

GIFTS TO UNINCORPORATED ASSOCIATIONS

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ABSTRACT

An unincorporated association is a strange phenomenon. As a matter of fact, it undoubtedly exists and engages in as wide a range of transactions as any legal person. As a matter of law, however, it has no existence separate and apart from that of its constituent members. It is consequently incapable of either bearing liabilities or enjoying rights. In particular, it cannot be a donee or legatee in its own right, nor can it be a beneficiary under a trust. Yet gifts, both by way of inter vivos disposition and legacy, and both directly and on trust, are continually made in favour of unincorporated associations. If the purposes pursued by an unincorporated association are charitable a gift made to it will be valid. If its purposes are not charitable, however, the fate of the gift is uncertain. This thesis examines the current law on non-charitable gifts made to an unincorporated association, concludes that it is in an unsatisfactory state and suggests a legal analysis by reference to which such gifts can be held to be valid.

The courts of the common law jurisdictions of the United Kingdom, Canada, Australia and New Zealand have developed no less than nine different possible ways of analysing a gift for the purposes of an unincorporated association. None is satisfactory. The gift may be held to be totally ineffective or, if effective, there is no assurance that the purposes of the association will in fact be carried out.

A gift for the purposes of an unincorporated association operates satisfactorily only if it ensures that the donated property is used for

those purposes and not for the personal purposes of the members of the association. Prima facie a trust on those terms would achieve this result. However, this is not the case because of a major deficiency in the law of trusts. The current law espouses the so-called 'beneficiary principle' under which no non-charitable trust is valid unless it has human beneficiaries. The result is that it is impossible to make a gift to an unincorporated association by way of a trust to further its purposes.

On examination of the 'beneficiary principle', the conclusion is reached that it has no solid foundation in authority. While it is based upon the undoubtedly sound principle that a trust must be subject to enforcement, it represents an extremely restrictive view of the manner in which the need for enforceability can be satisfied. It is argued that a broader viewpoint is both possible and acceptable. The 'beneficiary principle' should be replaced by the 'control principle'. The 'control principle' stands for the proposition that a trust for non-charitable purposes can be adequately controlled by a broad range of individuals, and not only direct beneficiaries. With this principle as its starting point, this thesis propounds the Control Analysis of gifts to unincorporated associations whereby gifts on trust for the purposes of the association are recognised as enforceable by its members and are therefore valid.

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*PART ONE*

INTRODUCTION TO UNINCORPORATED ASSOCIATIONS

In the common law jurisdictions of Great Britain, Canada, Australia and New Zealand, it is not possible to make a direct donation of funds to an unincorporated association. Yet, although no register or similar record is kept to record the number of unincorporated associations in existence at any particular time, it is more likely than not that every adult person residing within those jurisdictions belongs to at least one unincorporated association, whose purposes are furthered in the main by voluntary donation. The failure of the law to deal adequately with the common phenomenon of donation to such associations is therefore rendered all the more unfortunate by the size of the problem.

This is not to say that efforts have not been made from time to time to utilise principles of trusts law, property law and the law of contracts to provide solutions to the difficulty. Many analyses have been attempted of the legal framework within which gifts to unincorporated associations take effect, and it is with these attempts that Part Two of this thesis deals. However, it will be demonstrated that none of these provides a totally satisfactory solution which ensures that the donated funds actually enure to the benefit of the intended unincorporated association. The law requires re-analysis. Therefore Part Three presents a proposal for reform of the law of gifts to unincorporated associations which endeavours to rid the law of a longstanding anomaly. It does so by reappraising the principle of trusts law known as the 'beneficiary principle' and suggesting a feasible alternative.

The topics dealt with in Part One are preliminary in nature. The purpose of Chapter I is to clarify the scope of the thesis. This objective is achieved in a negative manner by emphasising those matters which, though

of a related nature, are not central to the thesis and which will not therefore be discussed further. Chapter II will consider the nature of an unincorporated association and will illustrate the problems which are caused by its peculiar status, both generally and in respect to gifts in particular. The discussion will be neither detailed nor lengthy because the purpose of its inclusion here is merely to provide a background to the main body of the thesis <sup>1</sup>.

\* \* \* \* \*

## I. THE SCOPE OF THE THESIS

### 1. Introduction

This thesis deals only with the specific topic of the donation of funds, by either a member or an outsider, to a non-profit-making, non-charitable, unregistered, unincorporated association. A number of topics are excluded from its scope. In particular, it does not deal with the question of the disposition of donated funds in the event of dissolution of the association. Nor does it deal with the issues that arise when a donor anticipates the problems consequent upon donation and attempts to evade them by drafting techniques. It will therefore be useful to be specific at the outset about the issues that are excluded from discussion.

This chapter has a two-fold aim : firstly, to prepare the ground for the substantive analysis of the topic of gifts to unincorporated associations; and, secondly, to demonstrate how the legal problems caused by gifts which fall within the definition can be avoided by keeping *outside* its scope.

### 2. Incorporated Bodies

This thesis is not concerned with either the general issue of the legal status of, nor the particular issue of gifts made to, incorporated bodies.

(i) Corporate Status

If an association wishes to have its own legal personality separate from that of its constituent members, it can do so by incorporating. On compliance with the requirements of the applicable legislation <sup>2</sup>, a company can be formed whose memorandum of association stipulates the purposes of the association. Alternate methods are by private Act of Parliament <sup>3</sup> or Royal Charter <sup>4</sup>. The most suitable type of company for a non-profit-making association is the company limited by guarantee in which members are not shareholders as such but are guarantors of funds in the event of the company being wound up with insufficient funds to meet its liabilities. Alternatively, the association can be incorporated specifically in the manner stipulated by legislation such as the British Columbia Society Act <sup>5</sup>.

The advantages of incorporation are many. The association and the persons with which it deals enjoy the benefit of its having full legal personality. It can therefore sue and be sued, acquire and deal with property in its own name, borrow funds, and so on. Most significantly for present purposes, it can also be the recipient of donations in its own right. It has perpetual existence and its constitution becomes public.

However, the disadvantages of incorporation are also numerous. Although some statutes make concessions for certain types of non-profit-making companies <sup>6</sup>, an incorporated association has to comply with a multitude of formalities and is closely regulated in the detailed conduct of its affairs. For example, its name and objects and changes therein must be approved, the fact of its incorporation must be certified, its accounts must be published, it must have registered offices, it must hold annual

general meetings, auditors must be appointed, registers of its members, directors and officers must be kept public, and so on.

All this involves the expenditure of funds and time, and often the hiring of lawyers and accountants. Although it would neatly solve the problem of making donations to the association <sup>7</sup>, incorporation is therefore not the ideal solution for the majority of associations, the size and aims of which do not justify the unavoidable expense and 'red tape'. Numerous *unincorporated* associations exist to which funds are regularly donated, and it is with them that this thesis deals.

(ii) Quasi-Corporate Status

If certain types of association comply with specific statutory requirements, though not incorporated, they are deemed to possess their own legal identity for certain purposes. The association acquires statutory recognition and various privileges. The phenomenon which emerges can be termed a 'quasi-corporation' in that it has many of the usual attributes of corporations, like the possession of a name in which it may sue or be sued, and the power (independently of its members) to hold property for the purposes defined by its objects and constitution. Illustrations in England, for example, are registered Friendly Societies <sup>8</sup>, building societies <sup>9</sup> and trade unions <sup>10</sup>.

However, again registration is not the ideal solution for all associations. In the first place, only certain categories of society can become friendly societies, building societies or trade unions. Secondly, registration involves numerous formalities and extensive regulation of the

society's constitution, internal affairs and finances. This thesis therefore deals only with unregistered, unincorporated associations.

If a donation *were* made to a duly incorporated or registered association, none of the problems which are encountered in the common law and which this thesis discusses and attempts to solve would arise. The matter would be governed totally by statute.

### 3. Non-Charitable

If a donor specifies purposes for his gift which are exclusively charitable in nature, or if the gift is made to a charitable institution to further its purposes, the legal problems and issues are totally different from those which arise in the context of non-charitable gifts. The law of charities, both case law and statute<sup>11</sup>, is a distinct area of legal learning and practice. Since charitable purposes are considered of particular value to society, gifts for purposes which satisfy the legal definition of charitable are accorded a number of concessions which facilitate their validity and short-cut the legal problems encountered with non-charitable gifts. Charitable donations are also encouraged by numerous fiscal advantages not enjoyed by donations of a non-charitable nature, and are implemented and administered by state-funded bodies.

Throughout this thesis, only gifts of a non-charitable nature will be discussed<sup>12</sup>.

#### 4. Donation, not Dissolution

The aim of this thesis is to analyse the legal framework within which the donation of funds to an unincorporated association can take effect. The discussion therefore deals principally with the initial act of donation, but there will inevitably be some spill-over into a discussion of the method of property-holding within the association after the gift takes effect. However, there is a further step in the history of donated funds : their allocation when the association is dissolved and there are surplus funds remaining. The topic of dissolution of unincorporated associations will *not* be discussed because the destination of funds on dissolution of an association is dictated in the main by their original source and method of donation. If the law concerning donations were clarified (as this thesis proposes to do), the law concerning dissolution would likewise become clear. The problems which are encountered on dissolution arise only because the mechanism of original donation was not analysed at the time of donation. It is submitted that the starting place for resolving the problems should therefore be the law of donation and it is to that topic that this thesis is restricted<sup>13</sup>.

#### 5. Straightforward Donation

It will be assumed throughout this thesis that the donor, ignorant of the problems which he is thereby causing, simply makes a straightforward donation to a specified unincorporated association for its purposes. It will be assumed that he makes no attempt, via conveyancing or other devices, to anticipate and forestall the difficulties which a straightforward gift will meet in the current state of the law.

On the other hand, a donor who is well-acquainted with the current law on gifts to unincorporated associations might specifically draft his gift with the pitfalls in mind. For example, he might expressly give the funds to the current members of the unincorporated association on the condition that they use them for the purposes of the unincorporated association with a divesting clause in the deed in the event that the funds are not so used, the funds then reverting to a named person or body. In other words, the members merely have a determinable interest in the funds<sup>14</sup>. Alternatively, the gift might be made in favour of a charity, but conditional upon the performance of a request that a proportion of the funds be used for the purposes of an unincorporated association<sup>15</sup>. In this manner, the unincorporated association benefits from the donation as much as if it had had the legal capacity itself to be the donee.

For the purposes of this thesis, however, it is assumed that the donor merely specifies that the gift is to go to a named unincorporated association. In any particular instance, he may well confer interests on other bodies and persons, but it will be assumed that they in no way influence the operation of what he intends to be a straightforward gift to the association.

## 6. Conclusion

To repeat, therefore, the aim of this thesis is to analyse the current and proposed common law on gifts to the residuary class of non-profit-making, unincorporated, unregistered, non-charitable associations. Discussion and analyses of other topics will have to be sought elsewhere.

FOOTNOTES : CHAPTER I

1. A significant amount of academic comment has already accumulated on the topic. See generally, Ford, Unincorporated Non-Profit Associations (Oxford : Clarendon, 1959) ; Stoljar, Groups and Entities (Canberra : Australian National University Press, 1973) ; Lloyd, The Law of Unincorporated Associations (London : Sweet & Maxwell, 1938).
2. United Kingdom Companies Act 1948, 11 & 12 Geo.VI, c.38 ; in Australia, for example, Western Australia Associations Incorporation Act 1895-1969 and Companies Act 1961, No.82 ; in Canada, for example, British Columbia Society Act, R.S.B.C. 1979, c.390 ; New Zealand Incorporated Societies Act 1908-1976. See generally, Horsley, Law and Administration of Associations in Australia (Sydney : Butterworths, 1976), pp 1-55 ; Gallins, Guide to the Incorporation and Operation of a Society in British Columbia (Vancouver : Community Legal Assistance Society, 1975) ; Sievers, "The Dissolution of Non-Profit Associations", (1981) 7 Mon.L.R.141, pp 159-164.
3. The oldest Australian corporate association, the Royal Benevolent Society of New South Wales, was created in this fashion in 1813.
4. For example, the Royal Horticultural Society in the United Kingdom.
5. *Supra*, footnote 2.
6. For example, Queensland Religious Educational and Charitable Institutions Act 1861, No.19.
7. Incorporation was the suggestion of the Goodman Committee on Charity Law and Voluntary Organisations, 1976, para.24.
8. United Kingdom Friendly Societies Act 1974, c.46. See, Fuller, The Law of Friendly Societies, 4th.ed. (London : Stevens, 1926) for background legislation and principles.
9. United Kingdom Building Societies Acts 1874-1962 ; New Zealand Building Societies Act 1965, No.22.
10. United Kingdom Trade Union and Labour Relations Act 1974, c.52, partic.s.2, and see, *Bonsor v. Musicians' Union* [1956] A.C.104; [1955] 3 All E.R.518 ; *Electrical, Electronic, Telecommunication and Plumbing Union v. Times Newspapers Ltd.* [1980] 3 W.L.R.98; [1980] 1 All E.R.1097. In Canada, for example, British Columbia Labour Code, R.S.B.C.1979, c.212, and see, *Teamsters, Local 213 v. Therien* (1960), 22 D.L.R.(2d) 1 ; Trade Unions Act, R.S.C.1970, c.T-11, s.6. In Australia, for example, South Australia Industrial Conciliation and Arbitration Act 1972, No.125. See also, United Kingdom Industrial and Provident Societies Act 1965, c.12 ; New Zealand Industrial and Provident Societies Act 1908, No.81. And see, Registry of Friendly Societies, Guide to the Law of Industrial and Provident Societies (London : H.M.S.O., 1978).

11. See generally, Picarda, The Law and Practice relating to Charities (London : Butterworths, 1977) ; Hanbury & Maudsley, Modern Equity, 11th.ed., eds. R. H. Maudsley & J. E. Martin (London : Stevens, 1981), pp 444-514 ; Waters, Law of Trusts in Canada (Toronto : Carswell, 1974), pp 419-550.
12. Note that a popular suggestion for reform has been a new definition of 'charity' to encompass many currently non-charitable purposes. This would assist many gifts for unincorporated associations whose purposes fall within the new definition. See, Gravells, "Public Purpose Trusts", (1977) 40 Mod.L.R.397 ; Royal Commission on Taxation of Profits and Income, Radcliffe Commission Report, (1955) Cmnd.9474, c.7; Cross, "Some Recent Developments in the Law of Charity", (1956) 72 L.Q.R.187. See also, Northern Ireland Charities Act 1964, c.33, s.24.
13. There is an extensive body of recent academic comment on the topic of dissolution of unincorporated associations. See, Sievers, *op.cit.* *supra*, footnote 2 ; Atkin, "Unincorporated Associations - Distribution of Surplus Assets on Dissolution", (1978) 8 N.Z.U.L.R. 217; Green, "The Dissolution of Unincorporated Non-Profit Associations", (1980) 43 Mod.L.R.626. See also, *Re William Denby & Sons Ltd. Sick & Benevolent Fund* [1971] 1 W.L.R.973; [1971] 2 All E.R.1196 ; *Cunnack v. Edwards* [1896] 2 Ch.679; 65 L.J.Ch.801 ; *Re Bucks. Constabulary Widows and Orphans Fund (No.2)* [1979] 1 W.L.R.936; [1979] 1 All E.R. 623 ; *Re West Sussex Constabulary's Widows' Children and Benevolent Fund Trust* [1971] Ch.1; [1970] 2 W.L.R.848 ; *Tierney v. Tough* [1914] 1 Ir.R.142 ; *Re Printers and Transferrers Amalgamated Trades Protection Society* [1899] 2 Ch.184; 68 L.J.Ch.537; 47 W.R.619 ; *Re Sick and Funeral Society of St.John's Sunday School, Golcar* [1972] 2 W.L.R.962; [1973] Ch.51 ; [1972] 2 All E.R.439.
14. See, *Re Chardon* [1928] Ch.464; 97 L.J.Ch.289. But note that the reverter is subject to the rule against perpetuities : United Kingdom Perpetuities and Accumulations Act 1964, c.55, s.12. The gift must therefore expressly limit the duration of the association's benefit to the perpetuity period.
15. *Re Tyler* [1891] 3 Ch.252; 60 L.J.Ch.686. *Cf. Re Dalziel* [1943] Ch. 277; 112 L.J.Ch.353; [1943] 2 All E.R.656.

## II. THE LEGAL DILEMMA - UNINCORPORATED ASSOCIATIONS

### 1. The Factual Existence and Legal Nature of an Unincorporated Association

As a matter of fact, it is evident that unincorporated associations *do* exist. Specific examples are Amnesty International <sup>1</sup>, the International Amateur Athletic Foundation <sup>2</sup> and the National Front <sup>3</sup>, whilst most social clubs, gardening societies, political parties, religious groups and sports associations are also unincorporated associations. Even trade unions were at one time merely unincorporated associations, whose factual existence could not be ignored <sup>4</sup> :

By forming and supporting financially and physically their own trade organisations, individual workers transcend themselves as individuals and raise themselves to the power of a new social and economic force . . . . . The trade union is, in the social, economic and political sense, a real thing, a separate factual entity.

The existence in fact of entities which are unincorporated associations is undeniable <sup>5</sup> and is even acknowledged by statute <sup>6</sup>. Therefore it is hardly surprising that donors name unincorporated associations as the intended recipients of their gifts.

However, as a matter of law, the "factual entity" represented by the unincorporated association is an "artificial and anomalous conception" <sup>7</sup>. An unincorporated association has no legal personality of its own and is not an entity at all. It is merely an aggregate of individuals who have chosen to associate together in terms of time, energy and property to pursue a common purpose <sup>8</sup>, and the association has no legal existence beyond that of its constituent members. Thus the association's name is merely "a convenient means of referring in conversation to the persons composing the society" <sup>9</sup>.

It does not represent a distinct legal person.

Many definitions have been attempted from time to time of the term 'unincorporated association' in an effort to clarify its status within the legal system. For example <sup>10</sup> :

[T]wo or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and on what terms and which can be joined or left at will.

It must be emphasised that the above definition was formulated in the specific context of a particular taxing statute and is for that reason somewhat restrictive in its view of the type of arrangement caught by the legislation <sup>11</sup>. It nevertheless makes two important points. Firstly, the unincorporated association is a non-profit-making notion, not a commercial enterprise. Its members associate together for the common pursuit of an ideal or objective which, though it may involve the expenditure of funds, incidental profits and ownership of property, does not contemplate gain. Secondly, an unincorporated association, though not an entity in its own right, is nevertheless more than a merely informal group of people who happen to spend time together. Some degree of formality and organisational structure is necessary to distinguish the true unincorporated association from the social gathering or groups such as families.

It is possible to enumerate at least six characteristics of an unincorporated association <sup>12</sup> :

[T]here are six characteristics which are either essential or normal characteristics of an unincorporated association. They are : (i) there must be members of the association; (ii) there must be a contract binding the members inter se; (iii) there will normally be some constitutional arrangement for

meetings of members and for the appointment of committees and officers; (iv) a member will normally be free to join or leave the association at will; (v) the association will normally continue in existence independently of any change that may occur in the composition of the association; and (vi) there must as a matter of history have been a moment in time when a number of persons combined or banded together to form the association.

It is submitted that compliance with requirement (vi) should not be seen as essential before an unincorporated association is considered to exist in practice. It is likely that many undoubtedly existent associations were created gradually, and developed from what were merely informal arrangements originally into true associations at no identifiable "moment in time". However, at least three of the other characteristics listed above warrant some discussion in order to clarify the nature of the average unincorporated association.

In the first place, one must agree that "there must be members of the association" who are themselves legal persons. The unincorporated association itself is not recognised at law as a legal person distinct and separate from its members. Without them, therefore, it can not enjoy even a vicarious existence.

As a second requirement, the members must be bound to some sort of multi-partite contract of association<sup>13</sup> which serves to take them outside the realm of a purely informal group of individuals. It indicates their serious intention to enter into legal relations. The terms of this contract are the rules of the association and together form its constitution and the ground-plan for its continuous existence. They are normally written but can be rendered effective by customary usage<sup>14</sup>. Evidently the extent to which an association is governed and regulated by a formal constitution will

vary according to its level of sophistication. Generally speaking, the rules will specify the purposes for which the association has been formed, which are almost unlimited. There are statutory prohibitions in the area of conspiracy and public order <sup>15</sup>, and rules which are illegal because they are contrary to statute or public policy, or in restraint of trade <sup>16</sup> will be denied legal force, but otherwise the members of an association enjoy contractual freedom in formulating their rules. The rules will also normally make provision for procedural matters such as the admission of members, the termination of membership, the variation of rules, the holding of meetings and the everyday management of the association's affairs. In the absence of an express provision in the constitution which stipulates otherwise, the rules can be altered only by the unanimous agreement of all members <sup>17</sup>, though in certain circumstances mere acquiescence may be sufficient <sup>18</sup>.

Thirdly, since the membership of many associations is large, and even geographically dispersed, the rules of an association often provide for the appointment of committees and officers, who not only perform the day-to-day administrative tasks of the association, but also represent the association's members as their agents in their dealings with the outside world. Above all, to the extent that the members themselves co-own the 'association' property <sup>19</sup>, subject to the rules of the association, title is often held on their behalf by appointed committee members as trustees. In this manner, conveyancing is rendered far more practicable and convenient by the existence of a small number of identified, named persons.

Therefore it can be seen that many unincorporated associations have a complex structure, with committees, rules, trustees, and so on. However, no amount of administrative machinery and constitutional detail of this

nature can detract from or obscure the basic fact that the association itself is nothing more than the sum of its members. It is no more capable of bearing legal rights and obligations in its own name than an animal or tree.

## 2. The Legal Problems Caused by Unincorporated Associations

As compared with the case of corporate bodies which have acquired legal personality and capacity by virtue of statute, when it comes to unincorporated associations there is no distinct area of law, known as 'association law' as such. Since an unincorporated association has no more capacity or legal existence than the individuals by whom it was created or continued, the legal problems caused by its factually distinct identity, which induces people to treat it as though it *did* exist, have to be solved using the ordinary legal principles which govern those individuals. As one commentator has said, the consequence is <sup>20</sup> :

[A]n inevitable characteristic of the law on unincorporated associations. Commencing with the premise that unincorporated associations are not juristic persons, thus having no independent legal identity, the law is forced to deal in an haphazard manner with the problems thrown up by the practical realities. The approach is haphazard because the factually distinct situation has to be encompassed within rules and principles which have been developed to deal with other factually distinct situations, such as trusts and contracts.

The point can be illustrated by a brief discussion of four examples <sup>21</sup>, in addition to the principal example of donations to unincorporated associations with which the body of this thesis deals.

### (i) Contractual Liability

In the area of contract law, an unincorporated association cannot itself be a contracting party because it has no contractual capacity. Therefore whenever an association purports to buy anything, employ anyone or enter into any other type of contract, resort has to be had to the law of agency to fix responsibility on the association's individual members. As mentioned above <sup>22</sup>, the rules may expressly confer general authority on specific committee members to enter into contracts on the association's behalf. Every individual member impliedly concurs in this authorisation when he subscribes and becomes contractually bound by the rules. In this manner, the 'association' funds can be reached to compensate the aggrieved outside contracting parties. However, if no general authority is provided for by the rules, the personal liability of any particular member, who purports to enter into contractual relations on behalf of the remainder of the members of the association and in its name can be determined only by the principles of the law of agency relating to the extent of his authority so to act <sup>23</sup>.

(ii) Liability in Tort

Similarly, in the law of tort, the wrongs of individual members can be imputed to the association's membership in general only through the law of vicarious liability. The association itself cannot be held liable in tort, since it has no capacity to commit legal wrongs <sup>24</sup>.

(iii) Procedural Difficulties

Having succeeded in establishing the substantive liability (or entitlement) of an unincorporated association through its individual

members, one then discovers that the association's lack of legal capacity also causes problems of a procedural nature <sup>25</sup>. However, all the common law jurisdictions with which this thesis deals have procedural devices which operate to prevent unincorporated associations from setting up their legal incapacity to evade liability, and "to facilitate the bringing of actions against unincorporated aggregates of persons" <sup>26</sup>. In particular, it is possible for representative proceedings to be brought by and against unincorporated associations <sup>27</sup>. Two or more of its members can sue or be sued in their names, on their own behalf and on behalf of all other members of the association, provided that certain requirements are carefully met.

The operation and pitfalls of representative actions against the members of an unincorporated association as representative defendant, in an effort to render the association itself effectively responsible, can be demonstrated by the case of *Roche v. Sherrington* <sup>28</sup>. There, the plaintiff was an ex-member of an international unincorporated association called Opus Dei which, being an unincorporated association, had no legal existence apart from the members of which it was composed. The plaintiff therefore sued two members of the association in their representative capacity as representing the entire present membership, wherever they may be. He claimed that the association was liable to repay certain sums of money which he had paid to Opus Dei during his membership and which he alleged had been procured by undue influence. The court would have found in his favour on the substantive issue but it struck out the suit on procedural grounds because it was not properly constituted as a representative action. The principal reason was as follows <sup>29</sup> :

[T]he present membership of Opus Dei is by [no] means the same as it was at the respective dates when the relevant payments were made. It is common ground that the present membership must include many persons who

were not members at those dates. In these circumstances it has to be asked on what grounds a person who became a member of Opus Dei after the date of a relevant payment by the plaintiff could possibly be personally liable in equity to make repayment to the plaintiff.

All persons covered by a representative action must have the same rights, or same liability and same defences as their named representative. In the present case, on the facts, members at different dates, of different sex and in different countries would have separate defences against the suit, and therefore did not have a common interest in defending the proceedings. The plaintiff could have avoided this problem had he specifically excepted those members who did not share a common interest with the selected representatives. The inconvenience, and necessity for precise information and foresight when suing an unincorporated association are apparent.

(iv) Occupation

The fourth illustration of the legal problems caused by an unincorporated association's lack of personality involves its liability for rates (or property taxes), based on its occupation of premises. As a matter of fact, it is obvious that unincorporated associations occupy premises in order to further their purposes. Associations habitually use postal addresses as mailing addresses and advertise the premises as their own and in their own names. Nevertheless, as a matter of law, the unincorporated association can occupy nothing and this causes problems for rating authorities who attempt to assess and collect rates. Two examples from recent cases will demonstrate the point.

In *R. v. Brighton Justices, ex parte Howard*<sup>30</sup>, an unincorporated

association known as Local Aid appeared to be the occupier of premises for which it was accordingly assessed to rates. However, as Lord Lance, C.J. put it <sup>31</sup>, "Local Aid could not occupy anything, because it was a nonentity". The rating authority nevertheless managed to establish their claim against a member of the association who they found to be its effective controller : "his was the hand on the tiller" <sup>32</sup>. He was therefore held *personally* liable as the constructive trustee by conduct of the unincorporated association and therefore liable on contracts he entered into on the association's behalf. He was in fact imprisoned for eighty-two days for failure to pay the rates due.

In *Verrall v. Hackney London Borough Council* <sup>33</sup>, however, the situation was not quite as simple. In that case, the rating authority assessed a prominent member and officer of the National Front to rates due in respect of premises used and, as a matter of fact, occupied by the National Front, which is an unincorporated association. Counsel for the rating authority had argued as follows <sup>34</sup> :

[W]here one can say that although a particular association is unincorporated, and thus not a legal entity, but both it and its members are clearly identifiable, then every such member is properly to be described as in beneficial occupation of premises used for the purposes of the association and thus liable for general rates if the necessary formalities are complied with.

In other words, every member of an unincorporated association can become personally liable for its rates, simply by virtue of his contract of membership. The court disagreed, and held <sup>35</sup> :

[T]he National Front was and is an unincorporated association and as such we do not think it could occupy anything . . . . Most unincorporated associations, such as clubs or charities, have trustees, or a committee, legal persons with funds available to pay the rates which it is recognised will have to be paid. It is these persons who, as a matter of law, usually occupy

the premises which are used for the purposes of their club or charity and are liable as such occupiers for the general rates. In our opinion, however, the unincorporated association which, speaking loosely, they run, can never be the occupier of those or any premises . . . . . [I]t follows that the mere fact that a person is a 'member' of an unincorporated association is insufficient material on which to base a finding that that person is the occupier of premises used for the purposes of the unincorporated association, either himself alone, still less jointly with the association.

The member had therefore been wrongly assessed to rates. Consistently with the *Brighton Justices* case, the decision demonstrates that the association's inability to 'occupy' as a matter of law has to be circumvented by assessing its trustees or committee members. The position of rating authorities is not an enviable one in that the identity of such persons will not necessarily be a matter of public record in any particular case. Furthermore, the case leaves unsolved the problem which will arise when an association has no trustees at all.

(v) Gifts

In general, the making of a gift is the simplest of transactions. It may be made *inter vivos* or by will, and in either case by a direct transfer to the intended beneficiary or indirectly, using a trust. The rules for establishing the capacity of a donor to give and of a donee to receive are simple<sup>36</sup>. Even in the case of land, the formalities that must be observed<sup>37</sup> to effect a gratuitous transfer of ownership are not excessively complicated.

However, when the specified recipient of a gift is an unincorporated association, the appearance of simplicity is deceptive. The association itself is not a legal entity and so cannot be a donee, and a gift by way of

trust, superficially attractive though it may be, is not an answer to the problem in the current state of the law because the association cannot be a beneficiary either.

3. Conclusion

In sum, it can be seen that the peculiar status of an unincorporated association causes many problems. The contrast between its factual existence as an entity and its lack of separate legal personality enables it to create legal problems by occupying premises, entering into contracts, and so on, but prevents the legal system from providing any satisfactory solutions. As will be demonstrated in Part Two, nowhere is the problem more acute than in the area of gifts to unincorporated associations.

\* \* \* \* \*

FOOTNOTES : CHAPTER II

1. See, *McGovern v. Attorney-General* [1981] 3 All E.R.493.
2. See, *Reel v. Holder* [1981] 1 W.L.R.1226; [1981] 3 All E.R.321.
3. See, *Verrall v. Hackney London Borough Council* [1983] 2 W.L.R.202; [1983] 1 All E.R.277.
4. Grunfeld, Modern Trade Union Law (London : Sweet & Maxwell, 1966), pp 37-38.
5. See also, Stoljar, Groups and Entities (Canberra : Australian National University Press, 1973), pp 59-60.
6. For example, United Kingdom Interpretation Act 1889, 52 & 53 Vict., c.63, s.19 ; United Kingdom Income and Corporation Taxes Act 1970, c.10, s.526(5).
7. *Leahy v. Attorney-General for New South Wales* [1959] A.C.457; [1959] 2 W.L.R.722; [1959] 2 All E.R.300. *Per* Viscount Simonds [1959] 2 All E.R.300 at 306.
8. See, Rickett, "Unincorporated Associations and their Dissolution", (1980) 39 Camb.L.J.88, pp 88-89.
9. *Per* Warrington, L.J. in *Bloom v. National Federation of Discharged and Demobilised Sailors and Soldiers* (1918), 35 T.L.R.50 at 51.
10. *Per* Lawton, L.J. in *Conservative Central Office v. Burrell* [1982] 1 W.L.R.522; [1982] 2 All E.R.1 at 4.
11. See further, *infra*, pp 80-82.
12. *Per* Vinelott, J., paraphrasing counsel in *Conservative Central Office v. Burrell*. [1980] 3 All E.R.42 at 58. See also, Stoljar, *op.cit. supra*, footnote 5, pp 38-40 ; Rickett, "Mr. Justice Vinelott on Unincorporated Associations and Gifts for Non-Charitable Purposes", (1982) 12 V.U.W.L.R.1, pp 14-16.
13. See, Green, "The Dissolution of Unincorporated Non-Profit Associations", (1980) 43 Mod.L.R.626, pp 629, 631ff. *Cf.* O'Connor, "Actions against Voluntary Associations and the Legal System", (1977) 4 Mon.L.R.87, pp 96-101 ; Stoljar, *op.cit. supra*, footnote 5, pp 43-50 ; Baxt, "The Dilemma of the Unincorporated Association", (1973) 47 A.L.J.305, p 307. See also, *infra*, pp 71-72.
14. *Lewis v. Heffer* [1978] 1 W.L.R.1061; [1978] 3 All E.R.354 ; *Abbott v. Sullivan* [1952] 1 K.B.189; [1952] 1 All E.R.226.
15. For example, trade unions were illegal because they were associations guilty of restraint of trade, until they were legitimised by statute.

Other examples are United Kingdom Unlawful Oaths Acts 1797m 37 Geo.III, c.123 and 1812, c.104, which prohibited the taking of oaths to be a member of a seditious society; United Kingdom Seditious Meetings Act 1817, 57 Geo.III, c.19, which prohibited meetings in Westminster for certain political purposes.

16. For example, *Strick v. Swansea Tin-Plate* (1887), 36 Ch.D.558 at 562.
17. *Reel v. Holder*, *supra*, footnote 2 ; *John v. Rees* [1969] 2 W.L.R.1294; [1969]2 All E.R.274. Cf. *Abbatt v. Treasury Solicitor* [1969] 1 W.L.R. 1575; [1969] 1 All E.R.52.
18. *Re Sick & Funeral Society of St. John's Sunday School, Golcar* [1972] 2 W.L.R.962; [1973] Ch.51; [1972] 2 All E.R.439 ; *Re William Denby & Sons Ltd. Sick & Benevolent Fund* [1971] 1 W.L.R.973; [1971] 2 All E.R.1196.
19. There is some academic debate concerning the nature of members' ownership : see, Green, *op.cit.supra*, footnote 13 ; Atkin, "Unincorporated Associations - Distribution of Surplus Assets on Dissolution", (1978) 8 N.Z.U.L.R.217, pp 231-233. See also, *infra*, pp 57-59. Cf. Stoljar, *op.cit.supra*, footnote 5, pp 44-49 ; Ford, Unincorporated Non-Profit Associations (Oxford : Clarendon, 1959), pp 5-7.
20. Rickett, *op.cit.supra*, footnote 12, p 13.
21. See also, Baxt, *op.cit.supra*, footnote 13.
22. *Supra*, p 15.
23. See, Fletcher, "Unincorporated Associations and Contract : The Development of Committee Liability and the Unresolved Issues", (1979) 11 U.QUEENSLAND L.J.53 ; Keeler, "Contractual Actions for Damages against Unincorporated Bodies", (1971) 34 Mod.L.R.615 ; Stoljar, *op.cit.supra*, footnote 5, pp 53-59.
24. See, Lloyd, The Law of Unincorporated Associations (London : Sweet & Maxwell, 1938), pp 133-165.
25. A member wishing to sue his own association encounters similar problems. See, O'Connor, *op.cit.supra*, footnote 13.
26. *London Association for Protection of Trade v. Greenlands Ltd.* [1916] 2 A.C.15; [1916-1917] All E.R.Rep.452. Per Lord Atkinson [1916] 2 A.C.15 at 30.
27. For example, United Kingdom Rules of the Supreme Court Order 15, Rule 12 ; and see, *Commissioners of Sewers of the City of London v. Gellatly* (1876), 3 Ch.D.610 ; *Harrison v. Marquis of Abergavenny* (1886-1887), 3 T.L.R.324 ; *Jarrott v. Ackerley* (1916), 85 L.J.Ch.135 ; *Smith v. Cardiff Corporation* [1954] 1 Q.B.210; [1953] 2 All E.R.1373. See, Stoljar, "The Representative Action - The Modern Position", (1957) 4 U.W.A.L.R.58. In Canada, for example, see British Columbia Supreme Court Rules, Rule 5(11).

28. [1982] 2 All E.R.426.
29. *Per* Slade,J., *ibid* at 433.
30. [1980] R.A.222.
31. *Ibid* at 225.
32. *Ibid* at 228.
33. [1983] 2 W.L.R.202; [1983] 1 All E.R.277.
34. [1983] 1 All E.R.277 at 284-285.
35. *Per* May,L.J., *ibid* at 285.
36. See, Vaines, Personal Property, 5th.ed., eds. E. L. G. Tyler & N. E. Palmer (London : Butterworths, 1973), pp 299-300.
37. See, Megarry & Wade, The Law of Real Property, 4th.ed. (London : Stevens, 1975), pp 476-489, pp 542-597.

*PART TWO*

GIFTS TO UNINCORPORATED ASSOCIATIONS

The aim of Part Two is two-fold. It will expound, analyse and assess the various methods whereby gifts to unincorporated associations can be construed as taking effect in the current state of the law, and it will demonstrate that, for one reason or another, none of these methods is totally satisfactory. In this way, Part Two prepares the ground for Part Three, which offers an alternative analysis which is demonstrably superior to any discussed in the pages which follow.

Part One established that an unincorporated association cannot itself be the recipient of a gift because it enjoys no existence independently of its members. Yet people continue to donate funds to unincorporated associations. Therefore, having established from an examination of the intended recipient association's structure, constitution and mode of operation that it is indeed an unincorporated, unregistered, non-charitable association, any court before which the fate of the gift is presented is faced with a problem. Over the years, the common law has arrived at at least nine different interpretations of the mechanism whereby a gift to an unincorporated association can, to a lesser or greater degree, take effect. The object of most of them is to circumvent the problem posed by the unincorporated association's lack of legal personality. They attempt to do so by permitting the gift to take effect in favour of persons who *do* have the recognition of the law, whilst imposing upon them constraints of various degrees of effectiveness in an effort to divert the benefit of the donation to the unincorporated association in question. The various methods are as follows :-

- i. An absolute gift to the members of the unincorporated association <sup>1</sup>;
- ii. A gift to the members of the unincorporated

- association which takes effect subject to a duty, imposed on the members by their contract of membership of the unincorporated association, to use the funds for the purposes of the association <sup>2</sup>;
- iii. A gift to the members of the unincorporated association, subject to a mandate arrangement between the donor and those members <sup>3</sup>;
- iv. A gift to the members of the association under and in accordance with the terms of a contract between the donor and the members <sup>4</sup>;
- v. A gift to the members of the unincorporated association, subject to a general equitable obligation owed by them to the donor <sup>5</sup>;
- vi. A gift on trust for the present members of the unincorporated association;
- vii. A gift on trust for the present *and* future members of the unincorporated association;
- viii. A gift on trust for the unincorporated association of which its members are the factual beneficiaries <sup>6</sup>;
- ix. A gift on trust for the purposes of the unincorporated association.

All but one of the above methods of interpreting a gift to an unincorporated association will be discussed in turn, though not exactly in the sequence used above. The exception is the case of the gift on trust for the present members of the association. This will not receive separate treatment as a distinct topic but will instead be discussed concurrently with, but in less detail than, the other situations which involve a trust of some kind.

As one progresses down the list of methods which are available for interpreting the legal framework of a gift to an unincorporated association, two trends are perceptible. On the one hand, there is a movement from the analysis which *least* achieves the donor's aim of conferring benefit on an unincorporated association (method i) to the analysis which would achieve it almost to the letter (method ix). On the other hand, from method i to method ix, one's likelihood of success in law correspondingly diminishes. This is because, as one moves down the list, one encounters two problems. Firstly, analyses i to v (inclusive) involve increasingly fictional and strained interpretations of the situation which obtains. Then, as one attempts analyses vi to ix (inclusive), the law as it currently stands throws more and more legal obstacles in the way of success. It is the combined effect of the two trends that makes no one analysis totally satisfactory.

Which of the above methods a court will select in any particular case of an attempted gift to an unincorporated association is principally a question of interpretation. Evidently the most significant consideration in resolving the question is the specific wording of the gift. For example, generally speaking, none of analyses i through v, which involve direct gifts to the members of the association, is available if the donor emphatically declares that his gift is to take effect under a trust. However, in interpreting the effect of a gift, its wording is often ignored by the courts so no hard and fast rules can be formulated.

Furthermore, more often than not no indication is given at all in the wording of the gift as to its intended legal framework, no doubt because the majority of donors are unaware of the problem of an unincorporated

association's lack of separate legal personality. Indeed, it can be assumed in each of the chapters which follow that the gift in question is simply "for the XYZ Association". The issue is in no way prejudiced by specific or detailed instructions. In such a case, all nine of the above approaches are reasonably open of any particular gift, and a choice has to be made.

It is submitted that the court's choice may be, and apparently *is*, made by asking one of two initial questions. On the one hand, a court may ask : what did the donor intend? The most probable response, after consideration of the donor himself, the nature of the association and the relationship between the donor and the association, would be that the donor intended to further a continuing group enterprise. In order to carry out such an intention, the gift must take effect, if at all, under analyses viii or ix. The consequence for the gift in the current state of the law would most likely be that it would fail.

On the other hand, a court may instead ask as its initial question : did the donor intend the gift to fail? The obvious answer must surely be that the donor did not intend his gift to fail. The court then has another choice to make. It may choose to be unsympathetic to the donor's predicament and utilise a construction of the gift which will inevitably lead to its failure. If it chooses to make a sympathetic response to the gift, however, it will attempt to put upon it an interpretation which will render it valid.

These various choices involve a large element of judicial subjectivity. It is possible that they are tacitly made with one eye on whether the particular gift in question *deserves* to take effect, and whether the

particular association and its activities are *worthy* of sympathy.

Apparently there is no one single analysis which alone is the correct interpretation of a particular gift.

The analyses will now be discussed. In each, significant advantages and disadvantages of the analysis will be pointed out so that the relative merits of each can be assessed as a mechanism to effect the donation of funds to an unincorporated association.

\* \* \* \* \*

FOOTNOTES : PART TWO, INTRODUCTORY COMMENTS

1. The Absolute Gift Analysis, *infra*, pp 33-50.
2. The Contract Analysis, *infra*, pp 51-78.
3. The Mandate Theory, *infra*, pp 82-88.
4. The Contractual Undertaking Theory, *infra*, pp 88-91.
5. The Suspended Beneficial Ownership Theory, *infra*, pp 91-95.
6. The Denley Analysis, *infra*, pp 132-150.

I. ABSOLUTE GIFT ANALYSIS

1. Introduction

X makes a bequest "to the Blackshire Association for the Shelter of Stray Animals, for the furtherance of its purposes". Assume that the Association is a non-charitable unincorporated association and that its purposes include the care of abandoned pets, the operation of an adoption service for such animals and the protection of the people in Blackshire from animal-ridden streets. It is funded entirely through voluntary contribution. It is evident that the Association itself is incapable of receiving the donation in its own right. In the eyes of the law, it does not exist. In certain circumstances, nevertheless, the courts have upheld the donation. They have explained that it takes effect as an absolute gift to the members of the association who are in existence at the date of X's death and who are under no legal obligation to apply the funds to the care of animals or to any other association purpose.

There are two major steps in the reasoning that permit the Absolute Gift Analysis. Firstly, the words "for the furtherance of the purposes [of the association]" are disregarded and stripped of legal effect. They are presumed to state merely the motive for making the donation. Secondly, it is assumed that the naming of the association is simply a method of defining the class of intended recipients. They are identified by reference to their membership of the association. The authority for the use of these two presumptions will be discussed before their combined effect is considered.

## 2. The *Re Sanderson* Principle

There is respectably ancient authority <sup>1</sup> for the view that if a fund is given to a person for a purpose, the fulfilment of which would substantially exhaust the fund, the person takes absolutely, unconstrained by any limitation on the use to which he puts the money. Purposes which would satisfy the test include general benefit, maintenance, training for a trade <sup>2</sup> and education <sup>3</sup>. The presumption is rebutted where the purpose is only *one* of the stated reasons for the gift, indicating that the benefit intended to accrue to the recipient is more limited.

An authoritative statement of the principle is found in *Re Sanderson's Trust* <sup>4</sup>, where the Vice-Chancellor, Sir W. Page Wood, explained <sup>5</sup> :

If a gross sum be given, or if the whole income of the property be given, and a special purpose be assigned for that gift, this Court always regards the gift as absolute, and the purpose merely as the motive of the gift, and therefore holds that the gift takes effect as to the whole sum or the whole income, as the case may be.

In that case, surplus funds from a bequest to a legatee remaining after his death were held *not* to be the absolute property of his estate, but fell into the residue of his benefactor's estate. The bequest was made on trust to apply "the whole or any part" of the fund for the "maintenance attendance and comfort" of the legatee. On construction of these words, it was held that, although the stated purposes were exhaustive in nature, only a portion of the fund was dedicated to them, so the legatee was not absolutely entitled. The presumption of an absolute gift was therefore rebutted.

The principle of *Re Sanderson* was applied recently by the Chancery

Division and the Court of Appeal of England in *Re Osoba*<sup>6</sup>. The difficulty in that case was caused in the main by the following clause of Mr. Osoba's will :

I bequeath to my wife all the rents from my leasehold property ... for her maintenance and for the training of my daughter Abiola up to University grade and for the maintenance of my aged mother provided my wife is resident in Nigeria.

When the testator died, his mother was already dead and his daughter was about ten years old. Five years later, the testator's widow died, and five years after that, when proceedings were commenced, the daughter had completed her university studies. It therefore appeared that all the purposes specified in the will had either failed or been achieved. Had the clause been construed as setting up a purpose trust, therefore, the funds would have fallen into residue. The Court of Appeal held unanimously, however, that the bequest was an absolute gift to the three beneficiaries as joint tenants. There being no evidence of actual or intended severance, the daughter was entitled, as sole survivor under *jus accrescendi* principles, to the whole bequest.

In the circumstances, despite the fact that the purpose of Abiola's university education was finite and, as the events which transpired had proved, not exhaustive of the bequest, the principle established in the old cases was applied. To requote the *dictum* in *Re Sanderson*<sup>7</sup> :

If a gross sum be given, or if the whole income of the property be given, and a special purpose be assigned for that gift, this Court always regards the gift as absolute, and the purpose merely as the motive of the gift, and therefore holds that the gift takes effect as to the whole sum or the whole income, as the case may be.

Of this, Goff, L.J. said<sup>8</sup> :

[I]t is not a rule of law, but, in the absence of

context, to which of course it must yield, or perhaps very special circumstances, it is a long established and oft applied principle which I would not seek to whittle away.

The principle was restated by Buckley, L.J. in the following terms <sup>9</sup> :

If a testator has given the whole of a fund, whether of capital or income, to a beneficiary, whether directly or through the medium of a trustee, he is regarded, in the absence of any contra-indication, as having manifested an intention to benefit that person to the full extent of the subject-matter, notwithstanding that he may have expressly stated that the gift is made for a particular purpose, which may prove to be impossible of performance or which may not exhaust the subject-matter.

The reference to the purpose is treated merely as a statement of the testator's motive in making the gift. In other words <sup>10</sup> :

The specified purpose is regarded as of less significance than the dispositive act.

In the *Osoba* case, the court felt that there were sufficient indications from the circumstances to conclude that Mr. Osoba had intended his daughter to take absolutely. One significant feature was that the education of someone who was only five years old when the will was drafted (as Abiola was) was a purpose which would be considered likely to deplete the fund substantially. Secondly, provision for one's education (like one's maintenance) confers an "extensive and continuing benefit" <sup>11</sup> equivalent to an absolute gift. Thirdly, the bequest was of the whole fund, which indicated that the testator had not contemplated any surplus.

This analysis is readily applicable to the case of a gift for the general or specified purposes of an unincorporated association. If it appears from the wording and circumstances of the gift that the donor intended the association to derive a continuing benefit from the fund and that fulfilment of the stated purpose would substantially exhaust the fund,

the stated purpose can be disregarded. Rather than creating a trust for the fulfilment of those purposes, the statement of purpose is seen merely as explaining the donor's motive. According to *Re Sanderson*, the association takes absolutely. For example, in *Re Ogden*<sup>12</sup>, a bequest to political bodies, some of which were unincorporated associations, "having as their objects ... the promotion of Liberal principles in politics" took effect as an absolute gift to them. Lord Tomlin explained the principle that governs such cases<sup>13</sup> :

[A] gift to a corporation, or a voluntary association of persons, for the general purposes of such corporation or association is an absolute gift.

The statement that the gift was for the promotion of Liberal principles was considered to be of no legal effect. It was merely a statement of the characteristic identifying the bodies to be selected and of the testator's motive in making the bequest<sup>14</sup>.

However, it will be recalled that the association itself can not be the recipient of the gift. It has no legal existence independently of its members. Therefore it is evident that *Re Sanderson's* principle alone is of little assistance in facilitating a gift to an unincorporated association. It does not explain who are the recipients of the gift. A further principle, which can combine in operation with that of *Re Sanderson*, is required to salvage the gift.

### 3. The *Re Smith* Principle

For the sake of convenience, the second principle will be referred to as the principle in *Re Smith*<sup>15</sup>, though it existed as part of the common law before the date of that decision. In *Re Smith*, a bequest of residue "for

the society or institution known as the Franciscan Friars of Clevedon ... absolutely" was held valid even though the Franciscan Friars was an unincorporated body with no capacity of its own to receive gifts. Joyce, J. stated the reason for this conclusion in the following terms<sup>16</sup> :

[A] bequest to any unincorporated society or association not charitable is good because, and only because, it is treated as being and is a bequest to the several members of such society or association, who can spend the money as they please.

The gift took effect as one to the individual Friars who were alive at the date of the testator's death, absolutely.

The situation is the inverse of that found in company law. There, except in certain circumstances, one must not 'pierce the corporate veil' to look beyond the legal fiction to the constituent individuals because the company is a legal person in its own right, separate and distinct from its shareholders. In the case of an unincorporated association, one has no choice but to look beyond the association to its constituent persons because the association has no legal identity or existence of its own<sup>17</sup>. The gift therefore takes effect as one to the members of the association in existence at the date of an *inter vivos* disposition or, if testamentary, at the date of the testator's death. Again, however, as with the principle in *Re Sanderson*, this construction is open to rebuttal by the circumstances of the case.

#### 4. The Principles Combined

The combined effect of the principle in *Re Sanderson* and the principle in *Re Smith* can be stated as follows<sup>18</sup> :

[A] gift to an association formed for [the attain-

ment of political objects] may, if the association be unincorporated, be upheld as an absolute gift to its members.

The statement of purposes and the fact that the stated recipient is an association are ignored, and the gift is construed as a gift to its constituent members absolutely.

An early case in which this result was achieved was *Cocks v. Manners*<sup>19</sup>. There, a bequest for the general purposes of a Dominican convent was upheld as an absolute gift to the existing members or nuns. Applying the *Re Sanderson* principle, it can be seen that the statement of the purpose for the gift was ignored so that no trust for those purposes was interposed. Combined with this, the principle also seen at work in *Re Smith* was put into operation. That is to say, the reference to the convent was treated merely as a method of defining and identifying its members as the intended recipients of the funds. Together, the two principles of construction enabled the gift for the purposes of the association to take effect as an absolute gift to its members.

The most recent, detailed explanation of this analysis currently available is provided by Viscount Simonds in *Leahy v. Attorney-General for New South Wales*<sup>20</sup>. This will now be utilised as the vehicle for discussion and criticism of the combined effect of the two principles, otherwise called the Absolute Gift Analysis, as a method of validating donations to unincorporated associations.

5. Leahy v. Attorney-General for New South Wales

Mr. Leahy was a wealthy and generous Australian who wanted the Catholic Church to benefit from his wealth after his death. Unfortunately, he expressed this apparently straightforward desire in the following clause of his will :

As to my property known as 'Elmslea' situated at Bungendore ... upon trust for such order of nuns of the Catholic Church or the Christian Brothers as my executors and trustees shall select and ... the selection of the order of nuns or brothers as the case may be to benefit under this clause of my will shall be in the sole and absolute discretion of my said executors and trustees.

This clause presented several problems. One possible construction of the terminology used was that it imposed trusts for the purpose of benefiting the religious orders. However, it had been established in the High Court of Australia in this case, and not later challenged, that the terms were not used by Mr. Leahy in their strict canonical sense. The result was that "order of nuns" in the will was held to include both contemplative and non-contemplative orders. This meant that the gift was not entirely charitable : it had a mixture of charitable and non-charitable elements. Normally, a trust for mixed charitable and non-charitable purposes would fail. New South Wales, however, had a statute <sup>21</sup> which would save the gift, but which would delete all non-charitable elements from its terms. The result of finding the existence of a trust and applying the statute would be that no distribution of funds could be made to any contemplative, non-charitable order. The executors of the will, not wanting such a result, argued that another construction of the clause was possible whereby all orders, including contemplative, would benefit as intended. from the testator's generosity. They argued the Absolute Gift Analysis.

The Judicial Committee of the Privy Council dedicated the larger part of its opinion to discussing this analysis but reached the conclusion that the executors' argument failed in the circumstances. The analysis would involve two steps. Firstly, the reference to orders of nuns (which are unincorporated associations) would be interpreted merely as a means of defining and identifying the individual nuns who were intended to benefit<sup>22</sup>. The unincorporated association itself would be incapable of receiving the funds in its own name. Secondly, any indication that the donees were not to take as absolute donees would be ignored<sup>23</sup>. Viscount Simonds clarified this to mean "absolute both in quality of estate and in freedom from restriction"<sup>24</sup>.

It is interesting to note that the Privy Council stated that the Absolute Gift Analysis of gifts to unincorporated associations was a "fundamental proposition"<sup>25</sup>. Viscount Simonds formulated it as follows<sup>26</sup>:

In law, a gift to [an unincorporated] society simpliciter (i.e., where ... neither the circumstances of the gift nor the directions given nor the objects expressed impose on the donee the character of a trustee) is nothing else than a gift to its members at the date of the gift as joint tenants or tenants in common.

In other words, the *prima facie* construction of the clause in the will was that those individual nuns belonging to the orders selected by the executors who were alive and members of the order at the date of Mr. Leahy's death could receive the gift absolutely and dispose of it as they wished. No doubt, in the circumstances, they would feel morally obligated to divert the gift to benefit the Church or the order. Indeed, many would be further obligated to do so by vows of poverty. Nevertheless, there would be no *legal* compulsion for them to do otherwise than pay the proceeds into their personal bank accounts.

However, the Privy Council went on to point out that the *prima facie* construction could be rebutted by a wide range of considerations : for example, the terms of the will, the nature of the unincorporated association, the association's organisation and rules, the subject-matter of the gift. In this case, Viscount Simonds concluded that the evidence of rebuttal in this manner was overwhelming in the circumstances. The Absolute Gift Analysis could not be utilised<sup>27</sup>. He concluded<sup>28</sup>:

[H]owever little the testator understood the effect in law of a gift to an unincorporated body of persons by their society name, his intention was to create a trust not merely for the benefit of the existing members of the selected order but for its benefit as a continuing society and for the furtherance of its work.

The will could not be construed as making an absolute gift and the trust it *had* set up failed, chiefly on the ground of perpetuity. The gift had to be salvaged by using the statutory provision, with the consequence that the non-charitable orders of nuns were eliminated from the scope of the gift, which then operated in favour of the non-contemplative orders of nuns only.

It is instructive to examine the circumstances which Viscount Simonds considered rebutted the *prima facie* Absolute Gift Analysis. They were four in number.

(i) Benefit to a Group

The first was the wording of the clause, whereby the testator had indicated that his intention was to benefit a group as a whole and not the individuals comprising it<sup>29</sup>. Some commentators have argued<sup>30</sup> that this conclusion was correct, particularly in view of the peculiarly 'group'

nature of Catholic orders. On the other hand, the Absolute Gift Analysis could *never* be effective if this circumstance were accorded significance in every case. The very object of the analysis is to salvage gifts to associations, all of which are characterised by group activity of some sort or another. No doubt the testator's true intention was to benefit the group rather than its members individually but, in view of the impossibility of effecting this in the current state of the law, it must surely be conceded that the salvage construction whereby the individual members benefit is closer to the testator's intention than total failure of his bequest. Following the testator's intentions too closely as an aid to construction would mean that every gift to an association would fail and the Absolute Gift Analysis would always be rebutted, thus losing the *prima facie* status accorded it by Viscount Simonds himself <sup>31</sup>. Therefore, it is submitted that, in the absence of very clear words to the contrary, the mention of an association or other group should not of itself foreclose use of the Absolute Gift Analysis.

(ii) Size of the Group

Secondly, Viscount Simonds pointed out that the members of Catholic orders alive at the testator's death may be very numerous and may be distributed world-wide <sup>32</sup>. Two interpretations are possible of this statement. On the one hand, he might have meant that *large* membership rebutted the presumption of an absolute gift to the members. In criticism of this, it is submitted that the validity of a gift to an association should not depend on the size of its membership for many reasons. In the first place, courts do not usually attach importance to difficulties in the administration of a gift by those responsible therefor when considering its

validity<sup>33</sup>. In the second place, the Privy Council had no evidence that the membership was extraordinarily large, and even cited *Re Clarke*<sup>34</sup> with approval, in which, apparently, the association had over two thousand members<sup>35</sup>. Finally, if the Privy Council was concerned that the size of the membership was relevant in that it would mean that each individual could only receive a nominal share, surely it would have discussed or requested evidence to this effect. Furthermore, since the court's concern touches problems with subsequent dealings with the donated funds, it appears totally irrelevant to the *initial* validity of the bequest and could produce arbitrary results.

The second possible interpretation is that Viscount Simonds was pointing out that the recipients would be for the most part unknown to the donor in such a case<sup>36</sup>. Again, as with the first criterion discussed above (group benefit), to emphasise such a problem is to emphasise the court's perception of the intention of the donor. If the court perceives the donor's intention as being to benefit each individual member, the perception is misconceived, since the donor's *true* intention is to benefit the association. Once this is recognised, it is apparent that the identity of the individual members is irrelevant.

(iii) Subject-Matter of the Gift

A third factor considered significant by the Privy Council was the subject-matter of the gift. The Judicial Committee apparently assumed that nuns and monks could not be intended to become the owners of grazing property and a homestead. Assuming for the sake of argument that it *could* be a relevant factor in choosing between the Absolute Gift Analysis and a

trust for the association, surely the subject-matter would be no more suitable for the purposes of the latter than for the former. However this may be, the Privy Council did not launch into a detailed enquiry on suitability so the criterion appeared to be little more than neutral in the decision. It is also suggested that no weight should have been attached to the point since the property could have been sold and the proceeds paid to the nuns anyway.

(iv) Capacity of the Recipients

In rebutting the presumption that the gift should be construed as an absolute gift to the members of the association, the Privy Council referred to the possibility that the members of the orders would not have the capacity to receive the gift. If this was an allusion to the fact that most nuns and monks take vows of poverty (as mentioned above), this should have *supported* the Absolute Gift Analysis, as a device of indirectly fulfilling the testator's intentions, rather than have rebutted it. The vows of poverty and other moral obligations to which nuns and monks are bound would no doubt compel the recipients to devote their gift for the benefit of the order. After all, the Judicial Committee had expressed concern that the testator's intention was to benefit the group activity, and this intention could be indirectly fulfilled in this manner. Furthermore, two cases cited with approval in *Leahy* were *Cocks v. Manners*<sup>37</sup> and *Re Smith*<sup>38</sup> in which gifts to Dominican sisters and Franciscan monks respectively, both of whom take vows of poverty, were validated under the Absolute Gift Analysis. In each case it was assumed that contracts and other obligations (including moral) taking effect outside the will could not affect the validity of bequests made by it.

In summary, therefore, it is submitted that the conclusion reached by Viscount Simonds was probably incorrect in the circumstances. Indeed, one commentator has even suggested <sup>39</sup> that the Privy Council was deliberately expressing its hostility to gifts to unincorporated associations, since it seemed to select as relevant those very factors most likely to deny validity to them. What is more important, however, is the implication that the above discussion has for the success of the Absolute Gift Analysis in general. If the Privy Council's treatment of the circumstances which could rebut the absolute gift presumption were adopted so that the above considerations became canons of construction, successful invocation of the Absolute Gift Analysis would be very rare. Any indication that benefit to a group activity was intended or that the status or number of the individual members was in some way inconsistent with receipt of the particular benefit would rebut its use. The result in *Leahy* could only be avoided by drafting a gift specifically and expressly to the individual members of the association which one hoped to benefit.

## 6. Conclusion

The above suggestion highlights the major and overriding disadvantage of the Absolute Gift Analysis. The individual members take the bequest or *inter vivos* gift absolutely "both in quality of estate and in freedom from restriction" <sup>40</sup>. There is no guarantee whatsoever that the money will be spent or used according to the testator's or donor's wishes. The members take the funds as co-owners and they can sever their shares at any time, even *after* leaving the association. Recognition of this eventuality used to influence the courts in that they were far more likely to adopt the Absolute Gift Analysis in

situations where the members were at least under a moral obligation to further the objects of the association of which they were members <sup>41</sup>.

In the absence of moral obligation, however, the donor has no guarantee whatsoever that the association will receive one penny of his money <sup>42</sup>.

In recognition of these major defects, the Absolute Gift Analysis is no longer given serious consideration in cases on donations to unincorporated associations. Most of the recent cases on the subject merely mention the analysis in passing <sup>43</sup>. Its unreliability and failure to achieve the aims of the donor, even in a limited form, have apparently been recognised.

\* \* \* \* \*

FOOTNOTES : CHAPTER I

1. For example, *Barlow v. Grant* (1684), 1 Vern.255; 23 E.R.451 ; *Hanson v. Graham* (1801), 6 Ves.Jr.239; 31 E.R.1030 ; *Leake v. Robinson* (1817), 2 Mer.363; 35 E.R.979 ; *Cope v. Wilmot*, cited in note to *Thompson v. Thompson* (1844), 1 Coll.381; 63 E.R.464 ; *Barton v. Cooke* (1800), 5 Ves.Jr.461; 31 E.R.682 ; *Lewes v. Lewes* (1848), 16 Sim.266; 60 E.R.876 ; *Noel v. Jones* (1848), 16 Sim.309; 60 E.R.893.
2. *Barlow v. Grant*, *supra*, footnote 1.
3. *Presant & Presant v. Goodwin* (1860), 1 Sw.& Tr.544; 164 E.R.852 ; *In re Andrew's Trust* [1905] 2 Ch.48.
4. (1857), 3 K.&J.497; 69 E.R.1206.
5. *Ibid* 69 E.R.1206 at 1208.
6. [1979] 1 W.L.R.247; [1979] 2 All E.R.393
7. *Supra*, p 34.
8. [1979] 2 All E.R.393 at 397.
9. [1979] 2 All E.R.393 at 402.
10. *Per Buckley, L.J., ibid.*
11. *Per Goff, L.J., ibid* at 398.
12. [1933] Ch.678; 102 L.J.Ch.226; [1933] All E.R.Rep.720.
13. [1933] Ch.678 at 681.
14. See also, *Re Turkington* [1937] 4 All E.R.501.
15. *Re Smith* [1914] 1 Ch.937; 83 L.J.Ch.687.
16. [1914] 1 Ch.937 at 948.
17. The same is true with gifts to a partnership in the partnership name : the gift is construed at common law as taking effect for the benefit of the individual partners : *Maugham v. Sharpe* (1864), 17 C.B.(N.S.) 443 at 463-4; 144 E.R.179 at 187 ; *Wray v. Wray* [1905] 2 Ch.349.
18. *Bowman v. The Secular Society* [1917] A.C.406; 86 L.J.Ch.568, *per* Lord Parker [1917] A.C.406 at 442.
19. (1871), L.R.12 Eq.574; 40 L.J.Ch.640; 19 W.R.1055.
20. [1959] A.C.457; [1959] 2 W.L.R.722; [1959] 2 All E.R.300.

21. New South Wales Conveyancing Act 1919-1954, s.37D.
22. The *Re Smith* principle: *supra*, pp 37-38.
23. The *Re Sanderson* principle: *supra*, pp 34-37.
24. [1959] 2 All E.R.300 at 307.
25. *Ibid* at 306.
26. *Ibid*.
27. See the similar conclusion reached by the High Court of Australia in *Bacon v. Pianta* (1966), 114 C.L.R.634.
28. [1959] 2 All E.R.300 at 312.
29. *Ibid* at 311.
30. For example, Lovell, "Non-Charitable Purpose Trusts - Further Reflections", (1970) 34 Conv.(N.S.)77, p 92.
31. See, Keeler, "Devises and Bequests to Unincorporated Bodies", (1963-1966) 2 Adelaide L.Rev.336, p 344.
32. [1959] 2 All E.R.300 at 311.
33. For example, *McPhail v. Doulton* [1971] A.C.424; [1970] 2 W.L.R.1110; [1970] 2 All E.R.228, *per* Lord Wilberforce [1970] 2 All E.R.228 at 247.
34. [1901] 2 Ch.110; 70 L.J.Ch.631; 49 W.R.628.
35. Keeler, *op.cit.supra*, footnote 31, p 346.
36. See, *Re Ray's Will Trusts* [1936] Ch.520; 105 L.J.Ch.257; [1936] 2 All E.R.93 at 98-99.
37. *Supra*, footnote 19.
38. *Supra*, footnote 16.
39. McKay, "Re Lipinski and Gifts to Unincorporated Associations", (1977) 9 V.U.W.L.R.1, p 2.
40. *Per* Viscount Simonds, *supra*, footnote 24.
41. For example, *Cocks v. Manners*, *supra*, footnote 19 : Dominican sisters had taken vows of poverty and were bound by religious conviction to use the donation for association purposes. *Cf.* *Re Amos* [1891] 3 Ch.159 : trade union members did not take under the Absolute Gift Analysis; no moral obligation to further the trade union's objects. Similarly, *Re Clifford* [1912] 1 Ch.29; 81 L.J.Ch.220 ; *Morrow v. M'Conville* (1883), 11 L.R.Ir.Eq.236 ; *Bacon v. Pianta*, *supra*, footnote 27.

42. At one time, a further objection to the Absolute Gift Analysis was that it was impossible to convict an association member for embezzlement of association funds because it would be a defence for the member to say that he was merely disposing of his own property. This was so until the passage of the Larceny and Embezzlement Act 1868, 31 & 32 Vict., c.116 under which a *prima facie* guilty member could be held liable despite his co-ownership.
43. For example, *Neville Estates v. Madden* [1962] Ch.832; [1961] 3 W.L.R.999; [1961] 3 All E.R.769 at 778 ; *Re Recher's Will Trusts* [1972] Ch.526; [1971] 3 W.L.R.321; [1971] 3 All E.R.401 at 404 ; *Re Lipinski's Will Trusts* [1976] Ch.235; [1976] 3 W.L.R.522; [1977] 1 All E.R.33 at 41 ; *Re Grant's Will Trusts*[1980] 1 W.L.R.360; [1980] 3 All E.R.359 at 364. All discussed, *infra*, pp 52-66.

## II. CONTRACT ANALYSIS

### 1. Introduction

A second analysis which has found popularity in the courts in recent years as an explanation of the mechanism whereby donations to unincorporated associations take effect is called, for the sake of convenience in discussion, the Contract Analysis.

Assume that X makes a gift "to the Fairways Golf Club", which is a non-charitable unincorporated association, incapable of receiving the donation in its own right because it lacks legal existence. According to the most straightforward version of the Contract Analysis, the donation is achieved in the following manner. An outright transfer of the funds takes place from X to the current members of the Golf Club. As in the case of the Absolute Gift Analysis<sup>1</sup>, from the point of view of property law the members become the legal co-owners of the funds. However, when they joined the Golf Club each member became (either expressly or by implication) a party to a membership contract and it is in its emphasis on the effect of this contract that the Contract Analysis differs from the Absolute Gift Analysis. As a matter of contract law, the members of the Golf Club are contractually bound to divert all funds that they receive from donors such as X in a manner specified by the terms of the membership contract. In one way or another, the contract assures that the funds are used for the Club's purposes. The members are thus restrained from asserting their ownership rights over donations so that the intention of X to benefit the Golf Club itself is fulfilled.

*Re Recher's Will Trusts*<sup>2</sup> is the only case in which the Contract Analysis has hitherto been applied directly. It has therefore been selected to illustrate the manner in which the courts interpret and utilise it. A more detailed exposition of the legal framework of the Contract Analysis, and its advantages and disadvantages, will then follow.

## 2. *Re Recher's Will Trusts*

In so far as they are relevant to the discussion, the facts in *Re Recher* were as follows. The London and Provincial Anti-Vivisection Society was a well-established, well-organised, non-charitable, unincorporated association. It had permanent headquarters and staff, a membership of nearly three hundred members, officers, a committee and a written constitution. The rules stipulated that all Society funds were held by trustees on what may be called an 'administrative trust' to hold or spend according to the directions of the committee who had absolute discretion in the matter, provided that they acted "for the protection and advancement of the interests of the Society". The main objects of the Society, as detailed in its constitution, were "to secure the total abolition of the practice commonly called 'Vivisection' in which is included the inoculation of animals for experimental purposes", and "to advocate the humane treatment of animals generally". Of particular interest was the rule that "Election to Membership shall be taken as conclusive proof of assent to the Rules for the time being of the Society". In other words, every member was bound, by his contract of association and membership with the Society, to respect the property-holding arrangements outlined above, whereby all Society funds were held by the committee for Society purposes.

The testatrix made a bequest to the Society in her will. However, the London and Provincial Anti-Vivisection Society as such had in fact ceased to exist even before the will had been drafted. It had joined forces with another anti-vivisection society which was subsequently incorporated. In the process, the original Society was dissolved and the membership contracts were terminated. As a result of this turn of events, the bequest ultimately failed and the decision of Brightman, J. in *Re Recher* was to that effect. Nevertheless, Brightman, J. dedicated half of his written reasons in the case to the question of the validity or otherwise of the bequest, on the hypothesis that the Society had *not* gone through the transformation and dissolution outlined above. In other words, he assumed that the London and Provincial Anti-Vivisection Society had still been in existence at the date the will came into effect in order to analyse the effectiveness of a gift to it.

The judge was faced with the argument that the legal effect of a gift to an unincorporated association could only be interpreted in three ways, all of which would operate to invalidate the bequest in question.

The first interpretation discussed in *Re Recher* was the Absolute Gift Analysis which has already been explained in this thesis <sup>3</sup>. It may be recalled that the overwhelming disadvantage of that analysis is that the members of the association are absolutely entitled to the funds as co-owners thereof. In the present case, Brightman, J. assumed that it could not have been the intention of the testatrix that her funds be dealt with in such a manner, since the aim, shared by herself and the Society, of the abolition of vivisection, would in no way be furthered thereby. He therefore rejected in summary fashion such an interpretation of the gift <sup>4</sup> :

[T]he gift ... is not a gift to the persons who were the members of the London and Provincial Society at the testatrix's death, as joint tenants or as tenants in common beneficially, so as to entitle any member to a distributive share. It would be absurd to suppose that the testatrix intended, as soon as the gift fell into possession, that any such member should be entitled, as of right, to demand an aliquot share.

It is interesting to note how different this approach is from that adopted by the Privy Council in *Leahy v. Attorney-General for New South Wales*<sup>5</sup>. There, the Absolute Gift Analysis was seen as the *prima facie* construction of a gift to an unincorporated association, subject to rebuttal by the particular circumstances. In *Re Recher*, the emphasis has shifted. Brightman, J. regarded the *prima facie* presumption to be that the Absolute Gift Analysis was *not* applicable.

As the law stood when *Re Recher* was decided, two other interpretations were available of gifts to unincorporated associations - that is, a gift on trust for present and future members, or a non-charitable purpose trust for the purposes of the association - and these will be discussed in this thesis in due course<sup>6</sup>. For the time being, suffice it to say that neither would have validated the bequest to the Society in the present case. As it was, however, Brightman, J. reviewed the circumstances and wording of the bequest, and concluded that neither interpretation was dictated thereby anyway.

Having decided that none of the above three interpretations was applicable to the bequest, Brightman, J. then went on to explain the fourth possibility. This was the Contract Analysis, which had been hinted at in *Leahy v. Attorney-General for New South Wales*<sup>7</sup> and explained, though not applied, by Cross, J. in *Neville Estates v. Madden*<sup>8</sup>. Brightman, J.

explained the operation of the Contract Analysis in the following terms<sup>9</sup> :

In the case of a donation which is not accompanied by any words which purport to impose a trust, it seems to me that the gift takes effect in favour of the existing members of the association as 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. So, in the case of a legacy. 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.

In other words, the current members of the London and Provincial Anti-Vivisection Society would be the recipients of the gift but, superimposed on this property transfer would be contractual restrictions, as contained in their contract of membership, which would limit their future dealings with it. Assuming that all members respected the rules set out in the Society's constitution, dealings with the fund would be limited to those which protected and advanced the interests of the Society. The internal mechanism whereby this would be achieved was stipulated in the rules to which each member was contractually bound. The members would transfer the fund to the trustees who would hold them under an 'administrative trust', along with all other Society property, awaiting instructions from the committee as to their disposition.

Brightman, J. acknowledged that the Contract Analysis was, in effect, a compromise, a "half-way house"<sup>10</sup>. From the point of view of property law, the members take immediate interests in the funds as co-owners, just as in the case of the Absolute Gift Analysis. In this way the problems caused by the certainty, perpetuity and beneficiary requirements of gifts

on trust <sup>11</sup> are avoided. At the same time, the problem of the Absolute Gift Analysis is minimised by the superimposed contractual obligations of membership which prevent members from taking 'absolutely' and enable funds to devolve to successive members in whatever manner is provided by the rules. Brightman, J. was quite happy with the compromise between the two alternatives presented by the mechanism of the trust on the one hand, and the Absolute Gift Analysis on the other. Of the argument that *only* these two extremes were available as explanations of gifts to unincorporated associations <sup>12</sup> he said :

If the argument were correct it would be difficult, if not impossible, for a person to make a straightforward donation, whether inter vivos or by will, to a club or other non-charitable association which the donor desires to benefit. This conclusion seems to me contrary to common sense.

It was therefore on the basis of "common sense", rather than good authority <sup>13</sup>, that the Contract Analysis came into being as an explanation in certain circumstances of the successful donation of funds to an unincorporated association.

Brightman, J. concluded that, had the London and Provincial Anti-Vivisection Society been in existence at the date of the death of the testatrix, the bequest to it would have been validated by the Contract Analysis. The bequest would have operated as a legacy to the members of the society at that time as an accretion to their funds as a society, subject to the membership contract in effect *inter se* which would have limited use of Society funds to the objects and aims of the Society. In the result, however, the bequest failed because the Society had itself predeceased the testatrix.

### 3. Step-by-Step Operation of the Contract Analysis

*Re Recher* left many problems unsolved and many questions unanswered in relation to the Contract Analysis. Furthermore, subsequent cases on the topic<sup>14</sup> have, if anything, confused the task of isolating and explaining the various elements of the analysis. The discussion which follows is therefore based largely on speculation, aided both by the bare outline which *Re Recher* formulated and by general legal principles.

#### (i) Step One : The Property Transfer

According to the Contract Analysis, when a donor makes a gift to an unincorporated association, property is transferred from the donor to the current members in good standing of the association<sup>15</sup>. The same is true whether the gift is made from an external benefactor, or is a subscription or contribution made by an internal member. The transfer may take place in one of two ways, depending principally on the wording of the gift.

In the first place, as in *Re Recher* itself, the transfer may be effected by the conveyance of legal title to the members. They take the property by way of absolute co-ownership and become fully entitled to it. In the eyes of a property lawyer, the members own the donated property in their own right. There being no restriction on their title (such as conditions subsequent), they can deal with the property as they wish. Should a member transfer his share to a third party, as a matter of property law, the transfer is good and no one can challenge the third party's ownership. There is nothing special about the nature of the members' owner-

ship<sup>16</sup> : they are normal co-owners, and most likely hold the property as tenants in common.

The second possible method whereby the transfer may take place from the donor to the members is through a trust, declared by the donor or implied from the wording of the gift, for the current members of the association. Such a trust satisfies the certainty, perpetuity and beneficiary requirements<sup>17</sup> for a valid trust. The selected trustees need not necessarily be association members themselves. Whoever they are, they hold legal title to the property whilst beneficial ownership is held by all the current members in good standing of the association. As such, the members are equitable co-owners of the property and can, as a group, terminate the trust if they choose, thus acquiring legal title. As a matter of property law, they are the effective owners of the property. This possibility was recognised by Oliver, J. in the case of *Re Lipinski's Will Trust*<sup>18</sup> :

If a valid gift may be made to an unincorporated body as a simple accretion to the funds which are the subject-matter of the contract which the members have made inter se ... I do not really see why such a gift, which specifies a purpose which is within the powers of the unincorporated body and of which the members of that body are the beneficiaries, should fail. Why are not the beneficiaries able to enforce the trust or, indeed, in the exercise of their contractual rights, to terminate the trust for their own benefit?

In the *Lipinski* case, the testator attempted to make a bequest of residuary estate to a non-charitable, unincorporated association, the Hull Judeans (Maccabi) Association, with the further direction that the money be used to construct or improve the association's buildings. It was held that the bequest was valid, although the exact basis for the decision is unclear<sup>19</sup> and the case can be severely criticised for its lack of precision<sup>20</sup>. Nevertheless, it is apparent from the above-quoted passage that

Oliver, J. contemplated the possibility that the Contract Analysis may apply to explain a gift for the purposes of an association which operates via a trust for its current members and it is submitted that he was correct in this contemplation.

Whether the property transfer is effected by an absolute conveyance of title *or* via a trust, the next step in the Contract Analysis operates in exactly the same way.

(ii) Step Two : The Contract

Step One in the Contract Analysis merely transfers title in the donated funds to the donees from the donor who then drops out of the picture. If the analysis stopped here, it would achieve little more than the Absolute Gift Analysis in that it would provide no legal guarantee whatever that the donor's intention to benefit an unincorporated association would be achieved. It would have to depend on the existence in the members of some sense of moral duty to divert their property to the association's benefit. Step Two therefore endeavours to create *legal* rights and duties circumscribing the ownership of the members. It involves the recognition of contractual terms which regulate the members' ownership in all respects. More than one method of achieving this is available within the ambit of the Contract Analysis. The actual method used in interpreting any particular donation will depend principally on the structural and constitutional details of the association in question. Each achieves essentially the same result.

a) Implied Contract

The first method entails recognition of an embryonic form of 'association law'<sup>21</sup>. It is generally acknowledged<sup>22</sup> that the unincorporated association is a consensual arrangement and that its members are the parties to a multi-partite membership contract entered into on admission to membership<sup>23</sup>. The terms of this contract are both express and implied. The former are found in the association's constitution, if any, to which each member on joining consents to be bound. The latter are formulated as a matter of necessary implication from the nature of an association. Thus, even if an association has no written constitution or if the constitution which it does have contains no provisions dealing expressly with the topic of donated funds, it is submitted that Step Two of the Contract Analysis *can* nevertheless operate.

Property transferred to the members *qua* association members under Step One is subjected to the implied terms of the membership contract. Since the very object of their associating together is to further and perpetuate the purposes for which the association was created, certain terms which give effect to this object are readily implied in the contract which they have entered into *inter se*. In particular, it is impliedly stipulated that, although each member becomes the co-owner of all 'association' property as a matter of property law, as a matter of contract law, the property can only be used for association purposes. Above all, each member is bound by an implied contractual obligation to transfer his share in 'association' property to the other members when he terminates his membership. In this manner, the member is restricted in the exercise of his proprietary rights.

b) Express Contract

Step Two is evidently more straightforward if the terms of the membership contract are express. Of course, the members of each unincorporated association have total freedom to stipulate whatever rules they consider appropriate. For the purposes of discussion, therefore, some generalisation is necessary and it is proposed to consider only two basic models for the express internal property-holding arrangements of an association.

Interposition of an 'Administrative Trust' In the first place, it is common, particularly in larger unincorporated associations, to find the existence of one or more appointed or elected committees which represent the interests of members of the association both in its dealings with the outside world, and internally. Such an arrangement is convenient and practicable. It is also common for the rules of an association to stipulate that all 'association' property must be held by certain committee members *on trust*, to be dealt with as directed from time to time either by another committee or the membership at large<sup>24</sup>. If this is the case, the Contract Analysis of funds donated to the unincorporated association operates as follows. Property in the donated funds is transferred to the current members in good standing of the association, as explained in Step One. The members are bound by their contract of membership to deal with their proprietary interests as specified in the rules. In this instance, each member is therefore under a contractual obligation to transfer his interest in the funds to the relevant committee members. The committee members are likewise bound to deal with the transferred funds, of which they are co-owners, as the rules dictate. In order to avoid committing a breach of contract, therefore, they must declare themselves trustees of the funds and hold them under the 'administrative trust'.

Ownership by Members Expressly Limited by the Rules      The second model illustrating the internal property-holding arrangements of an unincorporated association does not involve committees or 'administrative trusts'. Instead, the rules may simply and expressly stipulate that each member, whilst retaining ownership over the property, must utilise any interest he may hold in that property for the purposes of the association. They may prohibit any division of funds between the members for their own purposes, for example.

Such provisions have caused two particular problems for the validity of gifts. Each problem will be stated and illustrated by reference to case law, and it will be submitted in each case that the alleged problem is based on fallacious reasoning. It will be concluded that express restrictions on the ownership of funds by members of an unincorporated association are irrelevant to the validity of a gift to it under the Contract Analysis.

The *first* problem was identified by Cross, J. in the case of *Neville Estates v. Madden* <sup>25</sup> as a proviso to the successful use of the Contract Analysis of gifts to unincorporated associations :

[A gift to an unincorporated association] may be a gift to the existing members not as joint tenants, but subject to their respective contractual rights and liabilities towards one another as members of the association. In such a case a member cannot sever his share. It will accrue to the other members on his death or resignation, even though such members include persons who became members after the gift took effect. If this is the effect of the gift, it will not be open to objection on the score of perpetuity, unless there is something in its terms or in the rules of the association which precludes the members at any given time from dividing the subject of the gift between them on the footing that they are solely entitled to it in equity.

In other words, the court was of the opinion that an express stipulation in the rules of an unincorporated association which restricted the members' ownership of 'association' property would mean that any gift to that association would violate the rule against perpetuities. This result may be illustrated by *Carne v. Long*<sup>26</sup> where a testator devised his mansion to the Penzance Public Library (which was an unincorporated association) for its use, benefit, maintenance and support. The rules of the association stipulated that the Library had to remain in existence and its property undivided for as long as it had ten members. Lord Campbell, L.C. explained the effect of these rules on the validity of the gift<sup>27</sup> :

If the devise had been in favour of the existing members of the society, and they had been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition and not tending to a perpetuity. But looking to the language of the rules of this society, it is clear that the library was intended to be a perpetual institution, and the testator must be presumed to have known what the regulations were.

The bequest failed for perpetuity<sup>28</sup>. It had violated the law's proscription against remoteness of vesting embodied in the rule against perpetuities.

By way of criticism, it is submitted that the rule against perpetuities is irrelevant in this context. As was seen in the discussion of Step One above<sup>29</sup>, there is no possibility that property interests might vest outside the perpetuity period. As a matter of property law, they are vested at once and subsequent contractual restrictions can not change the situation. The rule against perpetuities is not triggered by the Contract Analysis<sup>30</sup>.

The *second* problem which courts have perceived the rules of an association to pose in the context of the Contract Analysis is demonstrated in the recent case of *Re Grant's Will Trusts*<sup>31</sup>. In brief, it is assumed that, if the rules of an unincorporated association indicate that its members are never to be permitted to receive and divert for personal use their interests in 'association' property, the donor could not have intended the gift to operate under the Contract Analysis. In *Re Grant* the testator had been an active member of the Labour Party in his lifetime so he devised all his property on his death to the local constituency Labour Party for the benefit of its headquarters. The local Party was an unincorporated association with a complicated and detailed constitution which regulated the internal mechanism whereby 'association' property was held. One of its rules stipulated that the association's members and committee had to accept any alteration to its constitution which the national Labour Party chose to make.

It was argued by the proponents of the validity of the bequest that the gift should take effect in accordance with the Contract Analysis so that the members would take absolute interests in the donated fund but be bound contractually to deal with them as stipulated by the rules regulating the holding of property within the association. In this manner, the gift would be valid and the local Party would benefit as intended by the testator.

Vinelott, J. rejected the argument and refused to interpret the bequest in accordance with the Contract Analysis. He gave the following reason<sup>32</sup> :

It must, as I see it, be a necessary characteristic of any gift [validated by use of the Contract Analysis]

that the members of the association can by an appropriate majority (if the rules so provide), or acting unanimously if they do not, alter their rules so as to provide that the funds, or part of them, shall be applied for some new purpose, or even distributed amongst the members for their own benefit.

In other words, the members must be able to govern the destination of the funds they hold and to divide them amongst themselves before a court will utilise the Contract Analysis to explain and validate a gift to the association. In the present case, the members did not control the property themselves, in that an external body - the national Labour Party - could alter the rules. The court therefore utilised the rules in the association's constitution concerning 'association' property as a tool of construction of the gift. They were open to the possibility of being altered externally, with the result that if the members were construed as holding interests in the funds, subject to those rules, the funds could be diverted away from the association which was intended to be benefited. Since the testator was well-acquainted with the content of the rules, the court concluded that he could not have intended his bequest to be interpreted in any manner which would permit this result, which included the Contract Analysis.

Two observations should be made in criticism of the court's line of reasoning in *Re Grant*. Firstly, any reliance on the court's perception of the donor's intention in relation to his gift is artificial. The *true* intention of the donor of funds to an unincorporated association is not to benefit the members in any way, but to promote the association. No donor *intends* to transfer his funds to the members, even with the safeguards of the Contract Analysis. Furthermore, the Contract Analysis was formulated as a salvage device to permit the courts to manoeuvre their

way around the problem of an unincorporated association's lack of legal personality. As such, its aim is to evade an anomaly in the law, not to honour a donor's intentions, however perceived.

The second criticism which may be levelled at a court's use of an association's constitution as a tool of construction is that the constitution is a contractual arrangement. Its terms can not be carved in stone or absolutely and forever entrenched. Therefore no term which prohibits members from severing their shares in 'association' property is inviolable. The members can at any time cast off the contractual fetters on their ownership of 'association' funds. Thus, in *Re Grant* itself, the members of the local Party had voluntarily subjected themselves to the external control of the national Labour Party by entering into a contractual term to that effect. They could just as voluntarily have dissociated themselves from the national Party by varying the terms of their membership contract.

In sum, it is submitted that the express rules of an unincorporated association should not influence a court's decision to use or not to use the Contract Analysis as a matter of interpretation. In *Re Grant* had the court espoused the Contract Analysis, the bequest would have been valid. Instead the court decided that the rules precluded such a result and held that the gift was intended to operate as a non-charitable purpose trust, which failed<sup>33</sup>. In this regard, *Re Grant* is an extremely unsatisfactory decision<sup>34</sup>.

(iii) Step Three : Misapplication of Funds

The discussion of Steps One and Two has demonstrated that the role of property law and its governing principles in the Contract Analysis is completed once the transfer of the donated funds has been effected. The law of contract then takes over. Thus if any of the members utilises the funds other than as stipulated in the rules of the association, he commits a breach of contract. The donor, not being a party to that contract (unless he is himself a member of the unincorporated association), has no remedy against him. Only the other parties to the association contract, the members, have a cause of action and it sounds solely in contract. The only other possibility is to resort to the law of restitution.

It is possible to regard the situation as being parallel to the traditional view of the legal position of the grantor of a licence over land. Traditionally, if the owner in fee simple, for example, of a plot of land, Y, granted a licence to a licensee, X, to play cricket on the land on Sundays in return for consideration, the existence of the licence was merely a matter of contract law. It did not affect Y's proprietary rights over his land in any way. However, if he violated the terms of the licence and prevented X from playing cricket by selling the land to a developer, X would only have a contractual remedy against Y<sup>35</sup>. Likewise, the remedy of other members of an unincorporated association (X) if one member (Y) absconded with funds donated to the association would be to bring an action in damages for breach of contract, or to apply either for an injunction to restrain that breach of contract or for an order of specific performance.

#### 4. Advantages of the Contract Analysis

The overriding advantage of the Contract Analysis is that the interpretation of a gift to an unincorporated association as operating within its framework will in most cases result in the validity of the gift. The troublesome requirements of trusts law need not be satisfied; the range of purposes for which the intended recipient association exists is as broad as the contractual freedom of its members<sup>36</sup>; the analysis is flexible to the particular internal constitutional arrangement of the recipient association. The analysis operates to validate both testamentary and *inter vivos* gifts, and donations from both external benefactors and the association's own members.

Although the analysis can not absolutely guarantee that the intentions of the donor will be fulfilled<sup>37</sup>, if he chooses his association carefully and selects one with a record of stability and even a constitution with a rigorous amending formula, he will improve the chances of his funds being utilised to benefit the association as a continuing enterprise. However, even the potential for change (within reasonable limits) by contractual variation which the Contract Analysis presents may serve a useful purpose from the point of view of public policy, so that one need not view the major weakness of the analysis as unqualifiedly undesirable. After all, the members of an association, who change its rules and objects from time to time, may be sensitive to current needs in society and may therefore perform a contemporaneously useful social function. It is not an inevitable result of the Contract Analysis that funds will stagnate in the coffers of associations which have outlived their usefulness or which have anachronistic aims.

## 5. Disadvantages of the Contract Analysis

It is suggested that the principal disadvantages of the Contract Analysis are three in number<sup>38</sup>.

### (i) No Legal Guarantee

If his gift is interpreted as taking effect in accordance with the Contract Analysis, the donor does not enjoy the benefit of the type of strong guarantee of performance which characterises gifts which operate within the legal framework of a valid trust<sup>39</sup>. In the first place, he may specify a purpose in the terms of his gift which is narrow and more limited in scope than the general purposes for which the recipient association exists<sup>40</sup>. Thus, in the example used at the very beginning of this discussion<sup>41</sup>, X may specify that his gift is "for the Fairways Golf Club for the purpose of funding competitive tournaments". The Club's rules meanwhile permit the whole range of both social and sporting activities associated with the game of golf. In such a case, even due compliance by all members with the terms of their association contract may not necessarily promote one single tournament. The specified purpose has no legal force under the Contract Analysis and is interpreted as merely stating the motive for the donation. In effect, the donor has to take the association and its constitution as he finds them.

In the second place, there is no guarantee that even the general purposes stipulated in the association's constitution will be implemented. Damages for breach of contract obtained by the association membership against a delinquent member who misapplied funds would

probably be nominal in quantum and therefore of little deterrent force. Furthermore, they would certainly provide neither the donor nor the association itself with a true remedy for the non-fulfilment of the terms of the gift.

Even more serious, however, is the disadvantage that, just as the two parties to an ordinary bipartite contract can vary or terminate it by mutual assent, so also can the members of an association vary or terminate their multi-partite contract. This can occur by unanimous agreement or even by a majority vote if the rules in the association's constitution so provide <sup>42</sup>. Brightman, J. recognised the existence of this problem in *Re Recher* and said <sup>43</sup> :

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 <sup>44</sup>.

The price of avoiding the complications of trusts law is the loss of its defining characteristic : the guarantee of performance. Thus if X's gift to the Golf Club is construed as taking effect under the Contract Analysis, the funds may well be utilised to finance the construction of a shopping centre on the seventeenth and eighteenth fairways if the members for the time being resolve to introduce this as one of the objects for which the association exists. Furthermore, the members may even decide to wind up the association and divide its assets amongst themselves. Since the only legal arrangement in existence is a contract between the members, no third party, such as the donor, could intervene. His generosity may therefore end up financing a member's new pair of golf shoes for use at a rival golf club. The nature of an association and its rules can ensure a continuing benefit to the association from donated funds to a certain extent only for as long as the association exists.

(ii) The Search for a Contract

The existence of a legally enforceable contract between the members of an unincorporated association is crucial for the purposes of the Contract Analysis. Particularly when the association in question has no written, constitutional membership document, the Contract Analysis runs into problems. The existence of contractual rights and obligations uniformly applicable to all members has to be implied according to what is reasonable in the circumstances and taking into account established practice, the general nature of the association and its activities<sup>45</sup>. The uncertainty inherent in this process casts doubt on the availability of the Contract Analysis in all cases other than those involving established and organised associations whose founding members have formulated written membership terms. In the absence of a written contract of some kind, a court is likely to refuse to interpret a gift as taking effect under the Contract Analysis.

However, even when a written constitution *does* exist, it may be difficult to establish the creation of a contract every time a member joins an association. Presumably when a member applies for admission to an association, he thereby offers to be bound by its existing rules and this offer is impliedly accepted by all the other members as a body when the application is approved<sup>46</sup>. One commentator has attempted to explain the arrangement in the following manner<sup>47</sup> :

The contract of association is a complex multi-partite transaction, with offer and acceptance blurred by members joining their society at different times, possibly without even having any knowledge of one another's existence or identity. The problem of explaining exactly how it is that all members can have attained a multilateral contractual accord is perplexing, but not insoluble. What is required is a recognition that the offer and acceptance in

these cases are open-ended. When an association is formed, there is implied into each member's contract a standing offer to prospective applicants to join on those terms which those existing members have accepted.

Particularly in the case of a large or physically decentralised organisation, the problems posed in this context by a large membership, most of whom are unaware of the existence and identity of the others, tempt one to conclude that the existence of the multi-partite contract necessary for the successful use of the Contract Analysis is a fiction<sup>48</sup>.

Indeed, some commentators would go even further and would deny the feasibility of the entire Contract Analysis because of the problem of inventing a legally enforceable membership contract. For example, Stoljar asserts that the structure of an unincorporated association consists of merely personal and *de facto* relationships<sup>49</sup>:

Not just because of the procedural difficulties that contract might here cause, or because there would be too many contracts to be recognised, or because the law would refuse to have such contracts specifically performed. The contractual explanation fails on rather more fundamental grounds. For ... the real point about the rules is that they are designed as instructions or as a ground-plan for the continuous running of the association, not to create private legal rights.

If one were to agree with the above point of view, one would be compelled to conclude that the Contract Analysis can not satisfactorily validate gifts to unincorporated associations. In response, however, it may be observed that the Contract Analysis at least presents a workable, though fictitious, legal framework to explain an otherwise inexplicable phenomenon : the successful donation of funds to unincorporated associations. It was formulated as a salvaging device and was intended to do no more than to improve an unsatisfactory anomaly in the law.

(iii) Fictitious Aspects of the Contract Analysis

The problem (discussed above) of inventing a legally enforceable contract is not the only fictitious aspect of the Contract Analysis. Several more are readily discoverable, which together strike at the conceptual and practicable soundness of the analysis. The problem will be illustrated briefly by mentioning two examples.

In the first place, if the members together own the property, should they not be personally taxable on the transaction and any income arising from its investment? Without going into any details of taxation law, in practice members of an unincorporated association are not assessed personally on 'association' property. Nevertheless, it has been suggested in some recent cases on an association's liability for *rates* that the members may indeed be assessed personally<sup>50</sup>. However, it is possible that such liability results from some perceived agency relationship between a particular member and the association itself, than from a recognition of the member's ownership of 'association' property.

The effectiveness of the Contract Analysis in achieving the donor's aim of benefiting an association depends to a great extent on an ongoing process whereby current members' interests in the property will be transferred in part or in full to future members as they join. To be operative, such a process normally involves that certain formalities, required by both property law and the law of contracts, be complied with. For example, if the members of an unincorporated association receive donated property as the beneficiaries of a trust in their favour, as explained in the latter part of the discussion of Step One of the Contract Analysis<sup>51</sup>, when the

current members die or resign from the association and impliedly transfer their interests in accordance with the terms of their contract, a disposition of subsisting equitable interests has taken place. Unless such a disposition is made in writing, statute <sup>52</sup> renders it void. Is it not unrealistic to assume that members in such a situation in practice dispose of their interests in 'association' property in writing? Yet in practice unincorporated associations *do* hold property.

## 6. Conclusion

One is compelled to conclude that the Contract Analysis does not realistically explain the mechanism whereby unincorporated associations actually receive and hold donated property, although in theory it holds many attractions. It permits courts to authorise the successful donation of funds to unincorporated associations. As such, it serves a useful purpose, but its role must be recognised as being limited to that of a salvaging device. It sets up a framework which apparently succeeds in achieving a result which is otherwise all but impossible in the current state of the law : the donation of funds to an unincorporated association, with a limited assurance that the association itself will benefit thereby. However, the success of the analysis is entirely superficial.

\* \* \* \* \*

FOOTNOTES : CHAPTER II

1. *Supra*, pp 33-50.
2. [1972] Ch.526; [1971] 3 W.L.R.321; [1971] 3 All E.R.401, hereafter referred to as *Re Recher*.
3. *Supra*, pp 33-50.
4. [1971] 3 All E.R.401 at 406.
5. [1959] A.C.457; [1959] 2 W.L.R.722; [1959] 2 All E.R.300. Discussed *supra*, pp 40-46.
6. *Infra*, pp 102-163.
7. *Supra*, footnote 5 [1959] 2 All E.R.300 at 306.
8. [1962] Ch.832; [1961] 3 W.L.R.999; [1961] 3 All E.R.769 at 778.
9. [1971] 3 All E.R.401 at 408.
10. *Ibid*.
11. *Infra*, pp 123-127, pp 152-158.
12. [1971] 3 All E.R.401 at 408.
13. The cases cited were : *In re Clarke* [1901] 2 Ch.110; 70 L.J.Ch.631, which was irrelevant to the present topic because the gift took effect on trust for the purposes of the Corps of Commissioners ; *Re Ray's Will Trust* [1936] Ch.520 at 524, a *dictum* which was again irrelevant because it deals with gifts on trust in general terms ; *Leahy v. Attorney-General for New South Wales*, *supra*, footnote 5 [1959] 2 All E.R.300 at 307, which was a discussion of the Absolute Gift Analysis ; and *Neville Estates v. Madden*, *supra*, footnote 8 [1961] 3 All E.R. 769 at 778, in which Cross,J.'s statements were not only *obiter*, but were also themselves totally unsupported by authority. In sum, none of the alleged authorities was directly on point.
14. For example, *Re Lipinski's Will Trusts* [1976] Ch.235; [1976] 3 W.L.R. 522; [1977] 1 All E.R.33 ; *Re Grant's Will Trusts* [1980] 1 W.L.R. 360; [1979] 3 All E.R. 359; hereafter referred to as *Re Grant*.
15. An alternative view is that the property is transferred to the trustees of the association. See further, *infra*, p 61.
16. Cf. Ford, Unincorporated Non-Profit Associations (Oxford : Clarendon, 1959), pp 5-8 ; Keeler, "Devises and Bequests to Unincorporated Bodies", (1963-1966) 2 Adelaide L.Rev.336, pp 352-356 ; Morris & Leach, The Rule Against Perpetuities, 2d.ed.(London : Stevens, 1962), p 315.

17. Discussed *passim, infra*, pp 152-158.
18. *Supra*, footnote 14 [1977] 1 All E.R.33 at 43.
19. See, *Re Lipinski, supra*, footnote 14 [1977] 1 All E.R.33 at 46.
20. Cf. Insall, "Gifts to Unincorporated Associations", (1977) N.Z.L.J. 489 : "Re Lipinski is a very important case in that it states clearly and unambiguously for the first time that there can be a valid trust for the purposes of an association", p 495. See also, Gravells, "Gifts to Unincorporated Associations - Where There's a Will There's a Way", (1977) 40 Mod.L.R.231.
21. See also, Green, "The Dissolution of Unincorporated Non-Profit Associations", (1980) 43 Mod.L.R.626, pp 627-629.
22. Discussed, *supra*, pp 14-15.
23. For further discussion of this topic, see *infra*, pp 71-72.
24. Such was the arrangement in *Re Recher, supra*, footnote 2 ; *Re Lipinski, supra*, footnote 14 ; and *Re Grant, supra*, footnote 14.
25. *Supra*, footnote 8 [1961] 3 All E.R.769 at 778-779.
26. (1860), 2 De G.F.& J.75; 29 L.J.Ch.503; 45 E.R.550.
27. *Ibid* 2 De G.F.& J.75 at 79-80.
28. See also, *Thomson v. Shakespear* (1860), 1 De G.F.& J.399; 29 L.J.Ch.276; 45 E.R.413 ; *Re Dutton* (1878), 4 Ex.D.54 ; *Re Nottage* [1895] 2 Ch.649; 64 L.J.Ch.695 ; *Macaulay v. O'Donnell* [1943]Ch.435n. Cf. *Re Drummond* [1914] 2 Ch.90; 83 L.J.Ch.817.
29. *Supra*, pp 58-59.
30. One might argue that the concern caused by express restrictions in the rules is not the rule against perpetuities, but rather the existence of impermissible conditions attached to title. It is not easy to derive such an argument from the cases discussed here, but even if such an argument *were* made, the gift would nevertheless validly take place. In other words, if an association's rules attached conditions to the members' title, the conditions in question would be void. The gift would be valid and members would take title, clear of the conditions, exactly as already discussed in Step One.
31. *Supra*, footnote 14. See also, *infra*, pp 97-98.
32. *Ibid* [1979] 3 All E.R.359 at 366.
33. *Infra*, pp 105-131.
34. See also the criticisms voiced in the following : Green, "'Love's Labours Lost': A Note on Re Grant's Will Trusts", (1980) 43 Mod.L.R. 459 ; Tettenborn, "Legacies and Local Labour Parties", (1980) 130

N.L.J.532 ; Rickett, "Mr. Justice Vinelott on Unincorporated Associations and Gifts for Non-Charitable Purposes", (1982) 12 V.U.W.L.R.1, pp 6-13.

35. For example, *Wood v. Leadbitter* (1845), 13 M.& W.838; 14 L.J.Ex.161; 53 E.R.351.
36. Terms which are illegal because they are contrary to statute, or public policy or in restraint of trade will not be legally enforceable. But *cf.* on the one hand, the impossibility of setting up a *trust* for a political purpose (*infra*, p113); and, on the other hand, the *Re Grant* case, for example, *supra*, footnote 14.
37. See, *supra*, pp 69-70.
38. Since Step One of the Contract Analysis involves the same process as that found in the Absolute Gift Analysis (*supra*, pp 33-50 ), the same factors may operate to rebut the availability of the Contract Analysis in any particular case (*supra*, pp 42-46). However, the same criticisms to this approach apply as were voiced in relation to the Absolute Gift Analysis (*supra*, *ibid*).
39. *Infra*, pp 102-174.
40. It is assumed here that a court is nevertheless willing to use the Contract Analysis and ignore the possible creation of a trust.
41. *Supra*, p 51.
42. *Reel v. Holder* [1981] 1 W.L.R.1226; [1981] 3 All E.R.321 partic.at 325 ; *John v. Rees* [1969] 2 W.L.R.1294; [1969] 2 All E.R.274 ; *Re Kaiapoi Woollen Mills Employees' Welfare Society* (1976), unreported, Christchurch (N.Z.) Registry, No.A 211/74, partic. at 9. *Cf.* *Abbatt v. Treasury Solicitor* [1969]1 W.L.R.1575; [1969] 1 All E.R.52 ; Baker, "Case Comment", (1970) 86 L.Q.R.18 ; *Innes v. Wylie* (1844), 1 Car.& Kir.257; 174 E.R.800 ; *Amalgamated Society of Engineers v. Jones* (1913), 29 T.L.R.484.
43. *Supra*, footnote 2 [1971] 3 All E.R.401.
44. Note that the 'administrative trust' could be terminated by a change in the rules which created it.
45. For example, *Abbott v. Sullivan* [1952] 1 K.B.189; [1952] 1 All E.R. 226 : a purely customary arrangement.
46. Similar to the multipartite arrangement in *The Satanita* [1895] P. 248; affirmed *sub nom. Clarke v. Dunraven* [1897] A.C.59.
47. Green, *op.cit.supra*, footnote 21, p 629.
48. See also, O'Connor, "Actions against Voluntary Associations and the Legal System", (1977) 4 Mon.L.R.87, p 97.
49. Stoljar, Groups and Entities (Canberra : Australian National University Press, 1973), p 43. See also, Baxt, "The Dilemma

- of the Unincorporated Association", (1973) 47 A.L.J.305, p 307.
50. For example, see *Verrall v. Hackney London Borough Council* [1983] 2 W.L.R.202 at 213 ; *R. v. Brighton Justices, ex parte Howard* [1980] R.A.222 at 225. Discussed, *supra*, pp 19-21.
51. *Supra*, pp 58-59.
52. United Kingdom Law of Property Act 1925, 15 & 16 Geo.V, c.20, s.53(1)(c). See also, New Zealand Property Law Amendment Act 1980, No.131, s.2 ; in Canada, see, for example, British Columbia Statute of Frauds, R.S.B.C.1979, c.393, s.2.

### III. THE BURRELL THEORIES OF DONATION

#### 1. Introduction

For reasons which will be explained in due course, it is only by dint of inference and conjecture that the case which most recently dealt with the topic of donations to unincorporated associations is of significance to this thesis. Consequently, less time will be spent on analysing *its* theories than on the others which are directly and authoritatively relevant and therefore discussed in some detail, both prior and subsequent to this chapter. The case is *Conservative and Unionist Central Office v. Burrell (Inspector of Taxes)*<sup>1</sup>, a decision of the English Court of Appeal, affirming the opinion of Vinelott, J. in the Chancery Division.

Each court discussed the issue of donation of funds for specified purposes and expounded theories on the mechanisms whereby such donations can be effective. The respective theories of the two courts differed substantially and, moreover, are open to more than one interpretation. Neither court used its theory to explain the donation of funds specifically to unincorporated associations. Nevertheless, the aim of this chapter is to evaluate the effectiveness and value of these theories as alternative analyses of donations to unincorporated associations. The conclusions reached will be : firstly, that the theories themselves are dubious; secondly, that they are of limited usefulness in the context of gifts to unincorporated associations; and thirdly, that they are neither viable nor superior analytical tools to the mechanisms already, and presently to be, discussed. In sum, they do not provide a satisfactory solution to

the problem at hand, but to omit discussion of them would nevertheless be to present an incomplete view of the topic.

## 2. The *Burrell* case

Under the United Kingdom Income and Corporation Taxes Act <sup>2</sup>, "companies" are liable to pay a corporation tax which is charged at a higher rate than personal income tax. Subsection 526(5) of the same Act is an interpretation provision which defines "company" as follows <sup>3</sup> :

'[C]ompany' means ... any body corporate *or unincorporated association*, but does not include a partnership, a local authority or a local authority association ...

Under this definition, the Conservative Party was assessed as an unincorporated association to corporation tax for the years 1972 to 1976, during which it had acquired substantial investment income and interest. The Party challenged the assessment and the finding that it was an unincorporated association <sup>4</sup>.

The Court of Appeal agreed with Vinelott, J. at first instance in holding that the Conservative Party was *not* an unincorporated association for the purposes of the Income and Corporation Taxes Act. Lawton, L.J. offered the following definition of an unincorporated association <sup>5</sup> :

It is against [the above] statutory background that a meaning has to be given to the words 'unincorporated association'. It is sufficiently like a 'company' for it to be put in the charging section within the ambit of that word. The interpretation section makes it clear that the word 'company' has a meaning extending beyond a body corporate but not as far as a partnership or local authority. I infer that by 'unincorporated association' in this context Parliament meant two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual

duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and upon what terms and which can be joined or left at will. The bond of union between the members of an unincorporated association has to be contractual.

It is important to observe that the court confined its opinion on the definition of an unincorporated association, and the Conservative Party's compliance or otherwise with that definition, to the specific statutory context. The court held - but only for the purposes of the taxing statute - that the Conservative Party was *not* an unincorporated association. It will be submitted that the Party *must* nevertheless be an unincorporated association in the *general* sense of the term and that the *Burrell* case demonstrates the existence of two types of unincorporated association : one type that is sufficiently close in structure and operation to a company to be taxed as such under the English Act; another type which encompasses all other unincorporated associations.

Both the Court of Appeal and the Chancery Division reviewed the complex constitutional and structural details of the composition of the Conservative Party. In particular, Lawton, L.J. examined the following features of the Conservative Party : the indirect methods whereby membership may be attained; the complex contractual links between the Party's various organs; the lack of a readily identifiable rule-making body; and the absence of a specific occasion when the original association contract was made which first brought the Party into existence. In sum <sup>6</sup> :

In my judgment, however viable such a body [as the Conservative Party] may be as a political movement, it lacks the characteristics of an unincorporated association for the purposes of the taxing statutes.

In other words, the Conservative Party was not an 'unincorporated association' within subsection 526(5) of the Income and Corporation Taxes Act,

and therefore not a 'company' within that statute's charging section, and the assessment to corporation tax had been made in error. Such was the *ratio decidendi* of the *Burrell* case and all other discussion was purely *obiter*.

### 3. The *Burrell* Theories of Donation

Had the Conservative Party been held to be an unincorporated association in the limited sense discussed above, the court would have had no difficulty in explaining how donations are received and property is held by it. Brightman, L.J. explained <sup>7</sup> :

If the party is rightly described as an unincorporated association with an identifiable membership bound together by identifiable rules ... no problem arises. In that event, decided cases say that the contribution takes effect in favour of the members of the unincorporated association known as the Conservative Party as an accretion to the funds which are the subject matter of the contract which such members have made *inter se*.

In other words, the Contract Analysis <sup>8</sup> would have been readily available to explain the mechanism and consequences of donation to the Party for Party purposes. The availability of such a straightforward explanation of the Party's fund-holding was used by the Crown to support its argument that it was an unincorporated association in the first place. The Crown argued that there was no other feasible explanation of how an organisation such as the Conservative Party received and owned funds in practice. By contrast, both Vinelott, J. in the Chancery Division and Brightman, L.J. in the Court of Appeal in the *Burrell* case managed to come up with *other* analyses of the legal nature of a donation to the Conservative Party.

#### (i) Irrevocable Mandate

In the Court of Appeal, Brightman, L.J. propounded the 'irrevocable mandate theory'<sup>9</sup>. He explained that when a donor gives funds to the treasurer of an "organisation" to be applied for the purposes of that organisation, a mandate arrangement is created which becomes irrevocable when the funds are mixed with the other organisation funds already held by the treasurer. In other words, property in the funds is transferred once and for all to the treasurer. He is authorised to use them in the manner stipulated and "the contributor has no legal right to require the mixed fund to be unscrambled for his benefit"<sup>10</sup>.

As a matter of property law, therefore, it appears that legal title is transferred to the recipient treasurer who becomes absolutely entitled to the funds. Presumably he would be taxed personally on income from the funds. Presumably, also, he is free and able from the point of view of property law to transfer his interest to others and divert the funds away from the purposes stipulated in the mandate. One is reminded of the Absolute Gift Analysis<sup>11</sup> of gifts to unincorporated associations. As Brightman, L.J. explained, however, his theory differs significantly from the Absolute Gift Analysis, with its attendant disadvantages<sup>12</sup>, in the following respect<sup>13</sup>:

[T]he contributor has no right to demand his contribution back, once it has been mixed with other money under authority of the contributor .....

This does not mean, however, that all contributors lose all rights once their cheques are cashed, with the absurd result that the treasurer or other officers can run off with the mixed fund with impunity. I have no doubt that any contributor has a remedy against the recipient (i.e. the treasurer, or the officials at whose direction the treasurer acts) to restrain or make good a misapplication of the mixed fund *except* so far as it may appear on ordinary accounting principles that the plaintiff's own contribution was spent before the threatened or actual misapplication. In the latter event the

mandate given by the contributor will not have been breached.

Brightman, L.J. did not explain the nature of the irrevocable mandate.

The mandate - which originated in the civil law of Rome and Scotland - is an implied contractual arrangement between the donor and the recipient whereby a species of gratuitous bailment is created. The contract provides for the transfer of the funds so that the transferee can utilise them for a stipulated purpose. Furthermore, as Jowitt's Dictionary of English Law says <sup>14</sup> :

A mandatary [i.e. the recipient/transferee] incurs three obligations : to do the act which is the object of the mandate, and with which he is charged; to bring to it all the care and diligence that it requires; and to render an account of his doings to the mandator.

The remedies against the recipient of the fund for its misapplication include an action for damages for breach of contract and an action for money had and received, coupled with an account. No doubt the contributor could apply for an injunction to restrain a threatened breach of mandate. It is possible, however, that an application for specific performance would be denied, since the essence of a mandate is a contract for services of a personal nature.

The similarity between the Irrevocable Mandate Theory and the Contract Analysis <sup>15</sup> is striking. In each case, property is transferred absolutely but the transferee is constrained by contractual obligations to deal with the property in a specified way. In each case, an action for breach of contract is the remedy available to deter or compensate for misapplication. The Irrevocable Mandate Theory therefore suffers all the disadvantages of the Contract Analysis enumerated in the preceding chapter <sup>16</sup>, such as the diffi-

culty of inventing contracts in certain circumstances. However, it also suffers additional drawbacks which stem from an important dissimilarity between the two analyses. In the case of the Contract Analysis, the contract is implied from the nature of membership of an association and subsists between members : the donor moves out of the picture entirely. By contrast, the Irrevocable Mandate Theory demands the implication of a contract between the recipient of funds and the donor himself. Brightman, L.J. recognised the unfortunate consequence of this aspect of his theory <sup>17</sup> :

The only problem which might arise in practice under the mandate theory would be the case of an attempted bequest to the Central Office funds, or to the treasurers thereof, or to the [Conservative Party], since no agency could be set up at the moment of death between a testator and his chosen agent. A discussion of this problem is outside the scope of this appeal and, although I think that the answer is not difficult to find, I do not wish to prejudge it.

In other words, the Irrevocable Mandate Theory only provides a ready solution in the case of *inter vivos* gifts to an "organisation" for its purposes. One can only speculate on the answer Brightman, L.J. would have given to the problem of a testamentary donation. Presumably it would involve the implication of a contract with the testator's estate. In response to this, two submissions are made : firstly, that the solution is hardly satisfactory or realistic, and betrays a somewhat fictitious element of the whole Irrevocable Mandate Theory; secondly, that the suggested solution is inconsistent with the nature of the mandate arrangement which is normally personal to the original contracting parties. Indeed, Brightman, L.J. himself was aware of this latter fact when he pointed out a second drawback of the Irrevocable Mandate Theory. Quite apart from the problem posed by bequests he recognised a potential difficulty even in the case of *inter vivos* gifts <sup>18</sup> :

A complaining contributor might encounter problems under the law of contract after a change of the office holder to whom his mandate was originally given. Perhaps only the original recipient can be sued for the malpractices of his successors.

Brightman, L.J. nevertheless dismissed the practical significance of this problem as a merely "procedural intricacy".

Despite the disadvantages of the Irrevocable Mandate Theory, Brightman, L.J. and the other judges of the Court of Appeal who expressed concurrence in his opinion were content that it satisfactorily explained the legal framework within which the Conservative Party held and administered its donated funds. In their opinion, when a donor gives money to the Party, an implied contract comes into existence which authorises the donee to take absolute title to the funds, but directs him - on pain of an action for breach of contract - to use them for the purposes of the Party.

(ii) Revocable Mandate

Throughout the course of its decision, the Court of Appeal made no reference to the opinion of Vinelott, J. in the court below<sup>19</sup> other than to affirm his holding that the Conservative Party was not an unincorporated association for the purposes of the Income and Corporation Taxes Act. In espousing the Irrevocable Mandate Theory neither approval nor disapproval was expressed by the appellate court of *his* discussion of the legal nature of a donation for specified purposes.

In fact, Vinelott, J. mentioned his own variety of the Mandate Theory<sup>20</sup>. He used as the vehicle for his discussion the example of an explorer who "invite[s] subscriptions to a fund to finance an expedition

to explore some unexplored area of the world" <sup>21</sup>. He offered the following analysis as a possible interpretation of the legal situation in such a case <sup>22</sup> :

[T]he subscribers would remain the beneficial owners of the money subscribed, the explorer having no more than a revocable mandate to use them for the stated purpose.

In other words, ownership and possession of the funds are separated. Unlike the case of the irrevocable mandate, it appears that the donor retains ownership of the property and is therefore presumably taxable on income therefrom until the funds are spent for the specified purpose, and title is transferred from the donor to a third party. Meanwhile the explorer has merely the right to hold and use the funds under the terms of an implied contract between himself and the owner to that effect unless and until the mandate constituted thereby is revoked.

By way of comparison with the Irrevocable Mandate Theory, it is pointed out that the position of the donor is both more and less favourable than that of the donor who is construed as having created an irrevocable mandate. The advantage to the donor of the revocable over the irrevocable mandate is that he retains more control over the funds, and can change his mind at any time before the funds are actually used, and revoke the mandate. The disadvantage, however, of his retention of ownership is that he is still taxable on income arising from, or dispositions of, the property. Otherwise, the limitations and drawbacks of this theory as an analysis of the legal framework of donations for specified purposes are the same as those suffered by the Court of Appeal's Irrevocable Mandate Theory. Above all, it is applicable only with difficulty to donations of a testamentary nature.

Indeed, as if in recognition of the limited scope of his theory, Vinelott, J. did not develop his suggestion in any detail. He merely mentioned the possibility of a revocable mandate in passing. He then went on to expound another theory, of which at least two interpretations are possible, each of which will now be discussed in turn.

(iii) Contractual Undertaking

The Crown had argued in the *Burrell* case that if the Conservative Party did not receive and hold donations as an unincorporated association under the Contract Analysis, there were only two other analyses available of the legal mechanism whereby a donation to the Party could take effect. In counsel for the Crown's view, *either* the Party treasurers held the funds on an invalid non-charitable purpose trust <sup>23</sup>, *or* either they or the Party leader himself were the absolute owners of all donations. Vinelott, J. rejected the contention that these were the only possible alternatives in the following terms <sup>24</sup> :

[T]he dilemma on which this argument rests is ... in my opinion a false one. It is simply not the case that the legal owner of property must always hold the property on some effective trust or be the beneficial owner of it ..... [A] situation in which the beneficial ownership of property which is not held by trustees on some effective trust is left in suspense can ... be produced by contract and may possibly arise in other circumstances.

The last sentence of this quotation is extremely troublesome and, as mentioned above <sup>25</sup>, no assistance can be derived from the Court of Appeal's opinion which makes no reference whatever to the reasoning of Vinelott, J.

One interpretation of Vinelott, J.'s words leads to a result which does not differ substantially from Brightman, L.J.'s Irrevocable Mandate

Theory, discussed above <sup>26</sup>. That is to say, it is possible to read Vinelott, J.'s judgment as propounding a theory whereby, although no mandate as such is created, the donor of property and its recipient are bound contractually. As a matter of property law, the donee is absolute owner of the transferred property but he is restricted by the terms of an implied contract with the donor to utilise it in a certain manner. In the event that funds are misapplied, the donor has retained no proprietary interest in them which he can assert against the donee : his remedy sounds solely in contract.

This Contractual Undertaking interpretation of Vinelott, J.'s theory is supported by two factors. In the first place, some of the terminology he uses in explaining his theory is contractual in nature. For example, he says <sup>27</sup> :

It appears to me that if someone invites subscriptions on the representation that he will use the fund subscribed for a particular purpose, *he undertakes* to use the fund for that purpose and no other and to keep the subscribed fund and any accretions to it (including any income earned by investing the fund pending its application in pursuance of the stated purpose) separate from his own moneys.

As will be mentioned below, he also speaks of the "remedy of specific performance", mentions "consideration for [a] *contractual* undertaking" <sup>28</sup> and "the implication of *contractual* undertakings" <sup>29</sup>.

A second reason for reading Vinelott, J.'s theory donation as involving a contractual relationship between donor and donee is that it embodies a viable, recognised and undisputed legal concept. The same can not be said for the alternative interpretation which will be discussed presently.

Viable as the Contractual Undertaking Theory may be as a matter of law, however, it is nevertheless highly unsatisfactory as a general solution to the problem of donations of funds for specified purposes. To begin with, it cannot be denied that it suffers the principal drawback already observed of the two Mandate Theories. In the words of Vinelott, J.<sup>30</sup>:

[I]n the case of a testamentary gift there is no room for the implication of any contract between the testator and the persons who are to receive the bequest.

As mentioned above, it is conceivable, but unlikely, that a contract could be implied between the donor's estate and the donee. Otherwise, the theory is available only to explain *inter vivos* donations for specified purposes. Another aspect of the same problem is that the donor and donee may be one and the same person. For example, if the member of an unincorporated association is also its treasurer who receives funds on the association's behalf, under the Contractual Undertaking Theory that member's subscription must become impressed with a contract between the member as donor and himself as donee.

A second problem is that of discovering the existence of implied contracts between the parties to a donation. In particular, in order to be legally enforceable, a contract must have been entered into with the *intention* of entering into legal relations and must be accompanied by consideration. One is struck by the artificiality of interposing a contract between gratuitous donors and donees.

The third problem stems from the fact that the donor gives up all proprietary interest in his funds. If the recipient chooses not to apply them for the specified purpose in accordance with the terms of the implied

contract, the donor has no guarantee that his true intentions will be fulfilled. Damages for breach of contract might be recoverable in such a case although the donor may be awarded nominal damages only. However, the remedies of specific performance, compelling due application of funds in accordance with the contract terms, and injunction, preventing their misapplication, are also available in limited circumstances, as Vinelott, J. explained <sup>31</sup> :

I can see no reason why if the purpose is sufficiently well defined, and if the order would not necessitate constant and possibly ineffective supervision by the court, the court should not make an order directing [the recipient of donated funds] to apply the subscribed fund and any accretions to it for the stated purpose.

Vinelott, J. expressed the opinion that his example of an explorer who receives subscriptions to finance an expedition would not satisfy the above criteria. The only other possibility, if the subscribers had sufficient information to seek relief in time, would be an injunction <sup>32</sup> :

[A]part from the possible remedy of specific performance I can see no reason why the court should not restrain the recipient of such a fund from applying it (or any accretions to it such as income of investments made with it) otherwise than in pursuance of the stated purpose.

Again, however, there are restrictions on the availability of injunctive relief and it is essentially a discretionary remedy.

The recipient's ownership of the funds is therefore hedged about by contractual limitations of limited effectiveness in guaranteeing that the funds reach the destination intended by their donor.

(iv) Suspended Beneficial Ownership

It is evident from the criticisms iterated above that Vinelott, J.'s

theory might become more acceptable if it can operate without the necessity of implying a contract between donor and donee. Each of the three problems with the Contractual Undertaking Theory is traceable to the fact that it is operating within the framework of contract law rather than property law. An analysis which put more emphasis on the latter might be more successful in achieving the donor's aim. The Suspended Beneficial Ownership Theory is an interpretation of Vinelott, J.'s judgment which attempts to do exactly that.

The crucial sentence in Vinelott, J.'s exposition of his theory ran as follows <sup>33</sup> :

[A] situation in which the beneficial ownership of property which is not held by trustees on some effective trust is left in suspense can also be produced by contract *and may possibly arise in other circumstances.*

The first interpretation of Vinelott, J.'s meaning offered above emphasised the contractual method of impeding a donee's ownership of donated funds. The second interpretation, on the other hand, emphasises the property concepts in the above-quoted sentence. It may be recalled that Vinelott, J. was faced with the argument that beneficial ownership of the Conservative Party funds must be in the recipient of those funds either as a trustee or as absolute owner. The Contractual Undertaking interpretation merely modified the latter alternative by the superimposition of contractual restraints. The second interpretation, however, offers a true alternative : the notion of suspended beneficial ownership. In other words, the donee of the funds holds bare legal title and is denied beneficial ownership of them; beneficial ownership, being vested in no-one at all, apparently hovers until the funds are duly utilised in accordance with the specified purpose. In the meantime, the following situation obtains <sup>34</sup> :

[T]he recipient of the fund is clearly not the beneficial owner of it and ... the income of it is not part of his total income for tax purposes. Equally, whilst the purpose remains unperformed and capable of performance the subscribers are clearly not the beneficial owners of the fund or of the income (if any) derived from it. If the stated purpose proves impossible to achieve or if there is any surplus remaining after it has been accomplished there will be an *implied obligation* to return the fund and any accretions thereto to the subscribers in proportion to their original contributions, save that a proportion of the fund representing subscriptions made anonymously or in circumstances in which the subscribers receive some benefit (for instance, by subscription to a whist drive or raffle) might then devolve as *bona vacantia*.

One commentator has argued <sup>35</sup> that the "implied obligation", far from being contractual in nature (as suggested by the first interpretation offered above), is "rather a type of general equitable obligation imposed as a remedy to deal with an otherwise difficult if not impossible situation" <sup>36</sup>. According to this view, the donee of funds is under a "general equitable obligation" to deal with them as directed, which is owed to the donors if they are alive and identifiable, to their estates if they are dead, and to the Crown if the donors are identifiable. Further advantages argued for this theory of donation by way of suspended beneficial ownership coupled with an equitable obligation are said to be that there is no limit to the duration of the dedication of property for the specified purposes and that the scope of purposes which can be benefited thereby is unlimited <sup>37</sup>.

Ideal as the analysis and its consequences may sound, the objections to this interpretation of Vinelott, J.'s theory are many. In the first place, the notion of suspended beneficial ownership at the least is unsupported, or, more likely, prohibited by authority. The precedent quoted

by Vinelott, J. to support his concept<sup>38</sup> were cases on the meaning of beneficial ownership in a special fiscal statutory context and provide little backing for his cause. Furthermore, the whole concept of the resulting trust is founded on a fundamental principle which Vinelott, J. appears to have overlooked. This is that there can *never* be suspended beneficial ownership : absolute title is either effectively transferred, or any beneficial interest which comes into existence reverts back to the purported transferor. The most clear authority for this proposition can be found in the House of Lords' decision in *Vandervell v. Inland Revenue Commissioners*<sup>39</sup> where Lord Reid explained the basis of the resulting trust doctrine in the following manner<sup>40</sup> :

The basis of the rule is, I think, that the beneficial interest must belong to or be held for somebody : so, if it was not to belong to the donee or be held by him in trust for somebody, it must remain with the donor.

And Lord Wilberforce emphasised that<sup>41</sup> :

The equitable, or beneficial interest ... cannot remain in the air.

The theory of Suspended Beneficial Ownership expounded by Vinelott, J. as a satisfactory analysis of the legal framework within which a donation such as that for the purposes of the Conservative Party can take effect cuts directly across the grain of hitherto accepted conceptual analysis.

A second objection to the suggested interpretation of Vinelott, J.'s theory of donation is recognised by its main supporter as being not merely its "lack of pedigree" as discussed above, but also "its apparent width"<sup>42</sup>. The general, equitable obligation has no foundation in authority and is apparently of a purely remedial nature, to be implied whenever the equity of the situation demands it. Far from being an advantage

of the analysis <sup>43</sup>, it is submitted that it introduces a far from acceptable level of uncertainty and discretion to an area of the law that already requires clarification.

It is suggested by way of conclusion that the Suspended Beneficial Ownership Theory is the less satisfactory of the two interpretations of Vinelott, J.'s discussion of donations for specified purposes. Furthermore, it may be recalled that the discussion was purely *obiter*, was in no way recognised as of value by the Court of Appeal and apparently has not attracted attention from any subsequent tribunal.

#### 4. The *Burrell* Case and Gifts to Unincorporated Associations

The object of the discussion thus far has been to explain the four theories of donation offered directly and by way of inference from the *Burrell* litigation, and to demonstrate their respective weaknesses and limitations. Each of the four analyses can explain the legal framework of a successful donation only in limited circumstances, but discussion of them has not been totally in vain. Provided that it is recognised that none of the theories is *the* ideal explanation of *all* gifts for specified purposes, the contribution of the *Burrell* litigation to the law of donations is helpful. It experimented in the area and attempted to expand the traditional conceptual frameworks within which the courts had hitherto worked.

It may be recalled that the discussion of the various theories in the *Burrell* case was predicated on a finding that the Conservative Party was *not* an unincorporated association. On this one might base an argument

that the theories are inapplicable to explain the legal basis of gifts for the purposes of such associations. However, it is suggested that three propositions are available to refute such an argument and show that the theories are available to explain not only donations in general, but also gifts specifically for the purposes of unincorporated associations. In appropriate (though qualified) circumstances, one or other of them can explain and therefore validate a gift for an unincorporated association, where other analyses, such as the Contract Analysis or the Absolute Gift Analysis, have failed.

*Firstly*, as has already been mentioned, the sense in which 'unincorporated association' was being utilised in the *Burrell* litigation was specialised. It was restricted to the specific context of the technical, fiscal legislation under consideration. Thus, in the *Burrell* cases, it was decided that, as a matter of statute law, the Conservative Party was not an unincorporated association. It does not follow, however, that the Party is not such an association in other legal contexts. Since there is no such general legal entity as an unincorporated association, the issue of whether or not one exists for common law purposes must be approached from a practical and realistic standpoint, founded on facts alone. Looking at the Conservative Party in this manner, how else can its factual existence be explained if not as an unincorporated association?

*Secondly*, the theories discussed above are in no way limited by conceptual necessity to the situation of a gift by one individual to another for abstract purposes. Each analysis is equally applicable to the situation where a donor gives funds to an association for its purposes. As in all the other analyses discussed in this thesis, the association

itself obviously can not be the recipient of the funds. It must therefore be decided as a matter of construction and interpretation of the gift and its circumstances whether the intended donees are the association's officers or its members. Once this has been resolved, the particular theory selected to explain the mechanism of donation operates exactly in the same manner as for a gift to an individual. Thus, the Irrevocable Mandate Theory, for example, can be extended to the case of unincorporated associations in the general sense of the word. Indeed, Brightman, L.J. in the Court of Appeal talked in terms of a gift to an "organisation" which took effect via a transfer to its treasurer <sup>44</sup>.

*Thirdly*, Vinelott, J. clearly and expressly contemplated the application of his theory (however interpreted) to gifts to unincorporated associations, although he recognised that it could only succeed if the gift took effect *inter vivos*. In the case of a testamentary gift, resort would have to be had, in his opinion, to the analyses discussed in the preceding chapters <sup>45</sup> :

A testamentary gift to a named society which is not an incorporated body must fail unless it can be construed as a gift to the members of an unincorporated association either as joint tenants [Absolute Gift Analysis] or as an accretion to the funds of the association to be applied in accordance with its rules (commonly with a view to the furtherance of its objects) [Contract Analysis]. But in the case of a testamentary gift there is no room for the implication of any contract between the testator and the persons who are to receive the bequest. In the case of an *inter vivos* subscription the intention of the subscriber can be given effect by the implication of contractual undertakings of the kind I have described.

Indeed Vinelott, J. retroactively explained a statement he made concerning *inter vivos* gifts in the earlier case of *Re Grant's Will Trusts* <sup>46</sup>, where a bequest to a constituency Labour Party failed, on the basis of

his Contractual Undertaking Theory. One commentator<sup>47</sup> has even extracted the following passage from *Re Grant* as a statement of Vinelott, J.'s theory, as applied to an unincorporated association, "in its embryonic form"<sup>48</sup> :

[S]ubscriptions by members of the Chertsey and Walton CLP must be taken as made on terms that they will be applied by the general committee in accordance with the rules for the time being, including any modifications imposed by the annual party conference or the NEC.

Vinelott, J. then went on to state that the funds would revert to the subscribers on resulting trust on dissolution of the party, and it was this statement which he retroactively amended in the *Burrell* case to incorporate his new theory. Of course, it is also possible to read the above quotation as merely reiterating the operation of the Contract Analysis which Vinelott, J. had just been discussing.

In sum, one can safely conclude that each of the *Burrell* theories of donation is applicable in the context of a gift for the purposes of an unincorporated association. However, if a court chose (as a matter of construction of the gift and its relevant surrounding circumstances) to espouse either the Irrevocable Mandate Theory, or the Revocable Mandate Theory, or the Implied Contractual Undertaking Theory, the gift would be valid and effective *only* in the case of an *inter vivos* donation. In each case, a contract would be implied between the donor and either an officer (or officers) or members of the association. One of the terms of this contract would be a promise on the part of the donee or donees to utilise the donated funds for a stipulated purpose. In the absence of express limitations in the terms of the gift, the implied stipulated purpose would be the general objects of the association. Testamentary gifts,

on the other hand, would fail. Furthermore, even in the case of *inter vivos* gifts, the donor's guarantee that the specified purposes will be carried out would be founded merely on personal contractual remedies. Proprietary remedies against the funds themselves would not be available.

Should a court choose to espouse the Suspended Beneficial Ownership Theory, it is submitted that a gift for an unincorporated association would take effect in the following manner. Factors such as the wording of the gift and the structure of the association would dictate whether members or representative officers of the association were the actual donees of the donated funds. They would hold bare legal title to them and would be under a general equitable obligation to utilise them in the specified manner. In case of misapplication, presumably the donor or his estate would have *locus standi* to invoke the court's remedial jurisdiction over the matter. It has been suggested, however, that *any* application of the theory's proposed framework for gifts for specified purposes - whether to donations in general, or to those for unincorporated associations in particular - would be legally unacceptable.

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FOOTNOTES : CHAPTER III

1. [1982] 1 W.L.R.522; [1982] 2 All E.R.1, affirming *Conservative and Unionist Central Office v. Burrell (Inspector of Taxes)* [1980] 3 All E.R.42; [1980] T.R.143 : hereafter referred to as "the *Burrell* case". See, Rickett, "Mr.Justice Vinelott on Unincorporated Associations and Gifts for Non-Charitable Purposes", (1981) 12 V.U.W.L.R.1.
2. 1970, c.10, s.238(1).
3. Italics added.
4. Both courts offered definitions and lists of characteristics of unincorporated associations. Interesting as these are and instructive as they might be to analyse, this portion of the case is dealt with in brief outline only. The reason for this apparent omission is that this thesis is written throughout on the hypothesis that an unincorporated association (whatever it may be) *does* exist. See *supra*, pp 13-16.
5. [1982] 1 W.L.R.522 at 525.
6. *Ibid* at 527.
7. *Ibid* at 529.
8. *Supra*, pp 51-78.
9. [1982] 1 W.L.R.522 at 529.
10. *Ibid*.
11. *Supra*, pp 33-50.
12. *Supra*, pp 46-47.
13. [1982] 1 W.L.R.522 at 529.
14. Jowitt & Walsh, Jowitt's Dictionary of English Law, 2nd.ed., ed. J. Burke (London : Sweet & Maxwell), p 1140.
15. *Supra*, pp 51-78.
16. *Supra*, pp 69-74.
17. [1982] 1 W.L.R.522 at 530.
18. *Ibid*.
19. *Supra*, footnote 1.
20. See also, Gray, "Gifts for a Non-Charitable Purpose", (1901-1902) 15 Harvard.L.R.509, p 525 ; Lloyd, The Law of Unincorporated Associations (London : Sweet & Maxwell, 1938), pp 173-174.

21. [1980] 3 All E.R.42 at 62.
22. *Ibid.*
23. *Infra*, pp 105-131.
24. [1980] 3 All E.R.42 at 61.
25. *Supra*, p 86.
26. *Supra*, pp 83-86.
27. [1980] 3 All E.R.42 at 62. Italics added.
28. *Ibid* at 63.
29. *Ibid* at 64.
30. *Ibid.*
31. *Ibid* at 63.
32. *Ibid.*
33. *Ibid* at 61.
34. *Ibid* at 63. Italics added.
35. Rickett, *op.cit.supra*, footnote 1, pp 22-25.
36. *Ibid*, p 22.
37. *Ibid*, p 24.
38. *Wood Preservation Ltd. v. Prior (Inspector of Taxes)* [1969] 1 W.L.R. 1077; [1969] 1 All E.R.364; 45 Tax.cas.112; and *Franklin v. Commissioners of Inland Revenue* (1930) 15 Tax.Cas.464.
39. [1967] 2 A.C.291; [1967] 2 W.L.R.87; [1967] 1 All E.R.1.
40. [1967] 1 All E.R.1 at 5.
41. *Ibid* at 18.
42. Rickett, *op.cit.supra*, footnote 1, p 23.
43. *Cf.* footnote 42, *supra*.
44. [1982] 1 W.L.R.522 at 529.
45. [1980] 3 All E.R.42 at 63-64.
46. [1980] 1 W.L.R.360; [1979] 3 All E.R.359 at 372. Discussed *supra*, p 64.
47. Rickett, "Purpose Trusts and Unincorporated Associations", (1981) N.Z.L.R.44, p 46.
48. [1979] 3 All E.R.359 at 371-372.

IV. GIFTS TO UNINCORPORATED ASSOCIATIONS ON TRUST

In many instances, the terminology used by a donor who wishes to make a gift to an unincorporated association will expressly create a trust under which he intends his donation to take effect. The major alternatives which he may attempt are as follows : "on trust for the W Association"; "on trust for the purposes of the X Association"; "on trust for the present members of the Y Association" <sup>1</sup>; "on trust for the present and future members of the Z Association". However, the terminology used is never conclusive and, just as the reference to a trust may be disregarded in favour of the Absolute Gift Analysis <sup>2</sup> or the Contract Analysis <sup>3</sup>, so may a superficially absolute gift be interpreted as imposing a trust. It is all a question of interpretation and construction of numerous factors, including the circumstances surrounding the gift and the wording of the remainder of the deed or will, if any, in an attempt to achieve the perceived intentions of the donor. The fact that the donor evidently aimed to dedicate the property subject to a legal, and not merely moral, obligation to the pursuit of the expressed purpose is a weighty consideration in favour of implying a trust.

From the point of view of the donor, the advantages of his gift's being analysed as operating within the framework of a valid trust are substantial. Firstly, the trustees are under a legal obligation to divert the funds as directed. In this manner the donor receives a guarantee that his wishes will be respected. The destination of the funds is not at the whim of persons under a merely moral obligation to deal with them in a certain way; nor subject to the possibility of being redirected in accordance with varied contractual obligations. Secondly, from the tax point of

view, the donor divests himself of all ownership of the funds while retaining some control, via the terms of the trust, over their utilisation.

In order to enjoy these advantages, however, the donor's attempts to create a valid trust must of course be successful. It is the theme of this chapter that, in the current state of the law, the donation of funds to an unincorporated association subject to a valid trust arrangement is no easy task. Three requirements, in particular, must first be satisfied :

- (i) The objects of the trust must be defined with certainty;
- (ii) The trust must not infringe the rule against perpetuities; and
- (iii) The trust must be enforceable.

The discussion which follows deals with three major sub-categories of gifts on trust for an unincorporated association, each of which has to satisfy all three of the above requirements in order to be valid.

The first is the *non-charitable purpose trust* which, if successful, would most nearly achieve the donor's true aim of guaranteeing that the association itself (not its members) derives a continuing benefit from the gift. As the law stands at present, pure purpose trusts are invalid, principally because they do not satisfy requirement (iii). They have no human beneficiaries who can ensure due performance by the trustees of the terms of the trust. The emphasis on the 'purpose' aspect of the gift is fatal to its validity.

The second sub-category of gift on trust therefore shifts its emphasis slightly away from the 'purpose' aspect of the trust in an attempt

to satisfy the third requirement. If the trust is a *non-abstract purpose trust*, in that it has 'factual' beneficiaries who themselves derive benefit from the gift, it can succeed. It must, of course, satisfy the other two requirements also before success is assured, and it is only in limited fact situations that the slight shift in emphasis will be sufficient.

The third sub-category represents a total de-emphasis on the 'purpose' aspect of the gift. It attempts instead to confer a continuing benefit on the association by giving the fund to its *present and future members on trust*. Although this method readily satisfies the third requirement of enforceability of the trust, it causes problems with the rule against perpetuities (requirement (ii)) and is rarely successful. Above all, it does not guarantee to the donor that the association's purpose will be furthered.

It will be seen that the law on gifts on trust for unincorporated associations is such that legal validity can only be bought at the price of sacrificing the donor's true intentions.

The discussion will proceed as follows:

- (i) The case of the invalid non-charitable pure purpose trust will be analysed first. The origins of the 'beneficiary principle', which dictates that purpose trusts must fail for lack of enforceability, will be sought. The historical, and present, reasons for the failure of gifts on trust for the purposes of unincorporated associations will be critically set out.
- (ii) Next, the notion of the valid non-abstract purpose trust will be investigated. Its limited and as yet uncertain ability to facilitate the donation of funds to unincorporated associations will be discussed.
- (iii) Finally, the possibility of making donations on trust to an associ-

ation's present and future members (in the *hope* that this may further the association's purposes) will be explored. Since the major obstacle to the validity of such gifts is the rule against perpetuities, some suggestions will be made whereby the obstacles may be overcome.

The aim of this chapter in pursuing the above line of argument is two-fold. In the first place, it sets out a critical analysis of the current law on the subject of gifts on trust for unincorporated associations. Secondly, and more importantly, it aims to demonstrate how unsatisfactory is the present state of affairs in this area of the law.

#### A. Pure Purpose Trusts

##### 1. Introduction

A makes a bequest on trust to further the aims and purposes of the Sportstown Rugby Football Club. The Club is an unincorporated association dedicated to the promotion and organisation of the town's rugby team and the provision of facilities, both athletic and social, for the team and its friends and supporters. Alternatively, A makes a bequest "to the Sportstown R.F.C." *simpliciter* and, in the circumstances, the only reasonable construction which a court would give of the gift would be one on trust in the above terms. For example, the number of members in the association may, in the opinion of the court, render any other construction, such as the Absolute Gift Analysis<sup>4</sup>, impracticable. In either case, it is evident that A's intention is to procure a guarantee that the fruits of his generosity will be enjoyed by the association itself, as an entity, on a long-term basis. In order to fulfil this intention, he has selected as the mechanism

whereby his donation will take effect the creation of a purpose trust in favour of the association.

In the present state of the law on the subject <sup>5</sup>, since the activities of the association and therefore the nature of the purpose itself are not charitable, his intention to bring into being a non-charitable purpose trust will be frustrated. This is because there is in trusts law a principle which has been referred to recently as the 'beneficiary principle' <sup>6</sup>. According to this principle, a trust for non-charitable purposes is void because a trust must be for the benefit of individuals : it must have human beneficiaries who can exercise rights of control over the trustees. This principle has serious repercussions in the area of unincorporated associations. Such an association, not being a legal entity, lacks the capacity itself to be the beneficiary of the trust and the trust is construed as one for the purposes of the association, which therefore lacks human beneficiaries. Thus, a gift on trust for Amnesty International (an unincorporated association) failed recently because of the 'beneficiary principle' <sup>7</sup>. Similarly, A's hypothetical bequest to the Sportstown R.F.C. would fail.

In this section it will be shown that, until 1952, there was no support in the cases for the 'beneficiary principle', and that if trusts for non-charitable purposes were held void it was either because the objects of the trust were uncertain or because the trust was of unlimited duration and therefore invalid as creating a perpetuity.

2. Before 1952 : The Requirement of Certainty and the Origins of the 'Beneficiary Principle'

(i) Morice v. The Bishop of Durham

The case of *Morice v. The Bishop of Durham*<sup>8</sup> is taken as the starting point for this discussion. In that case, a bequest of the residue of the personal estate of the testatrix was in terms of a trust for "such objects of benevolence and liberality as the Bishop of Durham [the trustee] in his own discretion shall most approve of". The next-of-kin of the testatrix applied to have the trust declared void on the ground that it was not charitable and was so vague and indefinite that it failed for uncertainty. They succeeded.

The Master of the Rolls, Sir William Grant, focussed his attention on the question whether the bequest created a valid trust for charitable objects. If so, any uncertainty of expression could be resolved using the administrative machinery set up for the purpose by the State in recognition of the value of charitable giving<sup>9</sup>. If not, the non-charitable trust, to which the same leniency would not be shown, had to fail for uncertainty. The reason for the requirement of certainty in such a case was explained in the following terms<sup>10</sup> :

That it is a trust, unless it be of a charitable nature, too indefinite to be executed by this Court, has not been, and cannot be, denied. There can be no trust, over the exercise of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership, and not trust. If there be a clear trust, but for uncertain objects, the property that is the subject of the trust, is undisposed of, and the benefit of such trust must result to those, to whom the law gives the ownership in default

of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody, in whose favour the Court can decree performance.

Fundamental to the trust arrangement is the requirement that a trust be subject to the control of the courts. The trustee is legal owner of the property and, unless restrained and regulated in his dealings with it, he might divert it to his own use or fail to perform altogether. The obligations imposed upon him by the terms of the trust might be ignored. Therefore equity will not permit a trust to exist unless the courts can prevent such non-performance. The courts, however, must *first* know the nature of the trust obligations that have been created. If they are not expressed with clarity and certainty, control becomes impossible : hence, the requirement of certainty of objects <sup>11</sup>.

A similar analysis was offered by the Lord Chancellor, Lord Eldon, who affirmed the decision of Sir William Grant in this case <sup>12</sup> :

As it is a maxim, that the execution of a trust shall be under the controul of the Court, it must be of such a nature, that it can be under that controul; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust : a trust therefore, which, in case of maladministration could be reformed; and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the Court can neither reform maladministration, nor direct a due administration.

In this instance, "objects of benevolence and liberality" was an extremely vague concept. No matter how the trustee applied the funds, no court which attempted to control his administration of the trust would be able to say with conviction whether the application fell within or without the terms of the trust. Control would not be possible. The

trust therefore failed.

It is important to observe that no objection was voiced to the fact that the trust was a non-charitable purpose trust *per se* and had no beneficiaries. Uncertainty was the only issue once the trust's non-charitable nature had been asserted. Neither court commented on the lack of human beneficiaries. No 'beneficiary principle' was invoked<sup>13</sup>.

(ii) *Bowman v. The Secular Society*

The next point in this historical review is the case of *Bowman v. The Secular Society*<sup>14</sup>. At the outset, it is submitted that the case in fact had very little to do with trusts law. Nevertheless, it cannot be omitted from discussion since *dicta* from it are often cited as alleged authority for the 'beneficiary principle', the origins of which are here being sought<sup>15</sup>.

In *Bowman v. The Secular Society*, the testator made a bequest of his residuary estate to and for the purposes of the Secular Society, which was not an unincorporated association, but a registered company limited by guarantee under the Companies Acts. The next-of-kin of the testator disputed the validity of this gift on the ground that the society's objects were unlawful. They failed. The House of Lords held that the bequest was valid.

The objects of the recipient company (as stated in its memorandum of association) which were challenged by the next-of-kin, included the following : "(A) To promote, in such ways as may from time to time be determined, the principle that human conduct should be based upon natural knowledge, and

not upon super-natural belief, and that human welfare in this world is the proper end of all thought and action ..... (C) To promote the secularisation of the State, so that religious tests and observances may be banished from the Legislature, and Executive, and the Judiciary ..... (G) To promote the recognition by the State of marriage as a purely civil contract, leaving its religious sanctions to the judgment and determination of individual citizens ..... (H) To promote the recognition of Sunday by the State as a purely civil institution for the benefit of the people, and the repeal of all Sabbatarian laws devised and operating in the interest of religious sects, religious observances, or religious ideas ..... (O) To do all such other lawful things as are conducive or incidental to the attainment of all or any of the above objects".

The House of Lords held unanimously that, although these objects involved a denial of Christianity, they were not criminal in nature because the propagation of anti-Christian doctrines did not constitute the offence of blasphemy. Furthermore, a majority of their Lordships<sup>16</sup> held that the objects were not illegal on the ground that they prevented the company from acquiring property by way of absolute gift.

In the course of their respective judgments, Lord Finlay did not mention the law of trusts at all, Lord Dunedin emphatically stated that the bequest did not impose a trust but was an absolute gift to the legal entity, and Lord Sumner only discussed the question of whether a charitable trust had been created. Lord Buckmaster concluded his opinion with the words<sup>17</sup> :

It is a mistake to treat the company as a trustee, for it has no beneficiaries, and there is no difference between the capacity in which it receives a gift and that in which it obtains payment of a debt. In either case the money can only be

used for the purposes of the company, and in neither case is the money held on trust.

He did not elaborate on these statements. It can be seen that the questions of the validity of non-charitable purpose trusts and the necessity for human beneficiaries were irrelevant in the view of these judges.

It is the judgment of Lord Parker, however, which causes interest and which has been adopted by the supporters of the 'beneficiary principle' as authoritative. In fact, Lord Parker came to the conclusion that the bequest in question was an absolute gift to the company. The testator had merely stated his motives for making the donation and had not imposed a trust. Indeed, a trust was unnecessary since the performance of the purposes for which the gift was donated would be almost guaranteed by this arrangement, because they echoed the objects of the company as stated in its memorandum of association.

Despite this conclusion, Lord Parker went on to discuss at length, *obiter*, what would have happened if the bequest *had* been made on trust. He began as follows <sup>18</sup> :

[O]n the footing that the society takes in the character of trustee ... it seems to me that the trust is clearly void ..... *A trust to be valid must be for the benefit of individuals*, which this is certainly not, or must be in that class of gifts for the benefit of the public which the courts in this country recognise as charitable in the legal as opposed to the popular sense of that term. Moreover, if a trustee is given a discretion to apply trust property for purposes some of which are and some are not charitable, the trust is void for uncertainty.

The clause in italics seems to be the sole mention in the case of the 'beneficiary principle'. No authority was cited for it. Nor was it material to his Lordship's reasoning or decision. The discussion centred

instead on the issue whether the bequest was charitable or not. He concluded *not* that the trust, had it existed, would have been void for lack of beneficiaries, but that its objects were either too vague and uncertain to render it valid as a charitable trust, or were political and therefore non-charitable. The judgment does not contain any authoritative, well-reasoned statement of the proposition that a non-charitable purpose trust is void for want of individual beneficiaries.

Be that as it may, sometimes an isolated *dictum* by an illustrious judge is taken up and applied over and over again and, although originally it claimed to state no fundamental principle of law, it gradually attains this status through the cases. The process is part of the development of the common law. It may therefore be instructive to survey cases that have applied *Bowman v. Secular Society*, both in England and throughout the Commonwealth jurisdictions, to ascertain whether or not it really was the original source of the 'beneficiary principle'.

At the outset it can be stated by way of summary that the *Bowman* case has been quoted as authority for many propositions but, apart from the cases specifically discussed hereafter, it is not extensively discussed in connection with the necessity of beneficiaries for a valid non-charitable trust.

In the recent case of *Regina v. Lemon*<sup>19</sup>, the Court of Appeal adopted and utilised *Bowman*'s discussion on the offence of blasphemy<sup>20</sup>. It has also been quoted in England as authority for the proposition<sup>21</sup> that, if a company is registered with a memorandum of association which sets out the objects of the company, neither the documents preliminary to incor-

poration nor the actions of the directors after its formation can be received in evidence to determine what the objects of the company are <sup>22</sup>. Similarly, in New Zealand, it has been quoted for its interpretation <sup>23</sup> of a statutory provision that certificates of incorporation are conclusive proof that all conditions precedent to the making of an alteration to the rules of an incorporated society have been duly fulfilled and the courts cannot go behind those certificates <sup>24</sup>.

In Canada and Australia, the *Bowman* case is cited as authority for a fourth proposition. To quote Davey, J.A. in the British Columbia Court of Appeal case of *Roman Catholic Archbishopric Corporation of Winnipeg v. Ryan* <sup>25</sup> as an example <sup>26</sup> :

[T]he reasoning of Lord Parker of Waddington supports the proposition that a gift to a corporation to be used for some stipulated purposes embraced within the corporate objects does not by implication create a trust for that purpose any more than a gift to a natural person to be used for some purpose benefiting him alone implies a trust cutting down the absolute interest.

Fifthly, the Canadian courts have derived from *Bowman* the general principle <sup>27</sup> that the enforcement of religious beliefs as such is not a legitimate concern of the criminal law of the realm <sup>28</sup>.

Above all, *Bowman* is renowned for its affirmation that a gift on trust for political objects can not be charitable <sup>29</sup> :

The abolition of religious tests, the dis-establishment of the Church, [etc.] ... are purely political objects. Equity has always refused to recognise such objects as charitable ..... [A] trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law

will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.

This principle has been applied again and again <sup>30</sup> and alone has elevated the *Bowman* case to the status of an important decision.

With a few exceptions, however, its solitary *dictum* on the need in a non-charitable trust for human beneficiaries has remained obscure. It has *not* evolved through the cases to become an accepted principle of the common law. It must therefore be concluded that the source of the 'beneficiary principle' is not traceable to *Bowman v. The Secular Society* after all.

(iii) *Re Diplock*

One of the exceptional instances in which Lord Parker's *dictum* in *Bowman* was cited, however, is worthy of discussion <sup>31</sup>. This was *In re Diplock* <sup>32</sup> where the testator's will provided, *inter alia*, that his executors should "apply the residue for such charitable institution or institutions or other charitable or benevolent object or objects in England as my acting executors or executor may in their or his absolute discretion select". The bequest failed for uncertainty, and *Morice v. The Bishop of Durham* and *Bowman v. The Secular Society* <sup>33</sup> were both cited as direct authorities. The uncertainty inherent in the phrase "charitable or benevolent" prevented the trust from falling within the legal definition of charity so, as a non-charitable purpose trust, it also fell foul of "a fundamental principle of the law relating to trusts" <sup>34</sup> which, *prima facie*, may sound like the 'beneficiary principle'. No justification or valid authority is given for its promotion to the rank of "fundamental principle". Sir

Wilfrid Greene merely explained its rationale <sup>35</sup> :

In order that a trust may be properly constituted, there must be a beneficiary. The beneficiary must be ascertained or must be ascertainable ..... The Crown has never assumed the right to come to the Court and ask for the execution of a philanthropic trust; it has only assumed the right to come to the Court and ask for the execution of a charitable trust, and accordingly, if there is a gift for philanthropic purposes, it suffers from the vice of not having a beneficiary, ascertained or ascertainable, in whose interest the Court can administer the trust.

The point made above is that a non-charitable purpose trust appears to lack an in-built mechanism for direct control: that is, someone who could go to court and ask that the trust be executed. Yet the Master of the Rolls then proceeded to deal only with the certainty aspect of the problem, with which there is no dispute. If a court does not know what constitutes due and valid performance by a trustee of the terms of the trust, the trust must fail for uncertainty. In *Re Diplock*, it was impossible to say with certainty whether any particular application of funds was or was not within the terms of the trust. This was the essence of the decision. "Benevolent or charitable object" embodies no definite concept. This being so, the absence of a beneficiary was immaterial to the failure of this particular trust. The case therefore does little to explain or illustrate the operation of the 'beneficiary principle'.

This submission is supported by the analysis used by the House of Lords on appeal in that case in reaching the same conclusion <sup>36</sup>. Two major threads of reasoning are discernible in their Lordships' judgments. Firstly, the terms of a trust must be expressed with certainty so that a court can effectively control a trustee in his administration of them <sup>37</sup>. Secondly, a testator may not delegate his testamentary power to his trustees

but must specify in clear terms the destination of his funds <sup>38</sup>. Nowhere can any objection to the bequest on the ground that it was a purpose trust be found. There is no assertion of the 'beneficiary principle' as that term is used here to denote the alleged requirement of human beneficiaries for a valid non-charitable trust. Its source is therefore still unknown.

(iv) In Re Wood

*In re Wood* <sup>39</sup> is another case that appears at first glance to assert that there exists in the law a 'beneficiary principle' which operates to invalidate non-charitable purpose trusts by demanding the presence of human beneficiaries. Again, however, on closer inspection, it becomes apparent that no such assertion is in fact made. The testatrix in that case directed trustees to pay the income of a "B.B.C. Trust Fund" £2 per week "towards the fund of the society, institution or body corporate or incorporate on behalf of which an appeal shall have been transmitted on the Sunday from the National station of the British Broadcasting Corporation". The bequest failed. Since the "Week's Good Cause" was not necessarily charitable, the bequest had to meet all the requirements of a valid non-charitable trust. This it failed to do. Harman, J. explained why this was so <sup>40</sup> :

[A] gift on trust must have a *cestui que trust*, and there being here no *cestui que trust* the gift must fail.

In view of the fact that "*cestui que trust*" is normally used synonymously with "beneficiary", Harman, J.'s judgment has been interpreted as deciding that the gift failed as a purpose trust *per se*. However, in truth, the reason for the bequest's failure was that it was uncertain and that, as their Lordships had pointed out in the *Diplock* case <sup>41</sup>, this uncertainty could not be cured by delegating one's testamentary power <sup>42</sup> :

I hold that this gift is bad because it is wholly uncertain and *has no object, no cestui que trust, which is either certain or can be made certain* by the directions which the testatrix has given. It can only be made certain by the decision of some third party. That is a delegation of testamentary power which, except in the case of a charity, is not permitted.

In this passage, Harman, J.'s use of the term *cestui que trust* can be read as encompassing both human beneficiaries *and* impersonal objects. The case in no way supports the existence in trusts law of a 'beneficiary principle'. It is prepared to permit a non-charitable purpose trust to exist, subject to perpetuity rules, provided that the purpose is expressed with clarity and certainty.

(v) Summary

In light of this brief historical review, it is pointed out that no case was decided solely on the basis of a rule that every non-charitable trust must have human beneficiaries. It is submitted that, until 1952, it was possible and correct to say that non-charitable purpose trusts in general were valid, provided that the purpose was defined with certainty and that public policy considerations, such as the rule against perpetuities, had been satisfied<sup>43</sup>.

3. Before 1952 : Trusts for Non-Charitable Purposes, the Rule against Perpetuities and Gifts to Unincorporated Associations

It was on the ground of the rule against perpetuities that most gifts for the non-charitable purposes of unincorporated associations were held to founder<sup>44</sup>. However, one important point is apparent from the authorities,

and has been the subject of many learned comments <sup>45</sup>. This is that the courts in this context are not expressly concerned with the remoteness of vesting problems with which the rule against perpetuities strictly speaking deals, but with a more general notion of inalienability, based on a public policy "to prevent the mischief of making property inalienable, unless for objects which are in some way useful or beneficial to the community" <sup>46</sup>, that is, within the legal definition of 'charitable'. Thus, if the object of the trust is merely non-charitable, it is felt that funds must not be withdrawn from commercial utility to stagnate. In these circumstances, the policy appears to override any countervailing policy of giving effect to the expressed intention of the donor.

Most of the cases on this subject date from the late nineteenth century and are a maze of confused terminology, defective reasoning and inappropriate cross-references to the remoteness of vesting rule <sup>47</sup>. It is not proposed to discuss them in any detail. Insofar as crystallisation of a guiding principle is possible from such a source, it may be stated as follows. If the donor makes it clear from the terms of the trust that the capital of the gift is to be retained as an endowment for the association indefinitely, the gift will fail as 'tending to a perpetuity'. One case where the donor did exactly that, with the result that the gift indeed failed was *Re Clifford* <sup>48</sup>. Mr. Clifford had phrased his will as follows :

I bequeath to the Oxford Angling and Preservation Society the sum of £200 free of duty, on condition that Mr. George Mallam or the president thereof for the time being, and the committee of the society undertake to invest and keep the same invested in his and their names as capital moneys, and to apply the income or dividends to arise therefrom to the purpose of restocking their waters, or for such other purposes as the president and committee for the time being shall resolve upon.

The Chancery Division, in declaring the gift void, held that an endowment had been expressly created.

To facilitate the success of his gift on trust, therefore, the knowledgeable donor needs to specify expressly that both capital and income are to be made available for the specified purpose or purposes. It has been held that one method whereby this can be achieved is the phrase 'on trust for the association's purposes absolutely', or words to that effect. In *Re Ray's Will Trusts*<sup>49</sup>, Clauson, J. made the following comments about use of the word 'absolutely' in this context<sup>50</sup> :

'Absolutely' means free of a fetter of some kind . . . . . It is really saying : 'This is not to be fettered by the fact that it is to be an endowment and is to be a gift of income only. It is to go into the funds of the society and to be used without fetters for any purpose for which the funds of the society can be used'.

In the absence of express words along these lines, the fate of the gift vis-a-vis the rule against inalienability will depend upon the court's interpretation of the gift as a whole.

Many of the ancient cases considered (erroneously, it will be argued) that a gift on trust to an association had to fail for perpetuity if it was the association's rules rather than the terms of the donor's gift which indicated that the property would be rendered inalienable<sup>51</sup>. Thus a stipulation in the recipient association's rules that "the institution shall not be dissolved without the consent of nine-tenths in number of the members present at a general meeting" and that "no member, on withdrawing from this institution . . . shall be entitled to claim any share or interest in the property of the institution"<sup>52</sup> would mean that a gift to that association, taking effect according to those rules, would be void for perpetuity.

It is submitted that the error of this reasoning lies in the fact that any association can change its rules via its members at any time. An association is contractual in nature. It is created by the *consensus* of its founding members. Similarly, its rules are formulated, its existence is terminated, its operation is dictated and, above all, its constitution is amendable, by the agreement of its members. Thus, for example, amendments to the rules could render a previously inalienable fund immediately divisible amongst the members. Any donor takes the risks inherent in the fact that an association's constitution cannot be absolutely entrenched. It is subject to possibly frequent change. Therefore it should not dictate the validity or otherwise of a gift. On the other hand, if the donor successfully utilises a trust to effect the donation, the terms with which he impresses his gift are fixed and binding on the trustees once and for all. They, alone, should be relevant. Admittedly, in certain situations, it may be possible to conclude from the facts and circumstances of the gift that the donor had not only acquainted himself with the details of the intended recipient association's constitution but had also impliedly incorporated its rules into the terms of the gift upon trust. It is submitted, however, that the courts in the old cases were somewhat over-eager in arriving at this implication<sup>53</sup>.

In summary, the old pre-1952 cases show that a gift on trust for the non-charitable purposes (general or specific) of an unincorporated association was valid and guaranteed satisfaction of the donor's wishes, provided that the trust terms neither expressly nor impliedly attempted to set up a perpetual endowment for the association by restricting use of the capital<sup>54</sup>.

To take the example used at the very beginning of this section, a

bequest by A on trust to further the aims and purposes of the Sportstown R.F.C. would be valid if A had died and any consequent litigation had gone to court before 1952, even if the association in fact chose to use the income and keep the capital intact indefinitely or if the association's rules stipulated that this occur, provided A had made no express or implied stipulation in the gift itself to this effect. The capital could be utilised and thus was not inalienable. There would be no tendency to a perpetuity.

#### 4. After 1952 : *Re Astor*

In 1952, the decision in *Re Astor's Settlement Trusts*<sup>55</sup> was handed down. It enunciated as a general principle that a trust for non-charitable purposes without human beneficiaries is void. In light of this important development, the case must be analysed in some detail.

In 1945, shareholders in the corporate proprietor of The Observer and other newspapers directed trustees of the settled shares to apply the income towards certain non-charitable purposes. These included "1. The establishment maintenance and improvement of good understanding sympathy and co-operation between nations ... 2. The preservation of the independence and integrity of newspapers and the encouragement of the adoption and maintenance by newspapers of fearless educational and constructive policies. 3. The promotion of the freedom independence and integrity of the Press in all its activities ..... 5. The protection of newspapers ... from being absorbed or controlled by combines or being tied by finance or otherwise to special or limited views or interests inconsistent with the highest integrity or independence .....7. The establishment assistance or support of any charitable public or benevolent schemes trusts funds associations or bodies

for or in connection with the (a) improvement of newspapers or journalism or (b) the relief or benefit of persons (or the families or dependents of persons) actually or formerly engaged in journalism or in the newspaper business or any branch thereof or (c) any of the objects or purposes mentioned in this schedule".

The settlors specified the duration of the trust and this was within the confines permitted by the rule against perpetuities. After the expiration of the period, there was a residuary gift in favour of "the younger of the two persons who shall at such end be respectively the warden of All Souls College Oxford and the master of Trinity College Cambridge or if the younger of them shall disclaim this benefit then for the other of them or if either office (of warden or master) shall be vacant at such end then for the person who shall hold the other office at such end".

On being warned of the possibility that the trusts of the 1945 settlement might fail, in 1951 the settlors resettled any interest they might retain by way of resulting trust in the settled shares. The trusts of this second settlement were charitable in nature and their validity was not questioned.

The trusts of the 1945 settlement, on the other hand, were challenged from two sides and on two grounds. Both the trustees of the 1951 settlement and the Attorney-General, as the administrative body in charge of the enforcement of charitable trusts on behalf of the Crown, had an interest in the welfare of the 1945 settlement. Only the failure of this latter would bring into existence the trusts for which they were responsible. They would be redundant in the future history of the shares if the 1945 settlement

had created valid trusts. They therefore challenged the validity of the trusts on two grounds : firstly, that they were non-charitable trusts for purposes, not individuals ; and secondly, that they were void for uncertainty. They succeeded on both counts. It is the first contention with which we are principally concerned in this section. For the sake of convenience, therefore, the second ground will be discussed in brief first.

(i) Certainty

It was contended, and held, that the trusts failed for uncertainty of objects. At the outset, it is admitted that the decision in *Re Astor* was correct on this point. Roxburgh, J. stated the requirement of certainty for the creation of a valid trust in the following terms <sup>56</sup> :

[T]he purpose must, in my judgment be stated in phrases which embody definite concepts, and the means by which the trustees are to try to attain them must also be prescribed with a sufficient degree of certainty . . . . The purposes must be so defined that, if the trustees surrendered their discretion, the court could carry out the purposes declared, and not a selection of them arrived at by eliminating those which are too uncertain to be carried out.

As has already been mentioned in the discussion of *Morice v. The Bishop of Durham* <sup>57</sup>, a trust for purposes is valid only if it can be said with certainty that any particular utilisation of funds is or is not within the definition of the purpose to be benefited <sup>58</sup>. Before a trustee can perform the terms of a purpose trust or a court can control or correct such performance, the conceptual content of the intended purpose must be clear.

It is here that one finds a major difference between trusts for charitable purposes and trusts for non-charitable purposes. Because charity

is considered worthy of special treatment, once a court has found that the purposes come within the legal definition of charity, failure to specify particular charitable objects does not invalidate the trust. This is because the state has established elaborate administrative machinery to facilitate the control and due administration of charitable trusts<sup>59</sup>. Furthermore, the courts have jurisdiction to establish schemes for the application of funds for charitable objects. Such is not the case with trusts for non-charitable objects. The trust in *Re Astor* therefore could not be saved<sup>60</sup> :

Counsel for the trustees of the 1945 settlement suggested that the trustees might apply to the court *ex parte* for a scheme. It is not, I think, a mere coincidence that no case has been found outside the realm of charity in which the court has yet devised a scheme of ways and means for attaining enumerated trust purposes. If it were to assume this (as I think) novel jurisdiction over public, but not charitable, trusts, it would, I believe, necessarily require the assistance of a custodian of the public interest analogous to the Attorney General in charity cases who would not only help to formulate schemes but could be charged with the duty of enforcing them and preventing maladministration. There is no such person.

With this in mind, it becomes evident that the *Astor* trust had to fail for uncertainty. It is riddled with statements of vague ideals, such as "the establishment maintenance and improvement of good understanding sympathy and cooperation between nations". Without further guidelines, no trustee could be sure that any particular payment was within the terms of the trust. Above all, the courts, on being requested to exercise control over the trustees, would be in no better position. Effective control over the trust would be impossible.

(ii) Beneficiary Principle

The other ground on which the *Astor* trust failed was that it infringed the 'beneficiary principle'. In other words, it was a non-charitable trust for purposes, whereas, to be valid, a non-charitable trust had to have human beneficiaries. Roxburgh, J. explained this conclusion by applying to trust law Hohfeldian-like reasoning on the nature of obligations<sup>61</sup>: every duty is balanced by a correlative right. Therefore, a trustee, as *prima facie* legal owner of trust property, can only be fixed with an equitable obligation to deal with it otherwise than as his own if this obligation is balanced by correlative rights in human beneficiaries. Roxburgh, J. explained the situation as follows<sup>62</sup>:

The typical case of a trust is one in which the legal owner of property is constrained by a court of equity so to deal with it as to give effect to the equitable rights of another. These equitable rights have been hammered out in the process of litigation in which a claimant on equitable grounds has successfully asserted rights against a legal owner or other person in control of property. *Prima facie*, therefore, a trustee would not be expected to be subject to an equitable obligation unless there was *somebody* who could enforce a correlative equitable right and the nature and extent of that obligation would be worked out in proceedings for enforcement.

A trust must be subject to judicial control. For this undisputed proposition, *Morice v. The Bishop of Durham*<sup>63</sup> is one of many authorities.

Roxburgh, J. then discussed cases in which equitable rights of this nature *did* exist but were located not in beneficiaries but in remaindermen and residuary legatees. In those cases, the trusts were upheld as valid, controllable arrangements, despite the absence of beneficiaries<sup>64</sup>.

Roxburgh, J. denied that those cases, where "the court had indirect means of enforcing the execution of the non-charitable purpose"<sup>65</sup>, were representative of the law and called them "anomalous and exceptional"<sup>66</sup>.

It is submitted that this was the crucial step in the reasoning in *Re Astor* and was primarily responsible for the birth of the 'beneficiary principle'. He concluded that the true principle was that a trust must have human beneficiaries. This, he said, was "a proposition which traces descent from or through Sir William Grant, M.R. [*Morice v. The Bishop of Durham* <sup>67</sup>], through Lord Parker of Waddington [*Bowman v. The Secular Society* <sup>68</sup>], to Harman, J. [*Re Wood* <sup>69</sup>]" . These cases have already been discussed in an attempt so to trace the descent of the proposition. It was found that no such proposition could in fact be derived from the cases. Prior to *Re Astor*, it was possible to reconcile the "anomalous" cases with cases like *Morice v. The Bishop of Durham*. A trust could be valid despite the absence of beneficiaries, provided that there was, *inter alia*, sufficient certainty to permit effective control by the courts. In *Re Astor*, however, Roxburgh, J. would not accept this and, without any valid authority, held that the trust failed as a purpose trust on the ground that it was not for the benefit of individuals.

(iii) Impact on Gifts for Unincorporated Associations

After *Re Astor* the 'beneficiary principle' stands for the proposition that a non-charitable trust is valid only if it has human beneficiaries who can exercise direct control over the trustees. Beneficiaries, by virtue of their entitlement under the terms of the trust, have *locus standi* to initiate proceedings against the trustees, whether with the aim of preventing maladministration of funds or of ensuring payment to themselves. Thus the trust is potentially <sup>70</sup> under tight control. This requirement means that settlors or testators *must* limit the boundaries of their generosity to ascertained or ascertainable individuals. Any attempt to benefit a non-

charitable purpose not expressed or, indeed, inexpressible in terms of individuals, will be defeated.

An unincorporated association is not an individual. Since a trust for an unincorporated association must therefore take effect as a trust, lacking in beneficiaries, for the purposes (whether specifically limited or general) of the association, assuming that those purposes are non-charitable, such a trust will likewise be defeated.

#### 5. Current Status of the 'Beneficiary Principle'

It now becomes necessary to ask the question : Given that *Re Astor* has not been overruled, to what extent has its spurious 'beneficiary principle' been applied and integrated into the common law since 1952? The answer, in brief, as the following summary will show, is that the 'beneficiary principle' has firmly taken root. Many cases over the last thirty years have, in one way or another, utilised the 'beneficiary principle' without specific mention of *Re Astor* itself; others have specifically attributed its modern formulation to Roxburgh, J. in that case <sup>71</sup>.

In *Re Endacott* <sup>72</sup>, for example, a testamentary gift of residuary estate "to North Tawton Devon Parish Council for the purpose of providing some useful memorial to the testator" failed. The purpose did not come within the legal definition of charity and did not meet the requirement of having human beneficiaries. Counsel for the Parish had argued that the case was a valid, non-charitable purpose trust, within the category of cases which Roxburgh, J. had labelled "anomalous" in *Re Astor* <sup>73</sup>. The Court of Appeal was not impressed by this argument. Its approval of Roxburgh, J.'s

'beneficiary principle' and disapproval of the validity of *any* non-charitable purpose trust are unambiguous. In the words of Lord Evershed <sup>74</sup> :

No principle perhaps has greater sanction or authority behind it than the general proposition that a trust by English law, not being a charitable trust, in order to be effective, must have ascertained or ascertainable beneficiaries.

Similarly, Harman, L.J. <sup>75</sup> :

I applaud the orthodox sentiments expressed by Roxburgh, J. in *Re Astor's Settlement Trusts* and I think, as I think he did, that though one knows there have been decisions at times which are not to be satisfactorily classified, but are perhaps merely occasions when Homer has nodded, at any rate these cases stand by themselves and ought not to be increased in number, nor indeed followed except where the one is exactly like another.

The court therefore solidly endorsed the 'beneficiary principle' and the trust failed <sup>76</sup>.

The endorsement of the *Re Astor* decision found in the earlier case of *Re Shaw* <sup>77</sup>, however, was made with greater reluctance. George Bernard Shaw had included in his will a direction to trustees to undertake certain inquiries and surveys into the feasibility of a forty-letter alphabet and to transliterate one of his plays. The validity of this trust was challenged by the residuary legatees under the will. It was evidently a purpose trust, but was its purpose charitable, as the Attorney-General claimed? The court concluded that the purpose was not charitable in nature <sup>78</sup>, firstly because it could be construed as political in nature <sup>79</sup> and secondly, because it was not purely for the advancement of education. Harman, L.J. concluded that the trust therefore had to fail because it was an impersonal trust for a non-charitable purpose : it had no human beneficiary. He felt compelled to follow *Re Astor*, but was aware of the defects of the 'beneficiary principle' <sup>80</sup> :

[O]ne cannot have a trust, other than a charitable trust, for the benefit, not of individuals, but of objects. The reason has often been stated, that the court cannot control the trust ..... An object cannot complain to the court, which, therefore, cannot control the trust, and, therefore, will not allow it to continue. I must confess that I feel some reluctance to come to this conclusion. I agree at once that, if the persons to take in remainder are unascertainable, the court is deprived of any means of controlling such a trust, but if, as here, the persons taking the ultimate residue are ascertained, I do not feel the force of this objection. They are entitled to the estate except in so far as it has been devoted to the indicated purposes, and in so far as it is not devoted to those purposes, the money being spent is the money of the residuary legatees, or the ultimate remaindermen, and they can come to court and sue the executor for a devastavit, or the trustee for a breach of trust, and thus, though not themselves interested in the purposes, enable the court indirectly to control them. This line of reasoning is not, I think open to me.

In other words, Harman, J. felt that the "anomalous" cases discussed and discredited in *Re Astor* represented the true position. Indirect control via residuary legatees or remaindermen would, in his view, suffice to create a valid trust. *Re Astor*, however, insisted that this was *not* enough and that only direct control via human beneficiaries was sufficient. In *Re Shaw*, therefore, the 'beneficiary principle' prevailed again<sup>81</sup>.

Particularly pertinent to the subject-matter of this thesis are the post-1952 cases on donations to unincorporated associations where the 'beneficiary principle' has been affirmed. *Leahy v. Attorney-General for New South Wales*<sup>82</sup> has been selected as an example, even though *Re Astor* was not in fact cited as authority. In the *Leahy* case, the testator made a bequest of certain property of his in the following terms :

As to my property known as 'Elmslea' ... and the whole of the lands comprising the same and the whole of the furniture contained in the homestead thereon upon trust for such order of nuns of the Catholic Church or the Christian Brothers as my executors and trustees shall select.

An order of nuns constitutes an unincorporated association. It was held that the trust would have failed at common law because it was a non-charitable purpose trust without human beneficiaries. It was saved, however, in the result, by a statutory provision<sup>83</sup>. The greater part of Viscount Simonds' opinion dealt with the law of donations to unincorporated associations in general. He enunciated clearly how the 'beneficiary principle' had been adopted in this area and operated to invalidate gifts on trust for the purposes of unincorporated associations<sup>84</sup> :

If the words 'for the general purposes of the association' were held to import a trust, the question would have to be asked, what is the trust and who are the beneficiaries? A gift can be made to persons ... but it cannot be made to a purpose or to an object : so also, a trust may be created for the benefit of persons as cestuis que trust but not for a purpose or object unless the purpose or object be charitable. For a purpose or object cannot sue, but, if it be charitable, the Attorney General can sue to enforce it.

Trusts for non-charitable purposes must fail, including those for unincorporated associations, because no direct control mechanism is available. Under the 'beneficiary principle', they must be declared void.

## 6. Conclusion

It has been demonstrated that the 'beneficiary principle' as a principle of law originally rested on unsteady foundations. The developments of the last thirty years have nevertheless rendered the principle unshakeable. Widespread acceptance of the 'beneficiary principle' in the area of donations to unincorporated associations has been the major culprit in confusing and complicating the subject. Faced with the problem of determining the legal effect of an attempt to make such a donation, the judiciary now takes the 'beneficiary principle' for granted. The following example is taken from the most recent case of the subject, *Conservative and Unionist*

*Central Office v. Burrell (Inspector of Taxes)* <sup>85</sup> :

[I]t is said, *as there cannot be a trust for a non-charitable purpose*, effect can only be given to the donor's intention if it is possible to construct out of the material before the court some unincorporated association which can be said to be the owner of moneys given for the purposes of the Conservative Party. The purpose which the owner wishes to further is then achieved ... *not by the creation of a trust for the purpose (which is a legal impossibility)* but by inferring the existence of an unincorporated association, the members of which can be treated as the owners of those moneys and the rules of which will in practice ensure that the moneys will be devoted to the intended purpose <sup>86</sup>.

The possibility of analysing the gift as a non-charitable purpose trust is automatically discounted. Because the 'beneficiary principle' prevents the successful use of the trust device in such a situation, other devices are attempted <sup>87</sup>, some of which do, and some of which do not, succeed in effecting the donation. In addition to the confusion that this state of affairs causes, the alternative methods invariably frustrate the donor's true intention : to further the association's purposes by financial benefit, coupled with a *guarantee* that this will occur. A trust for the purposes of the association would achieve precisely the desired effect. But it has no beneficiaries and therefore falls foul of the 'beneficiary principle'.

In summary, it cannot be doubted that, however obscure its origins might have been, today the 'beneficiary principle' appears firmly rooted in the current law, with the unfortunate consequence for the law on donations to unincorporated associations that it prevents the operation of the one mechanism which could achieve the deceptively simple aim of ensuring the enrichment of unincorporated associations.

B. Gifts on Trust for Non-Abstract Purposes : The Denley Analysis

1. Introduction

A makes a bequest in his will in general terms to the local voluntary youth association. Alternatively, he is more specific and makes the bequest in the following terms : "I bequeath \$x on trust for the Blanktown Youth Assistance and Recreation Association to further its purposes for as long as the law permits". The Association is a non-charitable club, of which membership is open to all residents of the locality between the ages of nine and twenty-one. Its objects, as stated in its founding constitution and currently executed, include the provision of recreational and social facilities and the organisation of sporting and leisure programmes for its members. On A's death, the trustees of his will apply to court for directions on the validity of the bequest, on the assumption that the club is a non-charitable non-profit-making unincorporated association. Let us assume, for the purposes of argument, that the court, on examination of the association, its constitution, the terms of the bequest and other relevant circumstances, concludes as a matter of construction that neither the Absolute Gift Analysis nor the Contract Analysis<sup>88</sup> is applicable. Nor does it interpret the gift as intended to operate as if it read as a gift on trust for the members of the association. Its possible reasons for so doing need not concern us here. For whatever reason, the courts holds that the bequest must operate as a gift on trust for the purposes of the Blanktown Youth Assistance and Recreation Association. In the opinion of our hypothetical court, the mechanism whereby the gift can take effect, if at all, is via a non-charitable purpose trust.

As discussed in the immediately preceding section of this chapter, cases such as *Re Astor*<sup>89</sup>, *Re Endacott*<sup>90</sup> and *Leahy v. Attorney-General for New South Wales*<sup>91</sup> have established that a gift for the promotion of the non-charitable purposes of an unincorporated association is *prima facie* invalid because of the 'beneficiary principle'. In other words, a trust must fail if it has no human beneficiary. Therefore, the view which prevails in the current law is that, if the only permissible construction of a gift is that it creates a trust for the purposes of the association, then the gift must fail unless the association's purposes are charitable in nature. Applying the 'beneficiary principle' to A's bequest to the Blanktown Association, the gift would fail and the funds would fall into residue on resulting trust.

However, the above statement of the law concerning purpose trusts is subject to one qualification, the scope and significance of which are uncertain but which nevertheless warrants some discussion. In brief, it was held in *Re Denley's Trust Deed*<sup>92</sup> that the 'beneficiary principle' is confined to those non-charitable purpose trusts where the purposes are abstract and impersonal in nature. In other words, a trust which, though expressed in terms of a purpose trust, is directly or indirectly for the benefit of one or more individuals may nevertheless be valid.

It will be submitted that this limitation of the operation of the 'beneficiary principle' can be of limited assistance in facilitating gifts to unincorporated associations. Therefore the source of the *Re Denley* qualification and its implications will now be discussed.

2. Re Denley's Trust Deed

(i) Facts

A company by the name of H. H. Martyn & Co. owned a plot of land in Cheltenham. In 1936 it conveyed the land to trustees by a complicated *inter vivos* deed of settlement which specified the trustees' powers and otherwise regulated in detail any future dealings with the property. In particular, the trustees were instructed to hold the land for the duration of a specified period on the following terms :

The said land shall be maintained and used as and for the purpose of a recreation or sports ground primarily for the benefit of the employees of the company.

When, in 1966, the company proposed to sell a portion of the lands to raise proceeds for the renovation of the remainder, it had to challenge the validity of the above clause so that the land could revert to the company, free of restriction, on resulting trust. It argued that the clause created a non-charitable purpose trust and was consequently void for having violated the 'beneficiary principle'. It was in this manner that the scope of the 'beneficiary principle' came to be re-examined by the Chancery Division of the High Court of England.

(ii) The Decision

Goff, J. rejected the argument of the company and held, *inter alia*, that the clause created a valid trust. Since the trust was phrased expressly for a non-charitable purpose, the principal issue of course was the application to the case at bar of the 'beneficiary principle' as

formulated in *Re Astor's Settlement Trusts*<sup>93</sup>. Whilst not questioning the correctness of that decision, Goff, J. nevertheless gave it a narrow interpretation, as follows<sup>94</sup> :

[T]here may be a purpose or object trust, the carrying out of which would benefit an individual or individuals, where that benefit is so indirect or intangible or which is otherwise so framed as not to give those persons any locus standi to apply to the court to enforce the trust, in which case the beneficiary principle would, as it seems to me, apply to invalidate the trust, quite apart from any question of uncertainty or perpetuity.

In other words, assuming that the requirements of certainty and perpetuity are satisfied, the essence of the validity of a trust is that it be subject to the control of the court. According to Goff, J., if the trust is set up for a totally abstract purpose or by its terms confers no significant benefit on anyone, then no-one has *locus standi* to invoke the court's jurisdiction. The trust can not be controlled and is invalid. As Goff, J. explained, it is only in these circumstances that the 'beneficiary principle' operates<sup>95</sup> :

[I]n my judgment the beneficiary principle of *In re Astor's Settlement Trusts* ... is confined to purpose or object trusts which are abstract or impersonal. The objection is not that the trust is for a purpose or object per se, but that there is no beneficiary or cestui que trust.

Goff, J. then went on to elaborate on the sense in which he was using the phrase "beneficiary or cestui que trust"<sup>96</sup> :

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.

By way of paraphrase, therefore, it appears that a trust which is a non-charitable purpose trust on its face may be valid if individuals derive some kind of benefit from its operation.

On the facts of *Re Denley* itself, the trust was designed to benefit the employees of the company. They were entitled to use and enjoy the land in question as a sports ground. In the opinion of Goff, J., the trust was therefore "directly or indirectly for the benefit of" the employees and was valid. *Locus standi* to invoke the courts' jurisdiction to control the trust if necessary was vested in the employees.

### 3. Questions Unanswered

At first blush, one might conclude that *Re Denley* has solved the problem of A's hypothetical bequest to the Blanktown Youth Assistance and Recreation Association. Although the gift *prima facie* sets up a trust for non-charitable purposes, it is arguable that the trust is neither "abstract" nor "impersonal" and that it therefore escapes the influence of the 'beneficiary principle' and is valid. The argument would point out the presence of the members of the Association. They are individuals who benefit directly by the trust and - the argument might continue - they therefore have standing to apply to court to control the trust. If the validity of this argument were accepted, the hypothetical court would conclude that the bequest was valid.

However, it is submitted that *Re Denley* left many questions as yet unanswered which preclude so straightforward a conclusion and subsequent cases<sup>97</sup> have done little to dispel the doubts. It is not proposed to attempt solutions of the many problems raised by *Re Denley* in this discussion. Instead, the plan is merely to pose some of the questions which it raises, in order to illustrate the issues which remain outstanding in the area of donations on trust for the purposes of unincorporated associations.

(i) Authoritative Weaknesses of *Re Denley*

The first question which *Re Denley* invites is : from what source did Goff, J. derive the principle that a purpose trust which is directly or indirectly for the benefit of individuals is valid, whereas an abstract or impersonal purpose trust is invalid? It should be apparent from the discussion of *Re Astor* in the preceding section that Roxburgh, J., in formulating the 'beneficiary principle' in general terms, denied the existence of a dichotomy between personal and impersonal such as that asserted by Goff, J. in *Re Denley*. It is submitted that the foundations on which the new principle was built were very weak.

Three cases were put forward as authorities in *Re Denley* each of which merits brief discussion. The first was *In re Harpur's Will Trusts*<sup>98</sup> which dealt with a direction to trustees to pay and divide residue "between such institutions and associations having for their main object the assistance and care of soldiers, sailors, airmen and other members of H.M. Forces who had been wounded or incapacitated during the recent world wars". It is submitted that the case is no authority for Goff, J.'s *ratio decidendi* in *Re Denley* for the following reasons : the principal issue turned on a question of statutory interpretation<sup>99</sup>; the 'beneficiary principle' of *Re Astor* was not discussed; certain ambiguous comments made by Lord Evershed and Harman, J. in the case<sup>100</sup> concerning purpose trusts were plucked by Goff, J. totally out of context. In short, the case provides no support for the proposition that the 'beneficiary principle' operates to strike down *only* abstract, impersonal purpose trusts.

The second case was *In re Aberconway's Settlement Trusts*<sup>101</sup> where

the validity was in question of a trust of the income of settled land established for the purpose of "securing and assisting and developing the use of the gardens at Bodnant for the cultivation of plants and flowers of home and foreign countries of botanical and horticultural interest". Again the case turned principally on a question of statutory interpretation<sup>102</sup>. The validity of non-charitable purpose trusts was a minor issue since it was apparently assumed by the court that the trust for the garden had been valid until terminated by the operation of the settlement terms. Thus the case *may* represent an assertion of the possible validity of non-charitable purpose trusts, though the point was neither argued nor discussed. However, even if this is so, it is important to observe that no distinction was drawn between abstract purpose trusts on the one hand, and purpose trusts for the benefit of individuals on the other. The court assumed that *all* non-charitable purpose trusts were valid. Therefore it is submitted that the case contains no support for the qualification of the operation of the 'beneficiary principle' put forward by Goff, J. in *Re Denley*.

The third case, by contrast, was *Re Bowes*<sup>103</sup>. The decision concerned a trust for planting trees and indeed contains *dicta* to the effect that the trust was valid because the purpose was of indirect benefit to those entitled to the land on which the trees were to be planted. The *dicta* are ambiguous, however, and neither analysis nor discussion of the 'beneficiary principle' is present. Therefore, in light of the precedent-based process of development of the common law, it must be concluded that *Re Denley* is dubious. As yet, however, it has not been challenged by subsequent courts.

(ii) Direct or Indirect Benefit

Nevertheless, assuming that *Re Denley* was correctly decided and *did* lay down a valid legal principle, the next question is : exactly what legal principle did it create? The decision was summarised in the following statement <sup>104</sup> :

Where ... 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.

In other words, provided that the fulfilment of a purpose somehow benefits an individual, a trust for that purpose is valid. The scope of the principle must, however, be uncertain unless the meaning of "directly or indirectly for the benefit of an individual" is determined.

*Re Denley* itself is of little assistance in clarifying Goff, J.'s meaning. There the trust presumably conferred on the employees a licence of some kind to use the property as a sports ground. Such a licence has many elements : it confers both financial and factual benefit and is of immediate and tangible advantage to the employees. Would a merely *de facto* advantage, such as the pleasure of being able to look at a beautiful work of art, be sufficient to bring a purpose trust within the scope of *Re Denley*, or would this be too "intangible"? Would the benefit to the population at large of a trust for "the preservation of the independence and integrity of newspapers and the encouragement of the adoption and maintenance by newspapers of fearless educational and constructive policies" as attempted in *Re Astor* be too indirect to be saved by the *Denley* Analysis? Does the individual have to have a legal interest of the type necessary to attain standing in other civil actions <sup>105</sup> ? Even on the facts of *Re*

*Denley* itself, was the licence irrevocable and contractual? If so, would it have been sufficient otherwise? These are but a few examples of the questions one might ask <sup>106</sup>.

The scope of the principle laid down in *Re Denley* and the extent to which it will facilitate the validity of non-charitable purpose trusts can only be determined by successive judicial decisions on the subject. The development which will thereby occur will no doubt be dictated by policy considerations and judicial value judgments on the social utility of the particular purpose trusts in question. Over the course of the fourteen years since the *Denley* decision, no guidelines have been forthcoming. The questions therefore remain unanswered.

(iii) The Nature of a Valid 'Personal' Purpose Trust

According to the *Denley* Analysis, a purpose trust is valid if it <sup>107</sup> is "directly or indirectly for the benefit of an individual or individuals". Another question which this formulation left unanswered was whether the trust thus validated operated as a purpose trust or as a discretionary trust for human *cestuis que trust* <sup>108</sup>. In other words, are the individuals whose ability to control the trust renders it valid merely 'factual beneficiaries' of a purpose trust, or are they true trust beneficiaries *stricto sensu*?

Goff, J. left both interpretations open, yet the consequences and implications of each differ enormously. These will be discussed in bare outline only to demonstrate the potential problems.

On the one hand, throughout his analysis of the 'beneficiary principle' and his formulation of the dichotomy between those purpose trusts which violate it and those which do not, Goff, J. spoke in terms of "beneficiaries or *cestuis que trust*". The distinction he drew between an invalid abstract purpose trust and a valid personal purpose trust was that the former had no beneficiary or *cestui que trust* while the latter did <sup>109</sup>. The inference which may be drawn from the use of such terminology is that a purpose trust may be valid if it can be personalised and converted into a discretionary trust with human beneficiaries in the traditional sense of the word. In other words, the gift's operation may be paraphrased as follows : 'on trust for X, Y, Z, to be used for purpose W'.

On the other hand, Goff, J. also spoke on occasion in terms of direct or indirect benefit for one or more individuals <sup>110</sup> and avoided using the words 'beneficiary or *cestui que trust*'. The inference which may be drawn from the use of such non-legal terminology is that a purpose trust may operate validly if it has merely 'factual beneficiaries'. Meanwhile, it retains its 'purpose trust' label and its immediate object is the purpose, not the individuals. In other words, the gift operates as one 'on trust for purpose W, for the benefit of X, Y, Z'.

If one favours the former interpretation, it is submitted that one is then committed to the following consequences of one's analysis. In the first place, the beneficiaries have, at the very least, a *spes* of ownership. In other words, if the personal purpose trust operated as a discretionary trust in *Re Denley*, the employees must have held equitable interests or some other form of 'ownership' in the land <sup>111</sup>.

Secondly, if the above conclusion is correct, it follows that the trust guarantee that the purpose will be carried out is lost. The beneficiaries may invoke the principle of *Saunders v. Vautier*<sup>112</sup> and together terminate the trust by demanding the transfer of the trust property or fund to them by the trustees. Thus, on the hypothesis that a discretionary trust for human beneficiaries is created by the *Denley* Analysis, those beneficiaries may profit at the expense of future and continuing fulfilment of the expressed purpose<sup>113</sup>.

Thirdly, in order for a discretionary trust to satisfy the rule against perpetuities, the interests of the beneficiaries must vest within the applicable perpetuity period<sup>114</sup>.

Fourthly, if the *Denley* Analysis converts a purpose trust into a discretionary trust, its constituent words must satisfy the certainty requirements for such trusts as formulated in *McPhail v. Doulton*<sup>115</sup>. The test is as follows<sup>116</sup> :

The trust is valid if it can be said with certainty that any given individual is or is not a member of the class.

Prior to *McPhail v. Doulton*, the standard demanded had been far more rigorous. The House of Lords in that case overruled *Inland Revenue Commissioners v. Broadway Cottages*<sup>117</sup> which had laid down the strict rule that a discretionary trust was too uncertain unless all of the eligible beneficiaries were ascertained or ascertainable. It is interesting to note that Goff, J., deciding *Re Denley* before the *McPhail v. Doulton* decision, utilised the now obsolete *Broadway Cottages* test to evaluate the trust's validity on the certainty issue. This indicates that Goff, J. may have perceived the result of his analysis to be the conversion of

purpose trusts into discretionary trusts.

By contrast, if one favours the second interpretation of the effect of *Re Denley*<sup>118</sup> - that the purpose trust undergoes no transformation but operates as a trust for a purpose provided it has 'factual beneficiaries' - the following are the major consequences.

Firstly, the 'factual beneficiaries' have no equitable interest in the trust fund or property. They have no form of ownership nor even *spes* ownership. Secondly, they can only enforce the purpose trust : they can not put an end to its operation. Thirdly, the rule against perpetuities does not as such demand of a purpose trust that interests vest at any particular time. Instead, the rule controls the *duration* of the trust. Fourthly, the trust must satisfy a certainty requirement, but in a different fashion from discretionary trusts<sup>119</sup>.

The common law has not yet produced an answer to the question : into which of the two conceptual frameworks discussed here does the *Denley*-type trust fit. Strong arguments can be made for and against each possibility, yet the answer is of more than merely academic interest because, as the rough outline above shows, the problem touches practical as well as conceptual issues. Without an answer, the value of *Re Denley* to the development of trusts law is limited. As will become apparent, the present writer's preference is for the view that the purpose trust which is salvaged by the *Denley* qualification of the scope of the 'beneficiary principle' retains the nature and characteristics of a purpose trust; and that the 'factual beneficiaries' are merely the necessary instruments of enforcement; no discretionary trust is created.

4. *Re Denley* and Gifts to Unincorporated Associations

A further question hitherto unanswered in the course of this discussion is whether or not A's hypothetical bequest to the Blanktown Youth Assistance and Recreation Association can be facilitated by utilising the *Denley* Analysis of purpose trusts. It will be recalled that the bequest *prima facie* fails. Being a gift on trust for the promotion of the non-charitable purposes of an unincorporated association, it appears to fall foul of the 'beneficiary principle'.

No unincorporated association was involved in *Re Denley* itself. The employees of H. H. Martyn & Co. merely constituted a class of individuals linked by the contract of employment they each held in common with the company. They were not formally associated *inter se* by any contract of membership. Therefore, the reasoning in *Re Denley* would have to be extended to assist A's hypothetical donation to the Blanktown Association. Whether or not *Re Denley*'s generous interpretation of the scope of the 'beneficiary principle' can be applied in the context of gifts to unincorporated associations is an issue which has apparently come before the courts on only two occasions. The uncertainty is increased by the fact that the answer given in each of those two instances was different.

A negative answer was given in *Re Grant's Will Trusts*<sup>120</sup>. That case dealt with a bequest to a branch of the Labour Party for the benefit of a particular local party's headquarters. Vinelott, J. discussed the various mechanisms (already canvassed here) whereby gifts to unincorporated associations could be valid in particular circumstances. On the subject of non-charitable purpose trusts, however, he asserted a strict application

of the 'beneficiary principle' and said <sup>121</sup> :

[T]he testator may seek to further the purpose ... by purporting to impose a trust ..... [T]he gift will fail on the ground that the court cannot compel the use of the property in furtherance of a stated purpose unless, of course, the purpose is a charitable one.

The existence of individuals or, more specifically, of members of the association who derived a direct or indirect benefit from the trust was not considered of significance by Vinelott, J. Of *Re Denley*, he said <sup>122</sup> :

That case on a proper analysis, in my judgment, falls altogether outside the categories of gifts to unincorporated associations and purpose trusts.

Without the assistance of *Re Denley*, the bequest would violate the 'beneficiary principle', if construed in the circumstances as imposing a purpose trust. In the result, the bequest also failed to satisfy the prerequisites of all the other mechanisms currently available in the law for effecting a successful donation to an unincorporated association. The funds therefore devolved as on intestacy.

In *Re Grant's Will Trusts*, therefore, Vinelott, J. denied that *Re Denley* extended the requisite element of control to satisfy the 'beneficiary principle' from traditional *cestuis que trust* to 'factual beneficiaries', particularly in the area of gifts to unincorporated associations. His reasons for so doing were as follows <sup>123</sup> :

I can see no distinction in principle between a trust to permit a class defined by reference to employment to use and enjoy land in accordance with rules to be made at the discretion of trustees on the one hand, and, on the other hand, a trust to distribute income at the discretion of trustees amongst a class, defined by reference to, for example, relationship to the settlor.

In other words, Vinelott, J. interpreted *Re Denley* as treating the trust in that case as a discretionary personal trust <sup>124</sup> and not laying down

any general principle for validating purpose trusts. On this interpretation, the employees in *Re Denley* are seen as orthodox *cestuis que trust* to whom, at the trustees' discretion, the funds would ultimately belong. In Vinelott, J.'s view, the trust was not a purpose trust at all. Each member of the class of employees therefore had at least a *spes* of actual ownership in the property and could terminate the trust in certain circumstances; he was not merely the recipient of a factual benefit under a purpose trust.

Such a narrow interpretation of *Re Denley* has been criticised as "unfortunate and retrogressive"<sup>125</sup>. It also ignores the second case on the current issue - the extension of the *Denley* Analysis of the 'beneficiary principle' to gifts for unincorporated associations - which held that a trust for the purposes of an association *can* succeed because of *Re Denley*.

*Re Lipinski's Will Trusts*<sup>126</sup> involved a bequest to a youth association on trust, with the additional stipulation that the funds be used to construct new, or improve the existing, premises of the association. Although the exact basis for Oliver, J.'s decision that the gift was valid is unclear, he treated *Re Denley* as "directly on point"<sup>127</sup> and "[in] accord with authority and with common sense"<sup>128</sup>. Applying *Re Denley* to the facts of *Re Lipinski*, the bequest was valid as a purpose trust which was neither abstract nor impersonal, but was for the benefit of ascertained individuals, namely, the members of the association. In other words<sup>129</sup> :

[T]he case appears to me to be one of the specification of a particular purpose for the benefit of ascertained beneficiaries, the members of the association for the time being.

The presence of the members meant that the trustees could be controlled and that the purpose trust was valid.

It is interesting to note that the court was willing to ignore the express stipulation of the testator in the *Lipinski* case that the funds be expended on the association's premises. Therefore it is possible to regard it as a further relaxation of the 'beneficiary principle'. To expand. The first step in the process of alleviating the rigidity of the 'beneficiary principle' was that taken in *Re Denley* : the presence of individuals who benefit, directly or indirectly from the performance of the purpose trust was held sufficient to constitute a valid trust. It is submitted that a second step was taken in *Re Lipinski* in that the individuals who benefit in this manner were held entitled to override the expressed purpose. By virtue of this second step, the court was permitted to ignore the testator's stipulation and deny that it constituted a fetter on its utilisation of the *Denley* Analysis. Oliver, J. concluded <sup>130</sup>:

I do not think the fact that the testator has directed the application 'solely' for the specified purpose adds any legal force to the direction. The beneficiaries, the members of the association for the time being, are the persons who could enforce the purpose and they must, as it seems to me, be entitled not to enforce it or, indeed, to vary it.

In sum, the bequest was valid and apparently took effect as a gift on trust for the *general* purposes of the association (not merely for the specific purpose of construction or improvement of its buildings). The members of the association for the time being would derive a benefit from the trust in this form so it was "outside the mischief of the beneficiary principle" <sup>131</sup> and could be controlled. It was therefore valid.

As a result of *Re Lipinski*, it is possible to say that the members of an unincorporated association *can* satisfy the test formulated by *Re Denley* for a valid, controllable purpose trust. On one interpretation of the *Denley* Analysis, gifts on non-charitable purpose trust for unincorporated associations require the existence of 'factual beneficiaries' who are interested in the disposal of the donated funds because of their direct or indirect benefit therefrom, even though they are not *cestuis que trust* in the traditional and strict sense of the term. The association's members *can* fit this description.

It is submitted, however, that this will not always be the case. It is worth repeating the words of Goff, J. in *Re Denley*<sup>132</sup> :

I think there may be a purpose or object trust, the carrying out of which would benefit an individual or individuals, where that benefit is so indirect or intangible or which is otherwise so framed as not to give those persons any locus standi to apply to the court to enforce the trust, in which case the beneficiary principle would, as it seems to me, apply to invalidate the trust, quite apart from any question of uncertainty or perpetuity.

Applying this limitation to the unincorporated association context, the trust will fail if the specified purpose is abstract or impersonal and no tangible nor sufficiently direct benefit accrues to individuals. Likewise if a gift is given on trust for the general purposes of a society, it will fail if those purposes are abstract and impersonal. To borrow the terminology utilised in an Australian case on the Contract Analysis<sup>133</sup>, a gift to an 'inward looking association' will be valid because it is set up to provide benefit to its own members. By contrast, a gift to an 'outward looking association' which pursues external, altruistic goals of no benefit to its members will fail. The distinguishing line between the two types of association, and consequently between valid and invalid gifts,

evidently depends on the scope of 'benefit' in this context, a problem to which no resolution has yet been found<sup>134</sup>. For example, take the factual situation of *Re Grant's Will Trusts*. Assuming that Vinelott, J. had acknowledged *Re Denley's* salvaging effect in the context of unincorporated associations, would the bequest for the purposes of the Headquarters of a local Labour Party have nevertheless failed? The answer would depend on the court's interpretation of 'benefit' and 'factual beneficiary'. On the one hand, it might have concluded<sup>135</sup> that the factual benefit to members of the receipt of funds to assist the running of their political party's administrative centre was too remote and intangible; the nature of the benefit was far different from that enjoyed by the employees through the provision of recreational facilities in *Re Denley*. On the other hand, the purpose may not have been seen in so abstract a light<sup>136</sup>. The members must derive *some* tangible benefit from the boosting of their association's coffers.

Even a gift on trust to an 'outward looking association' may succeed by virtue of the *Denley* Analysis. Although the association's members may not be factual beneficiaries who supply the requisite element of control, the association's purposes may well be of direct or indirect benefit to ascertainable individuals who are *not* members of the association. Presumably the gift would be valid in such a case. For example, take the case of a gift on trust for the purposes of Blanktown Association for the Provision of Recreational Facilities to Deprived Children. The hypothetical members are not themselves deprived children and therefore derive no tangible benefit from the furtherance of the association's purposes. Yet the trust may succeed, because the deprived children of Blanktown *do* benefit, in the same way as the employees in *Re Denley* itself.

## 5. Conclusion

If the *Denley* Analysis is accepted, A's bequest "on trust for the Blanktown Youth Assistance and Recreation Association to further its purposes for as long as the law permits" will be valid. The Association is an 'inward looking association' and its members are the direct recipients of the tangible benefits produced by the Association's operation. The bequest is squarely within the confines of *Re Denley* and thus escapes the scope of the 'beneficiary principle'.

However, the *Denley* Analysis is not the perfect solution to the problem of gifts on trust for non-charitable unincorporated associations. Two points must be emphasised. In the first place, clarification of the scope and effect of *Re Denley* is necessary before it can play a useful and practical role. Secondly, some major limitations on its ability to facilitate gifts are already clear. The most important of these is that it must be possible to construe the gift as being for a non-abstract purpose before the *Denley* Analysis will be of any assistance in effecting the donor's wishes.

### C. Gifts on Trust for the Present and Future Members of an Association

#### 1. Introduction

In his desire not only to confer a continuing pecuniary benefit upon an unincorporated association, but also to ensure that his largesse be remembered for some considerable period in the future, a wealthy garden

enthusiast, X, includes in his will a bequest of his residuary estate in the following terms : "I bequeath my residuary estate, henceforth to be known as the X memorial fund, upon trust for the present and future members of the Greenthumb Village Gardening Society so that they may continue to carry out its aims and objects for as long as possible". Alternatively, X merely bequeaths his estate on trust for the Gardening Society *simpliciter*, which in itself and in the current state of the law is an impossible trust, but the circumstances of the bequest are such that they rebut all presumptions that the gift can take effect in any way other than on trust for present and future members of the Society, identified by the reference to the Society itself <sup>137</sup>. In other words, as a matter of interpretation, a court would conclude that this was the result intended by X.

In each situation, X has attempted to create a trust for a class comprising the existing and future members of an unincorporated association in the *hope* that they will divert the funds to the advantage of the association. If the trust stands up, he has the guarantee that they and no one else will benefit from the gift. He has no guarantee, however, that they will indeed divert the funds as directed. Although the problem of an unincorporated association's lack of legal personality is successfully avoided by creating such a trust, equally troublesome problems are created in its place.

In recent cases dealing with the issue of donations to unincorporated associations, it is accepted without discussion as trite law that a trust for present and future members of an association must fail <sup>138</sup>. As a mechanism for effecting a donation, such a trust is considered totally unsuccessful and alternative legal analyses of the situation have to be sought in an attempt to achieve a result approximating to the donor's wishes.

The three major *potential* reasons for the failure of trusts in general will be reviewed in this section : the 'beneficiary principle', uncertainty and the rule against perpetuities. It is the latter which is generally treated as the culprit in the case of a gift on trust for the present and future members of an association. Some comments will be offered on this subject and it will be suggested that the recent cases which accept without question that such a trust must fail on this ground are not necessarily correct. At the outset, however, in the interests of completeness, the manner in which the beneficiary and certainty requirements are *satisfied* will be explained in brief.

## 2. The 'Beneficiary Principle'

The operation and scope of the 'beneficiary principle' have already been discussed at length <sup>139</sup>. A gift on trust for the members, present and future, of an unincorporated association evidently has human beneficiaries who can enforce due execution of the terms of the trust should the need arise. Therefore it is not, nor has it ever been contended to be, on the basis of the 'beneficiary principle' that gifts on trust for present and future members have consistently failed.

## 3. Certainty of Objects

In the words of Lord Upjohn in *Re Gulbenkian's Settlement Trusts* <sup>140</sup>, "the Court of Chancery, which acts in default of trustees, must know with sufficient certainty the objects of the beneficence of the donor so as to execute the trust" <sup>141</sup>. It is a requirement of the law of trusts that the donor express his intentions with sufficient precision and clarity for

trustees, beneficiaries and the court to be able to know, and to do or cause to be done what the donor intended when he formulated his gift <sup>142</sup>. The requirement has been the subject of a great deal of refinement <sup>143</sup> and academic comment <sup>144</sup> in recent years and of itself could be the subject of volumes of analysis and conjecture. Here the aim is far more modest. It is proposed merely to summarise the manner in which the gift in question on trust for the members from time to time of a particular unincorporated association satisfies the requirement of certainty of objects.

The discussion will proceed on the hypothesis that the notion of certainty can be subjected to a four-fold classification <sup>145</sup>. The *first* type of certainty is the most important : trust objects must be described with 'conceptual certainty'. In other words, the terminology used to describe the trust beneficiaries must have precise boundaries of meaning, and it must be possible to state clearly what are the criteria which any conceivable claimant must fulfil in order to fit the description. Classic examples of conceptually uncertain terminology are phrases such as "old friends" and "good citizens". By contrast, in the present case of a trust for the existing and future members of an unincorporated association, the words admit little doubt as to their meaning. In order to be within this class and thus establish entitlement as a beneficiary, the necessary and sufficient criteria which an individual must fulfil are certain : he must, within the relevant time period, have entered into a contract of membership with the association in accordance with the rules of its constitution (if any) concerning admission. The gift therefore satisfies the requirement of conceptual certainty.

The *second* type of certainty required of a non-charitable trust is

'evidential certainty'. Assuming that conceptual certainty is present, it may nevertheless be impossible as a matter of factual evidence to identify specific people as having satisfied the criteria involved in the definition of the class.

It is here that the distinction between fixed trusts and discretionary trusts becomes significant. On the one hand, the donor may have made it clear by the wording of his gift that every member of the defined class of beneficiaries is to have a specific share in the donated funds. The trust is then 'fixed', as compared, on the other hand, with a 'discretionary trust', where trustees, though obliged to distribute, have an element of choice in the matter of who will benefit and to what extent. Although the same degree of conceptual certainty is required for both fixed and discretionary trusts, the requirement of evidential certainty is totally different. If, as a matter of interpretation, a fixed trust has been created, it is necessary for the trustees to be able to draw up a complete list of names of everyone in the class of beneficiaries since the trust can not be duly executed unless every single person benefits. This list must be compiled within the perpetuity period in order to satisfy the requirement of evidential certainty. In the case of the gift by X to the present and future members of the Gardening Society, a complete list can be drawn up by consulting the membership records of the association from the date the trust becomes effective, for the duration of the perpetuity period<sup>146</sup>.

More often, however, it is submitted that a gift on trust for the members of an association will be discretionary in nature. The donor's true intention is normally to benefit the association itself and the trust for its members is merely a device to approximate to the desired result.

In such a case, "equal division is surely the last thing the settlor ever intended; equal division among all [members of the association] may, probably would, produce a result beneficial to none" <sup>147</sup>. Nor are all potential beneficiaries entitled to be considered. There is therefore no need for a complete list of eligible recipients before the trustees and the court can execute the terms of the trust and evidential uncertainty in drawing it up is not important <sup>148</sup>. The trust can be valid even in the absence of evidential certainty <sup>149</sup> :

The court is never defeated by evidential certainty . . . . . 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 postulant has on enquiry been proved to be within it; if he is not so proved then he is not in it.

In other words, if a person claiming to be within the conceptually certain definition can establish his claim, he is entitled to the rights of a beneficiary; if he can not, then he is not so entitled. Nevertheless, even in the latter case, if the trust satisfies the requirement of conceptual certainty, it is valid and no further requirement need be met <sup>150</sup>. In the case of a member from time to time of an association, provided he can establish by documentary or other evidence that he did indeed enter into a contract of membership, he is a beneficiary. In the case, however, of someone attempting to establish that he is the relative of X, for example, when all relevant birth and marriage records have been destroyed, X's particular claim may fail because the evidential difficulties may prove insurmountable. Despite this, the trust itself "for the relatives of X" would be valid, since a discretionary trust is not defeated by evidential uncertainty.

The *third* type of uncertainty arises if there is doubt concerning ,

"the whereabouts or continued existence of some members [of the class]" <sup>151</sup> who are nevertheless clearly within the definition of the class of objects as a matter of conceptual certainty. Such uncertainty is not important and both fixed and discretionary trusts are valid notwithstanding the lack of 'ascertainability'.

The *fourth* type of uncertainty causes a problem "where the meaning of the words used is clear but the definition of beneficiaries is so hopelessly wide as not to form 'anything like a class', so that the trust is administratively unworkable" <sup>152</sup>. In such a case, the trust will fail. The exact scope of this category is unclear. To borrow the words of Professor Emery <sup>153</sup>, it appears that a trust will be held to be administratively unworkable "where the settlor has in effect set his trustees an impossible task" with the result that "the extent and nature of the duty is ... so nebulous as to make it unenforceable". For example, a discretionary trust for "all the residents of Greater London" <sup>154</sup> would fail on the ground of administrative unworkability : the size and generality of the definition renders the trust uncontrollable; there are no metes nor bounds set to the exercise by the trustees of their discretion <sup>155</sup>; no court would be able to judge whether or not trustees were performing their obligations properly in distributing funds. A gift on trust for the members of an unincorporated association, on the other hand, gives trustees an easy task.

In conclusion, therefore, it is apparent that the reason for the consistent failure of gifts on trust for the present and future members of an unincorporated association has not been the certainty requirements of a valid trust. The major hurdle under the head of certainty is the need for conceptual certainty, and the notion of membership of an association

embodies a concept which admits of no doubt.

#### 4. The Rule against Perpetuities

The main problem with a gift on trust for present and future members of an association is the rule against perpetuities. For example, an old Irish instance of a gift to the members of a society which failed because it was held to contemplate future as well as present members as beneficiaries, was the case of *Morrow v. M'Conville*<sup>156</sup> where a gift of property for the use and benefit of a Roman Catholic convent was held to be non-charitable and void. Chatterton, V.-C. gave the reason as follows<sup>157</sup> :

[A] gift, not charitable, to a religious community, including not only the existing members, but also all persons who should be, or become thereafter, members of it, during a period capable of extending beyond the legal limits prescribed by the rule against perpetuities, is void.

Future members may join the society and become ascertained and their interests in the gift may vest at a time too remote from the date that the gift takes effect. The gift therefore fails *ab initio*.

Although it is felt that a detailed discussion of the operation of the rule against perpetuities is beyond the scope and size of this thesis, some comments are appropriate.

##### (i) The Rule at Common Law

The common law rule against remoteness of vesting (otherwise known as the rule in *The Duke of Norfolk's Case*<sup>158</sup>) runs as follows<sup>159</sup> :

No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.

It is apparent with a gift to future members of an association that interests will probably vest more than twenty-one years after the death of all relevant lives in being. In this case, it requires none of the exploration of improbable hypothetical situations, to which the courts are accustomed when dealing with the rule against perpetuities, to realise that certainty of vesting within the permitted period is lacking. Furthermore, even if the interests of existing members will vest in time, a class gift can not be partly good and partly bad. If, at the time the instrument comes into operation, some members of the class, such as future members, are not certain to be ascertained within the perpetuity period, then the whole gift is too remote<sup>160</sup>. In sum, a gift on trust for present and future members of an unincorporated association violates the common law rule against perpetuities.

(ii) The Rule under Statute

Over the last twenty years, most common law jurisdictions have passed legislation which substantially modifies the common law perpetuities rule<sup>161</sup> and it is tentatively suggested that the legal effect of a gift on trust for the present and future members of an unincorporated association may have changed accordingly. Two provisions in particular of the United Kingdom legislation may be relevant. It was mentioned above that, at common law, an interest *must*, as of the date the gift takes effect, be absolutely certain to vest within the perpetuity period. Under the legislation, however, if this common law rule would render a gift void, it is nevertheless treated as valid until events prove that the interest will, indeed, vest (if at all) after the end of the perpetuity period<sup>162</sup>. In the meantime, one waits to see what developments the passage of time

might bring. To use the example of a gift on trust for the existing and future members of an unincorporated association, such a gift would, in the absence of legislative reform, be struck down by the common law rule. This eventuality triggers the operation of the legislative 'wait and see' provisions which operate to salvage the gift for the time being by pretending that the disposition is not subject to the rule against perpetuities at all. *Prima facie* and for at least the duration of the perpetuity period, the gift to the association's members is valid.

The period of 'waiting and seeing' is calculated by reference to statutory lives in being. In the above situation, the donor and all those who were current members in good standing of the unincorporated association at the date of the gift in the case of an *inter vivos* donation, or all current members in good standing of the association at the date of the donor's death in the case of a testamentary donation are relevant lives in being<sup>163</sup>. However, this assertion must be read subject to the provision that "the lives of any description of persons falling within paragraph (b) ... of [subsection 5] shall be disregarded if the number of persons of that description is such as to render it impracticable to ascertain the date of death of the survivor"<sup>164</sup>. If this provision operates to render existing members unavailable as relevant measuring lives, and the donation is testamentary, "the period shall be twenty-one years"<sup>165</sup>. It seems that future members of the association, though "potential members of the class" defined by the donor<sup>166</sup>, do not qualify as statutory lives in being since they would not be "individuals in being *and ascertainable* at the commencement of the perpetuity period"<sup>167</sup>.

The second provision of the United Kingdom legislation which may

be relevant in facilitating the initial validity of a gift to the present and future members of an unincorporated association reverses the common law rule <sup>168</sup> that the share of every member of the donor's class of intended recipients must be ascertainable within the perpetuity period. The provision runs essentially as follows <sup>169</sup> :

Where ..... it is apparent at the time the disposition is made or becomes apparent at a subsequent time that, apart from this subsection, the inclusion of any persons, being potential members of a class ... would cause the disposition to be treated as void for remoteness, those persons shall, unless their exclusion would exhaust the class, thenceforth be deemed for all the purposes of the disposition to be excluded from the class.

In other words, the legislation permits separation of the good from the bad and probably reforms the gift to comply more closely than was possible under the common law rule with the donor's intentions, who undoubtedly would have preferred part of the class to take in the event that it was impossible to give full effect to his complete intention with respect to the class as a whole. In the case of a gift to the present and future members of an unincorporated association, since there is no time restraint placed upon the date of membership of future members, their inclusion in the class of recipients will evidently cause problems resulting in the gift's being struck down for remoteness even at the end of the 'wait and see' period. In this event, they should be excluded at that time from the class so that the gift can operate validly in favour only of all those who might be members of the association at that time.

In order to summarise the perceived (though as yet untested) combined effect of the statutory reform on gifts on trust for present and future members of unincorporated associations, it is helpful to refer back to the example posed at the beginning of this section of X's bequest

to A and B for the present and future members of the Greenthumb Village Gardening Society. Assuming that X died after July 15, 1964<sup>170</sup>, it is submitted that the correct approach is, *firstly*, to apply the common law rule against perpetuities to see whether the disposition infringes it. The unavoidable conclusion is that an infringement has indeed taken place. Since this is so, the *second* step is to apply the statutory 'wait and see' provisions, with the result that the gift is given initial validity. A valid trust has been created, at least for the time being, and A and B, the trustees, can proceed to distribute income, for example, disregarding the possibility of future invalidity and without fear of such acts being subsequently invalidated<sup>171</sup>. At the end of the 'wait and see' period (twenty-one years after the death of the last surviving person who was a member of the Gardening Society on X's death), one can ascertain whether or not, in the events which have actually transpired, interests under the gift have in fact vested. It is possible, for example, that the Greenthumb Village Gardening Society has been dissolved by this time and its funds distributed amongst the members. X's gift on trust could not prevent such a contingency. In such a turn of events, interests in the gift will have vested in time and the 'waiting and seeing' will not have been in vain, since X's wishes will have been complied with for a potentially considerable period of time. At common law, they would have been frustrated *ab initio*.

Assuming, however, that the Gardening Society is still flourishing in Greenthumb at the end of the 'wait and see' period, it is then apparent that the *third* step must be taken. The interests of future members evidently will not vest in time so they must be excluded from the class. The prospective shares of those members then accrue for the benefit of the existing members in whom, as a class, the total interest in X's donation

then vests. These members may then choose to terminate the trust and divert the funds for their own personal use so, ultimately, X's wish to benefit the Gardening Society via its members will be defeated. In the meantime, however, the statute has permitted the achievement of his aims. This conclusion is subject, of course, to one qualification. In view of the wording of the gift as one to the members themselves, whether or not the members in fact channel the income they receive under the trust to the good of the Society will depend on their own inclinations. They might feel morally bound to do so but, in the absence of obligations imposed upon them independently of the gift (for example, in their contract of membership), they are under no *legal* obligation.

(iii) Conclusion

Recent cases have continued to treat gifts on trust for the present and future members of unincorporated associations as automatically invalid even when they take effect after 1964, disregarding the potentially salvaging impact of the legislative reform discussed above. It is submitted that the courts in so doing are in error. By way of conclusion, it is submitted that if, in all the circumstances and on a fair construction of the donation, the true interpretation of its intent is that a trust for present and future members has been created, the above analysis of the effect of the legislation should be utilised to permit the gift initial validity even if it is later curtailed in its duration.

The major disadvantage of arguing that a gift to an association should be interpreted as taking effect as one on trust for its present and future members is, of course, that the effectiveness and accuracy of

the above analysis are untested. Apparently the applicability of the statutory reform of the rule against perpetuities has not been thoroughly analysed by the courts.<sup>172</sup> Nevertheless, it is submitted that at least two considerations argue in favour of its acceptance. In the first place, there is nothing in the literal wording of the statute to prevent its application to gifts on trust for the present and future members of unincorporated associations. Secondly, policy arguments in its favour are strong. The aim of the statutory provisions reforming the rule against perpetuities in general has been summarised as follows<sup>173</sup> :

No longer will family dispositions containing no threat to the public interest, and reasonable bargains between business men, continue to be struck down in the name of public policy.

Surely this argument applies equally to gifts by well-meaning donors to the members of unincorporated associations?

Whilst arguing the desirability of the above analysis, it is at the same time acknowledged that it by no means solves all the problems of effecting donations to unincorporated associations. As mentioned above, although it permits a continuing benefit to be conferred by way of trust, the benefit goes to the members, and will accrue to the association itself only if the members, present and future, feel morally compelled to divert the funds in this manner<sup>174</sup>. As a matter of trusts law, the beneficiaries are the members as individuals, not the association.

\* \* \* \* \*

FOOTNOTES : CHAPTER IV

1. If a gift in these terms succeeds, *prima facie* the present members of the association acquire equitable interests in the fund. Once the trustees distribute the trust fund, they are *functus officio* and the trust mechanism can be terminated by the action of the beneficiaries (the members of the association) who can then, as a matter of trusts law, divert the funds to their own use away from the association. It is possible, however, that the Contract Analysis may intervene at this stage : *supra*, pp 51-78. In other words, it may be apparent as a matter of interpretation from the circumstances of the donation that the donor intended the association and *not* its present members to derive a continuing benefit and that the nomination of the present members as beneficiaries was merely a convenient device to identify the association as the recipient actually intended. In such a case, the nature of the association as a contractual arrangement between the members will prevail and the members' equitable interests will be subjected to contractual terms restraining the members from treating the funds as their own. In other words, the Contract Analysis is equally applicable whether the initial method of donation to the members is direct, giving them legal title, or whether the initial mechanism is via a trust, giving members equitable interests. Since the operation of the Contract Analysis is purely a matter of contract law, the property issue of legal title *versus* equitable interest is irrelevant.
2. *Supra*, pp 33-50.
3. *Supra*, pp 51-78.
4. Discussed *supra*, pp 51-78.
5. Subject to what will be said in the next section, *infra*, pp 132-150.
6. *Re Denley's Trust Deed* [1969] 1 Ch.373; [1968] 3 W.L.R.457; [1968] 3 All E.R.65. *Per* Goff, J. [1969]1 Ch.373 at 382.
7. *McGovern v. Attorney General* [1982] 2 W.L.R.222; [1981] 3 All E.R.493.
8. (1805), 10 Ves.Jr.522; 32 E.R.947, affirming (1804), 9 Ves.Jr.399; 32 E.R.656.
10. For example, the Charity Commissioners, the Attorney General.
11. See generally, Hanbury & Maudsley, Modern Equity, 11th.ed., eds. R. H. Maudsley & J. E. Martin (London: Stevens, 1981), pp 210-216 ; Emery, "The Most Hallowed Principle - Certainty of Beneficiaries of Trusts and Powers of Appointment", (1982) 98 L.Q.R.551.
12. (1805), 10 Ves.Jr.522 at 539-540.
13. See also, Leigh, "Trusts of Imperfect Obligation", (1955) 18 Mod.L.R. 120.

14. [1917] A.C.406; 86 L.J.Ch.568.
15. For example, *In re Diplock* [1941] Ch.253; [1941] 1 All E.R.193, [1941] Ch.253 at 259 ; *Re Astor's Settlement Trusts* [1952] Ch.534; [1952] 1 All E.R.1067 at 1070.
16. Lords Dunedin, Parker of Waddington, Sumner and Buckmaster. Lord Finlay, L.C. dissented.
17. [1917] A.C.406 at 478.
18. *Ibid* at 441. Italics added.
19. [1979] 1 Q.B.10; [1978] 3 All E.R.175, affirmed, *sub nom. Whitehouse v. Lemon* [1979] A.C.617; [1979] 1 All E.R.898.
20. [1917] A.C.406 at 464-467, *per* Lord Sumner.
21. *Ibid* at 468 *per* Lord Buckmaster.
22. *Tennant Plays v. I.R.C.* [1948] 1 All E.R.506.
23. [1917] A.C.406 at 420-421, *per* Lord Finlay, L.C.
24. *Bouzaïd v. Horowhemua Indoor Bowls Centre Inc.* [1964] N.Z.L.R.187.
25. (1958), 12 D.L.R.(2d) 23 at 30.
26. Similarly, *Re Inman* [1965] V.R.238.
27. [1917] A.C.406 at 464-467, *per* Lord Sumner.
28. *Re Boardwalk Merchandise Mart Ltd. and the Queen* (1973), 31 D.L.R.(3d) 162 at 180.
29. [1917] A.C.406 at 442, *per* Lord Parker.
30. For example, *Re Shaw* [1957] 1 W.L.R.729; [1957] 1 All E.R.745 ; *Re Cooperative College of Canada and Saskatchewan Human Rights Commission* (1975), 64 D.L.R.(3d) 531 ; *Re Knight* [1937] O.R.462 ; *Perpetual Trustees Estate and Agency Company of New Zealand v. League of Nations Union of New Zealand* [1941] N.Z.L.R.1065 ; *Knowles v. Commissioner of Stamp Duties* [1945] N.Z.L.R.522 ; *McGovern v. Attorney General supra*, footnote 7.
31. Another example is *The Public Trustee v. Nolan* (1943), 43 State Reports (N.S.W.) 169. There, income was directed to be held on trust "to erect a carillon on similar lines to the one at Avalon Catalina Island, California, at such place on Sydney Harbour, or on the foreshores thereof, or at Park Hill, North Head, as my trustees may deem expedient, or to join with any other person or persons or public body in erecting such carillon, and it is my desire that such carillon should be played if possible on the arrival of and to welcome oversea liners coming into Sydney Harbour". The Supreme Court of New South Wales held that the trust was void because it

infringed the 'beneficiary principle'. Authorities cited were *Morice v. The Bishop of Durham*, *supra*, footnote 8 and *Bowman v. The Secular Society*, *supra*, footnote 14. *Per* Roper, J.: "That purported trust, being non-charitable and not for the benefit of any ascertainable *cestui que trust* fails and is void" (At 172).

32. *Supra*, footnote 15. Affirmed, *sub nom. Chichester Diocesan Fund and Board of Finance v. Simpson* [1944] A.C.341; [1944] 2 All E.R.60.
33. *Supra*, pp 107-114.
34. [1941] Ch.253 at 259, *per* Sir Wilfrid Greene, M.R.
35. *Ibid.*
36. *Chichester Diocesan Fund and Board of Finance v. Simpson*, *supra*, footnote 32.
37. *Ibid.*, at 349, *per* Lord Macmillan.
38. *Ibid.*, at 371, *per* Lord Simonds.
39. [1949] Ch.498; [1949] 1 All E.R.1100.
40. [1949] Ch.498 at 501.
41. *Supra*, pp 114-116.
42. [1949] Ch.498 at 502. Italics added.
43. The authors of Hanbury & Maudsley, *op.cit.supra*, footnote 11, agree, p 429. See also, Potter, "Trusts for Non-Charitable Purposes", (1949) 13 Conv. (N.S.)418.
44. For example, *Carne v. Long* (1860), 2 De G.F.& J.75; 29 L.J.Ch.503; 8 W.R.570; 45 E.R.550 ; *Thomson v. Shakespear* (1860), 1 De G.F.& J.399; 29 L.J.Ch.276; 8 W.R.265; 45 E.R.413 ; *Re Dutton* (1878), 4 Ex.D.54; *Re Amos* [1891]3 Ch.159 ; *Re Nottage* [1895] 2 Ch.649; 64 L.J.Ch.695 ; *Re Swain* (1908), 99 L.T.R.604 ; *Re Clifford* [1912] 1 Ch.28; 81 L.J.Ch.220; (1912), 106 L.T.R.14 ; *Macaulay v. O'Donnell* [1943] Ch.435n ; *Re Wightwick's Will Trusts* [1950] Ch.260; [1950] 1 All E.R.689 ; *Leahy v. Attorney-General for New South Wales* [1959] A.C.457; [1959] 2 W.L.R.722; [1959] 2 All E.R.300.
45. For example, Morris & Leach, The Rule Against Perpetuities, 2nd.ed. (London: Stevens, 1962), pp 316-317 ; Widdows, "Trusts in Favour of Associations and Societies : *Re Lipinski's Will*", (1977), 41 Conv. (N.S.)179 ; Hart, "Some Reflections on the Case of *Re Chardon*", (1937) 53 L.Q.R.24, pp 35-52 ; *per* Cross, J. in *Neville Estates v. Madden* [1962] Ch.832; [1961] 3 W.L.R.999; [1961] 3 All E.R.769 at 779 ; Ford, Unincorporated Non-Profit Associations (Oxford : Clarendon, 1959), pp 27-28.
46. *Per* Sir Montague E. Smith in *Yeap Cheah Neo v. Ong Cheng Neo* (1875) L.R.6 P.C.381 at 394.

47. For example, in *Carne v. Long*, *supra*, footnote 44, the Lord Chancellor's concern was not merely that the fund was rendered inalienable (which alone was sufficient ground for striking down the gift) but that it would be inalienable for longer than the period of a life in being, plus twenty-one years - the perpetuity period relevant to, and borrowed from, remoteness of vesting rules.
48. *Supra*, footnote 44.
49. [1936] Ch.520; 105 L.J.Ch.257; [1936] 2 All E.R.93.
50. [1936] 2 All E.R.93 at 99.
51. For example, *Re Dutton*, *supra*, footnote 44 ; *Re Clarke* [1901] 2 Ch.110; 70 L.J.Ch.631.
52. *Re Dutton*, *ibid*.
53. For example, *Carne v. Long*, *supra*, footnote 44.
54. As in, for example, *Re Drummond* [1914] 2 Ch.90; 83 L.J.Ch.817 : a gift to trustees to hold on trust for an old boys' club, to be utilised as the club's committee should think best for the school and the club ; *Re Prevost* [1930] 2 Ch.383; 99 L.J.Ch.425 : a bequest to the trustees of the London Library on trust for the general purposes of the library, including the benefit of the staff.
55. *Supra*, footnote 15. See generally, Marshall, "The Failure of the Astor Trust", (1953) 6 C.L.P.151 ; Leigh, *op.cit.supra*, footnote 13.
56. [1952] 1 All E.R.1067 at 1074-1075.
57. *Supra*, pp 107-109.
58. This is an adaptation to purpose trusts of the test of certainty in discretionary trusts laid down in *McPhail v. Douulton* [1971] A.C.424; [1970] 2 W.L.R.1110; [1970] 2 All E.R.228. See further, *infra*, pp 152-157.
59. *Supra*, footnote 9.
60. *Per Roxburgh, J.* [1952] 1 All E.R.1067 at 1075.
61. W. N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1913) 23 Yale L.J.16; (1917) 26 Yale L.J.710.
62. [1952] 1 All E.R.1067 at 1071. Italics added.
63. *Supra*, footnote 8.
64. *Pettingall v. Pettingall* (1842), 11 L.J.Ch.176 ; *Mitford v. Reynolds* (1848), 16 Sim.105; 17 L.J.Ch.238; 60 E.R.812 ; *Re Dean* (1889), 41 Ch.D.552; 58 L.J.Ch.693 ; *Pirbright v. Salwey* [1896] W.N.86 ; *Re Hooper* [1932] 1 Ch.38; 101 L.J.Ch.61 ; *Re Thompson* [1934] Ch.342; 103 L.J.Ch.162. Discussed, *infra*, pp 220-226.

65. [1952] 1 All E.R.1067 at 1071.
66. *Ibid* at 1074. See, Evans, "Purpose Trusts - Further Refinements", (1969) 32 Mod.L.R.96. Note that Messrs. Morris & Leach include (admittedly with reservations) in their sub-classification of these so-called "anomalous" exceptions the case of valid trusts for the purposes of unincorporated associations (discussed *supra*, pp 117-121) Morris & Leach, *op.cit.supra*, footnote 45, p 310. The learned gentlemen list the following exceptions to the 'beneficiary principle' : "(1) trusts for the erection or maintenance of monuments or graves; (2) trusts for the saying of masses, in jurisdictions where such trusts are not regarded as charitable; (3) trusts for the maintenance of particular animals; (4) trusts for the benefit of unincorporated associations (though this group is more doubtful); (5) miscellaneous cases".
67. *Supra*, footnote 8.
68. *Supra*, footnote 14.
69. *Supra*, footnote 39.
70. It is always possible that beneficiaries may choose *not* to initiate proceedings.
71. Note, however, that *Re Astor* has also been distinguished on the 'beneficiary principle' point : *Re Denley's Trust Deed*, *supra*, footnote 6; *Re Lipinski's Will Trusts* [1976] Ch.235; [1976] 3 W.L.R.522; [1977] 1 All E.R.33. *Per* Oliver, J. [1977] 1 All E.R.33 at 43-44. Discussed *infra* pp 132-150.
72. [1960] Ch.232; [1959] 3 W.L.R.799; [1959] 3 All E.R.562.
73. [1952] 1 All E.R.1067 at 1071-1074. *Supra*, pp 125-126.
74. [1959] 3 All E.R.562 at 568.
75. *Ibid*, at 570-571.
76. Note, however, that Lord Evershed, M.R. used rather an interesting case in the course of his judgment. The nature of the testamentary gift in *Re Catherall* (unreported) was very similar to that in *Endacott*, yet the trust was upheld. Its religious overtones might have attracted a charitable label. However, Roxburgh, J. (of *Re Astor* fame) seemed prepared to uphold it even as a non-charitable purpose trust, despite the absence of human beneficiaries : "It was argued whether this is a charitable disposition. I have reached no concluded opinion on that. Distinctions are very fine. I could construe the words as meaning such purposes (of a religious character) as they may think fit, being suitable as a memorial; that is charitable; or I could construe the words as meaning any purpose suitable as a memorial; that is non-charitable. But there is another ground on which this trust can be upheld. It is not perpetual. I went into these cases in *Re Astor's Settlement Trusts*. Such a trust as this is valid whether charitable or not. Purpose must embody a definite concept". (Quoted by Lord Evershed in *Re Endacott*

- [1959] 3 All E.R.562 at 569.
77. *Supra*, footnote 30.
78. *Ibid*, at 753-757.
79. *Bowman v. The Secular Society*, *supra*, footnote 14, and pp 109-114.
80. [1957] 1 All E.R.745 at 758.
81. Constrained by *Re Astor* from upholding the bequest as a trust, Harman, J. had wanted to hold it valid as a power (at 759). Though there could be no guarantee of performance, at least this would more closely approximate to the testator's intentions than total failure. There was strong authority against this course of action, however, so the bequest failed. Nevertheless, this *was* what happened in the end, backed up by an undertaking from the trustees that they would carry out the purposes. This was achieved by a compromise, the validity of which was affirmed by the Court of Appeal : *Re Shaw* [1958] 1 All E.R.245.
82. *Supra*, footnote 44. Discussed fully, *supra*, pp 33-50.
83. New South Wales Conveyancing Act 1919-1954, s.37D.
84. [1959] A.C.457 at 478-479.
85. [1980] 3 All E.R.42; [1980] T.R.143. Affirmed [1982] 1 W.L.R.522; [1982] 2 All E.R.1
86. [1980] 3 All E.R.42. *Per* Vinelott, J. at 60. Italics added.
87. Discussed in the preceding chapters, pp 33-78.
88. Discussed *supra*, pp 33-50 & pp 51-78.
89. *Supra*, footnote 15.
90. *Supra*, footnote 73.
91. *Supra*, footnote 44.
92. *Supra*, footnote 6. See generally, Evans, *op.cit.supra*, footnote 66 ; McKay, "Trusts for Purposes - Another View", (1973) 37 Conv.(N.S.) 420.
93. *Supra*, pp 121-127.
94. [1969] 1 Ch.373 at 382-383.
95. *Ibid* at 383.
96. *Ibid* at 383-384.
97. Specifically, *Re Lipinski's Will Trusts*, *supra*, footnote 71 ; *Re*

- Grant's Will Trusts* [1980] 1 W.L.R.360; [1979] 3 All E.R.359.
98. [1962] Ch.78; [1961] 3 W.L.R.924; [1961] 3 All E.R.588.
99. United Kingdom Charitable Trusts (Validation) Act 1954, 2 & 3 Eliz.II, c.58, s.1(1).
100. [1962] Ch.78 at 91 and 96, respectively.
101. [1953] Ch.647; [1953] 3 W.L.R.183; [1953] 2 All E.R.350.
102. United Kingdom Settled Land Act 1925, 15 & 16 Geo.V, c.18, s.106.
103. [1896] 1 Ch.507; 65 J.L.Ch.298; 44 W.R.441.
104. [1969] 1 Ch.373 at 383-384.
105. See, McKay, *op.cit.supra*, footnote 92.
106. For an attempt at answering them, see, McKay, *op.cit.supra*, footnote 92.
107. [1969] 1 Ch.373 at 383.
108. Another alternative is that it creates a fiduciary power - not a trust at all. Another suggestion is that the *Denley*-type trust represents a convergence of private and purpose trusts : Lovell, "Non-Charitable Purpose Trusts - Further Relections", (1970) 34 Conv.(N.S.)77, pp 78-80.
109. [1969] 1 Ch.373 at 383 C.
110. *Ibid* at 383 G.
111. This is evidently the view of McKay, "Re Lipinski and Gifts to Unincorporated Associations", (1977) 9 V.U.W.L.R.1, pp 8-12.
112. [1841] Cr.& Ph.240; 10 L.J.Ch.354. See also, *Re Chardon* [1929] Ch.464; 97 L.J.Ch.289 ; *Re Smith* [1928] Ch.915; 97 L.J.Ch.441 ; *Re Nelson* [1928] Ch.920n; 97 L.J.Ch.443n ; *Re Beckett's Settlement* [1940] Ch.279; 109 L.J.Ch.81 ; *Re A.E.G. Unit Trust (Managers) Deed* [1957] Ch.415; [1957] 3 W.L.R.95; [1957] 2 All E.R.506. For a review of the rule's application in Canada, see, Waters, Law of Trusts in Canada (Toronto: Carswell, 1974), pp 811-829.
113. Oliver, J. demonstrates this result in *Re Lipinski's Will Trusts*, *supra*, footnote 71 [1977] 1 All E.R.33 at 42-46.
114. For a brief discussion of this topic, see *infra*, pp 157-162.
115. *Supra*, footnote 58.
116. *Per* Lord Wilberforce [1970] 2 All E.R.228 at 246. For a recent and thorough analysis of the certainty requirement, see, Emery, *op.cit.supra*, footnote 11. See also, *infra*, pp 152-157.

117. [1955] Ch.20; [1954] 3 W.L.R.438; [1954] 3 All E.R.120.
118. As does Rickett, "Unincorporated Associations and their Dissolution", (1980) 39 C.L.J.88, pp 104-106.
119. Discussed *supra*, pp 123-124.
120. *Supra*, footnote 97. Discussed *supra*, pp 64-66. Criticised on this issue in, Green, "'Love's Labours Lost': A Note on Re Grant's Will Trusts", (1980), 43 Mod.L.R.459, p 461.
121. [1979]3 All E.R.359 at 366-367.
122. *Ibid* at 368.
123. *Ibid*.
124. The first interpretation discussed above, pp 140-143. See also, McKay, *op.cit.supra*, footnote 111.
125. Rickett, *op.cit.supra*, footnote 118.
126. *Supra*, footnote 71. See also, *supra*, pp 58-59.
127. [1977] 1 All E.R.33 at 43.
128. *Ibid* at 44.
129. *Ibid*, per Oliver, J. at 45.
130. *Ibid* at 45-46.
131. *Re Denley*, *supra*, footnote 6. Per Goff, J. [1969] 1 Ch.373 at 384.
132. *Ibid* at 382-383.
133. The distinction was rejected in that context in *Re Recher's Will Trusts* [1972] Ch.526; [1971] 3 W.L.R.321; [1971] 3 All E.R.401. See [1972] Ch.526 at 542; and *Re Grant's Will Trusts*, *supra*, footnote 97 [1979] 3 All E.R.359 at 365. See *infra*, pp 236-243.
134. As discussed *supra*, pp 139-140.
135. As did Rickett, "Mr. Justice Vinelott on Unincorporated Associations and Gifts for Non-Charitable Purposes", (1982) 12 V.U.W.L.R.1, p 10.
136. See, Green, *op.cit.supra*, footnote 120.
137. See *Bacon v. Pianta* (1966), 114 C.L.R.634. For criticism of the decision, see, Hogg, "Testamentary Dispositions to Unincorporated Associations", (1971-1972) 8 Mel.U.L.Rev.1.
138. For example, *Neville Estates v. Madden*, *supra*, footnote 45, [1961] 3 All E.R.769 at 779 ; *Leahy v. Attorney-General for New South*

*Wales*, *supra*, footnote 44 [1959] 2 All E.R.300 at 306 ; *Re Recher's Will Trusts*, *supra*, footnote 133 [1971] 3 All E.R.401 at 404.

139. *Supra*, pp 125-131.
140. [1970] A.C.508; [1968] 3 W.L.R.1127; [1968] 3 All E.R.785.
141. [1970] A.C.508 at 524.
142. See also the discussion, *supra*, pp 123-124.
143. For example, *McPhail v. Doulton*, *supra*, footnote 58 ; *Re Baden's Deed Trusts (No.2)* [1973] Ch.9; [1972] 3 W.L.R.250; [1972] 2 All E.R. 1304 ; *Re Manisty's Settlement Trusts* [1974] Ch.17; [1973] 3 W.L.R. 341; [1973] 2 All E.R.1203 ; *Re Locker's Settlement Trusts* [1977] 1 W.L.R.1323; [1978] 1 All E.R.216 ; *Re Barlow's Will Trusts* [1979] 1 W.L.R.278; [1979] 1 All E.R.296 ; *Re Hay's Settlement Trusts* [1982] 1 W.L.R.202 ; [1981] 3 All E.R.786.
144. For example, Hopkins, "Certain Uncertainties of Trusts and Powers", (1971) 29 C.L.J.68 ; Harris, "Trust, Power and Duty", (1971) 87 L.Q.R.31 ; McKay, "Re Baden and the Third Class of Certainty", (1974) 38 Conv. (N.S.)269 ; Emery, *op.cit.supra*, footnote 11.
145. A classification used by Emery, *op.cit.supra*, footnote 11.
146. Discussed presently, *infra*, pp 157-163.
147. *Per* Lord Wilberforce, *McPhail v. Doulton*, *supra*, footnote 58 [1971] A.C.424 at 451.
148. *McPhail v. Doulton*, *ibid*, overruling *Inland Revenue Commissioners v. Broadway Cottages Trust*, *supra*, footnote 117, which had held that a complete list of beneficiaries was necessary in both cases. Also discussed, *supra*, pp 142-143.
149. *Per* Sachs, L.J. in *Re Baden's Deed Trusts (No.2)*, *supra*, footnote 143 [1973] Ch.9 at 20.
150. *Cf.* Megaw, L.J., *ibid* at 24 and Stamp, L.J., *ibid* at 27-28.
151. *Per* Lord Upjohn in *Re Gulbenkian's Settlement Trusts*, *supra*, footnote 140 [1970] A.C.508 at 524.
152. *Per* Lord Wilberforce in *McPhail v. Doulton*, *supra*, footnote 58 [1971] A.C.424 at 457.
153. *Op.cit.supra*, footnote 11, p 558.
154. *Per* Lord Wilberforce in *McPhail v. Doulton*, *supra*, footnote 152.
155. See *Blausten v. Inland Revenue Commissioners* [1972] Ch.256 discussed in *Re Hay's Settlement Trusts*, *supra*, footnote 143.
156. (1883), 11 L.R.Ir.Eq.236.

157. *Ibid* at 246.
158. (1683), 2 Swan.454; 3 Ch.Cas.1; 22 E.R.931.
159. Gray, The Rule Against Perpetuities, 4th.ed., ed. R. Gray (Boston: Little, Brown & Co., 1942), § 201.
160. *Leake v. Robinson* (1817), 2 Mer.363; 35 E.R.979. See, Morris & Leach, *op.cit.supra*, footnote 45, pp 101 ff ; Leach, "The Rule Against Perpetuities and Gifts to Classes", (1938) 51 Harv.L.R.1329.
161. For example, United Kingdom Perpetuities and Accumulations Act 1964, c.55; in Canada, for example, British Columbia Perpetuity Act, R.S.B.C. 1979, c.321; in Australia, for example, Western Australia Law Reform (Property, Perpetuities and Succession) Act 1962, No.83 - now Property Law Act 1969, No.32, Pt.xi; New Zealand Perpetuities Act 1964, No.47. For details of reform enacted in other jurisdictions see, Maudsley, The Modern Law of Perpetuities (London : Butterworths, 1979), pp 247-256.
162. United Kingdom Act, s.3(1). Parallel provisions : British Columbia Act, ss.4, 5; New Zealand Act, s.8; Western Australia Act, s.7.
163. United Kingdom Act, s.3(5) (a) & (b) (i). Parallel provisions : British Columbia Act, s.6; New Zealand Act, s.8(4) & (5); *cf.* Western Australia Act, s.7(3).
164. United Kingdom Act, s.3(4) (a).
165. *Ibid*, s.3(4) (b).
166. *Ibid*, s.3(5) (b) (i).
167. *Ibid*, s.3(4) (a). Italics added.
168. *Supra*, pp 157-158.
169. United Kingdom Act, s.4(4). Parallel provisions : British Columbia Act, s.8(2); New Zealand Act, s.9(4); Western Australia Act, s.10.
170. United Kingdom Act, s.15(5). Parallel provisions : British Columbia Act, s.25, B.C.Regs.464/78, January 1, 1979; Western Australia Act, s.3(1), December 6, 1962; New Zealand Act, s.4(1), November 11, 1964.
171. United Kingdom Act, s.3(1). Parallel provisions : British Columbia Act, s.13; New Zealand Act, s.8(1).
172. It appears that the United Kingdom legislation has been analysed by the superior courts only in the following cases: *Re Holt's Settlement* [1969] 1 Ch.100; [1968] 2 W.L.R.653; [1968] 1 All E.R. 470 ; *Re Thomas Meadows & Co.Ltd. and Subsidiary Companies (1960) Staff Pension Scheme Rules* [1970] 3 W.L.R.524; [1971] 1 All E.R.239.
173. Morris & Wade, "Perpetuities Reform at Last", (1964) 80 L.Q.R.486, p 534.

174. This problem may be solved in part by the members' contract of association which may compel members to utilise funds given directly or on trust in a specified manner or be sued for breach of contract in default. For the operation, advantages and disadvantages of this mechanism, see *supra*, pp 51-78. It is emphasised, however, that any guarantee secured to the donor by this method sounds purely in contract; it has nothing to do with the initial mechanism of donation by way of trust; it is superimposed subsequently by virtue of the association's constitution and by the nature of the association itself.

*PART THREE*

THE CONTROL ANALYSIS

Part One explained the nature of the problem posed by the fact that an unincorporated association does not have the legal capacity itself to be the recipient of a donation. Various analyses are nevertheless available in the current law of the mechanism whereby donations can be made to an unincorporated association. The purpose of Part Two was to outline nine such analyses. The aim of Part Three is to expound an alternative, and more satisfactory, solution to the problem.

As was explained in Part Two, none of the nine analyses of gifts to unincorporated associations which have been formulated from time to time is satisfactory. At present, the common law has no analysis which provides a donor with both of the two results for which he aspires : that is, both the validity of his gift to the unincorporated association, *and* a guarantee that his gift will effectively benefit the association, and no one else.

The Absolute Gift Analysis entails that the gift take effect as one to the current members of the association who are then under no more than a moral obligation to utilise the funds for the purposes of the association. The same is true of a gift on trust for the current members of the association. A gift on trust for present *and* future members of the association is likely to fail in the current state of the law. Even if this were not the case, such an analysis of a gift to the association would be unsatisfactory in that, although it introduces an element of continuity to the benefit derived from the gift which is lacking in the Absolute Gift Analysis and the analysis of the gift as one on trust for only the present members of the association, again the recipients of the gift are merely under moral obligations to use the fund to the advantage of the association of which they are members. There is no legal guarantee of benefit to the association

itself. If the Contract Analysis is used, again the actual recipients of the gift are the present members of the association and it is only by virtue of personal contractual obligations that they are restrained from using the donated funds for their own gain. This results in both conceptual and practical weaknesses, and by no means guarantees that the intended recipient - the association itself - will benefit from the donation. Generally speaking, the Mandate Theory suffers from the same defect and provides only the limited guarantee of due performance furnished by a contractual bond. Furthermore, each of the four Burrell Theories of Donation is available only in the case of *inter vivos* gifts and provides no general solution to the problem of gifts to unincorporated associations.

It is to the law of trusts that one must turn to find an arrangement which guarantees performance of the specific terms of a gift. However, as was explained in Part Two, a trust for the non-charitable purposes of an unincorporated association shares the fate of all non-charitable purpose trusts in the current state of the law. Such trusts are valid only in narrowly defined, exceptional cases which are inadequate for general use. In all other cases, a non-charitable purpose trust fails because it has no human beneficiaries.

Part Three therefore offers an analysis which would permit a gift on trust for the non-charitable purposes of an unincorporated association to be valid, thus furnishing the guarantee of performance in favour of the association itself which all current analyses lack. It is an uncontested and basic principle that a trust must be enforceable to be valid. Having satisfied the requirements of certainty and compliance with the rule against perpetuities, a non-charitable trust must also contain some mech-

anism whereby the duties of its trustees can be enforced. This thesis in no way questions the validity of the sentiment that "it is not possible to contemplate with equanimity the creation of large funds devoted to non-charitable purposes which no court and no department of State can control, or, in the case of maladministration, reform" <sup>1</sup>. However, the 'beneficiary principle', which has prevailed in the common law for over thirty years, stands for the proposition that this requirement of enforceability can be satisfied *only* by the presence of direct beneficiaries of the trust. It will be argued that this takes too restricted a view of the need for control over trustees, and that the 'beneficiary principle' should be supplanted by the so-called 'control principle'.

In brief, the 'control principle', like the 'beneficiary principle', acknowledges that a trust must be enforceable. As compared with the 'beneficiary principle', however, it argues that the requisite element of control can be supplied by any one of numerous classes of persons other than direct beneficiaries, provided that they potentially have a claim over, or interest in, the subject-matter of the trust. It will be contended that such persons include the following categories, each of which will be discussed in the pages which follow :-

- i. Direct beneficiaries of the trust: that is, traditional *cestuis que trust* <sup>2</sup>;
- ii. Factual beneficiaries of the trust: that is, individuals who, though not direct beneficiaries, nevertheless enjoy a *de facto* advantage from the existence and due administration of the trust <sup>3</sup>;
- iii. The settlor who creates an *inter vivos* trust and who, being identifiable, stands to regain

the funds by way of reverter on resulting trust <sup>4</sup>;

- iv. The representatives of the estate of a testator who creates a testamentary trust who likewise stand to receive the funds under the resulting trust doctrine <sup>5</sup>;
- v. A testator's legatees who may benefit by way of resulting trust <sup>6</sup>;
- vi. Those entitled on the intestacy of a deceased donor who creates the trust in question over his residuary estate with no further provision for undisposed-of funds <sup>7</sup>;
- vii. The Crown, in the case of trusts created by anonymous or unidentifiable persons, and so on, because of the notion of *bona vacantia* <sup>8</sup>;
- viii. The residuary legatees or remaindermen (if any) named in the trust deed <sup>9</sup>.

It will be argued that each of the above classes of persons has standing to go to court and control the trustee in his dealings with the funds entrusted to him. The existence of any one individual within any of the above classes suffices to render the trust controllable. A gift on trust can therefore be valid even if the trust is a non-charitable purpose trust which lacks human beneficiaries. This use of the 'control principle' to analyse gifts which validly take effect by way of non-charitable purpose trust will be called the Control Analysis.

The Control Analysis as thus formulated is consistent with the basic principle that a trust must be enforceable. It is also desirable

as a matter of public policy in that, generally speaking, non-charitable purpose trusts are created to further causes which are at worst unobjectionable, and at best beneficial to society as a whole. It is submitted that the present attitude towards non-charitable purpose trusts stifles harmless displays of generosity without good reason.

Consistent as it may be with basic legal principle and policy, however, it will be acknowledged that the Control Analysis may run into practical problems. The objection can be validly made that, as a matter of practice and fact, certain of the above classes of persons in particular could not be relied upon to exert effective control over trustees. This may be so for either of two reasons: the expense of litigation may outweigh the potential financial advantage (if any) to the individual of due administration of the trust (classes iii, iv, vii); or the individual may enjoy a distinct financial benefit from *mal*administration of the trust (classes v, vi and viii, in certain circumstances). It will be admitted that such considerations are strong arguments against the validity of the 'control principle' as a general principle of the law of trusts and the feasibility of the Control Analysis as a satisfactory analysis of all gifts on non-charitable purpose trust.

In the specific area of donations to unincorporated associations, however, the objection loses its force entirely. This is because, to the classes ii through viii of potential controllers listed above, one can add the following in the case of a gift to an unincorporated association:-

ix. The members of the unincorporated association <sup>10</sup>.

It will be demonstrated that the members of an unincorporated association are in practice effective controllers of the trustees who hold funds on

trust for that association. Since this is so, the trust is enforceable. As a matter of legal principle, policy *and* practice, therefore, a gift on trust for the non-charitable purposes of an unincorporated association ought to be valid.

Above all, if a gift to an unincorporated association were interpreted in accordance with the Control Analysis, the analysis would suffer from none of the deficiencies observed in Part Two as inherent in all nine analyses discussed there. In the first place, as compared with the current analyses of gifts on non-charitable purpose trust, which is based on the 'beneficiary principle', under the Control Analysis the gift would be valid. Secondly, as compared with the Absolute Gift Analysis, the Contract Analysis and the analyses whereby the gift takes effect on trust for members, under the Control Analysis no legal rights over the donated funds would accrue to the association's members. Although the members might indirectly enjoy the advantage of membership of an enriched association, the benefit accrues to the association itself. Thirdly, as compared with the Burrell Theories of Donation, and (again) the Contract Analysis, under the Control Analysis enjoyment by the association of that benefit is guaranteed by the machinery and remedies of trusts law.

The discussion will proceed in three chapters. The first chapter will explain the nature and significance of the 'control principle' and its role within the Control Analysis. The second will demonstrate the operation of the Control Analysis as an analysis of *all* non-charitable purpose trusts. The third will deal specifically with the Control Analysis of gifts on trust for the non-charitable purposes of an unincorporated association.

FOOTNOTES : PART THREE, INTRODUCTORY COMMENTS

1. *Per* Roxburgh, J. in *Re Astor's Settlement Trusts* [1952] Ch.534; [1952] 1 T.L.R.1003; [1952] 1 All E.R.1067 at 1071.
2. *Infra*, pp 187-189.
3. *Infra*, pp 198-203.
4. *Infra*, pp 203-208.
5. *Infra*, pp 208-209.
6. *Infra*, pp 208-213.
7. *Ibid.*
8. *Infra*, pp 213-217.
9. *Infra*, pp 217-227.
10. *Infra*, pp 233-253.

## I. THE CONTROL PRINCIPLE

### 1. Introduction

In order to be valid, a trust must satisfy at least three major requirements. Its objects must be described with sufficient certainty <sup>1</sup>; it must comply with the rule against perpetuities <sup>2</sup>; and it must be enforceable. Throughout this chapter, it is assumed that the first two requirements have been met in any particular instance, and the emphasis falls totally on the requirement of enforceability.

The fact that the obligations of a trustee must be subject to enforcement by the courts of equity is a basic and fundamental principle of the law of trusts. The reason is simple <sup>3</sup> :

There can be no trust, over the exercise of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership, and not trust.

It is because the crucial word is "control" that the principle which demands a trust to be controllable is referred to here as the 'control principle'. This chapter will examine the meaning and nature of 'control' in this context.

It may be recalled <sup>4</sup> that the 'beneficiary principle' demands that a trust be subject to the control of direct human beneficiaries before it satisfies the requirement of enforceability. It will be argued that this is an overly-restrictive interpretation of the need for control and that the 'beneficiary principle' is, in fact, merely one illustration of the broader and more flexible 'control principle'. The 'control principle' will be formulated as follows : a trust which is otherwise valid will satisfy the

need for enforceability, even if it has no direct beneficiaries, provided that there is at least one identifiable person in existence who has sufficient interest in the operation of the trust that he may draw a court's attention to the trustees' conduct in relation thereto if the need arises. By re-examining the manner in which direct beneficiaries perform the necessary function of controlling the execution of a trust in their favour, it will be seen that exactly the same function can be performed by other individuals whose interest in the trust confers upon them the standing to exert control <sup>5</sup>.

## 2. The Need for Control

In the eyes of the law, when a trustee is appointed by a trust deed, will or declaration of trust and the property which is the subject-matter of the trust is transferred to him, the trustee becomes the legal owner of that property. The legal estate is vested in his name and he holds legal title. Yet, if the trust is valid, the law of trusts will guarantee the achievement of the stated aims of the settlor or testator in creating the trust. No contract need exist between the trustee and the settlor in the case of an *inter vivos* trust, nor between the trustee and the testator's personal representatives in the case of a testamentary trust. Furthermore, if the trust has direct beneficiaries, no agency relationship exists between them as principals and the trustee as agent. At no time is a trustee necessarily bound by contractual duties of this nature. How then, can the trust arrangement function to achieve the expressed purposes of the trust? How can there be any guarantee that the trustee will not exercise the legal rights and privileges which he enjoys as owner and divert the property to his own use?

The key lies in the notion of fiduciary obligation<sup>6</sup> :

Equity has intervened and not simply to prevent self-interested action. It has imposed a general obligation on the fiduciary *controlling* the manner in which he deals with and exercises his discretions.

The key word is "control". By conferring on a trustee the special status of fiduciary, equity has recognised the need for control over his ownership. "Control" is used above and throughout this discussion in its everyday, non-legal sense to denote a simple concept. In the words of the Shorter Oxford English Dictionary, to "control" someone means "to exercise restraint or direction upon the free action of" that person.

Therefore, control by the courts of equity over the trustee as legal owner, without which a trust would not validly exist, is achieved by the imposition of a fiduciary obligation upon the trustee by those courts. The statement that the trustee owns the trust property is only true to the extent that he is a fiduciary, since equity controls or restrains his free action in relation to the property. Without this control, the trustee's ownership would be absolute and he could divert trust funds to his own use. As a fiduciary, on the other hand, the trustee is restrained from dealing with the trust property as his own or otherwise in breach of the terms of the trust, both by controls implied by equity once the trust comes into being and by the specific and express limits set out in the trust deed or stated in the declaration of trust. The parameters of the trustee's ownership of trust property are thus determined by the extent and scope of equity's control. In sum, therefore, the 'control principle' stands for the proposition that, if an arrangement confers legal ownership on a person but lacks a mechanism of controlling that ownership, it is not a valid trust.

The principle is universal and holds true for both non-charitable and charitable trusts. Insofar as charitable trusts are concerned, it was pointed out at the very beginning of this thesis <sup>7</sup> that any detailed discussion of the law relating to charitable trusts would be omitted. This was because, in general, they stand quite apart, in a category of their own, and are given quite different treatment from trusts for purposes and people of a non-charitable nature <sup>8</sup>. Nevertheless, the presence of control over the actions of the trustees is as important to the validity of a charitable trust as it is to the validity of a non-charitable trust and a charitable trust can only be valid if it is subject to the control of the courts of equity. However, consistently with the preferential treatment accorded charitable trusts in recognition of their value to society and the State, a mechanism of control is automatically available via the Crown. The Master of the Rolls, Sir Wilfrid Greene, explained the position with clarity in *Re Diplock* <sup>9</sup>:

[T]he Crown, as *parens patriae* taking all charities under its protection, is in a position to enforce the trust; and therefore, although there may be no specified charitable beneficiary who can come to the Court and insist on having the trust performed, nevertheless the Attorney-General can appear and is entitled to insist on the trust being carried out, if necessary, by a scheme *cy pres*.

Equity's concern that the trust be under control is satisfied by the presence of someone who has rights of control over the arrangement.

In the case of non-charitable trusts, however, the identification of a method of control to satisfy the 'control principle' can be more problematic. The fact that the current law acknowledges that the existence of human beneficiaries provides adequate control is of little assistance unless the basis of their ability to control is understood. Again, it is submitted

that the key lies in the notion of fiduciary obligation. Of itself, the existence of an obligation is meaningless unless it is perfected by the existence of a corresponding right. In order to ascertain whether such a right exists in any particular case, the nature of the trustee's obligation must be examined more closely. It has been seen that the overriding obligation of a trustee as a fiduciary is to deal with the property to which he holds title in accordance with the terms of the trust, which allocate to numerous parties their respective interests in the trust property. If he broke his obligation and used the funds for his own benefit, that allocation would be upset. Therefore, it is submitted that each of those parties to whom interests have been allocated should have the right to prevent such an eventuality. They should be entitled not to have those interests impaired or interfered with by the trustee. Only if the existence of these rights can be found does the fiduciary obligation become enforceable and control over the trust become effective. Therefore it is only if persons holding such rights can be found that the 'control principle' is satisfied and the trust is valid.

That this is the true basis of the ability of direct beneficiaries to satisfy the 'control principle' will now be demonstrated.

### 3. Control by Direct Beneficiaries

S conveys land to X and Y on trust for his children, A,B and C to set up in business when they reach twenty-one. A,B and C are direct beneficiaries of the trust to whom potential interests in the trust property have been allocated. It is evident that, whatever else they may have<sup>10</sup>, they have a pecuniary interest in the trust property. If X and Y broke

their fiduciary obligations and sold the land to P, a *bona fide* purchaser of the legal estate for value without notice, A, B and C would suffer a pecuniary loss. They therefore have a right to restrain the trustees from dealing with the property otherwise than in accordance with the terms of the trust. This right gives them standing to go to court and exert control over them. *Inter alia*, they may ask for an injunction or, if the breach has already occurred, an account. The trust therefore contains a control mechanism and in this manner satisfies the 'control principle'. The trust is enforceable and valid.

It is unfortunate that the law of income tax - the "cuckoo in equity's nest"<sup>11</sup> - has caused some confusion in this area by redefining the position of the direct beneficiary within the trust arrangement. In *Baker v. Archer-Shee*<sup>12</sup>, for example, trustees were treated, not as legal owners of the securities that comprised the trust fund, but as a mere conduit for the passage of funds to the trust's beneficiary. As a result, the latter became taxable on the income received from the trust. This was equivalent to saying that the trustee was an agent of the beneficiary. This strikes at the very essence of trusteeship since it places the beneficiary, not the trustee, at the heart of the relationship. It makes the beneficiary the owner of the trust property, which destroys the whole concept of a trust<sup>13</sup>.

As Viscount Sumner stated in his dissenting judgment in *Baker v. Archer-Shee*<sup>14</sup> :

Lady Archer-Shee [the beneficiary]... does not, for income tax purposes, in my view own and is not entitled to any of the stocks, shares, securities or real property that form part of the ... trust estate. These belong to the trustee company ..... All that she has is a right, in the forum of the trustee and of the trust fund, to have the trust

executed in her favour under an order to be made for her benefit by the appropriate Court of equity.

As the 'control principle' asserts, the true position of the direct beneficiary of a trust is as a right-holder, capable of controlling the trustee in case of misapplication of funds, but otherwise merely the passive recipient of any benefits to which he is entitled. He can not instruct the trustees on matters involving the trust, nor can he become personally liable to third parties for the actions of the trustees. Any resemblances between the agent/principal relationship and the trustee/beneficiary relationship are amply outweighed by fundamental differences<sup>15</sup>.

It is therefore to be hoped that the view that a beneficiary holds a proprietary interest in the trust property itself which is administered for him by a trustee as a mere agent will be restricted to taxation cases, or even to the fact situation in *Baker v. Archer-Shee*, where the taxpaying beneficiary was solely entitled to the income which was the subject-matter of the trust<sup>16</sup>. Whenever the issue involves the working and supervision of the trust machinery, the direct beneficiary has merely a *spes* of ultimate ownership in the property derived from the allocation of interests expressed in the terms of the trust. Meanwhile he evidently has a pecuniary interest in the due administration of the trust and is thereby entitled to go to court and assert control over the trustee to ensure that he exercises faithfully and without negligence the administrative role held by him as a fiduciary. The direct beneficiary can thereby exercise the control rights that are essential to the trust arrangement. It is for this reason that a trust which has direct beneficiaries is valid.

#### 4. Control by Persons Other Than Direct Beneficiaries

When one examines the manner in which direct beneficiaries satisfy the 'control principle', it becomes apparent that this is not exclusive to direct beneficiaries alone. Their right to exercise control is derived from their pecuniary interest in the operation of the trust. The allocation of trust funds in the terms of the trust gave them an interest in ensuring that the trustees performed their fiduciary obligation not to interfere with that allocation. Such an interest suffices to give them standing to invoke the jurisdiction of a court of equity and thus control the trustee.

However, standing to appeal to the equitable jurisdiction of a court is not only accorded to those who, like direct beneficiaries, have a *species of ownership* in the trust property. Equitable principles are flexible and expansive, and "any attempt to found the jurisdiction to grant injunctions [for example] exclusively upon the existence of property or proprietary rights cannot be justified" <sup>17</sup>. Thus it is that Spry, speaking of injunctions but using words equally applicable to equitable remedies in general, says <sup>18</sup> :

[A] somewhat different basis for the grant of injunctions is found where what is in question is, not the prevention of a breach of the legal rights of the plaintiff, but rather a need to prevent the defendant from acting in a manner which is not in breach of his legal obligations but which is nonetheless *unconscionable*, as being contrary to established equitable principles or doctrines. Doctrines of this nature are seen in application in the rules relating to the administration of trusts, in the rules relating to fiduciary relationships .....

Since a trustee is under a fiduciary obligation not to interfere with the allocation of interests specified in the terms of the trust, any such interference in breach of that obligation must surely be considered "unconscionable". A court of equity would therefore grant a remedy to any person affected by such unconscionable behaviour. This includes *all* those whose

pecuniary interests are affected by the existence of the trust and not merely those who are direct beneficiaries of the trust.

It will be demonstrated in the next chapter in the context of a gift on trust for a non-charitable purpose, that the actions of the trustee affect the potential pecuniary interests of many individuals, including the donor and the various persons who stand to benefit, either after the trust has duly run its course or if it fails for some reason. As such, they are as entitled to be granted standing to control the trustees as are the direct beneficiaries of a trust, and, as Lawson says <sup>19</sup> "ubi remedium ibi jus : where there's a remedy there's a right". In other words, it is submitted that the fact that these individuals are entitled to invoke the courts' remedial equitable jurisdiction to remedy an unconscionable situation reveals that they possess rights of control. Their pecuniary interests in the execution of the trust give them a right to enforce the trustee's fiduciary obligation to deal with the trust property legally and in accordance with the terms of the trust. His obligation is thus rendered meaningful and he is effectively subject to control. In this manner, the 'control principle' is satisfied, and the trust should be considered enforceable and therefore valid.

In sum, it is submitted that the basic principle that a trust must be enforceable to be valid can be complied with in exactly the same manner by persons other than direct beneficiaries as it is when direct beneficiaries are present. A trust which is otherwise valid will satisfy the need for enforceability, even if it has no direct beneficiaries, provided that there is at least one identifiable person in existence who has sufficient pecuniary interest in the operation of the trust that he can be said to hold a right

of control over the trustee. Furthermore, it is argued that he has a sufficient pecuniary interest if he is presently or potentially affected by the allocation of funds, stipulated by the terms of the trust. It is the terms of the trust that define the trustee's fiduciary obligation of which control is essential.

The next chapter will test this analysis in the context of non-charitable purpose trusts by examining the position of several categories of person who have interests in such trusts.

#### 5. The Nature of the Control Exercised

The re-examination of the role of the direct beneficiaries of a trust in the context of the 'control principle' raises a few points about the nature of the control which they exercise which should be clarified. *Firstly*, it has been said that, whenever a trustee acts, or fails to act, in such a way that he breaks a term of the fiduciary obligation, the persons whose pecuniary interests are thereby affected have standing to ask that the trustee be controlled or restrained. However, it should be emphasised that this need not actually happen before the trust can be declared valid. The potential for control, *should* such an eventuality at some time occur, is sufficient to enable a valid trust to exist, assuming that all other requirements for a valid trust have been complied with. Likewise, if a person whose pecuniary interest has been damaged by the trustee's actions chooses not to go to court in vindication of this right of control, such inaction does not invalidate the trust. The possibility that the direct beneficiaries of a trust might not, in case of breach, enforce their rights against the trustee has always existed, yet has never led to the suggestion

that the trust is invalid. Take the example, used by Maitland, of a trust which he sets up by paying over to trustees a sum of money upon trust for his son<sup>20</sup>. As Maitland says :

[M]y son is the *cestui que trust*, and this trust may be perfectly constituted although he knows nothing about it. He perhaps is a baby in arms, or perhaps he is in Australia, or even perhaps he is unborn, for you may have a trust for an unborn person or an unascertained person. Here it can not be said that *cestui que trust* places any trust or reliance in the trustee.

The possibility of control by identifiable individuals is enough for validity *ab initio*.

*Secondly*, the fact that control by a pecuniary interest-holder may not occur does not turn the trust into a mere power<sup>21</sup>. The essential difference between the two phenomena is that a trust is imperative whilst a power is permissive. A trust retains its imperative nature even if no one takes the steps necessary to compel performance by the trustee. The nature of the arrangement can not depend on the chance that someone may or may not commence litigation. The important fact is that, *should* the operation of the trust be brought to the attention of the court, the trustee, if found to be out of line, will be commanded to perform his fiduciary obligations.

*Thirdly*, the court should be willing to exercise general control of both a positive and a negative nature over the trustee<sup>22</sup>. In other words, once its attention has been drawn to some problem in relation to the administration of the trust, it should not feel restricted to giving only the remedy requested by the individual who happens to come to court (assuming he has established his entitlement). It should oversee the trust in general and make whatever orders it considers appropriate. For example, take

the case of a fund transferred to trustees S and T to invest and pay the income thereon to A, B and C until they marry, with distribution of the capital thereafter amongst X, Y and Z. If X goes to court and complains that the trustees' mode of investment is eroding the capital to which he may one day become entitled, he may qualify for and get an injunction. However, if at the same time, on examining the operation of the trust, the court notices that the trustees are depriving A, B and C of their full entitlement by unauthorised payments to T, it should also order T to account to A, B and C. The mere fact that the direct beneficiaries, A, B and C, are sitting on their rights and are not before the court as plaintiffs should not prevent the court from exercising general equitable control over its fiduciary relationship with S and T<sup>23</sup>.

## 6. Conclusion

It has been argued that the 'control principle' merely restates the basic principle of trusts law that a trust must be enforceable. Under the 'control principle', the fiduciary obligation imposed by equity on a trustee must be converted into an effective control mechanism by the existence of persons who are entitled to enforce it. An otherwise valid trust is enforceable if there is at least one person who has the standing to exercise this control over the trustee. Direct beneficiaries of the trust are merely one example of the many classes of persons who fit this description and render a trust controllable and therefore valid. The 'control principle', thus formulated, is the basis of the Control Analysis of gifts on non-charitable purpose trust which follows.

FOOTNOTES : CHAPTER I

1. Discussed *supra*, pp 107-108, pp 123-124.
2. Discussed *supra*, pp 117-121.
3. *Morice v. The Bishop of Durham* (1804), 9 Ves.Jr.399; 32 E.R.656. Affirmed (1805), 10 Ves.Jr.522; 32 E.R.947. Discussed *supra*, pp107-109. *Per* Sir W. Grant, (1804),9 Ves.Jr.399 at 404-405.
4. See *supra*, pp 125-126.
5. See also, Harris, "Trust, Power and Duty", (1971) 87 L.Q.R.31, pp 36-39, pp 53-57.
6. Finn, Fiduciary Obligations (Sydney: The Law Book Company Limited, 1977) p 8. Italics added.
7. *Supra*, p 7.
8. See generally, Hanbury & Maudsley, Modern Equity, 11th.ed., eds. R. H. Maudsley & J. E. Martin (London: Stevens, 1981), pp 447-452.
9. [1941] 1 Ch.253 at 259.
10. For a detailed discussion of the position of beneficiaries, see, Waters, "The Nature of the Trust Beneficiary's Interest", (1967) 45 Can.Bar Rev.219.
11. Waters, "The Law of Trusts in the 80s", (1980-1981) 7 E.T.R.27, p 32.
12. [1927] A.C.844; 96 L.J.K.B.803.
13. *Cf. supra*, pp 184-185.
14. [1927] A.C.844 at 856.
15. See, Fridman, The Law of Agency, 4th.ed. (London: Butterworths, 1976), pp 15-18; Waters, *op.cit.supra*, footnote 11, pp 38-50.
16. As in *Reid's Trustees v. Commissioners of Inland Revenue* [1929] S.C.439; 14 T.C.512, *per* Lord Sands, (1929), 14 T.C.512 at 528-529 ; *Re Young* [1942] V.L.R.4 ; *Stannus v. Commissioner of Stamp Duties* [1947] N.Z.L.R.1, *per* Callan,J. at 24. But *cf.* *M.N.R. v. Trans-Canada Investment Corp. Ltd.* [1955] 5 D.L.R.576; [1956] S.C.R.49, where its scope was in fact extended.
17. Spry, Equitable Remedies, 2d.ed. (London: Sweet & Maxwell, 1980), p 316.
18. *Ibid*, p 317. Italics added. See also, Kerr, Injunctions, 6th.ed.,

ed. J. M. Paterson (Florida: Gaunt, 1981), pp 506-512.

19. Lawson, Remedies of English Law, 2d.ed. (London: Butterworths, 1980), pp 1-2.
20. Maitland, Equity, 2d.ed.reprint (London: Cambridge University Press, 1969), p 44.
21. *Cf.* The solution to the problem offered by, Ames, "The Failure of the 'Tilden Trust'", (1891-1892) 5 Harv.L.Rev.389 ; Scott, "Trusts for Charitable and Benevolent Purposes" (1944-1945) 58 Harv.L.Rev. 548 ; and rejected by Gray, "Gifts for a Non-Charitable Purpose" (1901-1902) 15 Harv.L.Rev.509 ; Harman,L.J. in *Re Shaw* [1957] 1 W.L.R.729; [1957] 1 All E.R.745 ; Evershed, M.R. in *Re Endacott* [1960] Ch.232 at 246; [1959] 3 W.L.R.799; [1959] 3 All E.R.562. See *supra*, p 129, footnote 81.
22. *Cf.* McKay, "Trusts for Purposes - Another View", (1973) 34 Conv. (N.S.)420.
23. In anticipation of an objection that might be made to this suggestion, it is pointed out that this general control is *not* equivalent to the day-to-day supervision of trusts of which the courts are so wary.

## II. THE CONTROL ANALYSIS AND NON-CHARITABLE PURPOSE TRUSTS

### 1. Introduction

X settles funds on A and B on trust to pay the income therefrom for the purpose of beautifying the parking lots of Concrete City for as long as the law permits, and to resettle the capital at the end of that period on trust for his friends, Y and Z (who are parking lot attendants). Assuming for the sake of argument that the beautification of parking lots is a non-charitable purpose, in the current state of the law the trust would fail and the interests of Y and Z would be accelerated. However unobjectionable in terms of public policy the express intentions of X might be, they would be defeated. This is because *Re Astor's Settlement Trusts*<sup>1</sup> and the line of cases which followed it<sup>2</sup> have established the principle that trusts for non-charitable purposes must fail because they have no human beneficiaries. This so-called 'beneficiary principle' insists not merely that a trust be enforceable (a proposition with which there can be no dispute<sup>3</sup>) but that the element of enforceability can *only* be provided by the presence of direct human beneficiaries. In the above example, the 'beneficiary principle' is violated because there are no human beneficiaries of the trust, so the trust fails *ab initio*.

The 'control principle', on the other hand<sup>4</sup>, stands for the proposition that a trust, which satisfies the requirements of certainty and compliance with the rule against perpetuities, is valid provided that someone exists who has a pecuniary interest in the execution of the trust and who can therefore exercise control over the trustees. If this principle is used to analyse the validity of a non-charitable purpose trust (the

Control Analysis), the trust will not fail. As a matter of principle, it would be enforceable under the Control Analysis. This is because numerous classes of persons eligible to exercise control exist <sup>5</sup> in the law of trusts generally and only one class - direct beneficiaries <sup>6</sup> - is lacking in the specific case of non-charitable purpose trusts. Therefore, in any particular instance of a non-charitable purpose trust, at least one class will be available to supply the necessary control. Take the above example of X's settlement in favour of the beautification of parking lots. As will be demonstrated in this chapter, X, Y and Z and the citizens of Concrete City are all affected by the allocation of funds attempted by the trust and therefore have a pecuniary interest in controlling the activities of A and B, the trustees. Under the Control Analysis, the trust would, in principle, be valid.

Four classes of persons whose existence in principle can validate a non-charitable purpose trust <sup>7</sup> will be discussed: 'factual beneficiaries' <sup>8</sup>; the donor (or his estate) <sup>9</sup>; the Crown <sup>10</sup>; and residuary beneficiaries <sup>11</sup>. However, the discussion will reveal not only the operation of the Control Analysis in principle and its authoritative support, but also the practical problems to which it gives rise in many instances.

## 2. 'Factual Beneficiaries'

S donates funds to X and Y on trust to build and maintain a squash court for the use of law students at a named school for a specified period of time. Since it is assumed that this would not be considered a charitable trust <sup>12</sup> and since there are no direct human beneficiaries, S has created a non-charitable purpose trust.

*Re Denley's Trust Deed*<sup>13</sup> nevertheless held that such a trust would be valid, because it confers a factual benefit on individuals: hence the term 'factual beneficiaries'. In the above example, the factual beneficiaries are the law students. Although they have no *spes* of ownership in the trust fund (as compared with direct beneficiaries<sup>14</sup>), on the authority of *Re Denley*, the trust is enforceable by them and therefore valid.

Although such was not the express basis of the decision in *Re Denley*, the above conclusion can be readily explained in terms of the 'control principle'. Factual beneficiaries enjoy a *de facto* advantage from the trust's execution, and the pecuniary benefit of not having to pay for the privileges and rights which it confers. They are therefore affected by the allocation of funds effected by the trust and have interests in the due and proper, continued performance of their obligations by the trustees. In the above example, if X and Y closed down the squash court and sold the property in it to commercial concerns, in breach of their fiduciary obligations, the factual beneficiaries of the trust would suffer some deprivation. Any such misapplication of funds or other breach of trust would be "unconscionable"<sup>15</sup>. This suffices to give the factual beneficiaries standing for the duration of the trust to go to court and assert their rights of control to secure proper performance of the trustees' obligations should they feel so inclined<sup>16</sup>. As a matter of principle, equity is satisfied that the possibility of control in this manner exists *ab initio* and that the trust is under surveillance. From the practical point of view, it is more likely than not that factual beneficiaries would indeed exercise their rights of control in such a situation. The continuation of the advantages which they are entitled to enjoy under the trust can only be assured by due administration of the trust, which they are

entitled to compel. The 'control principle' is therefore complied with and the trust is valid.

It is submitted that this Control Analysis of a non-charitable purpose trust can be seen in operation in *Re Trusts of the Abbott Fund*<sup>17</sup>. In that case, a sum of money was collected and held on trust for the maintenance of two deaf and dumb ladies who subsequently died. It was held that they had had no proprietary interests in the trust fund, so they were not direct beneficiaries. The trust was therefore a non-charitable purpose trust but was nevertheless valid. The ladies had been factual beneficiaries of the trust during their lifetimes. They had derived the benefit of financial assistance and medical care under the trust and were therefore entitled to exercise rights of control over the trustees. As Stirling, J. said<sup>18</sup>:

[I]f the trustees had not done their duty - if they either failed to exercise their discretion or exercised it improperly - the ladies might successfully have applied to the Court to have the fund administered according to the terms of the circular.

The trust had therefore been enforceable and valid, and only failed when the ladies died, leaving surplus funds available.

Other cases which illustrate the Control Analysis in operation are those which were cited in *Re Denley*<sup>19</sup>: *Re Harpur's Will Trusts*<sup>20</sup>, *Re Abercromway's Settlement Trusts*<sup>21</sup> and *Re Bowes*.

In *Re Harpur's Will Trusts*, the English Court of Appeal had to deal with the testatrix's direction to trustees to pay and divide her residuary estate "between such institutions and associations having for their main object the assistance and care of soldiers, sailors, airmen, and other members of His Majesty's Forces who have been wounded or incapacitated

during the recent world wars". Lord Evershed said <sup>23</sup> that this non-charitable trust for the factual benefit of the war veterans would have been valid if expressed with sufficient certainty. It would not have failed for lack of controllability. The benefit conferred upon the veterans by the due administration of the trust would have given them standing to secure continued and proper performance by the trustees of their obligations. Had the need arisen, they could have controlled the trust's execution. The benefit conferred was presumably by way of medical, rehabilitative and financial aid. The recipients would not thereby acquire any interest in the trust property itself. Their benefit was of a purely pecuniary nature.

In *Re Aberconway's Settlement Trusts* <sup>24</sup>, the trust created by Lady Aberconway was on terms to apply the income of settled land, of which her son was tenant for life, *inter alia* "in or towards securing and assisting and developing the use of the ... gardens at Bodnant for the cultivation of plants and flowers of home and foreign countries of botanical and horticultural interest and for experiments in the production and hybridization of foreign and domestic flowers and plants of all kinds". It was assumed that this non-charitable trust was valid despite the absence of direct human beneficiaries, because there was a factual beneficiary who was seen as a potential controller of the trustees. Lord Evershed, M.R. explained the nature of the benefit in question <sup>25</sup>:

In this case, the provisions of the Garden settlement ..... may, no doubt, be regarded as indirectly for the benefit of the tenant for life, at any rate so long as the tenant for life happens to enjoy the amenities of a good garden or happens to be an amateur of horticulture.

The son was "not entitled to touch a penny of the income" <sup>26</sup>. Neverthe-

less, the terms of the trust conferred upon him the factual and pecuniary benefit of enjoying a garden maintained at the expense of the trust. This entitled him to exercise rights of control over the trustees and was the basis of the trust's validity.

In *Re Bowes*<sup>27</sup>, a trust "to expend £5,000 in planting trees for shelter" on settled land of which the testator was tenant for life was held to be a valid trust. It is submitted that this was because the Control Analysis was used. The court concluded that the trust was "a valid trust to lay out money for the benefit of the persons entitled to the estate"<sup>28</sup>. The benefit there was that of an improvement to the value of the estate which the factual beneficiaries, as tenant for life and tenant in tail, owned. They therefore had a pecuniary interest in due performance of the trust and no doubt would have taken the necessary steps to ensure that the trustees acted accordingly, had the need arisen. The trust was therefore under control and the 'control principle' satisfied.

To summarise this section, it is concluded that a gift on non-charitable purpose trust is valid (provided the certainty and perpetuity requirements for validity are satisfied) if there are individuals who derive a factual, pecuniary benefit from the gift. In the current state of the law, this is explained in terms of the 'beneficiary principle'. It is submitted, however, that it is rather an illustration of the validity of the Control Analysis. The receipt of the benefit gives the factual beneficiaries an interest in the due performance of the trust. On application to a court of equity, they would be accorded standing to ask for preventive or restitutive remedies against trustees who threatened or committed any breach of trust. Meanwhile, throughout the existence of the

trust, these potential litigants hover in surveillance over the trustees. The legal ownership of the trustees can be restrained thereby in the manner demanded by equity of those in the position of fiduciaries. Thus controlled, the trust is valid.

Under the Control Analysis, therefore, S's gift to X and Y to build a squash court for use by law students would be enforceable and valid. Similarly, if one refers back to the hypothesis used in the introduction to this chapter <sup>29</sup>, it is possible to argue that the gift to A and B on trust to beautify parking lots also has factual beneficiaries: the citizens of Concrete City <sup>30</sup>.

### 3. The Donor

S makes an *inter vivos* settlement of funds on A and B on trust to achieve purpose X. If purpose X is duly achieved without exhausting the funds designated therefor, the surplus funds are held on trust for, and result to, S <sup>31</sup>. Therefore, quite apart from the natural, emotional interest a donor has in the destination of funds which he donates, S has a potential pecuniary interest in the trust he has set up.

The case is similar if T makes a bequest of funds to C and D on trust to be applied for purposes Y and Z. For the sake of discussion, assume that purpose Y is described with insufficient certainty and that purpose Z has become impossible by the date of T's death. The trust for those purposes fails. C and D must then hold the funds on resulting trust for T's executors to be distributed by them either as residue if T's will so provides, or as undiposed-of funds if not, or if the bequest itself was of residue.

T's residuary legatees and intestate successors respectively therefore have potential pecuniary interests in the gift<sup>32</sup>. In addition, T's executors are potentially interested in the bequest<sup>33</sup> because they are initially under a fiduciary duty to ensure due administration of T's estate. Obviously their interest will cease when the estate has been administered and they have discharged their duty.

Both examples illustrate the doctrine of resulting trust: whenever someone intends to create a trust but, as it turns out, the trust is ineffectually created, not expressed at all, or fails, a resulting trust arises in favour of the creator. The operation of the doctrine is demonstrated by the Vandervell litigation<sup>34</sup>, where the settlor was held liable to income tax because, having overlooked the possibility of reverter on resulting trust when he granted an option on trust without naming beneficiaries, he had failed to divest himself absolutely of his interest in the shares which were the subject of that option. As Lord Wilberforce said<sup>35</sup>:

The conclusion, on the facts found, is simply that the option was vested in the trustee company as a trustee on trusts, not defined at the time, possibly to be defined later. *The equitable, or beneficial interest, however, cannot remain in the air*: the consequence in law must be that it remains in the settlor.

It is unnecessary for present purposes to discuss the Vandervell litigation in detail. The long and short of it was that the settlor was demonstrated to have retained a pecuniary interest in the trust which he had set up.

It is submitted that the resulting trust doctrine, like the 'beneficiary principle', is merely an illustration of the fundamental principle upon which the 'control principle' is based, that a trust must be enforceable. The rationale behind the doctrine of resulting trusts is that

"equity abhors a beneficial vacuum"<sup>36</sup>. In other words<sup>37</sup>:

A resulting trust ..... comes into existence wherever there is a gap in the beneficial ownership. It ceases to exist whenever that gap is filled by someone becoming beneficially entitled. As soon as the gap is filled by the creation or declaration of a valid trust, the resulting trust comes to an end.

Although the law does not always succeed in explaining the location of the legal fee simple<sup>38</sup>, it insists upon being able to locate 'equitable ownership' when legal title and 'equitable ownership' are divided, as in the case of a trust. This is because, as already discussed<sup>39</sup>, when a trust is created the trustee is the legal owner. The role of equity in developing the notion of the trust was to recognise that the legal ownership of the trustee as fiduciary had to be subject to restraints. Otherwise, the trustee would be free to deal with the trust property as if it were his own, contrary to his undertaking as trustee and contrary to the intentions of the settlor or testator. Therefore equity demands that the trustee's ownership be circumscribed by restraints or rights of control, loosely termed 'equitable ownership'. A gap in this latter is not permitted.

The whole doctrine of resulting trusts is similarly based on equity's demand for control over the trustees as legal owners. As has been explained, when a valid trust is set up, the trustee owns the trust property at law, but he is constantly subject to restraint by persons who hold rights of control. This element of potential controllability is crucial to the successful operation of the trust. However, even when the trust comes to an end because its objects have been achieved, or fails, and there are surplus trust funds, the trustee can not be permitted to exercise his full rights over the funds as legal owner of them: he is still in the position of a fiduciary and can not become absolutely entitled at any time.

Therefore equity imposes another trust upon him: a resulting trust. The trustee has to hold the funds on bare trust for the settlor or testator's estate, whose situation is then analogous to that of a direct beneficiary<sup>40</sup>. The settlor or testator has a direct pecuniary interest in the resulting trust and is thus entitled to exercise rights of control over the trustee. In this manner, the gap in control is filled.

With the possible exception of the situation which will be discussed in due course<sup>41</sup>, a resulting trust might arise at any time during the intended existence of the original trust. Even if the trust initially takes effect, there is always the possibility of a resulting trust. Those who would become entitled to the surplus funds as beneficiaries of the resulting trust on such an occurrence stand to benefit at any time. They therefore have potential pecuniary interests in the original trust from its inception.

(i) Inter Vivos Gift

To illustrate this firstly in the context of an *inter vivos* trust, take the hypothesis posed above<sup>42</sup> of a gift by S to A and B on trust to achieve purpose X which does not exhaust the funds. If A and B perform their duties under the trust properly and in accordance with the standards imposed upon them as fiduciaries, when a resulting trust arises after achieving purpose X, and S receives the surplus funds, he can have no ground to challenge the quantum of his pecuniary benefit. However, if the trustees were permitted to squander the fund in applying it for purpose X, thus depleting the surplus available thereafter, S would suffer a pecuniary loss. This eventuality illustrates that S has an interest

in the due administration of the trust. In the event of an actual or threatened breach of duty by the trustees, it is submitted that this interest suffices to give S standing to appear before a court of equity and invoke rights of control over the trustees. The trust therefore satisfies the 'control principle' and is valid. It is submitted that Roxburgh, J. was mistaken in *Re Astor's Settlement Trusts*<sup>43</sup> when he said:

If the purposes are valid trusts, the settlors have retained no beneficial interest and could not initiate [proceedings].

As a matter of principle, it is submitted that the settlor *does* retain a potential pecuniary interest in the trust which he has set up, which suffices to render the trust controllable. Furthermore, as a matter of fact, a settlor can be expected in practice to exercise his rights of control to ensure that the funds which he has donated reach their intended destination, and *not* the pockets of the trustees. Under the Control Analysis, therefore, the trust is valid.

The Control Analysis of a non-charitable purpose trust can be illustrated by the case of *In re Hobourn Aero Components Limited's Air Raid Distress Fund*<sup>44</sup>, where the trustees were subjected to control via the resulting trust doctrine. In that case, a war emergency fund was established through voluntary contributions and deductions from the wages of a company's employees. This was held by trustees on trust "to help any employee who is in dire distress as the result of enemy action". As the end of the war drew closer and the purposes of the fund became redundant, the fund was liquidated and representatives of the donors applied to court for its decision on what should be done with the surplus. It was held that the contributors were entitled on resulting trust to have proportionate shares of the fund returned to them. At first instance<sup>45</sup>,

Cohen, J. explained the basis of this decision <sup>46</sup>:

[T]he basis on which the contributions are returned is that each donor retained an interest in the amount of his contributions except so far as they are applied for the purposes for which they were subscribed.

The settlors retained a potential pecuniary interest in the trust which furnished them with control rights over the trustees. The trust was therefore controllable and valid *ab initio* since the 'control principle' had been satisfied. The case also demonstrates how settlors do in practice exercise their control rights when the need arises. The Control Analysis of gifts on non-charitable purpose trust is therefore satisfactory both as a matter of principle and in practice when the gift takes effect *inter vivos*.

(ii) Testamentary Gift

The operation of the Control Analysis in the context of a testamentary gift can be illustrated by the hypothesis posed above <sup>47</sup> of a bequest by T to C and D on trust for purpose Y which fails to satisfy certainty requirements, and purpose Z which is impossible. On failure of the bequest, the funds revert by way of resulting trust to T's estate. Initially, therefore, it is T's executors who have an interest in the administration of the trust. They retain a potential pecuniary interest in the trust funds because of the possibility of a resulting trust <sup>48</sup>. Under the 'control principle', this means that they are entitled to exercise rights of control over the trustees to restrain them from violating the terms of the bequest. As a matter of principle, therefore, the Control Analysis of the bequest leads to the result that the trust is controllable and therefore valid. As a matter of practice, the duty of an executor as fiduciary is to the

estate as a whole <sup>49</sup>, so one might expect executors to keep a watchful eye on trustees <sup>50</sup> who hold funds of the estate and to ensure that the terms of the bequest are duly adhered to. Since executors do not generally stand to benefit personally from the failure of the bequest which triggers the resulting trust doctrine, they are likely to be as interested in due administration of the trust as in its failure.

However, the executors are not the only persons with potential interests in a non-charitable purpose trust created by a will, and their interests cease on completion of the administration of the estate anyway. If, on total failure of the trust or in the event of surplus funds remaining, funds revert to the estate by way of resulting trust, they will be distributed either to residuary legatees or to the testator's intestate successors. In this manner, the allocation of trust funds by the terms of the bequest affects residuary legatees and intestate successors, and confers on them potential pecuniary interests in the trust funds. Under the 'control principle', therefore, they can be regarded as potential controllers of the trustees. Their presence suffices to render the trust valid *ab initio*.

However, the Control Analysis can not be assessed only at the theoretical level. It must not only comply with basic legal principle but must also provide a practicable solution to the problem of the enforcement of non-charitable purpose trusts. Direct beneficiaries, factual beneficiaries and settlors are all likely to exercise their rights of control in practice because they are all personally interested in the due administration of the trust funds. Realistically, however, the objection can be validly made that residuary legatees and intestate successors are unsuitable and unreli-

able controllers to the extent that their rights of control are dependent on the resulting trust doctrine. Since such an objection has important consequences for the feasibility of the Control Analysis of gifts by way of non-charitable purpose trust, it warrants some discussion.

An opponent of the Control Analysis can forcefully argue that there is only one situation in which residuary legatees and intestate successors are likely to act to ensure compliance with the terms of the trust. This is the situation in which the trustee's actions are exhausting the trust funds, whilst due administration would not. In such a case, the residuary legatees and intestate successors would have sufficient pecuniary interest in controlling the trustee to exercise their rights so to do. Unless checked, the trustee's actions would diminish the surplus funds over which a resulting trust might arise in favour of the testator's estate.

Otherwise, however (the opponent's argument might continue), due execution of the terms of a bequest is surely the *last* thing residuary legatees and intestate successors want. Their interest in the fund is, more often than not, contingent on the *failure* of the trust. Therefore they are likely to exercise the rights of control which, in principle, they hold, only when the validity of the trust in question is subject to doubt. They can derive no personal financial benefit from situations where the trustee is misapplying the funds of a valid trust. They therefore have no incentive to act in the very situation when action is essential: when there is no ground for challenging the validity of the trust, but the trustee is abusing his position. In practice, in the absence of other controllers, the trust is then uncontrollable.

The point can be illustrated by the case of *Morice v. The Bishop of Durham*<sup>51</sup>, where the next-of-kin of the testatrix applied to court to assert their entitlement under a resulting trust. They claimed that a bequest on trust for "such objects of benevolence and liberality as the Bishop of Durham [the trustee] in his discretion shall most approve of" failed for uncertainty. They succeeded, and the funds reverted to them on resulting trust. In principle, therefore, they established their pecuniary interest in the purpose trust but, in practice, the control they exercised was of the most negative type.

Similarly, in *Re Diplock*<sup>52</sup>, the next-of-kin of the testator, via his executors, challenged the actions of the trustees in distributing over a quarter of a million pounds sterling which belonged to a trust fund amongst numerous charitable and benevolent objects and institutions. The testator had given the residue of his estate to his executors on trust "to apply the residue for such charitable institution or institutions or other charitable or benevolent object or objects in England as my acting executors or executor may in their or his absolute discretion select, and to be paid to or for such institutions and objects if more than one in such proportions as my executors or executor may think proper". The House of Lords held that the trust was void for uncertainty and a resulting trust arose in favour of the next-of-kin. Again, therefore, it can be seen that the next-of-kin undoubtedly held potential pecuniary interests in the testamentary trust, but that in practice the control which they were thereby entitled to exercise was of a limited nature.

If one supports the Control Analysis, however, two arguments are available to mitigate the practical defect of the Control Analysis pointed

out by our hypothetical opponent and which the above cases illustrate. In the first place, it is arguable that the court in each case might have disagreed with the assertions of the next-of-kin and found that the purpose trust *was* expressed with sufficient certainty. It might then have directed the trustee to perform his fiduciary obligations and apply the funds to the stated purposes<sup>53</sup>. In this situation, the Control Analysis operates satisfactorily. The 'control principle' is satisfied because the next-of-kin's potential pecuniary interest (derived under the resulting trust doctrine) gave them standing to assert their rights of control. Furthermore, as a matter of practice, the fact that they launched the suit demonstrated that the trust *was* potentially under control.

The second argument runs as follows: a potential controller can sit on his rights and yet not destroy the conceptual basis of the Control Analysis. After all, the possibility that a direct beneficiary might choose not to exercise his control rights in any particular instance does not invalidate the trust<sup>54</sup>. It is arguable that the fact that residuary legatees or intestate successors may similarly choose as a practical matter *not* to act in the event of an actual or threatened breach of trust should likewise not matter: their mere existence satisfies the 'control principle'.

In order to reach a conclusion in this section, one has to weigh the relative strengths of the arguments outlined above of the hypothetical opponent and the hypothetical supporter of the Control Analysis respectively. It is submitted that, although the resulting trust doctrine *can* solve the problem of the enforceability of non-charitable purpose trusts in certain circumstances, it is not a general solution. As a matter of principle, *all* gifts by way of non-charitable purpose trust can be rendered enforceable by

the existence of individuals who have potential interests in the trust funds because of the possibility of reverter on resulting trust. In fact, however, the Control Analysis can only operate successfully in limited fact situations. For example, the hypothetical gift described in the introduction to this chapter <sup>55</sup> would be valid under the Control Analysis, even though it is a non-charitable purpose trust without direct beneficiaries. When X settled funds on A and B on trust for the purpose of beautifying parking lots, his potential pecuniary interest in the fund, coupled with his concern that his wishes be carried out, would supply the control necessary for validity under the Control Analysis. In other situations, however - as when residuary legatees and intestate successors are the only potential controllers available - to the extent that it has to rely on the resulting trust doctrine for its effectiveness, the Control Analysis suffers from major practical defects.

#### 4. The Crown

By way of contrast with the above section, some cases have altogether rejected the application of the resulting trust doctrine to particular types of donation for non-charitable purposes <sup>56</sup>. In certain circumstances, the donation is seen as an out-and-out transfer, so that when the purpose is achieved without exhausting the funds or when the purpose becomes impossible of achievement, the donor is considered to have given up *all* interest in the funds. The surplus funds are deemed to be ownerless. It is submitted that the possibility of such an occurrence gives the Crown a potential pecuniary interest in the donation which confers upon it standing to bring litigation concerning the administration of the donated funds. In certain circumstances, therefore, the necessary element of control over a donation can

be provided by the Crown <sup>57</sup>.

The point can be illustrated by *In re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts* <sup>58</sup>. In that case, a fund was accumulated for the purpose of granting allowances to the widows and children of deceased members of the West Sussex constabulary. Funds were given, *inter alia*, via entertainment, raffles, sweepstakes and collecting-boxes. When doubt arose as to the fate of the fund on the amalgamation of the West Sussex Constabulary with another police force, the trustees proposed to use a portion of it in order to purchase annuities for certain widows and children and to distribute the remainder to members of the old West Sussex Constabulary. They applied to court for judicial approval of their scheme. The Treasury Solicitor appeared as one of many defendants, on behalf of the Crown, and challenged the proposed scheme, arguing instead that the fund was *bona vacantia*. The potential pecuniary interest of the Crown in the fund gave it standing to control the actions of the trustees in this manner.

In the event, the Crown succeeded in its claim over so much of the fund as had been subscribed via such events as raffles, and collecting-boxes. In reaching this conclusion, the court adopted the following *dictum* <sup>59</sup>:

So far as regards the contributors to entertainments, street collections, etc., I have no hesitation in holding that they must be taken to have parted with their money out-and-out. It is inconceivable that any person paying for a concert ticket or placing a coin in a collecting-box presented to him in the street should have intended that any part of the money so contributed should be returned to him when the immediate object for which the concert was given or the collection made had come to an end. To draw such an inference would be absurd on the face of it.

The presumption of resulting trust to the donors was rebutted.

Therefore, in those circumstances where the possibility exists that the funds will become *bona vacantia* when the purpose is achieved, or abandoned, or rendered impossible, the 'control principle' can be satisfied by the Crown. It has an interest in preventing misapplication of funds.

However, it is submitted that the circumstances in which the *bona vacantia* argument is appropriate are limited and exceptional. One of three factors, in particular, must be present. In the first place, funds generally devolve as *bona vacantia* only when they were not as such *donated* at all. If funds are given in return for a concert, or raffle ticket, and so on, a contractual relationship of sorts comes into existence, and the contributor retains no further interest in the funds because he receives in return all that for which he contracted. This is as compared with a true donation specifically for a particular purpose, on failure of which the funds return to the donor by way of resulting trust. The distinction was iterated clearly in the *West Sussex Constabulary* case<sup>60</sup> where the portion of the fund which had been raised by the sale of tickets, entertainment, and so on, devolved as *bona vacantia* whilst the portion of the fund which had been raised by donation reverted on resulting trust to the contributors.

A second factor which argues in favour of designating surplus funds as *bona vacantia* is a stipulation in the instrument which invited the contributions to the effect that the surplus will not be returned to the contributor<sup>61</sup>.

A third factor which appears to be influential is the inconvenience which would be caused if the donated funds were held to be subject to the resulting trust doctrine<sup>62</sup>. This can be seen particularly when there are

a large number of contributors to a common fund, many of whom are unidentifiable or anonymous, as when funds are accumulated using collecting boxes, or when the resulting trust would not arise until some considerable period of time had elapsed since the constitution of the original trust. In such situations, the practical solution which has been reached in some cases is that the surplus funds devolve on the Crown as *bona vacantia*.

In *Re Gillingham Bus Disaster Fund*<sup>63</sup>, however, the court was not prepared to hold that the Crown's entitlement to surplus funds could be based merely on convenience and practicality. In that case, a fund was set up to defray the funeral expenses of Royal Marine cadets who were killed, and pay for the care of others who were disabled, in a road accident. The public contributed to the fund both by significant donations and by anonymous, smaller contributions. When surplus funds were found remaining, the Crown argued that the trustees should pay them over as *bona vacantia*. The court disagreed and held that the surplus should be held on resulting trust for the donors<sup>64</sup>:

In my judgment the Crown has failed to show that this case should not follow the ordinary rule merely because there was a number of donors who ... are unascertainable. I see no reason myself to suppose that the small giver who is anonymous has any wider intention than the large giver who can be named. They all give for the one object. If they can be found by inquiry the resulting trust can be executed in their favour. If they cannot I do not see how the money could then ... change its destination and become *bona vacantia*. It will be merely money held upon a trust for which no beneficiary can be found. Such cases are common and where it is known that there are beneficiaries the fact that they cannot be ascertained does not entitle the Crown to come in and claim.

An inquiry was ordered to ascertain, if possible, the identity of the donors.

In sum, even if one agrees with the admittedly more practicable solution of declaring surplus funds *bona vacantia* in such circumstances, it can be seen that the types of cases in which the Crown will be able to establish its right to control the trustees of donated funds are limited. Only if one or more of the above factors is present in any particular case will the Control Analysis be applicable to the gift via the *bona vacantia* doctrine. Therefore the conclusion must be reached that the possibility of control by the Crown does not provide a general solution to the need for enforceability in a non-charitable purpose trust.

#### 5. Residuary Beneficiaries

There are at least four situations in which an individual may become entitled to trust funds as the residuary beneficiary of a gift which purports to take effect as a non-charitable purpose trust.

##### (i) Entitlement to Residue Dependent on Success of Gift

S transfers funds to A and B to use the income for the maintenance of his private park for as long as the law permits, and to pay over the capital to W when this direction has been complied with. Although the donor has created a non-charitable purpose trust, it is submitted that, if interpreted in accordance with the Control Analysis, it would be valid. In cases such as this the entitlement of W, the residuary beneficiary, is dependent upon due administration of the trust fund by the trustees, and he therefore has a potential pecuniary interest in the trust funds. Since he is directly affected by the allocation of funds stipulated in the terms of the trust, he has the right to control the trustees in their execution

of them. In this manner, the 'control principle' is satisfied. Furthermore, W has every incentive actually to ensure that the trustees do in fact perform their obligations to maintain the private park. Therefore, as a matter of both principle and fact, the trust is controllable.

(ii) Quantum of Residue Dependent on Success of Gift

T bequeaths funds to C and D to apply the income thereof for the maintenance of his private park for twenty-one years, and to pay the capital and any accumulated income to X thereafter. Again, the wording of the gift has created a non-charitable purpose trust. Again, however, it is submitted that the Control Analysis may assist.

It is evident that X, as residuary legatee, has a pecuniary interest in the administration of the trust. The actions of the trustee will directly affect his own financial expectations. Under the 'control principle' X has standing to exercise rights of control over the performance by C and D of their fiduciary obligations in relation to the trust fund. X has good reason to check on any dealings C and D may have with the trust property throughout the duration of the trust. Therefore the requisite element of control is present, equity is satisfied and the trust is valid<sup>65</sup>.

In practice, however, the situation may not be quite as simple. This may be demonstrated by posing two hypothetical sequences of events, one of which illustrates the Control Analysis operating effectively, and the other of which illustrates the potential problems in practice. Firstly, C and D may invest the trust fund so foolishly that there will be insufficient income to maintain the park adequately, leave alone to accumulate

for X. Although X will receive the capital whatever happens, he evidently has an interest in preventing the trustees' misapplication of income in this manner. In such a case, therefore, X would have a positive incentive to exercise his right to prevent misapplication of income. Although X's application to court would be phrased in terms of misapplication of trust funds, the court would presumably be free to assert affirmative control over the trustees as well, if necessary<sup>66</sup>. In this manner, due performance could be compelled.

The second sequence of events changes the nature of X's interest in one fundamental respect. Assume that C and D simply invest the trust fund and either ignore the direction to utilise the income for the maintenance of T's park totally, or merely apply minimal amounts to that purpose. Such a breach of trust is manifestly *in*, rather than contrary to the financial interests of X, since the value of his residue is enhanced thereby. Although in principle X has standing to exercise control over C and D, in fact it would be futile to expect any effective control by him. He has no financial incentive either to compel performance or prevent misapplication of funds<sup>67</sup>. Indeed, he is more likely to attempt to have the trust declared totally invalid. Thus, as with the case of residuary legatees or intestate successors whose potential interests depend not on the terms of the gift, but on the doctrine of resulting trusts<sup>68</sup>, the Control Analysis runs into practical problems. In certain circumstances, the conceptual validity of the analysis is robbed by considerations of a realistic and practical nature.

The operation in principle of the Control Analysis in this context can be illustrated by a case, which also demonstrates how the practical

problems can be overlooked in special circumstances. In *Re Thompson*<sup>69</sup>, the testator bequeathed a sum of money to a trustee to be applied as the trustee thought fit towards the promotion and furtherance of fox-hunting. His residuary estate was to go to the Master and Fellows of Trinity Hall, Cambridge for the benefit of the college. It is evident that there are no human beneficiaries, whether direct or factual. The trust was nevertheless valid, since it was controllable via the residuary legatees<sup>70</sup>. As Clauson, J. pointed out<sup>71</sup>:

[I]n case the legacy should be applied by [the trustee] otherwise than towards the promotion and furtherance of fox-hunting, the residuary legatees are to be at liberty to apply.

Although it is obvious that the residuary legatees might feel it to their advantage *not* to draw equity's attention to such a breach of trust in that the college could thereby profit, this possibility was recognised to be *conceptually* irrelevant. The practical consequences could be ignored in this particular case because the college was "anxious that the wishes of the testator in respect to the legacy to his friend [the trustee] should be carried out"<sup>72</sup>. In these circumstances, the residuary legatee would have sufficient, albeit non-financial, incentive to exercise its control rights over the trustee, should the need arise.

(iii) Quantum of Residue Independent of Gift

V bequeaths a fund to E and F, and stipulates that all the income has to be used to maintain his private park for twenty-one years and that the capital is to go to Y thereafter. Y will receive the capital whether or not E and F perform their obligations with regard to the income. His interest in the capital suffices to give him standing to challenge any unauthorised

dealings by the trustees with it during the twenty-one year period. Strictly speaking, this satisfies the 'control principle'. It permits him to draw a court's attention to the trustees and the court may then take affirmative action vis-a-vis the income.

However, Y's total lack of interest in the income and the trustees' dealings with it poses an insurmountable practical problem. If E and F chose to do nothing with the income, for twenty-one years, Y could not be relied upon to take any action whatsoever. Except in cases, like *Re Thompson*<sup>73</sup>, where a residuary beneficiary in a position similar to Y's was willing to supervise the administration of the trust, through a sense of moral duty, for example, the trust would be effectively uncontrollable. Indeed, such would be the case in the hypothetical posed in the introduction to this chapter<sup>74</sup>, where the residuary beneficiaries are interested only in the capital of the trust fund. Although as a matter of principle they satisfy the requirement for control over trustees, in practice effective control would depend on merely moral obligation.

(iv) Residue Charged with Payment of Gift

R transfers funds to G and H and directs that a certain sum be paid annually therefrom for the maintenance of his private park for as long as the law permits, with the remainder to go to Z. Such an allocation of funds affects Z directly and he has a distinct pecuniary interest in ensuring that G and H do not abscond with the funds. Since this is so, it is submitted that Z has standing to exercise rights of control over G and H and that the 'control principle' has been satisfied. In principle, the gift takes effect under a valid non-charitable purpose trust.

Two examples of valid trusts controlled in this way by residuary legatees are found in the case of *Mitford v. Reynolds*<sup>75</sup>. There, the testator directed that a hillock, belonging to a certain Mr. Evans, be bought for the deposit of the testator's body and those of his parents and sister. He gave his trustees detailed instructions vis-a-vis the mound :

On the summit of which they will be pleased to cause the erection (construction) of a suitable and handsome, as well as durable monument, planting the summit and sides of the mount with cedar and cypress trees, in a manner that may render it ornamental to the town ..... I direct and expressly will and command that this injunction for the place of final interment, be absolutely attended to and carried into instant effect and completion.

The residuary estate was bequeathed to the Government of Bengal for charitable purposes. As things turned out, Mr. Evans refused to sell the land, so the trust failed. However, as Shadwell, V.-C. pointed out, this was "not on account of any matter of law, but on account of a matter of fact"<sup>76</sup>. It is submitted that, had the sale of the land gone through, the trust for the erection of the monument would have been valid, even though it was an abstract purpose trust and had no direct nor factual human beneficiaries. This is because the gift over bequeathed not only the residuary estate, but also rights of control to the Government of Bengal, which satisfied the 'control principle'.

The second example is found in the provision of the will relating to the residuary bequest, which ran as follows:

I will, devise, give and bequeath the remainder of my property, of whatsoever kind and description and that may arise from the sale of my effects, after deducting the annual amount that will be requisite to defray the keep of my horses (which I will and direct be preserved as pensioners, and are never, under any plea or pretence, to be used, rode or driven, or applied to labour) to the Government of Bengal, for the express purpose of that Government

applying the amount to charitable, beneficial and public works at and in the city of Dacca in Bengal.

The court declared that the trust for the maintenance of the horses was valid and ordered that it be carried out<sup>77</sup>. Again there were no human beneficiaries, but the Earl of Auckland, representing the residuary legatee, the Government of Bengal, was a party to the action. It is evident that, had there been any query as to the validity of the trust for the horses or its due administration, the matter could have been raised on behalf of the residuary legatee and its right of control exerted. The trust was therefore controllable in principle and could be permitted to operate.

However, how likely is it that the Government of Bengal would have complained if the trustees had ignored the horses altogether and thereby increased the residue available for charitable purposes? Returning to the case of R's gift of residue to Z, Z in fact has no practical interest whatever in compelling performance of the trust for the maintenance of the park. Indeed, his interest is only in its failure<sup>78</sup>. Yet again the Control Analysis runs into the problem that many of the potential controllers have no incentive to exercise their rights against delinquent trustees.

It may be recalled that an attempt was made above<sup>79</sup> to minimise the practical significance of the lack of coincidence between a potential controller's interest and due performance of the trust. It was argued that the fact that a controller goes to court, even if he does so to contest the very validity of a trust, demonstrates that it is, in fact, under control. Once its attention has been drawn to the existence of a trustee's fiduciary obligations binding his legal ownership of trust funds, a court can pursue either of two alternative courses of action: if it concludes that the trust is

valid, it can assert affirmative control over the trustee, if necessary; but if the residuary beneficiary proves his claim that the trust is *not* valid, it can strike it down. This was demonstrated in *Re Dean*<sup>80</sup>, where the testator transferred his land for life to the plaintiff in the case, with remainder to the plaintiff's sons, and charged it with an annuity in favour of his trustees for fifty years. The will went on to provide:

I declare that my trustees shall apply the said annual sum payable to them under this clause in the maintenance of the ...horses and hounds for the time being living [which had been given to the trustees], and in maintaining the stables, kennels and buildings now inhabited by the said animals in such condition of repair as my trustees may deem fit.

All residuary personal estate was given to the plaintiff and his heirs.

The plaintiff, as residuary legatee, claimed that the trust in favour of the horses and hounds was invalid (in which case his life estate would be free of the charge) and asked for a declaration to that effect<sup>81</sup>. The court held that the trust for the horses and hounds was valid, even though there were no beneficiaries who could enforce its terms directly. North, J. recognised the control rights of individuals who held pecuniary interests in the trust property, including the residuary legatee in this particular case<sup>82</sup>:

[A] trust to lay out a certain sum in building a monument, and the gift of another sum in trust to apply the same to keeping that monument in repair, say, for ten years, is, in my opinion, a perfectly good trust, although I do not see who could ask the Court to enforce it. If persons beneficially interested in the estate could do so, then the present Plaintiff can do so; but, if such persons could not enforce the trust, still it cannot be said that the trust must fail because there is no one who can actively enforce it.

In other words, even though there were no direct beneficiaries of the trust "who can actively enforce it" by compelling performance of the trustee's obligations, the trust was valid. The Court was willing to affirm the trust's validity and order positive performance of its oblig-

ations even though the remedy requested by the residuary legatee had been a declaration of invalidity. The fact that the residuary legatee had commenced the proceedings by virtue of a pecuniary interest which conflicted with due administration of the trust had nevertheless demonstrated that the trust *was* under control. Once its attention was drawn to the trust in this manner, the court exercised its general power of control over its operation<sup>83</sup>.

However, even when this is so, the practical problem of the residuary legatee whose personal interests conflict with the due performance of the trust is still only partially solved. *If* he in fact challenges the validity of the trust, on the authority of *Re Dean*, he has demonstrated that the trust is under control. However, if no possible grounds for challenging its validity exist and the trustees are enhancing his financial advantage by maladministering the trust, the residuary legatee has no reason to assert his standing to control them.

In sum, the practical problem of ensuring effective control remains and can only be alleviated by a situation such as that which existed in *Pettingall v. Pettingall*<sup>84</sup>. In that case, a testator made a bequest to his executor for his "favourite black mare" in the following terms:

I hereby bequeath, that at my death, £ 50 per annum be paid for her keep in some park in England or Wales; her shoes to be taken off, and she never to be ridden or put in harness; and that my executor consider himself in honour bound to fulfil my wish, and see that she be well provided for, and removeable at his will.

This was held to be a valid trust for a non-charitable purpose even though it had no direct beneficiaries. Since there were residuary legatees with a pecuniary interest in the due administration of the trust fund, the trust was potentially under control and *Knight Bruce, V.-C.* held it valid<sup>85</sup>:

[I]f the mare were not properly attended to, any of the parties interested in the residue might apply to the Court.

As a matter of principle, the residuary legatees held the all-important rights of control <sup>86</sup>, and, even though in practice they only stood to *lose* from continued payments for the benefit of the mare, this was overlooked in the circumstances because the residuary legatees themselves had admitted that the trust was controllable.

Such a solution to the practical problem can only be available in exceptional cases. In all other cases, it has to be admitted that the problem of rendering effective the Control Analysis of gifts on non-charitable purpose trust where the *only* potential controller is a residuary beneficiary of type (iv) is insurmountable.

## 6. Conclusion

It has been demonstrated that a non-charitable purpose trust need not necessarily fail merely because it lacks direct human beneficiaries. The basic requirement that a trust, to be valid, must be enforceable can be fulfilled by the existence of individuals other than direct beneficiaries. At least one or other of the categories of potential controllers discussed in this chapter <sup>87</sup> will exist in every case of a gift which purports to take effect as a non-charitable purpose trust. If the gift is made for non-abstract purposes, its factual beneficiaries can enforce its terms (class ii). But even if the gift has abstract purposes, if the donor is identifiable, the resulting trust doctrine activates the control rights of either the settlor, in the case of an *inter vivos* gift (class iii), or the testator's executors (class iv), residuary legatees

(class v) or intestate successors (class vi), in the case of a bequest. But even if the gift has abstract purposes and the donor is *not* identifiable, the notion of *bona vacantia* brings the Crown (class vii) into the picture as a potential controller. Moreover, in every situation, if the gift expressly identifies residuary beneficiaries (class viii), they also serve to satisfy the 'control principle' and render the trust valid.

However, the aim of the discussion in this chapter has not only been to demonstrate the soundness of the Control Analysis in principle. Throughout, objections of a practical nature have been anticipated and voiced. In many instances they were recognised as valid. By way of summary, it must be said that, if a non-charitable purpose trust lacks factual beneficiaries and is testamentary, and therefore has to depend upon residuary legatees (either class v or class viii) or intestate successors (class vi) for its control, it is effectively unenforceable. Despite the theoretical advantages of the Control Analysis, this should not be permitted to obscure practical reality and validate such a trust.

When assessed in these terms, it has to be concluded that the Control Analysis is far from being the perfect solution for *all* gifts in general which are interpreted as taking effect by way of non-charitable purpose trust. As a general solution, it is unsatisfactory.

\* \* \* \* \*

FOOTNOTES : CHAPTER II

1. [1952] Ch.534; [1952] 1 All E.R.1067. Discussed *supra*, pp 121-127.
2. Discussed *supra*, pp 127-130.
3. See *supra*, pp 183-187.
4. *Supra*, pp 183-196.
5. Listed *supra*, pp 178-180.
6. Class i.
7. A consolidation of classes ii through viii, *supra*, pp 178-179.
8. Class ii, *ibid*.
9. Classes iii, iv, v, vi, *ibid*.
10. Class vii, *ibid*.
11. Class viii, *ibid*. See *Re Shaw* [1957] 1 W.L.R.729; [1957] 1 All E.R. 745, *per* Harman, J. [1957] 1 All E.R.745 at 758.
12. Under the reasoning of *London Hospital Medical College v. I.R.C.* (1976), 120 S.J.250.
13. [1969] 1 Ch.373; [1968] 3 W.L.R.457; [1968] 3 All E.R.65. Discussed *supra*, pp 132-150.
14. See *supra*, pp 187-189.
15. *Per* Spry, *op.cit.supra*, p 190.
16. *Cf.* McKay, "Trusts for Purposes - Another View", (1973) 34 Conv. (N.S.)420, pp 428-429: the employees who were the factual beneficiaries in *Re Denley* only had standing because they were contractual licensees, and no lesser interest would suffice for enforceability. See also, Rickett, "Unincorporated Associations and their Dissolution", (1980) 39 Camb.L.J.88, pp 104-108.
17. [1900] 2 Ch.326; 69 L.J.Ch.539; 48 W.R.541.
18. [1900] 2 Ch.326 at 331.
19. It was demonstrated *supra*, pp 137-138, that these cases were in fact no authority for the *ratio* in *Re Denley* which merely distinguished the 'beneficiary principle'. They *do* nevertheless support the 'control principle' and the analysis offered here of the role played by factual beneficiaries.
20. [1962] Ch.78; [1961] 3 W.L.R.924; [1961] 3 All E.R.588.

21. [1953] Ch.647; [1953] 3 W.L.R.183; [1953] 2 All E.R.350.
22. [1896] 1 Ch.507; 65 L.J.Ch.298; 44 W.R.441.
23. [1962] Ch.78 at 92.
24. *Supra*, footnote 21.
25. [1953] 2 All E.R.350 at 359.
26. *Ibid*.
27. *Supra*, footnote 22.
28. [1896] 1 Ch.507 at 511.
29. *Supra*, p 197.
30. A possible objection would be non-compliance with the fourth type of certainty requirement. See *supra*, p 156.
31. For example, *Re Cochrane* [1955] Ch.309; [1955] 2 W.L.R.267; [1955] 1 All E.R.222; *Re Flower's Settlement Trusts* [1957] 1 W.L.R.401; [1957] 1 All E.R.462; *In re Trusts of the Abbott Fund*, *supra*, footnote 17 ; *In re Gillingham Bus Disaster Fund* [1959] Ch.62; [1958] 3 W.L.R.325; [1958] 2 All E.R.749 ; *In re West* [1900] 1 Ch.84; 69 L.J.Ch.71 ; *Re British Red Cross Balkan Fund* [1914] 2 Ch.419; 84 L.J.Ch.79 ; *Re Hobourn Aero Components Air Raid Distress Fund* [1946] Ch.194; 115 L.J.Ch.158; [1946] 1 All E.R.501 ; *In re Hillier's Trusts* [1954] 1 W.L.R.700.
32. See also *supra*, pp 217-226.
33. For example, see *Morice v. The Bishop of Durham* (1804), 9 Ves.Jr. 399; (1805), 10 Ves.Jr.522 ; *In re Diplock, sub nom. Ministry of Health v. Simpson* [1951] A.C.251; [1950] 2 All E.R.1137 ; *Essery v. Cowland* (1884), 26 Ch.D.191; 53 L.J.Ch.661 ; *In re Ames' Settlement* [1946] Ch.217; 115 L.J.Ch.344; [1946] 1 All E.R.694.
34. *Vandervell v. I.R.C.* [1967] 2 A.C.291; [1967] 2 W.L.R.87; [1967] 1 All E.R.1 ; *White v. Vandervell Trustees* [1971] A.C.912; [1970] 3 W.L.R.452; [1970] 3 All E.R.16 ; *Re Vandervell's Trusts (No.2)* [1974] Ch.269; [1974] 3 W.L.R.256; [1974] 3 All E.R.205. For criticism, see Harris, "The Case of the Slippery Equity", (1975) 38 Mod.L.R.557.
35. *Vandervell v. I.R.C.*, *supra*, footnote 34, [1967] 1 All E.R.1 at 18. Italics added.
36. *Per Diplock*, L.J. in *Vandervell v. I.R.C.*, *supra*, footnote 34, [1965] 2 All E.R.37 at 46.
37. *Per Lord Denning*, M.R. in *Re Vandervell's Trusts (No.2)*, *supra*, footnote 34, [1974] 3 All E.R.205 at 211.

38. For example, in the area of contingent remainders, the location and ownership of the fee simple remains a mystery to this day. Megarry & Wade summarise the various theories that have, from time to time, been offered to provide a solution (Megarry & Wade, The Law of Real Property, 4th.ed. (London: Stevens, 1978), pp 182-183) - "Some said that ..... the fee simple was in abeyance, or *in nubibus* (in the clouds) or *in gremio legis* (in the bosom of the law); others argued on the principle that what the grantor had not conveyed away he still had in him, and so said that the fee simple remained vested in the grantor, or, if he was dead, his devisee or heir. The question was never finally settled, but the latter view more nearly corresponds with modern ideas". Another suggestion was that the interest was "preserved in the bowels of the land" (*Chudleigh's Case* (1595), 1 Co.Rep.113b at 137b; 76 E.R.261 at 319).
39. *Supra*, pp 184-187.
40. *Supra*, pp 187-189.
41. *Infra*, pp 213-217.
42. *Supra*, p 203.
43. *Supra*, footnote 1, [1952] 1 All E.R.1067 at 1071.
44. *Supra*, footnote 31.
45. [1946] Ch.86; [1945] 2 All E.R.711.
46. [1946] Ch.86 at 97.
47. *Supra*, pp 203-204.
48. See *Re Ames*, *supra*, footnote 33.
49. *Re Charteris* [1917] 2 Ch.379; 86 L.J.Ch.658.
50. Assuming that they are not one and the same person.
51. (1805), 10 Ves.Jr.522. Discussed *supra*, pp 107-109.
52. *Sub nom. Chichester Diocesan Fund & Board of Finance v. Simpson* [1944] A.C.341; 113 L.J.Ch.225; [1944] 2 All E.R.60.
53. See also *supra*, pp 193-194 and *infra*, pp 223-225.
54. Discussed *supra*, pp 192-193.
55. *Supra*, p 197.
56. For example, *Cunnack v. Edwards* [1896] 2 Ch.679; 65 L.J.Ch.801; *Braithwaite v. Attorney General* [1909] 1 Ch.510; 78 L.J.Ch.314 ; *In re Welsh Hospital (Netley) Fund* [1921] 1 Ch.655; 90 L.J.Ch.276 ; *In re Hillier's Trusts*, *supra*, footnote 31 ; *In re Ulverston & District New Hospital Building Trusts* [1956] Ch.622; [1956] 3 W.L.R.559; [1956] 3 All E.R.164 ; *In re West Sussex Constabulary's*

*Widows Children & Benevolent (1930) Fund Trusts* [1971] Ch.1; [1970] 2 W.L.R.848. For comments and criticism see Hickling, "The Destination of the Funds of Defunct Voluntary Associations", (1966) 30 Conv.(N.S.)117, p 118, pp 121-122 ; Green, "The Dissolution of Unincorporated Non-Profit Associations", (1980) 43 Mod.L.R.626, pp 643-648 ; Rickett, *op.cit.supra*, footnote 16, pp 112-122.

57. *Cf.* Control by the Crown of charitable donations, discussed *supra*, p 186.
58. *Supra*, footnote 56.
59. [1971] Ch.1 at 12, quoting P. O. Lawrence, J. in *Re Welsh Hospital (Netley) Fund*, *supra*, footnote 56, [1921] 1 Ch.655 at 660.
60. *Supra*, footnote 56.
61. See *Re West Sussex Contabular (etc.)*, *supra*, footnote 56, [1971] Ch.1 at 9 ; *Cunnack v. Edwards*, *supra*, footnote 56, [1896] 2 Ch. 679 at 683. Alternatively the fund may be regulated by statute and a provision therein may expressly make such a stipulation. For example, Friendly Societies Act 1829, 10 Geo. IV, c.56 s.26: see *Cunnack v. Edwards*, *supra* at 688.
62. See *Cunnack v. Edwards*, *supra*, footnote 56, [1896] 2 Ch.679 at 688 ; *Re West Sussux Contabulary (etc.)*, *supra*, footnote 56, [1971] Ch.1 at 12-13.
63. *Supra*, footnote 31.
64. *Per* Harman, J. at first instance [1958] 1 Ch.300 at 314.
65. *Cf.* McKay, *op.cit.supra*, footnote 16, pp 430-432.
66. See *infra*, pp 223-225.
67. See also discussion *supra*, pp 209-213.
68. *Ibid.*
69. [1934] Ch.342; 103 L.J.Ch.162.
70. Note that Roxburgh, J. agreed with this analysis in *Re Astor's Settlement Trusts*, *supra*, footnote 1, discussed *supra*, pp 121-127. [1952] Ch.534 at 546, but then went on to say that control via residuary legatees was "anomalous".
71. [1934] Ch.342 at 344.
72. *Per* counsel, *ibid* at 343.
73. *Supra*, p 220.
74. *Supra*, p 197.

75. (1848), 16 Sim.105. Another of Roxburgh,J.'s "anomalous" cases: *supra*, footnote 70.
76. (1848), 16 Sim.105 at 120. See also, *Trimmer v. Danby* (1856), 25 L.J.Ch.424, *per* Kindersley,V.-C. at 427.
77. See the discussion of this case in *Re Dean* (1889), 41 Ch.D.552; 58 L.J.Ch.693, *per* North,J.,41 Ch.D.552 at 557-560 for the details of the court order.
78. See also, discussion *supra*, pp 210-211.
79. *Supra*, pp 193-194, pp 211-213.
80. *Supra*, footnote 77: another "anomalous" case, *supra*, footnote 70. See also, *Trimmer v. Danby*, *supra*, footnote 76 ; *Pirbright v. Salwey* [1896] W.N.86 Note 4 ; *Re Hooper* [1932] 1 Ch.38; 101 L.J.Ch. 61. *Pirbright v. Salwey* and *Re Hooper* have been followed, relatively recently, in Canada: *Crocker v. Senior* (1972), 2 N.& P.E.I.R.179.
81. In the alternative, he claimed that he was entitled to the money left over annually when the trust had been performed. The court did not deal with this alternative claim.
82. (1889), 41 Ch.D.552 at 557.
83. Note a weakness in the decision of North,J. in *Re Dean*: that the trust was held valid for a projected duration of fifty years. The perpetuity period applicable to the duration of a non-charitable purpose trust is a life in being plus twenty-one years. An animal's life can not be counted as a life in being: *Re Kelly* [1932] Ir.R. 255. When there is no life in being, a trust can only validly last twenty-one years.
84. (1842), 11 L.J.Ch.176.
85. *Ibid* at 177.
86. Note that Roxburgh,J. agreed with this analysis in *Re Astor*, *supra*, footnote 70 [1952]Ch.534 at 543.
87. Listed *supra*,pp 178-180. The enumeration of classes in this paragraph also refers back to the same list.

### III. THE CONTROL ANALYSIS AND GIFTS TO UNINCORPORATED ASSOCIATIONS

#### 1. Introduction

If X makes a donation for the non-charitable purposes of a particular unincorporated association, one of nine possible interpretations will be put on the legal effect of what he has achieved <sup>1</sup>. A court's choice amongst the nine will be dictated both by objective factors, such as circumstantial information concerning X, the gift and the association, and subjective factors, such as the court's assessment of the social value of the association and the purposes which X's gift purports to further. As the law stands at present, and as was demonstrated in Part Two, none of the nine interpretations leads to a totally satisfactory result. In particular, if the court concludes, or, indeed, if X expressly or unequivocally stipulates, that the gift must take effect as a trust for the non-charitable purposes of the association, it will fail <sup>2</sup>. This is because it has no human beneficiaries and therefore violates the so-called 'beneficiary principle'.

However, the Control Analysis, as explained and developed in the preceding chapter, is as applicable to gifts on trust for the non-charitable purposes of an unincorporated association as it is to all non-charitable purpose trusts in general. Therefore all the comments and considerations of the last thirty-five pages are directly relevant to the case of the gift to an unincorporated association. Above all, it can be said that a gift on trust for an association, if tested according to the Control Analysis, will not fail for lack of enforceability. At least one individual from one or more of the various classes of controllers <sup>3</sup> will exist who can exercise control over the trustees and thus validate the gift.

It may be recalled that the classes of available controllers who have been discussed hitherto include:-

- i. Direct beneficiaries;
- ii. Factual beneficiaries;
- iii. The settlor of an *inter vivos* trust;
- iv. The representatives of the estate of a donor by way of testamentary trust;
- v. The legatees of such a donor;
- vi. Those entitled on the intestacy of such a donor;
- vii. The Crown;
- viii. The residuary beneficiaries of the trust.

Evidently, a gift on trust for an unincorporated association has no direct beneficiaries (class i) because the association itself lacks legal personality and is therefore incapable of being the beneficiary of a trust. However, if the purposes of the unincorporated association are such that they in fact confer benefit on identifiable persons, these factual beneficiaries can supply the necessary element of control (class ii) <sup>4</sup>. As for the donor himself, the resulting trust doctrine can operate in exactly the same fashion as it does with non-charitable purpose trusts in general, and confer potential control rights on the settlor if the donation to the unincorporated association is made *inter vivos* (class iii) <sup>5</sup>, or on his representatives, legatees and heirs (classes iv, v and vi) <sup>6</sup> if the donation is testamentary in nature. Similarly, the *bona vacantia* notion and possible entitlement of the Crown are as much an exception to the above operation of the resulting trust doctrine when the donation is made on trust for the purposes of an unincorporated association as it is when the gift is for any other non-charitable purpose (class vii) <sup>7</sup>. In addition, if the donor specified

residuary beneficiaries of his gift, they too can satisfy the 'control principle' in the context of unincorporated associations (class viii) <sup>8</sup>.

In sum, if X's gift on trust for the non-charitable purposes of the specified unincorporated association were interpreted in accordance with the Control Analysis, and it satisfied the requirements of certainty and compliance with the rule against perpetuities <sup>9</sup>, in principle it would be valid.

Therefore a court has a total of ten possible analyses from which to choose in interpreting a gift to an unincorporated association. However, one of the many factors which should influence the choice of analysis is the practical feasibility of the selected interpretation, since an analysis which merely superficially complies with legal principle but which *in fact* is incapable of implementing the principle's objectives should not be adopted. In this regard, it has been demonstrated that not every class of potential controllers discussed hitherto who satisfy the 'control principle' in fact ensures that trustees *are* actually controlled in their ownership of trust funds. In the cases of heirs and residuary beneficiaries (classes v, vi and viii), in particular, it was observed that compliance with principle and effective enforcement in fact were mutually inconsistent <sup>10</sup>. Therefore, if the Control Analysis could be developed no further than it has been in the context of non-charitable purpose trusts in general, it would have to be concluded that it did not supply a satisfactory solution to the problem of gifts to unincorporated associations.

However, it will be demonstrated in this chapter that the objection which weakens the plausibility of the Control Analysis in relation to non-charitable purpose trusts in general loses its force totally when the

analysis is applied specifically to gifts on trust for the non-charitable purposes of an unincorporated association. This is because an unincorporated association, by its very nature, has to have members. The role that can be played by those members as controllers of the trust, both in principle and in fact, will be explained. It will be seen that, whatever the purposes of the unincorporated association, the availability of its members to exercise control renders the Control Analysis far superior to any of the analyses which the law presently has to offer.

## 2. Control by the Members of an Unincorporated Association

For the purposes of this discussion, it is proposed to utilise the distinction which has been drawn between 'inward looking' associations, and 'outward looking' associations<sup>11</sup>. An 'inward looking' association is one that promotes the interests of its members and is illustrated by the example of a social club. An 'outward looking' association, on the other hand, promotes outside purposes, such as anti-vivisection, or a political ideal, and its members are the instruments rather than the recipients of the benefits thereby conferred.

### (i) Gift to an Inward Looking Association

If a gift is made on trust for the purposes of an inward looking unincorporated association, the members derive a factual benefit from the trust. For example, take the case of a chess club, whose constitution stipulates as the purpose of its existence the provision of facilities for its members to play chess in appropriate surroundings. The members enjoy the benefit of having the premises, equipment and amenities to pursue their

pastime. They are therefore factual beneficiaries of the gift on trust which enriches the association, and stand in exactly the same position as the factual beneficiaries of all other non-charitable purpose trusts<sup>12</sup>.

The additional feature that the potential controllers are not only factual beneficiaries but also members of the association for whose purposes the gift was made does not add anything to the Control Analysis as already discussed. The members enjoy a factual and pecuniary benefit from the gift and would be affected by any breach of trust by the trustees in their administration of the trust funds. They therefore have standing under the 'control principle' to assert rights of control to secure due performance of the trustees' obligations. The trust is thus rendered controllable, with the result that the gift for the purposes of the association would be valid in principle. Furthermore, the trust is without doubt actually under control, as a matter of fact. If the trustees absconded with the donation, or used it for purposes other than the purchase of chess boards or similar association purposes, the members would undoubtedly exercise their rights of control in order to restore to themselves the factual benefit which is rightfully theirs, via their membership of the association<sup>13</sup>.

(ii) Gift to an Outward Looking Association

By contrast, if a gift is made on trust for the purposes of an outward looking unincorporated association, the members personally derive no immediate factual benefit from the donated funds. For example, take the case of a political party which exists for the purpose of promulgating and furthering the political ideals of its members. Although the existence of such an association may well be beneficial in general terms to a democratic

society, no identifiable person benefits from the furtherance of such abstract and intangible purposes. In particular, it is not possible to describe the members as being the factual beneficiaries of any gift on trust for those purposes <sup>14</sup>.

However, it is submitted that the members can, nevertheless, satisfy the demands of the 'control principle' and extend the scope of the Control Analysis beyond that hitherto discussed. This submission is based on the overall nature and composition of an unincorporated association <sup>15</sup>. To summarise, it is a consensual arrangement whereby all current members in good standing have agreed to associate with one another for the furtherance of certain purposes. They normally pay some sort of subscription on admission, and receive various benefits from membership in return. More often than not, particularly in larger associations, the members appoint committees as the representatives of the association in its dealings with the outside world.

When a donation is made in general terms for the specified purposes of the association, whether from a member or from an outsider, it is received on the association's behalf by designated committee members who hold it as trustees on trust for the association. These committee members are contractually bound to the members of the association to deal with such property in accordance with the terms of the association contract, or constitution, which specifies the purposes and objects of the association's existence. Since it is merely a contract, the constitution can be varied at any time by the agreement of the members. Therefore, depending on the wording of the trust, the committee members could in fact utilise the donated funds for purposes other than those contemplated by the donor at

the time of the gift and yet not violate the terms of the trust. In other words, if the donor merely stipulates that his gift is for the purposes of the association, this might well be interpreted to mean 'the purposes from time to time of the association'. If so, the members might have contractually varied those purposes by the time the gift takes effect. If, on the other hand, the donor expressly enumerates the purposes for which the funds are to be used (which coincide with the purposes of the association), or if the gift is interpreted as meaning 'the purposes of the association as they stand at time of donation', the gift will be immune from variations to the constitution by the membership. In the latter case, the committee members will by implication nevertheless still be contractually bound to comply with the terms of the constitution as it stood at the relevant time.

In light of these facts, it is evident that every member of an unincorporated association is affected by the donation of funds to it and has a pecuniary interest in the due utilisation of those funds for the purposes of the association. In the first place, even if the association is outward looking so that members derive no immediate factual benefit from a gift for its purposes, they are nevertheless entitled to the enjoyment of certain advantages from their membership. Indeed, the payments made by a new member on admission to the association, and usually demanded periodically to ensure continued membership, are made in consideration for the receipt of such advantages. These advantages include the right to enjoy the association's premises and facilities. If the association prospers, members will receive a good return on their subscriptions via the fringe benefits available through membership. If the association is deprived of its funding, on the other hand, or embezzled of donations, members will

suffer a corresponding diminution in the return on their subscriptions. Members therefore have the right not to be wrongfully deprived of their enjoyment of membership and this right does not depend on a true proprietary interest in association property<sup>16</sup>.

Secondly, every member of an unincorporated association is part of the group enterprise it represents. On admission, he acquires a say in the activities and direction of that enterprise, including its property. Even though no member has a true proprietary interest in funds given on trust for the association (unless he is a trustee), every member nevertheless enjoys a pecuniary interest in them. This is because he has a contractual right to ensure that association property is devoted in accordance with the association contract, to which he is a party. When funds are donated to the association, thus increasing its property value, the value of each member's contractual right is likewise increased. Furthermore, each member has the power to cast his vote in favour of a change in the association's constitution, thus amending the mode of furthering its purposes, and having a direct influence on the disposition of the donated funds.

In sum, the status of each member within an association as one of the aggregate of individuals of which it is composed, confers on him an interest in all donations which are made to the association. Even if he personally derives no factual benefit from a particular donation because the association is outward looking, he is interested in all dealings which affect the association's financial status, including donations thereto on trust.

Therefore, from the point of view of principle, every member of an

unincorporated association has sufficient interest in the operation of a trust for the purposes of the association to satisfy the 'control principle'. If the trustee broke his fiduciary obligation in relation to the trust property and used it for purposes other than those of the association, every member would be affected. Each member therefore has a right of control over the trustee in the performance of his fiduciary duties. In this manner, the trust is rendered enforceable and valid <sup>17</sup>.

Above all, it is submitted that control via members is an effective method of guaranteeing that donated funds are *actually* used for association purposes. There is no inconsistency between the pecuniary interest of the members and the due administration of the terms of the trust. Members could derive no personal financial benefit from the failure of the trust because, on failure, the donated funds, or whatever surplus remained at that time, would either return by way of resulting trust to the donor or his estate, or go to the Crown as *bona vacantia*. With the members, therefore, there is no danger that the only occasion on which they would exercise their rights of control would be when the validity of the trust was in doubt. Likewise, members have no interest in permitting trustees to do nothing to further the purposes of the association for the duration of the trust in order to increase the residue available for residuary beneficiaries of the gift. Instead, the interests of the members coincide exactly with the interests of the association, since they *are* the association. From the point of view of the members, to further the purposes of the association is to further the ideals which, as their membership evidences, they share.

Furthermore, there can be little fear of apathetic passivity. Members of an unincorporated association are unlikely to sit on their rights

of control and permit breaches of trust to occur. For example, in the case of a donation for the purposes of the Labour Party<sup>18</sup>, it is hard to believe that not one member thereof would exercise his right to enforce due performance of the trust if the trustees used the funds to publish pamphlets on behalf of the Conservative Party, or to buy himself a house in the South of France. This also illustrates how, quite apart from the existence of community of interest between an unincorporated association and its membership, the practical feasibility of the Control Analysis is further enhanced by the numbers involved. There is normally only one donor, for example, who one hopes will enforce his gift; an unincorporated association, by contrast, must have at least several members in order to be an unincorporated association in the first place, and many associations have thousands, each one of whom has the right to enforce due performance of the terms of the trust. The odds are therefore very much in favour of effective control. From the point of view of the expense of litigation, also, there is the possibility of sharing the burden when large numbers of persons are involved.

In sum, it is submitted that the Control Analysis provides a satisfactory solution to the problem of gifts to associations. Control via members not only satisfies the basic principle of trusts law that a trust must be enforceable; it also guarantees control as a matter of fact.

Before concluding this section, it should be pointed out that the criticism levelled at the 'inward looking'/'outward looking' terminology by Brightman, J. in *Re Recher's Will Trusts*<sup>19</sup> which led him to reject its relevance, can in fact be turned into a further advantage of the Control Analysis. Brightman, J. said<sup>20</sup>:

The expressions "inward looking" and "outward looking" are imprecise and it is undesirable and indeed impracticable that the law should depend upon an ill-defined distinction of this sort; some associations, no doubt, look both ways; what then?

In the context of the Control Analysis, it is not necessary that it be possible to categorise every single unincorporated association as either inward looking or outward looking. In either case, a gift on trust for its purposes can be controlled by its members. The difference between the two types of association merely dictates the particular basis for the members' right of control. Furthermore, if an association is a "hybrid"<sup>21</sup>, the result is merely that the entitlement of the members to exercise rights of control is reinforced. Members will not only derive a factual benefit from the due performance of the trust, they will also enjoy the advantage of seeing the association's abstract purposes and ideals furthered, and its financial position in general strengthened. In conclusion, whatever the nature of an unincorporated association's objects, a gift on trust to further them will be valid if interpreted in accordance with the Control Analysis.

### 3. Assessment of Control Analysis of Gifts to Unincorporated Associations

In order to assess the true value of the Control Analysis of gifts to unincorporated associations, it is necessary to recapitulate the advantages and disadvantages of the nine analyses which are currently available in the common law, and conduct a comparison. It may be recalled that the nine analyses already discussed are as follows :-

- i. The Absolute Gift Analysis: absolute gift to the members of the unincorporated association;
- ii. The Contract Analysis: the gift to the members

- of the association takes effect subject to a contractual obligation to use and retain the funds for the purposes of the association;
- iii. The Mandate Theory: the gift to the members of the association takes effect subject to the terms of either a revocable or an irrevocable mandate arrangement between the donor and those members;
  - iv. The Contractual Undertaking Theory: the gift to the members of the association takes effect in accordance with the terms of an implied contract between the donor and the members;
  - v. The Suspended Beneficial Ownership Theory: the gift to the members of the association takes effect subject to a general equitable obligation owed by them to the donor;
  - vi. Gift on trust for the present members of the association;
  - vii. Gift on trust for the present *and* future members of the association;
  - viii. The Denley Analysis: the gift on trust for the association is validated through the existence of 'factual beneficiaries';
  - ix. Gift on trust for the purposes of the unincorporated association, governed by the 'beneficiary principle'.

Under the Absolute Gift Analysis <sup>22</sup>, the donated funds are transferred directly and absolutely into the hands of the current members of the association

in question at the time the gift takes effect. There can be no legal redress if the association receives not one penny of the gift because the members take as co-owners and are under only moral obligations to divert the funds to the benefit of the association. If they leave the association, they can take their share of the funds with them with impunity. Under the Control Analysis, the members of the association acquire no proprietary interest in donated funds at all.

Under the Contract Analysis <sup>23</sup>, again the members take the donated funds as co-owners thereof. Although they are contractually bound to use the funds for the purposes of the association and to transfer their interest in them to other members when they cease to be members themselves, there is no guarantee that the association will benefit in full or at all from the donation. This is because the restraints on the members' ownership of funds are merely contractual and the remedies available against a defaulting member therefore sound solely in contract. However, under the Control Analysis, trustees are restrained in their ownership of the donated funds by the fiduciary duty to which they are bound and this is reinforced by the guarantee of control which the law of trusts ensures. The analysis depends only to a minimal extent on the contractual nature of membership of an association. Under the Control Analysis, the contractual rights of a member are merely one of the sources of his entitlement to exercise control over the trustees, which triggers the whole panoply of remedies of trusts law. This is compared with the Contract Analysis, where the whole success of the gift stands or falls on the weak support of a contractual bond.

Turning next to the various theories of the *Burrell* litigation, if the Mandate Theory <sup>24</sup> is adopted and interpreted as requiring the gift to

take effect in favour of the members of the unincorporated association, but subject to some sort of mandate, it suffers from serious weaknesses. Whether the mandate is revocable or irrevocable, the only remedies for breach of mandate are contractual in nature. Moreover, the mandate subsists not merely between the members of the association *inter se*, but between the members and the donor. This limits the availability of the theory to *inter vivos* donations. By way of contrast, the Control Analysis does not depend on personal contractual remedies, and it is applicable with equal validity to both testamentary and *inter vivos* donations.

The fourth analysis is that the gift takes effect in favour of the members of the association absolutely (as a matter of property law), who are restrained by the terms of an implied Contractual Undertaking to the donor to utilise the funds for the purposes of the association<sup>25</sup>. This is unsatisfactory as a general solution to the problem of donations for the purposes of unincorporated associations because it can only explain those gifts which take effect *inter vivos*. In addition, it suffers all the drawbacks of being dependent upon the implication and effectiveness of a contract to control the ownership by members of the donated funds. Therefore, when compared with the Control Analysis, which has the advantages of being of general application, denying ownership to members and being supported by the enforcement procedures of trusts law, the Contractual Undertaking Theory is manifestly inadequate.

The Suspended Beneficial Ownership Theory must likewise be rejected. Insofar as it relies upon the notions of suspended beneficial ownership and general equitable obligation, it is legally unsound and of little practical value<sup>26</sup>. In comparing this assessment with the Control Analysis, it should

be recalled that the Control Analysis is built on and around basic legal principle. Moreover, the objection that it would fail in practice has been squarely met in the context of gifts for unincorporated associations.

The remaining alternative interpretations which can be put on a gift to an unincorporated association move away from construing the gift as an absolute transfer to members (albeit coupled with restraints of various kinds) to utilise the mechanism of a trust. Two possible analyses are that the gift takes effect either on trust for the present members of the association, or for both present *and* future members<sup>27</sup>. However, in either case, the analysis fails to guarantee that any benefit will accrue to the association itself. Even assuming that the gift complies with the certainty requirements and the rule against perpetuities, and is declared valid, as with the Absolute Gift Analysis the benefit of the gift goes not to the association but to the members themselves as beneficiaries of the trust, and the association will share that benefit only if the members feel compelled, as a matter of *moral* obligation, to divert the funds in that manner. Under the Control Analysis, the roles are reversed. The association itself is the 'beneficiary' of the trust, and the extent to which the members will benefit from the donation will depend upon the nature of the association.

Under the *Denley* Analysis<sup>28</sup>, the donated funds can be held on trust for the unincorporated association, and its beneficial enjoyment of the funds can be guaranteed by the presence of persons (if any) who derive a factual benefit from the gift. However, this result can only be achieved if the purposes of the association are non-abstract in nature; they must confer a sufficiently direct and tangible benefit on identifiable beneficiaries. The Control Analysis, by comparison, can achieve the same result

in the case of both abstract and non-abstract purposes. Furthermore, the *Denley* Analysis *per se* is unsatisfactory as a matter of law because it is extremely uncertain in scope and effect, and has no authoritative support. It has been submitted that these defects would be eliminated if the analysis were instead recognised as a variation of the Control Analysis.

Finally, if a gift is interpreted as a non-charitable purpose trust, even if it is described with sufficient certainty and properly limited in duration to the applicable perpetuity period, it will fail *ab initio*<sup>29</sup>. This is because the current law espouses the so-called 'beneficiary principle', for which the 'control principle' has been suggested as a replacement in this thesis. Under the 'beneficiary principle', all gifts on trust for the non-charitable purposes of an unincorporated association fail, and the intentions (usually generous and benevolent) of donors are frustrated. Under the Control Analysis, however, the gifts are valid, only the association can benefit and the fulfilment of the intentions of the donor is guaranteed.

#### 4. Conclusion

Under the Control Analysis, an otherwise valid gift for an unincorporated association will take effect within the framework of a non-charitable purpose trust for the duration of the applicable perpetuity period<sup>30</sup>. It is submitted that this is a desirable result - as a matter of principle, in fact, and from the point of view of public policy.

In the first place, the Control Analysis is consistent with the fundamental principle of trusts law that a trust must be enforceable to be valid.

Secondly, the Control Analysis of a gift to an unincorporated association ensures that the objectives of that principle are achieved in fact, as well as in theory. Thirdly, if one surveys the case law on the subject, it is apparent that the vast majority of gifts for associations which have failed through lack of an analysis such as that propounded in this thesis have been at worst neutral and at best beneficial from the point of view of public policy. The inability of the law to provide a guarantee that gifts to associations such as Amnesty International, contemplative orders of nuns, the Conservative Party and youth clubs has been a sad anomaly. In sum, one must conclude that the adoption of the Control Analysis of gifts to unincorporated associations would be a valuable reform of the current law.

Given that this is so, one further issue which remains to be discussed is whether and how such a reform might be possible. Evidently, the most efficient method of effecting a reform of this nature would be through the passage of appropriate legislation. Statutory measures to the effect that gifts for unincorporated associations should be valid and take effect through the vesting of funds in trustees would suffice, coupled with a specific provision conferring standing on members to enforce the gift in court. In the interests of certainty and public policy, additional provisions might stipulate a maximum duration for such trusts and deny validity to gifts for specified types of association, such as subversive political parties.

However, two objections can be levelled at the suggestion that reform can be achieved via legislation. Firstly, the problem of the validity of gifts to unincorporated associations has existed for a considerable period of time and, despite frequent calls by commentators for legislative reform, none of a general nature has been forthcoming. Legislators evidently con-

sider existing incorporation and registration procedures adequate, and are unwilling to encourage the proliferation of *unincorporated* associations. Secondly, it could be argued that legislation is not necessary. The same result could be achieved, based on existing common law principle, if only the situation were re-analysed and assessed by the courts in the manner suggested here.

In the United Kingdom, however, the door to such reform is apparently closed by the strong body of law which followed *Re Astor* and all but entrenched the 'beneficiary principle' as a rule of law<sup>31</sup>. Nevertheless, the matter has never been decided or ruled upon by the House of Lords, which would have the power to overrule the 'beneficiary principle' in the context of gifts to unincorporated associations. This could be achieved in one of two ways. On the one hand, the House could simply announce that it was changing the law because it no longer made sense. Alternatively, it could adopt the method it used in the *Baden* litigation<sup>32</sup>. In that case<sup>33</sup>, the House of Lords was dealing with the requirement of certainty in discretionary trusts. Lord Wilberforce had pointed out that the basis of the need for certainty was the principle that "a trust cannot be valid unless, if need be, it can be executed by the court"<sup>34</sup>. Having conducted a historical review of the cases, he discovered that, whilst the earlier cases had executed discretionary trusts according to the perceived intention of the settlor, later on, "the Court of Chancery adopted a less flexible attitude"<sup>35</sup>. The new rule which then developed was that equal division between all beneficiaries had to be possible and the earlier cases were dismissed as "anomalous". Lord Wilberforce commented on the interaction of practice and principle in the following terms<sup>36</sup> :

I do not think that this change of attitude, or practice, affects the principle that a discretionary

trust *can*, in a suitable case, be executed according to its merits and otherwise than by equal division. I prefer not to suppose that the great masters of equity, if faced with the modern trust for employees, would have failed to adapt their creation to its practical and commercial character.

In other words, Lord Wilberforce side-stepped a body of case law with which he did not agree by denying that it had established a new principle. It had merely adopted a *practice* in relation to the underlying principle - a practice that could be readily changed to suit contemporary conditions.

It is submitted that such a line of argument is equally applicable to the law of non-charitable purpose trusts. Again the fundamental principle is that a trust must be enforceable and it has been seen that both the 'beneficiary principle' and the 'control principle' are based on it. On the authority of the above case, it could be argued that *Re Astor* and its 'beneficiary principle' merely represented a less flexible attitude toward the interpretation of the principle. The principle itself has remained intact and a different practice could validly be adopted to deal specifically with the problem of gifts to unincorporated associations. Perhaps a modern-day court in England could be persuaded to adopt such an attitude and adapt the fundamental principle in the manner suggested here to arrive at the Control Analysis of gifts to unincorporated associations.

In Canada, however, the problems of incorporating the Control Analysis into the common law are less acute because the area of gifts to unincorporated associations is relatively untrodden ground <sup>37</sup>. When the topic comes up next, therefore, it is to be hoped that the Control Analysis, as and for the reasons formulated in this thesis, will prevail.

FOOTNOTES : CHAPTER III

1. See *supra*, pp 27-28.
2. *Supra*, pp 105-131.
3. *Supra*, pp 178-180.
4. Discussed *supra*, pp 198-203.
5. Discussed *supra*, pp 203-208.
6. Discussed *supra*, pp 208-213.
7. Discussed *supra*, pp 213-217.
8. Discussed *supra*, pp 217-226.
9. Its duration would have to be restricted to the perpetuity period. Discussed *supra*, pp 117-121.
10. Discussed *supra*, pp 209-213, pp 219-226.
11. In *Re Recher's Will Trusts* [1972] Ch.526; [1971] 3 W.L.R.321; [1971] 3 All E.R.401, such was the submission of Mr. Lyndon-Stanford, counsel for one of the organisations which benefited from the failure of the trust: [1972] Ch.526 at 531-533. See also *supra*, pp 148-149.
12. Discussed *supra*, pp 198-203.
13. See also *supra*, pp 144-149.
14. Of course, the purposes of an outward looking association *can* confer factual benefits on persons other than its members. See the example, *supra*, pp 149-150. In such a case, the outsiders can control the trust and render it valid as factual beneficiaries. The present discussion, however, deals only with the role of members of the association as a class of controllers *additional* to those already discussed. If the purposes are totally abstract, as in the example used in the text, another source of control must be found.
15. See also *supra*, pp 12-16.
16. See also, *Cohen v. National Union of Tailors and Garment Makers* (1962) Times, 13 January ; *Abbott v. Sullivan* [1952] 1 K.B.189; [1952] 1 All E.R.226 ; *Lee v. Showman's Guild of Great Britain* [1952] 2 Q.B.329; [1952] 1 All E.R.1175, *per* Lord Denning.
17. See also, Insall, "Gifts to Unincorporated Associations", (1977) N.Z.L.J.489, pp 492-493 ; Ford, Unincorporated Non-Profit Associations (Oxford : Clarendon, 1959), p 31 ; Green, "The Dissolution of Unincorporated Non-Profit Associations", (1980) 43 Mod.L.R.626, pp 642-643.

18. As in, for example, *Re Grant's Will Trusts* [1980] 1 W.L.R.360; [1979] 3 All E.R.359. Discussed *supra*, pp 64-66.
19. *Supra*, footnote 11.
20. *Supra*, 1 Ch.526 at 542.
21. *Per* Brightman, J., *ibid.*
22. *Supra*, pp 33-50.
23. *Supra*, pp 51-78.
24. *Supra*, pp 82-88.
25. *Supra*, pp 88-91.
26. *Supra*, pp 91-95.
27. *Supra*, pp 150-163.
28. *Supra*, pp 132-150.
29. *Supra*, pp 105-131.
30. *Supra*, pp 236-243.
31. Similarly in Australia: *Re Cain* [1950] V.L.R.382 ; *Leahy v. Attorney-General for New South Wales* [1959] A.C.457; [1959] 2 W.L.R.722; [1959] 2 All E.R.300 ; *Re Wilson's Grant* [1960] V.R.514 ; *Re Inman* [1965] V.R.238; A.L.R.796.
32. *McPhail v. Doulton* [1971] A.C.424; [1970] 2 W.L.R.1110; [1970] 2 All E.R.228 ; *Re Baden's Deed Trusts (No.2)* [1973] Ch.9; [1972] 3 W.L.R.250; [1972] 2 All E.R.1304.
33. *McPhail v. Doulton*, *supra*, footnote 32.
34. [1970] 2 All E.R.228 at 241.
35. *Ibid*, at 242.
36. *Ibid.*
37. There is no strong authority either for or against the 'beneficiary principle'. There are statutes expressly validating non-charitable purpose trusts for the perpetual care of graves: for example, Ontario Cemeteries Act, R.S.O.1970, c.57, s.23; Nova Scotia Trustee Act, R.S. N.S.1967, c.317, s.64; and converting non-charitable purpose trusts into powers: Ontario Perpetuities Act, R.S.O.1970, c.343, s.16; Alberta Perpetuities Act, R.S.A.1980, c.P-4, s.20. However, "beyond this point it is a matter for conjecture as to what the position is in Canada because the amount of reported litigation on the subject is so small": Waters, Law of Trusts in Canada (Toronto: Carswell, 1974), p 429.

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