"COMMON SENSE" AND TESTAMENTARY GIFTS TO UNINCORPORATED ASSOCIATIONS

Introduction

The recent decision of Oliver, J. in *re Lipinski's Will Trusts*[1] has again raised the problem of testamentary gifts to unincorporated associations and whether orthodox trust principles are adequate to ensure such a gift can be validly made without falling foul of a plethora of legal rules.

The difficulty "arises out of the artificial and anomalous conception of an unincorporated society which, though it is not a separate entity in law, is yet for many purposes regarded as a continuing entity and, however inaccurately, as something other than an aggregate of its members".[2]

The Facts

The case arose out of a summons by the plaintiffs, the testator's executors, for determining whether certain residuary bequests were valid or void.

By clause 4 of his will of December 21, 1967, the testator, Harry Lipinski, bequeathed his residuary estate to trustees on trust: "(a) as to one half thereof for the Hull Judeans (Maccabi) Association in memory of my late wife to be used solely in the work of constructing the new buildings for the association and/or improvements to the said buildings . . .

(c) as to the remaining one quarter for the Hull Hebrew Board of Guardians to be used solely in the work of constructing the new buildings for the association and/or improvements to the said building".[3]

The Hull Judeans (Maccabi) Association[4] had been founded as a cricket club in 1919 but had since expanded into providing social, cultural and sporting activities for "such Jewish youth in Hull as become members of the association". At the date of the testator's death it had a membership of 26.

The association, while never having formally adopted a constitution, had a document which was headed "Proposed Constitution" and which was treated as the constitution of the association. The relevant sections of this "Proposed Constitution" were:

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[1] [1976] 3 W.L.R. 522.

[2] *Leahy* v. *Attorney-General for N.S.W.* [1959] A.C. 457 at 477 *per* Viscount Simonds.

[3] [1976] 3 W.L.R. 522 at 524.

[4] Hereinafter referred to as the Hull Judeans.

Clause 1—Name. The name of the association shall be the Hull Judeans Maccabi Association. It shall be a branch of the Union of Maccabi Associations of Great Britain & Ireland, and shall accept all provisions relating to branches, laid down in the constitution of the union from time to time.

Clause 2—Aims and Objects: (a) To promote the interest, and the active participation of Anglo-Jewish youth of both sexes, in amateur sports, in all forms of cultural, and in non-political, communal activities. (b) To inculcate within its ranks a team spirit, a conception of fair play, good citizenship and self discipline. (c) To provide members of the association with facilities for training and friendly competition in all its activities. (d) To promote and foster the interest to cultivate a knowledge of Jewish history, of the Hebrew language and national traditions. (e) To provide for the advancement of the Jewish religious education and to develop within Jewish youth the principles of the spirit of the Jewish faith. (f) Generally to encourge the development in Jewish youth of the mind, spirit and body, in the traditions of the Maccabeans. (g) To foster better understanding between Jews and non Jews, by means of sporting, cultural and social intercourse. (h) To cooperate within the organization, association or club, whose aims and objects are similar to those of the association.

Clause 13—(h) Any amendment to this constitution shall be effected by a three quarters majority at a general meeting.

Clause 15—Trustees. (a) In the event of the dissolution of the association, the assets of the association shall be held by the trustees as a fund in order to set up any other local Jewish youth organization with similar aims and objects to the Hull Judeans Maccabi Association. (d) The assets of the separate sections shall at all times be the property of the association, and shall not be disposed of by the section without the sanction of the executive committee.

The Union of Maccabi Associations referred to in Clause 1 above, was an unincorporated society and was a legally constituted charity. Relevant rules of this association were:

Rule 2—Until otherwise determined any youth organization or club which complies with the conditions set out in the Annexe is eligible for membership of the union.

Rule 3—Any youth organization or club heretofore a member of

> the union shall be entitled to continue as a member provided that it shall within five months from the date of the adoption of these presents lodge with the executive evidence that it has complied with the conditions set out in the Annexe.

An Annexe to these rules listed the various objects of the association, and then in a proviso stated:

> Provided always that no youth organization or club shall have power to amend the objects herein contained for any purpose which is not of an exclusively charitable nature.

The Hull Judeans had never adopted the Union's constitution.

The Hull Judeans had been looking for new premises from mid 1963 and the testator was at all times conversant with the plans of the Hull Judeans. Of the various suggestions which had been entertained, including a youth centre, the opinion was that the association should buy new premises. Such premises were acquired in 1972.

By a summons, the plaintiffs sought the determination of the questions:

(1) whether on the true construction of the will, the bequest in Clause 4(a)

- (a) was a valid and effective bequest in respect of which the first defendant, the chairman of the association, was able to give the plaintiffs an effective recepit or discharge or
- (b) was effective *cy-près* or
- (c) was void for impracticality or otherwise or
- (d) had some other, and if so, what effect in law.

Question 2 was in similar terms to question 1, but referred to the Hull Hebrew Board of Guardians and its chairman, the second defendant. The third defendant represented all persons interested under the intestacy of the testator and the Attorney-General was the fourth defendant.

The Arguments

1. The Gift to the Hull Judeans.

(I) Whether the gift can take effect as a charitable gift.

The first defendant argued that each of the objects specified in Clause 2, save for those which were clearly ancillary, were capable, in themselves, of existing as charitable objects. Reference was made to such cases as *In re Mariette*[5] and *London Hospital Medical College* v. *Inland Revenue Commissioners*.[6]

The fourth defendant argued that an exclusively charitable character was imposed, "indeed forced", on the Hull Judeans by Clause 1, in that

[5] [1915] 2 Ch. 284.
[6] [1976] 1 W.L.R. 613, [1976] 2 All E.R. 113.

the association was to be a branch of the Union and, as such, should accept the constitution of the Union. Thus, by virtue of Clause 1, an automatic amendment or modification of the objects of the Hull Judeans took place, such that they were restricted to charitable objects, if not so already.

(II) Whether the gift can take effect as an absolute gift with a superadded direction.

The third defendant argued that the gift could not be construed as a gift to the members of the association at the date of the gift as joint tenants, nor by the presence of the specific direction to construct buildings and or make improvements to those buildings could it be construed as being to the members of the association subject to their contractual rights *inter se*.

(III) Whether the gift can take effect as a purpose trust.

The third defendant argued that the gift in fact was a purpose trust and failed both for that reason and because the purpose was perpetuitous. On the perpetuity aspect, it was argued that the testator had intended to create a permanent endowment in memory of his late wife. The factors indicating this intention were, firstly, that the gift was expressed to be in memory of the testator's late wife; secondly, that the gift was "solely" for a particular purpose; and thirdly, that the gift contemplated expenditure on "improvements". *In re Macaulay's Estate*[7] was relied on for this last contention.

With regard to the purpose intended by the testator, the fourth defendant claimed it could only refer to the youth centre project, as this was the only project for the erection of buildings under consideration at the material time.

2. The Gift to the Hull Hebrew Board of Guardians.

Clause 4(c) was attacked on the basis that the reference to "the association" was a reference not to the Board of Guardians but to the association named in Clause 4(a).

The Decision

1. The Gift to the Hull Judeans.

(I) Whether the gift can take effect as a charitable gift.

Oliver, J. concluded that the objects of the Hull Judeans were not charitable since the "association started life as a cricket club" and its primary objects as set out in Clauses 2 (a), (b) and (c) were "really nothing more than objects which might appropriately be found in any sporting or social club . . . and . . . wholly consistent with that being still its essential nature".[8] He distinguished the bequest from that in *In re Mariette*[9] and held that the essential nature of the Hull Judeans

[7] [1943] Ch. 435 (Note).
[8] [1976] 3 W.L.R. 522 at 529.
[9] [1915] 2 Ch. 284.

was not altered by Clause 2 of its constitution since the primary objects could not be construed as "ancillary to or coloured by" the remaining objects, which were capable of being charitable objects. Further, Oliver, J. ruled that no analogy could be drawn between this bequest and that in *London Hospital Medical College* v. *Inland Revenue Commissioners*.[10]

On the question of referential incorporation, Oliver, J. concluded that such a referential incorporation could not be effected on the strength of a provision included under the heading of "Name". Clearly, no one from the Hull Judeans, or the Union of Maccabi Associations would have contemplated such a result; notwithstanding this, it was inconsistent with the by-laws of the Union which, by implication, required existing branches to alter their constitutions.

Therefore, Oliver, J. concluded the Hull Judeans was not a charitable body, and that in consequence, the bequest could not take effect as a valid charitable gift.

(II) Whether the gift can take effect as an absolute gift with a superadded direction.

Oliver, J. approached the bequest on the footing that it was a gift to an unincorporated, non-charitable association. He contended that such a gift took effect if it was absolute and beneficial, and cited *In re Clarke*[11] as an example where such a gift was upheld.

Thus the problem to be overcome before such a gift could take effect was the specifying of purposes by the testator for which the legacy was to be applied.

Oliver, J. accepted as a working guide, the principles stated in *Neville Estates Ltd.* v. *Madden* where Cross, J. expressed the opinion that gifts to unincorporated associations might, depending on the actual words used, be construed in one of three different ways.

(a) As "a gift to the members of the association at the relevant date as joint tenants, so that any member could sever his share and claim it whether or not he continued to be a member . . . " (b) As "a gift to the existing members not as joint tenants, but subject to their contractual rights and liabilities towards one another as members of the association. In such a case a member cannot sever his share. It will accrue to the other members on his death or resignation, even though such members include persons who become members after the gift took effect. If this is the effect of the gift, it will not be open to objection on the score of perpetuity or uncertainty unless there is something in its terms or circumstances or in the rules of the association which precludes the members at any given time from dividing the subject of the gift between them on the footing that they are solely entitled to it in equity". (c) The "terms or circumstances of the gift or the rules of the association may

[10] [1976] 1 W.L.R. 613; [1976] 2 All E.R. 113.
[11] [1901] 2 Ch. 110.

show that the property in question [the subject of the gift] is not to be at the disposal of the members for the time being but is to be held in trust for or applied for the purposes of the association as a quasi-corporate entity. In this case the gift will fail unless the association is a charitable body".[12]

Oliver, J. concluded that the designation of the sole purpose of the gift made it impossible to construe the gift as one falling within the first category. After a discussion of the nature of a purpose trust and how this is related to the principles of *Leahy* v. *Attorney-General for N.S.W.*,[13] Oliver, J. concluded there was no real difficulty in construing the gift within the second category and he continued:

> If a valid gift may be made to an unincorporated body as a simple accretion to the funds which are the subject matter of the contract which the members have made *inter se* . . . I do not really see why such a gift, which specifies a purpose which is within the powers of the association and of which the members of the association are the beneficiaries, should fail.[14]

This was the case since the beneficiaries were able to enforce the trust or terminate it for their own benefit. Thus he concluded the gift could take effect "as an absolute gift with a superadded direction".[15]

(III) Whether the gift can take effect as a purpose trust.

In regard to the gift being perpetuitous, Oliver, J. concluded that the use of the words "in memory of my late wife" did not suggest an intention to create a permanent endowment, but on the contrary, the gift was merely a tribute by the testator to his late wife. Similarly, the contemplated expenditure on "improvements" did not reveal an intention of continuity. The purported reliance on *In re Macaulay's Estate*[16] for this proposition could not be supported because the House of Lords in that case derived the intention of continuity from the reference to "maintenance" rather than "improvements".

Oliver, J. thought it quite evident that the Hull Judeans was at liberty to spend both the capital and income of the bequest. As a consequence the gift came within Lord Buckmaster's *dictum* in *In re Macaulay's Estate* "Nor again is there a perpetuity if the Society is at liberty in accordance with the terms of the gift, to spend both capital and income as they think fit".[17]

He further relied on *In re Price*,[18] as authority for the same proposition, even though the important point that the trust was a purpose trust and unenforceable was not argued in that case. Oliver, J. then concluded that "it does not seem to me, therefore, that in the present case there

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[12] [1962] Ch. 832 at 849.
[13] [1959] A.C. 457. Hereinafter these three categories will be referred to as the first, second or third category as the case may be.
[14] [1976] 3 W.L.R. 522 at 533.
[15] *Id.* at 536.
[16] [1943] Ch. 435 (Note).
[17] *Id.* at 436.
[18] [1943] Ch. 422.

is a valid ground for saying that the gift fails for perpetuity".[19]

Regarding the validity of the gift as a purpose trust, Oliver, J. stated he was not convinced that the existence of a purpose trust in itself was sufficient to invalidate the gift. In *Leahy* v. *Attorney-General for N.S.W.* the Privy Council said:

> if the words "for the general purposes of the association" were held to import a trust, the question would have to be asked, what is the trust and who are the beneficiaries? A gift can be made to persons (including a corporation) but it cannot be made to a purpose or to an object: so also, a trust may be created for the benefit of persons as cestuis que trust but not for a purpose or object unless the purpose or object be charitable. For a purpose or object cannot sue, but, if it be charitable, the Attorney-General can sue to enforce it.[20]

Oliver, J. thought this was not meant as an exhaustive statement of the division between gifts which could be construed as being to individual members and those where the gift was to be devoted to a purpose or object but merely indicated "the broad division of trusts into those where there are ascertainable beneficiaries (whether for particular purposes or not) and trusts where there are none".[21] He derived support for this by relying on a later passage in the judgment in *Leahy*:

> if a gift is made to individuals, whether under their own names or in the name of their society, and the conclusion is reached that they are not intended to take beneficially, then they take as trustees. If so, it must be ascertained who are the beneficiaries. If at the death of the testator the class of beneficiaries is fixed and ascertained or ascertainable within the limit of the rule against perpetuities all is well. . . . A wider question is opened if it appears that the trust is not for persons but for a non-charitable purpose. As has been pointed out, no one can enforce such a trust. What follows? Ex hypothesi the trustees are not themselves the beneficiaries yet the trust fund is in their hands, and they may or may not think fit to carry out their testator's wishes. If so, it would seem that the testator has imperfectly exercised his testamentary power.[22]

Appealing to "common sense" he continued, "there would seem to me to be . . . a clear distinction between the case where a purpose is prescribed which is clearly intended for the benefit of ascertained or ascertainable beneficiaries, particularly where those beneficiaries have the power to make the capital their own, and the case where no beneficiary at all is intended . . . or where the beneficiaries are unascertainable".[23]

Therefore, where there was a purpose trust such that the trustees

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[19] [1976] 3 W.L.R. 522 at 532.
[20] [1959] A.C. 457 at 478-79.
[21] [1976] 3 W.L.R. 522 at 532.
[22] [1959] A.C. 457 at 484; [1976] 3 W.L.R. 522 at 532.
[23] [1976] 3 W.L.R. 522 at 532-33.

and beneficiaries were the same persons, Oliver, J. thought there was the strongest argument in common sense for saying that the gift should be construed as an absolute gift in the second category.

Oliver, J. thought the above distinction, while not being expressly stated in the authorities, was at least consistent with them. He then cited *In re Clarke,*[24] *In re Drummond*[25] and *In re Taylor*[26] as examples of gifts containing specific purposes which had been upheld and in which there were ascertainable beneficiaries. On the other hand, in *In re Wood*[27] and *Leahy* v. *Attorney-General for N.S.W.*[28] gifts specifying purposes had been held invalid where there were no ascertainable beneficiaries.

Oliver, J. relied directly on *In re Denley's Trust Deed*[29] and said that there, Goff, J. held that "the rule against enforceability of non-charitable 'purpose or object' trusts was confined to those which were abstract or impersonal in nature where there was no beneficiary or cestui que trust. A trust which, though expressed for a purpose directly or indirectly for the benefit of an individual or individuals was valid provided that those individuals were ascertainable at any one time and the trust was not otherwise void for uncertainty".[30] Oliver, J. unequivocally accepted, as being in accord with authority and common sense the proposition of Goff, J. that, "the objection is not that the trust is for a purpose or object *per se,* but that there is no beneficiary or cestui que trust".[31]

The reference by the testator to "the" buildings for the association did not refer to any specific buildings, but to whatever buildings the Hull Judeans may "have, erect or acquire". Likewise, the reference to improvements reflected the testator's intention that renovations might need to be made to such buildings. Thus, the Hull Judeans was to have the legacy to spend in this way for the benefit of its members.

Furthermore, he concluded that even though there was a specification of a particular purpose for the benefit of ascertained beneficiaries, namely the members of the association for the time being, the members could not only enforce it, but in fact vary it. For this proposition he relied upon *In re Bowes*[32] in which a "purpose" trust, there being ascertainable beneficiaries, was held alterable at the direction of the beneficiaries, since "the gift was intended to benefit the beneficiaries" and they therefore knew how they might be best benefited. Oliver, J. thought that there was no reason why the same reasoning should not apply where there was an unincorporated non-charitable association and

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[24] [1901] 2 Ch. 110.
[25] [1914] 2 Ch. 90.
[26] [1940] Ch. 481.
[27] [1949] Ch. 498.
[28] [1959] A.C. 457.
[29] [1969] 1 Ch. 373.
[30] [1976] 3 W.L.R. 522 at 533-34.
[31] *Id.* at 534.
[32] [1896] 1 Ch. 507.

that the use of the word "solely" added no legal force to the direction. He therefore concluded that the gift could be upheld as a "purpose trust".[33]

(IV) Whether the gift can take effect as a gift where the trustees and the beneficiaries are the same persons.

As stated previously[34] Oliver, J. concluded that where the trustees and beneficiaries were the same persons the gift could be construed as an absolute one to the members of the association subject to their contractual rights *inter se*. He cited *In re Turkington*[35] as an example, where the gift was construed as an absolute one to the members of the lodge for the time being since the members of a masonic lodge were both the trustees and the beneficiaries of a gift to build a temple.

Oliver, J. thought this was "a striking case which seems to be not far from the present"[36] and concluded that the gift could be upheld "on the analogy of *In re Turkington* as a gift where the trustees and the beneficiaries are the same persons".[37]

2. The Gift to the Hull Hebrew Board of Guardians.

Regarding this gift Oliver, J. concluded that even if the reference to "the association" was to the Hull Judeans his decision that the gift to it was valid precluded the next of kin claiming under an intestacy. Such an interpretation of clause 4(c) was not warranted as it was inconceivable that the testator, desiring to confer a benefit on the Hull Judeans, should give two-thirds to the Judeans direct in memory of his wife and one-third via a charitable body which took no interest under the will and without any reference to his wife. Oliver, J. thought "association" was a perfectly apt description of the Board of Guardians which was an unincorporated body. Therefore as the Board of Guardians was a charity no question of impracticality arose and thus the gift was a valid bequest.

Comments

1. The Gift to the Hull Judeans.

(I) Whether the gift can take effect as a charitable gift.

Oliver, J.'s conclusion about this aspect of the case is undoubtedly correct and in accordance with existing authority.

(II) Whether the gift can take effect as an absolute gift with a superadded direction.

Oliver, J.'s delineation of the principles relating to gifts to unincorporated associations is sound. One such requirement, that such a gift to be valid must be "absolute and beneficial",[38] was fundamental to the

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[33] [1976] 3 W.L.R. 522 at 536.

[34] *Supra* at 526-27.

[35] [1937] 4 All E.R. 501. In that case there was a gift to the Staffordshire Masonic Lodge as a fund to build a suitable temple in Stafford.

[36] [1976] 3 W.L.R. 522 at 533.

[37] *Id.* at 536.

[38] [1959] A.C. 457 at 478. Viscount Simonds defined "absolute gift" as one being "absolute both in quality of estate and in freedom from restriction". As to the beneficial aspect the Board at 478 said that "a gift can be made to persons (including a corporation) but it cannot be made to a purpose or object".

decision in *Leahy* v. *Attorney-General for N.S.W.* and has been reaffirmed in subsequent decisions both in England and Australia.[39]

The reference to *In re Clarke,*[40] as an example of the operation of these principles is however, unconvincing because, as has been recognized, it was only implicit in the decision that the beneficiaries of the gift were the individual members in the name of the society.[41] Essentially, however, nothing turns on this citation as an instance of an absolute and beneficial gift. Subsequent elaboration of these principles in *Neville Estates Ltd.* v. *Madden*[42] has received judicial approval in England and Australia.[43]

Oliver, J.'s conclusion that the gift could not be construed as being in the first category is certainly correct. However, it must be respectfully doubted whether those principles relating to the second category have been correctly applied. In *In re Recher's Will Trusts,* Brightman, J. in stating how these principles were to be applied said, "In the case of a donation which is not accompanied by any words which purport to impose a trust, it seems to me that the gift takes effect in favour of the existing members . . . as an accretion to the funds which are the subject-matter of the contract which the members have made *inter se*".[44]

Further, in speaking of gifts to unincorporated associations generally, both Dean, J. in *In re Cain*[45] and the Privy Council in *Leahy*[46] thought that there was considerations which might rebut the construction of a gift as being to the members of the society and thereby import a trust. Thus, these cases make it clear that it is only in the absence of words importing a trust that a gift can be construed in the second category. At any rate, this requirement is found in the second category itself, since Cross, J. envisages the possibility of "something in its [the gift's] terms or circumstances or in the rules of the association which precludes the members at any given time dividing the subject matter of the gift between them".[47]

The factors tending to rebut the construction of a gift to individual members and thereby import a trust have been considered in several recent decisions.[48] They include the form the gift takes, the number and

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[39] *Neville Estates Ltd.* v. *Madden* [1962] Ch. 832 at 849-50. *In re Recher's Will Trusts* [1972] Ch. 526 at 537, 540-41. *In re De Vedas (dec'd.)* [1971] S.A.S.R. 169 at 172, 176-77. *Re Goodson* [1971] V.R. 801 at 811-13. *Re Haks* [1972] Q.W.N. 59 at 61. *Re Hargreaves* [1973] Qd. R. 448 at 452-53.

[40] [1901] 2 Ch. 110.

[41] [1959] A.C. 457 at 479.

[42] [1962] Ch. 832.

[43] *In re Recher's Will Trusts* [1972] Ch. 526 at 540-41. *Re Goodson (dec'd.)* [1971] V.R. 801 at 812.

[44] [1972] Ch. 526 at 539.

[45] [1950] V.L.R. 382.

[46] [1959] A.C. 457.

[47] [1962] Ch. 832 at 849.

[48] *Leahy* [1959] A.C. 457 at 478, 485-86. *Neville Estates Ltd.* v. *Madden* [1962] Ch. 832 at 849-51. *Bacon* v. *Pianta* (1966) 114 C.L.R. 634 at 638. *In re De Vedas (dec'd.)* [1971] S.A.S.R. 169 at 181-82. *Re Haks* [1972] Q.W.N. 59 at 61. *Re Hargreaves* [1973] Qd. R. 448 at 451.

the disposition of the members of the association, the subject matter of the gift and the capacity of the members to put an end to the association and distribute its assets.

There is little evidence that Oliver, J. has taken these factors into account as his remarks germane to them, namely, that the word "solely" has no legal effect and the capacity to alter the Hull Judeans' constitution and divide its assets amongst themselves[49] occur in the context of his discussion of purpose trusts. If indeed he has considered them, his conclusions are inconsistent with previous authority.

We would suggest a proper consideration of these factors makes it unlikely that the gift could be construed in the second category. Firstly, if in several cases[50] the fact that the gift has been in terms upon trust for a particular association has not been "altogether irrelevant",[51] surely the addition of the words "to be used solely in the work of constructing the new building for the association and or improvements to the building"[52] would further indicate a trust was intended.

Secondly, notwithstanding Oliver, J.'s ruling that the members had the capacity to divide the Hull Judeans' assets, despite the presence of the specific directions in the gift, authority suggests such a capacity is restricted to cases where the gift was expressed to be to the association *eo nomine,* or to the association for its general purposes or where there was a discretion as to its use.[53] Contrary to this authority is *In re Turkington*[54] but as has been pointed out[55] this case is unsatisfactory as it is inconsistent with the principles which have been followed since *Leahy* v. *Attorney-General for N.S.W.*[56]

Furthermore, in two recent cases involving religious associations the legal capacity of the members to divide the assets was not decisive on the issue.[57] In *Neville Estates Ltd.* v. *Madden* Cross, J. said "In the first place, I do not think that members of a body of this sort envisage for a moment that its property can legally be divided between the members for the time being. Secondly, I think that the passing of a by-law enabling some majority of the members or even all the members to dissolve the synagogue and divide its property among themselves woud be a violation of the spirit, if not of the letter, of the final by-laws

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[49] [1976] 3 W.L.R. 522 at 535.

[50] Refer *supra* n. 48 except *Neville Estates Ltd.*

[51] [1959] A.C. 457 at 485.

[52] [1976] 3 W.L.R. 522 at 524.

[53] In, *In re Clarke* [1901] 2 Ch. 110; the gift was to the Corps of Commissionaires in London to aid in the purchase of their barracks or in any other way beneficial to the Corps. In, *In re Drummond* [1914] 2 Ch. 90; the gift was on trust to the Old Bradfordians Club, London to be used for such purpose as the committee for the time being might determine. In, *In re Recher's Will Trust* [1972] Ch. 526; the gift was to the London and Provincial Anti-Vivisection Society.

[54] [1937] 4 All E.R. 501.

[55] J.F. Keeler, "Devises and Bequests to Unincorporated Bodies" (1966) 2 *Adel. L.R.* 336.

[56] [1959] A.C. 457.

[57] *Neville Estates Ltd.* v. *Madden* [1962] Ch. 832. *In re De Vedas* (*dec'd.*) [1971] S.A.S.R. 169.

. . . I think that the nature of the association and the terms of the final by-laws are more important".[58] If such a rule were appropriate to "a sports club existing for the benefit of its members,"[59] particularly in view of the limitation imposed on the members' ability to appropriate the associations' assets to themselves by Clause 15 (a), (d) of the Hull Judeans constitution, this would further militate against the existence of such a right.

Thirdly, although the membership of the Hull Judeans was small and thus would favour the construction to individual members, it appears from a recent case that this is not necessarily decisive. In *In re Haks,* Lucas, J. in regard to a religious association said, "but, for myself, I would find it very difficult, whatever the size of the membership, to regard a gift by name to a society engaged in philanthropic work (even if not charitable) as being intended to confer an immediate benefit upon the persons who happen to be members at the relevant time".[60] On the basis of this rule Lucas, J. distinguished *In re Clarke*[61] but was undecided whether *In re Drummond*[62] could be so distinguished. Again, if such a rule was applicable to associations of the type of the Hull Judeans, particularly in view of its objects listed in Clause 2, this too would weigh against the construction of the gift to individuals.

Fourthly, it must be conceded that the subject matter of the gift being a monetary bequest, would favour the construction of the gift as being to the individual members.

Overall then, even if the remarks cited from cases involving religious associations should properly be restricted to them, it is questionable whether, on a proper consideration of these factors, Oliver, J. has correctly construed the gift as one to individual members, especially as his remarks on this point occur in a different context.

Perhaps, in upholding the gift as being to individual members Oliver, J. thought that because the word "solely" could be construed as not adding legal force to the purpose and that purpose was within the powers of the association, the gift was in fact a gift to an unincorporated association for the attainment of its purposes, a consruction which has been upheld as an absolute gift to members.[63] Alternatively, in asking the question "why are not the beneficiaries able to enforce the trust or, indeed, in the exercise of their contractual rights, to terminate the trust for their own benefit?",[64] he may have felt that these facts were analogous

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[58] [1962] Ch. 832 at 850-51.
[59] [1976] 3 W.L.R. 522 at 529 *per* Oliver, J.
[60] *Re Haks* [1972] Q.W.N. 59 at 62.
[61] [1901] 2 Ch. 110.
[62] [1914] 2 Ch. 90.
[63] *Bowman* v. *Secular Society Ltd.* [1917] A.C. 406 at 442 *per* Lord Parker; *In re Ogden* [1933] Ch. 678; both of which were approved in *Leahy* [1959] A.C. 457 at 478.
[64] [1976] 3 W.L.R. 522 at 533 *per* Oliver, J.

to those in *In re Clarke*[65] as if they could be accommodated within the principle accepted in Leahy that a gift could be upheld as one to members of the association "when the gift is in such terms that, though it is clearly not contemplated that the individual members shall divide it amongst themselves, yet it is prima facie a gift to the individuals and, there being nothing in the constitution of the society to prohibit it, they can dispose of it as they think fit".[66]

However, it is questionable whether this analogy is appropriate as, in *In re Clarke,* there is no indication that the members had to change the constitution to divide the gift among themselves, whereas the members of the Hull Judeans would have had to repeal Clause 5 of their constitution to do the same. Further, it is clear from *Leahy* v. *Attorney-General for N.S.W.*[67] that these validating principles rest on the gift first being upheld as one to individual members. As stated above we submit that such a construction of the gift is questionable and thus, Oliver, J.'s conclusion that the gift can be upheld "as an absolute gift with a superadded direction" is quite unsatisfactory.

(III) Whether the gift can take effect as a purpose trust.

Some aspects of Oliver, J.'s decision regarding the perpetuity question are also unsatisfactory. His construction of the words "in memory of my late wife" as suggesting a tribute rather than an indication of a permanent endowment is quite reasonable. Likewise, his construction of the word "solely" as not adding any legal force to the specified purpose although surprising, is perhaps not incorrect. Also his construction of the word "improvements" as connoting immediate renovations of any premises purchased by the Hull Judeans and not any ongoing programme of improvements which would evince an intention of continuity is indeed reasonable. Such an intention in *In re Macaulay's Estate*[68] was clearly derived from the use of the word "maintenance" rather than "improvements".

However, although Oliver, J.'s conclusion that the association was to be free to spend the capital of the legacy[69] is correct given his conclusion that the gift could be upheld as an absolute gift to members, his reliance on Lord Buckmaster's previously cited statement[70] and *In re Price*[71] is misleading. In *Leahy* it was said that such a right was dependent on the gift first being construed as a gift to members,[72] whereas Oliver, J. strangely cites this statement in the context of his discussion on purpose trusts. Furthermore, *In re Price*[73] could hardly be authority for such a

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65 [1901] 2 Ch. 110.
66 [1959] A.C. 457 at 479 *per* Viscount Simonds.
67 *Ibid.*
68 [1943] Ch. 435. (Note)
69 [1976] 3 W.L.R. 522 at 531.
70 *Supra* n. 16.
71 [1943] Ch. 422.
72 [1959] A.C. 457 at 483.
73 [1943] Ch. 422.

proposition where a purpose trust is involved because, as Oliver, J. himself admits[74] the question of a pupose trust was not argued in that case. Indeed, it would appear from *In re Denley's Trust Deed* that for a purpose trust to avoid infringement of a perpetuity period, its operation must be limited within that period.[75] Clearly, there is no such limitation in the will and therefore it would seem that the correctness of his decision on this point is doubtful.

Certainly the most creative and potentially far-reaching aspect of Oliver, J.'s judgment is that regarding the purpose trust itself. His conclusion that it is not "sufficient merely to demonstrate that a trust is a 'purpose' trust"[76] is a clear rejection of the line of authority that a pupose trust *per se* is invalid. It is indicative of a recent tendency in England of a more liberal approach to the beneficiary principle, such that whereas previously a gift could not be made to a purpose or object because it lacked human beneficiaries and was therefore unenforceable, now, such a gift can be so made provided that beneficiaries are sufficiently ascertainable to enforce the trust.[77] However, to date no such approach has been evident in Australian decisions.

As much as the previously mentioned distinction between purpose trusts where there are ascertainable beneficiaries and those where there are none is demanded by "common sense", or as much as it may represent a desirable judicial policy, the authority relied on for this distinction is quite unconvincing.

It is evident from the decision in *Leahy* that the Privy Council proceeded on the assumption that all purpose trusts, apart from some "anomalous and exceptional cases"[78] were void, as they lacked beneficiaries and were unenforceable. Although this, as Oliver, J. suggests, may not have been an exhaustive statement about purpose trusts, it is certainly arguable whether the Privy Council would have conceded that there were valid trusts for particular purposes where there were ascertainable beneficiaries. Indeed, it is clear from another part of the Privy Council's judgment that if a gift "for the general purposes" of an unincorporated association could not be construed as an absolute gift to individuals it would be void.[79]

Furthermore, the cases suggested by Oliver, J. as being consistent with this distinction are equivocal. In *In re Drummond*[80] it could not be said from the terms of the gift that the beneficiaries were ascertainable. In *In re Taylor* Farwell, J. made no finding regarding ascertainability saying,

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[74] [1976] 3 W.L.R. 522 at 532.
[75] [1969] 1 Ch. 373.
[76] [1976] 3 W.L.R. 522 at 532.
[77] *In re Denley's Trust Deed* [1969] 1 Ch. 373 at 382-86.
[78] *Re Astor's Settlement Trusts* [1952] Ch. 534 at 547 *per* Roxburgh, J. For further analysis of these cases see *id.* 542-47 and *In re Endacott* [1960] 1 Ch. 232 at 245-46.
[79] [1959] A.C. 457 at 479.
[80] [1914] 2 Ch. 90.

"It may be difficult to ascertain what persons the 'past and present members of the staff of the Midland Bank' include",[81] but thought it unimportant to his decision. On the other hand, in *Leahy*[82] it was not said that the beneficiaries were unascertainable, but rather that they might be "numerous, very numerous perhaps, and they may be spread over the world". It is admitted that *In re Clarke*[83] and *In re Wood*[84] are consistent with the suggested distinction.

Even in *In re Denley,*[85] the only direct authority relied upon by Oliver, J. for this distinction, is not conclusive, as the authority relied on by Goff, J. for the distinction between the two types of purpose trusts was circumstantial and indirect. Indeed, it is perhaps significant that in the subsequent case of *In re Recher's Will Trusts,* Brightman, J. failed to mention this distinction, but regarding purpose trusts said, "a trust for non-charitable purposes, as distinct from a trust for individuals, is clearly void because there is no beneficiary".[86]

While admitting that the members of an association who are the beneficiaries of a purpose trust "may enforce the trust", Oliver, J. does not say how this might be done.[87] Indeed it is surprising that Oliver, J. has given no consideration to this important question.

However, on the assumption that such a distinction does exist, Oliver, J.'s conclusion that a purpose trust where the donee association is itself the beneficiary of the prescribed purpose, should be construed as an absolute gift within the second category is puzzling. Even if the gift could correctly be upheld as an absolute gift to members, or as a purpose trust on the principles of *Re Denley,* because the end result is the same so that a gift in either of these circumstances will be valid, it does not mean they can be assimilated. Conceptually they are different, and as such, different rules are applicable.

It is clear that in an attempt to salvage otherwise invalid gifts, the the courts have strained to construe gifts in which purposes have been defined as absolute gifts to individuals,[88] but it is contradictory to conclude that a purpose trust, where the members are the beneficiaries of that pupose, can be assimilated with an absolute gift to those same members. The rule against perpetuities applies to the former, but not to the latter; furthermore, the beneficiaries are unable to vary the trust

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[81] [1940] Ch. 481 at 486.
[82] [1959] A.C. 457 at 485.
[83] [1901] 2 Ch. 110.
[84] [1949] Ch. 498.
[85] [1969] 1 Ch. 373.
[86] [1972] Ch. 526 at 538.
[87] For helpful comments see: P.W. Hogg, "Testamentary Dispositions To Unincorporated Associations" (1971-72) 8 *M.U.L.R.* 1 at 5-6. P.A. Lovell, "Non-Charitable Purpose Trusts — Further Reflections" (1970) 34 *Con.* (*N.S.*) 77 at 92-93. L. McKay, "Trusts for Purposes — Another View" (1973) 37 *Con.* (*N.S.*) 420 at 423-35. *Cf.* J.F. Keeler, "Devises and Bequests To Unincorporated Bodies" (1966) 2 *Adel.L.R.* 336 at 351.
[88] J.F. Keeler, *supra* n. 55 at 337.

in the former,[89] but in the latter they have such a capacity.[90] Oliver, J.'s statement that "if the purpose is carried out, the members can by appropriate action vest the resulting property in themeslves, for here the trustees and the beneficiaries are the same"[91] which he sees as making this assimilation more compelling, is undoubtedly true, but the fact that in both situations the members may ultimately be able to appropriate the association's assets to themselves must not be allowed to obscure the fact that such a result would be obtained at different times and be made possible by different principles.[92]

"Common sense" and the endeavour by the courts to uphold gifts where possible ought not be allowed to manipulate well established legal principles. Indeed, in neither England nor Australia has such a deliberate assimilation been contemplated.[93]

It is obvious that Oliver, J. has been mindful of the differing rules applying to these different types of gifts as his conclusion that, "the beneficiaries, the members of the association for the time being, are the persons who could enforce the purpose and they must, as it seems to me, be entitled not to enforce it or, indeed, to vary it"[94] if correct, would remove all practical difficulties facing such an assimilation. This would be the case because, if the members were entitled to vary a purpose trust, there would be no need to limit the purpose within the perpetuity period. However, his reliance on *In re Bowes*[95] for this proposition is almost certainly wrong. Firstly, it is more probable this case was an absolute gift to the beneficiaries with precatory words as to the use of the gift rather than a purpose trust. Secondly, in that case North, J. was more concerned with the wishes of the beneficiary rather than the intention of the testator as shown by the terms of the gift, whereas today, the courts are much more concerned with the proper construction of the terms of the gift.[96] Thirdly, it is contrary to a *dictum* of Lord Buckmaster in *In re Macaulay's Estate* that "the money can only properly be used for the specific purpose, and its application for these objects is engrafted on and affixed to absolute ownership. All trusts are in fact attached to the absolute fiduciary ownership, and in my opinion such a trust is imposed here and is not of a nature to permit the spending of

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[89] *In re Macaulay's Estate* [1943] Ch. 435 (Note) at 437 *per* Lord Buckmaster *cf.* Oliver, J.'s remarks *infra.*

[90] *In re Clarke* [1901] 2 Ch. 110 at 114 *per* Byrne, J. *In re Taylor* [1940] Ch. 481 at 488-89 *per* Farwell, J. *In re Recher's Will Trusts* [1972] Ch. 526 at 539 *per* Brightman, J.

[91] [1976] 3 W.L.R. 522 at 533.

[92] In the case of an absolute gift, the members could divide the association's assets immediately, whereas where there was a purpose trust this could only be done once the purpose had been carried out.

[93] *In re Price* [1943] Ch. 422 is an example of such an assimilation taking place, but the point that the gift in question was a purpose trust was not argued in the case.

[94] [1976] 3 W.L.R. 522 at 536.

[95] [1896] 1 Ch. 507.

[96] *In re Haks* [1972] Q.W.N. 59 at 61 *per* Lucas, J.

the money in any manner decided on for the benefit of the society".[97] Fourthly, in other cases where it has been decided that the purposes could be varied following appropriate action by the members, the gift has been construed as an absolute gift to them.[98]

Even if this principle was correct, there is no suggestion as to how it might be resolved in practice. Clearly, if all the beneficiaries (thus all the trustees) agreed to vary the trust no problem would arise, but what would happen if all the beneficiaries were not so agreed.[99] Similarly, would a residuary legatee be able to apply to the court to prevent misapplication of trust moneys or to prevent a breach of trust?

This aspect of the decision that the gift could be upheld as a "purpose trust" is quite unsatisfactory, particularly as it has caused further analytical confusion in this area.

(IV) Whether the gift can take effect as a gift where the trustees and the beneficiaries are the same persons.

This aspect of Oliver, J.'s decision must also be regarded as doubtful. It would seem likely that he has been swayed by the statement of Luxmoore, J. in *In re Turkington* that, "the beneficial interest in the fund is in the persons who are the trustees — in the body which is said to be the trustee — and, in those circumstances, where one finds the legal and equitable estate . . . in the same person or entity, the equitable interest merges in the legal interest, on the footing that a person cannot be a trustee for himself".[100] However, it must be questioned whether this analogy is apposite. Luxmoore, J. thought it significant that no separate trustee of the fund was constituted, but in the present case such a trust ought to have been imported. Also, Luxmoore, J. concluded that the members were able to deal with the fund as they saw fit and that *In re Clarke*[101] governed the case. However, here it is unlikely that the gift could be construed as an absolute one to the members as in *In re Clarke,* so enabling the members of the Hull Judeans to divide up its assets. Indeed, it is unlikely that Oliver, J. has appreciated this prerequisite, as he mentions *In re Turkington*[102] in the context of his discussion of purpose trusts. Furthermore, it has been pointed out that it is unlikely such a gift would be held valid today, as it is contrary to the principles in *Leahy*[103] and *Neville Estates Ltd.* v. *Madden.*[104]

Therefore, this aspect of the decision that the gift can be upheld

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[97] [1943] Ch. 435 (Note) at 437.

[98] See *In re Clarke* [1901] 2 Ch. 110; *In re Taylor* [1940] Ch. 481.

[99] From *Abbat* v. *Treasury Solicitor* [1969] 1 W.L.R. 1575, it appears that unanimity of members is not essential; this is possible where a majority of members at a general meeting vote in favour of an amendment or dissolution (of which due notice was given) and the remaining members take no steps to object to the majority decision.

[100] [1937] 4 All E.R. 501 at 504.

[101] [1901] 2 Ch. 110.

[102] [1937] 4 All E.R. 501.

[103] [1959] A.C. 457.

[104] [1962] Ch. 832; also see J.F. Keeler, *supra* n. 55 at 356.

"on the analogy of *In re Turkington* as a gift where the trustees and the beneficiaries are the same persons" is very doubtful.

2. The Gift to the Hull Hebrew Board of Guardians,

Oliver, J.'s construction of, and comments relating to, Clause 4(c) are undoubtedly correct.

Conclusion

The decision of Oliver, J. in *In re Lipinski's Will Trusts* has again highlighted the difficulty of making testamentary gifts to unincorporated associations. Indeed, it is apparent from many of the decisions in this area that the courts have endeavoured both to effectuate the testator's intentions wherever possible, and to comply with orthodox trust principles.

That this cannot be successfully achieved in all cases is surely demonstrated by this case. With respect, it would appear that Oliver, J. in his endeavour to uphold the gift to the Hull Judeans so as to give effect to the testator's intention, has not only altered this intention, but has incorrectly used and manipulated established legal principles to achieve this result.

Oliver, J.'s decision obviously reflects the recent change in emphasis by the courts to be more concerned with giving effect to the testator's intentions than the difficulties, particularly with regard to judicial control which has guided previous decisions.[105] That this judicial policy is a desirable and socially expedient attitude has clearly been pointed out by one Australian writer who has said, "There must be many thousands of unincorporated associations throughout Australia. In fact nearly everyone belongs to at least one. . . . None of the associations can function, without cash and other assets, and since they are not in business for gain, it is obvious that their members, or others interested in their work, will occasionally want to make gifts to them by will. Is there any good reason why the law should raise obstacles to the carrying out of this very natural desire?"[106]

However, as has been pointed out, a policy such as this can only be carried out at the expense of well established legal principles. Thus, the only real solution is legislative intervention giving unincorporated associations recognition as legal entities for the purpose of receiving testamentary gifts,[107] else the problem described by Brightman, J. when

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[105] *Cf. In re Astor's Settlement Trusts* [1952] 1 Ch. 534; *In re Endacott (dec'd.)* [1960] 1 Ch. 232.

[106] Hogg *supra* n. 87 at 9-10. See also J.H.C. Morris and W.B. Leach, *The Rule Against Perpetuities* (2nd ed. 1962) p. 321; *The American Restatement of the Law*: *Trusts* s. 124.

[107] Such legislation exists in some Australian States: e.g. Associations Incorporation Act 1956 (S.A.); Association Incorporation Ordinance 1953 (A.C.T.). Similar legislation exists in Tasmania, Western Australia and the Northern Territory. The N.S.W. Law Reform Commission received a reference from the N.S.W. Attorney-General in early 1977 under the Law Reform Commission Act 1967 (N.S.W.) to review the law relating to unincorporated associations.

he said, "It would astonish a layman to be told that there was a difficulty in his giving a legacy to an unincorporated non-charitable society which he had, or could have, supported without trouble in his lifetime",[108] will be a persistent one particularly where the testator prescribes purposes.

However, this has not been done in England or New South Wales, Victoria or Queensland and thus from the decision of Oliver, J. emerge a number of implications for gifts to unincorporated associations.

Firstly, it is evident that Oliver, J. has moved away from the strict constructional approach to such gifts which has applied since *Re Wood*[109] and *Re Cain*[110] and which has received the highest judicial support. With the possible exception of *In re Denley's Trust Deed*[111] recent decisions have followed this approach, although some dissatisfaction with it was expressed by Adam, J. in *In re Goodson*[112] where has said, "in my opinion, the creation of a purpose trust should not be inferred in the case of non-charitable bodies unless that is clearly required to effectuate a testator's intention".

Secondly, this is the first decision to follow *In re Denley's Trust Deed*[113] on the question of purpose trusts. The more liberal approach to the beneficiary principle espoused in that case, if it continues to be followed, even though it does rest on relatively weak authority, will give a testator more freedom to specify purposes which he wishes the donee association to pursue.

Thirdly, if as Oliver, J. suggests the members of an association are able to vary a purpose trust, it means that many associations will be capable of defeating a testator's intention, which is a serious consequence of the variation of those purpose trusts for the benefit of unincorporated associations. It will mean that the greater freedom given to testators to specify purposes in testamentary gifts will be eroded away where this happens.

Fourthly, as a result of the above, if a testator desires a purpose to be carried out and is not satisfied that the moral obligation incumbent upon the members of the association to effect that purpose is sufficient to ensure its completion, it will mean that a testator will be forced to make an absolute gift to an association conditional on it carrying out a stated purpose. Although such a gift has been judicially recognised[114] this is an unsatisfactory procedure.[115]

Fifthly, if a purpose trust for the benefit of the members of an unincorporated association can be construed as an absolute gift to mem-

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108 *In re Recher's Will Trusts* [1972] Ch. 526 at 536.
109 [1949] Ch. 498.
110 [1950] V.L.R. 382.
111 [1969] 1 Ch. 373.
112 [1971] V.R. 801 at 813.
113 [1969] 1 Ch. 373.
114 *In re Chardon* [1928] Ch. 464.
115 L. McKay, *supra* n. 87 at 429-30.

bers, it means difficulties relating to the validity of purpose trusts will be automatically overcome.

Thus, the decision of Oliver, J. raises a number of interesting implications for testamentary gifts to unincorporated associations, but it is respectfully suggested that his decision is contrary to orthodox trust principles.

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