom the enforcer needs to consider. However, it is submitted that some of the principles are of relevance to the position of an enforcer and, even more so, when the enforcer has powers vested in them in addition to their duties relating purely to enforcing the trust (which is not uncommon). Equally well, in the case of a mixed trust for both purposes and beneficiaries, the principles arising from *Centre Trustee* may be highly relevant to the enforcer's office.

Furthermore, one might legitimately argue that, even in the case of a pure purpose trust, the duty placed on an enforcer to avoid conflicts of interest should be at least equal to, and possibly even greater than, that placed on a protector in a fiduciary position to a trust purely for beneficiaries for the following reason. In the case of a trust for beneficiaries there is, at least, the possibility that the beneficiaries would be able to seek relief from the Court to prevent the activities of an errant protector, if the trustees were not willing to take action against the protector themselves. In the case of a 'pure' purpose trust, as there are no beneficiaries, the only person available to ensure that the trust is administered properly by the trustees is the enforcer. Thus, one might argue that an enforcer is under duty to apply the highest levels of probity to their office so as to avoid conflicts of interest.

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*Furthermore, one might legitimately argue that, even in the case of a pure purpose trust, the duty placed on an enforcer to avoid conflicts of interest should be at least equal to, and possibly even greater than, that placed on a protector in a fiduciary position.*

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## Conclusions

Plainly, the legal issues concerning the 'pure' offices of protector and enforcer are quite different. However, an enforcer of a 'pure' purpose trust may also hold powers (such as those commonly vested in protectors) in addition to their duties relating purely to enforcing the trust. In these circumstances it is submitted that similar considerations will apply as between the duties of enforcers and protectors, at least in relation to the non-enforcing powers vested in the enforcer. Likewise, where an enforcer is acting in a fiduciary capacity in relation to the enforcement of a purpose trust, as with a protector who is acting in a fiduciary capacity in relation to a trust for beneficiaries, it seems likely that there will be a requirement to act in good faith in the interests of the objects of the trust as a whole<sup>43</sup> and to avoid conflicts of interest.

In particular, in the case of a mixed trust of purposes and beneficiaries where powers of appointment or veto (over the trustees' power of appointment) which directly concern the interests of the beneficiaries are vested in the enforcer; the enforcer will need to exercise a considerable degree of care in carrying out their duties and obligations to ensure that they are carried out in accordance with the relevant trust instrument and the proper law of the trust.

It will be apparent from the above comments that, in the case of some trusts at least, there is the potential for the issues facing protectors and enforcers to become quite complex. If and when complexities do arise, it is likely to be very unhelpful if the person

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43. The word 'objects' being used here to describe beneficiaries or non-charitable purposes.

occupying the position of a protector or enforcer is also potentially subject to a conflict of interest. It seems unassailable that the best way to avoid a conflict of interest as a protector or enforcer is not to accept such office at the outset if there is a possibility that a conflict of interest could arise in the future.

As a result of recent events in the financial markets and the current general economic situation, it seems all but inevitable that there will be even greater scrutiny by tax authorities and financial regulators as to how financial structures operate with an 'eye' to recovering revenue and reducing risk, respectively. In such a 'brave new world', it seems unlikely that there will be much sympathy from such bodies towards persons holding the offices of trustee, protector and enforcer (and those whose interests they are seeking to protect) where best practice is not routinely applied to such

offices. Such considerations, especially in relation to the reduction of risk for companies, have given rise to the significant increase in the number of non-executive directors being appointed to the boards of companies. It is suggested that, in such an environment, settlors, their advisers and professional trust companies should, where appropriate, make best use of companies and other organizations which specialize in the provision of the services of protectors and enforcers, which are also independent of the trustees and are not involved in the day-to-day dealing of the settlor's or beneficiaries' affairs. In so doing, the issues facing persons holding such offices should be dealt with in the most professional manner possible with full appreciation of the issues concerned, whilst at the same time avoiding any possibility of a conflict of interest.