

THE DUTIES OF A TRUST ENFORCER

This article examines the office of trust enforcer introduced by some offshore trust jurisdictions. It analyses the primary role of an enforcer in a private purpose trust, and explores the essence of the duties of an enforcer and how the enforcement mechanism can be improved.

Tsun Hang TEY*

*BCL (Oxford), LLB (KCL), AKC; Barrister (Gray's Inn),
Advocate & Solicitor (Singapore), Advocate & Solicitor (Malaya);
Associate Professor, Faculty of Law, National University of Singapore.*

I. Introduction

1 The office of trust enforcer,¹ found in the offshore trust jurisdictions, is a non-beneficial power holder² in the context of private purpose trusts, and exists for the sole purpose of monitoring the trustee's activities and the performance of the purpose of the private trust.³

2 Much has been written for or against the conventional English position that private purpose trusts, bar a few anomalous exceptions,⁴ are void. Much has also been written on the notion of "beneficially

* The author is grateful to Terence Tan and Ouyang Xiaohui for their assistance.

1 See, eg, the Cook Islands' International Trusts Act 1984 (amended 2004) s 12(2), Cyprus' International Trusts Law 1992 s 7(3), Labuan's Offshore Trusts Act 1996 s 3, the Seychelles' International Trusts Act 1994 s 14(4), the British Virgin Islands' Trustee Act (as amended 2003) s 84A(17), Belize's Trusts Act (Cap 202, 2000 Rev Ed) s 15(1)(c), Trusts (Guernsey) Law 2007 s 12(1)(a), Mauritius' Trusts Act 2001 s 19(2)(b), the Isle of Man's Purpose Trust Act 1996 s 1(1)(d)(i), Trusts (Jersey) Law 1984 (amended 1996) Art 10A, Bermuda's Trusts (Special Provisions) Amendment Act 1998 s 12B, Brunei's International Trusts Order 2000 s 79 (2).

2 Tsun Hang Tey, "Trust Protector" (2008) 20 SAclJ 99.

3 Donovan Waters, "Protectors and Enforcers: Drafting the Trust Instrument" [2000] 8(4) JITCP at 24.

4 These were classified by J H C Morris & W Barton Leach, *The Rule against Perpetuities* (London: Stevens & Sons Ltd, 1956) at p 296 into five categories: (i) trusts for the erection or maintenance of monuments or graves; (ii) trusts for saying of masses (where such trusts are not regarded as charitable); (iii) trusts for the maintenance of particular animals; (iv) trusts for the benefit of unincorporated associations (although this group is more doubtful); (v) miscellaneous cases. This classification was also adopted by Lord Evershed MR in *Re Endacott* [1960] Ch 232 at 246. See also *Re Goode* [1960] VR 117; and *Leahy v A-G (NSW)* [1959] AC 457.

ownerless” property that English law traditionally finds repugnant,⁵ and on whether the character of the trust is obligational or proprietary.⁶ Traditionalists take the position that only beneficiaries with *proprietary interests* who stand *directly* to benefit from the trust may enforce the trust.⁷ Thus, private purpose trusts are entirely anomalous⁸ and impossible of justification.⁹ Lord Evershed’s words in *Re Endacott*,¹⁰ where he referred to the Privy Council decision of *Leahy v AG (NSW)*,¹¹ that “a trust, not being a charitable trust, in order to be effective, must have ascertained or ascertainable beneficiaries”, is often cited as support.

3 Other academics advocate a broader perspective. A trust is valid as long as it is *enforceable by any person*,¹² even if he has no interests in the trust fund. The concern of private purpose trusts, also known as “trusts of imperfect obligation”,¹³ lies in *enforceability* and court control. As long as a trust deed supplies a mechanism for the enforcement of a private purpose trust, and the obligation is enforceable,¹⁴ and the trustee

5 The rationale of the beneficiary principle is explained by Sir William Grant MR in *Morice*, that “there must be somebody in whose favour the court can decree performance”: (1804) 9 Ves 399.

6 For example, James Penner, “Exemptions” in *Breach of Trust* (Peter Birks & Arianna Pretto eds) (Oxford: Hart Pub, 2002) p 241 at p 254.

7 See Paul Matthews, “From Obligation to Property, and Back Again?” in *Extending the Boundaries of Trusts and Similar Ring-fenced Funds* (David Hayton ed) (The Hague; London: Kluwer Law International, 2002) p 203 at p 223. Matthews proposes the right-duty relationship. The trustees should only owe duties to the beneficiaries, as only they have a corresponding right to make the trustee account to them for the carrying out of these duties.

8 J D Heydon & M J Leeming, *Jacob’s Law of Trusts in Australia* (Chatswood, NSW: LexisNexis Butterworths, 7th Ed, 2006) at para 1107.

9 *Re Wood* [1949] Ch 498 at 501, where Harman J held that “a gift on trust must have a *cestui que trust*”; *Re Astor’s Settlement Trusts* [1952] Ch 534; *Re Shaw* [1957] 1 WLR 729; *Re Recher’s Will Trusts* [1972] Ch 526 at 538, echoing Lord Parker in *Bowman v Secular Society* [1917] AC 406 at 441: “A trust to be valid must be for the benefit of individuals or must be in that class of gifts which the courts recognize as charitable.”

10 [1960] Ch 232 at 246.

11 [1959] AC 457.

12 Deriving support from Millet LJ’s statement in *Armitage v Nurse* [1998] Ch 241 at 253, that “there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them”, and otherwise “there are no trusts”.

13 Hart, “What is a Trust?” (1899) 15 LWR 291, cited in Anthony Duckworth, “STAR WARS: Smiting the Bull” (1999) 13 TLI 158 at 165.

14 For example, in *Re Shaw* [1957] 1 WLR 729 at 744–745, Harman J cited Roxburgh J in *Re Astor’s Settlement* [1952] Ch. 534 at 542 (“But if the purposes are not charitable, great difficulties arise both in theory and in practice. 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.”) and enunciated that the rationale for holding a private purpose trust invalid is that the court cannot control the trust as the object cannot complain to the court. Enforceability was also the

(cont’d on the next page)

in accepting the trust acknowledged that he owed a correlative duty to account to the settlor, equity should respect the intention of the settlor to confer the right upon the enforcer.¹⁵

4 This article is much less ambitious. It explores and clarifies the nature of duties of trust enforcer, by making a close reference to the specific role an enforcer plays in the context of private purpose trusts in the offshore trust jurisdictions.

II. The offshore statutory models

5 The private purpose trust, which exists to facilitate the achievement of a specific purpose,¹⁶ has increasingly been used in the commercial context to provide a means of asset securitisation or to take transactions off the balance sheet of a company.¹⁷ Private purpose trusts also have many valuable estate planning and commercial uses, such as enabling one to set up a trust which contains both philanthropic and charitable purposes, to separate voting rights from economic control, to hold shares of a private trust company, to purchase assets or to finance transactions to provide security for an entity which then finances the purchase.¹⁸ The office of enforcer, a valuable tax-planning tool, provides a layer of confidentiality and flexibility to the tax-planning process.

6 Due to the absence of beneficiaries in a private purpose trust, an enforcer must be appointed to oversee the trustees – to ensure that the trust is administered to satisfy the purpose for which it was established. The introduction of the office of enforcer is intended to overcome the historic objection to private purpose trusts. An enforcer takes over the traditional role of a beneficiary in an onshore person trust – compelling an accounting by the trustee or bringing an action against the trustee when due and proper administration of the trust is not satisfactorily

stated rationale in some of the anomalous cases, most notably, *In Re Thompson* [1934] Ch 342, where the reasoning of *Pettingall v Pettingall* (1842) 11 LJ Ch 175, cited in *Re Thompson* [1934] Ch 342 at 343, was followed. In *Re Thompson*, despite the absence of a human beneficiary, Clauson J upheld the bequest towards the promotion of foxhunting because of the 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.

15 David Hayton, “Developing the Obligation Characteristic of the Trust” (2001) 117 LQR 96 at 98.

16 The Asset Protection Book, “Purpose Trusts” <http://www.assetprotectionbook.com/purpose_trusts.htm> (accessed 10 August 2008) at p 1.

17 The Asset Protection Book, “Purpose Trusts” <http://www.assetprotectionbook.com/purpose_trusts.htm> (accessed 10 August 2008) at p 1.

18 Higgs & Johnson, “Guide to Bahamian Trusts” <http://www.higgsjohnson.com/legalGuides/guide_%20bahamian_trusts.pdf> (accessed 10 August 2008) at p 5.

performed.¹⁹ The appointment of an enforcer is considered crucial in ensuring that trustee conduct is monitored, and any fraud and fault on the part of the trustee is remedied as soon as possible.²⁰ The appointment of an enforcer thus provides the settlor with an additional layer of security.

7 The trustee still retains ownership of the trust assets, which are to be used for the furtherance of the specific purpose of the trust. However, he is now subject to certain duties owed to the enforcer to use the trust assets exclusively for the non-charitable purpose.²¹

8 An enforcer may be a single person, a committee of persons or a corporation chosen by the settlor.²² The powers granted to him may be similar to that granted to a trust protector, such as the power to remove a trustee and appoint a new trustee.²³ There is generally no restriction on who can be appointed an enforcer – any person, whether legal or natural, is eligible.²⁴ A settlor can even appoint himself as the first enforcer under the terms of his trust deed as the most eligible person for the enforcement duties, while at the same time incorporating provisions for the appointment of subsequent enforcers.²⁵

9 The commercial demand was such that²⁶ there are now well over a dozen offshore trust jurisdictions which permit non-charitable purpose trusts without identifiable beneficiaries.²⁷ Whilst Nauru was the

19 Donovan Waters, "Protectors and Enforcers: Drafting the Trust Instrument" [2000] JTTC 1 at 1–2.

20 Manitoba Law Reform Commission, *Private purpose trusts* (Report #77) (September, 1992). The Commission regarded it as essential that any domestic legislation that would introduce private purpose trusts into Manitoba set out who may be an enforcer (the trustee was excluded), how the enforcer is to be appointed, removed and replaced, and the duties of the enforcer.

21 *Underhill and Hayton Law of Trusts and Trustees* (London: LexisNexis Butterworths, 17th Ed, 2007) at p 152.

22 See, eg, "a person or persons named in the trust instrument appointed to enforce the trust": the Cook Islands' International Trusts Act 1984 (amended 2004) s 12(2), Cyprus' International Trusts Law 1992 s 7(3), Labuan's Offshore Trusts Act 1996 s 3, the Seychelles' International Trusts Act 1994 s 14(4).

23 David Harris, "Special Trust Arrangements in Bermuda" (2002) 5 PCB 286 at 288–289.

24 Bedell Cristin, "Private purpose trusts" <www.bedellproperty.com/main/cms/includes/asp/CMFileGetFile.asp?fi=1454> (accessed 10 August 2008).

25 Even if the machinery for the appointment of a successor enforcer breaks down, a court ought to hold that it has inherent jurisdiction to appoint an enforcer as a vital officer of the trust. For example, the Isle of Man Court of Appeal appointed a protector in *Steele v Paz Ltd*, (10 October 1995) Butterworths Offshore Cases and Materials, vol 1, pp 338–418, CA of Isle of Man. (P W Smith QC & T B Hegarty QC).

26 *1 International Trust Laws* (Glasson ed, Update 8 May 1997) at para A24-14.

27 The Principality of Liechtenstein enacted purpose trust legislation as long ago as 1926. Lesser-known jurisdictions followed suit: Nauru in 1972 and the Cook Islands in 1984. It was not until the 1990s that more established offshore trust

(cont'd on the next page)

pioneer in this field in 1972,²⁸ the idea took off only with Bermuda's Trusts (Special Provisions) Act 1989, which has since been adopted by several other offshore trust jurisdictions.²⁹

10 The Cayman Islands' Special Trusts (Alternative Regime) Law 1997 ("STAR Law"), now substantially incorporated into Part VIII of the Trusts Law (2001) Revision, is arguably the most sophisticated,³⁰ and boldest,³¹ addition to the non-charitable trust legislation in the offshore trust jurisdictions. Coupled with the Perpetuities (Amendment) Law 1997, it is arguably the leading example³² of the non-charitable purpose trust idea.³³

11 Many offshore trust jurisdictions, such as the British Virgin Islands,³⁴ the Isle of Man,³⁵ and Mauritius,³⁶ provide that the purposes must be "specific, reasonable and possible",³⁷ and "not immoral, contrary to public policy or unlawful". The critical dividing line between valid and invalid trusts is thus unclear. The term "reasonable" suggests that the judge may make a subjective opinion of whether the settlor's dispositions are sensible. The term "possible" is clear enough, but the legislation does not provide for the circumstance where the trust is partly possible, and partly impossible.

jurisdictions introduced their own statutes. Purpose trust legislation is now in force in Anguilla, Barbados, Bermuda, the British Virgin Islands, the Cayman Islands, the Cook Islands, Cyprus, the Isle of Man, Jersey, Liechtenstein, Mauritius, Nauru and the Seychelles.

28 Foreign Trusts, Estates and Wills Act 1972.

29 Trusts (Special Provisions) Act 1989. See also Antony G D Duckworth, "The Role of Offshore Jurisdictions in the Development of the International Trust" 32 *Vand J Transnat'l L* 879 at 937.

30 David Hayton, "STAR Trusts" (1998) 4 *Amicus Curiae* 13.

31 Andrew Huxley, "Rhodes, Arakan, Grand Cayman: Three Versions of Offshore" in *Comparative Law in Global Perspective* (Ian Edge ed) (Ardsley, NY: Transnational Pub, 2000) p 145 at p 147.

32 See Cayman Islands' Special Trusts (Alternative Regime) Law 1997 s 6 which provides that the STAR trust can apply to trusts for human beneficiaries, charitable or private purpose trusts, and trusts for purposes and beneficiaries.

33 Paul Matthews, "From Obligation to Property, and Back Again?" in *Extending the Boundaries of Trusts and Similar Ring-fenced Funds* (David Hayton ed) (The Hague; London: Kluwer Law International, 2002) p 203 at p 232. See also, Hart, "What is a Trust?" (1899) 15 *LWR* 291, cited in Anthony Duckworth, "STAR WARS: Smiting the Bull" (1999) 13 *TLI* 158 at 164; Kiralfy, "Purpose Trusts, Powers and Conditions" (1950) 14 *Conv* 374, cited in Anthony Duckworth, "STAR WARS: Smiting the Bull" (1999) 13 *TLI* 158 at 164.

34 Trustee (Amendment) Act 2003 s 84(A)(3).

35 Purpose Trusts Act 1996 s 1(1)(b).

36 Trusts Act 2001 s 19.

37 Anthony Duckworth, "STAR WARS: The Colony Strikes Back" (1998) 12 *TLI* 16. Duckworth suggests that "specific" and "reasonable" are vague, and may aggravate uncertainty.

III. The duties of trust enforcer

A. *Trust enforcer as fiduciary*

12 In defining the duties of an enforcer, it is important to decide whether an enforcer is a fiduciary. The primary role of an enforcer in a private purpose trust is to monitor the trustee's activities so as to ensure that the purpose of the trust is carried out. In order to ensure that the enforcer carries out its role expediently, certain duties should be imposed on it.

13 In the case of an enforcer appointed in a private purpose trust, it is clear that the objective of the trust is a purpose, for example to hold shares in a company, and the role of the enforcer is (as it were) to act on behalf of, and for the furtherance of, that purpose, by monitoring the trustee to ensure that the trustee fulfils his duties by carrying out the purpose of the trust.

14 In view of its role, it is argued that the enforcer is a holder of power within the trust arrangement and that its position is that of a fiduciary. It has also been suggested that if mainland courts were asked to rule with regard to a private purpose trust, they would inevitably hold that the role of the enforcer of trustee's duties is a fiduciary role.³⁸

15 The argument that an enforcer is a fiduciary³⁹ is also supported by the STAR regime of the Caymans Islands – the Special Trusts (Alternative Regime) Law 1997.⁴⁰ The legislation makes it mandatory that there must be an enforcer⁴¹ and the office is expressly stipulated to be a fiduciary one.⁴² Criminal sanctions are imposed if the requirement for the appointment of an enforcer is not adhered to.⁴³

38 Donovan Waters, "Protectors and enforcers: Drafting the Trust Instrument" [2000] JITCP at 20.

39 See also Belize's Trusts Act (Cap 202, 2000 Rev Ed) s 16(5) which provides that a trust protector shall owe fiduciary duties to either (i) the beneficiaries or (ii) the purpose for which the trust is created.

40 See Special Trusts (Alternative Regime) Law 1997.

41 Special Trusts (Alternative Regime) Law 1997 s 7(2) states:

The only persons who have standing to enforce a special trust are such persons, whether or not beneficiaries, as are appointed to be enforcers –
(a) by or pursuant to the terms of the trust; or
(b) by order of the court.

42 Special Trusts (Alternative Regime) Law 1997 s 8(2) 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.

43 Special Trusts (Alternative Regime) Law 1997 s 7(5) states:

In the circumstances described in subsection (4)(c), the trustee shall within 30 days apply to the court for the appointment of an enforcer, or for the administration of the special trust under the direction of the court, or for such
(cont'd on the next page)

16 In the Cayman Islands⁴⁴ and Guernsey,⁴⁵ an enforcer is presumed to have a fiduciary duty to act responsibly with a view to the proper execution of the trust. This presumption may be rebutted by evidence of a contrary intention. However, the specific fiduciary duties to which an enforcer is subject are not described in detail.

17 In Brunei, an enforcer with a duty to enforce a special trust has a duty to “act responsibly with a view to enforcing the proper execution of the trust, and to consider responsibly at such intervals as the enforcer reasonably considers appropriate whether and how to exercise the power and then to act accordingly”.⁴⁶ Moreover, a trustee, another enforcer, or any person expressly authorised by the trust instrument, has standing to bring an action against an enforcer to compel it to perform its duties if it fails to do so.⁴⁷

18 In Mauritius, although there is no express provision on the duties of an enforcer, the legislation provides that it should not place itself in a position which may conflict with its duties to enforce the purposes of the trust; derive directly or indirectly any profit by reason of its appointment other than any reasonable fee for its service and for any reasonable expenses which it may have incurred in the discharge of its duties; nor enter on its own account into any dealing with the trustee of the purpose trust or in relation to the trust property of the purpose trust of which he is an enforcer.⁴⁸

19 In Guernsey, although there is no express provision on the duties of an enforcer, the legislation provides that, subject to the court’s approval, or provisions of the Act or the terms of the trust, it shall not derive, directly or indirectly, any profit from his appointment, cause or permit any other person to derive any such profit, or on his own account either enter into any transaction with the trustees, or relating to the trust property, which may result in any such profit.⁴⁹

other order as the court shall think fit and, if a trustee knowingly fails to do so, he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding \$10,000.

See also s 7(4)(c):

If there is no enforcer who is of full capacity and who –

- (i) is a beneficiary; or
- (ii) has a duty to enforce and is fit and willing to do so.

44 See Special Trusts (Alternative Regime) Law 1997 s 8(2).

45 See The Trusts (Guernsey) Law 2007 s 12(2).

46 See International Trusts Order 2000 (17 July 2000) ss 81(1) and 81(2).

47 See International Trusts Order 2000 (17 July 2000) s 81(3).

48 See Mauritius Trusts Act 2001 ss 21(4)(a)–21(4)(c).

49 See Trusts (Guernsey) Law 2007 s 13(1).

20 In contrast, the legislation in the Bahamas and Bermuda are silent on the duties of an enforcer.⁵⁰

B. The content of duties

21 It is argued that a routine transplantation to an enforcer of the fiduciary standards applied to trustees would be a mistake.⁵¹ Settlers generally expect an enforcer to monitor the activities of the trustee, to ensure that the latter fulfils his duties of carrying out the purposes of the trust. This is akin to the role of a “watchdog” – a different role from that of a trustee.

22 The content of the duties owed by an enforcer should not be dependent on the labelling of that office as enforcer or trustee. Since there is a distinction between duties which are solely fiduciary, and duties which may be fiduciary or non-fiduciary, it is argued that the question of whether the specific duties owed by an enforcer are fiduciary ones should depend on the substance of the obligations.

23 It has been suggested above that an enforcer is generally in a fiduciary position with regard to the powers it holds, but it does not follow that every duty owed by it would be a fiduciary duty. Accordingly, it would be difficult for courts to come up with a precise formulation of the fiduciary rules which should be applied to an enforcer. As such, it is argued that a settlor should ideally specify the exact standards which an enforcer must meet in the exercise of its powers.

C. Trust enforcer as co-trustee?

24 An enforcer should not be treated as a trustee; that goes against the very rationale behind the appointment of an enforcer – to ensure that the trustee carries out his duties in accordance with the purposes of the trust.

25 However, there may be situations where an enforcer may be treated as no different from a co-trustee – when an enforcer is armed with a wide array of powers, for example, when it is not only given veto powers over any decisions made by the trustee, but also more extensive powers, such as a power to replace the trustee and directive powers over investments and distributions.

50 See also St Lucia’s International Trusts Act (15 of 2002) s 21, which, in allowing for non-charitable purpose trusts so long as they are reasonable, specific, capable of fulfilment and are not unlawful or contrary to public policy, is totally silent on trust enforcer.

51 Stewart E Sterk, “Trust Protectors, Agency Costs, and Fiduciary Duty” (2006) 27 *Cardozo L Rev* 2761 at 2785.

26 Generally, a settlor would want to avoid a situation where an enforcer is treated as a co-trustee by the court. Such a situation would erode the advantage of appointing an enforcer (instead of a co-trustee in the first place) – that an enforcer is to check and monitor the actions of the trustees, and the latter retain the primary responsibilities for the making of any decisions pertaining to the trust. Since an enforcer need not be cognisant of every possible detail of the trust, monitoring costs are minimised.⁵² However, an enforcer treated as a co-trustee would result in an increase in monitoring costs since co-trustees make decisions by consensus, with each co-trustee contributing equally to each decision.

D. Duty to whom?

27 There remains an important difficulty, even if an enforcer is classified as discharging a fiduciary role – to whom does it owe its fiduciary duties? The statutes of a number of offshore jurisdictions which provide for the role of an enforcer remain silent over this point.⁵³

28 Since a private purpose trust has no beneficiaries, the easy answer would be that an enforcer owes fiduciary duties to the settlor, especially if the settlor can compel the enforcer to act. However, this remains a novel idea which has not been accepted by any courts, primarily because this would be contrary to the basic intention of an irrevocable trust, where the settlor drops out of the picture after making the declaration and loses control directly or indirectly over the assets concerned.⁵⁴ Questions would also be raised as to whether the “trust” is

52 See Stewart E Sterk, “Trust Protectors, Agency Costs, and Fiduciary Duty” (2006) 27 *Cardozo L Rev* 2761 at 2776. Another advantage is that it limits the potential for *quid-pro-quo* decision-making by co-trustees who have to interact on a regular basis with respect to trust administration.

53 See, however, for example, Trusts (Jersey) Law 1984 (amended 1996) Art 10B(1) which stipulates that “[i]t shall be the duty of an enforcer to enforce the trust in relation to its non-charitable purposes”, the Cayman Islands’ Special Trusts (Alternative Regime) Law 1997 s 8(2) which provides that “[s]ubject 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”, (Trusts (Guernsey) Law 2007 s 12(2) which stipulates that “[i]t is the fiduciary duty of an enforcer to enforce the trust in relation to its non-charitable purposes”, Belize’s Trusts Act (Cap 202, 2000 Rev Ed) s 16(5) which provides that a trust protector shall owe fiduciary duties to either (i) the beneficiaries or (ii) the purpose for which the trust is created.

54 See *Hayton and Marshall: Commentary and Cases on the Law of Trusts and Equitable Remedies* (London: Sweet & Maxwell, 12th Ed, 2005) at p 16: “A trust is not a contract like a contract for the benefit of a third party or parties or a contract of agency ... once the settlor has made his unilateral transfer of his assets to the trustee to own as a segregated patrimony, he *drops out of the picture and cannot tell the trustee what to do*: the trustee’s obligations are independent obligations owed exclusively to the beneficiaries who alone have correlative rights against the
(cont’d on the next page)

really a sham, since it begins to take on the appearance of an agency rather than a genuine trust, so as to perpetuate the settlor's control over the trust.⁵⁵

29 It is likely that a court would hold that a trust is a sham in a situation where an enforcer owes a fiduciary duty to the settlor, and where they intended to create a false or misleading appearance to third parties that certain legal rights and obligations have been created. This would be the case when a settlor seeks to retain control of a trust he has created by naming himself as the beneficiary, and appointing an enforcer to ensure that the trust is enforced accordingly to achieve the settlor's purposes.⁵⁶

30 Traditionally, a fiduciary duty is imposed on one party where he has undertaken responsibility for the property or affairs of another, so as to ensure that he does not exploit his position for his own benefit at the expense of the other party, with whom he would be in a relationship of trust or confidence. In solving the conundrum posed by the identity of the party to whom an enforcer owes its fiduciary duties, it is suggested that this traditional understanding of a fiduciary duty be split into two separate points.

31 The first point is that a party who has undertaken such responsibility for the property or affairs of another has to be subject to a fiduciary duty. Here, an enforcer clearly falls into this category as it has assumed responsibility for ensuring that the assets put into the private purpose trusts by the settlor are used for the settlor's purposes.

32 The second point pertains to the identity of the party to whom a fiduciary owes its duties. In a trust for beneficiaries, the trustee would owe fiduciary duties to a beneficiary, because the latter is the beneficial owner of the trust assets. However, in the context of an enforcer

trustee." [emphasis added] However, counter-arguments have also been raised by a number of commentators, who are in favour of at least limited settlor standing, which would allow settlors to enforce trust terms and the trustee's adherence to his fiduciary duties. Langbein advances a contractarian view of trusts whereby the trust is analogised to a third-party beneficiary contract. He argues that since the promisee in a third-party beneficiary contract can bring suit to enforce such contracts, the analogous actor in trust law, the settlor, should likewise be able to bring suit to enforce the trust terms agreed upon with the trustee. See John H Langbein, "The Contractarian Basis of the Law of Trusts" (1995) 105 Yale LJ 625. Stikoff also makes a similar argument based on the agency costs theory of trusts. See Robert H Stikoff, "An Agency Costs Theory of Trust Law" (2004) 89 Cornell L Rev 621 at 668-669.

55 *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802, [1967] 1 All ER 518 at 528 (CA) per Diplock LJ. See also, Matthew Conaglen, "Sham Trusts" (2008) 67 Cambridge LJ 176.

56 Paul U Ali, "Publication Review: Trusts and Related Tax Issues in Offshore Financial Law by Rose Marie-Antoine" (2006) 21(1) JIBLR 58 at 58.

appointed in a private purpose trust, there is only a purpose and no party to whom an enforcer can owe its fiduciary duties. As such, in the event that an enforcer breaches its fiduciary duties, it is suggested that the trust instrument must expressly provide for a person who has the standing to bring an action for the enforcement of the duties of an enforcer. Such a person can be a trustee, another enforcer, or any person expressly authorised by the trust instrument.⁵⁷

33 Adopting this modified structure of fiduciary duties to which an enforcer is subject ensures that the office of enforcer remains a fiduciary one, and that there is always an interested party who can step in to bring an action against an enforcer in the event of it breaching its fiduciary duties.

E. Excluding the duties?

34 Another important issue that should be considered is whether the duties of an enforcer can be excluded. A settlor might grant an enforcer power free of duties when the power is being given by the settlor for the benefit or protection of the holder, or as a privilege or right of patronage, or if the settlor's intention is to enable the enforcer to assist, not to require him to do so – a moral duty perhaps, but not a legal duty.

35 The absence of a legal duty may reflect either the enforcer's unwillingness to accept duty and the consequent risk of litigation and liability, or the settlor's view that the prospects of achieving his objectives are improved by excluding any duties owed by the enforcer. However, the wisdom of such a move by the settlor can be questioned, especially if the power granted to the enforcer is such that he could, by his misguided action or inaction, disrupt the administration of the trust or compromise the achievement of the settlor's objectives.

36 A parallel can be drawn with exemption clauses for trustees. Generally, if a trustee can prove that the settlor knew, and approved, of the clause in the trust instrument which exempts the trustee from liability for a breach of trust upon a fair and non-restrictive construction of the clause, then the trustee would be able to escape liability for such a breach unless it was a dishonest or reckless breach of trust.⁵⁸ As Millett LJ held in *Armitage v Nurse*:⁵⁹

57 Adopted from the Cayman Islands' Special Trusts (Alternative Regime) Law 1997 s 8(3).

58 David Hayton, *Hayton and Marshall: Commentary and Cases on the Law of Trusts and Equitable Remedies* (London: Sweet & Maxwell Ltd, 12th Ed, 2005) at p 659. Hayton also points out that this is subject to the principle that "the jurisdictions of the court as to pure matters of law cannot be ousted by provisions in the trust
(cont'd on the next page)

[T]here is an irreducible core of obligations owed by trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts.

37 However, he expressly limited those core obligations of a trustee to his duty to perform the trust honestly and in good faith for the benefit of the beneficiaries.⁶⁰

38 Since an enforcer is a power-holder within a trust, it is argued that it owes an irreducible core of obligations – to act responsibly so as to enforce the proper execution of the trust, and to consider at intervals which it reasonably considers appropriate whether and how to exercise its powers and then to act accordingly – which can be enforced by a trustee, another enforcer, or any person expressly authorised by the trust instrument. These core obligations cannot be excluded in anyway; doing so erodes the crucial role played by an enforcer in a private purpose trust – to monitor the activities of the trustees so as to ensure that they are in accordance with the purposes of the trust.

IV. Improving the enforcement mechanism

39 Under the Cayman Islands' "alternative regime", if the STAR trust is chosen, the beneficiaries would not have *locus standi* to enforce the trust, or any enforceable rights to the property.⁶¹ The only persons who have the *locus standi* to enforce a STAR trust are those appointed to be enforcers.⁶²

40 The *locus standi* to enforce a special trust may be granted or reserved as a right or as a duty.⁶³ Duckworth explains that there are voluntary and obligational enforcers.⁶⁴ A voluntary enforcer may be appointed if the settlor himself is the beneficiary, so he can choose

instrument giving the trustees power to determine all questions arising in the execution of the trusts under the instrument".

59 *Armitage v Nurse* [1998] Ch 241 at 253.

60 *Armitage v Nurse* [1998] Ch 241 at 253–254, per Millett LJ: "The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient."

61 Special Trusts (Alternative Regime) Law 1997 s 7(1).

62 Special Trusts (Alternative Regime) Law 1997 s 7(2).

63 Special Trusts (Alternative Regime) Law 1997 s 8(1).

64 Anthony Duckworth, *Special Trusts (Alternative Regime) Law 1997, Cayman Islands: 2nd generation of purpose trusts and more* (Essex, UK: Gostick Hall Pub, 1998) at p 59.

whether he wishes to enforce the trust.⁶⁵ Often, an obligational enforcer would be appointed. His duty is similar to that of a trust protector who ensures that the settlor's plan is carried out.⁶⁶ If the settlor does not make clear his intention, it is presumed that the enforcer is to have a duty.⁶⁷

41 A trustee, another enforcer, or any other authorised person has *locus standi* to enforce the duty of the enforcer.⁶⁸ Matthews criticises this provision as a trustee is unlikely to bring an action against an enforcer.⁶⁹ However, there are practical safeguards provided in the legislation. A successor trustee or a co-trustee who discovers breaches of trust may bring an action against the delinquent trustee and the enforcer.

42 In the absence of an effective enforcer, the court may appoint enforcers upon the trustee's application.⁷⁰ The trustee may apply to the court for the administration of the trust under the direction of the court, or for such order as the court thinks fit.⁷¹ A trustee who knowingly fails to do so is subject to criminal sanctions.⁷² Mechanisms of this sort are essential so that settlors may be reassured that their enforcement arrangements would not be frustrated.

43 An enforcer has the same rights as a beneficiary of an ordinary trust to bring administrative and other actions concerning the trust, and to be informed of the terms of the trust and to receive accounts.⁷³ An enforcer has the same rights as the trustee to protection and indemnity and to make applications to the court for an opinion, advice or direction, or for relief from personal liability.⁷⁴

44 Other offshore trust jurisdictions, such as the Bahamas,⁷⁵ Bermuda,⁷⁶ British Virgin Islands⁷⁷ and Mauritius,⁷⁸ similarly provide for

65 Anthony Duckworth, *Special Trusts (Alternative Regime) Law 1997, Cayman Islands: 2nd generation of purpose trusts and more* (Essex, UK: Gostick Hall Pub, 1998) at p 59.

66 Anthony Duckworth, *Special Trusts (Alternative Regime) Law 1997, Cayman Islands: 2nd generation of purpose trusts and more* (Essex, UK: Gostick Hall Pub, 1998) at p 59.

67 Special Trusts (Alternative Regime) Law 1997 s 8(2).

68 Special Trusts (Alternative Regime) Law 1997 s 8(3).

69 See Anthony Duckworth, "STAR WARS: The Colony Strikes Back" (1998) 12 TLI 16 at 20.

70 Special Trusts (Alternative Regime) Law 1997 ss 7(4)–7(5).

71 Special Trusts (Alternative Regime) Law 1997 ss 7(4)–7(5).

72 Special Trusts (Alternative Regime) Law 1997 s 7(5).

73 Special Trusts (Alternative Regime) Law 1997 s 9(a).

74 Special Trusts (Alternative Regime) Law 1997 s 9(b).

75 Purpose Trusts Act 2004 s 6.

76 Trusts (Special Provisions) Amendment Act 1998 s 12B(1).

77 Trustee (Amendment) Act 2003 s 84A.

78 The Trusts Act 2001 s 19(b).

mechanisms of enforcement. There are differences. In most regimes, the enforcer must be named in the trust instrument or, at least, the instrument must contain the mechanism for appointing an enforcer.⁷⁹ Some provide for the appointment of a successor to the enforcer.⁸⁰

45 Bermuda, however, takes a different approach. Anyone with sufficient interest may enforce the purposes, and in default, the Attorney-General has the power to enforce.⁸¹ Hence, there is no need to appoint an enforcer in the instrument itself.

46 The comprehensive framework of enforcement as provided in the Cayman Islands' STAR regime is a good model for emulation. However, it is suggested that to better guard against practical abuse, if the enforcer appointed is a non-beneficiary, more than one non-beneficiary enforcer should be appointed to improve accountability. Further, the legislation may specify that the trustee may not be the enforcer and an appointed enforcer should be independent of the trustee. This would give settlors greater confidence.

47 As Matthews suggests, when non-beneficiary enforcers are appointed, there is a risk that the trustee and enforcer would embezzle the trust fund. The STAR regime has provisions to guard against practical abuse. The trustee has to be a licensed Cayman Islands trust company⁸² and there are severe criminal penalties for theft and business and regulatory consequences. Cayman Islands trust companies are licensed⁸³ under the Banks and Trust Companies Law which gives the Monetary Authority broad powers, not merely to revoke licences but also to appoint managers. It is specially authorised to do so if the licensee is carrying on business in a manner detrimental to the interests of the beneficiaries of any trust.⁸⁴ The embezzled funds would also be

79 See, however, Bermuda's Trusts (Special Provisions) Amendment Act 1998 s 12B which provides that a purpose trust may be enforced by the person or persons stated in the trust instrument, the settlor, a trustee, or the court will appoint a person or persons it considers to have interest to do so, and Brunei's International Trusts Order 2000 s 79(2) which provides that enforcers may be appointed under the trust instrument or by the court.

80 See, eg, Belize's Trusts Act (Cap 202, 2000 Rev Ed) s 15(1)(c), the British Virgin Islands' Trustee Act (as amended 2003) s 84A(3)(d), the Isle of Man's Purpose Trust Act 1996 s 1(1)(d)(ii), Trusts (Jersey) Law 1984 (amended 1996) Art 10A, Trusts (Guernsey) Law 2007 s 12(1)(b), Mauritius' Trusts Act 2001 s 19(2)(b). See also the Cayman Islands' Special Trusts (Alternative Regime) Law 1997 s 7(4), Brunei's International Trusts Order 2000 s 80, Bermuda's Trusts (Special Provisions) Amendment Act 1998 s 12B which grant the courts discretion to appoint successor enforcers in certain circumstances or as they deem fit.

81 Trusts (Special Provisions) Amendment Act 1998 s 12B(1).

82 Special Trusts (Alternative Regime) Law 1997 s 12.

83 As required by the Special Trusts (Alternative Regime) Law 1997 s 12.

84 Banks and Trust Companies Law s 14(1).

recoverable by civil action at the suit of the trustee through the Monetary Authority's manager.

48 The STAR regime resolves the traditionalist objections of uncertainty⁸⁵ and the rule against public policy, by providing for the subsequent reformation of the trust which has become impossible, impracticable, unlawful, contrary to public policy or obsolete by reason of changed circumstances such that it fails to achieve the general intent of the trust.⁸⁶

V. Judicial control

49 In order to allow an enforcer to perform its function, the trust instrument must expressly provide that the enforcer has an absolute right of access to any information or documents pertaining to the trust,⁸⁷ its assets, and the administration of the trust.⁸⁸ Most importantly, an enforcer, if necessary, can apply to the court to ensure that the objective of the trust is honoured.⁸⁹ These powers are granted to an enforcer in order to enable him to perform his sole function of monitoring the trustee's performance of its duties.

50 Similar to the trust protector, an enforcer is a power-holder within a trust, and both are generally considered to be fiduciaries with regard to the powers they hold. The creation of these fiduciary powers is facilitated by law, which also imposes a regime of control over the exercise of these powers in order to prevent any abuse.

51 The three broad categories of control on the powers held by fiduciaries are as follows. The first category includes the doctrine of a fraud on a power and the canons of construction, and aims to define and limit the extent of the power. The second limits the power indirectly by exposing the fiduciary to different sanctions so as to minimise the number of low-quality decisions being made. The final category includes both the self-dealing and fair-dealing rules, as well as the principle in *Re Hastings-Bass*.⁹⁰

52 Although offshore and Commonwealth legislation are generally silent on the issue of judicial control over an enforcer, the Brunei

85 Special Trusts (Alternative Regime) Law 1997 s 10.

86 Special Trusts (Alternative Regime) Law 1997 s 11.

87 See, eg, the British Virgin Islands' Trustee Act (as amended 2003) s 84A(15) which stipulates that the trustee is to provide the enforcer with certain trust documents and information.

88 ILS Group Limited, "Purpose Trusts" <<http://www.ils-world.com/library/trusts/download-001.pdf>> (accessed 10 August 2008) at p 1.

89 David Harris, "Special Trust Arrangements in Bermuda" (2002) 5 PCB 286 at 289.

90 See *Re Hastings-Bass* [1975] Ch 25 at 41, per Buckley LJ.

legislation does provide us with some guidance. It expressly provides that a trustee, or another enforcer, or any person expressly authorised by the trust instrument, have standing to bring an action against the enforcer to compel him to discharge his duties.⁹¹ This means that the court has an indirect role in controlling an enforcer, where on an application by such interested persons, it can rule that the enforcer must discharge its duties if it has failed to do so.

53 An analogy can also be drawn from the context of the charitable purpose trust, where the Attorney-General or the Charities Commission typically has the powers to institute inquiries and require any person to furnish accounts and statements with respect to any matter in question at the inquiry,⁹² and to institute proceedings against a party who is alleged to have breached the trust.⁹³ Applied to a private purpose trust, the trustee, another enforcer, or any person expressly authorised by the trust instrument would perform a role akin to that of the Attorney-General or Charities Commission in a charitable purpose trust – having standing to institute an action against the enforcer if it fails to discharge its duties.

VI. Conclusion

54 An enforcer in a private purpose trust ensures that the trustee carries out his obligations in fulfilling the purpose of the trust and discharges appropriately his specific duties. In this sense, the enforcer takes the place of the beneficiary in an onshore person trust, who would have been able to ensure the same by using the remedies that he is entitled to by law.

55 The office of enforcer is a fiduciary one, and any doubts as to the identity of the party to whom an enforcer owes its fiduciary duties can be resolved by adopting the modified structure of the traditional fiduciary duty mentioned above. The crux of imposing the fiduciary duty is to ensure that the fiduciary is held accountable for any breaches of its fiduciary duties, and this is achieved by making it mandatory for settlors to provide expressly in the trust instrument for persons who are authorised to bring an action against an enforcer if it breaches its fiduciary duties.

91 International Trusts Order 2000 (17 July 2000) ss 81(1)–81(3).

92 For example, Charities Act (Cap 37, 2007 Rev Ed) s 8 (Singapore).

93 For example, Government Proceedings Act (Cap 121, 1985 Rev Ed) s 9 (Singapore).