Private Purpose Trusts and the *Re Denley* Trust 50 Years On

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Cases cited
Re Denley's Trust Deed [1969] 1 Ch. 373 (Ch D)
Pettingall v Pettingall (1842) 11 L.J. Ch. 176 (Ch D)
Re Endacott [1960] Ch. 232 (CA (Civ Div))
R v District Auditor, ex parte West Yorkshire Metropolitan County Council [1986] R.V.R. 24; [2001] W.T.L.R. 785 (QBD)

Introduction

Within England and Wales, it is well-known that a trust cannot be for a purpose unless it is charitable.[1] Yet this assertion is often caveated by the so-called 'exceptions' to the rule; one such exception is that of the *Re Denley*[2] trust. Though some have advocated that it should never have been permitted[3], the consensus seems to be that the *Re Denley* trust is yet another form of permissible non-charitable purpose trust.

It has now been five decades since the High Court handed down its controversial judgment in *Re Denley* and notwithstanding the controversy, the decision remains 'good law'.[4] Though perhaps tempting, it would be naïve to "[place it] on one side in a pile…marked 'not to be looked at again'".[5] And to simply dismiss the case as *sui generis* would likewise trivialise the decision. Indeed, the case requires revisiting not least because it appears to contravene orthodox trust law principles,

[1] *Bowman v Secular Society Ltd* [1917] AC 406 (HL), 441 (Lord Parker); *Leahy v Attorney-General for New South Wales* [1959] AC 457 (PC (Aus)), 478-479 (Viscount Simonds).

[2] *Re Denley's Trust Deed* [1969] 1 Ch 373 (Ch D).

[3] eg. W Swadling, 'Orthodoxy' in W Swadling (ed) *The Quistclose Trust: Critical Essays* (Hart Publishing, 2004) p 29.

[4] 'good law' in that it has not been overruled.

[5] *Re King (Deceased)* [1963] Ch 459 (CA), 483 (Lord Denning), the epigram referring a different case.

but also because the decision has been positively cited and relied upon in recent caselaw.[6] So returning to the decision 50 years later is more than just an historically felicitous foray; it is an opportune moment to reconsider our understanding of the fundamental rules and principles governing this area of the law. It may, consequently, require us to reassess those cases which have taken *Re Denley* as gospel.

This article will set out the law in relation to private purpose trusts within England and Wales, and provide a much-needed, up to date critique on the current state of the law. Concomitantly, it will re-examine *Re Denley* in light of these considerations to establish to what extent, if any, its ostensible departure from the orthodoxy can be justified. Finally, the article will go on to consider possible recognised, alternate methods which could have been employed in *Re Denley* to achieve the same ends, thus avoiding the creation of this novel, controversial type of trust.

Re Denley's Trust Deed

HH Martyn Co Ltd was a hugely successful company operating from the early 1900s until 1971, with its most prestigious projects including the gates for London's Marble Arch, architectural design and decoration work for the SS Queen Mary, and providing parts for the Queen Elizabeth Hall, London.[7] The organisation initially began as a group of art craftsmen in the late 1800s but evolved to become a limited company at the turn of 20th century, specialising in stone, marble and wood carvings. It later diversified into, inter alia, joinery, cabinet-making, wrought iron works and stained glass.[8] The business continued to expand and, in 1915, it extended its influence to the aviation sector, being subcontracted to build aircraft. So prosperous was the company in fact, that by 1920 its Sunningend Works in Cheltenham was the largest employer in the area, employing over 1,000 people.[9] The most significant development however - legally speaking at least - took place in 1936 when HH Martyn Co Ltd constructed a trust deed; the latter part of this deed created a legal quandary, one which

[6] *Gibbons v Smith* [2020] EWHC 1727 (Ch); *Grender v Dresden* [2009] EWHC 214 (Ch); [2009] WTLR 379. *Re Merchant Navy Ratings Pension Fund* [2015] EWHC 448 (Ch); [2015] Pens LR 239 also cited the case but was more equivocal in its treatment.

[7] Grace's Guide to British Industrial History, 'H.H. Martyn', at <https://www.gracesguide.co.uk/H._{H.M}artyn > (*accessed*30*August*2020).

[8] J Whitaker, (The National Archives), 'H.H. Martyn and Co. Ltd.', at <https://discovery.nationalarchives.gov.uk/details/r/5fb31548-ae73-482e-8590-20cf251f6ff4> (accessed 30 August 2020).

[9] *Ibid.*

appeared to challenge conventional legal rules and principles - and it was this issue which progressed to the High Court in the guise of *Re Denley's Trust Deed*.

The contentious disposition required land to be given on trust to be maintained and used as a sports ground – to be used primarily by employees of the company, secondarily by any others the trustees would allow. Reginald Goff J chose not to strike down the disposition but uphold it; in his opinion it was a valid trust which was directly or indirectly for the benefit of ascertainable individuals.

Justice Goff's decision was, and still remains, a controversial one but it is nonetheless a decision still being relied upon today. To continue to accept the trust's legitimacy without subjecting it to proper scrutiny however, is to play a dangerous game indeed. Its apparent departure from traditional trust law rules and principles warrants a re-examination of the case; for as Rickett said

> "[t]he ends pursued do not always justify apparent disregard for central propositions in the law of trusts (without, at the very least, some strong arguments)."[10]

Therefore, in order to determine the credibility of the *Re Denley* trust, it is important to analyse it within its relevant, wider legal framework - that of the law of private (non-charitable) purpose trusts.

Non-Charitable Purpose Trusts

Traditionally within England and Wales, non-charitable purpose trusts have been a fly in the ointment that is the private trust; the general rule states such are typically void.[11] Roxburgh J in *Re Astor's Settlement Trusts*[12] explained non-charitable purpose trusts may be declared void for two reasons: failure to satisfy the beneficiary principle and uncertainty of the putative trust. Crucially however, it has become apparent that private purpose trusts can fail for further reasons, viz. for infringing the perpetuity rule; for capriciousness; and, on a more practical level, for being administratively unworkable. The current state of the law concerning each of these elements will now be considered.

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[10] CEF Rickett, 'Problems of Reasoning in the Law of Trusts' (1978) 37(2) CLJ 219, 219.

[11] Cf. P Baxendale-Walker, *Purpose Trusts*, 2nd edn (Tottel Publishing, 2008) who argued the converse.

[12] *Re Astor's Settlement Trusts* [1952] Ch 534 (Ch); [1952] 1 All ER.

1. The Beneficiary Principle

The beneficiary principle requires there to be beneficiaries who are able to enforce the trust (and if need be, the court). As stated in *Morice v Bishop of Durham*[13]:

> "There can be no trust, over the existence of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership, and not a trust…There must be somebody, in whose favour the court can decree performance."[14]

As long-standing as this rule is, however, a different interpretation of the beneficiary principle has been propounded in recent years. Hayton, for example, is of the belief that, though there must be somebody able to enforce the trust, that individual need not be a beneficiary/object.[15] Indeed, why cannot the settlor of the trust appoint someone – who does not have any interest in the property – to act as a protector/enforcer of the trust? This novel view has gained popularity in offshore jurisdictions, with some countries formally recognising such a mechanism through specific statute.[16]

The enforcer approach however has departed noticeably from the established view - that is, where the individuals able to enforce the trust are those with a beneficial interest.[17] Such a bifurcation, separating those with interests in the property, from those able to enforce the trust, is unwarranted. As Matthews argues, the right-duty relationship is central to the trust and to allow someone to

[13] *Morice v Bishop of Durham* 32 ER 656; (1804) 9 Ves Jr 399 (Ch). Matthews claims the rule existed before even *Morice*: P Matthews, 'The New Trust: Obligations Without Rights?' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Oxford University Press, 1997) p 2.

[14] *Ibid Morice*, 405 (Sir William Grant MR).

[15] DJ Hayton, 'Developing the Obligation Characteristic of the Trust' (2001) 117 LQR 96. See also e.g. A Duckworth, 'Star Trusts' (2013) 19(2) Trust Trustees 215; Baxendale-Walker, *Purpose Trusts*.

[16] eg. Bermuda Trusts (Special Provisions) Act 1989, ss 12A and 12B (inserted by the Bermuda Trusts (Special Provisions) Amendment Act 1998); the Cayman Islands Special Trusts (Alternative Regime) Law 1997. For a fascinating interjurisdictional focus on the enforcer principle and non-charitable purpose trusts, see generally L Smith, 'Give the People What They Want? The Onshoring of the Offshore' (2018) 103 Iowa L Rev 2155.

[17] 'Beneficial interest' more broadly conceived to include potential objects under a discretionary trust whom arguably have the right to be considered, which, it has been said, is an interest of sorts: *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139 (CA), 13 (Lewison LJ). See also *Gartside v IRC* [1968] AC 553 (HL); *Sainsbury v IRC* [1970] Ch 712 (Ch).

enforce without an interest would make the trust institution akin to a contract.[18] Only those with beneficial interests are able to enforce the trust. Indeed, as Millett LJ in the Court of Appeal in *Armitage v Nurse*[19] made clear:

> "there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts…"[20]

There are also pragmatic issues with the enforcer principle. In light of the performance of their role, for instance, the adage "who watches the watchmen?"[21] becomes apposite. Should the enforcer fail to perform their role effectively, or, worse still, conspire with the trustee to steal the property, what then? To prevent such happening the settlor would need to appoint an additional enforcer to oversee the first enforcer, and so on *ad infinitum*.[22] The chance of this occurring, though perhaps unlikely, is still of course an unwelcome prospect; it is difficult to see how the enforcer principle is an improvement on the current orthodox accountability relationship.[23]

That said, it should be recognised the novel approach may provide greater flexibility particularly for complex, commercial arrangements. Wealthy individuals using the mechanism may move their property away from 'traditional trust' territories to that of enforcer-enabled jurisdictions, most likely for the purpose of tax planning. And this, depending upon the reader's point of view, may not constitute 'abuse' or be cause for concern; Gardner, for example, views trusts as merely facilitative devices, where the owner/settlor is entitled to maximal autonomy such that "[if] he might wish to dispose of [his property] in some

[18] P Matthews, 'From Obligation to Property, and Back Again?' in DJ Hayton (ed), *Extending the Boundaries of Trusts and Similar Ring-fenced Funds* (Kluwer Law International, 2002) 203, p 241; cf. JH Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 Yale LJ 625.

[19] *Armitage v Nurse* [1998] Ch 241 (CA).

[20] *Ibid* 253.

[21] A variant translation of: *quis custodiet ipsos custodes*?

[22] C Webb and T Akkouh, *Trusts Law*, 5th edn (Palgrave, 2017) p 70. It also calls into question the mandatory nature of the trustee's duties if an enforcer were not to enforce such (KFK Low, 'Non-Charitable Purpose Trusts: the Missing Right to Forego Enforcement' in RC Nolan, KFK Low, and TH Wu (eds) *Trusts and Modern Wealth Management* (Cambridge University Press 2018) 486, p 503).

[23] Indeed, as Low observed, the enforcer principle also presumes that the individual appointed as enforcer is more reliable than the appointed trustee; why not appoint that person as trustee instead? Or even as an additional trustee? (*Ibid* Low).

elaborately arranged fashion, he should be able to do so".[24] And of course it should also be remembered that orthodox trust law recognises the discretionary trust - traditionally a popular vehicle for settlors wishing to do the very same thing: minimise tax liability.

Significantly however, the enforcer principle produces (more) troublesome effects. It enables settlors to shield assets from creditors - the settlor's own creditors or the trustee's (it being trust property) and also the creditors of other parties, who may not have any beneficial entitlement to the property.[25] What is more, the enforcer principle allows settlors to reserve extensive powers over the trust property (via the enforcer[26]) and therefore create what is, in essence, a sham or 'illusory' trust.[27] This should be avoided at all costs.

To permit the enforcer principle would be to substantially undermine centuries' worth of caselaw and affect processes such as that concerning insolvency. Additionally, it would be antithetical to the trust concept itself; the notion of such being built upon the (admittedly woolly) concept of conscionability, with 'conscience' the "linchpin in the trust relationship".[28] To twist the rules to allow a mechanism which would, in all likelihood, produce more inequitable outcomes for innocent parties, would be markedly ironic. Though the trust has grown and evolved since its embryonic days as the 'use' (and rightly so) we must be very wary of allowing the equitable creature to evolve to such an extent that it takes on characteristics hitherto unknown. We should certainly not cast off its heritage so readily, lest it become a wholly different animal altogether. So it is that, to permit anyone other than those with beneficial interests (or the court) to enforce, it would not be a trust.

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[24] S Gardner, *An Introduction to the Law of Trusts*, 3rd edn (Oxford University Press, 2011) pp 31-32.

[25] B McFarlane and C Mitchell, *Hayton and Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies*, 14th edn (Sweet Maxwell, 2015) p 195. As pithily explained, "[what this amounts to], in economic terms, is to create a fund of property that is unowned" (Smith, 'Give the People What They Want?', 2170).

[26] This may be the settlor himself *qua* enforcer.

[27] McFarlane and Mitchell, *Hayton and Mitchell*, p 195. See *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch) a recent example considering this issue.

[28] Matthews, 'From Obligation to Property', p 205.

The Beneficiary Principle and Re Denley

Re Denley was not a case of orthodox understanding concerning the beneficiary principle and the employees did not have a proprietary (or general beneficial) interest. Reginald Goff J described the employees and "other persons" as "ascertainable individuals" with legal standing to ensure adherence to terms of the disposition; they had *locus standi*.

A comparison may be made here with that of *Pettingall v Pettingall*[29] and *Re Thompson*[30] regarding individuals who are not 'beneficiaries' but nevertheless have *locus standi* to ensure the trust is properly performed. *Pettingall* concerned a bequest of £50 per year to be used for the upkeep of the testator's favourite black mare; the court upholding the gift on the basis the residuary legatee had *locus standi* and could ensure adherence to the terms of the trust. Likewise, in *Re Thompson*, a trust for the promotion of fox-hunting, the court granted a '*Pettingall* order' recognising the interested party (Trinity Hall, Cambridge) had the ability to ensure compliance to the terms of the trust.[31]

However, with respect to Clauson J's judgment in *Re Thompson*, the reasoning was defective. By so effortlessly granting a *Pettingall* order, it effectively meant the judge retrospectively validated an invalid purpose trust; as Penner candidly explained: "On this basis any purpose trust of whatever kind could be enforced…It is getting things absolutely the wrong way round to find that a purpose trust is valid whenever one can devise a *Pettingall* order."[32] As such, it is therefore not good authority.

In relation to *Pettingall*, it should be recalled that the later Court of Appeal decision in *Re Endacott*[33] declared such testamentary purpose trusts to be "troublesome, anomalous and aberrant"[34] and should not be extended.[35] *Re*

[29] *Pettingall v Pettingall* (1842) 11 LJ Ch 176 (Ch).

[30] *Re Thompson* [1934] Ch 342 (Ch).

[31] Though some doubt the utility of *Re Thompson* following the enactment of the Hunting Act 2004, the situation is more nuanced. Schedule 1 of the 2004 Act permits hunting but within limited circumstances (eg. Sch 1, para 1(1) allowing poultrymen to stalk, flush out and kill foxes) and so Watt persuasively argues that the Act does not in fact render this particular category of purpose trust obsolete (G Watt, *Trusts Equity*, 8th edn (Oxford University Press, 2018) p 102). Nevertheless, such purpose trusts would still be subject to the usual limitations and thus may fail for policy reasons/capriciousness.

[32] JE Penner, *The Law of Trusts*, 11th edn (Oxford University Press, 2019) p 241.

[33] *Re Endacott* [1960] Ch 232 (CA).

[34] *Ibid* 251 (Harman LJ).

[35] *Ibid* 246 (Lord Evershed MR).

Endacott is an authoritative decision and one which preceded *Re Denley*. The notion that *Re Denley*, an *inter vivos* disposition not falling within any of the accepted anomalous trust categories, could be justified on the grounds of *Pettingall* therefore seems untenable. Furthermore, the facts of *Pettingall* saw that the residuary legatee had a financial incentive; any money misapplied would diminish the amount they would ultimately receive later. In *Re Denley* there was no financial incentive or issue of fund dissipation, only the possibility of losing the small amount of their own money which they paid so as to use the grounds (twopence (2d.) per week). True though it is that a misuse of the land may have decreased the value of the property, the likelihood of such happening was remote (it being in the employees' own interests not to damage/misuse their employer's land) and importantly, the benefit granted to the interested parties was the use of the land, not its value.[36] Notwithstanding both courts in these cases granting *locus standi* enforceability, that is the extent of their similarity with *Re Denley*.

Moreover, regardless of the above distinctions, the *locus standi* notion itself is inherently defective. McKay has explained that in such situations an interested party, such as the residuary legatee, is not in truth incentivised to ensure the purpose of the trust is performed at all; any funds given towards achieving the purpose would come from the trust fund itself (as in *Pettingall*), and so it would be in the residuary legatee's interest to see that the purpose of the trust is *not* performed.[37] Furthermore, were the court to permit incentives or payments to be made (whether or not from the trust fund itself) to third parties so as to ensure performance of the trust, it would essentially be introducing the enforcer principle via the back-door. Goff J was therefore wrong to recognise the employees in *Re Denley* as having *locus standi*.

Another interpretation would be to view the disposition as a power. The general rule prohibits trusts for purposes but it does not appear to preclude a power for a purpose - the latter thought not to infringe the beneficiary principle. Indeed, some are of the belief that *Re Douglas*[38] is an example demonstrating this point.[39] Yet, for one to share such a view would in reality be a postulation as *Re Douglas* involved a power to appoint property to institutions who would subsequently apply

[36]The value of the land would have also fluctuated during the period.

[37]L McKay, 'Trusts for Purposes – Another View' (1973) 37 Conv 420, 424.

[38]*Re Douglas* (1887) 35 Ch D 472 (CA).

[39]eg. D Hayton, 'Overview' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing, 2002) 379, p 382; PH Pettit, *Equity and the Law of Trusts*, 12th edn (Oxford University Press, 2012) p 63; Webb and Akkouh, *Trusts Law*, p 68.

such to particular purposes; it was not a power for purposes *simpliciter*.[40] Consequently, it would be remiss to treat the case as an authority proving the point. And more obviously, were the disposition to be construed as a power, it would be acting contrary to the established view as declared by the Court of Appeal[41] that "a valid power cannot be spelt out of an invalid trust".[42]

2. Certainty

In addition to the beneficiary principle, the trust must also be sufficiently certain. The trust in *Morice* - for "such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve of" – failed for this reason. In essence, this prerequisite requires the purpose and terms of the trust to be sufficiently clear to provide the trustee (or the court) with sufficient guidance as to how to perform the trust. Inevitably therefore, a lack of clarity as to the trust's purpose/terms will have a reflex action upon the disposition, casting doubt upon the intention of the settlor.[43]

Certainty and Re Denley

Counsel for the defendants challenged some of the language used in the trust deed, claiming such terms as "other persons" and "employees subscribing" were uncertain. Goff J was nevertheless equipped to provide release, employing the maxim *certum est quod certum reddi potest* as a tool to cut through the dragnet cast by Mr Lightman and others.

Yet in providing liberation, His Justice failed to notice he cast a net of his own; he explained the performance of the purpose must benefit individuals in a way that was not too remote or indirect.[44] But such a phrase is itself laden with incertitude. Would it not have been too remote/indirect were the individuals never

[40] Penner, *The Law of Trusts*, pp 241-242; similar sentiments regarding *Re Douglas* are echoed by Gardner, *An Introduction*, p 154.

[41] *IRC v Broadway Cottages Trust* [1955] Ch 20 (CA).

[42] *Ibid* 36 (Jenkins LJ).

[43] Similar to trusts for people: *Mussoorie Bank v Raynor* (1882) 7 App Cas 321 (PC (Ind)), 331. It should also be acknowledged that the settlor's intention may be readily manipulated in relation to this certainty requirement; a shrewd judge may choose to interpret the terms/purpose in such a broad manner that the individual would not be treated as intending a purpose trust, but rather construed as having intended an entirely different, and thus valid, disposition (See eg. *Re Andrew's Trust* [1905] 2 Ch 48 (Ch); *Re Bowes* [1896] 1 Ch 507 (Ch)).

[44] *Re Denley* [1969] 383.

able to access the grounds during the restricted opening times? What if the 'other persons' did not live in the Cheltenham or Gloucestershire area? Goff J chose to evade such inquiries, curtly stating that "such cases can be considered if and when they arise."[45] But surely the trustees' ability to appoint any other persons they wished would have been caught by remoteness/indirectness?

Perhaps the answer can be found in his pronouncing the trustee's ability as a power. But this reasoning is fallacious, for a sufficient level of certainty is still required for powers; how else could we know whether or not they acted ultra vires? And, as previously explained, there is currently no English authority which validates powers for a purpose. This once again raises the bigger issue of the type of disposition the settlor had intended, viz. if it really was a trust, what type of trust was it?

Vinelott J in *Re Grant's Will Trusts*[46] claimed *Re Denley* was better seen through the lens of orthodoxy, that it was to be viewed as a type of discretionary trust.[47] Indeed, from a distance this suggestion does bear an attractive mien; a closer inspection, however, exposes its flaws. One such flaw is that it overlooks Justice Goff's choice of words to describe the employees; he referred to them as "individuals", purposefully avoiding the label 'beneficiary' or 'object', despite him using these designations elsewhere in the judgment when construing the state of the law. The proposition also misunderstands the nature of the arrangement; the trustees did not have the discretion as to which of the employees could use the property - that was determined by whichever employees paid the weekly subscription. Yet one may retort the trustees did have a discretion but it was in the form of *how* the property was used (being able to determine opening hours etc), but this would not correspond with the orthodox understanding of discretionary trusts, ie. trustees given the discretion to choose whichever people, within a particular class, are to benefit. Perhaps most significant of all, were one to paint the *Re Denley* trust a discretionary trust for people, it would expose it to the prospect of all the individuals joining together and ending the trust, claiming the property for themselves.[48] This is clearly contrary to what the settlor intended.

[45] *Ibid.*

[46] *Re Grant's Will Trusts* [1979] 3 All ER 359 (Ch); [1980] 1 WLR 360.

[47] *Ibid* 368 (Vinelott J).

[48] The rule in *Saunders v Vautier* 41 ER 482; (1841) 4 Beav 115 (Ch). Cf. McFarlane and Mitchell, *Hayton and Mitchell*, p 176 – who state that were *Re Denley* to be viewed as giving the 'beneficiaries' only a power to ensure the trust's terms were adhered to, they would not have a power to terminate the trust; that is, *Re Denley* could be seen as being an exception to the established *Saunders v Vautier* rule.

3. Perpetuities

Non-charitable purpose trusts must not infringe the common law rule against perpetuities, viz. the rule against inalienability. This requires that the duration of the trust not exceed the period of a stated 'life or lives in being' plus 21 years. The 'life in being' is understood to be that of a specified human being[49] and, if there is no 'life in being' mentioned, simply the maximum 21-year period applies.[50] So far so clear. Rather unhelpfully however, there are several decisions which are noticeably jarring and it is to these cases we now turn.

Re Hooper[51] concerned a trust for the care and upkeep of family graves but used the rather imprecise phrase "so far as [the trustees] could legally do so". The court determined such to be a reference to the common law period and was therefore, in its view, valid. Similarly, in *Pirbright v Salwey*[52] the court deemed "so long as the law…permitted" sufficient to satisfy the requirement. These are clear examples of courts providing a benevolent construction to fulfil a testator's wishes.[53] To follow such cases however would prove a very slippery slope regarding the certainty/clarity of language required for such dispositions. For instance, what would happen were a testator to provide for their animal "for as long a time as rules allow"? Or "as far as custom tolerates"?

Sheridan posited, in light of these cases, that all private purpose trusts should be treated as valid for the 21-year period.[54] Though this could avoid (some) interpretation issues, this would be to needlessly remove one of the core prerequisites for purpose trusts; these trusts are already questionable deviations from the norm - the conditions for such should remain resolute and not be diluted any further. Moreover, on a practical level, it would need parliamentary intervention to introduce statute enabling such a broad-brush approach to be taken and this seems unlikely, at least anytime in the near future.[55]

[49] Rather than that of eg. an animal: *Re Kelly* [1932] IR 255. Yet, it should be noted the testator/settlor need not be related to the 'life in being' nor personally know them eg. a 'royal lives clause'.

[50] *Re Hooper* [1932] 1 Ch 38 (Ch).

[51] *Ibid.*

[52] *Pirbright v Salwey* [1896] WN 86.

[53] See also *Mussett v Bingle* [1876] WN 170.

[54] L Sheridan, 'Trusts for Non-Charitable Purposes' (1953) 17 Conv 46, 54-55 (though this would not apply to those trusts specifically seeking validity *in perpetuum* eg. *Re St Andrew's (Cheam) Lawn Tennis Club Trust* [2012] EWHC 1040 (Ch); [2012] 1 WLR 3487).

[55] A recent review of the rules led to the Perpetuities and Accumulations Act 2009, but which left unaffected the rules for non-charitable purpose trusts.

Further deviations can be seen in the forms of *Re Dean*[56] and *Re Haines*[57]. *Re Dean*, a case now seen as dubious, saw the court accept a trust for the upkeep of the testator's horses and hounds for 50 years were they to live that long. Similarly, in *Re Haines*, the High Court upheld a trust for the upkeep of a cat for its lifetime; Danckwerts J having speciously reasoned that, consequent of the typical lifespan for such an animal being approximately 16 years, it did not infringe the perpetuity period.[58] These two decisions are particularly difficult to justify, not least because they were decisions of the lower court, but because of the lack of sufficient thought given in either case.

In *Re Dean*, North J was certainly cognisant of the perpetuity requirement for such trusts, warning that:

> "The testator must be careful to limit the time for which [the trust] is to last, because, as it is not a charitable trust, unless it is to come to an end within the limits fixed by the Rule against Perpetuities, it would be illegal."[59]

Rather astonishingly, despite this apparent awareness, North J did not go on to state if the trust had actually complied with the perpetuity rule. Furthermore, in *Re Haines*, though addressing the perpetuity requirement, the judge employed what was, in this author's view, very questionable logic; upholding the trust through reliance upon the average life expectancy for that particular animal only leads to further confusion and distinctions. Courts do not discriminate as to the type of animal which may benefit from these types of trusts.[60] Upholding a testator's wish to provide for their pet cat, dog or horse is surely no different were it for their hamster or snake - or that the testator was an apiarist; were a testator to create a trust to look after his fledgling tortoise for instance, but fail to mention a life/lives in being, and were the court to apply similar reasoning to *Re Haines*, it would very likely breach the rule.

These frankly baffling deviations are not so much "occasions when Homer has nodded"[61] but rather occasions for which he was comatose. It is necessary to be

[56] *Re Dean* (1889) LR 41 Ch D 552 (Ch).

[57] *Re Haines* (1952) *The Times*, 7 November 1952.

[58] *Ibid* 11. Yet a quick internet search would find instances where these animals have outlived that timeframe.

[59] *Re Dean* (1889), 557 (North J). Though more accurately it would be *void* rather than illegal.

[60] eg. a gift to feed sparrows: *Attorney-General v Whorwood* 27 ER 1188 (1750) 1 Ves Sen 534, 27 ER 1188 (Ch) (though the gift failed for infringing the perpetuity period).

[61] *Re Endacott* [1960] Ch 232, 250 (Harman LJ).

aware of these specific instances - given the popularity of such purpose trusts[62] - but these cases are evidently aberrations and should not be relied upon. To borrow the words of Nourse LJ: "Anomalies do not justify anomalous exceptions."[63] And it would also seem that following more recent caselaw, ie. those decided since *Re Endacott*, the courts are less willing to take such a generous approach regarding the perpetuity rules.[64]

Perpetuities and Re Denley

Counsel for the defendants did not claim the perpetuity rules were an issue most likely because of Clause 2's apparent clear wording, specifying the period to be for the lifetime of the last survivor of certain named individuals (alive on or born on 1st March 1936) i.e. lives in being, plus 21 years. That is to say it appeared to satisfy the rule against perpetuities; Justice Goff appeared to have concluded this to be the case too.[65] However, his Justice did not elucidate as to which of the two rules were applicable, whether it was the rule against the remoteness of vesting or the rule against inalienability.

On behalf of the third defendant (the Hospital), Mr Lightman contended the trust directly conferred a benefit upon a definite class of persons (the employees) and had confined the trust to the perpetuity period[66] - suggesting he perceived the rule against the remoteness of vesting as the relevant rule.[67] The timing of events is important because the case preceded the Perpetuities and Accumulations Act 1964.[68] Consequently, the provision would have been subject to the common law rule, which dictated that the perpetuity period began from the date the trust instrument took effect, viz. 11th August 1936, when the trust deed was executed. Worth noting too is the unforgiving nature of the common law approach; generally

Lightman先生代表第三被告（醫院）辯稱，該信託直接授予特定類別的人（員工）福利，並將信託限制在永久期限——這表明他認為反對授予的遠端規則是相關規則

[62] See generally J Brown, 'What are we to do with Testamentary Trusts of Imperfect Obligation?' [2007] Conv 148.

[63] Said in the context of land as a d*onatio mortis causa*: *Sen v Headley* [1991] Ch 425 (CA), 440 (Nourse LJ).

[64] Perhaps more so for sepulchral graves/monuments; s1 Parish Councils and Burial Authorities (Miscellaneous Provisions) Act 1970 permits burial/local authorities to contractually agree to maintain graves, monuments and memorials up to 99 years.

[65] *Re Denley* [1969] 386.

[66] *Ibid* 381.

[67] Or rather the most relevant rule, having earlier also stated (at 380) he believed there was a valid purpose trust created too.

[68] Perpetuities and Accumulations Act 1964, s 15, and the Act was not retrospective in effect.

there was no 'wait and see' principle (unlike the 1964 Act[69]) so were there any possibility, no matter how improbable, an interest might vest outside the period, the trust was void *ab initio*.[70] That is, it functioned on "the most pessimistic possible computation of what *might* happen"[71] – it applied "remorselessly".[72] Be that as it may, on the premise it was the remoteness of vesting rule which was applicable, the issue remains of in whom was the interest to vest: the employees or the Hospital?

Mr Lightman stated (unsurprisingly) that, consequent of the gift-over, the land was to vest in the Hospital - whether the trust for the employees ceased naturally due to the effluxion of time or ended prematurely as a result of a forfeiture clause.[73] But context is crucial, for the trust deed was effectuated prior to the introduction of the National Health Service (founded in 1948) and, being a voluntary hospital, it would have been a charitable institution.[74] This is troublesome because where there was a gift to private persons with a gift-over to a charity, the common law took the same approach, deeming the gift-over void if it was *possible* (likelihood irrelevant) of vesting outside the perpetuity period.[75] There was certainly a chance in this case that none of the forfeiture clauses would be triggered to bring the trust to an untimely end. Indeed, even at the date the case was heard, it would seem Goff J was of the belief none of the forfeiture clauses had ever been triggered.[76] So were the trust to naturally conclude upon cessation of the specified period, a gift-over to the Hospital after such would have been void for vesting outside the period. More importantly, closer scrutiny of the case would in fact show that the Hospital was entitled to the land *only if* a forfeiture clause were triggered, ending the trust prematurely; they were not entitled to the property otherwise, and this was made clear through the specific language of

[69] *Ibid* ss 2-3.

[70] *Re Watson's Settlement Trusts* [1959] 1 WLR 732 (Ch), 739 (Roxburgh J); S Bridge, E Cooke, and M Dixon, *Megarry Wade: The Law of Real Property*, 9th edn (Sweet Maxwell, 2019), p 331.

[71] W Barton Leach, 'Perpetuities Reform by Legislation: England' (1957) 70 Harv L Rev. 1411, 1415 (emphasis added).

[72] *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399 (PC (Jam)), 1408F (Lord Millett).

[73] *Re Denley* [1969] 380.

[74] National Archives, 'Hospital Records Database (Cheltenham General Hospital)', at <https://www.nationalarchives.gov.uk/hospitalrecords/details.asp?id=328> (accessed 30 August 2020); GC Gosling, *Payment and Philanthropy in British Healthcare, 1918-1948* (Manchester University Press, 2017) p 59.

[75] *Re Johnson's Trusts* (1866) LR 2 Eq 716 (Ch); *Re Bushnell (Deceased)* [1975] 1 WLR 1596 (Ch); Bridge, Cooke, and Dixon, *Megarry Wade*, pp 369-370.

[76] *Re Denley* [1969] 375.

Clause 2(j) of the trust deed and echoed by Goff J himself.[77] In light of the above, the Hospital could not have been the party within which the interest was to vest.

It seems more likely the interest was to vest in the employees, but this is not without its problems either. The harshness of the common law rule was such that if it was possible an interest would not vest *within* the timeframe the gift was void - even if it in fact did vest within the period.[78] This could vitiate *Re Denley*; it was only the employees paying weekly subscriptions who were to receive an interest in the land, so it was possible none of the employees would pay the fee and equally no secondary group of 'other persons' be appointed by the trustees.[79] Accordingly, though the chance of such happening was remote, there was nevertheless a possibility no interest would vest within the timeframe. *Re Denley* would have thus failed for infringing the rule against the remoteness of vesting.

Much to the chagrin of this author, Goff J did not address this particular (trust for people) remark by Mr Lightman, but were he deemed to have acquiesced on the point[80] it would have nevertheless been a *non sequitur*. The rule against the remoteness of vesting applies to all types of *proprietary* interest but, as his Justice made clear, the employees did not have such an interest, only *locus standi* – thus raising the question of why mention the rule at all if it did not apply? Not least of course were he to have explicitly confirmed the application of the remoteness of vesting rule (and ignored the infringement) he would have made - not so much a mischief - but rather mincemeat of his own beneficiary principle argument, in addition to adopting the erroneous view of it as a discretionary trust.[81] It is proposed *ex hypothesi* the rule against inalienability must have been applicable.

Goff J's deafening silence on which rule applied was likely a deliberate choice on his part; for him to have clarified which rule would have been to force his own hand and effectively state within which of the two grounds *Re Denley* was to pitch its tent. For the trust cannot be a *tertium quid*, with a foot in both camps. If it is deemed therefore to have satisfied the perpetuity rules, it must have been the rule against inalienability which was relevant, a rule still administered by the common law. The consequence of this would be that the trust was, in effect, a non-charitable purpose trust; one which, as explained above (see '*1. The*

[77] His Justice stating that the gift-over was simply "to cover the actual or de facto failure of the trust" (at 391).

[78] Law Commission (Report No.251), *The Rule against Perpetuities and Excessive Accumulations* (1998) 14.

[79] The judgment suggests no 'other persons' were in fact appointed by the trustees.

[80] He did allude to "the vested interest" when discussing a forfeiture clause (at 392).

[81] As explained above (see '*2. Certainty and* Re Denley').

Beneficiary Principle and Re Denley') is distinguishable from *Pettingall* and other testamentary purpose trusts, and flagrantly violates the Court of Appeal's definitive pronouncement - just several years earlier - that the categories were not to be extended.[82]

4. Capriciousness

Capriciousness is not a principle of universal application which renders every type of disposition invalid. Rather, it would seem that some dispositions, such as legacies, are permitted regardless of caprice; it has been stated that "a testator may dispose of his property as he wishes, however capriciously".[83] A distinction, however, can be made where the disposition purports to establish a trust, as such can fail for capriciousness (though, in truth, such has been a rare occurrence within this jurisdiction).[84] While the justification for the distinction is not entirely clear[85] it nevertheless becomes pertinent to ask what is meant by this nebulous term. It would appear there are a few possibilities.

Perhaps the most well-known explanation of the term relates to instances where the settlor's (or testator's) intentions are deemed arbitrary; where the terms of the trust "negative any sensible intention on part of the settlor" such that the objects would be "an accidental conglomeration of persons who have no discernible link with the settlor".[86] Though this was said in the context of trusts/powers for people rather than purposes, could not this explanation be adopted for purpose trusts too, *mutatis mutandis*? It seems the answer would be no. Were a transplantation to expect there to be absent a discernible link with the settlor, it would be problematic; within purpose trusts, the object of the trust is the purpose, so this

[82] *Re Endacott* [1960] Ch 232 (CA), 246 (Lord Evershed MR).

[83] *Nathan v Leonard* [2003] 1 WLR 827 (Ch), 831 (Deputy High Court Judge John Martin QC). See also *Bird v Luckie* (1850) 8 Hare 301 (Ch), 306 (Knight Bruce VC).

[84] *Brown v Burdett (Declaration of Intestacy)* (1882) 21 Ch D 667 (Ch) being the only clear example. (Arguably *Re Shaw* [1957] 1 WLR 729 (Ch) should have also failed for capriciousness, in addition to infringing the beneficiary principle).

[85] Glister and Lee state the distinction is based on fiduciary obligations being owed (in discretionary trusts and powers), with capricious terms rendering performance of their obligations impossible (J Glister and J Lee, *Hanbury Martin: Modern Equity*, 20th edn (Sweet Maxwell, 2015) p 95. Yet, *ex hypothesi* non-fiduciary powers would not be able to fail for capriciousness. Moreover, executors and administrators owe fiduciary obligations too, so this does not square with capricious legacies being permitted; it also overlooks the fact that though the terms may be capricious, trustees may still perform their duties sensibly.

[86] *Re Manisty's Settlement* [1974] 1 Ch 17 (Ch), 27 (Templeman J); cf. *R v District Auditor, ex parte West Yorkshire Metropolitan County Council* [1986] RVR 24; [2001] WTLR 785 (QBD).

would mean determining whether or not there is a discernible link between the *purpose* of the trust and the *creator* of the trust. In the context of testamentary purpose trusts for example, this could prove somewhat farcical where, say, a testator wishes to provide for the erection and maintenance of a monument for someone other than himself - perhaps even someone unrelated.[87] Such altruistic instances as this would surely be deemed to lack a discernible link with the testator, and thus be said to negative any sensible intention on his part; a truly risible result.

In the context of purpose trusts therefore, it would be better for it to be limited to the initial constituent, viz. where the purposes of the trust "negative any sensible intention on part of the settlor". This would appear a more pragmatic approach but would still be, as Maitland would say, "a poor thing to call a definition".[88] In addition, when it is examined more closely it can be seen as merely an attempt to conceal the courts' power to (still) strike down any trusts which in their view they simply deem unworthy, without clear justification for the decision. It is also inevitably hostage to the vagaries of whichever judge is hearing the case; that which may be considered capricious by one, may not be so by another (as shown in *Re Hay's ST*[89]). This does little for the surety and predictability of the law. In fact, it is redolent of Selden's well-known Chancellor metaphor[90] - but rather that this abstruse explanation of the term being tantamount to a clog on his equitable foot.

A more nuanced meaning of 'capriciousness' has been suggested. Where the purpose of a trust is to destroy or waste property, such will be deemed capricious, causing the trust to fail.[91] The 19th century case of *Brown v Burdett*[92] is a clear

[87] As in *Mussett* [1876] WN 170 where a £300 bequest to erect a monument to the testator's wife's first husband was not capricious and upheld.

[88] FW Maitland, *Equity: A Course of Lectures*, 2nd edn (revised by J Brunyate) (Cambridge University Press, 1936) p 1.

[89] Disagreeing with Templeman J's assessment in *Manisty* of "residents of Greater London" being capricious, Megarry VC stated: "I do not think that the judge had in mind a case in which the settlor was, for instance, a former chairman of the Greater London Council": *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (Ch), 212.

[90] F Pollock (ed), *Table Talk of John Selden* (Selden Society, 1927) p 43.

[91] M Pawlowski, 'Testamentary Trusts and Capricious Testators', Trusts Trustees 26(3) (2020) 222; P Matthews, 'The Comparative Importance of the Rule in *Saunders v Vautier*' (2006) 122 LQR 266, 274-275.

[92] *Brown* (1882) 21 Ch D 667 (Ch). See also the Scottish cases of *McCaig v University of Glasgow* [1907] SC 231; *McCaig's Trustees v Kirk-Session of United Free Church of Lismore* [1915] SC 426; *Aitken v Aitken* [1927] SC 374.

example of this, where the testator had sought to provide a freehold house to trustees on trust, with the purpose of blocking up almost all of the rooms in the house for 20 years. Pawlowski states the *raison d'être* for this view of capriciousness is that of public policy - to protect the economic interests of others. In other words, a trust would be deemed capricious where the extreme consumption/use of property is detrimental to the interests of those otherwise entitled (and/or the community generally) - or where property with economic value and utility is destroyed without good reason.[93] This is important because the decision of whether to enjoy the property, or destroy it, is no longer one for the testator/settlor to make as the property would no longer belong to him; rather it is a decision for those who would otherwise benefit e.g. residuary legatees.[94] This characterisation of capriciousness is more feasible, setting some much-needed metes and bounds upon the meaning of the term, whilst concomitantly retaining some flexibility.

Yet, there may be occasions where the purpose of the trust is not patently harmful or wasteful as such but the terms are nevertheless problematic. For example, what if there is incongruity between the purpose of the trust and the size of the fund/property dedicated to achieving that purpose? That is, should the amount dedicated to carrying out the purpose be considered exorbitant[95] whether it would cause the whole trust to fail for capriciousness, or whether it would be partially upheld - the remainder on resulting trust. This author would argue it is better to declare the entire trust void; were the trust to be upheld in part, it would require the courts to exercise a considerable level of discretion - potentially tantamount to guesswork – or, at best, require courts involvement and oversight of the trust for possibly a long period of time, a timely, resource-heavy option. It would be better the whole trust fail than either of these possibilities and we should not ignore the crucial fact that this area of law needs clarity, not further uncertainty.

Though it failed for uncertainty of purpose and infringing the beneficiary principle, it is nonetheless useful to consider *Re Endacott* to illustrate the point regarding exorbitance. Here, the testator had bequeathed £20,000 "for the purpose of providing some useful memorial to myself". This would be the modern-day equivalent of a testator devoting more than £385,000 to achieve that end, an amount which most would surely consider extortionate - save perhaps were it for a

[93]Pawlowski, 'Testamentary Trusts', 225.
[94]Matthews, 'The Comparative Importance', 274-275.
[95]cf. deficient: see '*5. Administrative Workability*' below.

particularly prominent figure.[96] Had the testator used more definitive language, such as "£20,000 to erect a monument in my memory", could such have failed for being capricious?[97] In light of the more practicable meaning of the term 'capriciousness', it is quite likely; dedicating such a large sum to that particular purpose could be deemed wasteful, being detrimental to the economic interests of others.[98]

For a testamentary trust, this would be unnecessarily depriving, for a period of time, whomever is otherwise entitled to that property.[99] For an *inter vivos* trust, the argument may prove problematic where, after the period of application, any remainder of the fund is to return to the settlor. Yet, a broader argument could be advanced. By allocating an excessive amount to the *inter vivos* purpose trust, the settlor can be said to be keeping their wealth out of absolute ownership as well as out of the open market - the settlor is therefore (albeit indirectly) affecting the economic interests of others.[100] Such scenarios of 'excessiveness' therefore, could be said to fall within a broader understanding of 'wastefulness' thereby showing the utility of this alternative understanding.

Rather unhelpfully, some attempts to clarify the law concerning the capriciousness of trusts, though well-intentioned, have simply muddied the waters further. For instance, in *Re Manisty*[101] Templeman J referred to the hypothetical example of "residents of Greater London", and equated the term to the separate

[96] Cf. *Trimmer v Danby* (1856) 25 LJ Ch 424: a £1000 bequest, from the artist JMW Turner, to erect a monument to himself in St Paul's Cathedral was upheld (current monetary equivalent approx. £100,000). But even then, prestige must have its limits; would it not be beyond the pale were eg. a 160ft monument, costing over £4million, be built to honour an eminent individual's memory? (ie. the modern-day equivalent of the £46,000 it cost to build Nelson's Column in the 1840s (HB Wheatley and P Cunningham, *London Past and Present: Its History, Associations, and Traditions*, vol. 3 (Cambridge University Press, 1891) p 405).

[97] Arguably not infringing the beneficiary principle, being a recognised testamentary purpose trust, but there may still be an issue regarding perpetuity (cf. the benevolent approach in *Mussett* [1876] WN 170). Still, as *Re Endacott* shows, courts are not confined to failing trusts upon a single ground.

[98] Not dissimilar to *McCaig* [1907] SC 231; *McCaig's Trustees* [1915] SC 426.

[99] As in *Brown* (1882) 21 Ch D 667.

[100] Comparable to the rationale of the perpetuity rules, for which it has been said "stem from the general policy of the law against the withdrawal of property from commerce" (JHC Morris and W Barton Leach, *The Rule Against Perpetuities*, 2nd edn (Stevens Sons Ltd, 1962) p 2; echoed by CT Emery, 'Do we need a Rule Against Perpetuities?' [1994] 57(4) MLR 602, 603-604).

[101] *Manisty* [1974] 1 Ch 17.

concept of administrative workability.[102] Emery, in his celebrated article did likewise, believing the two terms to be synonymous, going as far to say that it was "hardly necessary to invent a new vitiating factor – 'capriciousness' – where essentially the vice is administrative unworkability and may properly be so called".[103] Nevertheless, such opinions notwithstanding, the two terms are distinct and should be treated thus, as will now be explored.

Capriciousness and Re Denley

With the trust's particular purpose being evidently virtuous and the close relationship of the primary category of persons to the settlor (employees), it is no surprise to learn it did not fail on the common meaning of capriciousness. Similarly, were we to use the alternate definition offered by Pawlowski - whether it is wasteful or destructive - it is difficult to see how it could be deemed capricious.

Yet, one could make the argument that it was capricious as a result of 'excessiveness'. Not only would it have meant unnecessarily/unfairly keeping the property out of absolute ownership for a period of time, but if the number of individuals who did actually use the property within that period were negligible (or non-existent) it would have been detrimental to the economic interests of those otherwise entitled – *a fortiori* considering the property was land, a scarce and valuable resource.

However, this would, in truth, be a tenuous argument. *Re Denley* was an *inter vivos* trust, so were the court to strike down the trust for capriciousness, the property would have nonetheless returned to the settlor. This would not only have defeated the settlor's intentions but concomitantly destroyed any hopes the interested parties, such as the Hospital, may have had of receiving the property. That said, a failure of the *inter vivos* trust (unlike a testamentary one) would have afforded the putative settlor another opportunity to rewrite any of the offending language and try once more to effectuate their wishes.

[102] *Ibid* 29 (Templeman J).

[103] CT Emery, 'The Most Hallowed Principle – Certainty of Beneficiaries of Trusts and Powers of Appointment' (1982) 98 LQR 551, 585.

5. Administrative Workability

The principle that a private trust for persons can fail for being administratively unworkable was made manifest in *R v District Auditor, ex p. West Yorkshire MCC*[104], the only example within English law of a trust having failed for such. The case concerned a local authority attempting to create a discretionary trust for a list of purposes "for the benefit of any or all or some of the inhabitants of the County of West Yorkshire". Though the court concluded that it was not capricious (according the traditional understanding of term) it did find that, to apply a fund of £400,000 to several purposes benefiting a class of potentially 2.5 million people, was administratively unworkable.[105]

Be it a trust for people or purposes, it is vital to extricate a reasonable understanding of this ambiguous phrase. Some, such as Grbich, have stated administrative unworkability to be synonymous with issues of certainty.[106] Though Grbich did not have the benefit of the *District Auditor* judgment - his article having preceded the case - it is of course far from a useful explanation and evidently contradicts Lord Wilberforce's dictum in *McPhail v Doulton*[107] that: "There may be a third case [besides conceptual and evidential uncertainty] where the meaning of the words used is clear but the definition of the beneficiaries is so hopelessly wide as not to form 'anything like a class' so that the trust is administratively unworkable or…cannot be executed".[108] And it would seem, since *McPhail*, this 'too wide a class' explanation has become the shorthand for administrative unworkability.

This 'size of the class' understanding, though useful in its brevity, nonetheless amounts to *reductio ad absurdum*; it fails to explain precisely *why* having a large class of individuals would make the trust administratively unworkable or unable to be executed. Hardcastle, however, provides a definition which accords with his Lordship's view and goes some way to resolving that problem; he similarly equates administrative unworkability with "impossibility of execution" rather than certainty, because the "precision of a given description is a linguistic exercise which

[104] *R v District Auditor, ex parte West Yorkshire Metropolitan County Council* [1986] RVR 24; [2001] WTLR 785 (QBD).

[105] Also declared void for not falling within any of the recognised 'exceptions' to the private purpose trust rule.

[106] Y Grbich, 'Baden: Awakening the Conceptually Moribund Trust' (1974) 37 MLR 643; Emery, 'The Most Hallowed Principle'.

[107] *McPhail v Doulton* [1971] AC 424 (HL).

[108] *Ibid* 457 (Lord Wilberforce).

must precede the application of that description to the facts".[109] He then goes on to explain that a trust would be impossible to execute - administratively unworkable - were a significant (ie. disproportionate) amount of the funds required to be used by the trustees to identify the individuals within the class.[110]

This author would like to refine Hardcastle's definition; to provide one that is more specific and which would be equally applicable to both trusts for people and trusts for purposes. This author proposes a trust may be considered administratively unworkable (impossible to execute) as a result of disproportionality *specifically due to there being insufficient funds/property* which, consequently, prevent the trustees being able to carry out their duties effectively – be it distributing among a class of objects or applying it for certain purposes. This would rationalise why trusts for potentially large groups of individuals – such as that in *McPhail* – will not necessarily fail for administrative unworkability and would also justify the decision in the *District Auditor* case, which did fail for such. Accordingly, this definition would mean that even a trust for a potentially small class of individuals could fail for unworkability. Take, for example, the instance where an impecunious testator leaves £10 on trust to be distributed equally between his children and grandchildren; this trust would not fail for uncertainty nor for capriciousness (given the testator's penury) but would very likely be impossible to execute given the paltry sum.[111] While such scenarios would of course be extremely unlikely and, given the amount of administrative work which would inevitably be required to distribute such a small amount, failure of such trusts would certainly be justified. It is therefore best to understand administrative unworkability as based upon disproportionality but where insufficient property/funds make it impossible for the trustees to perform their duties effectively.

Administrative Workability and Re Denley

Should we apply the vague (and this author would contend, erroneous) 'size of the class' understanding, there may be an argument the class of those able to benefit from the trust would be so hopelessly wide to not form anything like a class – particularly as the secondary group of 'other persons' was uncapped. But to take

[109] IM Hardcastle, 'Administrative Unworkability – A Reassessment of an Abiding Problem' [1990] Conv 24, 24.

[110] *Ibid* 25.

[111] It would also mean the concept would equally extend/apply to fixed trusts, not just discretionary trusts.

this approach would be to not only apply an unhelpful understanding of the term but to also categorise the Re Denley trust as a trust for people; this would echo the sentiments of Vinelott J in Re Grant's WT[112] which, for reasons stated above[113] is a flawed proposition. It would also not accord with the reality that, when paying proper attention to the perpetuity rules, the trust in Re Denley was akin to a non-charitable purpose trust. A more suitable definition needs to be applied.

The preferred understanding, as argued above concerns that of disproportionality, such being applicable for both trusts for people and for purposes. It may be possible therefore that the property concerned could be deemed disproportionate (insufficient) for achieving its particular purpose. Put simply, the number of individuals to benefit from the use of the sports ground may be so large as to vastly outnumber the ground's capacity; the property would not be sufficient for its purpose. This argument may appear far-fetched but it is in fact quite plausible, as the reader will recall that the success of HH Martyn and Co Ltd (the settlor) led to it at one point being the largest employer in the Cheltenham area, with over 1,000 employees.[114] Though we do not know the size of the property, it is not unreasonable to think that had every employee sought to use the sports ground (the subscription fee was only a nominal twopence (2d.) a week) within the restricted opening times, the land would not have had sufficient capacity – *a fortiori* there being any (uncapped) number of 'other persons' who also could be permitted to use the grounds. Whilst it is true the trustees had a *discretion* as to permit any 'other persons' to use the property, they did not have any discretion regarding the employees; it was for any employees who paid the weekly subscription. Moreover, the trust deed included a forfeiture clause - Clause 2(j) - which stipulated that should the number of employees subscribing and using the land be less than 75 per cent of the total number of employees, the trust would terminate and the property pass to the Hospital. It is therefore possible that at one time the number of employees who would have been entitled to use the sports ground may have been up to, or even over, 750 people. And though one may parallel this situation with that of the trust in *McPhail*[115] – a trust also benefitting a potentially large number of employees, which did not fail for administrative

[112] *Re Grant's WT* [1979] 3 All ER 359 (Ch), 370 (Vinelott J).
[113] See '*2. Certainty and* Re Denley'.
[114] Whitaker, 'H.H.Martyn and Co. Ltd'; Grace's Guide, 'H.H. Martyn'.
[115] *McPhail* [1971] AC 424 (HL).

unworkability – *McPhail* is distinguishable.[116]

One reply to this line of argument may be that such an outcome could be avoided with the use of some form of booking system, allocating timeslots to employees so as to avoid the grounds being potentially overwhelmed. This would certainly go some way to assuaging the numbers issue but there is no record or allusion of any such system within *Re Denley*, and it would also have needed to have been in operation from the outset – the very beginning of the trust – to try and prevent such a situation ever occurring. But still this would not have been a panacea. The employees' right to use the ground was conditional upon paying a weekly subscription, failure to do so resulting in the revocation of that right. Given the nature of this arrangement, it is certainly conceivable that a paying employee would seek to use the grounds more than once (perhaps multiple times) during the week for which they have paid - for them to have 'value for money' as it were and seize the extraordinary opportunity. Consequently, were many employees of the same mind, it could have meant the number of employees wishing to use the sports ground during any one week may still be too large for the ground's capacity, even if a booking system was in operation. In short, the property would (still) be insufficient for its purpose and the trust should therefore have failed, being administratively unworkable.

Alternate Means?

It is clear that Justice Goff's rationale for permitting this type of trust was unfounded, and ignored and/or contravened central tenets of trust law. Nevertheless, it is worth considering how the outcome of the case may have otherwise been achieved – how the settlor's wishes could have been fulfilled through the use of other recognised and uncontroversial methods.

[116]Being a discretionary trust for people, the trustees therefore had the discretion as to selecting, from amongst/within a specified class of people, who was to benefit; the employees would only be able to 'enjoy' the property after the decision had been made and exercised in their favour.

(i) In Possession of Property on behalf of Another

A general rule of property law is that where an employee is in possession of property in the course of their employment, they hold such possession on behalf of their employer.[117] This would explain the lack of proprietary rights/interests and why the trustees could appoint a secondary class of individuals to use the ground; the employees were not solely entitled to use the land to the exclusion of others.

Yet, closer consideration of this approach shows its fragility. It would be a considerable stretch to argue the employees were in the course of their employment when in possession of the property; the use of the sports ground was not part and parcel of the employees' contract of employment, but a separate, additional arrangement for any employee paying the weekly subscription. Moreover, there is a practical issue: should there have been a period where no employees were paying the subscription and using the grounds, how could it be suggested any employee(s) were in possession of such on behalf of the company? This would have still been a problem were those possessing the land only those considered to fall within the 'other persons' category, unless the trustees utilised their discretion and appointed non-paying employees (but it seems no such appointments of 'other persons' were made). Still, a broader point must be made. Even if the contract of employment entitled employees to use of the sports ground, it would be only that – permitting them *use* of the property –which is of course very different from granting them the right to *possess* the land.

(ii) Contractual Licence[118]

A deceptively simple proposition is that the arrangement was a contractual licence. It is very likely, if not certain, that for those employees who paid a weekly subscription, it would have given rise to a contract – a contractual agreement permitting them use of the land, upon continued payment. Again, this was not an entitlement to possess; the arrangement was not a lease and were one to even overlook the possession issue, to propose it created a lease would be wrong - not least because other issues would arise, such as co-ownership, and identifying precisely which of the parties undertook the role of lessor. Moreover, up until the early 1980s[119] the courts took a much more conservative view of leases: if it seemed one party did not intend to give the other a lease, quite simply there would

[117] *Parker v British Airways Board* [1984] QB 1004 (CA), 1017 (Donaldson LJ).
[118] McKay briefly considered the idea of employees as licensees: 'Trusts for Purposes', 428.
[119] ie. pre-*Street v Mountford* [1985] AC 809 (HL).

be no lease.[120] Therefore, at most, it would be a licence.

Should the right to use the property be understood to have derived from a contractual licence, it would mean the right was a personal one. So, were the company to have given away the land in breach of contract, for instance, the personal right of the employees generally would not have bound the recipient of the property. This is clearly sensible and would have also assisted the employees, helping them understand their rights – a personal right being much more cognisable than that of the ambiguous and frankly unjustifiable notion of *locus standi* (see '*1. The Beneficiary Principle and* Re Denley' above). Within this licensor-licensee relationship therefore, it would be appropriate to view the right of the (paying) employees as not having the ability to compel performance of the purpose per se, but simply the right to ensure their own use of the property. Put simply, it would not be for the paying employees to be able to enforce the wider purpose, so as to, for instance, prevent a non-paying employee (and who was not appointed as an 'other person') from using the property. The (paying) employees' rights were merely personal as against the company, not against third parties.

It would appear that a contractual licence is both a simple and convenient explanation for describing the rights and relationship of the employees in relation to the company. However, it should be realised that this would require the reader to ignore the language and general tenor of the deed which had evidently sought to effectuate a (type of) trust rather than a licence.

(iii) Bare Trust with Mandate/Agency

The most appropriate solution would therefore be to recognise a trust had been created – but a trust different to that as construed by Justice Goff (and Justice Vinelott in *Re Gran*t). This could be that of a bare trust with mandate.[121] Through this method, the company would have retained equitable title of the property (hence employees having no equitable proprietary interest), with the trustees simply holding the property to the order of the settlor. The trustees would be nominees, agreeing to comply with the orders made by the company, including any instructions contained within the deed.

[120] *Errington v Errington Woods* [1952] 1 KB 290 (CA), 298 (Denning LJ); *Marchant v Charters* [1977] 1 WLR 1181 (CA); B McFarlane, *The Structure of Property Law* (Hart Publishing, 2008) p 510.

[121] Similar to that argued for the *Quistclose* trust: P Millett QC, 'The *Quistclose* Trust: Who Can Enforce It?' (1985) 101 LQR 269. See also JE Penner, 'Lord Millett's Analysis' in Swadling's *Quistclose Trust: Critical Essays*, pp 41-66.

In this regard, there would be no issue concerning the beneficiary principle; the beneficial ownership having remained with the settlor company throughout. It is also clear from the language of the disposition that the settlor had intended to create a trust; not just through the use of designations such as "trust" and "trustees" but also granting trustees *powers* in relation to the property.

Not unreasonably though, one might argue that to provide such specific, detailed instructions to the trustees for what they must do or permit concerning the property would make it equivalent to a *special* trust rather than bare trust, but this is not necessarily so. As Matthews has explained in his two-part treatise on bare trusts, though bare trustees have limited duties, they can nevertheless have significant powers; statute, for instance, makes clear that bare trustees of land have all the powers of the beneficial owner of land.[122] The language of the trust deed appears to gel with this notion.

The disposition was also an *inter vivos* one which, in addition to HH Martyn Co Ltd being a private limited company with separate legal personality[123] would mean it would have been unaffected by the death or departure of employees. It would have also been undisturbed at the death or resignation of any of the trustees; the mandate/agency relationship persisting with the remaining trustees, also combined with the principle that a trust will not fail for want of a trustee.

Equally important, is that a nomineeship arrangement of this kind would prove no problem in relation to the rules governing perpetuity, for such relationships do not fall foul of the perpetuity rules.[124] The question of whether the rule against the remoteness of vesting or the rule against alienability was applicable would therefore have been immaterial.

Whilst there is a possibility that administrative unworkability may prove a sticking point - at least if this author's proposed 'insufficient property for achieving the particular purpose' definition[125] were to be applied, it is not guaranteed that it would prove so. What is more is that this method would not come unstuck upon grounds of capriciousness; be it the common 'lack of discernible link' understanding, or the preferred wastefulness/destruction meaning of the term as explained above.[126]

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[122] Trusts of Land and Appointment of Trustees Act 1996, s 6; P Matthews, 'All about Bare Trusts: Part 1' [2005] 5 PCB 266; 'All about Bare Trusts: Part 2' [2005] 6 PCB. 336, 343.

[123] *Salomon v Salomon Co Ltd* [1897] AC 22 (HL).

[124] P Matthews, 'A Problem in the Construction of Gifts to Unincorporated Associations' (1995) Conv 302, 303-304. See also *Bowman* [1917] AC 406 (HL).

[125] See '*5. Administrative Workability*' above.

[126] See '*4. Capriciousness*' above.

Whether the courts would seek to apply the above five elements to a bare trust of this nature is not entirely clear; were they to do so, however, the chances of the trust failing upon any of these grounds appears very slim indeed. Equally important, this bare trust with mandate analysis would not only correspond with the language of the trust deed but also satisfy the intentions of the settlor – and crucially it would do so without undermining or ignoring central trust law rules and principles.

Conclusion

It is clear that Goff J's reasoning in *Re Denley* cannot be justified and the trust, as construed by His Justice, should never have been permitted. In his choosing to recognise the trust as a novel one, and relying upon dicta from cases of dubious relevance to do so[127] Goff J made manifest the maxim *ut res magis valeat quam pereat*. As Birks has astutely observed though: "[whenever this maxim] is in the air, one knows that principles are being stretched and blind eyes turned to keep some boat afloat".[128] This seems to be an accurate assessment of *Re Denley*. The decision is particularly galling given the alternate legal means existing which would have been equally capable of satisfying the settlor's wishes - methods which crucially do not contravene fundamental trust law principles. Yet, what is perhaps most alarming is that recent decisions show judges are continuing to believe the credibility of the judgment and the legitimacy of the *Re Denley* trust, readily employing the device without deliberation. This is of course troubling and must be addressed at the next available opportunity; for in truth it is not hard cases, but simply bad ones, that make bad law.

[127]eg. *Re Bowes* (No. 1) [1896] 1 Ch 507 (Ch); *Re Aberconway's Settlement Trusts* [1953] Ch 647 (CA).

[128]P Birks, 'Retrieving Tied Money' in Swadling's *Quistclose Trust: Critical Essays*, p 122.