Trusts and purposes – settlors assigning purposes to beneficiary trusts

Article

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Introduction

This article explores the law governing express trusts for beneficiaries *where the settlor stipulates a particular purpose for the trust*.[1] A good example is the leading case of *Re Osoba*[2] – considered in detail below – where the settlor's will declared a trust to pay for the education of his daughter. This trust had a beneficiary: the daughter.[3] But it also had a stipulated purpose: paying for her education. The focus here will be on the interpretation and classification of such trusts.

There is evidently a wide divergence of views about these trusts. So it is perhaps helpful to give an indication at the outset of this article's direction of travel. The position taken here will be that: (1) in general, provided it is possible to pursue the settlor's stipulated purpose, the stipulation is binding; the beneficiary can only be benefited in the manner directed – in our example by payment for her education.[4] But, nevertheless: (2) although the purpose is binding, these should be classified as beneficiary trusts.

The consideration of classification will yield a proposed general definition of what is meant in the law by a 'beneficiary trust' and a 'purpose trust'.

Prefatory points

Before turning to an examination of how the law interprets declarations of trusts for beneficiaries where the settlor stipulates a particular purpose for the trust, some significant background law should be briefly mentioned.

Frustration of a settlor's stipulated purpose within a beneficiary trust: the rule in Saunders v Vautier – as extended by the Variation of Trusts Act 1958

First, a specific rule that beneficiaries are able to use to *override* a settlor's stipulated purposes: the rule in *Saunders v Vautier*.[5] That case held that where a beneficiary is *sui juris* – adult and of sound mind – and is entitled to the whole beneficial interest, they can terminate a trust and take the property out, even though this violates the terms of the trust. A trust said the beneficiary should receive property at 25; he was held able to take it out as soon as he was adult. It follows that several beneficiaries can do this: if they are all *sui juris*, between them entitled to the whole beneficial interest, and unanimously agreed. And it follows that beneficiaries can use this power to simply vary the terms of a trust, rather than terminating it.[6] Beneficiaries can equally

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[1] The fullest textbook treatment of the topic is JE Penner, *The Law of Trusts* (12th edn, OUP 2022), paras 7.33-7.53.

[2] [1979] 1 WLR 247 (CA).

[3] Some would object definitionally to use of the word 'beneficiary' here: we shall examine their objection in due course.

[4] Although those familiar with the judgments in *Re Osoba*, above n 2, may be thinking at this stage – with some justification – 'That does not sound like what the court said in that particular case?'

[5] (1841) 4 Beav 115, 49 ER 282.

[6] The existence of a power to vary trusts is sometimes questioned, because of its potential to foist on trustees a different trust from the one they agreed to: but see Joel Nitikman, 'Variation Under the Rule in *Saunders v Vautier*: Yes or No?' (2015) 21 T&T 923.

exercise the power over some severable *part* of a trust's assets, if they hold the whole beneficial interest in that part – provided this will not unduly prejudice the remainder of the trust.[7]

The point is more subtle and less obvious than in other cases discussed here, nevertheless we could analyse *Saunders v Vautier* as a beneficiary trust with a purpose stipulated by the settlor: the purpose of holding the trust property as an enforced-savings investment fund until the beneficiary was 25. But the beneficiary of such a trust, using their *Saunders v Vautier* power, is able to defeat the settlor's purpose and take the trust property freed from it – provided they are *sui juris* and entitled to the whole beneficial interest.[8]

Basically, the philosophy of the rule is that a settlor cannot give a gift to a *sui juris* beneficiary and say, 'You shall enjoy your gift as I dictate, not as you prefer'.[9]

The rule was extended by the Variation of Trusts Act 1958, which enables the court to approve an exercise of the power on behalf of those not able to exercise it themselves, because not *sui juris* – for example, children – or not ascertained.

A settlor cannot exclude the *Saunders v Vautier* power by declaring the beneficiary shall *not* be free to take the trust property in disregard of the settlor's stipulated purpose: *Stokes v Cheek*.[10] But a well-advised settlor can act indirectly to prevent the power arising, by limiting the beneficiary's entitlement under the trust.

Property holding within non-charitable unincorporated associations

Secondly, it is necessary to be clear about how property is generally held and received within non-charitable unincorporated associations – clubs, societies, etc – as this will be the context of some cases discussed. *Re Recher's Will Trusts*[11] and *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No 2)*[12] show that property-holding officers of a non-charitable unincorporated association generally hold and receive its property on trust for its current members, as beneficiaries, whether the association exists to benefit its members or for other reasons; and the members' equitable interests are subject to a contract between the

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[7] See in particular *Re Marshall* [1914] 1 Ch 192 (CA); *Re Sandeman's Will Trusts* [1937] 1 All ER 368 (Ch); *Lloyds Bank plc v Duker* [1987] 1 WLR 1324 (Ch).

[8] This purpose, an investment, was of course different in kind from the purpose in this article's opening example – 'to pay for the education of my daughter' – where the settlor's purpose governed expenditure of the trust fund; although, note, a failing stipulated investment could consume much, or all, of a fund. But this article is not concerned solely with settlors' stipulations for purposes *in the sense of purposes for expending the trust fund*. For example, case law will be examined here where the settlor's stipulated purpose for a trust was granting a licence to use land to beneficiaries – which might be executed by simply *holding* trust land (as well as by, alternatively, spending a trust fund on leasing land).

[9] Paul Matthews, 'The Comparative Importance of the Rule in *Saunders v. Vautier*' (2006) 122 LQR 266, 273-75 (notes omitted) says: '[The rule] illustrates and exemplifies the idea of beneficial (or "equitable") ownership or property … the idea of *exclusive decision-making.* If I give something to you, then the "property" idea should mean that it is yours to deal with as you please. "Property" means – indeed, etymologically, has to mean – that *you* decide. I should not be able, consistently with the idea of property, to make something your "property", and then *tell you how to deal with it* … Whatever the subject-matter of the trust, it no longer belongs to the settlor or (obviously) the testator, and the decision whether to enjoy it or destroy it is no longer one for him. Instead it is ultimately a decision for those who benefit from the trust.' The analysis of the case law here suggests this requires some qualification. While those exercising the power must be entitled under the trust to the whole beneficial interest in the trust assets, this need not be a *proprietary* beneficial interest: that is, beneficiaries exercising the power need not be entitled by the trust terms *to* the trust assets; it is sufficient that they are entitled to have the whole of them expended for their benefit by the trustees on a purpose stipulated by the settlor – a right that does not constitute a property interest. In particular, see the analysis of *Re Bowes* [1896] 1 Ch 507 (Ch), below n 27, where the judge allowed exercise of the power despite assuming the beneficiaries only had under the trust a beneficial entitlement of the latter kind.

[10] (1860) 28 Beav 620, 54 ER 504. The facts and decision are explained below.

[11] [1972] Ch 526 (Ch).

[12] [1979] 1 WLR 936 (Ch).

members formed by the association's rules, governing how the property is to be used.[13] So it is a beneficiary trust.[14]

Interpreting a settlor's stipulation of a purpose for a beneficiary trust

The courts have reached various interpretations in cases where settlors have stipulated a purpose for a beneficiary trust: seeking to infer what the settlor intended. It is perhaps helpful to examine these interpretations in an ascending order, according to the degree of significance the settlor's stipulated purpose is found to have for delimiting the scope of the trust.

(1) A possible interpretation: the settlor's purpose as only a non-binding indication of wishes

One possible interpretation of a settlor's stipulation of a purpose for a beneficiary trust is to view the purpose as merely a non-binding indication of the settlor's wishes. An extreme example is *Re Lipinski's Will Trusts*,[15] where a testator left property to the Hull Judeans (Maccabi) Association, a small non-charitable unincorporated association operating a Jewish youth club, 'to be used solely in the work of constructing the new buildings for the association and/or improvements to the said buildings'. Oliver J held the donor's specific direction for the use of the gift to be only a non-binding indication of the donor's wishes: the association was entirely free to use it as they wished.[16] This looks difficult to justify on the wording of the will – which said the gift was given 'solely' for the stated purpose. However, it may be a sensible, practical decision. There was no stipulation that any buildings be retained.[17] So, had this been found instead a *binding* stipulation of a trust purpose, for buildings only,[18] but the association did not wish to use the money for buildings, it was open to them to nevertheless spend the money on buildings and then resell them quickly, leaving the association free to do whatever it wished with the proceeds; but having wastefully incurred transaction costs. And there would have been difficulty avoiding these transaction costs by exercising the power in *Saunders v Vautier* to override the stipulated purpose: quite apart from the problem within any association of obtaining the unanimous agreement of all of the member beneficiaries, this was a youth club so the beneficiaries would not all have been adult as required for use of the power, without resort to the Variation of Trusts Act 1958.

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[13] There are exceptions, where statutory regulation or some different declaration of trust supervenes. And in rare cases, assets are not held by trustees but are instead owned directly by the members of the association, subject to the contract between them formed by the rules of the association: *Artistic Upholstery Ltd v Art Forma (Furniture) Ltd* [1999] 4 All ER 277 (Ch).

[14] The view that the property-holding officers of such associations might hold their assets on a type of valid non-charitable purpose trust was firmly rejected in *Leahy v A-G for New South Wales* [1959] AC 457 (PC).

[15] [1976] Ch 235 (Ch). Similarly, *Re Turkington* [1937] 4 All ER 501 (Ch), where Luxmoore J said (504): 'The whole question is whether this is a trust or whether it is simply an indication by the testator of the purposes for which he would like the money to be expended, without imposing any trust on the beneficiary'.

[16] [1976] Ch 235 (Ch), 243-50.

[17] Unless inferred: Oliver J explicitly found any such inference unwarranted [1976] Ch 235 (Ch), 244-46. (A direction for retention would have posed a problem under the rule against perpetual trusts.)

[18] This would *not* convert the trust into an invalid non-charitable purpose trust, although this is widely believed: it would remain a valid beneficiary trust, with the beneficiaries to be benefited in a particular manner stipulated by the settlor – see below the discussion of *Re Price* [1943] Ch 422 (Ch).

(2) The *presumed* interpretation where the whole of a trust fund is settled towards the purpose: the settlor's purpose as merely the 'motive' for a gift of the entire trust property

The leading case of *Re Osoba*[19] lays down the *presumed* interpretation of a settlor's stipulation of a purpose for a beneficiary trust, *where the whole of a trust fund is settled towards the purpose*. The Court of Appeal laid down that it is presumed, in the absence of contrary indication, that the settlor's stipulated purpose is merely the 'motive' for gifting the whole trust property to the beneficiary. In particular, if the stipulated purpose proves impossible, the beneficiary is entitled to the trust property anyway.[20] In *Re Osoba*, a testator made a will when his daughter was five years old, leaving the residue of his estate on trust 'for [my wife's] maintenance and for the training of my daughter … up to university grade and for the maintenance of my aged mother …' After his death, this was held a trust for the wife, daughter, and mother absolutely as joint tenants. Mention of their maintenance or education was held to be merely an expression of 'motives' for a gift of all of the trust property, not a limitation on the benefits they could receive: the property was wholly theirs. Both the wife and the mother being dead, and assuming there had been no severance of the joint tenancy, all the trust property went to the daughter, despite the fact that her university education had been completed several years earlier. After reviewing earlier cases, Buckley LJ made the clearest statement of principle:[21]

> 'If a testator has given the whole of a fund, whether of capital or income, to a beneficiary, whether directly or through the medium of a trustee, he is regarded, in the absence of any contra indication, as having manifested an intention to benefit that person to the full extent of the subject matter, notwithstanding that he may have expressly stated that the gift is made for a particular purpose, which may prove to be impossible of performance or which may not exhaust the subject matter. This is because the testator has given the whole fund; he has not given so much of the fund as will suffice or be required to achieve the purpose, nor so much of the fund as a trustee or anyone else should determine, but the whole fund. This must be reconciled with the testator's having specified the purpose for which the gift is made. This reconciliation is achieved by treating the reference to the purpose as merely a statement of the testator's motive in making the gift. Any other interpretation of the gift would frustrate the testator's expressed intention that the whole subject matter shall be applied for the benefit of the beneficiary. These considerations have, I think, added force where the subject matter is the testator's residue, so that any failure of the gift would result in intestacy. The specified purpose is regarded as of less significance than the dispositive act of the testator, which sets the measure of the extent to which the testator intends to benefit the beneficiary.'

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[19] [1979] 1 WLR 247 (CA). Also, *Barlow v Grant* (1684) 1 Vern 255, 23 ER 451; *Barton v Cooke* (1800) 5 Ves Jun 461, 31 ER 682; *Webb v Kelly* (1839) 9 Sim 469, 59 ER 439; *Lewes v Lewes* (1848) 16 Sim 266, 60 ER 876; *Presant v Goodwin* (1860) 1 Sw & Tr 544, 164 ER 852; *Re Andrew's Trust* [1905] 2 Ch 48 (Ch). *Re Osoba* was seemingly followed in a case not fully reported: *Davies v Hardwick* [1999] CLY 4954 (Ch).

[20] In a number of the cases cited in the previous note, the impossibility of pursuing the settlor's stipulated purpose arose because the beneficiary died: the beneficiary's estate was held entitled to the property.

[21] [1979] 1 WLR 247 (CA), 257.

Settlor's 'motive' or binding stipulation while the settlor's intended purpose is possible?

The characterisation in *Re Osoba*, above, of the settlor's stipulation regarding how the trust fund was to be used to benefit the daughter, as being merely the settlor's 'motive' for a gift of all the property, looks like understatement. The word 'motive' emerged from case law discussing the situation where the settlor's stipulation regarding how the trust fund was to be used was no longer possible. But the legal status of the stipulation as to the purpose for which the trust fund was to be used seems greater than mere 'motive'. Presumably, the stipulation, *if still possible to carry out*, was a binding one that the trustee had to observe: it was an express term of the trust. So had the daughter's education not been completed in *Re Osoba*, it would presumably have been the trustee's duty to use the fund only for that purpose – until the stipulated purpose was no longer possible, at which point it would have become available as an unrestricted gift, due the inferred intention of the settlor. The daughter could, of course, have used her power under the rule in *Saunders v Vautier* to override that binding term of the trust while the purpose was still possible – but only if *sui juris*, or with the court's approval under the Variation of Trusts Act 1958.

This appears to be the view of Penner, in the most searching textbook analysis of such trusts:[22]

> '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 daughter in *Re Osoba*] the whole trust fund until she was either educated up to university grade, or it became clear that carrying out the purpose was impossible (eg no university would admit her)?[23] 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.'

And this view of the matter appears to be supported by a reading of *Re Skinner's Trusts*.[24] A testator left manuscripts he had written to trustees 'for my grandson, that they may provide for the said books being published to the best advantage for the interests of the said child, so as to contribute towards raising a fund to assist him when he goes to [college]'. And he left the trustees £1,000 towards the printing. There were doubts whether the book would prove profitable if published. The grandson, now adult, exercised his power under *Saunders v Vautier* to take the £1,000 rather than have it applied towards publication. Page Wood V-C said this was a case where the beneficiary would have been entitled to the £1,000 had the settlor's stipulated purpose of publishing the book been impossible (giving the example of the manuscripts having been destroyed).[25] But he indicated that, given the purpose was possible, the beneficiary had to exercise his *Saunders v Vautier* power in order to be able to take the trust

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[22] JE Penner, *The Law of Trusts* (12th edn, OUP 2022), para 7.53.

[23] Penner interjects in a similar passage elsewhere, 'Perhaps surprisingly, there is no authoritative answer to this question in common law trusts doctrine': JE Penner, 'Purposes and Rights in the Common Law of Trusts' (2014) 48 RJTUM 579, 594.

[24] (1860) 1 John & H 102, 70 ER 679. *Re Bowes* [1896] 1 Ch 507 (Ch) may be another example: but it is not wholly clear that was a case involving a trust within this category at all, for reasons explained below.

[25] (1860) 1 John & H 102, 70 ER 679, 107-8.

property in disregard of the stipulated purpose – with the clear implication being that the purpose was otherwise binding. The judge said:[26]

> 'There is no doubt that, if the main object of a gift is to benefit the person who is to take, and no other person is interested in the bequest—in such a case, if the gift cannot be applied to the purpose specified, or if the legatee prefers to have it otherwise applied, he has the option of saying that, although the testator has expressed his desire that the benefit shall be conferred in a particular form, he does not like to take it in that manner, and may ask the Court to give him the property absolutely.'

If the analysis here is correct, we can conclude that the *presumed* interpretation of a settlor's stipulation of a purpose for a beneficiary trust, where the whole of a trust fund is settled towards that purpose, is that the trust requires the stipulated purpose to be pursued by the trustees insofar as possible as the sole manner of benefiting the beneficiary, but the trust secondarily means that, insofar as that is not possible, the beneficiary is entitled to the trust property anyway. Although, of course, even while the settlor's stipulated purpose is still possible and binding, the beneficiary can use their *Saunders v Vautier* power to override it and take the trust property in disregard of it. However, if this analysis is *not* correct, then the presumed interpretation of a settlor's stipulation laid down in *Re Osoba* – our category (2) – seems to merge into our category (1): that is, 'motive' appears simply to mean the same as 'non-binding indication of wishes'.

It might be argued that, to the contrary, the law should not see the settlor's stipulation as binding while possible: for the sake of flexibility – given the beneficiary is ultimately entitled to all of the trust property anyway. For example, while the settlor's stipulation may be for spending on the beneficiary's education, the beneficiary might have more pressing needs – such as costs of medical treatment for a debilitating, life-threatening illness. Seeing such a trust fund as unrestricted, and available for any use throughout, might be tempting in light of such possibilities. But it should be borne in mind that even if the settlor's stipulation of a purpose is seen as binding, the fund could still be diverted to other uses in a suitable case, using the *Saunders v Vautier* power as extended by the Variation of Trusts Act 1958 to override the settlor's stipulation. And, of course, modern well-drafted trusts will include express powers providing flexibility within the trust. Respecting a settlor's declared terms is the usual starting point of the law: and it is suggested that approach applies here.

(3) The *basic alternative* interpretation: the beneficiary is only entitled provision for the settlor's stipulated purpose

The basic alternative to the *presumed* interpretation of the settlor's intention outlined above is that, where a settlor has declared a trust for a beneficiary, to be benefited by a purpose stipulated by the settlor, the settlor instead intended that the beneficiary should *only* be entitled to provision for the stipulated purpose from the trust – nothing more – and that is then the limited effect of the trust. Which means, in particular, that if the stipulated purpose proves impossible, this time the trust property does *not* go to the beneficiary regardless: instead, as a trust *solely* to make provision for an impossible purpose, the trust has failed and there will be a resulting trust for the settlor or the settlor's estate. Therefore, there is only a valid subsisting trust *provided* the settlor's stipulated purpose is possible; and only then can the beneficiary exercise their *Saunders v Vautier* power to override the settlor's stipulated purpose and take the trust property free of it. Two scenarios can be identified here: (a) where *the whole of a trust fund* is settled towards the stipulated purpose, *but the presumption that the settlor intended the*

[26] (1860) 1 John & H 102, 70 ER 679, 105.

beneficiary to be ultimately entitled to all of the property is rebutted; and (b) where instead all that is settled for the stipulated purpose is *what proves to be the part of a trust fund required for that purpose*, in which case *the presumption relating to settling the whole of a trust fund does not apply to begin with*.

3(a) Settlor gives the whole of a trust fund for the stipulated purpose

Re Bowes[27] explains the law where a settlor puts the whole of a fund on trust for a beneficiary, to be benefited by a purpose stipulated by the settlor, and the correct interpretation is – in rebuttal of the usual presumption – that the settlor intends the beneficiary *only* to be entitled to use of the property for the settlor's stipulated purpose, and nothing more.[28] In *Re Bowes*, a testator left £5,000 'upon trust to expend the same in planting trees for shelter on the Wemmergill estate'. There was expert evidence that only a fraction of such expenditure would be beneficial to the estate; and the owners of the estate, as beneficiaries of the trust, did not wish even for that, preferring to take the money instead, if possible; although they said they would not refuse the trees if it came to it. The settlor's stipulated purpose was therefore possible. North J said that if the settlor's stipulated purpose had been impossible – in particular, if the estate owner beneficiaries had flatly refused consent to planting – the trust would have failed.[29] But given the settlor's stipulated purpose was possible, and there was therefore a valid subsisting trust, the beneficiaries could exercise their *Saunders v Vautier* power to override the stipulated purpose and take the £5,000.[30]

3(b) Settlor gives only the requisite part of a trust fund for the stipulated purpose

Re Sanderson's Trust[31] is the leading authority on the second type of situation: where a settlor declares a trust for a beneficiary, to be benefited by a purpose stipulated by the settlor, and the settlor gives for the purpose only the *part* of the trust fund that proves to be required for the settlor's stipulated purpose; leading to the inference that the settlor intended the beneficiary to be entitled *only* to use of that part of the property, for the purpose, and nothing more.[32] A testator left property on trust, during the life of his mentally disabled brother, to apply the whole

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[27] [1896] 1 Ch 507 (Ch).

[28] Although the case explains how the law applies in such a situation, it is not clear whether or not the judge considered that the case itself *did* involve such a situation – for reasons explained in the following note. (A similar case where the court plainly *did* believe a beneficiary was only entitled to provision for a settlor's stipulated purpose, and no more, was *Re Aberconway's Settlement Trusts* [1953] Ch 647 (CA) – assuming the landholder in that case was indeed beneficiary of the trust; but this is very questionable, with the basic nature of the trust there highly debatable. There the whole of an income, for a limited period, was settled on trust for the maintenance of a horticultural garden on the 'beneficiary's' land, subject to provisos that the 'beneficiary' both consented to the maintenance and allowed visitors to the garden if required by the trustees. The court made clear (esp Lord Evershed MR's leading judgment, 662) that had some impossibility supervened in maintaining the garden the 'beneficiary' would not have been entitled to the income regardless.)

[29] He said [1896] 1 Ch 507 (Ch), 510 (emphasis added): 'If [the life tenant simply refused permission to plant], *and he did not contend for anything more than that*, the legacy would fail…'. The highlighted qualifying words mean we do not know whether the court viewed this case as being within our category (2) – beneficiary entitled to all the trust property, even if the settlor's stipulated purpose is impossible – or category (3) – beneficiary only entitled to provision for the settlor's stipulated purpose, which must therefore be possible for there to be a valid subsisting trust. The main text, of course, describes the position as the court indicated it would be assuming the case was within category (3). But the judge left open category (2) in the highlighted wording, implying that it was arguable on behalf of the estate owners as beneficiaries that they were entitled to the trust property even if the settlor's stipulated purpose was impossible: on the ground that the settlor's intention was – in line with the usual presumption where the whole of a fund is settled towards the purpose – that they should be entitled to it in this eventuality. Ultimately, because the settlor's stipulated purpose *was* possible, it was unnecessary to decide what the settlor's intention was regarding impossibility.

[30] [1896] 1 Ch 507 (Ch), 510-11.

[31] (1857) 3 K&J 497, 69 ER 1206.

[32] *Cope v Wilmot* (1772) Amb 704, 27 ER 457 – as explained in *Re Sanderson* (1857) 3 K&J 497, 69 ER 1206, 505-7– was a case where an expansive view was taken of the purpose and therefore what was needed.

or any part of the income for his maintenance, attendance and comfort. At the disabled brother's death, it was held there was a resulting trust of the lifetime income not used for his maintenance, for the testator's estate; it did not belong to the disabled brother's estate. The disabled brother had a right only to expenditure on suitable maintenance; not to all the income. In other words, the settlor's stipulated purpose operates as a limitation on the beneficial entitlement: to the amount of the trust property needed for the settlor's stipulated purpose. Page Wood V-C said:[33]

> 'I do not think [the trust] confers on him an absolute right to have the whole income applied, except in the event of a case being made, that the whole was wanted for the specific purposes directed by the will. It is not the whole income that is given. It is "the whole or any part;" … I do not think, therefore, that the present case is within the class of cases where an entire fund is given, and a purpose is assigned as the motive of the gift …'

If the beneficiary's own money is spent on the settlor's stipulated purpose, the amount can be recovered from the trust by the beneficiary (or their estate, if dead): that is, the beneficiary is equitable owner of that amount. In *Re Sanderson*, the judge added that the disabled brother's personal representatives could, on behalf of his estate, recover from the trust any expenditure made on his maintenance from his own property:[34]

> 'I inquired … whether the brother had been maintained in any way out of his own property, and for this reason. I think he had a clear right to have this fund applied for all purposes requisite for his maintenance, attendance and comfort. If, therefore, he had been left to his own funds for his maintenance, attendance and comfort, I apprehend there would have been a clear right on the part of his personal representatives to have that fund recouped. Part of the personal estate of the intestate, whom they represent, having been applied for his maintenance, attendance and comfort, when another fund ought properly to have been applied for that purpose, they would have had a right to say, recoup the fund that has been so improperly applied out of the fund which was given for that specific purpose. However, I am told that this was not the case.'

Of course, it follows from this approach that there is, again in this situation, only a valid subsisting trust if the settlor's stipulated purpose is possible; otherwise the trust must fail and there would be a resulting trust for the settlor or the settlor's estate. So only if the settlor's stipulated purpose is possible, so that there is a valid subsisting trust, can the beneficiary then use their *Saunders v Vautier* power to take the amount demonstrably needed for the settlor's stipulated purpose, in disregard of the purpose. An extreme example of use of the power is *Stokes v Cheek*.[35] A testatrix directed trustees to use money to buy annuities for beneficiaries; specifically adding the beneficiaries were not to be allowed to take out the money instead of receiving the annuities. Sir John Romilly MR nevertheless held the beneficiaries could take out the money:[36] 'The annuitants are entitled to such a sum as would be required to purchase their annuities'.

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[33] (1857) 3 K&J 497, 69 ER 1206, 507-8.
[34] (1857) 3 K&J 497, 69 ER 1206, 508.
[35] (1860) 28 Beav 620, 54 ER 504.
[36] (1860) 28 Beav 620, 54 ER 504, 621. He observed that it would be pointless to insist on the purchase of annuities to be given to the beneficiaries, who would then be able to sell them for cash.

The particular context of gifts to non-charitable unincorporated associations

Although it is now tolerably well understood that a gift to a non-charitable unincorporated association is generally received by its property-holding officers on trust for the members, as beneficiaries, subject to the contract formed by the association's rules, there does still seem to be a general tendency to believe that if a donor to such an association stipulates a particular, binding use for their donation, this means a purpose trust has now been declared – for the stipulated purpose – liable to be a non-charitable purpose trust invalidated by the beneficiary principle.[37] But, given that outright, unqualified donations to non-charitable unincorporated associations create beneficiary trusts, then just as with any other beneficiary trust, the addition by the settlor of a stipulation for use for a particular purpose – *provided that purpose benefits the association membership, the trust beneficiaries* – should simply create a valid *beneficiary trust for an assigned purpose*, of the sort we are considering here.[38] Authority apparently supporting this analysis is *Re Price*.[39] A testatrix left property to the Anthroposophical Society in Great Britain 'to be used at the discretion of the chairman and executive council of the society for carrying on the teachings of the founder, Dr. Rudolf Steiner'. Cohen J held this was a valid gift: he said the association was bound by the restriction on how the property could be expended – it could not be used for any wider activities of the association – and apparently treated it as a beneficiary trust for the association membership.[40] (However, the authority of *Re Price* has been questioned: Oliver J suggested it appeared to involve a purpose trust with no ascertainable beneficiaries – presumably believing the trust's benefits went to the public rather than the association members – in *Re Lipinski*.[41] If this criticism is correct, the underlying approach to the law in *Re Price* nevertheless remains sound: it is simply the application to the facts that is questionable.)

Limitation of a beneficiary's entitlement to the amount needed for pursuit of a purposes may be inferred from the circumstances

Although the focus here is on *express* stipulations by settlors of a purpose to a beneficiary trust, it should be noted that a limitation within a beneficiary trust, restricting the beneficiary's entitlement to use of the trust property only to the amount needed for a particular purpose, may equally be an *inference* of the settlor's intention, from admissible evidence of the circumstances in which a trust was created. In *Re The Abbott Fund*,[42] a trust fund was raised from subscribers to maintain two impoverished deaf and dumb women. Stirling J began his judgment by saying:[43] 'The difficulty in this case arises from the fact that there is no declaration of trust.' He inferred that the subscribers only intended the women to be entitled to expenditure from the fund on their maintenance: the fund was not absolutely theirs, forming part of their estates at

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[37] For example, a clear statement of this general view is Charlie Webb and Tim Akkouh, *Trusts Law* (5th edn, Palgrave 2017), para 4.11.

[38] If the stipulation is interpreted as a binding restriction to use for the purpose, such a donation should be kept separate from the general funds of the association, because while these are on a beneficiary trust permitting use for any of the association's purposes, this particular donation will be on a more limited beneficiary trust, only to be used for the settlor's stipulated purpose – subject, of course, to exercise of the *Saunders v Vautier* power.

[39] [1943] Ch 422 (Ch).

[40] [1943] Ch 422 (Ch), 427-8.

[41] [1976] Ch 235 (Ch), 245-47; see also *Re Astor* [1952] Ch 534 (Ch), 546; and *Re Grant* [1980] 1 WLR 360 (Ch), 369. However, Geraint Thomas and Alastair Hudson, *The Law of Trusts* (2nd edn, OUP 2010), para 6.18, views *Re Price* as indeed being a beneficiary trust; cf doubts expressed in Lynton Tucker, Nicholas le Poidevin, and James Brightwell (eds), *Lewin on Trusts* (20th edn, Sweet & Maxwell 2020), para 5.066. For a fuller consideration of this difficult case, and the issues involved, see David Wilde, '*Re Denley*: Re-evaluating its Significance for Non-Charitable Purpose Trusts' (2023) 139 LQR forthcoming.

[42] [1900] 2 Ch 326 (Ch).

[43] [1900] 2 Ch 326 (Ch), 330.

their deaths; when they died what remained went back on resulting trust to the subscribers. The judge said:[44]

> 'The ladies are both dead, and the question is whether, so far as this fund has not been applied for their benefit, there is a resulting trust of it for the subscribers. I cannot believe that it was ever intended to become the absolute property of the ladies so that they should be in a position to demand a transfer of it to themselves, or so that if they became bankrupt the trustee in the bankruptcy should be able to claim it. I believe it was intended that it should be administered by … the trustee or trustees [who] 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.'

(4) Another possible interpretation: the settlor's purpose as simply a precondition to validity of the trust

A further interpretation of a settlor's stipulation of a purpose for a beneficiary trust appears to have been recognised by the courts. *Re Ames' Settlement*,[45] as explained in later cases, seems to show that if a settlor's declaration of a beneficiary trust states a particular fundamental purpose behind it, the viability of that purpose can be understood to be a precondition to the validity of the trust (and nothing further): if the settlor's purpose fails from the outset, the trust correspondingly fails and the property is held on a resulting trust for the settlor or the settlor's estate. So, in outline, when a trust was established stated to be a marriage gift, and there was no marriage, a resulting trust arose. Note that the settlor's purpose in *Re Ames* was unlike the other stipulated purposes considered here: it did not delimit *how* the trust property was to be used to benefit the trust beneficiaries within the trust once it was in operation – it simply laid down a context required for the trust to commence. The settlor's purpose was that the trust should serve as a marriage gift. Once the marriage was an accomplished fact, the trust property was then available for *any* manner of benefit for the beneficiaries. In other words, 'purpose' is being used in a rather different sense here: by 'purpose' of the trust, here we mean merely the contextual reason the trust was initially created, rather than, as previously, the object to be pursued when executing the trust once it exists.

In *Re Ames*, in 1908 a settlor covenanted 'in consideration of the … intended marriage' of his son to pay a sum to trustees within one year from the solemnization of the marriage, on a typical marriage settlement. The marriage ceremony took place; the money was paid to the trustees; and the parties lived together for many years. In 1927 the wife obtained a decree of nullity – which, at the time, retrospectively invalidated a marriage from the outset[46] – and she released any interest under the settlement. The husband continued to receive the income until his death in 1945. On the husband's death the trustees were directed by Vaisey J to pay the fund back to settlor's estate rather than those entitled on default of issue under the settlement. The judge said:[47]

> 'It seems to me that the claim of the executors of the settlor in this case must succeed. I think that the case is, having regard to the wording of the settlement, a simple case of money paid on a consideration which failed.'

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[44] [1900] 2 Ch 326 (Ch), 330-31.
[45] [1946] Ch 217 (Ch). Similarly, *Essery v Cowlard* (1884) 26 Ch D 191 (Ch).
[46] This retrospective operation was removed by the Nullity of Marriage Act 1971, s 5; now the Matrimonial Causes Act 1973, s 16 – where there is a power to make property adjustment orders in s 24.
[47] [1946] Ch 217 (Ch), 223.

Lord Browne-Wilkinson, speaking obiter, but delivering the leading judgment in the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington LBC*,[48] preferred the language of a 'condition precedent to the operation of the trust' to that of 'total failure of consideration'.[49] He said about *Re Ames*:[50]

> 'The judgment is very confused. It is not clear whether the judge was holding (as I think correctly) that in any event the ultimate trust failed because it was only expressed to take effect in the event of the failure of the issue of a non-existent marriage (an impossible condition precedent) or whether he held that all the trusts of the settlement failed because the beneficial interests were conferred in consideration of the intended marriage and that there had been a total failure of consideration … On either view, the fund was vested in trustees on trusts which had failed. Therefore the moneys were held on a resulting trust of type (B) above. [That is, (B) Where A transfers property to B *on express trusts*, but the trusts declared do not exhaust the whole beneficial interest].'

Further elaboration on *Re Ames* is found, again obiter, in the Court of Appeal in *Burgess v Rawnsley*.[51] There Browne LJ succinctly summarised the rule:[52] 'As I understand it, the basis for this sort of resulting trust is that the purpose for which the trust was created has wholly failed.'

A settlor's precondition purpose may be inferred from the circumstances

In *Burgess v Rawnsley*, Sir John Pennycuick added – and this was also implicit in the other two judgments in the Court of Appeal – that a settlor's purpose being a precondition to the validity of the trust may equally be an *inference* of the settlor's intention, from admissible evidence of the circumstances in which a trust was created, rather than being anything expressly indicated in the declaration of trust. He said:[53]

> 'Where a person makes a disposition in contemplation of an intended marriage, then, even if the disposition is not expressed to be conditional upon the marriage taking place, if the marriage does not in fact take place, there is no doubt that he is entitled to have the settlement set aside upon the ground that the purpose of the disposition has failed. That is plain common sense and it is not necessary to go into the technicalities of marriage as a consideration.'

Classification: 'beneficiary trusts' or 'purpose trusts'

Turning to the issue of classification of the trusts under consideration here. A taxonomy of trusts derived from judicial exposition must, of course, include 'trusts for beneficiaries' and 'trusts for purposes'. And the general understanding seems to be that these are mutually exclusive categories: a trust can only be in one category or the other – it cannot fall within both. For example, according to *Hanbury and Martin*:[54] 'With any particular trust, there may be a question of construction to determine whether the trust is for persons or for purposes'. In a sense, this is a false dichotomy: all express trusts are trusts for purposes, given that a settlor's

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[48] [1996] AC 669 (HL).
[49] There having been a tortuous debate amongst restitution scholars about exactly what this latter expression can comprehend.
[50] [1996] AC 669 (HL), 715, cross-referring to 708.
[51] [1975] Ch 429 (CA). Only Lord Denning MR would have made the point a ground for his decision (438).
[52] [1975] Ch 429 (CA), 441.
[53] [1975] Ch 429 (CA), 445.
[54] Jamie Glister and James Lee (eds), *Hanbury and Martin Modern Equity* (22nd edn, Sweet & Maxwell 2021), para 16-002.

declaration of trust is a purposeful activity – even a straightforward beneficiary trust simply for immediate distribution of the trust property can be described as for the purpose of giving to the beneficiary.[55] However, the distinction between beneficiary trusts and purpose trusts is well established and it is one we must give practical effect to.

Where a settlor expressly adds a stated purpose onto a trust for a beneficiary, either label – 'beneficiary trust' or 'purpose trust' – could be justified as a matter of the ordinary use of language: there is a beneficiary named, so it could be called a beneficiary trust; but equally there is a purpose stated, so it could be called a purpose trust.[56] But what is the appropriate legal classification? Hackney identified a long-standing problem:[57] 'No definition of terms has … been offered …' This area is bedevilled by inconsistent use of terminology. It is submitted that the legal classification should follow from the *reason* the law draws the distinction; and consequently these trusts belong in the category of 'beneficiary trusts' – it is unhelpful to describe them, as sometimes happens, as 'purpose trusts'.[58]

The reasons for distinguishing between 'beneficiary trusts' and 'purpose trusts'

The key reason we must separate beneficiary trusts from purpose trusts is the rule stated by the Court of Appeal in *Re Endacott*:[59] that is, while a trust can exist for a beneficiary, a trust cannot exist for a non-charitable purpose (subject to the minor exception recognised by the court for the trusts of imperfect obligation).[60] And the reason non-charitable purpose trusts were said not to be valid was that, in the absence of a beneficiary there would be no one to enforce the trust. Lord Evershed MR, delivering the leading judgment in the Court of Appeal, felt able to say, famously stating this so-called 'beneficiary principle':[61]

> '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.'[62]

It is submitted that this rule – a non-charitable purpose trust is invalid *because* there is no beneficiary to enforce it – *presupposes* that by 'purpose trust' the law means one *without a beneficiary*. And that – given this rule as our primary context for classification – since in the case of trusts for beneficiaries where the settlor stipulates a particular purpose for the trust, we have a type of trust that *does have a beneficiary to enforce it* and consequently *is clearly generally valid* – as the cases considered here demonstrate – it can only make sense to classify these trusts within the 'beneficiary trust' category.

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[55] Simon Gardner, *An Introduction to the Law of Trusts* (3rd edn, OUP 2011), 225.

[56] Jonathan Garton, Rebecca Probert, and Gerry Bean (eds) *Moffat's Trusts Law: Text and Materials* (7th edn, CUP 2020), 223, observe, 'This demarcation [trusts for persons and trusts for purposes], however straightforward in theory, is not easy to apply where a combination of persons and purposes appears.'

[57] Jeffrey Hackney, *Understanding Equity and Trusts* (Fontana 1987), 71.

[58] JG Riddall, *The Law of Trusts* (6th edn, Butterworths 2002), 227, warns about general ambiguity in use of the expression 'purpose trust', commenting, 'It is … submitted that the term "purpose trust" is best avoided.' See also Geraint Thomas and Alastair Hudson, *The Law of Trusts* (2nd edn, OUP 2010), para 6.44.

[59] [1960] Ch 232 (CA).

[60] Regarding these trusts for monuments, animals, and religious ceremonies, see David Wilde, 'Trusts of Imperfect Obligation' (2022) 28 T&T 298.

[61] [1960] Ch 232 (CA), 246.

[62] Although this is disputed legal history: Paul Baxendale-Walker, *Purpose Trusts* (Butterworths 1999 – a later second edition, sometimes mentioned in citations, was apparently never published); but see Penner's review of the book at (2000) 14 TLI 118.

Some, of course, believe the 'beneficiary principle' is now qualified by the controversial and difficult decision in *Re Denley's Trust Deed*.[63] That case will be examined shortly.[64] But even on this view, it seems we should still draw the line where *Re Endacott* implies it should be drawn – to identify which trusts need saving by the (supposed) *Re Denley* principle.[65]

In the context of public, charitable trusts, there is again a need to separate purpose trusts from beneficiary trusts. By Charities Act 2011, s 1, a charitable trust must be 'for charitable purposes only', and by s 2 a charitable purpose must be 'for the public benefit' – as opposed to being of private benefit, which would be the case if there was a beneficiary.[66] (Of course, people in general benefit from the execution of trusts for charitable purposes; but they are not 'beneficiaries' in the private trust sense of the word, with the range of associated rights.) Again, therefore, in this area too, understanding a 'purpose trust' as being one *without a beneficiary* aligns with the applicable law.

Case law laying down 'the beneficiary principle'

It is perhaps worth briefly examining the key case law laying down the rule against non-charitable purpose trusts: to establish that – as is conveyed by the practically synonymous name 'the beneficiary principle' – it is the absence of a beneficiary to enforce the trust that lies at the heart of the rule, given that it has been suggested (including judicially) that additional factors are involved; and also to illustrate the sort of problematic trusts that gave rise to the rule.

Morice v Bishop of Durham[67] laid down the general rule that a trust for a purpose – as opposed to a beneficiary – can only exist if the purpose is recognised by the law as charitable: non-charitable purpose trusts were said to be invalid because (1) there would be no one to call for enforcement of the trust and (2) the purpose might be too uncertain for a court to control administration of the trust anyway. A testatrix left property on trust to dispose of it to such objects of benevolence and liberality as her executor in his discretion should most approve of. It was held the trust was not limited to charitable purposes only: it therefore failed and there was a resulting trust for the testatrix's estate.[68] Further objections to non-charitable purpose trusts are often added in the books: (3) some purposes would be undesirable.[69] And (4) a

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[63] [1969] 1 Ch 373 (Ch).

[64] Lynton Tucker, Nicholas le Poidevin, and James Brightwell (eds), *Lewin on Trusts* (20th edn, Sweet & Maxwell 2020), para 5.054, calls *Re Denley* 'the leading authority concerning the validity of trusts for apparent non-charitable purposes'. The word 'apparent' shows the definitional difficulties here; with the text seeming to ultimately conclude (para 5.056) that *Re Denley* was a beneficiary trust rather than a purpose trust after all.

[65] It was also suggested for a time that the *Quistclose* trust – from *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL) – involved the recognition of a new type of valid non-charitable purpose trust. In the *Quistclose* case, a loan, to be used by the borrower only in paying debts owed to their creditors, was found to be held by the borrower on trust: first to pay the creditors; and second, if that did not happen, to repay the lender. It was then suggested by some that the first trust, for payment of the creditors, was a purpose trust. But the *Quistclose* trust has now been explained differently, as only one single beneficiary trust, in *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164. The borrower held the money on trust for the lender from the outset; the borrower had only a power to pay the creditors; otherwise the money had to be returned to the beneficiary lender. And if the lender had a duty to exercise the power, and pay the creditors, this came from a separate contract or mandate between lender and borrower – it was not part of the trust arrangement.

[66] See for example *Dingle v Turner* [1972] AC 601 (HL), where the House of Lords said that a charitable trust for the relief of poverty cannot be a trust for particular beneficiaries; it must instead be for the purpose of relieving poverty amongst a class of poor people – although the class may be small and have a personal nexus.

[67] (1804) 9 Ves 399, 32 ER 656 (affd (1805) 10 Ves 522, 32 ER 947).

[68] The court recognised trusts for charitable purposes were valid because (1) the Attorney-General would enforce them, as they are in the public interest; and (2) charitable trusts are exempt from the requirement of certainty of objects: if a trust was for unspecified charitable purposes, a scheme could be devised for using the property by the court.

[69] For example, *Brown v Burdett* (1882) 21 Ch D 667 (Ch). A testatrix left a house on trust to block it up (except four rooms a housekeeper and his wife were to occupy) for 20 years; and then for beneficiaries. It was held there

purpose could last indefinitely, undesirably tying up the trust property perpetually. Another, spurious, objection also sometimes found is: (5) if declared by will, such a trust would be an invalid delegation of testamentary power – a violation of the supposed general rule that you cannot in your will leave someone else to decide the destination of your property.[70] But it is clear that (1) the absence of any beneficiary to call for enforcement of the trust is the pivotal point. By contrast (2) uncertainty and (3) undesirability could be dealt with on their own, without invalidating all non-charitable purpose trusts; while there is in place a rule preventing (4) perpetual duration;[71] and on analysis there is no rational substance to (5) the supposed general rule against delegation of testamentary power and it has been rightly rejected.[72]

Modern applications of 'the beneficiary principle' start with a series of three cases. In *Re Astor's Settlement Trusts*,[73] an inter vivos trust for furthering a list of purposes was held invalid: (in outline) good relations between nations and peoples; independence and standards in newspapers; publishing; help of those associated with the press. In *Re Shaw*,[74] George Bernard Shaw's testamentary trust to research the benefits of a revised English alphabet and to produce a demonstration work was held invalid.[75] And in *Re Endacott*,[76] a testamentary trust for 'some useful memorial to myself' was held invalid.

These cases – old and new – exemplify what the law means by a non-charitable 'purpose trust': one *without a beneficiary to enforce it*.

A proposed definition of 'beneficiary trust' and 'purpose trust'

It follows that expressly declared trusts should be classified as follows. A 'beneficiary trust' is – however circular this may be – one that has a beneficiary. That is, the trust was designed to benefit a selected person or persons, and accordingly the law affords them the familiar rights we recognise beneficiaries to have: to be informed of the trust, to obtain an account, to enforce the trust, to sue for its breach, etc. Importantly, if there is a beneficiary, it is irrelevant whether or not the declaration of trust also stipulates it is for a particular purpose. And a 'purpose trust' is therefore one to pursue a purpose *without a beneficiary*. That is, the trust was declared for the carrying out of a specified purpose or purposes not serving any specific, identifiable beneficiary or beneficiaries – although carrying out the purposes may benefit some people in general.

However, it is necessary to take the analysis further. First, to examine a fundamental controversy over what precisely a 'beneficiary' is. Secondly, to evaluate the merits of an alternative approach to the classification of 'beneficiary trusts' and 'purpose trusts'. And thirdly, to confront some practical difficulties in applying the proposed definition.

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was no valid disposition of the property during the 20-year period; so it passed under the rules on intestacy. Bacon V-C's full judgment read (673): 'I think I must "unseal" this useless, undisposed of property ... There will be a declaration that the house and premises were undisposed of by the will, for the term of twenty years from the testatrix's death.'

[70] High authority can be cited for this objection; for example, a majority of the House of Lords endorsed it in *Chichester Diocesan Fund and Board of Finance v Simpson* [1944] AC 341 (HL), 348 (Viscount Simon LC), 349-50 (Lord Macmillan), 364 (Lord Porter), 371 (Lord Simonds).

[71] See David Wilde, 'The Rule Against Perpetual Trusts: Part 1 –Trusts for Non-Charitable Purposes' (2021) 35 TLI 149.

[72] *Re Beatty* [1990] 1 WLR 1503 (Ch). But see Lionel Smith, 'What is Left of the Non-Delegation Principle?' in Birke Häcker and Charles Mitchell (eds) *Current Issues in Succession Law* (Hart 2016).

[73] [1952] Ch 534 (Ch).

[74] [1957] 1 WLR 729 (Ch).

[75] By a compromise of the litigation the project was in fact funded: [1958] 1 All ER 245n.

[76] [1960] Ch 232 (CA).

The orthodox view of a 'beneficiary'

The 'orthodox' view of a 'beneficiary' is identified by Swadling.[77] That is, a 'beneficiary' is a person a trust is designed to benefit by conferring on them a definable *beneficial proprietary interest* in the trust assets – as beneficial 'equitable owner'. Basically, this means a 'beneficiary' must, definitionally, have an entitlement to receive a distribution of income or capital from the trust; although this right may be discretionary, postponed, contingent, or defeasible; and the beneficiary will often enjoy their interest by using the trust assets in specie rather than taking receipts – for example, occupying land rather than receiving rents from it. The law then affords this person the familiar rights we recognise beneficiaries to have: to be informed of the trust, to obtain an account, to enforce the trust, to sue for its breach, etc.

There is a formidable tradition supporting this orthodox definition. As only one example of many such statements, perhaps the most widely cited description of the core of a trust is that of Lord Lindley delivering the judgment in *Hardoon v Belilios*:[78] 'All that is necessary to establish the relation of trustee and cestui que trust is to prove that the legal title was in [one person] and the equitable title in [another].'

To see the problem this view raises for classification of the trusts under consideration, let us briefly return to *Re Osoba*,[79] our archetype of the trusts being considered, where the settlor declared a trust to pay for the education of his daughter. Under the usual presumption set out and applied in that case, the daughter was held ultimately entitled to the trust property; so she was, therefore, fully a beneficiary in this orthodox sense. *But* if we assume a trust where the presumption was found to be rebutted on the facts, so that the intended beneficial entitlement was understood to be limited to provision for the daughter's education only, such a trust *might* be executed by handing over the trust fund to her – to purchase books, computer equipment, etc. But it might equally be executed without paying anything to the daughter. For example, by the trustee paying the daughter's university fees directly: that is, paying for her to receive services, Or, by the trustee paying off the daughter's student loan directly: that is, discharging a liability for her. Or, by the trustee leasing a house for the daughter to occupy as student accommodation: that is, granting her a licence to reside in trust property. In none of these scenarios does the daughter obtain property from the trust. Given that, under the terms of the declared trust, she therefore has no *beneficial entitlement* to trust property, which we could call her beneficial 'equitable owner' of – merely a right instead to have the trust property used for her benefit – this orthodox school of thought would call her a '*factual* beneficiary' rather than a '*legal* beneficiary' of this trust: and accordingly insist that we must be dealing with a purpose trust, since there is no beneficiary in the legal sense of the word. For example, expressing this view in relation to *Re Osoba*, when the case was decided at first instance, Rickett said:[80] 'under a private trust the interest of the beneficiary is not simply factual, but *equitable*. The beneficiary owns the benefits of the property in *all* possible senses'.

Following this orthodox approach, we would therefore have to classify what we have so far been calling a 'beneficiary trust' as a 'purpose trust' because it would have no 'beneficiary' properly so called.[81] But is this orthodox approach the whole story?

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[77] William Swadling, 'Orthodoxy' in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart 2004).
[78] [1901] AC 118 (PC), 123.
[79] [1979] 1 WLR 247 (CA).
[80] CEF Rickett *Re Osoba* (1978) 37 CLJ 219 (note), 222. He was criticising Megarry V-C's unambiguous treatment of the daughter as a trust 'beneficiary' [1978] 1 WLR 791 (Ch); similar language was, of course, used by the judges on appeal [1979] 1 WLR 247 (CA).
[81] Accordingly, we would have to question whether the 'beneficiary principle' is satisfied – or the, supposed, *Re Denley* [1969] 1 Ch 373 (Ch) qualification to it – so that there is a valid trust at all.

The trust in Re Denley

When giving his orthodox definition, Swadling was discussing the case of *Re Denley*.[82] There land was declared to be held on trust (limited within the common law perpetuity period) 'for the purpose of a recreation or sports ground … for the benefit of the employees of [a specified] company'. Goff J held this to be a valid trust. Swadling argues the decision was wrong. Because the trust declaration conferred no beneficial proprietary interest on the employees: they were only entitled by its terms to receive a licence to use land, which is a merely personal right – a permission given by one person to another. Swadling said[83] *Re Denley* 'confuse[d] factual with legal benefit'. That is:

> 'The trust which the settlor created was not one in which the employees were intended to have what … might be loosely called "ownership" rights, only "use" rights, which is not the same thing at all.'

Given there was no 'beneficiary' in the orthodox sense, this therefore could only be a purpose trust: for the purpose of conferring a licence. And as a non-charitable purpose trust it should fail.

Yet the trust was upheld in *Re Denley*. Can this be accounted for? If the decision *is* correct, there are two possible understandings of it. First, the case decided that a non-charitable purpose trust is valid if, despite the absence of a beneficiary, there is someone to enforce it: what might be called (although this expression was not used in the case) a 'benefiting enforcer'.[84] Someone who benefits from the trust and is given standing to enforce it; but who is not a 'beneficiary', in the conventional sense of the word, because – while they have enforcement rights – the law does not afford them the full range of other rights a 'beneficiary' is recognised to have; they lack some – unspecified – right(s) from those conferred by equity on true 'beneficiaries'. And the employees in *Re Denley* qualified as (only) 'benefiting enforcers'. There are statements in the case that would support this interpretation.[85] But, legally, this interpretation does not make a great deal of sense.[86] For present purposes, having identified this possibility, the matter can be left at that.

The second way to account for the decision in *Re Denley* is to say that the law does not *only* recognise 'orthodox beneficiaries'. In the law of trusts, the notion of a 'beneficiary' is in fact wider, and also covers what could be called 'non-orthodox beneficiaries'. That is, beneficiaries not entitled to a beneficial proprietary interest in the trust assets, *but instead only entitled to have the trust assets applied in some way for their benefit by the trustees*. The employees in *Re Denley* were, accordingly, 'beneficiaries' of the trust – 'beneficiaries' of this non-orthodox variety – with the trustees obliged to observe a licence for them to use the land as a sports ground.

An alternative view of a 'beneficiary'

On this non-orthodox view, a 'beneficiary' does not, definitionally, need to have a beneficial proprietary interest in the trust assets. All that is required to qualify a person as a 'beneficiary' is that the trust was designed to benefit them and the trustees are obliged by the terms of the

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[82] [1969] 1 Ch 373 (Ch).

[83] William Swadling, 'Orthodoxy' in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart 2004), 29.

[84] 'Benefiting enforcer' in contrast to the sort of non-benefiting enforcer some jurisdictions allow by statute to be appointed to validate non-charitable purpose trusts – one who derives no benefit from the performance of the trust obligation; although they might be incentivised in other ways to seek enforcement of it.

[85] Especially in widely cited dicta at [1969] 1 Ch 373 (Ch), 382-84.

[86] For a full critique of the case see David Wilde, '*Re Denley*: Re-evaluating its Significance for Non-Charitable Purpose Trusts' (2023) 139 LQR forthcoming.

trust to apply the trust property in *some way* beneficial to them. The law then affords them the full range of familiar rights we recognise beneficiaries to have: to be informed of the trust, to obtain an account, to enforce the trust, to sue for its breach, etc.

The 'orthodox beneficiary' has been central to trusts discourse. But in truth – albeit less noticed – 'non-orthodox beneficiaries' recur throughout the case law. For example, trusts to confer a licence on a beneficiary – rather than confer a beneficial proprietary interest – have long been recognised: *Re Denley*[87] was nothing new, if understood in this way.[88] A common situation has been the deceased owner of a home creating by will a trust over it conferring a 'right of residence', typically on a surviving partner for their life. Such wills have sometimes been interpreted in the case law as intended to confer on the beneficiary a life interest in the house – a recognised beneficial proprietary interest – giving a right to take rents from the property and assign the interest. But in *Re Gibbons*,[89] the Court of Appeal recognised that such wills have sometimes instead been interpreted in the case law as intended to confer on the beneficiary merely a right to reside – a licence.[90] Accordingly, Vinelott J was probably correct to say in *Re Grant's Will Trusts*:[91] '[*Re Denley*] on a proper analysis … falls altogether outside the categories of … purpose trusts.'

The other major strand of case law recognising 'non-orthodox beneficiaries' is explained by Penner:[92]

> 'The courts in the nineteenth century were well versed in enforcing … 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 … 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.'

As we have seen, where a fund is settled on such a trust, it is *presumed* to create an orthodox beneficiary trust; the beneficiary is ultimately entitled to the fund: above, *Re Osoba*.[93] However, the trust can be interpreted instead as creating *only* an entitlement to application of the fund by the trustees in the manner directed: above, *Re Sanderson*.[94] As already explained in relation to education, such trusts are liable to be executed without payment of anything to the beneficiary. Similarly, a trust for maintenance might be executed by payment of fees direct

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[87] [1969] 1 Ch 373 (Ch).

[88] David Wilde, 'The Nature of Beneficiaries' Rights – Can there be a Trust to Observe a Licence Over Property?' (2021) 27 T&T 208.

[89] [1920] 1 Ch 372 (CA).

[90] An interpretation endorsed in cases such as *Parker v Parker* (1863) 1 New Rep 508; *May v May* (1881) 44 LT 412 (Ch), 413; *Re Anderson* [1920] 1 Ch 175 (Ch), 180 (approved in *Morss v Morss* [1972] Fam 264 (CA), 275 and 278); *Shanks v IRC* [1929] 1 KB 342 (CA), 363-64, per Russell LJ, whose judgment was later approved by the House of Lords in *IRC v Miller* [1930] AC 222 (HL;S), 233 (Lords Buckmaster and Blanesburgh) and 239 (Lord Warrington); *Re Goddard* [2020] EWHC 988 (Ch), esp [56] and [58].

[91] [1980] 1 WLR 360 (Ch), 370.

[92] JE Penner, *The Law of Trusts* (12th edn, OUP 2022), para 7.35. He calls the trusts discussed in this section of the present article 'specified benefit trusts'; and he opens his discussion of them by highlighting the terminological difficulties (para 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'.

[93] [1979] 1 WLR 247 (CA).

[94] (1857) 3 K&J 497, 69 ER 1206.

to a care provider – a payment for services for the beneficiary. Or a trust for advancement might be executed by funding an exhibition for an aspiring artist's work – funding a marketing opportunity for the beneficiary. Accordingly, the beneficiary of such a trust has no beneficial proprietary interest in the trust assets – no right to receive property from the trust – only a right that the trust fund be used in an appropriate way for their benefit as stipulated by the settlor. Again, these are non-orthodox beneficiaries, long recognised in the law.

Despite the traditional focus on orthodox beneficiaries, Nolan has provided an analytical framework capable of accounting for the presence of non-orthodox beneficiaries in the case law.[95] In the foremost consideration of beneficiaries' rights, he explains that a beneficiary's equitable interest – commonly referred to as 'equitable ownership' – is in truth a 'bundle of rights'.[96] In particular, a beneficiary has two core rights. First, a right against the trustee to due performance of the trust, which is a personal right against the trustee alone.[97] Secondly, a right to exclude others in general from the benefit of the trust assets, which is a property right.[98] Powerful judicial support for such a view was provided by Lord Sumption JSC in the Supreme Court in *Akers v Samba Financial Group*.[99]

It is submitted that the law *does* recognise both orthodox and non-orthodox beneficiaries. And that, accordingly, a 'beneficiary trust' is that it is one with *either* an orthodox or a non-orthodox beneficiary. And a 'purpose trust' is therefore one to pursue a purpose *without any beneficiary, orthodox or non-orthodox.* That is, the trust was declared for the carrying out of a specified purpose or purposes not serving any specific, identifiable beneficiary or beneficiaries – although carrying out the purposes may benefit some people in general.

The 'impressionistic' approach to classifying 'beneficiary trusts' and 'purpose trusts'

So far it has been assumed that if 'beneficiary trusts' can be identified, 'purpose trusts' must be what remains. However, to the contrary, it is sometimes suggested that even if a trust has a beneficiary, it can nevertheless still be appropriate to classify it as a 'purpose trust'. This view seems to involve saying that if a trust has both a beneficiary and an element of purpose to it, the trust should be classified as a 'purpose trust' if, as a matter of impression, the purpose element predominates.

The most fully reasoned statement of this apparent approach – also taken by others – is perhaps Virgo's textbook, giving this example:[100]

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[95] RC Nolan, 'Equitable Property' (2006) 122 LQR 232.

[96] ibid, 254.

[97] Described ibid, 236. He adds there: 'However, in particular circumstances, and for particular purposes [this right] might be regarded as proprietary, for the distinct reason that it constitutes a "cashable right" in the hands of a beneficiary, whether or not it is also transmissible. After all, general notions of "property" or "ownership" are not always those used for a particular purpose.'

[98] Described ibid, 251. He says there: '[This right matches] the notion derived from case law of proprietary rights: they are claims to exclude others from access to assets, whether or not they consented to such exclusion. They merit description as proprietary rights or rights of property. They also form the common, core, proprietary aspects of interests under trusts …'

[99] [2017] UKSC 6, [2017] AC 424, [82]-[83] (obiter); cited with approval in Paul S Davies and Graham Virgo, *Equity and Trusts: Text, Cases and Materials* (3rd edn, 2019 OUP), 60.

[100] Graham Virgo, *The Principles of Equity and Trusts* (4th edn, OUP 2020), sect 7.2.1. (Virgo was seemingly attempting to rationalise a view expressed in past editions of *Hanbury and Martin* – and still found in the current edition, Jamie Glister and James Lee (eds), *Hanbury and Martin Modern Equity* (22nd edn, Sweet & Maxwell 2021), para 16.002.)

> '[I]n *Re the Trusts of the Abbott Fund* [101] … money was collected from the public for [the purpose of maintaining] people in distress … two deaf and blind sisters … [T]he [trust] could have been construed as [an] express private [trust], with the beneficiaries being the people in distress. But … the trustees had a great deal of discretion as to the use of the money collected … Consequently, [the case is] preferably analysed as being [a trust] for the purposes of benefiting the people in distress rather than for the particular people themselves. Since the class of people who could be benefited was limited, it followed that [the] trust could [not] be charitable, because the public benefit requirement was not satisfied … Since, however, there were ascertainable beneficiaries who directly benefited from the carrying out of the purposes, they were in a position to enforce the [trust] and so there was no objection to the [trust] being recognized as valid, consistent with the approach adopted in *Re Denley*.'[102]

This was a trust for 'non-orthodox beneficiaries'. Like *Re Sanderson*,[103] above, the fund was held on trust for them, not conferring a beneficial proprietary interest, but with an entitlement only that the trustees use the fund for necessary maintenance.[104] *Re Sanderson* is generally seen as a beneficiary trust; so why is *Re Abbott* – supposedly – different? Is the element of discretion, focused on by Virgo, *materially* different because there are two people to be maintained rather than one? Or is providing for a close relative somehow *materially* different from providing for others?[105] So, we have what *looks like* a trust for non-orthodox beneficiaries being classified as a 'purpose trust' validated by the (unclear) *Re Denley* principle – presumably because, as a matter of impression, the 'purpose' element behind this trust predominates.

Matters were seemingly taken even further by Hayton, with a trust for *orthodox* beneficiaries also apparently classified as a 'purpose trust' validated by the (unclear) *Re Denley* principle. In *Wicks v Firth*,[106] a company established a trust to pay discretionary scholarship awards to the children of employees of the company (and subsidiaries), the children being called in the trust instrument 'the beneficiaries'. The House of Lords also spoke of, 'This trust in favour of the beneficiaries…'[107] So these were orthodox beneficiaries: on the exercise of the

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[101] [1900] 2 Ch 326 (Ch). There is no discussion in the judgment of this being a 'purpose trust'. Virgo (and *Hanbury and Martin*), above n 100, also mention *Re Gillingham Bus Disaster Fund* [1959] Ch 62 (CA). But – although this is widely assumed – it is not clear that case involved a valid trust at all, as opposed to a purported trust. Only the dissenting judgment of Ormerod LJ (79) is unequivocal that he viewed the declared trust as – partly – valid.

[102] [1969] 1 Ch 373 (Ch).

[103] (1857) 3 K&J 497, 69 ER 1206.

[104] [1900] 2 Ch 326 (Ch), 330-31. When the beneficiaries died, it was held that what remained in the fund went back on resulting trust to the subscribers: it did not form part of the beneficiaries' estates as their property.

[105] A large measure of trustee discretion is also common in many discretionary trusts for simple distribution of a fund between *orthodox* beneficiaries – widely treated as straightforward beneficiary trusts – so it is not obvious that discretion should be taken as indicative of a 'purpose trust' rather than a 'beneficiary trust'. Admittedly the sort of discretion involved in *Re Abbott* was different from the typical discretion encountered when a straightforward discretionary trust for the distribution of a fund is executed – simple questions of who to give to, how much, and when. But was the discretion involved in *Re Abbott* significantly different from that which must be exercised in a straightforward discretionary trust for distribution where a principal intended beneficiary suffers from a serious long-term illness, involving needs that must accordingly be taken account of when administering the trust, with delicate judgement calls?

[106] [1983] 2 AC 214 (HL). There was no discussion in the judgments of the trust in question being a 'purpose trust'.

[107] [1983] 2 AC 214 (HL), 232 (Lord Templeman delivering a summary of the facts adopted by all of their Lordships. *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 (HL) shows, of course, that this could not be a charitable trust for the advancement of education. As a general rule, there is private – not public – benefit if those who can benefit are all defined by a 'personal nexus': ie, they are all linked to one person, or to several people – equally to one company or several companies.)

trustees' discretion in their favour, they would hold a beneficial proprietary interest in the trust fund, for the amount of the scholarship awarded, and they would then receive that distribution outright. Yet, Hayton[108] put this into the category of 'trusts for purposes personally benefiting particular classes of individuals' validated by *Re Denley* – presumably based on the perceived predominance of a purpose element within the trust. Again, it appears clear that a discretionary trust to provide educational scholarships for (even a large number of) family members is a beneficiary trust: *Re Compton*.[109] So how is a discretionary trust to provide educational awards for the children of employees *materially* different? The most obvious point of distinction would be along the lines that providing for the education of one's family looks clearly beneficiary-focused; but providing for the education of the children of employees could be viewed as to a major degree instrumental and oriented around the interests of the business – it is purpose-focused. But this sort of reasoning seems to confuse the motive for creating a trust with the objects of the trust.[110]

These are trusts scholars of the highest eminence. But is this 'impressionistic' approach not a strikingly subjective basis for legal classification? A counter-argument tending in support of their position might be that, the critical reasoning used above – asking why making essentially the same provision is being classified in two different ways without any material difference – could equally be used in the *opposite* direction. If we start from the numerous cases of charitable trusts for providing maintenance for a disabled section of the public, or for funding the education of a section of the public, these are clearly purpose trusts.[111] So how, it may be asked, is making *essentially the same provision* – maintenance of the disabled or funding education – for a private class of beneficiaries not also a purpose trust? This is a fair and substantial point: it arguably justifies their stance. But the answer, it is suggested, is that public, charitable trusts are only classified as 'purpose trusts' *because* there are no beneficiaries. The outcome of the law's evolutionary process is that a purpose trust *means* one without a beneficiary. Indeed, otherwise, pursuing the reasoning under scrutiny to its extreme, logical conclusion, we might find there is no such thing as a clear-cut 'beneficiary trust'. A trust for the purpose of distributing a fund amongst the public would be a 'purpose trust' – albeit not a charitable one (because not limited to a charitable object such as the relief of poverty) so that it would fail as a non-charitable purpose trust. And so given *that trust* would be a purpose trust, then a simple declaration '£10,000 on trust to be paid to my daughter', *being*

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[108] David J Hayton, 'Developing the Obligation Characteristic of the Trust' (2001) 117 LQR 96, 98. See also Jessica Hudson, Ben McFarlane, and Charles Mitchell (eds), *Hayton, McFarlane and Mitchell on Equity and Trusts* (15th edn, Sweet & Maxwell 2022), para 8.029; Paul Matthews, Charles Mitchell, Jonathan Harris, and Sinéad Agnew (eds), *Underhill and Hayton Law Relating to Trusts and Trustees* (20th edn, LexisNexis 2022), para 10.131 (cf para 10.137). (This view is seemingly also adopted in Jamie Glister and James Lee (eds), *Hanbury and Martin Modern Equity* (22nd edn, Sweet & Maxwell 2021), para 16.002, n 10.)

[109] [1945] Ch 123 (CA).

[110] If classification is to focus on motive rather than form, does it not logically follow that similar funds should also be classified as 'purpose trusts' even if they do not stipulate a particular type of benefit, such as payment for education, but simply provide for direct distribution of the trust fund to beneficiaries? For example, should we not say, on a similar approach, that the trust in *McPhail v Doulton* [1971] AC 424 (HL), upheld in *Re Baden's Deed Trusts (No 2)* [1973] Ch 9 (CA), was a 'purpose trust' given it involved the chairman and managing director of a company establishing a trust, later also funded by the company, to serve as a non-charitable corporate employee benefit fund ('for the benefit of any of the officers and employees or ex-officers or ex-employees of the company or to any relatives or dependants of any such persons')? Was this leading case on certainty of beneficiaries in discretionary trusts therefore not even a 'beneficiary trust' after all? Such an approach could lead to all manner of orthodox beneficiary trusts being classified as 'purpose trusts'. It perhaps informed the suggestion (by counsel) that an orthodox beneficiary trust in the form of an occupational pension trust fund might be at risk of being a purpose trust in *Merchant Navy Ratings Pension Fund Trustees Ltd v Stena Line Ltd* [2015] EWHC 448 (Ch), [2015] Pens LR 239, [241].

[111] That is, 'the relief of those in need because of … disability…' and 'the advancement of education', within Charities Act 2011, s 3(1) paras (j) and (b) respectively.

essentially the same provision, paying over money, would also be at risk of being classified as a 'purpose trust'. Everything would become a potential 'purpose trust' – subject only to the filter of very subjective impressionistic classification acting in mitigation. But confronting these dilemmas is wholly unnecessary, given we have a superior bright-line classification available instead: if a trust has a beneficiary, it is always a 'beneficiary trust', end of story.[112] One suspects that is an approach to classification most lawyers already intuitively accept.

Furthermore, this impressionistic approach must *inevitably* produce confusion over terminology. If we start from Proposition 1: 'A trust cannot exist for a non-charitable purpose *because* in the absence of a beneficiary there is no one to enforce it' – the rule in in *Re Endacott*, above. Then something clearly shifts in our use of terminology if we add as Proposition 2: '*Except that* a non-charitable purpose trust is valid where there is a beneficiary to enforce the trust' – a supposed qualification from *Re Denley*, above. Proposition 1 *presupposes* that a non-charitable purpose trust is one *that does not have a beneficiary*. So in Proposition 2, which posits a non-charitable purpose trust *with* a beneficiary, clearly 'non-charitable purpose trust' is being given a *different* meaning. Confusion is therefore inherent in the impressionistic approach. Of course, legal terminology should, so far as reasonably possible, be used consistently. And in this instance it is submitted that it should align with the *rationale* for the rule we are seeking to implement. Given that the key rule requiring a distinction to be drawn between 'beneficiary trusts' and 'purpose trusts' is that 'a trust cannot exist for a non-charitable purpose *because* in the absence of a beneficiary there is no one to enforce it', then it can only really make sense to say that a 'purpose trust' *means* a trust *without* a beneficiary.

Finally, this impressionistic approach appears to violate a fundamental premise we started from: that 'beneficiary trusts' and 'purpose trusts' are mutually exclusive – a given trust cannot fall within both categories.[113] So is it coherent with the surrounding legal framework to talk about a 'purpose trust' *with a beneficiary*? It may be that Virgo, Hayton, and others are saying that the 'beneficiaries' of funds they classify as 'purpose trusts' are reduced, as a result of the classification, to what has been called here *Re Denley* 'benefiting enforcers' – with standing to enforce the trust but lacking the full range of beneficiary rights – meaning that these trusts ultimately *had* no 'beneficiaries' properly so called. This involves a different Proposition 2, that does maintain consistency of terminology: '*Except that* a non-charitable purpose trust is valid where there is a benefiting enforcer available to enforce it' – a possible understanding of *Re Denley*. But it is not clear that those concerned are saying this. And anyway, as suggested above, the notion of *Re Denley* 'benefiting enforcers' appears to have little legal merit.[114] If this is *not* what is being said, it is then far from clear what the *point* of classifying a trust with a beneficiary as a purpose trust would be. No consequences would seem to follow from such a classification: given the trust would inevitably be rescued, on this view, by *Re Denley's* recognition that a 'purpose trust' with a beneficiary to enforce it is valid. But should invoking the special authority of *Re Denley* really be needed to tell us what has been apparent for centuries: that a trust with a beneficiary is valid? Is it not simpler and clearer to say that a trust with a beneficiary is definitionally never a 'purpose trust' – 'beneficiary trust' and 'purpose trust' are mutually exclusive categories?

Deciding whether there is a 'beneficiary' at all

If it is accepted that the objects of trusts can be either persons or purposes, but not both at the same time, then where a trust advances both a person and a purpose, a decision – sometimes

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[112] 'Superior' because better reflecting the rule we are seeking to give effect to; the rule that non-charitable purpose trusts are invalid *because they do not have a beneficiary to enforce them*. Unfortunately, the proposed classification is not *entirely* 'bright-line': see below 'Deciding whether there is a "beneficiary" at all'.

[113] Above, n 54.

[114] Above, n 86.

difficult – must be made regarding classification, as 'beneficiary trust' or 'purpose trust': that is, whether the person advanced is the object of the trust, rather than the purpose advanced being the object of the trust, so that the person *qualifies* as the trust's 'beneficiary'. In principle, this must be decided, not based on our own subjective impressions of which element predominates, but according to a more objective criterion. That is, discerning the apparent intention of the settlor regarding the object of the trust; using usual interpretive techniques. Who or what did the settlor declare the trust (primarily) to benefit? Accordingly, it has been emphasised here throughout that a person is only a 'beneficiary' if the trust was designed to benefit them.

The point that the object of a trust is who, or what, the settlor *designs* a trust to benefit is perhaps most neatly made in Lord Cottenham LC's celebrated dictum, delivering the judgment in the House of Lords in the Irish case of *Shaw v Lawless*:[115]

> 'It was asked, among other things, whether, if a testator should say that he desired his son to be educated at a particular school, that would create a trust in favour of the schoolmaster? That would certainly be a matter for the advantage of the schoolmaster, but it could not be contended that he would have a right to enforce the performance of this desire of the testator. It would be an expression of desire made for the benefit not of the master but of the scholar.'

Here the choice of trust object being posed is between two people: the son and the schoolmaster. We easily conclude the son is the beneficiary *because the trust was designed to benefit him*; any benefit to the schoolmaster is a side effect. Less obviously, we also implicitly make a choice of trust object between a person and a purpose. Again the answer is quite clear: so much so, that we might easily overlook the issue. We effortlessly conclude that, although the purpose of education is involved, this is not a trust for the purpose of advancing education, rather than for the son as beneficiary – because it would be unreasonable to surmise that the settlor's apparent object was to *promote education in the abstract*.

But in other cases, where a trust advances both a person and a purpose, it is much more difficult to discern the settlor's apparent intention and so identify the object of the trust.[116] An example is *Re Skinner*,[117] mentioned above, where the testator left money on trust to publish a book he had written, the profits going to his grandson. Page Wood V-C classified this as a beneficiary trust for the grandson, rather than a trust for the purpose of securing publication of the settlor's own book, saying:[118]

> 'This case appears to be near the border line between these classes of authorities; but I think, upon the whole, that the benefit of the legatee must be taken as the guiding rule. The primary intention is clearly to benefit the legatee.'

Webb and Akkouh[119] have suggested that, in borderline cases, the courts lean towards finding a beneficiary trust. They cite as the 'best example' of such 'rather strained'

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[115] (1838) 5 Cl & F 129, 7 ER 353, 155-56.

[116] These problems would be much reduced, of course, if we limited ourselves to only recognising 'orthodox beneficiaries', with their telltale beneficial proprietary interest. However, facing any additional difficulty that may arise from recognising 'non-orthodox beneficiaries' is a price we must pay to be faithful to the way in which the courts apply the word 'beneficiary' in practice. As cases discussed here show, they do not appear to treat a beneficial proprietary interest in the trust assets as a prerequisite to 'beneficiary' status.

[117] (1860) 1 John & H 102, 70 ER 679.

[118] (1860) 1 John & H 102, 70 ER 679, 106.

[119] Charlie Webb and Tim Akkouh, *Trusts Law* (5th edn, Palgrave 2017), para 4.6.

interpretations of settlor intentions the case of *Re Bowes*,[120] mentioned above, where the testator left money on trust to plant trees on an estate that he had owned up to his death; either according to a scheme for planting he might designate before his death or according to the wishes of the new estate owners. This was held to be a beneficiary trust for the new estate owners, rather than a purpose trust to improve the estate for general posterity. North J said:[121] 'I think the fund is devoted to improving the estate, and improving the estate for the benefit of the persons who are absolutely entitled to it'.

Webb and Akkouh – who allow that *Re Denley* may validate non-charitable purpose trusts if what are called here 'benefiting enforcers' are available[122] – give two reasons for the courts nevertheless tending towards finding a beneficiary trust. The first is to guarantee the validity of the trust: given that we now clearly know non-charitable purpose trusts are generally invalid – although this was significantly less clear at the time cases like *Re Skinner* and *Re Bowes* were decided, with the 'beneficiary principle' only later attaining the prominence it now has, from the second half of the twentieth century; validity not being the issue in those cases. The second reason for tending towards finding beneficiary trusts is that the beneficiaries may, as a result, be able to take the trust property in disregard of the settlor's stipulated purpose for using it, which might be an unattractive one, by exercising their power under the rule in *Saunders v Vautier*. This was the actual issue – with use of the power successful – in both of *Re Skinner*, where there were doubts the book would prove profitable if published, and *Re Bowes*, where the expert evidence was that only a fraction of the tree planting would be beneficial to the estate, and its owners did not wish for any new trees at all.

The 'objects' of a trust must be distinguished from the 'motives' for creating it

Although the objects of a trust have been described here as 'Who or what the trust is designed to benefit', it should be kept in mind that the objects of a trust are distinct from the *motive* for creating it.[123] An example already mentioned is *Wicks v Firth*,[124] where the company established a trust to pay discretionary scholarship awards to the children of employees. Whatever the corporate self-interested *motivation* for declaring the trust, this was clearly a trust *for beneficiaries*. The objects of a trust are 'Who or what the trust is designed to benefit' *directly by execution of the trust's declared terms.*

Nomination of a 'beneficiary' is not conclusive that there is a 'beneficiary trust'

Finally, it should be noted that if a settlor designates a 'beneficiary' within a trust declaration, this does not necessarily conclude the question whether there is, in truth, a 'beneficiary trust'. This is most obvious in the case of a 'sham' declaration – where the settlor has no real intention to create a trust at all.[125] However, it could also be the case where a settlor does wish – or at least hope – to create a functioning trust. For example, the trust in *Re Astor*[126] was characterised as a non-charitable purpose trust, for the good of society in general: to (as outlined above, in part) promote independence and standards in newspapers; promote publishing; help those associated with the press. Suppose such a settlor added, 'the beneficiaries of this trust are the employees of national and regional newspapers in the UK' – perhaps at the urging of a professional adviser, seeking a disingenuous route to validity. Assuming this not to be credible,

[120] [1896] 1 Ch 507 (Ch).
[121] [1896] 1 Ch 507 (Ch), 511.
[122] Charlie Webb and Tim Akkouh, *Trusts Law* (5th edn, Palgrave 2017), para 4.7.2.
[123] *Re King* [1923] 1 Ch 243 (Ch), 245.
[124] [1983] 2 AC 214 (HL).
[125] The classic example is *Midland Bank plc v Wyatt* [1997] 1 BCLC 242 (Ch).
[126] [1952] Ch 534 (Ch).

because the plain intent was to benefit the public in general, then presumably this insertion would not save the trust as a 'beneficiary trust'.[127]

Conclusions

Where a settlor declares a trust for a beneficiary, stipulating a particular purpose for the trust, the courts have identified a range of possible interpretations, seeking to discern the settlor's intention. The stipulation of the purpose may be interpreted as any of the following. First, occasionally, as merely a non-binding indication of wishes, not a term of the trust at all. Secondly – and, at least on the somewhat revisionist reading of the case law adopted here, this is the *presumed* position where *the whole of a trust fund* is settled towards the purpose – as a binding purpose that must be pursued as the sole manner of benefiting the beneficiary insofar as possible, but with the beneficiary entitled to the benefit of the trust property anyway insofar as the purpose proves impossible (but with, of course, the beneficiary able even while the purpose is still possible to use their *Saunders v Vautier* power to override it and take the trust property in disregard of it). Thirdly – if that presumption is rebutted, or does not apply because *only the required part of a trust fund* is settled towards the purpose – as a binding purpose that must be pursued as the sole manner of benefiting the beneficiary, and with the beneficiary entitled to nothing more than that; meaning, in particular, that if the stipulated purpose proves impossible, the trust has failed and there is a resulting trust for the settlor or the settlor's estate. (Therefore, there is only a valid subsisting trust *provided* the settlor's stipulated purpose is possible; and only then can the beneficiary exercise their *Saunders v Vautier* power to override the purpose and take the trust property free of it.) Fourthly, in some cases the purpose may be instead a fundamental reason for creating the trust that operates simply as a precondition to the validity of the trust, and not as a limitation on how the trust should operate when in existence: so that if the settlor's reason for creating the trust is frustrated from the outset by events, the trust fails.

Where a trust has a beneficiary, but the settlor assigns a purpose to the trust, the trust should nevertheless be classified as a 'beneficiary trust' not a 'purpose trust'. The classification 'beneficiary trust' should be applied to *every trust that has a beneficiary*. But it is important to be clear that a person can be a 'beneficiary' even if the terms of the trust do not confer a beneficial proprietary interest on them. In other words, not every beneficiary trust involves giving property to the beneficiary. All that is required to qualify a person as a 'beneficiary' is that the settlor designed the trust (primarily) to benefit them, through the trustees applying the trust property in some way beneficial to them: which is not limited to conferring ownership on them, but can include instead, for example, providing a licence, purchasing services, discharging a liability. The law then affords such a person the familiar rights we recognise beneficiaries to have: to be informed of the trust, to obtain an account, to enforce the trust, to sue for its breach, etc. *Re Denley* was accordingly a 'beneficiary trust' – a trust to provide a licence to use land to the employees *as beneficiaries*. The classification 'purpose trust' should only be used for *trusts without a beneficiary*: trusts for the carrying out of a specified purpose or purposes, not serving any specific, identifiable beneficiary or beneficiaries, although carrying out the purposes may benefit some people in general. This understanding of 'beneficiary trusts' and 'purpose trusts' should be adopted because it follows logically from the key reason we must distinguish between them: the rule that a non-charitable purpose trust is invalid *because it has no beneficiary to enforce it*. This rule presupposes that by 'purpose trust' the law means one without a beneficiary. Accordingly, it is unhelpful and confusing ever

[127] The example is suggested by JE Penner, *The Law of Trusts* (11th edn, OUP 2019), para 9.80, saying that if such an insertion could save the trust, '*Re Astor* is essentially overthrown' (in a passage omitted from the new 12th edn, 2022). A *separate* question would be whether the insertion renders the trust a valid non-charitable purpose trust with 'benefiting enforcers', a possible reading of *Re Denley* [1969] 1 Ch 373 (Ch).

to label a trust with a beneficiary a ‘purpose trust’, even if the settlor stipulates a purpose for the trust. This approach to classification is also consistent the rules governing charitable trusts.