Legislating On Purpose
A Critical Evaluation of Statutory Purpose Trusts in the British Virgin Islands

This article seeks to expound and evaluate the statutory provisions in the British Virgin Islands (“BVI”) Trustee Act (the “Trustee Act”) allowing for the establishment of purpose trusts. Section 84 was inserted into the Trustee Act by the Trustee (Amendment) Act 1993 and came into effect on 1 November 1993. Its provisions were very closely modelled on part II of the Bermudian Trusts (Special Provisions) Act 1989 and created, for the first time, a statutory basis for the establishment of purpose trusts in the BVI. The Trustee (Amendment) Act 2003 introduced section 84A into the Trustee Act to govern statutory purpose trusts created on or after 1 March 2004. This article examines in depth three validity conditions that are common to sections 84 and 84A and the significance of the dropping of a fourth in relation to section 84A trusts.

In doing so it establishes some ground rules for what may and may not be achieved under each section in respect of philanthropic, family and commercial trusts. The later sections of the article argue in particular that section 84A was intended to allow a settlor to achieve what is achievable under part VIII of the Cayman Trusts Law (“STAR”) namely the establishment of a trust for people or purposes or both with an enforcer having the exclusive right to enforce the trust and hold the trustee to account. Some concluding observations are offered on the thorny question of whether a trust to “hold and retain” property states a valid purpose, a matter of considerable significance for the drafting of trusts of shares in the commercial and private trust company contexts. The conclusion argued for is that such trusts do not alienate the equitable interest.

The two statutory regimes: validity conditions

Section 84 (2) provides that “a person may create a valid trust for any purpose, whether charitable or not, if (a) the purpose is specific, reasonable and possible; (b)
the purpose is not immoral, contrary to public policy or unlawful ...” and five further conditions are met. The first four of these, which will not be the subject of analysis, concern the identity of the trustee, the need for an enforcer, proof of his consent to act and a terminating event. The fifth is contained in section 84 (1) (b) which provides that a trust established under the section must be a trust other than one for the benefit of particular persons, whether or not immediately ascertainable, or some aggregate of persons ascertained by reference to some personal relationship. This last requirement will be referred to as the “personal benefit restriction.”

Section 84A (2) provides that “a person may create a valid trust for any purpose or purposes if the conditions set out in subsection (3) are satisfied” and those conditions, so far as relating to the purposes themselves, are that (a) the purpose or purposes are specific, reasonable and possible; and (b) the purpose or purposes are not immoral, contrary to public policy or unlawful.” Three of the five further conditions set out in section 84, though differently worded, also apply, the requirement for a terminating event and the personal benefit restriction being dropped.

Both sections implicitly impose a writing requirement since a valid purpose trust may be created under each section (only) if “the trust instrument appoints a person” to enforce the trust. It is, moreover, an assumption of sections 84 (5) and 84A (10), which make substantially similar provision as to what must be done in the case of death, unwillingness, unfitness or incapacity on the part of the enforcer, that there will always be an “instrument creating the trust.” There are also references in sections 84A (16) and (22) to “the instrument declaring or evidencing” the trust which call to mind section 53 (1) (b) of the Law of Property Act 1925 (requiring that declarations of trust respecting land be “manifested and proved” in writing). That provision has long been understood to entail that a trust of land under English law need not be in writing but only so evidenced with the result that subsequent written evidence of a prior oral trust meets the formality requirement. It is submitted, however, that the references in section 84A (16) and (22) are too slight to displace the other references which seemingly require writing at the outset and there is no reason to think, in any event, that the legislature intended to change the law as set out in section 84 in this respect which contains no such ambiguity. It is submitted therefore that both sections impose not merely a writing requirement but a requirement that the trust be created in writing.

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1 This term is used only in section 84A, section 84 referring rather to a (or the) “person to enforce the trust.” Nothing turns on the difference and “enforcer” is the term used in this article other than where quoting from section 84.
Since the conditions in sections 84 (2) (b) and 84A (3) (b) (that the trust be not contrary to law, morals or public policy) are requirements of all valid trusts but those in sections 84 (2) (a) and 84A (3) (a) (specificity, reasonableness and possibility) are not, it may be inferred that the latter shed light on some of the distinctive aspects of BVI statutory purpose trusts. It is worth examining these conditions, therefore, in some detail. For ease of reference, they will be referred to as the “positive conditions.” The conditions in section 84 (2) (b) and 84A (3) (b) will, conversely, be referred to as the “negative conditions.”

The analogy to charitable trusts

An illuminating way of understanding the scope of the positive conditions is to analyse the functions they serve. Identifying those functions is, however, a matter of argument. The argument here presented is that the three requirements of specificity, reasonableness and possibility serve different functions which are best understood by contrasting them with the most nearly analogous requirements of a valid charitable trust. This argument has two aspects in that it both denies that the positive conditions are collapsible into (or are merely aspects of) a single certainty requirement and asserts the explanatory force of the analogy to charitable trusts in the interpretation of each. The argument in support of the denial will be presented later but the assertion of utility in the analogy is, it is submitted, justified by the following considerations.

First and most obviously, there is simply a stronger analogy between purpose trusts and charitable trusts than there is between purpose trusts and people trusts (by which is meant, for the moment, all express trusts other than trusts for charitable or non-charitable purposes) in that, with the possible exception of charitable trusts for poor relations, charitable trusts are of necessity purpose trusts. The analogy is strengthened in relation to BVI statutory purpose trusts by the enactment of what is in effect a cy-près jurisdiction (sections 84 (15) to (18) and 84A (22) to (25)) and the disapplication of the rule against inalienability or perpetual duration to them (sections 84 (3) and 84A (1) and (5)). In attempting to ascertain legislative intention as expressed in the positive conditions, therefore, it makes more sense to regard them as modifications of the charitable trust than as tinkerings with the concept of a valid people trust. The charitable trust is, in other words, the natural starting point.

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2 See the section entitled “Reasonableness.”
3 This definition is only a working definition which receives some refinement in the section entitled “Purposes generally” below.
Second, there are a number of policy considerations which argue in favour of applying the relaxed charity law standards of trustee controllability to the case of the statutory purpose trust. The other option, which is to apply the standards of controllability applicable to people trusts and, in particular, the requirement of conceptual certainty in discretionary trusts and powers - such that one must be able to say of any particular application of a fund that it is within or without the discretion or power in question⁴ - may well be appropriate in a discretionary people trust where benefiting those entitled to take in default of exercise of the discretion or power must be assumed to form an important, if default, element of settlor intent.

Indeed, it is this consideration which was advanced as the sole justification for the “within or without” test for certainty of powers in Re Gulbenkian’s Settlement as appears from the speech of Lord Upjohn:

“But with respect to mere powers, while the court cannot compel the trustees to exercise their powers, yet those entitled to the fund in default must clearly be entitled to restrain the trustees from exercising it save among those within the power. So the trustees or the court must be able to say with certainty who is within and who is without the power.”⁵:

In the case of gifts for charitable purposes, however, there need and ordinarily will not be any person entitled in default and this is true also of BVI statutory purpose trusts which may endure in perpetuity. It should also be borne in mind that even if a BVI settlor chooses to establish a terminable purpose trust under section 84A, he has the option (on which the original trustee is very likely to insist) of providing, pursuant to section 84A (16) (c), that for so long as the trust is a purpose trust, the trustee owes no duty to any persons entitled to such assets when the trust ceases to be a purpose trust or in relation to any purposes for which such assets are then to be applied. Therefore, at least in the cases where the settlor chooses to establish either a perpetual purpose trust or a terminable one which takes full advantage of section 84A (16) (c), the focus is very much away from the rights of any person entitled in default. Instead, and as is the case in trusts for charitable purposes, the focus is on the practical matter of getting a job done, accomplishing a purpose.

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⁵Reported as re Gulbenkian’s Settlements 1970] AC 508 at 525E-F per Lord Upjohn with whom three of their Lordships expressly agreed.
It is true, however, that in relation to discretionary trusts (as opposed to powers), the usual justification for the very same certainty requirement rests on the consideration that:

“the court, if called upon to execute the trust power6, will do so in the manner best calculated to give effect to the settlor’s or testator’s intentions. It may do so by appointing new trustees, or by authorising or directing representative persons of the classes of beneficiaries to prepare a scheme of distribution, or even, should the proper basis for distribution appear by itself directing the trustees so to distribute.”7

In order for the court to be able to give effect to the settlor or testator’s intention in any of these ways, so the argument runs, the intention must be at least as clearly defined as it is required to be in the case of a valid power (although it need not be more so).

It must be doubted, however, whether this requirement can really have been intended to apply to statutory purpose trusts. This is for two reasons principally. The first is that very many concepts which describe worthwhile objects of human endeavour are notoriously not amenable to strict definition or, therefore, of being stated in a way that allows one to determine in advance with certainty whether or not a particular activity would achieve or help achieve the stated objective. This is in part a function of the relative difficulty humans have in predicting outcomes and in part a function of the sufficiency, for the purposes of practical reasoning, of relative indeterminacy of aim. In other words, relative indeterminacy of aim is both practically necessary and practically sufficient in significant areas of worthwhile human endeavour. To adopt the “within or without” test would greatly undermine the practical utility of the legislation and, as will be argued later, the specificity requirement does not entail this.

The other reason is that the test for certainty as applied to discretionary trusts assumes that there will be postulants whose claims to the exercise of discretion in their favour must be supported by evidence of membership of a class, quite apart from any other merit. As Sachs LJ put it in Re Baden’s Deed Trusts8

“Once the class of persons to be benefited is conceptually certain it then becomes a question of fact to be determined on evidence whether any

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6 A term which is used to mean a trust to distribute with a power of selection i.e. a discretionary trust.
7 Per Lord Wilberforce, Re Baden’s Deed Trusts, sub nom McPhail v Doulton [1971] AC 424 at p527A-B.
8 [1973] Ch 9 at p20B.
postulant has on inquiry been proved to be within it: if he is not so proved, then he is not in it.”

This fact highlights that recipients of discretionary trust bounty must, at a minimum, demonstrate that they are not disqualified from benefit under the trust. The provision of a threshold criterion of entitlement may thus be seen as part of the rationale for the certainty requirement as applied to discretionary trusts. It is a reminder that, though different from the kind of entitlement (in default) which is the focus of concern where powers are concerned, a person seeking to benefit (or whom trustees seek to benefit) under a discretionary trust must nonetheless demonstrate entitlement of some sort as a pre-condition of benefit. There is, however, no equivalent role for entitlement in the threshold sense where a trust obligation is imposed in order to achieve a purpose, charitable or otherwise What matters in such case is that the proposed application of funds may, from the practical perspective, be said to be consistent with achievement of the purpose. Determining whether it is so need not and often cannot be a black and white matter.

There is more to be said on the relationship between the certainty and specificity requirements but it is respectfully submitted that the learned author of the chapter on purpose trusts to be found in Glasson’s International Trust Laws overlooks the foregoing considerations when asserting that

“there is no obvious reason why non-charitable purpose trusts, if allowed at all, should enjoy the same relaxation from the requirement of certainty of objects [as charitable trusts].”

The same author elsewhere expresses the view, in relation to the current Bermudian requirement that a statutory purpose be “sufficiently certain to allow the trust to be carried out,” that “[t]he applicable test of ‘certainty of objects’ of a purpose trust – and particularly a discretionary purpose trust – is not laid down in the [Act], but, presumably, the principles established in English law in relation to trusts for beneficiaries will apply, ie the ‘complete list’ test in the case of a purpose trust where there is no discretion as to the application of income or capital and the ‘any given postulant test’ in the case of a discretionary trust for purposes.” Since the view is also expressed that it is doubtful whether there is any change of substance between the current and former Bermudian provisions (that is, between

9 See the sections entitled “The specificity requirement: general observations” and “The specificity requirement: specifics.”
10 Vol 2, paragraph B4.26/34.
12 Paragraph 41.15.
13 The Law of Trusts, paragraph 41.15.
the current Bermudian provisions and the positive conditions), it would appear to be assumed that the positive conditions are to be interpreted as importing the certainty of objects requirements applicable to a discretionary people trust. If so, it is respectfully submitted that that assumption is mistaken.

For ease of reference, the foregoing policy considerations which argue in favour of relaxed validity conditions in the case of purpose trusts will be referred to as the facilitative policy consideration.

The third reason for using charitable rather than people trusts as the appropriate comparator is that charitable purposes may be included as purposes of a trust established under sections 84 or 84A and they must be capable of being accommodated within the statutory regimes without too much distortion.

It is worth, however, being clear about why and to what extent charitable purposes may be included under each of the regimes: in section 84, the possibility of their inclusion follows from the wording of section 84 (2) which expressly includes charitable purposes whereas under section 84A, they may be included because a trust for any purpose or purposes is valid if the conditions in section 84A (3) are satisfied and none of those conditions disqualifies a purpose on the ground of its charitable nature.

What section 84A does not permit, however, is the establishment of a privately enforceable “trust for exclusively charitable purposes” since that is the very definition of “charitable trust” in section 84A (1) and section 84A (7) provides that nothing in section 84A “affects the law with respect to charitable trusts and, in particular, nothing in this section shall affect the ability of the Attorney-General to enforce a charitable trust.” Subsection (8) drives the point home: “any purported appointment of an enforcer of a charitable trust shall be of no effect.”

The reason these provisions are so emphatic is to make clear what is less than wholly clear in section 84 the opening words of which provide that a person may create “a valid trust for any purpose, whether charitable or not” if certain conditions are met (none of which entails the disqualification of a trust for exclusively charitable purposes). Taken on its own, this simple provision might be thought to have allowed philanthropists to oust the jurisdiction of the Attorney-General in relation to trusts for exclusively charitable purposes since, read on its own, it undeniably allows for
the creation of a statutory purpose trust with a single (and therefore, of necessity, exclusively) charitable purpose\(^\text{14}\).

The opening words, however, are not to be read on their own but in the light of section 84 (4). That subsection makes clear that “nothing in this section shall affect the existing law with respect to trusts established for charitable purposes” and thereby not merely preserves but aims to preserve **without in any way affecting** the Attorney-General’s role in relation to charities. This, however, is not possible if a trust for exclusively charitable purposes can be established under section 84. There are two alternative reasons for this.

First, the appointment of someone other than the Attorney-General as “a person … to enforce the trust,”\(^\text{15}\) despite use of the indefinite article which could in some contexts leave it open that he may be one amongst others with that function, in fact ousts the Attorney-General’s role altogether in relation to the trust. This is the result of reading section 84 as a whole and must follow from the provision in section 84 (6). That subsection provides that the court may, on the application of the Attorney-General, acting in turn on information received from the trustee as to the death, unwillingness, unfitness or incapacity of the enforcer, declare the replacement proposed by the Attorney-General “to be the person to enforce the trust.” Use of the definite article reveals the legislative assumption that there would thereafter be no enforcement role for any person other than the court’s appointee and the order of the court, necessarily in the same terms as section 84 (6), could have no other effect: its appointee would be the person to enforce the trust. But since the court order is merely gap-filling, it is to be inferred that the appointee has the same powers as the person replaced and, therefore, that a person appointed under section 84 (2) (d) to enforce the trust has an exclusive role in relation to the charity and the Attorney-General none. That is plainly disallowed by section 84 (4).

Second and alternatively, the appointment of someone other than the Attorney-General as “a person to enforce the trust” would mean, at the very least, that that person and the Attorney-General were co-enforcers and that too would clearly affect his role in relation to charities. It would mean, intolerably, that his ability to act in the public interest as he might see fit would be fettered by having to obtain the agreement of the enforcer (at best) and potentially defeated entirely if, as co-

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\(^{14}\) The Attorney-General, it should be remembered, has power only over funds held on **exclusively** charitable trusts and he therefore has no more role in relation to a statutory purpose trust with mixed purposes than he would in respect of a fund which might be spent on charitable or non-charitable objects as the trustees saw fit.

\(^{15}\) Under section 84 (2) (d).
enforcers, each were entitled to act independently of the other. Neither result can have been intended and each, it is submitted, is ruled out by section 84 (4).

Accordingly, section 84 (4) requires section 84 (2) to be read as providing that “a person may create a valid trust [other than a trust for exclusively charitable purposes] for any purpose [or purposes] … if …” which is exactly what section 84A provides. In other words, section 84A should be regarded as clarifying but not changing the law from 1 March 200416 on this point.

The positive conditions

On the assumption that at least some of the foregoing considerations argue in favour of analogizing the statutory purpose trust to the charitable trust, this and the following section of the article argue for particular conclusions that may be drawn from the analogy. To begin with, the positive conditions are taken in the order in which they appear in the sections.

The specificity requirement: general observations

Taking a fund given on trust “for the advancement of education in England & Wales” as the paradigm of a valid charitable trust under English law, it can be seen that the law will enforce a charitable trust obligation notwithstanding a very high degree of generality of purpose. It is important, however, to clarify the ways in which that is so in order properly to understand what is (and is not) entailed by the first of the positive conditions.

The first sense in which the paradigm might be said to display generality of purpose is that in which the object of the philanthropist’s bounty may be said to be unspecific in the sense of conceptually uncertain. Whether the object in this sense is “education” or “the advancement of education” does not matter: both are relatively – indeed, highly - uncertain concepts.

The second sense in which the purpose may be said to be general is the sense in which it is unspecific as to manner of achievement: the trustees have the widest possible discretion how they shall advance education in England & Wales. On the strength of this example alone it can be stated safely that the law will tolerate an obligation to achieve a charitable purpose which is maximally unspecific as to mode of achievement. But it is a mistake to think that this is a mere mirroring of the position with people trusts where, of course, maximal discretion as to whether, when

16 The commencement date of section 84A.
and how to benefit persons may be conferred on trustees. Rather, the toleration of maximal discretion in a charitable trustee how he should achieve a general charitable purpose is the necessary consequence of accepting that general (meaning conceptually uncertain) purposes may create valid charitable trust obligations to begin with. Someone has to mediate the general to the particular and that someone is the trustee (who may, of course, invoke the assistance of the court).

Third, the purpose may be said to be general in the sense that persons generally are intended to benefit by its achievement. This last sense is, however, none other than the public benefit requirement imposed on all charitable trusts (save, anomalously, those for poor relations). As such, it is not on a par with the first sense of generality here considered (conceptual uncertainty) since the latter is, in substance, a dispensation from the standard otherwise applicable to express trusts. Generality of purpose understood as the public benefit requirement is the very opposite of a dispensation. It does not say that charitable purposes may benefit people generally but, rather, that they must do so in an identifiable sense.

If the foregoing is a correct analysis, the specificity requirement may be seen as covering the same ground as the certainty of objects dispensation which avails in the case of charitable trusts. The public benefit requirement, so far as it applies to statutory purpose trusts at all, is dealt with through another mechanism, a matter which will become clearer in the sections on the reasonableness requirement and the personal benefit restriction. Before turning to that, however, it is necessary to say more about what is entailed by the specificity requirement.

**The specificity requirement: specifics**

It is submitted that, at a minimum, the specificity requirement does not exclude generality of purpose in the sense of achievement of public benefit. This must follow in the case of section 84 from the conclusion, which will be argued for in the section on the personal benefit restriction, that the personal benefit restriction and reasonableness requirements together amount to a weak public benefit requirement in section 84 trusts.

But it must follow also from the fact that a valid trust may be established under either section which includes charitable purposes amongst non-charitable ones since a purpose otherwise charitable but which aims at purely private benefit is simply not a charitable purpose at all, however benevolent the intention (the case of trusts for poor relations excepted once again). Accordingly, the rule must be that since charitable purposes included in a statutory purpose trust must aim at public benefit, non-charitable purposes may do so. There is, so to speak, levelling up, not down.
The key question, however, is: how specific must a purpose be in order not to fall foul of the specificity requirement? The starting point, if the general argument so far is good, must be the consideration that “specific” is used by way of contrast with the high degree of generality of purpose that is tolerated in charitable trusts as regards conceptual certainty and concomitant trustee discretion. If so, the requirement must be taken as ruling out privately enforceable trusts which include, alongside non-charitable purposes, the advancement of education or religion or the relief of poverty simpliciter, precisely because such purposes, being as general as the law allows, are necessarily not specific (whatever “specific” means). It must also be taken as ruling out non-charitable purposes of a similar level of generality such as, for example, the promotion of socialism, the free market, humanism, atheism, rationalism (although the last might exist as a charitable trust outside sections 84 and 84A as advancing education) and so on. Although, unlike the legal concept of charity, the categories of non-charitable purpose are not defined (other than by the positive and negative conditions), grammar suggests the rule of thumb that a statement of purpose which is no more than a verb followed by an abstract noun will, most likely, be general rather than specific. If at least this restriction is not entailed by the specificity requirement, then it means nothing at all.

Beyond that, however, the facilitative policy consideration argues for the adoption of a meaning of “specific” which respects the facts that purpose trusts are not about determining entitlement in any sense and that legislation designed to facilitate their creation must have been intended to accommodate relative indeterminacy of settlor aim. A possible meaning satisfying these criteria would be that the purpose is “sufficiently certain to allow the trust to be carried out” (as is the current Bermudian provision) if, at least, that is understood as focusing the enquiry on the practical question whether the statement of purpose can be said to give the trustee an adequate idea of what the settlor wanted to achieve – something, that is, to be getting on with. A statement of purpose will be adequate in this sense, it is submitted, if it is clear that at least one application of the fund would accomplish the purpose in whole or part.

Rather than asking why the certainty of objects requirement should be relaxed in relation to non-charitable purpose trusts, it seems at least equally appropriate to turn the question around and ask why a settlor should not be allowed to impose - and a trustee to accept - a binding obligation to apply property for a non-charitable purpose in circumstances where at least one application of the fund is clearly within the settlor’s purpose. Granting that it does not follow of necessity, as it does with charitable trusts, that a non-charitable purpose trust will achieve anything of public
benefit, a statutory purpose must nonetheless aim at something which, in the eyes of the law, is reasonable and this, it will be argued in the next section, imports a weak value requirement. So far, therefore, from there being no obvious reason for relaxing the certainty of objects requirement in relation to statutory purpose trusts, all reasons seem to point in favour of doing so and the legislature’s use of the word “specific” does not, it is submitted, suggest otherwise.

If adopted, this approach allows for the creation of an enforceable trust obligation the proposed performance of which in a doubtful case can be the subject of an application under section 6 of the Trustees’ Relief Act for the “opinion, advice or direction” of the court so far as it raises a question respecting the “management or administration” of trust property or, alternatively, under the court’s inherent jurisdiction to construe trust instruments and give guidance on the question whether a proposed application of funds is within the trustee’s powers\(^\text{17}\). This does not quite amount to saying that the court, as is the case with charitable trusts, can settle or approve a scheme for the exercise of the trustee’s discretion and thereby effectively substitute concrete obligations for those only vaguely stated. It merely affords the trustee of a purpose trust a right that all trustees, including charity trustees, have.

For the sake of completeness, reference requires to be made to the Canadian case of \textbf{Wood and Whitebread v The Queen}\(^\text{18}\). There, Stevenson LJSC sitting in the trial division of the Alberta Supreme Court considered the meaning of the word “specific” in the context of section 20 (1) of the Perpetuities Act, 1972. That provision reads, so far as material, as follows:

“A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital, as the case may be, and, unless the trust is created for an illegal purpose or a purpose contrary to public policy the trust is valid so long and to the extent that it is exercised either by the original trustee or his successor, within a period of 21 years …”

The learned judge said this:

“An obvious difficulty is in the use of the term ‘specific.’ Two choices appear to be open: to define the term as being the opposite of ‘general’; or to define it as ‘precise or certain.’ While the former interpretation may be applicable, there is nothing in the section which does away with the recognized

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\(^{17}\) \textit{Public Trustee v Cooper} [2001] WTLR 901.

\(^{18}\) Also cited as \textit{In Re Russell}, [1977] 6 WWR 273.
requirement that the objects of a power must be certain. A gift in order to be protected by the section must be certain. In the case of a charitable trust the court is able to supply certainty by its scheme making power. No authority was suggested to me which would enable the court to settle a scheme for a power. I am also mindful of the fact that the term ‘specific’ is ordinarily to be found defined as ‘made definite’ or ‘precise.’”

Although this reasoning appears to overlook the possible meaning of “specific” contended for above, it hardly matters in that the court’s decision appears to have been that the “within or without” test applies whatever it means. In the context of a provision which validates purpose trusts as powers, this is entirely justifiable and consistent with the argument advanced in this article since in validating the trust in this way, the legislature created an entitlement in default.

**Reasonableness**

The reasonableness requirement, it is submitted, may illuminatingly be viewed as a weak analogue of the “benefit” part of the public benefit requirement in charitable trusts. (The “public” part of that requirement will be analysed in the section on the personal benefit restriction.).

It should be pointed out that this understanding of the reasonableness requirement differs from that apparently held by the learned authors of Thomas and Husdon who, as has already been observed, comparing the current Bermudian requirement that a purpose be “sufficiently certain to allow the trust to be carried out” with the former requirement that it be “specific, reasonable and possible” opine “[w]hether there is any change of substance here is doubtful: a trust which is ‘sufficiently certain’ for the purposes of … the new definition is likely to be one which would also have been ‘specific, reasonable and possible’ ….” That understanding effectively collapses all three of the positive conditions into a certainty requirement. Yet even if specificity and possibility can be understood as conditions going to workability and, in that sense, as complementary (although analytically distinct) aspects of the one certainty or workability requirement, and even if a trust for a purpose which failed to meet that requirement in either sense might properly be stigmatized as unreasonable, it does not follow that all trusts for purposes which are specific and possible will be reasonable. That must involve a further judgment on the purpose and it is hard to see how it can fail to be a value judgment, however thin, on the substance of the matter – the thing aimed at.

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19 There is now, of course, such authority see *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587.
20 Paragraph 41.15. The same point is made in paragraph 41.26.
That conclusion is supported by this further consideration: the imposition of the negative conditions (which disallow trusts for purposes harmful in the eyes of the law to individuals or society) implicitly entails that it is insufficient that a statutory purpose trust be merely not aimed at harming individuals or society. Unless the positive conditions (and the reasonableness requirement in particular) are entirely otiose, they must be requiring something more than mere avoidance of harm. The reasonableness requirement must therefore invalidate some trusts for perfectly lawful purposes which, moreover, contravene neither morality nor public policy. Quite obviously, it invalidates those trusts for purposes which are, over and above those minima, unreasonable.

Relative to which concerns, however, are judgments of reasonableness to be made with respect to the myriad valuable and value-neutral purposes which fall on the right side of the line drawn by the negative conditions? The valuable or, more properly, that which a reasonable (even if wrong) body of opinion will attest as valuable, will not present a problem: it is always reasonable to aim at increasing the number and variety of valuable options or states of affairs or, at least, those that reasonable people are prepared to concede might be or prove valuable. It is when no reasonable body of persons is prepared to make this concession that the difficulty arises.

The function and utility of the reasonableness requirement as a substantive constraint on achieving purposes can be well illustrated by reference to a well known English case where nobody was prepared to attest to the value of what the testator wanted to achieve.

In Re Pinion21 the Court of Appeal ruled that it was proper to receive expert evidence on the question what aesthetic merit there might be in a residuary trust for the free, public display in perpetuity of the artist testator’s “squalid” studio together with its contents (which included a dozen or two third rate items of antique furniture that would, however, have been “smothered by [an] intolerable deal of rubbish” including the artist’s own “atrociously bad” paintings). On the strength of unanimously adverse expert evidence, the bequest failed as a charitable trust both under the educational head and the fourth head of trusts having public utility. Russell LJ thought it “absurd” that a will trust for the display of chattels without more might qualify as a charitable bequest since “otherwise the contents of any dwelling-house in the land, if displayed to the public, could be said to have a tendency to advance education in aesthetic appreciation.” While it is entirely possible that expert artistic opinion may have changed on such questions (such that

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21 [1965] 1 Ch 85.
Ms Tracy Emin’s unmade bed “in all its embarrassing glory[, e]mpty booze bottles, fag butts, stained sheets, worn panties: the bloody aftermath of a nervous breakdown” 22 might, if settled or bequeathed by its current owner on trust to display it to the public in perpetuity, now qualify as a charitable trust, the question arises whether Mr Pinion’s bequest, assuming that it would still not qualify in England as a charitable trust, would meet the reasonableness requirement. In other words, could a testator with the same ambitions as Mr Pinion now realize them by establishing a section 84A purpose trust?

It is worth observing as a preliminary to the answer first that a section 84A trust need not aim at achieving any public benefit at all23 and second that any public benefit sought to be achieved need not benefit the BVI public or any section of it. As much flows from the simple fact that nothing in the positive conditions says otherwise. But does that mean that a trust to open and maintain a squalid studio in perpetuity as a museum for displaying art and effects the value of which is not attested by any reasonable body of opinion is a trust for a reasonable purpose? It is submitted not for a number of reasons.

First, where the exhibition cannot on any view of the matter be thought to educate or inspire but yet seeks to foist itself upon the public, the reasonableness requirement is an appropriate tool for ensuring that what are, in effect, trusts for the perpetuation in the public memory of persons wholly unremarkable, are disallowed. Such memorials involve not just endowments but endowments in specie requiring not merely preservation of capital but inalienability of a particular asset. Where that asset is land, a finite resource, its tying up in perpetuity should always be scrutinized and its tying up in perpetuity solely for the purpose of publicly remembering the unremarkable should always be regarded as unreasonable.

Unlike the position in Bermuda and Cayman, there is no restriction on settling BVI land on a purpose trust and the reasonableness requirement is, it is submitted, an important (because the only) ground upon which there can be public control of such trusts, there being (by definition) no public policy against settling BVI land on non-charitable purpose trusts if neither section 84 nor 84A expressly forbids doing so.

Further, if an English testator purports to establish a testamentary trust requiring his trustees to hold his English land in perpetuity for a non-charitable purpose, selecting BVI law as the governing law of the trust in accordance with article 6 of the Schedule to the Recognition of Trusts Act 1987 but, as in Re Pinion, all relevant and credible

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22 http://www.saatchi-gallery.co.uk/artists/artpages/tracey_emin_my_bed.htm accessed 9 July 2010 9:08am EST.
23 This, as will be seen in the section entitled “the personal benefit restriction” is not true of a trust under section 84.
expert opinion being adverse to the idea that there is any value in the expressed purpose, it seems that the English court is not confined to reliance on the public policy exception in article 18 of the Schedule to the 1987 Act in order to avoid giving effect to the trust since, if the argument in the preceding paragraph has force, it is not materially lessened by the consideration that the land in question is in England: what makes it unreasonable to restrict BVI land to such worthless and enduring user is not its location (which could in principle, but apparently does not in the BVI, raise a public policy concern) but the finite nature of land as a resource wherever found. Unlike other forms of capital, it cannot, except in the most trivial way, be extended and can therefore only be built up. As a matter of BVI law, therefore, such trust should fail.

A trust to perpetuate the memory of the testator within a family or club, for example by the holding of an annual event of some description, would not, however, fall foul of these considerations. What they highlight is the importance both from the local BVI and conflict of law perspectives of the reasonableness requirement and the role it serves. Much is lost, pace Thomas and Hudson, if it is collapsed into the certainty or workability requirement.

**Possibility**

It has already been hinted that this can be seen, together with the specificity requirement, as an aspect of workability. At a minimum, therefore, it must require logical possibility (so that a trust to find a way of squaring circles, an activity to which Thomas Hobbes apparently devoted a considerable amount of his adult intellectual efforts, would obviously not qualify). Beyond that, it seems that achievement of the purpose must at the outset also be possible in the sense of “practicable” because the court’s jurisdiction to vary purposes on the ground of impossibility or impracticability would appear to arise under sections 84 (17) and 84A (24) only where their achievement “has become” impossible or impracticable by reason of “changes in circumstances since the trust was created” and it cannot have been intended to leave trustees in a position where they have an obligation that cannot be performed. The only reasonable inference from these provisions, therefore, is that trust instruments charging trustees with the performance of impracticable purposes do not create obligations and the possibility requirement should be so read.

It might be argued against this, in reliance on sections 84 (16) and 84A (23) that since the court, in exercising its powers to vary purposes, is enjoined to “have regard to such factors as [it] thinks material which may include” subsequent impossibility or impracticability (amongst others), the court is in fact expressly empowered to
consider any factor which it considers material and may, therefore, consider initial impossibility and impracticability as a reason for varying the purposes of a trust. But the maxim *expressio unius est exclusio alterius* (an express reference to one thing impliedly excludes the other) seems to apply here. By referring expressly to subsequent impossibility and impracticability as material factors, the legislature is to be taken as implicitly ruling out initial impossibility and impracticability since otherwise the express reference is entirely redundant. Sufficient scope is given to the words “may include” by interpreting them to confer on the court discretion to count or discount subsequent impossibility or impracticability as material factors as it sees fit.

If that is right, sections 84 (17) and 84A (24) are to be read as meaning that purposes which were either impossible or impracticable of achievement at the outset cannot be varied by the court. That this is the correct reading is supported by the consideration that the court’s power in sections 84 (15) and 84A (22) to “vary any of the purposes of the trust,” cannot extend to purposes which, by reason of the possibility requirement, cannot figure amongst “the purposes of the trust” to begin with. Since that clearly rules out purposes which are initially impossible, the fact that sections 84 (17) and 84A (24) treat impracticability on the same footing, must mean that it also rules out purposes which are initially impracticable.

The fact that impracticability is dealt with on the same footing as impossibility in the cy-près provisions is entirely appropriate in light of the analogy with charitable trusts since where a gift for a charitable purpose is judged impracticable from the start (as where, for example, insufficient funds are devoted to achievement of the purpose) the gift fails unless a general charitable intention can be discerned. But it is long established that there is no cy-près jurisdiction in relation to non-charitable purposes initially incapable of achievement, however benevolent (there is, additionally, no coherence in the notion of a general, non-charitable intention) and the wording of sections 84 (17) and 84A (24), far from altering that position, appears to accept it.

The possibility requirement must, therefore, entail initial practicability. This conclusion, if sound, has the easily overlooked consequence that the transfer of a purely nominal sum to the intended trustee of a purpose trust may not be enough to constitute the trust (as it undoubtedly would in the case of a people trust). This is for the reason that a trustee will not ordinarily be able to achieve anything in practical terms with a purely nominal sum and, if he cannot, the trust will therefore fail

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24 *Cherry v Mott* (1836) 1 My & Cr 123.
25 *Attorney-General v Haberdashers Company* (1834) 1 My & K 420.
without possibility of rescue by the court. Thought therefore needs to be given to the sufficiency of seed capital when establishing purpose trusts.

Before leaving the possibility requirement, it is worth looking briefly at the role, if any, to be played by the requirement of administrative workability in BVI statutory purpose trusts since the possibility requirement is clearly an aspect of workability. Thomas and Hudson suggest, albeit in relation to the current Bermudian provision already quoted, that “it is also likely that a discretionary trust for purposes will fail for ‘administrative unworkability’ in Bermuda, as in England.”26 This, with respect, cannot be right and the notion that a “discretionary trust for purposes” will fail on this ground in England is a very odd way of stating the real point which is that it is not generally possible to have a discretionary trust for purposes in England unless charitable (in which case the requirement of administrative workability does not apply). The authority relied on is R v District Auditor, ex parte West Yorkshire Metropolitan County Council27 but that case decided that a trust “for the benefit of any or all or some of the inhabitants of the County of West Yorkshire” could not take effect as a private (ie people) trust because, the class being “far too large”, it was administratively unworkable. The court, it is true, also held that it failed as a non-charitable purpose trust but only because it did not come within any of the exceptions to the rule that such trusts are invalid. The workability requirement was applied to the trust only to test its validity as a people trust. The requirement, first mentioned by Lord Wilberforce in McPhail v Doulton28, seems tied to the width of a class of beneficiaries and thus to people trusts.

In any event, the validity conditions of BVI purpose trusts are set by statute and administrative workability – understood as something other than the possibility requirement - simply does not feature among them. Further, if the analogy to charitable trusts is good, one would not expect it to do so.

**The personal benefit restriction**

It is convenient now to turn to an analysis of the personal benefit restriction which applies only to section 84 trusts. Consideration of what it and its deliberate omission from section 84A entail is a useful transition into a final section on purposes generally.

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26 Paragraph 41.15.
What the personal benefit restriction achieves in section 84

It will be recalled that this is the requirement that a trust established under section 84 be a trust “other than a trust (i) that is for the benefit of particular persons whether or not immediately ascertainable, or (ii) that is for the benefit of some aggregate of persons ascertained by reference to some personal relationship.” It is subjected to extended analysis and criticism by Thomas and Hudson who argue that almost every term used in the provision is of unclear ambit. Theirs have not been lone voices.

A purposive approach to the provision as a whole, however, reveals with tolerable clarity an intention to exclude trusts which, even if expressed as trusts for the achievement of purposes, benefit persons other than in the way in which trusts for exclusively charitable purposes (are required to) benefit persons. This is to be inferred from the exclusion of benefit to “particular” persons (charitable trusts, as has been earlier argued, necessarily benefiting persons generally in some sense) and persons connected by a personal relationship (which, other than in the case of trusts for poor relations, is fatal to charitable trusts). Limbs (i) and (ii) are, in other words, legislative summaries of the principal ways in which public benefit can fail to be achieved with the consequence that the trust in question will not have charitable status. Taken together, they seem intended to rule out the achievement of purely private benefit through a section 84 trust.

This, it is important to note, is not positively to require that a section 84 trust achieve public benefit. It is simply a negative restriction on achieving private benefit. The positive requirement as to benefit is, as one would expect, to be found amongst the positive conditions namely the reasonableness requirement. It has been suggested, however, that this is a weak requirement which is met if a reasonable (even if wrong) body of opinion attests to the value of the purpose. The personal benefit restriction is to be understood as a gloss on this requirement which entails that the value in question must not be purely private but accessible to persons generally in the sense that is true also of charitable trusts.

Putting all of this together, it can therefore be seen that the reasonableness requirement is a weak value requirement which, coupled with the personal benefit restriction, yields a weak public benefit requirement for section 84 trusts. A section 84 purpose must, therefore, be one which a reasonable body of opinion judges to be of value to the public or a section of it, even if other reasonable persons would disagree, perhaps correctly, with that judgment. Paradigmatically, it would validate

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29 Paragraphs 41.30 to 41.36.
a trust to achieve the purposes of a particular (and thus specific) political party (whose objectives did not fall foul of the negative conditions) although the potential uses of an offshore trust structure without a beneficial owner to promote the purposes of a political party onshore must, in light of legislation in a number of jurisdictions forbidding the foreign funding of political parties, be regarded as more limited now than in the past.

It can also now be seen that section 84 aims to respect a tripartite classification of express trusts according to their objects and mode of enforcement. Subsections 84 (2) and (4), on their true construction, are aimed at ensuring that trusts for exclusively charitable purposes remain enforceable only by the Attorney-General. They are left untouched. The personal benefit restriction is aimed at ensuring that people trusts (understood as trusts intended to benefit particular persons or classes of persons other than sections of the public) remain enforceable only by their beneficiaries. They, too, are left untouched. In between these categories, section 84 allowed for the creation of a trust for purposes which might be non-exclusively charitable or exclusively non-charitable, that are specific enough to be workable, practically achievable and which are capable of being seen, at a minimum, by reasonable people as being of value to the public or a section of it and (or but) which are enforceable only by an enforcer. That, it is submitted, is what the section was intended to achieve and, despite one or two infelicities of drafting, can fairly be seen to have achieved. Key, however, is a proper understanding of the reasonableness requirement and the personal benefit restriction.

One consequence of this construction of the section is that the scope for achieving commercial purposes under section 84 was severely limited since it is only in residual cases, if any, that it will be sought to achieve commercial purposes other than “for the benefit of particular persons.” Commerce achieves good, if at all, primarily through the pursuit of private advantage. It is unsurprising, therefore, that in respect of purpose trusts created on or after 1 March 2004, the personal benefit restriction has been dropped.

**What dropping the personal benefit restriction achieves in section 84A**

Section 84A, in this light, may be regarded as allowing purposes which benefit persons in the ways prohibited by the personal benefit restriction. This does not mean, however, that persons so benefited become objects of a section 84A trust. Those, it is submitted, remain exclusively the purposes. It is a terminological inexactitude likely to lead into more serious error, therefore, to refer to section 84A trusts whose purposes benefit particular persons or aggregates of persons ascertained by some personal relationship as having “beneficiaries”. That is bound
to raise the wrong sort of question such as that posed by Thomas and Hudson in relation to what they call “a ‘mixed’ trust (ie one with human beneficiaries and non-charitable purposes)” namely “do the human beneficiaries\(^{31}\) have any standing at all to enforce the trust ...?”\(^{32}\)

Part of the justification for a negative answer is just this consideration: the objects of a statutory purpose trust are purposes, not the persons who are intended to benefit by achievement of those purposes. The other part of the justification relies on the wording of section 84A (17) which provides that “an enforcer of a trust appointed in accordance with the provisions of this section shall have both the power and the duty of enforcing it.” The question then arises: does this mean that the power and duty are exclusive? The answer to this question is very important and so it is very important to be clear about why it is in the affirmative.

It is true that to say of someone that “he has the power of enforcing” a trust might mean only that (and be properly rendered as) “he has power of enforcing” it. In such case the definite article is redundant to the meaning. Its use is stylistic only and no inferences which affect meaning should be drawn from its presence in the phrase. It might, however, be intended as non-redundant in some contexts and the question then becomes: what indications are there, either way, about its use in section 84A (17)?

The starting point, it is submitted, is the fact that the section makes plain that the enforcer shall “have the duty of enforcing” the trust. The definite article may not be dropped from that phrase without replacing it with the indefinite article if sense is to be retained. The statute, after all, is not written in Latin or any of the Slavic languages. Since, therefore, one or other article must be used and each has a different meaning, it is a question (absent grounds for suspecting erroneous usage) what is meant by use of the definite article. This is best approached by considering first what use of the indefinite article would mean. It is submitted that to say that the enforcer shall “have a duty of enforcing the trust” means that he has an obligation to enforce the trust, whilst leaving open that others might also have a like obligation. Use of the definite article can mean only, therefore, that he has an obligation to enforce the trust but closing off the possibility that others might have a like obligation. In other words, it would mean that the duty of enforcing the trust is upon him and no other. Any other person charged with failing to enforce the trust in breach of duty would establish a complete defence simply by pointing to section 84A (17).

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\(^{31}\) The question, once posed, should cover all juridical persons.

\(^{32}\) Paragraph 41.08.
If that is right, then unless the indefinite article preceding “power” is also exclusive, the words “the power and” are redundant in their entirety since the enforcer, having “the duty” of enforcing the obligation, has all “the power” necessary for that purpose and no additional power-conferring words are needed. Accordingly, the only non-redundant purpose of spelling out that the enforcer has “the power” as well as the duty of enforcing the trust is to put beyond doubt that no-one else has any power to enforce it. It may safely be inferred, therefore, that the use of the definite article in relation to the section 84A (17) power of enforcing the trust is non-redundant and intended to indicate exclusivity.

Further, the argument raised earlier\(^{33}\) on section 84 (6) was to the effect that, despite use of the equivocal indefinite article in section 84 (2) (d) (“a person … to enforce the trust”), the legislature’s true intention is revealed in the unequivocal section 84 (6) namely that such person is, in fact, “the person to enforce the trust.” If that is so, an intention to change the law should not be inferred unless clearly indicated by the language used in section 84A but the double use of the definite article in section 84A (17) seems intended not merely to emulate but to render even more explicit the assumption underlying section 84 (6). It would be remarkable therefore if, having come to the conclusion that section 84 provided for an exclusive enforcer regime, a court were to conclude that the language of section 84A was intended to provide otherwise in relation to trusts created on or after 1 March 2004.

Lastly on the question of exclusivity, although it is permissible to have regard to the content of the personal benefit restriction in order to determine what effect its deliberate omission from section 84A must have been intended to have, it is not possible effectively to write it back into section 84A in order to determine what kinds of personal benefit would justify standing on the part of anyone, in addition to the enforcer, to enforce the trust. That would be to disrespect the fact that it was dropped as a requirement of purpose trusts created on or after 1 March 2004. Since, however, no other criterion emerges from the section, the only reasonable inference about legislative intent on the question is that no kind of personal benefit under the trust would afford standing to enforce the trust. In other words, it is not reasonable to assume that the legislature would have failed to specify a criterion if it intended that one should apply.

It follows from these considerations that even “particular persons” (or classes of persons connected by a personal nexus) intended to be benefited by the achievement of section 84A purposes have no right to enforce a trust established for their benefit (if the section 84A conditions are met) and this must be so even where the trust

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\(^{33}\) See the text to footnote 15.
serves no purpose other than their benefit and is, therefore, in substance a people trust which, but for the appointment of an enforcer and its meeting the other section 84A requirements, would be an ordinary people trust enforceable only by its beneficiaries.

In other words, the dropping of the personal benefit restriction must be regarded as having been intended to allow settlors to do in the BVI what settlors have the option of doing under the STAR legislation namely to establish a valid trust for persons which divorces entitlement to benefit under a trust from the right of enforcement of it. It might have been easier to determine this if something as simple and clear as sections 99 (1)34 and 100 (1) and (2)35 of the Cayman Trusts Law had been enacted in the BVI but a conclusion is nonetheless clear for its having to be argued for at some length.

Purposes generally

It might be asked, however, does this not fall foul of what might be seen as the über requirement of section 84A (2) that the trust be for a “purpose or purposes?” Even though “purpose” is undefined in the legislation, are not people and purpose trusts mutually exclusive categories? The answer to these kinds of question, if they must be answered either affirmatively or negatively, must be in the negative (if all or any of the arguments in the previous section have validity and force) but the better approach is to explain why they rely on a false dichotomy.

Why people trusts can be purpose trusts under section 84A

Unlike the STAR legislation, which applies to trusts only if the trust instrument contains a declaration to that effect, section 84A will apply to a trust if it meets the stipulated conditions, none of which requires a declaration that the section applies. Accordingly, it is an open question with every trust whether the instrument creating it establishes a section 84A trust. That question of construction is thrown wide open, however, by three considerations of general application. First, there is no requirement that any purpose or purposes of the trust be referred to or described as purposes in the trust instrument (although the purposes must, if the writing requirement identified earlier applies, be set out or fairly implied by what is set out in the instrument creating the trust). Second, all intentional acts-in-the-law are purposive in some sense or other. Third, there is no limitation on the extent to which

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34 “99 (1) The objects of a special trust or power may be persons or purposes or both.”
35 “100 (1) A beneficiary of a special trust does not, as such, have standing to enforce the trust ....” (2) “The only persons who have standing to enforce a special trust are such persons, whether or not beneficiaries, as are appointed to be enforcers.”
particular persons or classes of related persons may be benefited under a section 84A trust and nothing, in particular, to prevent the trust’s purposes from benefiting only such persons and achieving no other purpose. On the contrary, the section provides that a person may create a “valid trust for any purpose or purposes if ....”

It must therefore follow that prima facie all trusts created by instrument (other than trusts for exclusively charitable purposes) are capable of being trusts for a “purpose or purposes” within the meaning of the section whether or not they mention the word “purpose” or section 84A and this includes (because there is nothing in the wording of the section to exclude) traditional or family trusts. To be clear, this is because imposing a trust obligation upon T to make payments of income from a fund to A for life and to hold the capital for B, imposes a duty on T for the purpose of benefiting A and B in those ways. Likewise conferring a trust power on T to make payments of income or capital to members of the settlor’s family in his absolute discretion imposes a duty on T for the purpose of benefiting the settlor’s family. Further, since these purposes are specific and reasonable and, if sufficient funds are settled, likely to be practically achievable and since, further, there can be nothing contrary to law (assuming no money laundering issues arise), or morality or public policy in aiming to achieve them, the only criteria by which such trusts can be determined to be within or without section 84A are those which concern the enforcer and the identity of the trustee (who must be a “designated person”\(^{36}\)).

Assuming that a trust governed by BVI law will ordinarily have a designated person as a trustee, this reduces the question of construction in the ordinary case of a traditional or family trust to a very simple one namely whether the instrument appoints a person as enforcer of the trust, provides for the appointment of another enforcer on any occasion on which there is no enforcer or any able and willing to act and the original enforcer is a party to the instrument or signifies his consent to act as enforcer in writing addressed to the trustee as is required by section 84A (3) (d) and (e). If so, it is a section 84A purpose trust even if it refers expressly to purposes nowhere and achieves no purpose other than would be achieved by a traditional or family trust outside section 84A. The questions raised earlier rely on a false dichotomy, from the section 84A point of view, between people trusts and purpose trusts. The true dichotomy is between those trusts whose purpose it is to benefit people but which have statutory enforcers and those trusts which are enforceable by the people whom it is the settlor’s purpose to benefit. This conclusion has two further consequences worth highlighting.

\(^{36}\) A barrister or solicitor practising in the BVI, an accountant who is also an auditor for the purposes of the Banks and Trust Companies Act 1990 likewise practising, a licensee under the Banks and Trust Companies Act 1990 or any other person designated by Order of the Minister of Finance.
**The rule in Saunders v Vautier**

The first consequence is that validly establishing a section 84A trust must exclude *Saunders v Vautier* rights in persons who, had the trust been established outside the section, would have had them. Explanations of this fact which base themselves on the absence of a proprietary interest in such persons under a statutory purpose trust or the exclusive right of the enforcer to require the trustee to do things are likely to raise further, difficult questions such as “why do such persons not have proprietary interests?” and “why should an enforcer have the right to call for title?” which may not be easy to answer.

It is submitted that the best explanation for the exclusion of *Saunders v Vautier* rights is, in the case of section 84A trusts, the provision made by section 84A (16) namely that “the instrument declaring or evidencing a purpose trust may, but need not, ... (a) specify an event or date upon the happening or occurrence of which the trust ceases to be a purpose trust.” If it does not do so, the trust is by definition perpetual and **no-one** has the right to terminate it. If it does, on the other hand, specify a terminating date or event, then it makes nonsense of the statutory permission if it does not mean that the trustee’s obligations shall continue until the date or event specified so that, absent intervening events rendering the purposes illegal, immoral or contrary to public policy, nothing (and therefore no-one) can bring the trust to an end prior thereto, subsequent impossibility or impracticability triggering the cy-près jurisdiction and the continuation of the obligation in modified form.

**Purposes which benefit people in perpetuity**

The second consequence is that trusts which would otherwise be people trusts can be brought under the perpetuities regime applicable to purpose trusts which, by a combination of subsections 84A (1) and (5), may be perpetual since those subsections specifically disapply the “rule against perpetual trusts.” Something requires to be said, however, about how the rule against remoteness of vesting applies to section 84A purpose trusts.

The first thing to be said is that it **does** apply since section 84A contains no equivalent to section 84 (3) which, for a reason that is not widely understood, disapplied the rule against perpetuities and remoteness of vesting to section 84 trusts. The more important thing, however, is that its application is limited to ensuring that the transfer into trust or to a person (or for purposes) upon termination of the trust, if terminable, takes place within the perpetuity period. This, certainly, is how it applies to charities although they may avail of the exception that a gift over

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37 (1841) 4 Beav 115.
from one charity to another need not take place within the perpetuity period. It does not, however, apply to applications of charitable funds for the charitable purposes to which they are devoted even though some of those applications will necessarily involve dispositions to persons (eg grants) and, therefore, a vesting of property outside the perpetuity period. To apply the rule against remoteness of vesting to individual applications for charitable purposes would be inconsistent with allowing charitable purposes to be achieved in perpetuity to begin with. Section 84A (5) appears to follow the charitable model in this respect in that it disapplies what it calls the rule against trusts or powers of excessive duration and section 84A (1) makes clear that this includes “any rule prohibiting a trust or power under which trust property would, apart from the rule, be capable of application for a purpose beyond a permissible period.” The significance of this for trusts which, but for meeting the section 84A criteria, would be people trusts is that payments to persons whom it is the settlor’s purpose to benefit fall to be treated as applications of trust property for a purpose and are not, therefore, invalidated by being made outside the perpetuity period.

**What things might not be purposes?**

There are, it is submitted, some things that are not or cannot sensibly be understood as purposes within the meaning of the statutory provisions notwithstanding the width of reference implied by the qualifier “any.” Two matters, at least, make this clear and are worth highlighting.

First, it is possible and illuminating to distinguish amongst purposes between motives and intentions. A motive is a **backwards-looking** reason for action which seeks to explain action by reference to a circumstance existing prior to or contemporaneously with the action. An intention is a **forward-looking** reason for action which seeks to explain action by reference to a future circumstance which it is desired to bring about.38 They are differently oriented ways of explaining purposive behaviour. The statutory permission to create a trust for purposes is, it is submitted, a permission to create a trust for forward-looking reasons only. A trust established, therefore, merely because one has children (a fact which might appear in a recital as the settlor’s purpose in establishing the trust) or because one is a socialist (which might likewise appear) does not specify a purpose if the mode of benefiting the children or advancing socialism is not also expressly or impliedly specified in the instrument. An instrument which reveals the settlor’s purpose in the sense of motive but which, for one reason or another, fails to specify objects would not, it is

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submitted, be capable of existing as a section 84A purpose trust. Any transfer to the trustee under such instrument purportedly on the terms of the instrument would effect no more than a bare trust.

Second, there is the proper analysis of a trust to “hold and retain” property. The question whether a voluntary transfer expressed to be “on trust to hold and retain” property without more creates merely a bare trust for the transferor or a valid purpose trust has been much debated in the literature normally in the context of shares in a company. There are a number of considerations which suggest that under BVI legislation, at least, it has merely the former effect.

The starting point must be the consideration that a transfer simply “on trust for sale,” which is the converse obligation, clearly does not alienate the entire equitable interest in the property transferred since it gives no hint what should be done with the proceeds and they would undoubtedly be held on bare trust for the transferor. Do the facilitative provisions of sections 84 and 84A mean that a transfer on trust “to hold and retain” achieves something more? It is submitted not for the following reasons.

Section 3 of the Trustee Act confers on a trustee, subject to any provision contained in the instrument creating the trust, a wide power of investment of “any portion of the trust funds.” This, of necessity, entails a power of sale over the entire trust fund for the limited purpose of investing or re-investing it, just as section 17 of the Trustee Act, like section 16 of the English Trustee Act 1925, gives a non-excludable power of sale and mortgage over trust property where trustees are “authorized … to pay or apply capital money subject to the trust for any purpose or in any manner.” (It is to be noted that this provision, which pre-dates statutory purpose trusts, implicitly acknowledges that there is no bright line between achievement of purposes and benefiting people since the paradigm use of the power conferred is the raising of funds to make an advancement under the statutory - or an express - power to or for the benefit a person entitled to the capital of trust property.)

What, however, is the difference between, on the one hand, a trust (“A Trust”) in which the settlor expressly ousts the section 3 power (so that there is an implicit duty to retain the trust property in specie, subject to the section 17 power of sale, for the entirety of the trust period) but fails to specify any objects and, on the other hand, the three following kinds of trust each of which, unlike A Trust, complies with the section 84A enforcer requirements and happens to have a “designated person” as

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On the assumption that the settlor’s failure to specify any objects of A Trust is not a mistake which would permit rectification of the instrument, any transfer of property to the trustee of A Trust purportedly on the terms of A Trust would in fact and in law be a transfer on bare trust for the settlor precisely because, despite making it clear that that the trustee has no power to sell the property for investment purposes (and therefore has a duty to hold and retain the property), he has failed to specify any object of the trust. If that is so, it is impossible to see why B, C or D Trusts should be any different since each differs from the preceding one in the series only in form and not by way of substantive provision: B differs from A only in having an enforcer and designated person as trustee; C differs from B only in expressly conferring a duty instead of implicitly imposing the same duty by ousting a power and D differs from C only in labelling that express duty as a purpose. In other words, if A Trust specifies no object (which must be a matter of substance, not form), it must follow that neither does D Trust.

Can it be said, however, that a trust imposing a duty (whether or not expressed as a purpose) to hold and retain property is capable of being construed as a section 84A trust for the “purpose” of ousting the section 3 power of investment? There are three reasons for thinking not.

First, a trust purpose, though a purpose of the settlor, is to be achieved, if at all, by the trustee during the trust period rather than by the settlor at the outset. Ousting the section 3 power, however, is a purpose which is necessarily achieved by the settlor right at the start of the trust period and the trustee does nothing during the trust period to ensure that it remains ousted: the power is ousted however the trustee behaves thereafter. This kind of purpose (as with purposes which are mere motives) is therefore the wrong kind of purpose.

Second, allowing that a trust might be established purely for the purpose of ousting the section 3 power must mean that a trust could be established purely for the
purpose of ousting any of the statutory powers of trustees (so far as excludable) since there is nothing special, from this point of view, about the power contained in section 3. By way of example capable of multiplication, it would allow a settlor to create a trust of property purely for the “purpose” of ousting the power to insure that property contained in section 20 of the Trustee Act (which, by reason of the provision made by section 66 (2), parallel to that made by section 69 (2) of the English Trustee Act 1925, is excludable). But that is an absurdity which permits and requires rejection of the premise which entails it.

Third, it is not reasonable to infer that the legislature intended sections 84 and 84A to provide a complicated way of doing what might be done more simply in light of section 66 (2) by ousting the relevant statutory powers of trustees by express or implicit provision to that effect in the instrument.

These three reasons together with a comparison of the A, B, C and D Trusts suggest both the utility of distinguishing, amongst forward-looking purposes, between purposes internal and external to the trust and that a statutory purpose must be external to the trust. By this is meant that a statutory purpose must describe a goal that does not merely consist in establishing, by exclusion or modification of the powers and duties of trustees under the general law, what powers and duties a particular trustee shall have: if a stated purpose can be viewed as achieving no more, for example, than an exclusion of power which the trustee would otherwise have, it falls to be regarded as a purpose wholly internal to framework of the trust which leaves unstated what purpose or purposes are to be achieved once that framework has been established. A framework is just a framework.

Another perspective on the internality and externality of purposes may be gained by reflection on the different ways of speaking that are appropriate to the contexts of people and charitable trusts. As regards people trusts, it is in particular a misuse of language to refer to the beneficiaries, despite their being objects, as “duties” of the trustee. Z, the life tenant of a trust, is not a duty even though he is an object of the trust. This is not the case in relation to charitable trusts where it is proper (using the paradigm analysed earlier) to speak of the advancement of education as a (indeed, the primary) duty of the trustee. In charitable trusts, objects are spoken of as duties. It may be this asymmetry which has engendered the belief that the duties of a trustee of a purpose trust are on a continuum and that there is no difference of kind between “framework” duties (which is what internal purposes determine) and the purpose or purposes which the trustee is to achieve once that framework is established (external purposes). But, if so, this belief is seriously mistaken at least in relation to charitable purpose trusts.
The distinction of kind to be drawn between the duties of charitable trustees which are objects and their other duties is that the duties which are also objects must be **intrinsically** of value (public benefit) whereas the others are so only **instrumentally**. No-one would even think that a duty to hold and retain property (without more) could be the sort of duty that could be the object of a charitable trust. That, however, is not because holding and retaining particular property is not of public benefit (it might be) but because, if it is of public benefit, it is so only instrumentally. Charity trustees may therefore have a duty to hold and retain property - but only instrumentally for the public benefit as is the case, for example, with the trustees of Sir John Soane’s Museum whose duties include the preservation of 12, 13 and 14 Lincoln’s Inn Fields, London for the public benefit40.

What, it may then be asked, if a legislature decided to use the model of charitable trusts to allow, for the first time, a privately enforceable trust for the achievement of purposes beyond those achievable through a charitable trust? Should it be assumed that in doing so, its intention was not merely to expand the range of intrinsically valuable purposes which might be achieved through a trust structure (so as to allow that purposes other than those exclusively of public benefit might be valid so long as a mechanism of private enforcement were established) but also to allow that duties which, in a charitable context (as in a people trust context) might exist **only** as means to an end, could be made ends in themselves? That internal purposes, in other words, might qualify as external ones?

At the very least, such outcome is not the necessary consequence of this kind of legislative adaptation of the charitable trust and the history of purpose trusts in the BVI suggests that it was not in fact the intent behind sections 84 and 84A: if the argument earlier advanced to the effect that section 84 retained a weak public benefit requirement is correct, then it is hard to square it with the thesis that a trust might be established to achieve an entirely inward-looking purpose and section 84A, modifying section 84 merely to allow that particular persons and classes of related persons might benefit from a purpose trust, can hardly be regarded as having done so either.

It might, however, be said that this is where the analogy to the charitable trust breaks down, at least in relation to section 84A trusts: in specifying that a privately enforceable trust for “any purpose or purposes” might validly be established and dropping any semblance of a public benefit requirement, the legislature intended to allow what those words allow according to their ordinary and natural meaning namely that a trust for any purpose or purposes (meeting the positive and negative

40 Registered charity number 313609.
conditions) might be validly established. Against this argument, repeated insistence on the analogy to charitable trusts is futile since analogy has force in argument only where there is agreement about the significance of the similarities and differences between the objects of comparison.

The argument based on a consideration of the A, B, C and D Trusts, however, is not analogical. It relies on the principle of identity and argues that there is no relevant difference between the cases. If valid, its conclusion compels. There is, moreover, another argument whose conclusion, if valid, likewise compels.

It is implicit in the wording of subsections 84A (16) and (22) which refer to an instrument “declaring or evidencing” a purpose trust that a trust might be established under this section by declaration (and there is no reason to think that section 84 is any different since that would be the default position as a matter of principle and nothing in the wording of section 84 excludes the possibility). Consider then the following syllogism: (1) the object of a purpose trust may be any purpose or purposes, including the holding and retention of property; (2) a designated person may validly declare himself trustee of his own property for any lawful object therefore (3), a designated person may declare himself trustee of his own property for the purpose of holding and retaining that property.

Whether (3) is regarded as false or merely absurd does not matter since, either way, it will entitle rejection of the premise which entails it. It cannot, however, be entailed by (2) since that is known to be true and the true can entail neither the false nor the absurd. The vice in the argument must therefore lie all in (1). But the first part of that premise (up to the comma), is also true in the sense that it merely paraphrases the statutory formula “a person may create a valid trust for any purpose or purposes.” From this it may be concluded that the offending words are those which follow the comma: “including the holding and retention of property.” Accordingly, it follows that despite the width of reference of the qualifier “any,” the purposes for which a statutory purpose trust may be created exclude the holding and retention of property. This conclusion follows, of course, only if (3) is either false or absurd and so it is important to be clear about why it is. The argument may be taken in three stages.

First, a trust for the purpose of holding and retaining property does not become unreasonable or contrary to public policy simply because it has been established by declaration rather than transfer. Were it otherwise, declaration and transfer would not be truly alternative modes of creating a trust yet it is trite law that they are:
... it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes.\textsuperscript{41}

This means that it cannot be argued that holding and retaining property is a valid statutory purpose but that it is necessarily unreasonable or contrary to public policy for a designated person to declare himself trustee of his own property for such purpose.

Second, the arrangement described in (3) appears to leave the designated person with full use and enjoyment of the property albeit that he cannot dispose of it. This must follow from the fact that the arrangement, if effective at all, merely disables him from disposing of the property. Where the designated person, A, is an individual, however, such arrangement is indistinguishable from a “trust” for A for life, remainder to B where B is the purpose of holding and retaining the property rather than a person. This, however, is not a valid trust at all. During A’s lifetime, A’s duty to hold and retain the property is necessarily for his benefit (because he is entitled to full use and enjoyment of it other than by disposition) and thus is instrumental only. What, however, is there in A’s words “I hereby declare myself trustee of my X Co shares for the purpose of holding and retaining them” to suggest that things change on his death? Nothing, it seems, and that answer does not alter even if A adds “in perpetuity” to his declaration since the duration of a trust period cannot determine whether a duty is instrumental or intrinsic. Accordingly, the nature of the duty must continue to be instrumental after A’s death and the “trust” must therefore be regarded as specifying no object after A’s death. If that is so, the capital interest in the property is undisposed of by the declaration and never leaves A. In other words, A’s legal beneficial interest in the property is wholly unaffected by his declaration. The purported restriction on his power of disposition is of no effect and there is no alienation of the equitable interest. The trust can be said to be “at home” as much as if A had declared himself trustee of his own property for himself\textsuperscript{42}.

Third, if that is true of an individual it is true a fortiori of a body corporate which has no power to determine the destination of its property upon dissolution. The declaration can therefore deal only with the income aspect (use and enjoyment) of the property in question. If the capital interest is not subsequently and validly

\textsuperscript{41} Milroy v Lord (1862) 4 De G F & J 264 per Turner LJ. This does not deny that there might be something of equal validity in between: Chaithram International SA v Pagarani [2001] 1 WLR 1; [2001] 2 All ER 492.

\textsuperscript{42} Re Selous [1901] 1 Ch 921; Re Cook [1948] Ch 212.
disposed of by the company, it will be available for division amongst its creditors and members upon liquidation in accordance with statutory rules.

Why is it, it might be asked, that these conclusions seem obvious when the case of a trust established by declaration is considered but recondite in the case of a transfer on trust? It is submitted that if it is not simply the result of subconscious adoption of the false reasoning that, as regards purpose trusts, all duties may be objects because all objects are duties, it is because a trust established by transfer with the holding and retention of property as its sole object makes the transferee look like a custodian. This gives the semblance of content to the idea that it has been established for that purpose. Quite obviously, however, a trust established by declaration leaves no room for that idea. Some other purpose, not being the benefit of the person making the declaration, must be stated.

Just as with charitable and people trusts, therefore, a trustee of a trust established under sections 84 and 84A may have only an instrumental duty to hold and retain property. Accordingly, unless a duty to hold and retain property (however labelled) can be construed on ordinary principles as having been intended to benefit a person or persons other than the settlor or achieve some charitable or other purpose beyond mere retention of the property, a transfer of that property on trust to retain it without more creates only a bare trust for the settlor and a declaration by a designated person to like effect does not alienate the equitable interest.

Further, the fact that the words “holding and retention of property” may be replaced in the syllogism set out above with, eg “the holding so-as-not-to-insure property” without altering the falsity or absurdity of the conclusion yielded suggests strongly that the conclusions drawn in the preceding paragraphs may be generalized to exclude as possible statutory purposes all those things that have been called internal purposes in this article, that is, those purposes of the settlor which aim merely to exclude or modify the powers and duties that a trustee has under the general law.

Often, of course, it will be possible to find that a trust to hold and retain shares (eg in the context of a commercial transaction where the immediate and seemingly overriding concern is to establish an ownerless structure) is for the benefit of particular persons and that such purpose is sufficiently, if implicitly, stated in the trust instrument in accordance with the writing requirement. Sometimes, however, it will not and it is prudent therefore when drafting trusts of this sort to be specific, so far as possible, about the ultimate or mediate commercial purposes being achieved or persons thereby benefited. Where shares in a private trust company are in issue, the specificity should focus on what family objectives are being achieved by having
what is, in effect, an ownerless structure. “Family harmony” might not be sufficiently specific but purposes, for example, such as smooth succession management in relation to control of the company on the death of X, the settlor of the shares, or the desire to avoid succession issues within the family during the trust period, would.

By way of summary, it might be observed that the fact that a duty to hold and retain property is specific, reasonable, possible, and not contrary to law, morality or public policy does not entail that it is therefore a purpose which may be the object of a statutory purpose trust. What things qualify as purposes is a question logically prior to the question whether they also meet the positive and negative conditions. It is a question that was, so far as express provisions are concerned, left open by the legislature when enacting section 84 and section 84A differs in this regard only in expressly excluding trusts for exclusively charitable purposes. This article has, therefore, attempted to identify what the sections must be regarded as having implicitly excluded. It has argued that they are those purposes which, in the case of section 84, are exclusively charitable and, in relation to both sections, are (1) mere motives for establishing the trust in question, (2) achieved at the outset by the terms of the instrument rather than, if at all, by the trustee during the trust period, and (3) internal to the trust in the sense of merely excluding or modifying the powers and duties which trustees have under the general law.\(^3\)

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**Statutory Purpose Trusts in the BVI**

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

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For more information please contact:

Naomi Little
+1 (441) 298 7828
naomi.little@conyersdill.com
www.conyersdill.com

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\(^3\) A similar internal/external distinction is asserted but not argued for at any length by Matthews in relation to the objects of a STAR trust at (1997) 11 Trust Law International 67 and also in the New Trust: Obligations without Rights? in AJ Oakely (ed) Trends in Contemporary Trust Law (Oxford University Press, New York, 1996), 25 where the analogy to charitable trusts is relied on to some extent.