Developing the obligation characteristic of the trust

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L.Q.R. 96 IN the twenty-first century it seems likely that the English trust concept will be seen to be a more flexible obligation than is currently considered to be the case so that out-dated descriptions or definitions of the trust will need to be re-cast. This flexible further facilitation of settlor's wishes will result from refining what is the irreducible core content of the trust [1] and from clarifying the public policy limits upon trusts. [2] Cases heard by the English courts in dealing with English assets owned by foreign trustees of trusts governed by foreign laws will add impetus to this process of refinement and clarification, as will the drafting of trusts by English lawyers aware of attractive aspects of a foreign trust law and who use the facility afforded by the Recognition of Trusts Act 1987 to choose a foreign law to govern what would otherwise be an English trust. Some such lawyers may wonder why a similar effect cannot be achieved under English trust law and so patriotically choose English law to govern a trust containing provisions designed to achieve what a foreign law achieves. After all, if the English court gives effect to a trust expressly governed by "Suntopian" law which allows a settlor to enforce the trust, although he is not a beneficiary, and which permits non-charitable purpose trusts to be valid where an enforcer has been appointed in the trust instrument, why cannot the same result be achieved under English law if the trust provisions are appropriately drafted?

The orthodox view: trusts need beneficiaries to enforce them

Of course, in English trust law as Lord Millett has stated, [3] "It is elementary that a settlor who retains no beneficial interest cannot enforce the trust which he has created." Once the settlor has unilaterally transferred his entire interest in particular property to his trustee this is regarded as amounting to the complete fulfilment of his purposes, so that he drops out of the picture. [4] Into the picture come the beneficiaries for whose benefit the ***L.Q.R. 97*** trustee is to own and manage the trust property and who have equitable proprietary interests which enable them to trace the trust property and claim an equitable lien over any exchange product or an equitable proportionate ownership interest in such product. The trust has thus developed from a repository of the settlor's wishes to a property receptacle providing proprietary interests for the beneficiaries. [5] By virtue of their equitable proprietary interest they have a right to see trust documents, [6] particularly the trust accounts, so that they can falsify or surcharge the accounts, [7] and if they are all ascertained and of full capacity and between them absolutely entitled to the trust property they can demand that the trustee transfer their property to them or their nominees. [8]

Charitable purpose trusts are valid because they are enforceable by the Crown as *parens patriae* acting through the Attorney-General [9] or the Charity Commissioners. [10] However, the orthodox view is that non-charitable purpose trusts are void. As Lord Evershed M.R. stated in *Re Endacott* [11]: "No principle, perhaps, has greater sanction or authority behind it than the general proposition that a trust by English law, not being a charitable trust, in order to be effective must have ascertained or ascertainable beneficiaries." Thus, Brightman J. (as he then was) concluded in *Re Recher's Will Trusts* [12]: "A trust for non-charitable purposes, as distinct from a trust for individuals, is clearly void because there is no beneficiary." Just as a car needs an engine, so a trust needs a beneficiary.

The reason for this rule is that a trust is an obligation and so requires the trustee to owe duties to the beneficiaries, who have a correlative right to make the trustee account to them for the carrying out of those duties. [13] However, as Megarry V.-C. pointed out in *Re Montagu's S.T.*, [14] there is a ***L.Q.R. 98*** "tendency in equity to put less emphasis on detailed rules that have emerged from the cases and more weight on the underlying principles that engendered those rules, treating the rules less as rules requiring complete compliance and more as guidelines to assist the court in applying those principles". Is it, then, accountability to beneficiaries that is at the core of the trust concept or is it just accountability to someone?

Why non-charitable purpose trusts should only need someone intended by the settlor to enforce them

The underlying principle, it is submitted, is that for there to be a trust obligation there needs to be some person intended by the settlor to have *locus standi* to enforce the trustee's duties. [15] It suffices if, as Sir William Grant M.R. succinctly stated in *Morice v. Bishop of Durham,* [16] "There [is] somebody in whose favour the court can decree performance" because, as Roxburgh J. emphasised in *Re Astor's S.T.,* [17] "A trustee would not be expected to be subject to an equitable obligation unless there was somebody who could enforce a correlative equitable right, and the nature and extent of that could be worked out in proceedings for enforcement."

In *Re Denley's Trust Deed* [18] Goff J., after accepting that trusts for purposes personally benefiting particular classes of individuals [19] were outside the mischief of the beneficiary principle, distinguished such trusts from "a purpose trust, the carrying out of which would benefit an individual or individuals, where that benefit is so indirect or intangible or which is otherwise so framed so as not to give those persons any *locus standi* to apply to the court to enforce the trust, in which case the beneficiary principle would apply to invalidate the trust". Lord Millett, when a leading Silk in 1985, explained this difficult distinction as follows [20]:

"It must be a question of construction in every case whether the trust is for the benefit of a class of individuals, the specified manner of their enjoyment … being secondary; or whether the specified mode of enjoyment is the essence of the gift, the indirect benefit to individuals ***L.Q.R. 99*** being secondary. If the trust is of the first kind it is a valid trust for the benefit of the specified class who may, if unanimous, terminate the trust and call for the trust property. If the trust is of the second kind … it is an invalid purpose trust."

What, however, if the settlor in his trust deed expressly confers *locus standi* on an enforcer interested in the furtherance of the settlor's specific non-charitable purpose trust? Take the case of a trust to further the interests of the U.K. Conservative Party expressed to be enforceable by the Leader from time to time of the Conservative Party, or a trust to further the purposes of a contemplative Order of nuns expressed to be enforceable by the Head of the Order from time to time, or a trust to press for the abolition of vivisection expressed to be enforceable by the Chair from time to time of the unincorporated National Anti-Vivisection Society or a trust to further the professional interests of barristers entitled to practise in the English courts expressed to be enforceable by the Chair from time to time of the Bar Council. In each case at expiry of a valid perpetuity period the capital passes to a designated person.

The trust deed clearly supplies a mechanism for the positive enforcement of the trust so that the trustees are under an obligation to account to someone in whose favour the court can decree performance. [21] Such express mechanism was lacking in the cases [22] of void non-charitable purpose trusts so far considered by the courts which could therefore take the view expressed by Harman J. in *Re Shaw,* [23] "An object [as distinct from an individual] cannot complain to the court which, therefore, cannot control the trust and, therefore, will not allow it to continue" and by Viscount Simonds in *Leahy v. Att.-Gen. for New South Wales,* [24] "a trust may be created for the benefit of persons as *cestuis que trust* but not for a purpose or object unless the purpose or object be charitable. For a purpose or object cannot sue, but if it be charitable the Attorney-General can sue to enforce it". However,

where the settlor has expressly provided for an enforcer who *can* sue to enforce the non-charitable purpose trust, so that the trustee is under an enforceable obligation, why should the English court not accept ***L.Q.R. 100*** that there is a valid trust obligation (if limited to a valid perpetuity period [25] and certain and workable)? [26]

Underlying and underpinning the trust obligation is the fundamental principle that just as a car needs an engine, so a trust needs an enforcer (whether the enforcer be a beneficiary or the Attorney-General or the Charity Commissioners or some person expressly appointed by the settlor to be enforcer with *locus standi* positively to enforce the trust). Is it seriously to be suggested that the English court would invoke the orthodox beneficiary principle to refuse to give effect to a foreign non-charitable purpose trust of English assets where under the foreign governing law as a result of legislation (like that of Jersey or Bermuda or the Isle of Man or the Cayman Islands or the British Virgin Islands) such a trust is valid where the trust instrument expressly provides for an enforcer? Would the English court really hold the assets to be subject to a resulting trust for the settlor? It is submitted that, because the beneficiary principle should be regarded as the "enforcer principle", the English court would regard the foreign trust concept neither as repugnant to the English trust concept nor contrary to English public policy, the trust being one that the English court can "both enforce and control". [27]

Thus, where a trust instrument provides for an enforcer to enforce a non-charitable purpose trust, the beneficiary principle should not vitiate such a trust, [28] whether the trust be governed by a *foreign law* with legislation accepting such a trust as valid (and whether the trust is wholly foreign, ***L.Q.R. 101*** except for some trust assets located in England, or is wholly internal to England except for the choice of the foreign governing law [29]) or be governed by *English law* under general equitable principles. Of course, it should not matter that the settlor appoints himself the first enforcer under the terms of his trust deed as the person best fitted for the enforcement task, with provision for subsequent enforcers. [30]

As Lord Wilberforce said in *McPhail v. Doulton* [31] in upholding a discretionary trust for a huge class of beneficiaries comprising "officers and employees or ex-officers and ex-employers of the Company and any relatives or dependants of such persons". "A trust should be upheld if there is sufficient practical certainty in its definition for it to be carried out, if necessary with the administrative assistance of the court, according to the expressed intention of the settlor." Where a settlor creates a trust to use the income to further the policies of the Conservative Party enforceable by the Leader from time to time of such Party or to further the purposes of a contemplative Order of nuns enforceable by the Head from time to time of such Order, he will appoint sympathetic trustees as well as a sympathetic interested enforcer so that court intervention should be unnecessary. If the settlor chooses to have as enforcers any member of the Conservative Party or of the Order, no question of administrative unworkability should arise even if there are over two and a half million enforcers. [32] After all, the trust is not a discretionary trust for benefiting some members personally but a trust to carry out ascertained policies or purposes within particular parameters.

Moreover, as Robert Chambers has explained [33] in dealing with *Quistclose* trusts, P can pay money to R to be used for purposes benefiting people or even for abstract purposes, imposing an enforceable restriction on R's use of the money, so that P has a right to restrain misuse by R and the money is not available on R's insolvency for R's general creditors. It is but a short step from the right of P and his assignee to prevent R from using the money other than for the designated purposes to recognising the right of P as settlor to enforce his non-charitable purpose trust or of E as P's designated enforcer to enforce such trust.

Traditionalists will argue, no doubt, that trusts must always be "of property" in circumstances where the settlor has divested himself of his beneficial interest and invested the beneficiaries with equitable interests in ***L.Q.R. 102*** the trust property, so that it is their property and no longer his property--and it is only they (and no one else) who have rights in respect of such property and to whom the trustees owe obligations. However, it is rather strange for persons within a very extensive fluctuating range of discretionary beneficiaries, like those in *McPhail v. Doulton,* [34] to be regarded as owning equitable interests in the trust property rather than choses in action against the trustee. Indeed, most will never receive any trust assets, while it seems clear that their right to see trust documents and trust accounts is not really based upon any equitable proprietary interest therein but upon their fundamental right to make the trustee account for stewardship of the trust property. [35]

They do, however, each have a right to use the equitable tracing process to recover for the trust as a whole a proportionate interest in, or an equitable lien over, the product of the trust property, whether in the hands of the trustee or of a third party not being a bona fide purchaser of trust property without notice nor protected by statutory overreaching provisions. [36] But this proprietary tracing process is also available where charitable trustees are legal and beneficial owners of the trust property, subject to fiduciary and equitable obligations enforceable by the Attorney-General or the Charity Commissioners, or where personal representatives

are legal and beneficial owners of their deceased's property, subject to fiduciary and equitable obligations enforceable by those benefiting under the deceased's will or intestacy. [37] Such tracing process will therefore be available if trustees of a non-charitable purpose trust are regarded as legal and beneficial owners of the trust property, subject to fiduciary and equitable obligations enforceable by the enforcer designated as such in the trust instrument. Moreover, in such cases (as in the *Quistclose* trust cases explained by Robert Chambers [38]) the trust property and its traceable product is not available for claims of the trustee's private creditors, *e.g.* on the insolvency of the trustee.

Sufficient proprietary aspects therefore arise in relation to non-charitable purpose trusts to justify their existence as enforceable trusts where an enforcer is expressly appointed in the English or foreign trust instrument. The basis of the trust is the unilateral transfer of assets by a settlor to a person voluntarily undertaking the office of trustee with the benefits and ***L.Q.R. 103*** burdens attaching to such office. [39] It should make no difference whether the burdens are enforceable by the beneficiaries or by the Attorney-General or the Charity Commissioners or by the designated enforcer.

Trusts for beneficiaries--additional enforcers

A settlor may well usefully choose to designate himself (and after his death, a protector) as enforcer where the trust property will be held for a range of beneficiaries currently minors or unborn (or for many years bound to include unborn unascertained beneficiaries); and there seems no good reason why trustees who voluntarily undertake such extra obligation to him should not be bound by it without the need for the settlor to take further steps of a contractual nature to achieve this. [40] However, the settlor's rights must be additional to, rather than to the exclusion of, the rights of the beneficiaries, because if only the settlor can sue in respect of events occurring in his lifetime, the property is really held to his order, the beneficiaries having no rights, other than testamentary rights to whatever is left in the trust when the settlor dies if the settlor's deed complied with the requirements of the Wills Act 1837. As Millett L.J. has said, [41] "If the beneficiaries have no rights enforceable against the trustees there are no trusts"--other, one might add, than a resulting trust for the settlor.

Where the settlor is enforcer of his trust for beneficiaries he may be regarded as a sort of protector or guardian of the interests of any beneficiary not yet ascertained and of full capacity. Most offshore, and some English, trust deeds appoint someone to be a protector with power to monitor the conduct of the trustees and to replace them and whose consent may be necessary to certain actions of the trustees. [42] It is assumed in offshore cases [43] that the protector must have *locus standi* to the extent necessary to enable him to perform his functions (and, indeed, the Manx appellate court has held that the court does have inherent jurisdiction to appoint a protector with key functions in the life of the trust where such office is vacant and otherwise no appointment could be made). [44] This ***L.Q.R. 104*** assumption is surely correct because equity's role is to facilitate a settlor's intentions, and not to frustrate them, unless there are good public policy grounds against such facilitation or unless the settlor's requirements for the vehicle he intends to create are repugnant to the requirements for the trust vehicle. [45] No such repugnancy exists where the settlor or protector has enforcement rights *in addition to* the rights of the beneficiaries (so strengthening the trust obligation), and one cannot see any public policy ground to justify nullifying enforcement rights of settlors or protectors, whether governed by English law or a foreign trust law, except, of course, where all the beneficiaries are ascertained and of full capacity and unanimously reject any intervention by others for the benefit of the trust as a whole. [46]

It will be noticed that the enforcement position of objects of a power of appointment has not been dealt with. It is the beneficiaries entitled in default of exercise of the power who have interests in the trust property [47] and to whom the trustee owes a duty not to exercise the power of appointment without proper consideration. [48] The beneficiaries clearly must have a right so far as practicable [49] to be informed, when of full capacity, [50] that they are beneficiaries, so as to have a meaningful, effective right to make the trustees account for their trusteeship. [51] In the words of Lord Eldon in *Morice v. Bishop of Durham* [52]: "As it is a maxim that the execution of a trust shall be under the control of the court, it must be of such a nature that it can be under that control so that the administration of it can be reviewed by the court." If a secretive settlor stipulated in his trust instrument that the trustees were not to inform beneficiaries that they were beneficiaries and were to distribute trust assets only by way of cash via Liechtenstein bank safety deposit boxes or otherwise in such fashion that the source of the money was untraceable, then the beneficiaries would be ***L.Q.R. 105*** unable to assert any rights as beneficiaries to bring the trustees to account before the court. Thus, the trustees could not be under any equitable obligation to the beneficiaries: the settlor could require all the trust assets to be transferred to him or another person not a beneficiary under the trust instrument and, as intended by the settlor, the beneficiaries would never be able to do anything about it. The settlor's stipulation surely makes the trust a sham, the "beneficiaries" not being beneficiaries in the eye of equity. As Millett L.J. stated in *Armitage v. Nurse* [53] "If the beneficiaries

have no rights enforceable against the trustees there are no trusts." Accountability of the trustees to the beneficiaries is at the very core of the trust (other than charitable or non-charitable purpose trusts), so that *de facto* exclusion of such accountability or *de jure* by a clause in the trust deed ousts any trust for the so-called beneficiaries. [54]

However, there can still be a valid trust obligation where objects of a power of appointment have no rights to be informed that they are objects, [55] so that they do not learn of the trust and so cannot call the trustees to account, so long as there are beneficiaries who have, or will have by the end of the trust period, rights to call the trustees to account. [56] It is a question of construction as to whether or not the settlor intends objects of a power of appointment who are not beneficiaries to have a right to see the trust documents and accounts and to bring the trustees to account for their trusteeship of property which, after all, belongs beneficially to the beneficiaries [57] in default of any exercise of the power of appointment.

Accountability to the beneficiaries alone being sufficient for a valid trust obligation, the settlor may expressly exclude objects of a power of ***L.Q.R. 106*** appointment from having any rights to make the trustees' account [58]; indeed, there seems no reason why the settlor should not stipulate that objects be not told they are such objects, so as not to raise false hopes of benefiting under these extra optional powers conferred on the trustees, until the trustees have assets surplus to the needs of the beneficiaries and are seriously considering benefiting certain objects, who must then be approached for information enabling the trustees to choose between them. Otherwise, it may be that the settlor will be taken to confer such accounting rights upon the objects of a power, usually by necessary implication from the structure of the trust provisions; for example, where there is a power of appointment in favour of objects exercisable till the end of the trust period, whereupon a fixed or discretionary trust arises for beneficiaries not ascertainable till the end, or near the end, of the trust period, so that it would be reasonable for the settlor to intend objects of the power to be able to police the trust until the beneficiaries are ascertained. [59]

In dealing with objects of a power the cases do not, of course, refer to an object as an enforcer but, where an object is not a beneficiary, an object cannot have enforcement rights as a beneficiary. Thus, where the court regards an object as having *locus standi* to make the trustees account, the court is recognising an enforcer additional to the beneficiaries. This is further support for the view that a settlor or protector can be an enforcer in addition to beneficiaries in trusts for beneficiaries where the settlor's trust instrument makes provision for this. There then seems no reason why, in the absence of beneficiaries, a settlor should not make a non-charitable purpose trust enforceable by a person nominated in his trust instrument as enforcer to ensure that the purposes are carried out. In both cases the presence of the enforcer designedly ensures that there is a trust obligation ***L.Q.R. 107*** that the court can enforce and control, assuming certainty and administrative workability exist.

Conclusion

The status of beneficiary automatically [60] confers rights as enforcer of the trust obligation. However, there is no reason why equity should not permit a settlor to confer additional enforcement rights on other persons (including himself), and, where the obligation is not to benefit particular beneficiaries but to effect purposes, to confer original primary enforcement rights on an enforcer whom the settlor believes can be relied upon to ensure that the settlor's purposes are effected. Thus, non-charitable purpose trusts should not be automatically void: they should be valid if the settlor has appointed an enforcer, so long as they are administratively workable and restricted to a valid perpetuity period. [61] ☆

A trust governed by English law would then be described as an equitable obligation binding a person ("the trustee") to deal with property owned [62] by him as a trust fund segregated from his private patrimony whether for the benefit of persons ("the beneficiaries") of whom he may himself be one, and any one of whom has the right to enforce the obligation, or for the furtherance of a purpose which can be enforced [63] by an enforcer provided for in the terms of the trust or, in the case of charitable purpose trusts, by operation of law. In respect of the trust fund (consisting not only of the original assets vested in the trustee by the creator of the trust, "the settlor", and those subsequently added by the settlor, but also of those assets from time to time representing the produce of the original or added assets) a beneficiary or an enforcer has *personal* rights against the trustee to ensure that the latter makes good any loss occasioned to the trust fund by any ***L.Q.R. 108*** breach of trust; and augments such fund by the amount of any profits made in breach of trust; while also having *proprietary* rights against the trustee and, indeed, against any third party to whom any part of the trust fund has been wrongfully transferred unless that party is a bona fide purchaser without notice of the trust or protected by statutory provisions. [64]

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Footnotes

1 See D. J. Hayton "The Irreducible Core Content of Trusteeship", Chap. 3 of A. J. Oakley (ed.), *Trends in Contemporary Trust Law,* (1996) and *Armitage v. Nurse* [1998] Ch. 241 at p. 253 *per* Millett L.J. referring to "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."

2 Article 18 of The Hague Convention on the Law Applicable to Trusts and on their Recognition (implemented by the Recognition of Trusts Act 1987) permits the court to refuse to recognise the effect of a foreign trust where "manifestly incompatible with public policy".

3 When a leading Silk in "The *Quistclose* Trust: Who Can Enforce It?" (1985) 101 L.Q.R. 269 at p. 287.

4 *Re Astor's S.T.* [1952] Ch. 534 at p. 542 *per* Roxburgh J.; *Bradshaw v. University College of Wales* [1988] 1 W.L.R. 190 at p. 194 *per* Hoffmann J. Also see *Goulding v. James* [1997] 2 All E.R. 239.

5 R. M B. Cotterrell in S. Goldstein (ed.), *Equity and Contemporary Legal Developments* (1992), pp. 302-334. Generally, see P. Matthews, in "The New Trust: Obligations without Rights?" Chap. 1 of A. J. Oakley (ed.), *Trends in Contemporary Trust Law* (1996).

6 *O'Rourke v. Darbishire* [1920] A.C. 581 at pp. 626-627 *per* Lord Wrenbury distinguishing a beneficiary's proprietary right to see his "own" trust documents from the right to discovery of someone else's documents. This was accepted in *Re Londonderry's Settlement* [1965] Ch. 918 at p. 937.

7 As discussed extra-judicially by Millett L.J. in "Equity's Place in the Law of Commerce" (1998) 114 L.Q.R. 214 at pp 225-227.

8 *Saunders v. Vautier* (1841) 4 Beav. 115; *Stephenson v. Barclays Bank Ltd* [1975] 1 W.L.R. 88.

9 *Att.-Gen. v. Brown* (1818) 1 Swans. 265 at p. 290 *per* Lord Eldon; *National Anti-Vivisection Society v. I.R.C.* [1948] A.C. 31 at p. 62 *per* Viscount Simonds.

10 Charities Act 1993, ss. 8, 16, 18, 19, 26.

11 [1960] Ch. 232 at p. 246 treating as anomalous concessions to human sentiment valid testamentary trusts for erection and maintenance of sepulchral monuments, for care of pet animals or for priests saying masses in private; however, lack of a person positively interested in the carrying out of such purposes indicates that the "trusts" are really in the nature of powers: R.E.M., (1952) 68 L.Q.R. 449.

12 [1972] Ch. 526 at p. 538 echoing Lord Parker in *Bowman v. Secular Society* [1917] A.C. 406 at p. 441: "A trust to be valid must be for the benefit of individuals or must be in that class of gifts which the courts recognise as charitable." Thus L. McKay in "Trusts for Purposes" (1973) 37 Conv. at p. 420 states: "The rule that every non-charitable trust must have a *cestui que trust* must now be accepted as a well-established requirement of the law of trusts"; and all trust textbooks reflect this.

13 See *per* Millett L.J. in *Armitage v. Nurse* [1998] Ch. 241 at p. 253, cited in n. 1, *supra.*

14 [1987] Ch. 264 at p. 278.

15 Persons named in a trust deed and benefiting directly or indirectly *but not intended to have a right to enforce the trust* have no *locus standi* to enforce the trust: *Shaw v. Lawless* (1838) 5 Cl. & Fin. 129 at p. 153; *Gandy v. Gandy* (1885) 30 Ch.D. 57 at pp. 69-70 *per* Bowen L.J. The fact that the residuary legatees or the next of kin as default beneficiaries will take property if not used for a specific purpose does not, of course, indicate that the settlor-testator intended such "negatively" interested persons to be enforcers, so the presence of such persons will not save a trust for non-charitable purposes: *Re Shaw* [1957] I W.L.R. 729 at p. 745, and *Re Davidson* [1909] 1 Ch. 567 at p. 571.

16 (1804) 9 Ves. 399 at p. 405.

17 [1952] Ch. 534 at p. 541.

18 [1969] 1 Ch. 373 at pp. 382-383.

19 *e.g.* a trust for the award of scholarships for the educational instruction at a university for the children of employees or officers of ICI Plc or certain nominated subsidiaries of it: *Wicks v. Firth* [1983] 2 A.C. 214.

20 "The *Quistclose* Trust: Who Can Enforce it?" (1985) 101 L.Q.R. 269 at p. 282.

21 As required by Sir William Grant M.R. in *Morice v. Bishop of Durham* (1804) 9 Ves. 399 at p. 405, by Roxburgh J. in *Re Astor's S.T.* [1952] Ch. 534 at p. 542, and by Harman J. in *Re Shaw* [1957] 1 W.L.R. 729 at p. 745.

22 *e.g. Re Nottage* [1895] 2 Ch. 649, *Re Wightwick's W.T.* [1950] Ch. 260 and *Leahy v. Att.-Gen. for New South Wales* [1959] A.C. 457, where in each case lack of restriction to a valid perpetuity period rendered the trusts void in any event (but for a saving statute in the New South Wales case).

23 [1957] 1 W.L.R. 729 at p. 745.

24 *Leahy v. Att.-Gen. for New South Wales* [1959] A.C. 457 at p. 479.

25 See cases cited in n. 22, *supra.* It would seem that the 80-year statutory period available for the rule against persons acquiring a vested interest at too remote a time is not available for the rule against income being rendered inalienable by being required to be used for non-charitable purposes for a period which may exceed a perpetuity period of relevant lives in being plus 21 years: Perpetuities and Accumulations Act 1964, s. 15(4); Hayton and Marshall, *Commentary and Cases on The Law of Trusts and Equitable Remedies* (10th ed., 1996), p. 184 n. 61.

26 "A court of equity does not recognise as valid a trust which it cannot both enforce and control" as Roxburgh J. remarked in *Re Astor's S.T.* [1952] Ch 534 at p. 549, summarising Lord Eldon's views in *Morice v. Bishop of Durham* (1805) 10 Ves. 521 at p. 539. So long as the trustee's obligation is enforceable by the enforcer it does not matter that the enforcer, like a beneficiary, is under no direct obligation to anyone to exercise his enforcement rights. However, section 33 of the Charities Act 1993 workably allows proceedings to be taken with reference to charitable purposes by "any person interested in the charity", so it would seem that a settlor could workably provide that if "any person interested in the fulfilment of the non-charitable purposes" bona fide considers that the enforcer is not properly enforcing the purposes then he may apply to the court, which ought to have inherent jurisdiction to replace and appoint an enforcer, which is a fiduciary office crucial to the trust like that of protector on which see text to n. 44 *infra.* In Bermuda, by s.12B(1) of the Trusts (Special Provisions) Act 1989 (as inserted by s.2 of the Trusts (Special Provisions) Amendment Act 1998), "The Supreme Court may make such order as it considers expedient for the enforcement of a purpose trust on the application of … (d) any other person whom the Court considers has sufficient interest in the enforcement of the trust", such provision being considered workable: *cp. locus standi* for judicial review purposes.

27 See dictum of Roxburgh J., *supra.*

28 But the trust could be vitiated if not restricted to a valid perpetuity period or if not administratively workable (so having an expert enforcer with leeway to determine questions of fact and incidental questions of construction will be useful: *The Glacier Bay* [1996] 1 Lloyd's Rep. 370; *Brown v. G10 Insurance Ltd* [1998] Ll.Rep. I.R. 201; *Re Tuck's S.T.* [1978] Ch. 49); while if the alleged purpose merely amounted to an investment clause (*e.g.* to accumulate the trust income and develop the value of the trust fund) rather than a clause disposing of investment income and capital, this would be regarded as creating a resulting trust for the settlor.

29 Permitted by the Recognition of Trusts Act 1987 unless "manifestly incompatible with public policy" as provided by Article 18 of the incorporated Hague Convention on the Law Applicable to Trusts.

30 If the machinery for the appointment of a successor enforcer breaks down the court ought to hold that it has inherent jurisdiction to appoint an enforcer as a vital officer of the trust: *cp.* Isle of Man appellate court appointing a protector in *Steele v. Paz Ltd* [1993-95] Manx L.R. 102 and, on appeal, 426.

31 [1971] A.C. 424 at p. 450.

32 *R v. District Auditor, ex p. West Yorkshire M.C.C.* (1985) 26 R.U.R. 24 (administrative unworkability where 2,500,000 beneficiaries).

33 *Resulting Trusts* (1997), pp. 68, 85-89.

34 See *supra,* n. 31.

35 See *Hartigan Nominees Pty Ltd v. Rydge* (1992) 29 N.S.W.L.R. 405 at pp. 422 and 443-444; *Re Rabaiotti's Settlements* [2000] Jersey L.R. 173 and *Att.-Gen. of Ontario v. Stavro* (1995) 119 D.L.R. (4th) 750.

36 *e.g.* Law of Property Act 1925, ss.2 and 27.

37 *Re Diplock* [1948] Ch. 465.

38 See *supra,* n. 33.

39 *Re Norfolk's S.T.* [1982] Ch. 61. It is a beneficial incident of such office that entitles the trustee to debit the trust fund for his fees and expenses (and to have a non-possessory equitable lien as security payment)--and not any contract between the settlor and the trustee. Disclaimer by the trustee does not nullify the trust: the settlor (or his personal representative if the settlor dead) instead becomes trustee: *Mallott v. Wilson* [1963] 2 Ch. 494.

40 *Beswick v. Beswick* [1968] A.C. 58. For possibilities of new contractual arrangements to benefit third parties, and enforceable by them, now see Contracts (Rights of Third Parties) Act 1999.

41 *Armitage v. Nurse* [1998] Ch. 241 at p. 253.

42 On protectors generally see D. W. M. Waters, "The Protector: New Wine in Old Bottles?", Chap. 4 in A. J. Oakley (ed.), *Trends in Contemporary Trust Law*; A. Duckworth, "Protectors--Fish or Fowl" Parts 1 and II respectively in (1995) 4 J. Int. T. & C. Planning 131 and (1996) 5 J. Int. T. & C. P.18; D. J. Hayton, "English Fiduciary Standards and Trust Law" (1999) 32 Vanderbilt J. Transnational Law 555 at pp. 579-589.

43 *e.g Von Knierem v. Bermuda Trust Co Ltd* (1994) Butts O.C.M., Vol. 1, pp. 116-125; *Re Omar Family Trust* [2000] W.T.L.R. 713.

44 *Steele v. Paz Ltd* [1993-95] Manx L.R. 102 and, on appeal, 426. It should follow tht the court also has inherent jurisdiction to replace a protector who breaches his fiduciary duties.

45 See the approach of the Court of Appeal in *Armitage v. Nurse* [1998] Ch. 241 and of the Privy Council in *Hayim v. Citibank N.A.* [1987] A.C. 730.

46 *Saunders v. Vautier* (1841) 4 Beav. 115; *Stephenson v. Barclays Bank Ltd* [1975] 1 W.L.R. 88. If the foreign law excludes *Saunders v. Vautier* rights where a material purpose of the settlor still subsists, then the English court ought to regard the beneficiaries' interests merely as choses in action against the trustees who have a defence against the beneficiaries' claim to the property where the settlor's purpose remains to be achieved: *cp. Re Fitzgerald* [1904] 1 Ch. 573 (inalienability of alimentary life interest under Scots trust recognised by English Court of Appeal). A beneficiary of full capacity can direct a settlor or protector to take no steps so far as concerns his own interest but cannot prevent enforcement rights being exercised for the benefit of the trust fund as a whole.

47 *Re Brooks S.T.* [1939] 1 Ch. 993; thus the fraud on a power doctrine does not apply to the release of powers in favour of a default beneficiary: *Re Somes* [1896] 1 Ch. 250.

48 *Karger v. Paul* [1984] V.R. 161.

49 *Re Hay's S.T.* [1982] 1 W.L.R. 202 at pp. 209-210.

50 *Hawksley v. May* [1956] 1 Q.B. 304.

51 Thus in *Murphy v. Murphy* [1999] 1 W.L.R. 282 the settlor's son as a discretionary beneficiary was entitled to an order that the settlor give him the name and address of the offshore trustee; also see *Scally v. Southern Health & Social Services Board* [1992] 1 A.C. 294, at pp. 306-307 where the House of Lords held an employed doctor's right to obtain enhanced pension benefits if exercised within a limited period was of no effect unless he was aware of it, so the employer Board was under a duty to take reasonable steps to bring it to his attention so as to render his right efficacious.

52 (1805) 10 Ves. 521 at p. 539.

53 [1998] Ch. 241 at p. 253 and see cases cited in n. 51, *supra.*

54 If the trustee cannot be called to account by a beneficiary, then the beneficiary is remediless and the trustee may do as he likes, as pointed out by the Michigan Court of Appeal in *Raak v. Raak* 428 NW 2d 778 at p. 780 (1988).

55 See *per* Templeman J. in *Re Manisty's Settlement* [1974] Ch. 17 at p. 25, where he stated that there was no need to take steps to inform objects of the power who were employees of the settlor's company or relatives of those who were the primary object of the settlor's bounty. Recent DNA advances (showing most Europeans to be descendants of one of six women) make "relatives" a huge class, the word meaning descendants of a common ancestor (whose bones might be dated to 2000 B.C.) as held in *Re Baden's Deed Trusts (No 2)* [1973] Ch. 9. A discretionary trust for S's relatives (potentially well over 10 million) should be void for administrative unworkability nowadays.

56 As Lord Evershed stated in *Re Endacott* [1960] Ch. 232 at p. 246, "a trust by English law, not being a charitable trust, in order to be effective must have ascertained or ascertainable beneficiaries". In *Re Hay's S.T.* [1982] 1 W.L.R. 202 at pp. 213-214 Megarry V.-C. stated: "Beneficiaries under a trust have rights of enforcement which mere objects of a power lack."

57 See n. 47, *supra.*

58 The only automatic irreducible core right of someone who is only an *object,* once aware of the trust, is to seek to have the trustees replaced by new trustees if he has grounds to believe that the trustees cannot be trusted to consider the exercise of their power fairly and properly: *Re Manisty's Settlement* [1974] Ch. 17 at p. 25, *per* Templeman J. In *Mettoy Pension Trustees Ltd v. Evans* [1990] 1 W.L.R. 1587 at pp. 1617-1618 Warner J., citing *Re Hodges* (1878) 7 Ch. D. 754 and *Klug v. Klug* [1918] 2 Ch. 67, held he had power to exercise the fiduciary power of a pension fund trustee to augment the pensions of beneficiaries, which he would do rather than replace the insolvent trustee. He thus exercised a power to benefit *beneficiaries* (who were not volunteers but had earned their rights to deferred pay), as in *Re Hodges* (power of maintenance exercised in favour of infant beneficiaries who were wards of court becoming absolutely entitled to capital if attaining 21) and *Klug*

v. Klug (power of advancement exercised to benefit beneficiary). Where there is a trust for members of class A and a power of appointment of income or capital in favour of class B it seems to be out of the question for the court to exercise the power (especially, if class B be large, *e.g.* the settlor's relatives or anyone except the beneficiaries, the trustees and the settlor and his spouse) with the result that it should have to appoint new trustees.

59 This reasonable assumption underlies the views in *Spellson v. George* (1987) 11 N.S.W.L.R. 300 at pp. 316-317 and *Murphy v. Murphy* [1999] 1 W.L.R. 282 at p. 290 that an object has a right to see trust documents. In many cases, however, an object will also have a right as a contingent beneficiary, as where at the end of the trust period the beneficiaries are to be the settlor's descendants then alive, while the objects are also such descendants who may theoretically survive till then, equity taking account of possibilities as in the rule against remoteness of vesting.

60 See *Armitage v. Nurse* [1998] Ch. 241 at p. 253 cited in n. 1, *supra.* For a temporary period a beneficiary may be denied full enforcement rights (*e.g.* to see accounts of the trust portfolio of investments) as in a "blind" trust of a settlor's assets while he or she holds a sensitive public office, *e.g.* Prime Minister, Chancellor of the Exchequer, Director of the Serious Fraud Office, Governor of the Bank of England. Any "beneficiary" permanently denied enforcement rights should be characterised as a mere object of a power.

61 Nowadays, surely the perpetuity rules for trusts for beneficiaries and for non-charitable purposes should be the same, with the result that the "wait and see" facility and the 80-year period (or the 125-year period proposed by Law Com. No. 251 "The Rules against Perpetuities and Excessive Accumulations" (1998) should be available for the latter trusts. Indeed, the pressure from the validity of perpetual trusts under the laws of the Cayman Islands, Turks and Caicos Islands, Samoa, Manitoba, Alaska, Arizona, Delaware, Florida, Idaho, Illinois, Maryland, South Dakota and Wisconsin in conflict of laws cases in the English courts in respect of English assets should severely undermine the justification for the English perpetuity rules, especially if it allows them to be circumvented, as is already happening in connection with the restrictive 21-year accumulation period. Globalisation contributes to harmonisation.

62 A trustee is concerned with ownership-management (not with management as agent or bailee of assets owned by another): *Smith v. Anderson* (1880) 15 Ch.D. 247 at p. 275, *per* James L.J.; *Chief Commissioner of Stamp Duties v. ISPT Pty Ltd* (1999) 2 I.T.E.L.R. 1 at p. 15, *per* Mason P. (New South Wales Court of Appeal).

63 The right of a beneficiary or enforcer to enforce the trustee's obligation entails the right to the information necessary to enable an effective surcharge or falsification of the trustee's accounts in seeking judicial enforcement of the trust.

64 The core of a trust concept developing in Europe does not require the trust to create a proprietary interest, just a segregated fiduciary patrimony immune from claims by the trustee's spouse, heirs and personal creditors: *Principles of European Trust Law* (eds. D. Hayton, S. Kortmann and H. Verhagen) (1999).

