Trusts & Equity

STAR trusts

by Professor David Hayton

The Cayman Islands have recently enacted the *Special Trusts (Alternative Regime) Law* 1997 (STAR) which, in conjunction with the *Perpetuities (Amendment) Law* 1997 exempting STAR trusts from the rules against perpetuities, makes possible the creation of the most sophisticated trust vehicle in the world, if an express choice of Cayman Law is made, as recognised in the *Hague Trusts Convention* implemented by the *English Recognition of Trusts Act* 1987. However, if the constructors of such a vehicle are not very skilled and knowledgeable, it is possible that the vehicle may turn out to be unstable in certain environments, rather than being the James Bond multi-purpose vehicle intended by the designer.

The vehicle plans of the designer provide substantial precautions against accidents, in that STAR only applies if the trust instrument contains a declaration to that effect, and if one of the trustees is a trust corporation duly licensed under the *Banks and Trust Companies Law* 1995. Moreover, it is a criminal offence for a trustee to accept property on a STAR trust, unless he has taken steps to ensure that the settlor understands who will have the right to enforce the trust (s. 3, 12 and 14).

Enforcement rights are, of course, at the very core of the trust concept. Thus, there is a fundamental problem with purpose trusts that are not charitable trusts enforceable by a state office holder. To deal with this problem, many off-shore jurisdictions have enacted legislation validating purpose trusts, if the settlor initially appoints an enforcer having particular qualifications in the relevant jurisdiction.

STAR PURPOSE TRUSTS

The STAR legislation expressly deals with deficiencies that may arise under other jurisdictions' legislation. It applies not just to purpose trusts but to people trusts and to mixed purpose and people trusts (s. 6), so avoiding any preliminary issue as to whether a particular trust is subject either to the purpose trust regime or the people trust regime.

It deals in s. 10 with potential problems as to the uncertainty of the meaning of some purposes by allowing the trust instrument to provide a mechanism for resolving uncertainty and, in default, giving the court jurisdiction to resolve uncertainty: a STAR trust is only to be void if the court cannot, as a matter of probability, discern the settlor's general intention.

Because a STAR trust can last for ever and so can become obsolete, like a trust for charitable purposes, the trust instrument is allowed to provide a cy-près mechanism to reform the trust purposes and, in default, the court has a cy-près jurisdiction similar to its charitable jurisdiction (s. 11).

The only persons who have standing to enforce a STAR trust are the persons appointed to be enforcers by, or pursuant to, the terms of the trust or by the court (s. 7(2)), except that a trustee's duties may be enforced by a co-trustee or a successor trustee (s. 7(6)). An enforcer may be a voluntary enforcer, with a power but no duty to enforce, or an obligatory enforcer, under a duty to enforce (s. 8(1)). However, if the voluntary enforcer is not a (self-interested) beneficiary, the trustee is under a duty to apply to the court for the appointment of an obligatory enforcer (s. 7(5)).

To deal with the possibility that purpose trust legislation may otherwise be construed as only creating a personal obligation binding the trustees and not a proprietary interest affecting the trust property, s. 9(c) makes clear that:

'... in the event of a breach of trust, an enforcer has, on behalf of the trust, the same personal and proprietary remedies against the trustee and against third parties as a beneficiary of an ordinary trust.'

STAR PEOPLE TRUSTS

In s. 7 (1) it is pointed out that:

'A beneficiary of a special trust does not as such have standing to enforce the trust, or an enforceable right against a trustee or an enforcer, or an enforceable right to the trust property.'

This exceptionally exclusionary section should lead the Cayman court and the English lex fori, in a conflicts of law matter involving a STAR trust, to characterise such a 'beneficiary' merely as an object of a power and not a beneficiary (in the proper traditional sense) under a trust. Note that 'beneficiary' is defined in s. 2 (1) as:

'... a person who will or may derive a benefit or advantage, directly or indirectly, from the execution of a special trust.'

While an object of a power need not be informed that he or she is such an object, and may be excluded from having any rights to see trust accounts, the correlative right-duty relationship between beneficiary and trustee is at the core of the trust concept. As Millett LJ stated in *Armitage v Nurse* [1997] 2 AER 705, 713:

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

THE ENFORCERS

The only persons who have standing to enforce a STAR trust are the persons appointed to be enforcers by, or pursuant to, the terms of the trust or by the court (s. 7(2)), except that a trustee's duties may be enforced by a co-trustee or a successor trustee (s. 7(6)). An enforcer may be a voluntary enforcer, with a power but no duty to enforce, or an obligatory enforcer, under a duty to enforce (s. 8(1)).

Thus, if no 'beneficiary' is appointed an enforcer, so as then to be characterised as truly a beneficiary, the question arises whether or not a resulting trust arises in favour of the settlor under Cayman law or a foreign lex fori. If so, the settlor's beneficial interest will be part of his estate available for claims by his creditors and a divorcing spouse and,

on his death, for claims by forced heirs under a civilian *lex successionis*.

THE TRUSTEE

The question is whether the trustee holds the legal title on a resulting trust for the settlor, but with power to benefit as objects the so-called 'beneficiaries', so that the beneficial or equitable interest is vested in the settlor. Or whether the trustee, like an executor of an unadministered estate or, it seems, a charitable trustee, holds the legal beneficial interest subject to fiduciary duties like those owed by executors to legatees or by charitable trustees to the Attorney-General (or in England also the Charity Commissioners or persons interested in the charity under s. 33 of the *Charities Act* 1993).

No fiduciary duties are owed by the trustee or the enforcer to the 'beneficiaries' who have no personal or proprietary rights against a trustee or an enforcer or any third party by virtue of the cited s. 7(1), which goes well beyond simply excluding *Saunders v Vautier* [1894] Beav 115 rights of beneficiaries to call for their property to be vested in them. However, a trustee's duty is enforceable by the enforcer (s. 7(2)) or by a co-trustee or a successor trustee (s. 7(6)), while an obligatory enforcer is:

'... deemed to have a fiduciary duty to act responsibly with a view to the proper execution of the trust' (s. 8(2)).

This duty is enforceable by:

'... a trustee or another enforcer or any person expressly authorised by the terms of the special trust' (s. 8(3)).

Furthermore, if there is a voluntary enforcer who is not a self-interested beneficiary, then the trustees (of whom one must be a licensed trust corporation) are under a duty by s. 7(5) to apply to the court for appointment of an obligatory enforcer, on payment of a fine not exceeding 10,000 Cayman dollars.

THE LEGAL BENEFICIAL INTEREST

Unfortunately the STAR legislation, although preventing the beneficiaries from having any beneficial interest, does not deal expressly with the whereabouts of the beneficial interest, but s. 5 does provide for the law relating to STAR trusts to be:

'... the same in every respect as the law relating to ordinary trusts save as provided in this Law.'

Thus, it leaves the door open to a court to find that a resulting trust arises in favour of the settlor because nothing 'in this Law' expressly locates the beneficial interest elsewhere.

However, an implication arises from s. 13(2) which provides:

'for the purpose of the Penal Code property held upon a special trust shall be regarded, as against the trustee of the property ... and against any enforcer of the trust, as belonging to others (except to the extent of the beneficial interest, if any, of the trustee or the enforcer).'

The implication is that, otherwise, property vested in the trustee or in the enforcer would belong to them beneficially so that they could not be guilty of theft.

SAFEGUARDS

The vehicle plans of the designer provide substantial precautions against accidents in that STAR only applies if the trust instrument contains a declaration to that effect, and if one of the trustees is a trust corporation duly licensed under the *Banks and Trust Companies Law* 1995.

It is to be hoped, therefore, that the Cayman court and a foreign lex fori will hold that the trustees of a STAR trust have the legal and beneficial ownership of the trust property to the exclusion both of the 'beneficiaries' and of the settlor (although this may lead to tax problems where trustees are resident outside tax havens). Exceptionally however, it will, of course, be possible for a court, in special circumstances, to hold that a STAR trust is a sham trust where the beneficial interest has remained in the settlor, e.g. where the enforcer is the settlor or his dummy and the trustee always does as directed by the enforcer.

SOME PURPOSE PITFALLS

If legal and beneficial ownership is vested in the trustees, it may be tempting to regard as valid a trust providing for trustees simply to hold all the shares in X Co Ltd (or in Z Private Trust Co Ltd), rather than regard a resulting trust arising for the settlor, because the provisions of the trust only require the trust fund to continue to be invested in its existing state without disposing of any income or capital. However, to take advantage of STAR, s. 6 (1) requires that there be 'objects of a special trust' which 'may be persons or purposes or both'. The holding of shares in a particular company is not an object in itself but a means to attaining an object: thus to obtain the benefit of STAR the object or purpose of holding the shares needs to be spelled out.

If the object or purpose is expressed to be the maintenance or development of the activities of X Co Ltd, one may query whether this will be sufficient to satisfy s. 6 when it would seem that such would, anyhow, be the implicit duty of a trustee holding all the shares in X Co Ltd, and one then wonders for what purpose or for whose benefit the activities of X Co Ltd are to be maintained or developed.

No problem, however, arises if the income has to be spent on achieving an object such as abolishing vivisection or achieving some other reform of the law, or promoting some socially beneficial purpose that falls outside the boundaries of charitable purposes, so indicating that no problem should arise if the income (if any) arising from the holding of the shares in X Co Ltd is to be spent on maintaining or developing the activities of X Co Ltd except to the extent that a power to accumulate income is exercised with the object of capitalising income: all income is then disposed of for objects.

Under STAR trusts which are expressed to continue indefinitely, the capital does not need to be disposed of. However, if the STAR trust is expressed to last for an ascertained or ascertainable period, whereupon the capital is to pass to Y, then capital is ultimately used for the object of benefiting Y as ultimate beneficiary under the terms of the STAR trust.

AVOIDING PROBLEMS

If an English settlor has $10m in a Cayman bank account which is transferred to Cayman trustees of a STAR trust who acquire a Cayman company, which they use to acquire assets which happen to include English land or English stocks and shares, then no problem should arise. In such fashion English or other settlors should be able to create very sophisticated trust vehicles for achieving a vast range of purposes.

PUBLIC POLICY PROBLEMS

STAR does not apply to Cayman land, revealing that Cayman public policy is opposed to allowing non-charitable purpose trusts of Cayman land and to exempting any trust of Cayman land from the perpetuity rules.

Under art. 18 of the *Hague Trusts Convention*, effect does not have to be given

to an applicable foreign trust law if this would be manifestly incompatible with public policy. Thus, if an English settlor settles English land on English beneficiaries and chooses Cayman law as the applicable trust law, so that he can create a STAR trust to last for ever or a STAR non-charitable purpose trust, it seems clear that the English court would refuse to recognise the validity of the purported STAR trust, and so hold the trust void. It should make no difference if other types of English property are the subject-matter of the trust.

It should further make no difference if an English settlor uses the device of simply inserting a Cayman company to which is transferred the English land or other English property, with a transfer of the shares in the Cayman company then being made to Cayman resident trustees of a Cayman STAR trust.

However, if an English settlor has $10m in a Cayman bank account which is transferred to Cayman trustees of a STAR trust who acquire a Cayman company, which they use to acquire assets which happen to include English land or English stocks and shares, then no problem should arise. In such fashion English or other settlors should be able to create very sophisticated trust vehicles for achieving a vast range of purposes.

However, if a trust is intended to be a trust for people, one or more beneficiaries should be appointed as enforcer(s), so as to oust a possible public policy response of a traditional trust jurisdiction in which trust assets are situated. Such a jurisdiction might take the view that where a settlor is concerned to benefit a private group of people who can have the enforcement rights against the trustee then some of such people must have enforcement rights because, in the words of Millett LJ:

'... if the beneficiaries have no rights enforceable against the trustees there are no trusts'

Recognition of legal and beneficial ownership in the trustee is an anomalous necessity for purpose trusts; but to extend the anomaly to STAR people trusts so that beneficiaries do not even have personal rights, let alone proprietary rights, would so destroy the concept of a trust for beneficiaries – which requires beneficiaries to have some core rights – that a STAR trust whose beneficiaries have no rights of enforcement should be characterised as a resulting trust for the settlor, where the trustee has merely a power to benefit the 'beneficiaries' simply regarded as objects of power.

Professor David Hayton
Kings College, London