

CONTROL OF CHARITIES UNDER GUERNSEY LAW

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Introduction

The point which arose in the case of *Re Insinger Trust (Guernsey) Limited*³ was both simple and nice.

Had the court jurisdiction to make a declaration about the charitable status of a charity so as to be able to claim tax reliefs abroad? The answer might, to an English lawyer, have seemed too simple for words. But Guernsey is not England and until 1989 trusts, including charitable trusts, were governed by customary law.⁴ This customary law was overlaid and to some extent supplanted in 1989 by the statutory framework introduced by the passing of the Trusts (Guernsey) Law 1989. That Law dealt with charitable trusts specifically in a number of respects, in particular as regards the introduction of the cypres rules already operating in England.

With a new scenario it is therefore not so very strange that what seems simple in England was, to a court unfamiliar with the new statutory jurisdiction over charitable trusts, not so very simple. In any event different answers were given both at first instance and in the Court of Appeal.

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3 (1999) 2 ITEL 154, Guernsey CA.

4 For an account of the pre-1989 law of trusts in Guernsey, see the paper by St John A Robilliard "Foundations of Guernsey as a Trust Jurisdiction" (1996). The author is an Advocate of the Royal Courts of Guernsey and Partner in Ozannes, PO Box 186 1 Le Marchant Street St Peter Port Guernsey GY1 4HP. Tel: 01481 723 466.

The charity concerned was FDS Charitable Trust ("FDS") a Guernsey charity whose sole trustee was Insinger Trust (Guernsey) Limited. FDS was in essence a medical research charity, whose objects were set out in a Trust Deed of 27 October 1998. Though constituted in Guernsey its main axis was in the Russian Republic. And to get tax relief in Russia it needed to establish its credentials as a charity recognised under Guernsey law. The particular predicament of the trust was its need to demonstrate to the tax authorities in the Russian Federation, where the main work of the Trust was carried out, that the Trust was validly constituted as a charitable trust in Guernsey. This in turn would enable it to secure exemption from forfeiture to the Russian Federal Budget of funds already distributed to the tune of \$667,677 together with possible 100% penalties. There being no register of charities in Guernsey only an order of the court in whose jurisdiction the Trust was originally established to the effect that the Trust was validly constituted as a charitable trust could satisfy the tax authorities in the Russian Federation. Unless exemption was established in that way the Trust was, according to the evidence adduced before the court, destined to suffer a tax liability of \$667,677 with possible additional penalties at a rate of 100%.

Objects of FDS Trust

The full text of clause 3 of the Trust Deed which was an irrevocable deed was as follows:

"3. The Trustees shall hold the capital and income of the Trust Fund upon trust to apply the income and all such part or parts of the capital for or towards the advancement of education or research in any or all of the fields of medicine, ecology, and pharmaceuticals at such time or times and at such places in such manner as the Trustees may in their absolute discretion think fit provided that the Trustees may at their absolute discretion for the period of 21 years from the date of this Deed instead of applying the income of the Charity in any year accumulate all or any part of such income at compound interest by investing the same and the resultant income in any of the authorised investments and hold the same as an accretion to and as part of the capital of the Charity without prejudice to the rights to apply the whole or any part of such accumulated income in any subsequent year as if the same were income of the Charity arising in the then current year."

Decision of the Lieutenant Bailiff at First Instance

In dismissing the application the learned Lieutenant Bailiff held:

“that the present trust was one where there was a beneficiary;⁵ (2) that the Court could easily have made a declaration that the Trust was a validly constituted trust *simpliciter*;⁶ but (3) that, although it was a reasonable inference that the objects of the Trust were charitable⁷ the Court could *not* make the declaration sought because the wording of section 64(1)(b) of the Trusts (Guernsey) Law 1989 as amended by the Trusts (Amendment)(Guernsey) Law 1990, which enables the court "to make a declaration as to the validity or enforceability of a trust", does not on its face enable the court to make a declaration that a trust is validly constituted as a *charitable* trust, such a declaration being one as to the *status* of the trust and the wording of the statutory provision only going to declarations as to validity and enforceability of a trust and not as to its status⁸; (4) that the absence of the word "status" from the statutory wording could not be corrected by implying it into the clear language of the subsection, for that would be tantamount to legislation.⁹

Criticism of the Reasoning at First Instance

The first holding of the judge appears wrong. There was no identifiable human beneficiary in the present Trust. It was a trust for purposes. The word "beneficiary" in section 11(2) is to be understood as referring to persons and not purposes: the contrast implicit in the section is between a trust for the benefit of an identifiable or ascertainable person or identifiable or ascertainable persons and a trust for charitable purposes on the one hand and a trust which is not for the benefit of an identifiable or ascertainable beneficiary or beneficiaries nor for a charitable purpose on the other hand. Trusts in the first category are *prima facie* valid and enforceable: trusts in the latter category are not. A trust for non-charitable purposes is therefore invalid and unenforceable because it is (*ex hypothesi*) neither for charitable purposes nor for the benefit of identifiable or ascertainable beneficiaries.

The objects of the Trust were clearly charitable as being for the advancement of

5 Judgment 2C.

6 Judgment 4B-C.

7 Judgment 5A-B.

8 Judgment 7A-B

9 Judgment 5G-7A.

education and the learned Lieutenant Bailiff had no difficulty on that score.¹⁰ The research objects he considered, after having heard argument, could be assumed to be educational and beneficial to the community.¹¹ Those assumptions are obviously correct¹²

The decision at first instance is hard to reconcile with Section 11(2)(c) of the Guernsey Trust Law. This latter provision appears to corroborate the ability of the court under section 63(1)(b) to make a declaration as to the validity and enforceability of a charitable trust. The court may declare that a trust is invalid and unenforceable because it has no identifiable or ascertainable beneficiary or beneficiaries and is not a charitable trust. Such a declaration is a declaration as to the validity or enforceability of the trust, albeit one which denies validity or enforceability. Equally (it would seem) the court may make a declaration that a trust which has no identifiable or ascertainable beneficiary or beneficiaries but which is charitable is therefore valid and enforceable.

Section 11(2)(c) thus has every appearance of enacting in statutory language the general rule established by English case law, namely that a trust for purposes, not being for the benefit of identifiable or ascertainable beneficiaries, is invalid and unenforceable unless for a *charitable* purpose.¹³ On the other hand, the wording of section 11(2)(c) would appear to exclude the anomalous exceptions in English law (referred to in *Re Endacott*¹⁴) which allow enforceability to purpose trusts for the benefit of animals or monuments. In Guernsey it would therefore appear that the anomalous trusts for the benefit of animals or monuments allowed under English law would under Guernsey law be invalid and unenforceable.

Crystallising the matter still further, the thrust of sections 11 and 63 seems to be that a trust for a purpose will be invalid unless declared to be for a charitable purpose. There must be a mechanism to resolve whether, for trust law purposes, a purpose is charitable or not.

¹⁰ Judgment 5B.

¹¹ Judgment 5D-E.

¹² See *Tudor on Charities* (8th edn 1995) 48-49; *Picarda Law and Practice Relating to Charities* (2nd edn) 48-51 ; and see *ibid* 3rd edn (1999).

¹³ See *Re Astor's Settlement Trusts* [1952] Ch 534; *Re Shaw* [1957] 1 WLR 729; *Re Endacott* [1960] Ch 232, CA.

¹⁴ [1960] Ch 262, CA.

Those trust law purposes include the other provisions in the Guernsey Trust Law notably Sections 11, 12, 18, 53 and 54 which specifically mention trusts for charitable purposes.

Moreover there is in the statute a relevant mechanism for establishing in cases of doubt or dispute, or whenever it is otherwise expedient in the interest of the trust, that it is indeed a valid charitable trust. That mechanism is Section 63 which allows applications for a declaration as to whether or not a trust is valid and enforceable. Section 63 (1) provides that on the application of any person mentioned in subsection (2) (who includes HM Procureur and a trustee) the Royal Court may:

- “(a) make an order in respect of:
 - (i) the execution, administration or enforcement of a trust..
- (b) make a declaration as to the validity or enforceability of a trust”.

Once a declaration is made under Section 63 that a particular trust for a purpose is a valid charitable trust it can claim exemption from the 100 year rule under section 12 of the Guernsey Trust Law; and arguments raised by those who seek to upset the trust on the ground that it is void as infringing that rule will be precluded by such a declaration.

Such a declaration will also be sufficient to classify the trust as a valid charitable trust (or trust for charitable purposes) for the purposes of other sections in the Guernsey Trust Law made applicable to trusts for charitable purposes. Thus Section 18 makes it the duty of a trustee to execute and administer the relevant trust and exercise his functions in accordance with the provisions of the law and subject thereto, where there are no beneficiaries, in the interests of the charitable purpose. And a declaration may be necessary as a precondition of applying the provisions of Sections 54 and 55 which apply to trusts for a charitable purpose and allow of a cyprus or other variation of a trust for charitable purposes.

On this footing the language of Section 63(1)(b) thus appears to be in no way defective; on the contrary, it seems perfectly clear and so does not require legislation to correct it.

A declaration that a trust for a purpose is a valid charitable trust is not just a declaration as to "status". It is a declaration as to *validity* because a purpose trust can under Section 11(2)(c) of the Guernsey Trust Law only be *valid* if it is for a charitable purpose. Putting it another way, a purpose trust is not validly constituted

unless it is constituted as a charitable trust i.e. is established for purposes which are exclusively charitable.

In the present case the Lieutenant Bailiff accepted that the purpose of the trust was charitable but claimed that he had no jurisdiction under Section 63 to make a declaration that it was constituted as a valid charitable trust. That in itself seems a startling proposition. For in order to make a declaration as to the validity of a purpose trust it has to be declared that it is constituted as a charitable trust or is a validly constituted charitable trust. Charitability is central to validity in the case of a purpose trust or trust for a purpose.

Decision of Guernsey Court of Appeal

The Court of Appeal of Guernsey allowed an appeal from the judgment of the Lieutenant Bailiff and granted the declaration sought. The leading judgment was delivered by The President, Richard Southwell QC with whom Sir Philip Bailhache and Peter David Smith QC simply agreed.

After some preliminary observations about the trusts of the charity and the absence of any system of registration of charities in Guernsey or any regulatory body to administer or regulate charities in Guernsey¹⁵, the President observed that the regulation of charities was therefore a matter for the Guernsey courts.

He then alluded to the fact that the Trust was recognised by the Guernsey tax authorities as being a charity and therefore not subject to taxation in Guernsey. But apart from that recognition a trustee of a charitable trust had no means of establishing it as charitable status except by asking the Guernsey Courts to make a relevant determination.

No "beneficiaries"

The first question was whether there were any beneficiaries of the trust. The answer given was: plainly not. It was perfectly true that the Trust had made donations to a scientific body in Russia, so as to enable that body to pay sums to scientists and others engaged in research, research which would otherwise have ceased to be carried on due to lack of funds. But, as the President pointed out, such donations do

not make the recipient or recipients 'beneficiaries' of the Trust.¹⁶ There were in truth no beneficiaries of the Trust, which was established for charitable purposes and for no other purposes. If the Trust were to be administered otherwise than for its charitable purposes it would naturally be for HM Procureur to bring that matter before the Guernsey courts so that the trustee could be restrained from using the funds of the Trust otherwise than for the charitable purposes laid down in the declaration of charitable trust.¹⁷

The predicament of the Trust, whose proper law was Guernsey law, was summed up by the President. The Trust was a charity under Guernsey law. The trustee of the Trust needed a decision of the Guernsey courts that the Trust was a charity but the Royal Court had refused to grant an appropriate declaration even though the Royal Court itself recognised that the Trust was charitable. The Royal Court had taken the view that it did not have the power to grant that declaration.

Articulated in that way the predicament had an air of formalistic unreality about it. So it is hardly surprising that the Guernsey Court of Appeal proceeded to confirm that there was indeed the relevant power available, both under Guernsey customary law and under the Trusts (Guernsey) Law of 1989.

Guernsey Customary Law

What would have been the position had the question arisen before the passing of the 1989 Law? The position under Guernsey customary law independently of statutory provisions was quite straightforward:

"The courts of Guernsey then had power to decide, for example, whether a trust was a valid charitable trust or not, and if it was charitable, how it was to be administered as a charity, and any other question arising in relation to a charity. Clearly under Guernsey law the courts could have made a declaration that a particular trust was a charitable trust."¹⁸

That power had not been taken away by the 1989 Law because section 74(2)(b) preserves powers of the Guernsey courts existing independently of the 1989 Law.

¹⁶ (1999) 2 ITEL 154 at 156a.

¹⁷ *Ibid* at 156 b-c.

¹⁸ *Ibid* at 156 e-f.

'Court' is defined as 'the Royal Court' sitting as an ordinary court.¹⁹ Pursuant to the Court of Appeal (Guernsey) Law 1961, ct II, the Guernsey Court of Appeal is able to exercise on appeal all the powers of the Royal Court.

Accordingly the President was prepared in pursuance of the power which the court had under Guernsey customary law to make the necessary declaration that the Trust was a charitable trust.

Statutory Position

The finding of the Royal Court that it had no power under section 63 (1) (a) and (b) of the 1989 Law to make the declaration was one which, "with great respect to the Royal Court", the President was not willing to uphold. He first considered section 63(1)(a). This provides that on the application of any person mentioned in subsection (2) (who include HM Procureur and a trustee) the Royal Court may:

- "(a) make an order in respect of:- (i) the execution, administration or enforcement of a trust.
- (b) make a declaration as to the validity or enforceability of a trust"

In each case a preliminary question might arise as to whether the trust was charitable and while in the former case a declaration to that effect might be at the least desirable, in the latter case it would be necessary, for it would be an essential part of the declaration as to the validity of otherwise of the trust.

Section 11 was also relevant. Under that section an application to the court as to the validity or enforceability of a trust may be made by any person mentioned in section 63(2) i.e. including HM Procureur and the trustee: see section 11(6). Section 11 (2) provides that a trust is invalid and unenforceable to the extent that, *inter alia*, -

- "(c) it has no beneficiary identifiable or ascertainable under Section 8(1) unless it is created for a charitable purpose"

It is sufficient here to note, without reproducing its exact terms, that section 8(1) deals with the way beneficiaries are to be identifiable or ascertainable.

Suppose, the President said, that as with the Insinger Trust there were no identifiable

or ascertainable beneficiaries. The question would then arise whether the trust was "created for a charitable purpose". If the court held that it was, it could in its discretion make a declaration to that effect. Accordingly the President concluded that a power to make a declaration arose both under customary law and under statute law and he stated that he was prepared to make the declarations sought.

A final point of importance emerged at the end of the President's judgment. Notice of the application was given to HM Procureur. The President confirmed that service of a notice of an application of this kind concerning a charity was correct because the Procureur was a necessary party even though he may permissibly, in the event, not wish to appear before the court. Here the Procureur was aware both of the original application by Insinger Trust and of the appeal and indicated his support for both.

Function of HM Procureur

The function of HM Procureur in Guernsey in charity cases corresponds to that of the Attorney General in England in such cases. The present case establishes that he must be made a party to an application concerning the administration of a charity but concedes that he may "naturally" (as the President put it) not wish to appear before the court. In England the Attorney General would not only be made a party but would almost invariably appear before the court. The Procureur in the present case took the view that it was sufficient to communicate his views in support of the application to the court in writing without the necessity to appear. In a jurisdiction like that of Guernsey that course seems eminently reasonable where he supports the application. Where however he opposes, or the application is contested by another party and the Procureur's view even if neutral would be of assistance to the court, the Procureur may well take a different view. In any such case it would also, perhaps, be open to the Guernsey court to require his presence.