



Concentrate Questions and Answers Equity and Trusts: Law Q&A Revision and Study Guide (3rd edn)

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## p. 94 7. Trusts of Imperfect Obligation

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### Abstract

The Concentrate Questions and Answers series offer the best preparation for tackling exam questions. Each book includes typical questions, bullet-pointed answer plans, suggested answers, and author commentary. This book offers advice on what to expect in exams and how best to prepare. This chapter covers questions on trusts of imperfect obligation.

**Keywords:** trusts, imperfect obligation, certainty of objects, perpetuities, disposition, unincorporated association

### Are You Ready?

In order to attempt the questions in this chapter you will need to have covered the following topics:

- The exceptional cases where a private trust for purposes is permitted
- Gifts to unincorporated associations

### Key Debates

**Debate:** it is arguable that many purpose trusts are valuable and for the law automatically to deny validity to them where they do not satisfy the requirements of charity law is harsh.

The debate is twofold:

- a should the exceptions to the rule which have always been recognised continue and, indeed, be extended?
- b and, is it right that the courts should continue to interpret purpose trusts more generously where possible to recognise 'indirect' objects and so validate them?

Cases such as *Re Lipinski* and *Re Recher* develop this point and Baughen (2010) and Luxton (2007) argue aspects of this debate. There is also the question of whether a statutory code could provide some resolution to this area of law. For this argument, see Pawloski (2019). (For both references see 'Taking Things Further').

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### Question 1

Daniel, who died last month, made the following dispositions in his will which was executed on 1 January 2018:

- a £50,000 to the Seaview District Council for the erection and maintenance of a statue on the promenade in memory of my late wife.
- b £5,000 for the care of my cat Tortoiseshell and any kittens she may have.
- c £20,000 for the fostering of cordial relations and understanding between countries.
- d The residue of my estate to the Cranford Cricket Club for the purpose of building a new pavilion and changing rooms.

The Cranford Cricket Club is a non-charitable unincorporated association.

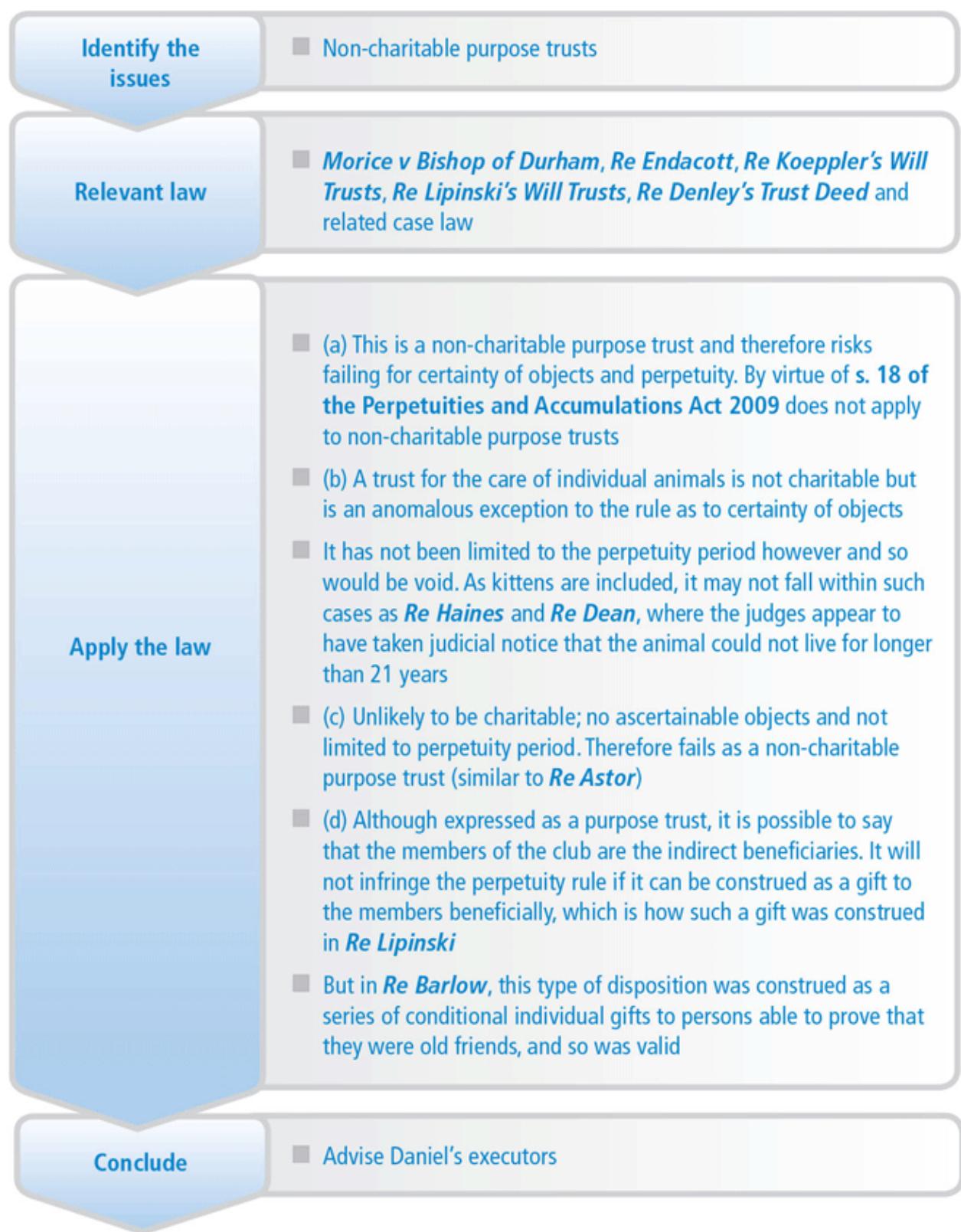
**Advise Daniel's executors as to the validity of these dispositions.**

### Caution!

- This is a typical problem question on this area of the law, where the examiner chooses from the cases examples of trusts which may or may not fail for certainty of objects or perpetuity. Although it is a fairly compact area of law, you need to know the cases on it and the reasoning applied in them to answer the question well.
- Notice that you are asked to comment 'on the validity of each disposition'. So, you need to consider this broadly.

■ It is possible that such a question might also include a charitable disposition. For example, in part (a), if the disposition had been for the erection and maintenance of a shelter on the promenade, it might have been valid as a charitable disposition under the fourth head of charity (trusts for other purposes beneficial to the community). As you are asked to consider the validity of the disposition you have to consider this too.

## Diagram Answer Plan



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## Suggested Answer

### (a) Statute

To be valid, a trust must comply with the requirement for certainty of objects, that is, there must be ascertainable persons able to enforce the trust.<sup>1</sup> In *Morice v Bishop of Durham (1804)* 9 Ves 399, 32 ER 656 a trust for ‘such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve of’ was held to be void. Grant MR said that such ‘an uncontrollable power of disposition would be ownership and not trust’.

<sup>1</sup> Statement of the law with case to follow.

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↳ To be valid a trust must also comply with the rule against perpetual trusts, unless it is a charitable trust. This rule is not affected by the **Perpetuities and Accumulations Act 2009**. In any event, this Act does not apply to wills executed before the date (6 April 2010) on which the Act came into force (s. 16(5A)(a), **Perpetuities and Accumulations Act 1964**).

The gift in this clause is essentially a trust for a purpose<sup>2</sup> and there are no particular objects that are able to enforce it. It cannot be brought within any of the four heads of charity in *Pemsel's Case [1891] AC 531* and is therefore a non-charitable purpose trust. It is not dissimilar to the disposition in *Re Endacott [1960] Ch 232*, where a testator left his residuary estate to the North Tawton parish council ‘for the purpose of providing some useful memorial to myself’. The gift could not take effect as an outright gift to the parish council as the purpose attached to it created a trust. It was not charitable, and was too wide and uncertain to fall within the anomalous cases ‘when Homer has nodded’ (per Harman LJ), namely, the maintenance of tombs. A valid trust within this category should probably have some funerary association and should not be excessive in amount (*Re Endacott*). £50,000 might well be regarded as excessive.

<sup>2</sup> Here comes the application of the law to the problem.

The courts have made a concession for such trusts for the maintenance of tombs and monuments and of individual animals (such trusts having been described by Roxburgh J in *Re Astor's Settlement Trusts [1952] Ch 534* at p. 547 as ‘concessions to human weakness or sentiment’), but only as regards lack of objects and not perpetuity, so that a trust for the erection and maintenance of a monument limited to 21 years might be valid. The gift here is for the maintenance of the statue as well as its erection, and therefore will be void additionally as infringing the perpetuity rule.

If the statue could be regarded as a monument<sup>3</sup> then a donation for its erection, but not its maintenance, might be valid under this exception to the general rule (*Mussett v Bingle* (1876) *WN* 171).

<sup>3</sup> Your conclusion.

### (b) Tortoiseshell and Kittens

Although a trust for the care of animals generally (*Re Wedgwood* [1915] *1 Ch* 113) and the care of cats in particular (*Re Moss* [1949] *1 All ER* 495) can be a charitable trust, a trust for the care of individual animals is not.<sup>4</sup> Nevertheless, a trust for the care of individual animals can be valid as a private trust, this being another anomalous exception to the rule requiring certainty of objects. Again, however, any such trust must not infringe the rule against perpetuities.

<sup>4</sup> Identification of the issue and the statement of the law start here.

Although there are cases such as *Re Haines, The Times*, 7 November 1952 and *Re Dean* (1889) *41 ChD* 552, where the judges appear to have taken judicial notice of the fact that the particular animals concerned would be unlikely to live beyond the perpetuity period (a cat in *Re Haines* and horses and hounds in *Re Dean*), it would seem that such judicial indulgence is misguided. The rule against perpetual trusts,<sup>5</sup> which was expressly preserved by the **Perpetuities and Accumulations Act 1964**, s. 15(4) (and which is not affected by the **Perpetuities and Accumulations Act 2009**), must be applied at the time the trust is created and it must be possible to say at that time that the trust will not continue for longer than the perpetuity period, which in the present case is 21 years. Moreover, the rule against perpetuities has never recognised animal lives as lives in being for the purposes of calculating the perpetuity period (*Re Kelly* [1932] *IR* 255).

<sup>5</sup> In most courses nowadays the rule against perpetuities is mostly dealt with in the briefest detail—except when it comes to trusts of imperfect obligation as here. Then you find a testing question with a reference to future kittens and find yourself having to deal with it.

One must therefore conclude<sup>6</sup> that the disposition to Tortoiseshell and her kittens is void, although had it been limited to 21 years or ‘for so long as the law allows’ then it could have been valid for 21 years. It could also have been limited to the life or lives in being of a person or persons living plus 21 years as in *Re Howard, The Times*, 30 October 1908, where the lifetime of the survivor of two specified servants was used from which to measure the perpetuity period for the maintenance of a parrot.

<sup>6</sup> Application and conclusion in this paragraph.

### (c) Cordial Relations

This disposition would again be a purpose trust<sup>7</sup> without objects able to enforce it and would therefore fail unless it could be brought under one of the heads of charitable trusts. However, a disposition with laudable objects is not necessarily charitable and it is unlikely that this one would be. Although similar objects were held to be charitable within the head of education in *Re Koeppeler's Will Trusts [1986] Ch 423*, the disposition there was to 'Wilton Hall', a recognised series of lectures which the testator had organised during his lifetime. This is much more vague however in its application.

<sup>7</sup> Here you can go quickly into the application as the broad statements of the law have already been made so they are implicit here.

In *Re Astor's Settlement Trusts*, a trust for (*inter alia*) the maintenance of good understanding between nations and the preservation of the independence and integrity of the newspapers was considered too vague and uncertain as to its application for the court to administer and was void.<sup>8</sup>

<sup>8</sup> There is really nothing more to be said in this part—so deal with it concisely.

### (d) Cranford Cricket Club

A gift to a non-charitable unincorporated association may also fail for lack of certainty of objects and for perpetuity (note as at (a) that the rule against perpetual trusts is not affected by the **Perpetuities and Accumulations Act 2009**).<sup>9</sup>

<sup>9</sup> If you have already discussed the point then refer back to your discussion as here.

There have been cases where the courts have interpreted gifts to associations as being gifts to the current members beneficially ↵ as in *Re Clarke [1901] 2 Ch 110*, where a gift to the 'Corps. of Commissionaires' was held to be a valid gift to the members beneficially for the time being.

In *Re Lipinski's Will Trusts [1976] Ch 235* however, Oliver J followed the principle of *Re Denley's Trust Deed [1968] 1 Ch 373* by finding that although a trust for the erection of buildings for the Hull Judeans (Maccabi) Association was expressed as a purpose trust, it was in fact for the benefit of ascertainable

individuals, namely, the members of the club, and he therefore held the trust to be valid. It was argued that because the testator had made the gift in memory of his late wife, this tended to a perpetuity and precluded the association members for the time being from enjoying the gift beneficially: this argument was rejected by Oliver J. Applying the principle of *Re Lipinski's Will Trusts* to this disposition therefore, it might well not fail for certainty of objects.

The further requirement of compliance with the rule against perpetuities must also be satisfied as regards a disposition to an unincorporated association. Gifts to members of an unincorporated association were considered in detail by Cross J in *Neville Estates Ltd v Madden [1962] Ch 832*. He identified two categories of gifts to unincorporated associations which would not infringe the perpetuity rule, namely, where the gift is to the members themselves as joint tenants beneficially, or to the members as members of the association, but there is nothing in the rules of the association to preclude the members from deciding, if they so choose, to divide the gift up between themselves. In both these cases the possibility of immediate division of the gift makes it inoffensive to the rule against perpetuities. Cross J's third category, however, is where there is some factor, such as the rules of the association (see *Re Grant's Will Trusts [1980] 1 WLR 360*), or the nature of the gift (see *Leahy v A-G (NSW) [1959] AC 457*), which precludes any immediate division of it between the members of the association for the time being. Such gifts will be void. This analysis by Cross J was adopted by Brightman J in *Re Recher [1972] 1 Ch 526* where he was prepared to accept as valid a gift to the members of an association on a contractual basis according to the terms of the association's rules, which did not preclude the members from dividing up the gift between themselves if they so decided. The decision in *Hanchett-Stamford v A-G [2008] EWHC 30 (Ch)* supports this approach.

Assuming that there is nothing in the rules of the Cranford Cricket Club which would preclude the members for the time being from dividing the gift between themselves if they decided to do so, the gift would not fail for perpetuity and could therefore be a valid trust.<sup>10</sup>

<sup>10</sup> This short paragraph contains your final conclusion on this part.

### Looking For Extra Marks?

- To obtain good marks on such a question, you would have to demonstrate not merely a knowledge of any authorities which may be relevant to the precise terms of the gifts, but also a broader understanding of the underlying principles, for example a knowledge of the cases on monuments in part (a) and of Cross J's analysis of gifts to unincorporated associations in part (d).

## **Question 2**

There can be no trust over the exercise of which this court will not assume control ... (Grant MR in *Morice v Bishop of Durham (1804) 9 Ves 399, 32 ER 656.*) Keeton and Sheridan, *The Law of Trusts*, 10th edn, Professional Books Ltd, 1974, wrote: Modern cases regard (Grant MR) as saying that a trust must have definite human or corporate objects or be charitable. Construing his judgment in this sense has impeded the development of purpose trusts.

**Critically examine the rationale for Grant MR's dictum and discuss the solutions which the courts have found to some of the problems raised by the rule.**

## **Caution!**

- This is a fairly typical essay question on trusts of imperfect obligation which requires you to demonstrate an understanding of the rationale for such a rule. You should also be aware of the criticisms of the rule and the ways in which the courts have mitigated the harshness of it in some of the more recent cases.

## Diagram Answer Plan

Every trust must have objects as otherwise there would be nobody able to enforce the trust obligation and the trust property would be left unfettered in the hands of the trustees

The courts must be able to control a trust and to administer it if necessary, but it would be impossible to do this if the objects were too wide or uncertain

Purpose trusts may also infringe the perpetuity rule unless they are expressly limited to the perpetuity period. The rule against perpetual trusts is not affected by the **Perpetuities and Accumulations Act 2009** (s. 18)

Gifts to unincorporated associations present problems as to certainty of objects (the members are a fluctuating body which will also include future members) and perpetuity (no limited time for their existence)

Gifts to unincorporated associations will be valid if they can be construed as gifts—beneficially to the members for the time being, or there is nothing in the rules of the association to prevent the members from deciding to treat them as such, or if the gift can be construed as one to be held by the members under a contract (*Re Recher*)

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## Suggested Answer

The effect of this dictum was to prevent the development of purpose trusts where they fell foul of the rules for certainty of objects or charity law.<sup>1</sup> This policy decision is not necessarily justifiable as there may be good reasons for permitting funds to be allocated for a purpose which may not be charitable. This dictum has caused considerable difficulties in creating trusts for groups of individuals formed loosely together in unincorporated associations where there is no good reason why their activities should not benefit from the munificence of a donor.

<sup>1</sup> The question asks for a critical examination so present a critical perspective. This version adopts a negative criticism. You could do the reverse but whatever your view is assert it and then explain it.

One of the three requirements for certainty for a trust is certainty of objects.<sup>2</sup> The reason expressed for this by Grant MR was that there must be a person or persons able to enforce the obligations of the trust against the trustees, as otherwise property would be left in their hands entirely without obligation attaching to it. This would abnegate the essential nature of a trust of division of legal and equitable ownership and would be equivalent to unfettered ownership.

<sup>2</sup> Now set out the basic principle.

Trusts for charitable purposes<sup>3</sup> are enforced by the Attorney General so that this problem does not arise. However, trusts for non-charitable purposes clearly do present a problem in this respect.<sup>4</sup>

<sup>3</sup> Then explain charities as exceptions.

<sup>4</sup> That naturally leads you to this next point.

A further objection to enforcing a non-charitable purpose trust is the difficulty of interpreting and applying the purpose. This was illustrated in *Re Astor's Settlement Trusts* [1952] Ch 534. The court must be able to control and administer a trust itself if necessary. Any uncertainty or ambiguity as to the purpose to be carried out will make this impossible and is a further reason for the invalidity of such trusts.

A further problem<sup>5</sup> with non-charitable purpose trusts is the unlimited scope of purposes which the courts might be called upon to recognise as valid. Although many non-charitable purpose trusts might be useful and beneficial to some persons, other such purported trusts may benefit nobody. The case of *Brown v Burdett* (1882) 21 ChD 667, where a house was left in trust to be shut up for 20 years, illustrates the undesirable purposes for which eccentric testators might create trusts. Such capricious trusts will not be recognised. However, any decision on the desirability or otherwise of any particular purpose → necessarily involves a difficult value judgement. From a practical point of view, Roxburgh J said in *Re Astor's Settlement Trusts* '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>5</sup> Each paragraph takes a new point.

Non-charitable purpose trusts must also comply with the perpetuity rule.<sup>6</sup> An application of this rule invalidates any non-charitable purpose trust which might subsist for more than a life or lives in being plus 21 years, or if no lives are specified, then for more than 21 years. This rule is not affected by the **Perpetuities and Accumulations Act 2009** which establishes a new perpetuity period for other trusts (other than those which are for charitable purposes). Purpose trusts infringe this rule if they provide for the tying up of capital for more than the permitted period. If all the capital can be spent at once, this problem does not arise: *Re Lipinski's Will Trusts [1976] Ch 235*.

<sup>6</sup> This paragraph deals with the perpetuity point.

Nevertheless,<sup>7</sup> it must be conceded that many purpose trusts may be valuable and for the law automatically to deny validity to them is harsh. There are certain exceptions to the rule therefore which have always been recognised, and more recently the courts have been prepared to interpret purpose trusts more generously where possible to recognise 'indirect' objects and so validate them.

<sup>7</sup> Nice word to start a paragraph which is setting out a counterpoising point to the previous one.

The clearly recognised anomalous exceptions are trusts for the maintenance of tombs and monuments and of individual animals. All such trusts must, however, comply with the perpetuity rule.<sup>8</sup>

<sup>8</sup> Good to repeat this important point.

A gift to an unincorporated association may necessarily involve problems as to both certainty of objects and perpetuity, as the association is a fluctuating body of people which may include future members, and may have purposes which are perpetual. This problem was addressed by Cross J in *Neville Estates Ltd v Madden [1962] Ch 832*, who was able to find that a disposition to the members for the time being beneficially (either as joint tenants or tenants in common) is unobjectionable. They themselves are the object of the gift and so they may, if they wish, divide the gift between themselves at any time. Such a disposition is also unobjectionable as regards perpetuity.

A second possibility is that the gift is one to the members as members of the association, in which case they take beneficially, but subject to the contractual rules of the association. Provided that there is nothing in the rules to prevent the members from agreeing to change them if necessary in order to

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take the gift beneficially, then the gift will again be unobjectionable on grounds of certainty of objects or perpetuity. If, however, there is something in the nature or terms of the gift, or the rules of the association, which precludes the members from taking beneficially, then the gift will be for the purposes of the association and will offend the certainty of objects rule and possibly also the perpetuity rule. In *Re Grant's Will Trusts* [1980] 1 WLR 260<sup>9</sup> the rules of the local Chertsey and Walton Constituency Labour Party were subject to the rules of the National Labour Party and could not be altered by the local party. The members could not alter the rules to make the gift one which they had control over and it therefore failed.

<sup>9</sup> Here starts a discussion of the cases.

In *Re Recher's Will Trusts* [1972] Ch 526, Brightman J found that a gift to an anti-vivisection society would have been valid as within Cross J's second category, although it might have surprised the testatrix to know that this was the legal position! (In this case, a gift to an amalgamated association which was incorporated after the testatrix's death was void, as it contemplated a different contractual situation from that subsisting at death.)

In *Re Denley's Trust Deed* [1968] 1 Ch 373, land was left on trust for use as a recreation ground for the employees of a company. Goff J upheld the trust as he was able to find that the employees were the *de facto* beneficiaries, even though the trust was expressed as a purpose trust, and so had *locus standi* to enforce the trust. This was followed in *Re Lipinski's Will Trusts* where a trust 'solely' for the erection and improvement of new buildings for the Hull Judeans (Maccabi) Association was held to be valid on two separate grounds, one of them being that the members of the association could be treated as the *de facto* objects of the trust. The other ground was on the contract-holding construction described in *Re Recher's Will Trusts*. Oliver J held in *Re Lipinski* that the expressed purpose of the gift being 'in memory of my late wife' did not imply an intention to create a permanent endowment but was merely a tribute to the testator's wife and therefore did not necessarily tend to a perpetuity. The decision in *Hanchett-Stamford v A-G* [2008] EWHC 30 (Ch) supports this approach.

Clearly legal recognition afforded only to trusts with objects able to enforce them is open to criticism on the grounds of harshness and inflexibility and creates difficulties with endowments for unincorporated associations. Whilst any general abrogation of the rule would be undesirable, the modifications made by the courts where there are discernible 'indirect' objects are to be welcomed.<sup>10</sup>

<sup>10</sup> Give a view in this concluding paragraph to show that you have thought about these issues and are not just describing them.

### Looking For Extra Marks?

- Some development of a critique going further than the resumé in the conclusion in the suggested answer would earn you more marks. For example, you could include discussion of Mark Pawlowski's (2019) proposal for a statutory code (see 'Taking Things Further') as well as reference to the other literature listed there.

### p. 104 Taking Things Further

- Baughen, S., 'Performing animals and the dissolution of unincorporated associations: the "contract-holding" theory vindicated' [2010] Conv 216.
- Luxton, P., 'Gifts to clubs: contract-holding is trumps' [2007] Conv 274.

*These two articles cover the contract-holding theory for gifts for incorporated associations.*

- Brown, J., 'What are we to do with testamentary trusts of imperfect obligation?' [2007] Conv 148.

*This is a good article to get across this topic.*

- Pawlowski, M., 'Private purpose trusts—a statutory scheme for validation' (2019) 25(4) Trusts & Trustees 391–396.

*This article discusses whether the UK should introduce legislation to validate non-charitable purpose trusts, as some offshore jurisdictions have already done.*

### Online Resources

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