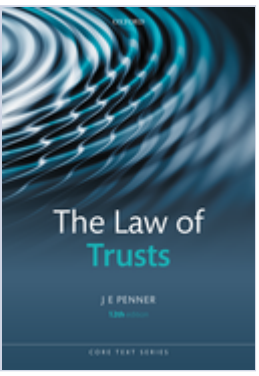

The Law of Trusts (12th edn)
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7. The beneficiary principle

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Abstract

Titles in the Core Text series take the reader straight to the heart of the subject, providing focused, concise, and reliable guides for students at all levels. This chapter focuses on how the law enables a person to devote their property to the carrying out of purposes, while restricting the ways in which that can be done. The discussions cover the beneficiary principle and the invalidity of private purpose trusts; anomalous valid purpose trusts; the case of powers for purposes; an enforcer principle for the creation of a private purpose trust; specified benefit trusts aka *Re Sanderson's* trusts, and the rule against perpetuities.

Keywords: beneficiary principle, private purpose trusts, anomalous valid purpose trusts, powers for purposes, specified benefit trusts, enforcer principle

Summary

The beneficiary principle and the invalidity of private purpose trusts

7.1 The 'beneficiary principle' can be stated thus: for a trust to be valid, it must be for the benefit of ascertainable individuals, ie specific beneficiaries. The corollary of this rule is, roughly, that equity will not recognise a trust to carry out a purpose, since the benefits of carrying out a purpose cannot be localised to specific individuals. The only valid exception to this principle are trusts to carry out charitable purposes which we shall look at in detail in **Chapter 18**. The duty to enforce charitable trusts fell on the King as *parens patriae* ('father of the country'), and thence to the Attorney-General as his legal representative. Since charitable trusts are also called 'public' trusts, the beneficiary principle is also framed as the 'no *private* purpose trusts' rule.

7.2 The two most quoted statements expressing the 'no purpose trusts rule' come from the case of *Morice v Bishop of Durham* (1804, before Sir William Grant MR, 1805 on appeal to Lord Eldon LC). Both emphasise that for a trust to exist there must be objects of the trust, specified individuals *entitled* under the trust terms, who will therefore have standing to bring the trustees to court to enforce the trust obligations against the legal owner (**2.35**). Sir William Grant MR said (at 658):

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

p. 159 ↵ Implicit in this statement is the view that only those who are intended to benefit *qua* beneficiaries have standing to enforce it. Whilst other individuals may *factually* benefit from the trustee's carrying out his obligations to the beneficiaries, this does not make these other individuals beneficiaries, and they have no standing to enforce the trust. Your children may certainly factually benefit when you receive income as an income beneficiary under the trust, as you might use this money to support them, but that doesn't make your children objects of the trust. This rule is in essence parallel to the 'privity' rule of contract law: your children may factually benefit when your employer pays you your salary under your contract of appointment, but that does not make your children parties to the contract (**6.13**). So only those who are right holders under a trust may enforce it, not every Tom, Dick, or Mary who might like to see it carried out.

7.3 From this point of view, the beneficiary principle can be regarded as a corollary of the certainty of objects requirement: if a trust is expressed in terms of a purpose, then it will be impossible to determine any definite objects of the trust, and therefore there are no persons at whose insistence and for whose benefit the court can order the trustee to carry out the trust. Lord Eldon clearly equates the court's control over the trust with the existence of ascertainable objects and indeed, subject matter. He said (at 954):

> *As it is a maxim, that the execution of a trust must 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 … unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the court can neither reform maladministration, nor direct a due administration.*

7.4 The best statement of the principle, however, is Roxburgh J's in *Re Astor's Settlement Trusts* (1952). In 1945, Viscount Astor made a settlement of most of the shares of 'The Observer Limited'. The income from the trust fund that was set up was to be applied to a number of purposes, including the maintenance of good understanding between nations, the preservation of the independence and integrity of newspapers, editors, and writers, the protection of newspapers from control by combines, and the improvement of newspapers. It was admitted that the purposes were not exclusively charitable (see **18.53** for the requirement that, to be valid, a charitable trust must be for exclusively charitable purposes).

7.5 Roxburgh J framed the beneficiary principle in this way (at 541):

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

p. 160 **7.6** According to Roxburgh J, either the legal owner of the property is under a trust obligation or he is not. If he is, then someone else must have corresponding beneficiary's rights against him which can be enforced. If he is not, then he can deal with the property as he wishes because he is the beneficial owner. Roxburgh J sees no ground between these two alternatives, and it is submitted that he is perfectly right not to see any. The very existence of a trust turns on there being a trust obligation to someone who, in consequence, has an equitable, beneficial interest in the trust property. If we take the requirement of there being objects with trust interests seriously, speaking about the need for someone with standing to enforce the trust is a distinctly second-order way of framing the beneficiary principle. The essence of the principle is that for a trust to exist, there must be someone other than the trustee who has the real beneficial equitable interest in the trust property. If there is no such person, then not only is there no person to enforce obligations against the trustee, but more fundamentally, there are no trust obligations to enforce, for the legal owner owns it for his own benefit absolutely.

7.7 Since, however, in cases of this kind the settlor has clearly intended to create a trust by transferring the property to a trustee, the trustee cannot keep the property for himself. A resulting trust (**2.14**) arises, because the settlor has failed effectively to dispose of the beneficial interest in the property. In this case, he fails to do so because he tries to do the impossible—create a trust without a beneficiary, which for equity is no trust at all.

7.8 Roxburgh J also said (at 541–542):

> *... if the purposes are not charitable, great difficulties arise both in theory and in practice. In theory, because having regard to the historical origins of equity it is difficult to visualise the growth of equitable obligations which nobody can enforce, and in practice, because it is not possible to contemplate with equanimity the creation of large funds devoted to non-charitable purposes which no court and no department of state can control ... If the purposes are valid trusts, the settlors have retained no beneficial interest and could not initiate them. It was suggested that the trustees might proceed ex parte to enforce the trusts against themselves. I doubt that, but at any rate nobody could enforce the trusts against them.*

So the trust failed.

7.9 Roxburgh J further decided that the trusts were also void for uncertainty, citing in particular the phrases 'different sections of people in any nation or community', 'constructive policies', and 'integrity of the press'.

7.10 In *Re Denley's Trust Deed* (1969) Goff J appeared to narrow the 'no purpose trusts' rule considerably, while at the same time arguing that he was not diminishing the effect of the beneficiary principle, properly understood. The case concerned a trust, created by a company, of a plot of land (at 375F–G):

> *... to be maintained and used as and for the purpose of a recreation or sports ground primarily for the benefit of the employees of the company and secondarily for the benefit of such other person or persons (if any) as the trustees may allow to use the same ...*

p. 161 ↵ There was a gift over of the land to a hospital if at any point fewer than half the employees were paying a weekly subscription (a condition subsequent of defeasance (**3.20**) which was not free from interpretive difficulty (391G–393B)), and the gift was properly limited to a perpetuity period.

7.11 Goff J held that the gift was valid (at 382–384):

> *I think that there may be a purpose or object trust, the carrying out of which would benefit an individual or individuals, where the benefit is so indirect or intangible or which is otherwise so framed as not to give those persons any locus standi to apply to the court to enforce the trust, in which case the beneficiary principle would, as it seems to me, apply to invalidate the trust, quite apart from any question of uncertainty or perpetuity ... The present is not, in my judgment, of that character, and it will be seen that ... the trust deed expressly states that, subject to any rules and regulations made by the trustees, the employees of the company shall be entitled to the use and enjoyment of the land ... [I]n my judgment the beneficiary principle of* Re Astor *... is confined to purpose or object trusts which are abstract or impersonal. The objection is not that the trust is for a purpose or object per se, but that there is no beneficiary or cestui que trust ... Where, then, the trust, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals, it seems to me that it is in general outside the mischief of the beneficiary principle.*

7.12 The problem with this passage is that Goff J does not make it clear on what basis, and to what rights, such 'individuals', here the employees, were entitled to under the trust. On one hand, whilst the benefited individuals were held to have standing to enforce the trust, what does this amount to? May they enforce the trust only in order to make the trustees carry out the purpose, or may they combine with the hospital to defeat

the purpose under the principle in *Saunders v Vautier* (**3.62** et seq)? Goff J does not discuss this. His only remarks concerning any disputes whilst the trust was up and running concern disputes between different groups of benefited individuals, and he gives no clear guidance as to how a dispute between the trustees and these individuals is to be resolved. We shall revisit *Re Denley* later on, because on one construction of the deed and on one construction of his judgment a valid trust for the employees could clearly have been found, which doesn't impinge on the beneficiary principle at all (**7.54**). (For a recent critique of the judgment in so far as Goff J's judgment really does validate a kind of private purpose trust, see Morris 2020).

7.13 Goff J's decision has received some obiter consideration. In *Re Grant's Will Trusts* (1979) Vinelott J said (at 368) that the case was:

> *... altogether outside the categories of gifts to unincorporated associations and purpose trusts. I can see no distinction in principle between a trust to permit a class defined by reference to employment to use and enjoy land in accordance with rules to be made at the discretion of trustees on the one hand, and, on the other hand, a trust to distribute income at the discretion of trustees among a class, defined by reference to,*
> p. 162 *for example,* ↵ *relationship to the settlor. In both cases the benefit to be taken by any member of the class is at the discretion of the trustees, but any member of the class can apply to the court to compel the trustees to administer the trust in accordance with its terms.*

7.14 It is not clear whether there really is 'no distinction' between the two classes of cases. In the latter case, the discretionary trust is one in which the class of beneficiaries is defined by the individuals' relationship to the settlor, but their individual shares are entirely at the trustees' discretion. In such a case, the trustees' discretion is wholly dispositive, a matter of who within the class shall benefit at all, and in what amounts. By contrast, in the *Re Denley* case, the mere power of the trustees to make rules governing the enjoyment of the land does not amount to a discretion over who and in what proportion the beneficiaries may benefit from the property. This discretion is more along the lines of an administrative discretion (**3.38**), to ensure that all the employees may enjoy the sports ground as much as possible. Now the exercise of an administrative discretion can have dispositive effects—this is why a trustee must act in an even-handed way when exercising a discretion to choose investments (**8.3**). Following this logic, presumably the trustees would be in breach if they framed rules governing the use of the land that unfairly excluded or limited the access of a particular group of employees.

7.15 *Re Denley* was also considered in *Re Lipinski's Will Trusts* (1976). Oliver J stated (at 248) that the passage quoted above from Goff J's decision as being '[in] accord both with authority and with common sense', but did not discuss precisely how *Re Denley* should be applied to the *Re Lipinski* facts, where a gift expressed to be for the purpose of constructing new buildings was given to an 'unincorporated association' (**11.73** et seq), a group of individuals who together form a society, or club, bound by rules. In particular, finding the gift valid he said the following (at 250):

> *[I]t seems to me that whether one treats the gift as a 'purpose' trust or as an absolute gift with a superadded direction or ... as a gift where the trustees and the beneficiaries are the same persons, all roads lead to the same conclusion.*

7.16 The vital point here is that on the latter two treatments of the gift, the testator's expressed purpose may be entirely ignored, either because as a 'superadded direction' it merely expresses a motive for the gift (recall 'precatory words' (**5.14**)), or on the basis that, the trustees and the beneficiaries being the same persons, ie the members of the club, the property is absolutely owned, and thus on *Saunders v Vautier* principles the beneficiary/trustees may do with the property what they like. This seems at odds with the impression Goff J clearly gives that the trustees are to carry out the purpose. Both Vinelott J's and Oliver J's interpretations appear to be killing *Re Denley* with kindness. While they are happy to agree that the *Re Denley* trust was valid, in doing so they seem to defeat the spirit of Goff's decision.

7.17 Recall also *West Yorkshire Metropolitan County Council* (**5.55**). One of the reasons Lloyd LJ gave for finding that trust for all the residents of West Yorkshire bad was that it amounted to an invalid purpose trust, which could not be treated as a case like *Re Denley* because the class being so large, there were no ascertainable beneficiaries.

p. 163 **7.18** Two fairly recent first instance decisions have cited *Re Denley* with approval. In *Grender v Dresden* (2009) Norris J said (at [18], emphasis added):

> *As to the argument that this is an unlawful purpose trust, I reject that argument and hold that this is a* trust for a definable class of persons *of the type recognised in* Re Denley *[1969] 1 Ch 373. The Deed recites that the shares are held for the benefit and subject to the direction of the Estate Residents, and it is simply a question of identifying that class of beneficiary.*

One of the main trustee obligations was to use trust funds to maintain roads and footpaths in a residential neighbourhood, and the trust beneficiaries were the neighbourhood residents themselves.

7.19 In *Gibbons v Smith* (2020, 2021) Roth J cited *Re Denley* with approval (at [53]–[54]), but it is not clear what the point of doing so was, since the case concerned a trust of assets held for members of an unincorporated association, and as we shall see (**11.73** et seq), such trusts are not purpose trusts at all.

Anomalous valid purpose 'trusts'

7.20 I have put 'trusts' in scare quotes advisedly. It is not clear that the anomalous valid purpose 'trusts' we are about to examine are trusts at all, but are really mere powers over trust property. But as they are generally treated under the heading of 'trusts' by judges, we shall do the same. These exceptions to the beneficiary principle are all testamentary trusts. These are trusts for the maintenance of particular animals owned by the testator (a horse, *Pettingall v Pettingall* (1842); horses and hounds, *Re Dean* (1889)) and for the construction and maintenance of graves and funeral monuments (*Mussett v Bingle* (1876); *Re Hooper* (1932)), and for the saying of private masses for the repose of the testator's relatives' souls (*Bourne v Keane* (1919); *Re Heatherington* (1990)).

7.21 In *Re Endacott* (1960), a testator left his entire residuary estate, which amounted to more than £20,000, 'to the North Tawton Devon Parish Council for the purpose of providing some useful memorial to myself'. The gift was not allowed as an exceptional testamentary trust to construct a monument: Lord Evershed MR said

(at 247), 'It would go far beyond any fair analogy to those decisions.'

7.22 These trusts are sometimes called 'trusts of imperfect obligation', because there are no beneficiaries of these trusts, and thus no obligations are owed to any persons to carry out the purpose by the legatee of the gift who, as 'trustee', is the person to carry it out. However, this does not mean that the legal holder of the money to be devoted to the purpose may spend the money as he likes. If a testamentary gift is upheld as a purpose trust of this kind, the court will make a '*Pettingall*' order (named after the order made in that case).
p. 164 The legatee must undertake to the court to carry out the purpose, and the 'interested' parties, ie those persons who would take if the trust were to fail and who will take any funds surplus to the requirements of carrying out the purpose, are given leave to apply to the court if the trustee applies the property outside of the intended purpose. Thus the 'enforcement' of these 'trusts' is essentially identical to the enforcement of mere powers of appointment.

7.23 Notice that a surplus of funds not required to carry out the trust is always a possibility in these cases. The animal to be provided for, for example, might perish shortly after the death of the testator.

7.24 Two final points are to be made on these exceptional trusts: one serious, one trivial. The serious point concerns a case that is regularly cited in the textbooks as a possible case of a valid anomalous purpose trust. In *Re Thompson* (1934) a testator left money to a friend in trust for the purpose of promoting fox-hunting. Clauson J decided that he could make a *Pettingall* order because there was a residuary legatee who as an interested party could enforce the trust by applying to the court. But on this basis any purpose trust of whatever kind could be enforced; the *Pettingall* order is devised to deal with a trust of imperfect obligation only if it is already found to fall within the class of exceptions to the general no purpose trust rule in the first place. It is getting things absolutely the wrong way round to find that a purpose trust is valid whenever one can devise a *Pettingall* order.

7.25 The trivial point is simply that leaving property for their maintenance is as much as you can do for your pets after you die. The idea that a millionaire may leave his fortune to his favourite cat is a cartoon fiction having no basis in law, in case you were wondering. Your animals are your property in law, and you cannot leave property to property. In legal terms, leaving property to your cat, Fred, is no different from leaving property to your toaster; the most you can do is leave a reasonable sum to keep Fred in the condition to which he has become accustomed.

The rules on duration of trusts

7.26 A purpose trust, such as a trust for the upkeep of a grave, can last forever. Therefore, if the testator does not specifically limit his gift to a perpetuity period, the gift will be void for perpetuity. Section 18 of the Perpetuities and Accumulations Act 2009 provides that the Act does not 'affect the rule of law which limits the duration of noncharitable purpose trusts', so the pre-2009 Act law will, apparently, continue to apply. It may be the case that a testator is not entitled to choose the statutory perpetuity period of 80 years provided by the Perpetuities and Accumulations Act 1964. This turns on technical considerations regarding the interpretation of s 15(4) of the Act and the question of whether the rule against perpetuities applies in a distinct way to pure purpose trusts (see Matthews (1996)), and no case has decided the point. A testator may,

however, employ a 'lives in being plus 21 years' clause to indicate a perpetuity period, naming individuals as the relevant lives in being. For this purpose a 'royal lives' clause is appropriate, for example: '£10,000 to my
p. 165 trustees on trust to maintain my grave, such trust not to extend beyond the expiry of 21 years following the death of the last surviving descendant of Queen Elizabeth II alive at my death.' The purpose of picking the descendants of a king or queen is simply that, being famous, it will be easy for the trustees to determine when the last surviving life in being dies. If the testator does not use a royal lives clause, and wishes the trust to have a specific duration, then, assuming he is not entitled to use the statutory period of 80 years or less, he may only choose a period within the definable portion of the common law rule, ie the portion not determined by the duration of any lives in being, thus periods of 21 years or less. If the testator specifies that his gift is to continue 'for as long as the law allows' or uses some similar phrase, courts have allowed the gift to last for 21 years (*Pirbright v Salwey* (1896); *Re Hooper* (1932)).

Powers for purposes

7.27 The beneficiary principle applies to trusts, not to powers of appointment. As there is no obligation to exercise powers, there is no similar problem of finding a true beneficiary to enforce their exercise; moreover, those who take in default of appointment are the beneficial owners of the property until it is appointed away from them (**3.10**). The courts have expressed their willingness to uphold powers to devote trust property to purposes. *In Re Douglas* (1887) concerned a power to appoint property to institutions, not to purposes per se; but since such institutions would themselves apply the property to particular purposes, the case is cited as evidence of judicial willingness to uphold powers for purposes. In *Re Shaw* (1957) George Bernard Shaw had in his will devoted funds for the purpose of devising a 40-letter alphabet for the English language. Harman J accepted that a power to devote funds to the purpose would have been valid but, having decided that the provision imposed a trust to carry out the purpose, he relied on *IRC v Broadway Cottages Trust* (1955) to hold that a valid power is not to be spelled out of an invalid trust (**4.17**). More importantly, powers to expend money for purposes are the foundation of the modern bare trust with a contractual or agency mandate, which we shall examine in **Chapter 11**.

7.28 Certain Canadian jurisdictions provide legislation which 'saves' invalid purpose trusts by treating them as valid powers. In Alberta, British Columbia, and Ontario trusts 'for a specific noncharitable purpose that creates no enforceable equitable interest in a specific person must be construed as a power to appoint the income or the capital, as the case may be' (Perpetuities Act, RSA 2000 c. P-5, ss 20(1); Perpetuity Act, RSBC c.358, ss 24(1); Perpetuities Act, R.S.O. 1990 c. P.9, ss 16(1).)

7.29 Those who take in default of appointment, while they can ensure that the power holder does not exercise the power improperly, cannot, however, insist that the power holder exercise the power; they would be unlikely to insist even if they could, because every such exercise will diminish the amount of property they will receive in default. Thus, while a settlor can empower someone to spend the trust property on a purpose,
p. 166 there will be no one who is interested in ensuring that the power is exercised. Therefore a settlor creating a power cannot ensure that the trust property will be applied to the purpose he desires, although, obviously, if he gives the power to someone who is loyal to him and shares his devotion to the purpose, he may be confident that the property will be applied to it despite the absence of any legal means of enforcement.

7.30 The case of powers for purposes raises the interesting question of whether such powers can be fiduciary powers, ie whether their holders, typically the trustee of the trust, owe any fiduciary obligations in their exercise. As we have seen, fiduciary power holders owe fiduciary obligations both to those who take in default of appointment, and to the objects of the power. But here, there are no objects of the power—the power is to carry out a purpose, and a purpose cannot be owed anything. So any proposed positive fiduciary duty, say to consider exercising the power from time to time, which is not owed to those who take in default of appointment (their interests are best served if it is not exercised at all), has no corresponding right holder, no human object. Since there are not private duties without corresponding private rights, there cannot be any fiduciary obligations of this kind.

7.31 On the other hand, a power holder clearly has duties not to misuse the power, a duty that can be enforced by those who take in default of appointment. And to the extent that the fiduciary obligations binding the power holder concern wrongful acts, rather than wrongful omissions, which affect the interests of those who take in default of appointment, then such duties can be enforced. Thus, for example, if the trustee fiduciary power holder were to carry out the trust purpose, say to devise a 40-letter alphabet for English, by setting up his own company and paying the trust money to it to carry out the purpose, such an expenditure would be made in conflict of interest; those who take in default would have standing to challenge this expenditure, because to the extent that the trustee exercises the power in order to benefit himself, he exercises the power improperly, diminishing their interests under the trust, favouring his own interests over those of these beneficiaries. It would also appear that such a trustee cannot release the power; although a trustee can decide not to exercise the power at all, any purported release would be ineffective and, for example, would not bind any successor trustee. The fiduciary principle works here not because anyone has standing to enforce a fiduciary obligation not to release, but because the holder being a fiduciary extinguishes any valid power to release. Thus, it seems that there can be a fiduciary purpose power, although the fiduciary character of the power is limited.

7.32 A power to appoint property to purposes must be expressed with sufficient precision for the power holder and the court to know with certainty what will count as appointing property to the purpose, in case any person who would take in default of appointment were to challenge a particular expenditure by the power holder. The 'is or is not' test (**4.14** et seq) should apply, which is to say that any power must be expressed with a certainty sufficient to determine whether any proposed expenditure is within the power or not. In *Re Astor*, Roxburgh J would have held the trust to fail for uncertainty as well as for breaching the beneficiary principle. Since the capricious creation (**3.81**) or exercise (**3.53**) of a power may also be invalid, one presumes that a power to appoint property to purposes may flounder if capricious.

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Specified benefit trusts

7.33 Much of the confusion surrounding the idea of a purpose trust results from failing to observe that the benefits of trust property can be applied to benefit the beneficiaries in different ways. Recall our example of Lionel (**2.38**). Recall also, that where the title to a house is a trust asset, the trust terms might require the trustee to licence a beneficiary to go into possession of the house to live in it. Now, in a colloquial sense, this is a 'purpose' trust because the trustee must use the house for a purpose, ie letting the beneficiary live in it. But

this trust in no way violates the beneficiary principle. It's just a trust where the beneficiary's interest in the trust asset is *specified*, that is, out of the different ways in which the asset could be applied to benefit the beneficiary—the obvious alternative here would be to let the house at a rent to a third party to generate income to be paid to the beneficiary—the trust specifies how the trust assets are to be applied to benefit her. We can call such trusts 'specified benefit trusts' or SBTs.

7.34 There are two different forms of SBTs, which give rise to different problems. The first kind is a trust to use trust money and apply it to the benefit of a beneficiary in a particular way, rather than just paying it to him. An example would be to use trust money to maintain, ie financially support, a disabled person. The second kind is one where a particular non-money trust asset must be applied to benefit the beneficiary in a particular way, as for example in the trust we have just seen to licence a beneficiary the occupation of a house title to which is held on trust.

7.35 Courts in the nineteenth century were well versed in enforcing SBTs of the first kind, in particular trusts to pay for the maintenance, education, and advancement of children. A trust for maintenance is one that will provide for a person's daily costs of living, a roof over her head and food, clothing, etc; a trust for education is straightforward; a trust for 'advancement' had a special meaning in this context (**3.44**), ie a trust to pay sums of money to 'advance' someone in the world, usually an infant who is approaching adulthood, by paying the costs of getting him started in his career. A typical example of a payment for advancement in the nineteenth century would be the purchase of a 'living' for a cleric, ie an appointment to an office in the Church of England, or the purchase of a commission in the army. Because the nature of these costs and expenses was so familiar there was no certainty of subject matter issue, although how much needed to be spent in any individual case would depend upon the trustees' exercising their discretion reasonably. Applying the 'is or is not' test of certainty, the question is whether any particular expenditure by the trustees is within the expense of education, say, or is not, and the courts clearly felt that what counted as an expenditure on education, maintenance, and advancement was certain enough.

7.36 Of course, one can create an SBT for 'purposes' other than education, maintenance, and advancement. Consider this gift: '£100,000 on trust to pay Julia £1,000 on each occasion that Chelsea FC wins a match during the regular football season of 2023–24, all funds remaining to be paid to Timothy.' This trust is
p. 168 perfectly valid, if unusual: the settlor has simply chosen an unusual way of carving up the beneficial interests between the two beneficiaries.

7.37 The main problem that can arise in these cases is one of construction of the terms of the trust, which were typically testamentary, where a specific sum of money was given on trust to, say, educate a beneficiary, which concerned the destination of any surplus of funds that arose, not being capable of being spent. The situation is no different from the possibility of a surplus in the anomalous valid trust cases (**7.23**). For example, the beneficiary might die shortly after the trust comes into effect.

7.38 The leading case concerning the interpretation of these trusts is *Re Sanderson's Trust* (1857). Here, a testator left property upon trust to 'pay and apply the whole or any part of the [income] for and towards [the] maintenance, attendance, and comfort' of his mentally disabled brother for the remainder of his life. At the death of this brother there remained unexpended income, and the question was whether those funds should

be held on trust for the residuary legatees under the testator's estate, or whether the money should go into the brother's estate. In other words, the question was whether the gift was limited to such portion of the income as was required to pay for the brother's maintenance, or whether it was an absolute gift of the whole.

7.39 Page-Wood VC distinguished the two possible interpretations of testamentary gifts of this kind as follows (at 1208–1209):

> *In reference to gifts of this description, there are two classes of cases between which the general distinction is sufficiently clear, although the precise line of demarcation is occasionally somewhat difficult to ascertain. If a gross sum be given, or if the whole income of the property is given, and a special purpose assigned for that gift, this Court always regards the gift as absolute, and the purpose merely as the motive of the gift, and therefore holds that the gift takes effect as to the whole sum or the whole income, as the case may be … [If] an entire fund is given for the maintenance of children or the like, they take the whole fund absolutely, and the maintenance is treated in effect as simply the motive in making the gift; while, on the other hand, if a portion only of the fund is given for maintenance, then they are entitled to draw out so much only as may be necessary for the purpose specified.*

7.40 Thus, there developed a body of case law directed to determining whether the testator intended that the whole of the trust property should go to the beneficiary, the purpose of maintenance, or education, or whatever, merely indicating the motive of the gift, or whether he was creating a fund out of which money might be distributed only on the basis of meeting the costs or expenses of the purpose. If, on the facts, the latter is the case, any property left when the purpose was accomplished will result either to the settlor or, in the case of a will, to the testator's residuary legatees, unless a specific gift over of the remainder is made.

7.41 In this case, Page-Wood VC decided that the brother was only entitled to such part of the fund as was
p. 169 necessary for his maintenance, attendance, and comfort. Nevertheless, it is clear that the brother, and others who benefit under like trusts when the costs or expenses that the trusts cover are met, are just as much human beneficiaries as persons who are recipients of absolute gifts. In particular, they are not to be regarded as beneficiaries of discretionary trusts, in which the trustees, at their discretion, may or may not spend the money on the particular purpose, ie to pay the particular expenses the testator indicated. The beneficiaries (or their guardians if they are minors or incapacitated) are fully entitled to demand the requisite payments to meet the costs or expenses specified by the trust.

7.42 A somewhat unusual case, also decided by Page-Wood VC, was *Re Skinner's Trusts* (1860). Here the Reverend Skinner left £1,000 in his will for the publication of his own work, 'intitled "An Analysis of Language, and Symbols of the Worship of the Sun" in two volumes', the profits and copyright of which were to be used to provide his grandson with funds for his education. The executors of the will set aside £1,000, and sought advice from an expert and the publisher, both of whom advised against its publication. The question was whether the grandson was entitled to the whole fund, the publication of the manuscript being only a suggested means by which he should benefit, or whether the publication of the manuscript was the essential means by which the grandson was to benefit. On the latter view, it was argued that the trust had failed

because the book was unpublishable; it would be equivalent to the case where Julia in the example at **7.36** would get nothing if Chelsea FC were to go bankrupt and cease to play. Page-Wood VC, while regarding the case on the borderline, preferred the former interpretation; thus the whole amount went to the grandson.

7.43 In *Conway v Buckingham* (1711) the life tenant was required to build a mansion house according to the testator's model; the trust was properly seen as a valid SBT, the effect of the testamentary instruction being to diminish the interest of the life tenant and benefit the remainderman by requiring the capitalisation of the income in a particular way. The dispute in the case between the life tenant and the remainderman was whether the amount spent by the life tenant was sufficient given the vagueness of the testator's 'design' or model, and the court held that it was.

7.44 In *Re Bowes* (1896) £5,000 was left upon trust for the purpose of planting trees on an estate. The evidence of foresters indicated that only a fraction of the land would benefit from the planting at a cost of only £800. North J decided that the paramount intention of the gift was to benefit the persons entitled to the estate, and so this intention should prevail over the specific means of planting trees where that means, if carried out, would be actually disadvantageous to the beneficiaries. Thus the owners of the estate were entitled to the £5,000 absolutely.

Appeal cases

7.45 The problem of inferring the settlor's intention has been particularly acute in 'appeal' cases, where an
p. 170 appeal has been made to raise funds to provide for individuals who have suffered some misfortune. It is obviously a vexed task to determine whether an amorphous group of often anonymous contributors had one intention or the other, and perhaps these cases should be regarded as in a class of their own. In *Re Abbott Fund Trusts* (1900), one Dr Abbott of Cambridge placed money on trust for the support of his family, including two daughters who were deaf and dumb, but the trustee turned out to be a rogue and the trust money disappeared. Several persons in turn sought subscriptions on behalf of the two daughters, which were held by trustees who made quarterly payments to the two women. On the death of the survivor of the two, some £366 remained.

7.46 The only evidence of the intention of the subscribers was the circular making the appeal for funds, which stated that the fund was to enable the women to reside in Cambridge and to provide for their 'very moderate wants', and, if the trustees so decided, to purchase annuities for them. Stirling J decided (at 330–331):

> *I cannot believe that [the fund] was ever intended to become the absolute property of the ladies so that they should be in the position to demand a transfer of it to themselves, or so that if they became bankrupt the trustee in bankruptcy should be able to claim it … I think that the trustee or trustees were intended to have a wide discretion as to whether any, and if any what, part of the fund should be applied for the benefit of the ladies and how the application should be made. That view would not deprive them of any right in the fund, because if the trustees had not done their duty—if they either failed to exercise their discretion or exercised it improperly—the ladies might successfully have applied to the Court to have the fund administered according to the terms of the circular. In the result, therefore, there must be a declaration that there is a resulting trust of the moneys remaining unapplied for the benefit of the subscribers to the Abbott fund.*

7.47 In *Re Andrew's Trust* (1905) money was raised by subscription for the children of the Bishop of Jerusalem. Again, the evidence as to the objects of the trust was slim, which was found in a letter by the now deceased canon who had initiated the appeal, who described the money as having been collected (at 49):

> *for and towards the education of Bishop Barclay's children … [and] that it was by no means intended for the exclusive use of any one of them in particular, nor for equal division, but as deemed as necessary to defray the expenses of all, and that solely in the matter of education.*

7.48 The children's education having been provided for under their father's will, the trustees sought a declaration enabling them to distribute the fund to the children. Kekewich J decided as follows (at 53):

> *Here the only specified object was the education of the children. But I deem myself entitled to construe 'education' in the broadest possible sense, and not to consider the purpose exhausted because the children have attained such ages that education in the vulgar sense is no longer necessary. Even if it be construed in the narrower sense it is, in Wood VC's language, merely the motive of the gift, and the intention must be taken to provide for the children in the manner (they all then being infants) most useful.*

p. 171 **7.49** After reviewing these two decisions in *Re Osoba* (1978), Megarry VC said (at 1103):

> *I think that you have to look at the persons intended to benefit, and be ready, if they still can benefit, to treat the stated method of benefit as merely indicating … the means of benefit which are to be in the forefront. In short, if a trust is constituted for the assistance of certain persons by certain stated means there is a sharp distinction between cases where the beneficiaries have died and cases where they are still living. If they are dead, the court is willing to hold that there is a resulting trust for the donors; for the major purpose of the trust, that of providing help and benefit for the beneficiaries, comes to an end when the beneficiaries are all dead and so are beyond earthly help, whether by the stated means or otherwise. But if the beneficiaries are still living, the major purpose of providing help and benefit for the beneficiaries can still be carried out even after the stated means have all been accomplished, and so the court will be ready to treat the standard means as being merely indicative and not restrictive.*

7.50 While there is obvious sense in this, Megarry VC appears to take a dangerously ex-post view of the interpretation of these gifts. Surely any interpretive strategy should be primarily devoted to figuring out the settlors' intentions from the outset, when the trustees who are to administer the trust receive the funds. It is then that they must be certain whether the trust is a gift of the whole with a mere motive or an SBT only of a part.

7.51 Secondly, do Megarry VC's words about the means in a gift of the whole, that they 'are intended to be in the forefront', mean that even where the gift is of the whole, the trustees must first apply the money according to the motive, to defray the expenses of maintenance or education or whatever, until such time as they are no longer incurred, as when the education of the beneficiary is complete? In other words, does the gift become an absolute one only upon the 'purposes' either being accomplished or no longer capable of fulfilment? (Cf *Re Bowes.*) If so, what happens if before the 'purpose' comes to an end, ie before the trustees distribute the property as an absolute gift, the beneficiaries all die? Whether the gift is a gift of the whole or only a part

surely cannot simply turn on the time of the beneficiaries' deaths, because that would engender a lottery whereby the remaining surplus of a large gift for the education of Albert would go into his estate if he were to die the day after graduation (the purpose being complete, the gift of the whole would now 'take'), but would go on resulting trust if he died the day before. Megarry VC's guidance on the construction of such gifts should, then, be treated with some care.

7.52 *Re Osoba* (1978, Ch D; 1979, CA) concerned a testamentary trust of residue for the maintenance of the testator's widow and his mother, and for 'the training of my daughter Abiola up to university grade'. There was no gift over which would take effect on the completion of the purposes. The testator's mother had predeceased him, and by the time the case came before the court the testator's widow was dead, and Abiola had finished her university education; the question was whether the surplus funds were to be held on a partial
p. 172 intestacy, all of the trust purposes for the residue now being fulfilled. Megarry VC said he would lean toward construing a gift of residue as an absolute gift, since otherwise any surplus would go on resulting trust to those who would take on intestacy, not an intention one would normally ascribe to a testator. Megarry VC construed the instructions as to how the money should be spent as a mere indication of motive, and decided that the wife and Abiola together became entitled to the whole fund absolutely on the testator's death.

7.53 These trusts raise the question: even in cases where the beneficiaries' interests are not limited by the purpose, should the trustees nevertheless take the settlor's purpose into account? Should they spend the money on the stated purpose first? Should, for example, the trustees have refused to give Abiola the whole trust fund until either she was educated up to university grade, or it became clear that carrying out the purpose was impossible (eg no university would admit her)? One might suggest that the courts should at least require the trustees to comply with the settlor's directions, not so as ultimately to limit the extent of the beneficial gift, but to give effect in so far as possible to the means by which the settlor chose to give it. Thus, it might be right to say that until the beneficiaries use their *Saunders v Vautier* rights to vary or collapse the trust, individual beneficiaries should be able to insist that the trustees comply with the settlor's declared means of distribution in so far as it is certain.

7.54 SBTs of the second kind, where a specific trust asset is to be applied in a particular way for the benefit of beneficiaries are, as you can imagine, very common in cases where the trustees hold title to residential properties which under the terms of the trust the beneficiaries are entitled to use as a residence. Returning to *Re Denley*, should we treat that case as an SBT of this second kind? As we have seen, it is difficult to follow Goff J's reasoning, but at one point he said (at 388B–C):

> *Any difficulty there might be in practice in the beneficial enjoyment of the land by those entitled to use it is, I think, really beside the point. The same kind of problem is equally capable of arising in the case of a trust to permit a number of persons—for example, all the unmarried children of a testator or settlor—to use or occupy a house or to have the use of certain chattels.*

This clearly suggests that he was thinking of an SBT of the second kind.

7.55 On this interpretation, the trustees held the land on the trust for the employees and any other individuals they appointed, to license their use of the land as a recreation ground, with a gift over to the hospital on condition subsequent, ie when fewer of than half the employees were paying subscriptions. On this interpretation, the employees were not merely 'factual beneficiaries' of a purpose trust, but genuine beneficiaries. Had they so decided (the decision would have had to be unanimous, which might be unlikely) they could, with the hospital, have exercised their *Saunders v Vautier* rights to direct the trustees to transfer the title to the land at their direction (subject to the unsettled question of whether objects of a mere power of appointment to a class of beneficiaries—the trustee had power to appoint non-employees to use the ground—can 'block' the operation of the principle (**4.69**).)

An enforcer principle?

7.56 Should the law, or on an unconventional view of the case law, does the law, allow private purpose trusts? Hayton (2001a) argues that the cases should be read to reveal not a beneficiary principle, but rather an enforcer principle. An enforcer principle would allow a settlor to create a private purpose trust so long as the trust revealed a person or class of persons who could enforce the trust against the trustee, such as the employees who factually benefited from the trust in *Re Denley* on a purpose trust interpretation of that case, or if the settlor named a particular individual as one who should have standing to enforce the trust.

7.57 While perhaps attractive in theory, there are several difficulties with this view. Remember that trusts are private, and that the only rights under the trust are those that are given to specific individuals or classes of individuals by the settlor. While the settlor can carve up the beneficial interest in the trust property in any way he likes, does he effectively create a purpose trust by giving the trustee a duty to apply the money to a purpose, and the 'enforcer' a power to enforce that duty? It is difficult to see how. Why cannot the trustee and enforcer agree to split the money between themselves? After all, no one else, no third party or the court, has any independent right to enforce any duties against the trustee (there is no equivalent of the Attorney-General who enforces charitable purpose trusts), and so no one can insist that the enforcer exercise his power to make the trustee apply the money to the purpose. The extent of the trustee's duty is the extent to which that duty will be enforced against him by the enforcer, and if the enforcer has no interest in seeing the purpose carried out, he is perfectly entitled at law to cut a deal with the trustee to split the money between themselves, in the same way that beneficiaries could consent to a distribution of trust funds that would otherwise be a breach of trust (**3.64**) because trusts are purely private arrangements in which there is no public interest, and these *private* purpose trusts, by definition, generate no public interest, not being charitable.

7.58 The upshot is that the beneficial interest in the trust property does not 'go to the purpose'. It is distributed between the person who has the duty to spend the money on the purpose, usually, one imagines, the trustee, and any person, the 'enforcer', who has the corresponding power to enforce the duty against him. It would not help, of course, to impose a duty upon the enforcer to enforce the purpose trust against the trustee, because one would then just need a third party to enforce that duty against the enforcer, and then another to enforce his duty, ad infinitum. The result is that the 'purpose trust with enforcer' mechanism

Hayton describes, while perhaps within the law, does not deliver a true purpose trust, but rather enables the settlor to give his trustee a power to apply property to purposes and a power to another to make him exercise that power.

7.59 In the last three paragraphs, we treated the enforcer as a holder of a personal power under traditional trust rules, and concluded that he can choose to enforce the purpose or not, to release the power if he so
p. 174 chooses, or even to cut a deal with the trustee to divide up the trust property. According to that analysis, then, the enforcer has the right he has because he has an indirect interest in the trust property itself. But Matthews (2002) considers the nature of the enforcer's rights if we take this sort of arrangement as advertised, and we really accept that the enforcer has no interest, direct or indirect in the trust property, and has only a power to enforce the obligation the trustee undertakes to carry out the purpose. As Matthews persuasively contends, such a right–duty relationship between the enforcer and trustee can, on the principles of English law, be only personal between them, ie it must be seen as a contractual not a trust relationship. Why? The point is that while a settlor can, by creating a trust, give beneficial interests in the property that 'run' with the trust property, and hence would bind successor trustees, or (non-bona fide purchaser) third parties who receive the property in breach of trust, a settlor has no power to bind property merely with personal rights that do not give an interest in the property itself.

7.60 Compare the case of land. I can create an easement such as a right of way over my property, Blackacre, to you as owner of Whiteacre, and that easement will 'run' with the land, ie attach to the land. If I sell Blackacre, the new owner will be bound by the easement, and if you sell Whiteacre, its new owner will be able to use the right of way. But while I can contract with you to wash my windows each month for £50, there is no way I can make that relationship 'run' with the land so that my purchaser will be bound to pay your purchaser to wash his windows, because the rights under that contract do not 'run' with the land, but are merely personal between us; while 'negative' or 'restrictive' obligations or covenants (eg a covenant not to use a premises for commercial purposes) can run with the land in equity, positive obligations cannot (*Rhone v Stephens* (1994)). And Matthews says the same thing about the positive obligation of the trustee to the enforcer. While the initial trust 'agreement' between settlor, trustee, and enforcer can create personal rights and duties as a matter of contract, because the enforcer, unlike an object of a trust or power, has no interest in the trust property, his rights do not 'run' with the trust property. So at most he could require the original trustee to carry out the purpose by bringing an action for breach of contract if he did not, but his enforcement rights could not bind successor trustees, much less third-party recipients of the trust property transferred in breach of trust. If this is right, and the logic seems impeccable, then again we find that there is no basis in English law for a true private purpose trust. It is also worth pointing out that if the enforcer mechanism does work as advertised so that positive obligations can be imposed upon property, then simply by using the device of the enforcer private purpose trusts can be employed to make positive obligations run with land, and centuries of case law could be overturned in a trice. This also strongly suggests that Matthews' criticisms should be given a good deal of weight.

7.61 True private purpose trusts can only be created if the law is changed so as to give some public force to the purpose trust, so that the trust property is governed not merely by the private rights of individuals (in which case, it is no longer clear that they can be called 'private' purpose trusts). Certain 'offshore' jurisdictions, to
p. 175 attract trust business, have also, by legislation, created true non-charitable purpose trusts, under which the

court has the power to enforce any purpose trust at the application of any interested party ((Bermuda) Trusts (Special Provisions Act) 1989, as amended 1998), or which employ criminal sanctions to ensure that the enforcer enforces the trust ((Cayman Islands) Trust Law 2001, incorporating (Cayman Islands) Special Trusts (Alternative Regime) Law 1997).

Further reading

Gravells (1977)

Matthews (2002)

Morris (2020)

Penner (2000, 2014b)

Must-read cases: *Re Astor's Settlement Trusts* (1952); *Re Denley* (1968); *Re Grant's Will Trusts* (1979); *Re Lipinski's Will Trusts* (1977); *Re Sanderson's Trust* (1857); *Re Osoba* (1977).

Self-test questions

1. Explain the rationale of the beneficiary principle.
2. Is an anomalous, valid, purpose trust, for example, for the care of the deceased's pet, really a trust or should it be regarded as a power to apply money to the pet's benefit?
3. Should the 'beneficiary principle' be reformulated along the lines of an 'enforcer' principle?
4. What are the defining features setting apart specified benefit trusts from private purpose trusts?
5. What should the approach of the courts be when there is a surplus of funds in 'appeal' cases?

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