Charitable trusts

Kerrie Le Tissier of Bedell explains why non-charitable purpose trusts can be a useful tool for estate planning and wealth preservation

Kerrie Le Tissier, senior associate, Bedell

Guernsey statutory law has provided for non-charitable purpose trusts (usually known simply as 'purpose trusts') since the Trusts (Guernsey) Law, 2007 (as amended) was brought into force in March 2008. This type of trust operates much in the same way as the more traditional types of trust structures and the form and contents of the trust documents are usually similar. The trustee still holds the trust property on trust subject to the powers and duties set out in the trust instrument and the legislation and the same requirements for a valid trust apply.

However, there are two key differences which mean that to those unfamiliar with them purpose trusts can appear to be a rather different beast. Firstly, the trust will be established for one or more non-charitable purposes (instead of or as well as beneficiaries or charitable purposes in a hybrid trust), with the trustee's overriding fiduciary duties including acting in the advancement of those purposes (instead of or as well as in the interests of the beneficiaries or charitable purposes). Secondly, an enforcer (who cannot be the trustee but could be the settlor) must be appointed to enforce the trust in relation to its non-charitable purposes as there is no beneficiary that could enforce those purposes. The enforcer could have additional powers such as the power to appoint and remove trustees or its consent could be required before the trustee exercises certain powers (such as adding new purposes).

This article looks at the key issues to consider when establishing a purpose trust (and some of the common pitfalls) and explores some of the uses of purpose trusts in private wealth management.

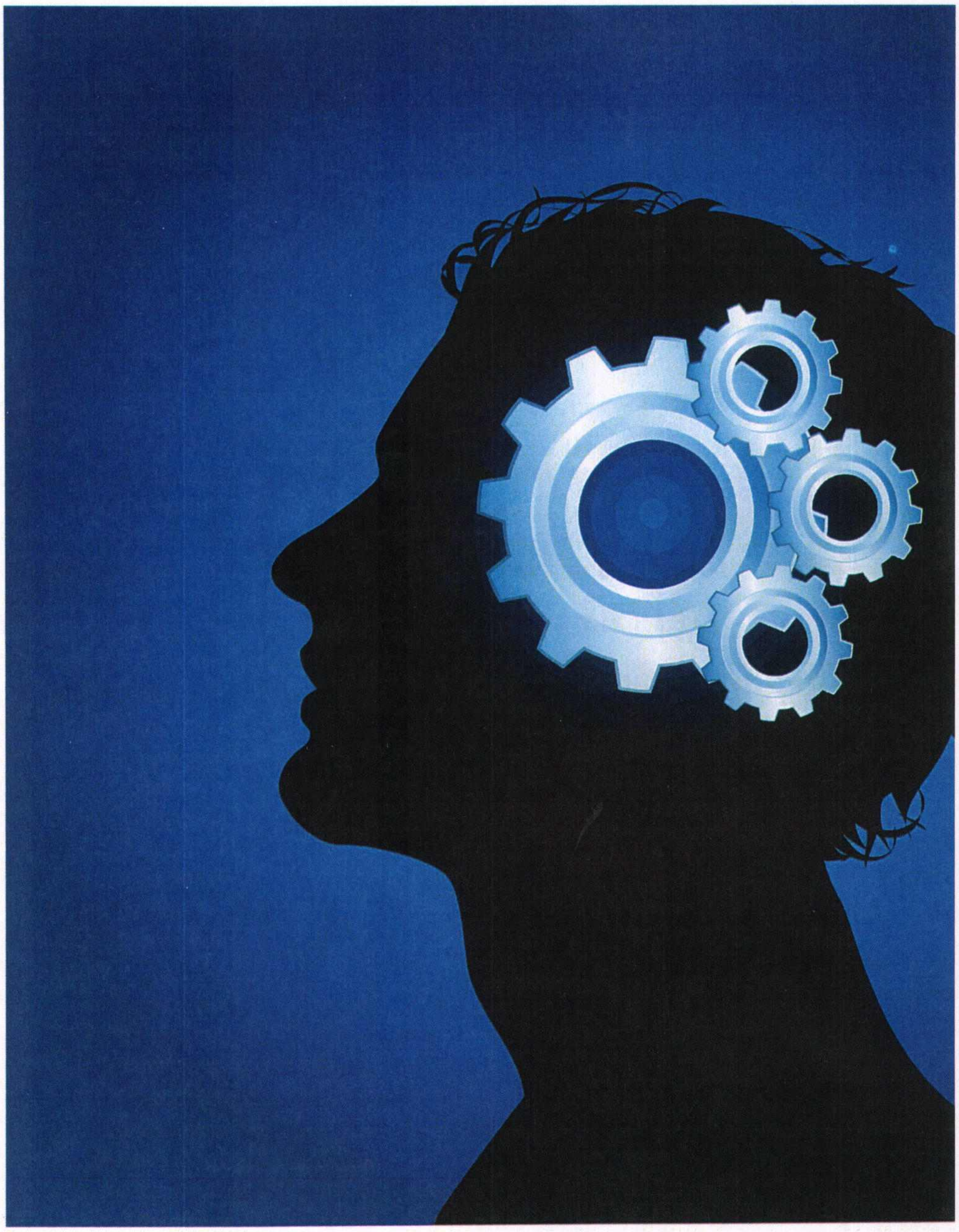
Key issues

It is essential that the purposes are drafted clearly and with sufficient certainty to ensure that they are valid (from a legal perspective) and also that they work (from an administrative perspective). They should reflect the settlor's intentions and requirements and they should leave the trustee in no doubt as to what it can and cannot do with the trust property.

For instance, a common purpose is simply "to hold shares in X Limited". Whilst that is a lawful purpose (the legislation states that a purpose may be the holding or ownership of property), if that is the sole purpose of the trust, how will the trustee know how to vote on matters put to it as a shareholder and what should it do with any dividends or other distributions received on the shares? A reference to exercising rights as a shareholder at the trustee's discretion should be included in the purposes at the very least. Guidance in respect of matters such as voting and distributions should ideally also be given to the trustee. This could be done by including additional purposes (for example, for the trustee to vote in a certain way on particular matters, such as the appointment and removal of directors or a change in the constitution of the company, or that distributions should be paid or transferred to a particular person or used to support another business). Alternatively (or additionally) guidance could be given in a non-binding letter of wishes which has the benefit that it could be changed more easily and so retain some flexibility in the structure if circumstances were to change. The appropriate solution will depend on how prescriptive the settlor wants to be.

Each purpose should also be drafted as specifically as possible so, in the above case, "X Limited" should be fully identified in terms of its full name, where it is incorporated and its registration number (and possibly also its registered office) to ensure there is no room for uncertainty.

The above considerations apply to any purpose, whether it be holding other types of assets or carrying on certain activities. When setting up a purpose trust, it is well worth stress- testing the purposes to determine whether they deal with all possible outcomes and eventualities, and whether the trustees have the guidance they need to fulfil their duties in the manner intended by the settlor. It is usually appropriate to take legal advice to ensure the purposes are valid - any ambiguity as to what is intended or whether a particular action is within the purpose could render a purpose (and possibly the whole trust) uncertain or even invalid.



Uses of purpose trusts

As with other types of trusts, purpose trusts are very useful and versatile and can be used in a range structures and transactions, both for holding and managing private wealth and in corporate and commercial transactions as an orphan vehicle.

The simplest and most common use of the purpose trust is to hold shares in one or more companies. In a private wealth structure, those companies would usually own the underlying assets, be they properties, boats, planes, portfolios of shares or other investments. The structure can be as simple or as complex as necessary, ranging from the purpose being to hold shares in X Limited (and exercising rights in respect of those shares), where X Limited holds one asset, to the purposes being to hold shares in a number of identified companies each of which holds a particular asset or class of assets. The purposes could be quite detailed in terms of how those assets should be administered, for example they could include ensuring boats are registered and/or based in a particular jurisdiction and made available for use by certain persons at certain times. A purpose trust as an asset holding structure is particularly useful if the assets are not intended to generate a regular income which is to be distributed amongst family members but are instead intended to be held and preserved and yet put to specific uses.

Another common use is to hold shares in a private trust company which will act as trustee of one or more family trusts. This is particularly useful for high net worth individuals and family offices that may require an independent structure with added layers of control and confidentiality. The use of a purpose trust in this way has the benefit of providing for succession and continuity of the PTC as the shares fall outside of the estate of any one or more individuals. Upon the death of the older generation that may have otherwise held them, the shares in the PTC can continue to be held within the purpose trust without being distributed amongst family members. These benefits apply equally where shares in a family business are held in a purpose trust.

Purpose trusts are also very useful in philanthropic endeavours where assets are to be used to promote or further some cause which is not regarded as "charitable" by law. This allows for trusts for purposes which lack an element of public benefit (and so would not be regarded as charitable), but which nonetheless are for worthy philanthropic purposes, to be created and run in a similar way to charitable trusts (albeit that an enforcer must be appointed).

Conclusion

Purpose trusts are a useful and popular solution where assets need to be held and used for particular purposes without giving any person or class of persons an interest in those assets. They are flexible structures as they can be used for a whole range of purposes which could be combined with beneficial trusts and/or charitable trusts, provided always that sufficient care is taken over the drafting of the purposes to ensure they are clear, valid and administratively workable.