Trusts & Equity
Fall Term 2018

Lecture Notes – No. 6

THE BENEFICIARY PRINCIPLE AND PRIVATE PURPOSE TRUSTS

A general formulation of the 'beneficiary principle' is as follows:

> **For there to be a valid trust there must be beneficiary (corporate or human) in whose favour performance of the trust may be decreed unless the trust falls within a group of exceptional anomalous cases when it is valid but unenforceable so that the trustee may perform it if they wish.**

Morice v Bishop of Durham (1804) 9 Ves 399, 405 is commonly cited as authority for the proposition: '… [e]very other [than charitable] trust must have a definite object. There must be somebody in whose favour the court can decree performance.'

Non-compliance with the beneficiary principle will generally invalidate a trust obligation. **However, in Ontario, the court enjoys a statutory jurisdiction to recognize the failed trust as a power (and thus the trustee may utilize the power free from fear of liability for breach of trust) where the disposition is conceptually certain and specific enough to fall within the statute.**

Illustrations:

Re Astor's Settlement Trusts
[1952] Ch 534

Here the settlor settled shares in the company which publishes The Observer newspaper, income to be used for protection of newspapers from combine control, preservation of journalistic integrity, etc. The trust failed as it was neither charitable nor did it have human beneficiaries. It was for general purposes, not people, and thus uncontrollable by the court as too nebulous.

Per Roxburgh J:

> Let me, then, sum up the position so far. On the one side, there are LORD PARKER'S two propositions with which I began. These were not new, but merely re-echoed what SIR WILLIAM GRANT, M.R., had said in Morice v. Bishop of Durham as long ago as 1804: "There must be somebody, in whose favour the court can decree performance". The position was recently re-stated by HARMAN, J., in Re Wood where he said ([1949] 1 All ER 1101): "a gift on trust must have a cestui que trust", and this seems to be in accord with principle. On the other side is a group of cases relating to horses and dogs, graves and monuments—matters arising under wills and intimately connected with the deceased—in which the courts have found means of escape from these general propositions, and also Re Thompson and Re Price which I have

endeavoured to explain. Re Price belongs to another field. The rest may, I think, properly be regarded as anomalous and exceptional and in no way destructive of the proposition which traces descent from or through SIR WILLIAM GRANT, M.R., through LORD PARKER OF WADDINGTON, to HARMAN, J. Perhaps the late SIR ARTHUR UNDERHILL was right in suggesting that they may be concessions to human weakness or sentiment: see UNDERHILL'S LAW OF TRUSTS AND TRUSTEES, 8th ed., p. 79. **They cannot, in my judgment, of themselves (and no other justification has been suggested to me) justify the conclusion that a court of equity will recognise as an equitable obligation affecting the income of large funds in the hands of trustees a direction to apply it in furtherance of enumerated non-charitable purposes in a manner which no court or department can control or enforce. I hold that the trusts here in question are void** on the first of the grounds submitted by counsel for the trustees of the settlement of 1951 and counsel for the Attorney-General.

Re Shaw
[1957] 1 WLR 729

[This case illustrates well the defining difference between invalid *private purpose trusts* and valid *public purpose trusts* (or more conventionally, *charitable trusts*): public benefit.]

George Bernard Shaw's will gave funds in trust "(i) to ascertain by inquiry how much time could be saved by persons who speak and write the English language, by the substitution for the present English alphabet of a proposed British alphabet containing at least forty letters; to show the extent of the time and labour wasted by the use of the present alphabet; and, if possible, to show the loss of time in terms of loss of money; (ii) to transliterate one of the testator's plays into the proposed British alphabet; to advertise and publish the transliteration with the original lettering opposite the transliteration, page by page; and to present copies thereof to public libraries, so as to persuade the government or the public to adopt the proposed alphabet."

It was held that the trust was invalid as charitable and not an exception to the beneficiary rule - the trusts were not within the category of charitable trusts for other purposes beneficial to the community, because the object of the research set out by the testator was to convince the public that the new alphabet would be beneficial, and, analogously to the cases of trusts for political purposes advocating a change in the law of the land, the court was not in a position to judge whether the adoption of the new alphabet in fact would be beneficial.

Re Endacott
[1960] Ch 232

A testator gave by will his residuary estate "to North Tawton Devon Parish Council for the purpose of providing some useful memorial to myself."

It was held that the gift was not a good charitable gift and failed for uncertainty on the following grounds: (i) the words "for the purpose of providing some useful memorial to myself" were not merely expository, but were intended to impose an obligation in the

nature of a trust, so that the gift was not an out and out gift to the council; (ii) though the purpose of the intended trust was to create a memorial to the testator himself, yet it was to be one that was useful and would serve a public purpose of some kind; but, as the purpose of utility so expressed was not synonymous with the gift's being simply for the benefit of the inhabitants of the parish, it was not within the line of authority by which gifts for such benefit had been held to be charitable; (iii) the gift was of too wide and uncertain a nature to fall within the anomalous class of cases in which trusts, although not charitable, were upheld as being of a public character.

Some anomalous exceptions creating allowable powers:

- Re Dean (1889) 41 Ch D 552: a trust for the maintenance of the horses and hounds of T is valid.

- Re Hooper [1932] 1 Ch 38: a trust for the maintenance of funeral monuments is valid.

Courts will not add to these unprincipled categories.

'Apparent Purpose Trusts'

Sometimes the beneficial class is set out in the instrument in a manner that seems an invalid purpose trust, but can be construed in a manner so as to reveal a certain class of beneficiaries.

Re Denley
[1969] 1 Ch 373

Here land was to be maintained and used for the purposes of a recreation or sports ground primarily for the benefit of "the employees of the company" and, secondarily, for the benefit of "such other person or persons, if any, as the trustees may allow to use the same"; and if at any time the number of employees subscribing should be "less than seventy-five per cent of the total number of employees at any given time" or if the land should at any time cease to be required or to be used by the employees as a sports ground, it was to be conveyed to the general hospital at Cheltenham.

It was held, distinguishing *Astor*, that this was not an invalid purpose trust but a valid trust - where a trust, though expressed as a trust for a purpose that was not in law a charitable purpose, was directly or indirectly for the benefit of individuals, it was not invalid for the absence of certainty of objects where the class of beneficiaries ("the employees of the company") was sufficiently ascertainable. The trustees held a trust obligation together with a valid power to extend the beneficial class (persons other than "the employees of the company").

Statutory Conversion of Specific Purpose Trusts into Simple Powers

Under provincial legislation many of the problems are avoided by converting a specific purpose trust into a simple power, which then would be applied by the donee of the power in accordance with the standard rules respecting certainty of objects.

The Perpetuities Act, RSO 1990, c.P.9
s.16(1)

> Specific non-charitable trusts
> 16.--(1) 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 as and to the extent that it is exercised either by the original trustee or the trustee's successor, within a period of twenty-one years, despite the fact that the limitation creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period, but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the limitation to be void if the court is of opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.

Re Russell Estate
[1977] 6 WWR 273 (Alta. SCTD)

Per Stevenson J.:

> It is interesting to note that in Re Shaw, [1957] 1 All E.R. 745, Harman, J., faced with a purpose trust, which was within the perpetuity, expressed the wish that he could treat George Bernard Shaw's trust for the creation of a new alphabet as a power citing the Restatement of Trusts. Indeed, in that case, by a compromise this result was achieved with the concurrence of all parties (In Re Shaw, [1958] 1 All E.R. 245).
>
> **The legislation appears to me to equate "specific purpose trusts" with other recognized anomalous purpose trusts which have been permitted to operate as powers.**
>
> Does this gift come within the remedial section? 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 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"; see, e.g., 39A Words and Phrases 398. I note in discussing purpose trusts that Scott sees a requirement that it be definite. (2 Scott on Trusts, Third Edition, p. 937).**

Here the purposes of the power were held insufficiently specific given the various goals of the Society. It seems a rather harsh application of the test which muddies specificity of intent with conceptual certainty of a class of objects.

'Gifts To Unincorporated Associations'

An unincorporated association has no legal personality; it cannot hold property. Can it be the beneficiary of a trust where a trustee is given money for its use or benefit?

In **Conservative Central Office v Burrell [1980] 3 All ER 42 (Ch),** it was held that an "unincorporated association" is one which cannot itself own property as it has no legal personality (thus its money is controlled by leading members who hold it on bare trust for all members), but has the following features:

(i) 2 or more persons joined together for a common purpose;
(ii) mutual rights and duties arising from a contract between members;
(iii) rules determine who controls (and on what terms) the association and its money;
(iv) members can join or leave the association at will.

Who is the beneficiary of the gift – the association or its past and/or present members?

The basic rule was given in Re Recher's Will Trusts [1972] Ch 526; National Westminster Bank Ltd. v National Anti-Vivisection Society Ltd, [1972] Ch 526, 539 per Brightman J:

> In the absence of words which purport to impose a trust, the legacy is a gift to the members beneficially, not as joint tenants or as tenants in common so as to entitle each member to an immediate distributive share, but as an accretion to the funds which are the subject-matter of the contract which the members have made inter se.

Thus, the contract will govern and only those that are subject to the contract (i.e. current members) are affected.

What is the nature of the gift?

In Re Denley [1969] 1 Ch 373 Goff J held:

> … where, then, the trust, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals, it seems to me that it is in general outside the mischief of the beneficiary principle.
>
> There are 4 possibilities in construing the facts:

> there is an absolute gift to the members of the association (Leahy), and any member may claim his share provided that this is what the donor intended.
>
> A trust exists for present members, either jointly or separately;
>
> A trust exists for present and future members (thus an endowment);
>
> No endowment trust but rather a gift to the present members beneficially as an accretion to the association's property to be dealt with according to the rules of the association by which the members are contractually bound; Re Lipinski [1976] Ch 235.

The fourth option above is the modern approach.

Re Lipinski's Will Trusts
[1976] Ch 235

The testator bequeathed half of his residuary estate to trustees on trust for the 'Hull Judeans (Maccabi) Association' in memory of his late wife to be used solely in constructing and improving the new buildings for the association. One half (that is, a one-quarter share of the residuary estate) was to be held for a school and the other half was to be held for the 'Hull Hebrew Board of Guardians' to be used solely in constructing and improving the new buildings for the association. By the time of the testator's death, the association had acquired its own premises. Based on *Re Denley*, it was held by Oliver J. that:

> … whether a gift was treated as a purpose trust or an absolute gift to an unincorporated non-charitable body with a superadded direction, the gift was valid if the beneficiaries were ascertainable; that the specified purpose of the gift to the Hull Judeans was within the power of that association and its members were the ascertained or ascertainable beneficiaries and, accordingly, the association's members were the persons who were entitled to enforce that purpose or, notwithstanding the use of "solely," to vary that purpose.

Thus the contract ruled as to entitlement and use.

What happens when the association is wound up or otherwise dissolves?

The old rule was to divide the assets on dissolution amongst the membership according to their subscriptions or contributions; that approach is no longer followed. Now the matter is primarily on one of contract.

Hanchett-Stamford v AG
[2008] EWHC 330 (Ch)

The plaintiff was the sole surviving member of the *Performing and Captive Animals Defence League* and as such entitled to the league's assets.

Per Lewison J:

28 Unincorporated associations do not have separate legal personalities. Almost all the myriad legal problems to which they give rise stem from this…

29 … In *In re Recher's Will Trusts* [1972] Ch 526 Brightman J adopted this three-fold classification; as did Lawrence Collins J in *Hunt v McLaren* [2006] WTLR 1817. In *Recher's* case Brightman J also pointed out that it would be absurd to suppose that a donor or testator intended that, as soon as a gift to such an unincorporated association had been made, any member of the association became entitled as of right to demand an aliquot share of the gift. I respectfully agree. In my judgment under normal circumstances a gift to an unincorporated association will fall into the second of Cross J's categories. It is, in Brightman J's words [1972] Ch 526, 539:

"an accretion to the funds which are the subject matter of the contract which such members have made inter se, and falls to be dealt with in precisely the same way as the funds which the members themselves have subscribed."

He added, at p 539, that in the absence of words which purport to impose a trust:

"the legacy is a gift to the members beneficially, not as joint tenants or as tenants in common so as to entitle each member to an immediate distributive share, but as an accretion to the funds which are the subject matter of the contract which the members have made inter se."

30 In *In re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No 2)* [1979] 1 WLR 936, 941 Walton J characteristically described this as "quite elementary".

31 **It follows, in my judgment, that the members for the time being of an unincorporated association are beneficially entitled to "its" assets, subject to the contractual arrangements between them. This was also Lawrence Collins J's conclusion in *Hunt v McLaren* [2006] WTLR 1817, para 113. It is important to stress that this is a form of beneficial ownership; that is to say that in some sense the property belongs to the members. *Megarry & Wade, The Law of Real Property*,6th ed (2000), para 9-095 accuses the courts of having developed "a new form of property holding by unincorporated associations" in order to escape from technical difficulties of the classic models of joint tenancies and tenancies in common. I do not think that the courts have purported to do so, and in view of the proviso to section 4(1) of the Law of Property Act 1925 it is difficult to see how they lawfully could, at least in relation to land. So the "ownership" of assets by an unincorporated association must, somehow, fit into accepted structures of property ownership.**

32 In *In re Recher's Will Trusts* [1972] Ch 526, 539 Brightman J pointed out:

"Just as the two parties to a bi-partite bargain can vary or terminate their

contract by mutual assent, so it must follow that the life members, ordinary members and associate members of the London & Provincial society could, at any moment of time, by unanimous agreement (or by majority vote, if the rules so prescribe), vary or terminate their multi-partite contract. There would be no limit to the type of variation or termination to which all might agree. There is no private trust or trust for charitable purposes or other trust to hinder the process. It follows that if all members agreed, they could decide to wind up the London & Provincial society and divide the net assets among themselves beneficially. No one would have any locus standi to stop them so doing. The contract is the same as any other contract and concerns only those who are parties to it, that is to say, the members of the society."

33 It follows, therefore, that in the case of a society with two or more members, the members could, by agreement, divide the society's assets between them.

34 In *In re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No 2)* [1979] 1 WLR 936, 943 Walton J elaborated on the ownership of assets as follows:

"Before I turn to a consideration of the authorities, it is I think pertinent to observe that all unincorporated societies rest in contract to this extent, but there is an implied contract between all of the members inter se governed by the rules of the society. In default of any rule to the contrary- and it will seldom, if ever, be that there is such a rule- when a member ceases to be a member of the association he ipso facto ceases to have any interest in its funds As membership always ceases on death, past members or the estates of deceased members therefore have no interest in the assets. Further, unless expressly so provided by the rules, unincorporated societies are not really tontine societies intended to provide benefits for the longest liver of the members. Therefore, although it is difficult to say in any given case precisely when a society becomes moribund, it is quite clear that if a society is reduced to a single member neither he, nor still less his personal representatives on his behalf, can say he is or was the society and therefore entitled solely to its fund. It may be that it will be sufficient for the society's continued existence if there are two members, but if there is only one the society as such must cease to exist. There is no association, since one can hardly associate with oneself or enjoy one's own society. And so indeed the assets have become ownerless."

…

47 The thread that runs through all these cases is that the property of an unincorporated association is the property of its members, but that they are contractually precluded from severing their share except in accordance with the rules of the association; and that, on its dissolution, those who are members at the time are entitled to the assets free from any such contractual restrictions. It is true that this is not a joint tenancy according to the classical model; but since any collective ownership of property must be a species of joint tenancy or tenancy in common, this kind of collective ownership must, in my judgment, be a subspecies of joint tenancy, albeit taking effect subject to any contractual

restrictions applicable as between members. In some cases (such as *Cunnack v Edwards* [1895] 1 Ch 489; [1896] 2 Ch 679) those contractual restrictions may be such as to exclude any possibility of a future claim. In others they may not. The cases are united in saying that on a dissolution the members of a dissolved association have a beneficial interest in its assets, and Lord Denning MR goes as far as to say that it is a "beneficial equitable joint tenancy". I cannot see why the legal principle should be any different if the reason for the dissolution is the permanent cessation of the association's activities or the fall in its membership to below two. The same principle ought also to hold if the contractual restrictions are abrogated or varied by agreement of the members. I do not find in the authorities considered by Walton J anything that binds me to hold that where there is one identifiable and living member of an unincorporated association that has ceased to exist, the assets formerly held by or for that association pass to the Crown as bona vacantia. In addition, article 1 of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the peaceful enjoyment of possessions. It says:

"No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law "

48 On the face of it for one of two members of an unincorporated association to be deprived of his share in the assets of the association by reason of the death of the other of them, and without any compensation, appears to be a breach of this article. It is also difficult to see what public interest is served by the appropriation by the state of that member's share in the association's assets. This, in my judgment, provides another reason why the conclusion that a sole surviving member of an unincorporated association, while still alive, cannot claim its assets is unacceptable.

49 **I therefore respectfully decline to follow Walton J's obiter dictum that a sole surviving member of an unincorporated association cannot claim the assets of the association, and that they vest in the Crown as bona vacantia. I might add that the Attorney General suggested in argument, without arguing in favour of one outcome, that there were three possible outcomes: first, that the last surviving member is entitled to the assets; secondly, that the assets are held jointly between the last surviving member and the estate of the member whose death caused the dissolution; thirdly, that the assets were ownerless or bona vacantia. For the reasons I have given, I conclude the first outcome is correct and I reject the second and third.**

50 Ms Maclennan did suggest that the league might have spontaneously dissolved before Mr Hanchett-Stamford's death. However, although his activities on the league's behalf had dwindled before his death they did not stop completely. In my judgment the league did not dissolve spontaneously before his death. I consider that the league ceased to exist upon his death in January 2006, when its membership fell below two. Since Mrs Hanchett-Stamford is the

> sole surviving member of the league, she is, in my judgment, entitled to its assets. She is therefore entitled to be registered as proprietor of Sid Abbey and as shareholder of the shares now held in the league's name. Her entitlement is free from any restrictions imposed by the rules of the league, which must have ceased to bind on the death of her husband. It follows that she is free, if she so chooses, to give all the former assets of the league to the Born Free Foundation.

Polish Alliance of Association of Toronto Limited v. The Polish Alliance of Canada 2017 ONCA 574 (Ont. C.A.)

An unincorporated association requires the consent of all its members to allow the association to be wound up and for the members to leave with its assets.