The rule against perpetual trusts: part 2 – property holding within non-charitable unincorporated associations

Article

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Introduction

As the first of these two articles outlined, the rule against perpetual trusts originated to limit the duration of non-charitable purpose trusts.[1] This article will explain how the rule was also soon applied to limit the period a donor could stipulate that a continuous endowment they gave to a non-charitable unincorporated association was to be held on trust within it. But that it is debatable whether the rule still applies in this context; given the law's modern treatment of these trusts as beneficiary trusts rather than purpose trusts. The view expressed here is that the courts do still see the rule as applicable; although whether they are justified in doing so is less clear. However, even if the rule no longer properly applies, a consideration of the rule's history in this area is nevertheless still helpful: to expose an error in current statements of the law regarding how non-charitable unincorporated associations hold property. Because a proposition that, in its origins, was a misinterpretation of the rule against perpetual trusts has, in the eyes of *some* at least, now morphed into a significant free-standing supposed rule limiting how such associations can receive property, having nothing to do with perpetuity. This misconception is the widely-cited ruling of Vinelott J in *Re Grant's Will Trusts*[2] that a donation to such an association is only valid if the members have the power to divide it between themselves. It will be argued that this decision does not represent the law – whether the decision is understood as a purported application of the rule against perpetual trusts (which is how *Re Grant* and the surrounding cases appear to present it) or understood as involving a free-standing supposed rule, unconnected with perpetuity (which is how some interpret the case law).

How non-charitable unincorporated associations hold property

As a prelude, it is necessary to be clear about the law's modern understanding of how non-charitable unincorporate associations receive and hold property.[3] The leading cases are *Re Recher's Will Trusts*[4] and *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No 2)*.[5] They show that, unless some other trust has been declared, property-holding officers of a non-charitable unincorporated association hold its assets on trust for its current members, as beneficiaries; whether the association exists to benefit its members or for other reasons.[6] And the members' equitable interests are subject to a contract between them formed by the

[1] David Wilde, 'The Rule Against Perpetual Trusts: Part 1 – Trusts for Non-Charitable Purposes' (2021) 35 TLI 149. Prior reading of that article is assumed here: foundational points made there are not repeated.
[2] [1980] 1 WLR 360 (Ch), 368.
[3] Some categories of unincorporated association are subject to statutory regimes rather than the general legal position stated here.
[4] [1972] Ch 526 (Ch).
[5] [1979] 1 WLR 936 (Ch).
[6] Both cases reject any distinction between an 'inward-looking' association (basically meaning self-serving) and an 'outward-looking' one (basically meaning altruistic): [1972] Ch 526 (Ch), 542; [1979] 1 WLR 936 (Ch), 940.

association's rules, governing how the property is to be used.[7] This applies to the general funds of an association, typically arising from members' subscriptions. And the presumption is that a donation to a non-charitable unincorporated is intended to be held in the same way as the association's general funds; again, whether the association exists to benefit its members or for other reasons.[8] Equitable ownership – subject to the contract – is in the current members: it is lost by those who depart and acquired by those who join in the future. The cases said it is open to the current members to depart from their contract and decide to divide the property between themselves for personal use: either by varying the contract within the rules, for example by majority vote; or otherwise unanimously, by agreeing to abandon the contract. And it is irrelevant that a donor might not foresee this.

This is still often called the 'contract-holding theory'. Penner has suggested that 'contract/trust-holding theory' is clearer.[9] This is an improvement. But 'theory' is now understatement, given it is clearly established law, having been applied in numerous cases including at the highest level.[10] 'Contract/trust-holding approach' seems preferable.

Early application of the rule against perpetual trusts to non-charitable unincorporated associations

Prior to the 1960s, there was a vague sense in the case law that donations to non-charitable unincorporated associations might be a category of valid non-charitable purpose trust; until this was ruled out by *Leahy v A-G for New South Wales*.[11] The contract/trust-holding approach came to the fore only after this. While the nature of donations to non-charitable unincorporated associations was unclear, it is understandable that the rule against perpetual trusts was applied to them, copied across from the context of non-charitable purpose trusts.

A relatively simple rule against perpetual trusts had been established to regulate non-charitable purpose trusts. If the capital could be freely spent, there was no perpetuity: but if there was a stipulation for the capital to be a continuous endowment, this had to be limited within the common law perpetuity period – 'lives in being plus 21 years' – for the trust to be valid. Unfortunately, when the rule was adopted for donations to non-charitable unincorporated associations, spurious additional tests for perpetuity were suggested. None of these bears scrutiny, it will be suggested. And all were rejected in at least much of the case law. However, regrettably, one of these false tests has persisted into modern statements of the law: the regular

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[7] *Re Horley Town Football Club* [2006] EWHC 2386 (Ch), [118] and [128], described the trustees as holding on a 'bare trust' with their only duty being to follow the association's directions (plus fiduciary duties of loyal service). 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 its rules: *Artistic Upholstery Ltd v Art Forma (Furniture) Ltd* [1999] 4 All ER 277 (Ch).

[8] This appears to be a strong presumption. *Re Lipinski's Will Trusts* [1976] Ch 235 (Ch) shows that even a donation including a direction that it must be used for a specified purpose will not necessarily be interpreted as intended to impose a trust for that purpose, provided the purpose would benefit the members of the association: they are still liable instead to become beneficial owners subject to the contract formed by their rules; and as owners they are free to decide to ignore the direction and do as they wish with the property. See further n 49 below.

[9] JE Penner, *The Law of Trusts* (11th edn, OUP 2019), para 9.71: 'This analysis of the way in which unincorporated associations receive gifts and hold property is generally termed the "contract-holding theory", although it operates through a trust of the association members' money.'

[10] *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 (HL): equitable ownership by the members subject to a contract formed by the rules was accepted both of general funds and outside donations.

[11] [1959] AC 457 (PC). The vague sense that they were purpose trusts should not be overstated. It was intermittent as well as vague. As the review of the authorities in *Leahy* – somewhat confused without the benefit of the contract/trust holding analysis – helps to show, some cases clearly treated the association members as beneficiaries, often to the point of regarding them as unrestricted beneficial owners, neglecting the contract in the association's rules binding them.

assertion that there is a perpetuity if there is an obstacle to the association members dividing a donation between themselves.

The first case to apply the rule against perpetual trusts to a continuous endowment for a non-charitable unincorporated association was *Carne v Long*.[12] A testator left lands to the trustees of a subscription library 'to hold to them and their successors for ever, for the use, benefit, maintenance and support of the said library'. This was held void as a perpetuity. It is tolerably clear that the rule against perpetual trusts was applied – with Lord Campbell LC expressly following a case generally understood to have applied that rule to invalidate a non-charitable purpose trust.[13] This decision was clearly justified under the rule: an unlimited continuous endowment had been directly stipulated.

The first error: a suggestion that if an association is perpetual by its constitution any donation to it is a perpetual trust

However, Lord Campbell LC added some wider obiter dicta in *Carne v Long*.[14] These *could* be understood to say – although it looks more like a misunderstanding – that if a non-charitable unincorporated association is itself a perpetual institution by its constitution,[15] any donation to it is a perpetual trust, even if the association is entirely free to spend the capital. This clearly confuses perpetuity of the association with perpetuity in the donation: only the latter can be relevant. Any misunderstanding to this effect was quickly corrected (obiter) by Wickens V-C in *Cocks v Manners*.[16] Nevertheless the error resurfaced at times.

It is possible to argue that a *very large* donation to a seemingly perpetual non-charitable unincorporated association, even if there is no restriction in the gift on expending the capital, is likely to involve an element of continuous endowment *in practice*. However, this looks too speculative for the law to regard. We should not underestimate the capacity for an association to expend capital by widening its activities once resources allow. The better view is that if a donation leaves freedom to expend the capital, it does not violate the rule against perpetual trusts; no matter that the association is perpetual by its constitution, and no matter how large the donation is.[17]

The second error: a suggestion that if a donation stipulates purchase of a capital asset it is a perpetual trust

The other two main errors in applying the rule against perpetual trusts to donations to non-charitable unincorporated associations both emerged from *Re Dutton*.[18] A testator left a gift to a subscription library, towards the fund used to pay off the mortgage on its premises. The gift was held invalid under the rule against perpetual trusts. This decision looks wrong: there was no stipulation for any continuous endowment here. The first judgment was given by Kelly CB.[19] He adverted to the fact that the association could endure perpetually.[20] But it has already been suggested that the perpetuity of the association *in itself* is not problematic. He added to this that the donation stipulated expenditure on a capital asset – the premises – and this made it a violation of the rule against perpetual trusts. The problem with such reasoning is that the donation did not stipulate that the purchased capital asset be retained continuously as an endowment – although that may have been the donor's expectation. The association was

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[12] (1860) 2 De G, F&J 75, 45 ER 550.
[13] *Thomson v Shakespear* (1860) 1 De G, F&J 399, 45 ER 413.
[14] (1860) 2 De G, F&J 75, 45 ER 550, 79-80.
[15] The library's rules provided the institution should not be broken up so long as ten members remained.
[16] (1871) LR 12 Eq 574 (Ct Ch), 585-86.
[17] This would be in line with the later leading statement of the rule by the House of Lords, below n 41.
[18] (1878) 4 Ex D 54 (Ex).
[19] His reasoning is at (1878) 4 Ex D 54 (Ex), 58.
[20] By its rules it was not to be dissolved except by resolution of nine-tenths of a specially convened general meeting, confirmed by a similar resolution at a second meeting.

entirely free to sell that asset and spend the proceeds. The better view is that there is no violation of the rule against perpetual trusts in those circumstances.[21]

The third error: a suggestion that any donation is a perpetual trust if the members are unable to dissolve the association so as to divide its property between themselves

The second judgment in *Re Dutton* was delivered by Huddleston B.[22] He focussed on a different point to identify a violation of the rule against perpetual trusts: the inability of the members to dissolve the association in order to divide its property between themselves. He referred to the Literary and Scientific Institutions Act 1854, s 30, by which, on dissolution the association's property would have to go to another institution. But if a donation leaves an association entirely free to spend the capital, where is the element of continuous endowment to breach the rule against perpetual trusts?

As mentioned, this has been the most long-lived of the errors to have appeared in the rule against perpetual trusts – right through to the modern law – a belief that if association members are not free to divide its assets between themselves a donation creates a perpetuity. But it is difficult to see any reasoning behind this notion.[23] What the rule against perpetual trusts has always demanded is that the terms of a trust leave sufficient freedom to expend the trust capital because they do not restrict it to a continuous endowment for too long a period. If an association has that freedom, that should be the end of the matter. That its members cannot divide its property between themselves personally, whether by dissolving the association or otherwise, seems irrelevant to the perpetuity issue.[24] The ability to divide would, after all, simply be an *additional* route to the freedom to expend the property. On top of the freedom to expend *within the framework of the association*, there would now also be a freedom to take the association's assets personally and expend them *outside that framework*. But why should the law require this *double* freedom to spend? It could be suggested that the freedom to spend personally is a *purer* freedom to spend – unhampered by the decision-making processes of the association – and the law should insist on its presence. But this makes no real sense. A member would have to *go through* those very decision-making processes in order to obtain that personal freedom – and persuading an association to distribute assets to members personally is often likely to be much more difficult than securing decisions to spend the association's funds on its objectives. In any case, it cannot seriously be believed that the friction generally existing within the decision-making processes of non-charitable unincorporated associations threatens the prospect of perpetuitous holding of donations unspent. If we believe that such associations really do struggle so badly to reach decisions to spend their funds on their objectives, then surely all payments to such associations must be invalid under the rule against perpetual trusts – including membership subscriptions – not just donations.

A coherent formulation of the rule against perpetual trusts for non-charitable unincorporated associations emerges

The first half of the twentieth century saw a sequence of cases that *tended* towards a coherent understanding of the rule against perpetual trusts as it applied to non-charitable unincorporated associations. The issue was seen as whether the terms of a donation left sufficient freedom to expend its capital, because there was no direction for a continuous endowment beyond the common law perpetuity period – with the other erroneous, supposed tests that had initially

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[21] For later judicial recognition of this, see below n 28 and n 80.
[22] His reasoning is at (1878) 4 Ex D 54 (Ex), 58-59.
[23] Obviously the rule against perpetual trusts cannot have included any requirement of a power of division when it was copied across from the field of non-charitable purpose trusts – in that context there are no beneficiaries to divide the trust property between: it is mandated for a purpose.
[24] Whether it might have any other significance for the validity of a donation is considered later.

emerged fading. The key point was identified and emphasised in *Re Clarke*:[25] saying a donation is valid if the association is left free to expend the capital of it, because there is no stipulation in the gift for a continuous endowment. Byrne J upheld a gift by will 'to the committee for the time being of the Corps of Commissionaires in London to aid in the purchase of their barracks, or in any other way beneficial to that corps'.[26] His reasoning indicated that there is no perpetuity where an association is left free to spend the capital of a money donation;[27] or equally to sell off any capital asset that was donated, or that was stipulated should be purchased with a money donation, and spend the proceeds.[28] Unfortunately, the judgment is compromised by incorrect and somewhat confused obiter dicta – concessions to the earlier mistaken cases – suggesting the inability of an association's members to divide a donation between themselves might lead to a perpetual trust.[29] However, the correct emphasis on the terms of the gift leaving freedom to expend the capital of a donation as the crucial point was subsequently endorsed in *Re Drummond*.[30] A testator left money on trust for the Old Bradfordians' Club, London[31] for such purpose as its committee might determine, with various suggestions. Eve J said there was no perpetuity because there was nothing in the terms of the gift to prevent the committee from spending the donation freely.

The erroneous view that any donation to a non-charitable unincorporated association creates a perpetual trust if the members are unable to divide its property between themselves was rejected both explicitly and implicitly. It was explicitly rejected in obiter dicta of Joyce J in *Re Swain*,[32] where he said 'it is not necessary, in my opinion, to the validity of such a gift that it must be in accordance with the rules of the Society, or be possible under the rules to distribute the money as or by way of bonus to the individual members'. More significantly, given some modern statements of the law, the erroneous view was also implicitly rejected in the situation where an association's rules make it *subject to outside financial control*, by the decision in *Re Ray's Will Trusts*.[33] Clauson J upheld a testatrix's gift to a non-charitable convent solely with reference to whether the capital of the donation could be expended freely.[34] He apparently saw it as no objection that the convent's constitution said it was ultimately subject to the control of the Bishop.[35] This is one of numerous cases where gifts to such non-charitable religious associations have been upheld, despite the obvious fact that their constitutions must have made them subject to outside restraint by affiliation, effectively preventing the association's members dividing its property between themselves.[36]

However, error was never far away. A good example of how confusion pervades this area is *Re Taylor*.[37] A testator gave property to a trustee company holding a bank worker association's non-charitable benevolent and welfare fund. The gift was held valid. Farwell J stated the rule against perpetual trusts incorrectly, as requiring the association members must be free to *divide* a donation between themselves;[38] but the principal authorities he relied on,

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[25] [1901] 2 Ch 110 (Ch).
[26] This was on the assumption the gift was not charitable: the corps, self-supporting, found employment for discharged and disabled soldiers and sailors.
[27] [1901] 2 Ch 110 (Ch), 114.
[28] [1901] 2 Ch 110 (Ch), 121.
[29] [1901] 2 Ch 110 (Ch), 114-16.
[30] [1914] 2 Ch 90 (Ch), 97-98.
[31] A club for Bradford Grammar School old boys.
[32] (1908) 99 LT 604 (Ch), 606.
[33] [1936] Ch 520 (Ch).
[34] [1936] Ch 520 (Ch), 524.
[35] [1936] Ch 520 (Ch), 523. (For confirmation of the contractually binding nature of the constitution of a religious community, see *Shergill v Khaira* [2014] UKSC 33, [2015] AC 359, esp [46].)
[36] See for example the review of authorities in *Re Smith* [1914] 1 Ch 937 (Ch).
[37] [1940] Ch 481 (Ch) (compromised on appeal [1940] Ch 834).
[38] [1940] Ch 481 (Ch), 486.

and indeed quoted from, had stated the requirement correctly as freedom to *expend* the capital of the donation. And for good measure the judge went on to casually and indistinctly suggest the freedom to expend and divide might either both be required, or be alternatives, in satisfying the rule.[39]

This line of cases culminated in a succinct and flawless statement of the basic test to be applied under the rule against perpetual trusts in the context of donations to non-charitable unincorporated associations by the House of Lords in *Re Macaulay's Estate*.[40] A testatrix left property to 'the Folkestone Lodge of the Theosophical Society … absolutely for the maintenance and improvement of the Theosophical Lodge at Folkestone'. This was held invalid because the word 'maintenance' was taken to stipulate holding a perpetual endowment. Lord Buckmaster said:[41]

> '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 … If the gift is to be for the endowment of the society, to be held as an endowment, and the society is, according to its form, perpetual, the gift is bad, but if the gift is an immediate beneficial legacy, it is good.'

The power to spend the capital need not be unrestricted

As just quoted, in *Re Macaulay* Lord Buckmaster said the rule against perpetual trusts is satisfied if 'the Society is at liberty in accordance with the terms of the gift, to spend both capital and income *as they think fit* …' (emphasis added). However, this requires modest qualification given the decision in *Re Price*.[42] That case shows the rule can be satisfied even if a restriction is placed on the gift, limiting its use to being freely expended on only *some* of the association's objects. 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.[43] He added there was no violation of the rule against perpetual trusts, given there was no stipulation for a continuous endowment, with the association instead free to expend the property – albeit within the imposed limit.[44] (The authority of the case has been questioned: it has been suggested the gift should have been invalid as a non-charitable purpose trust.[45] However, this is not necessarily correct. Mention of a purpose does not always create a purpose trust. A trust for a purpose directly benefiting a person is presumed to create a trust for them: a beneficiary trust, not a purpose trust.[46] And the trust benefits can be understood as limited to spending on that purpose alone, with the beneficiary having no further right to the property.[47] Exactly the same approach can be applied to donations to non-charitable unincorporated associations.[48] *Re Price* may be an example. And

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[39] [1940] Ch 481 (Ch), 488-89.
[40] [1943] Ch 435n (HL).
[41] [1943] Ch 435n (HL), 436. The other judgment, by Lord Tomlin, is consistent with this approach.
[42] [1943] Ch 422 (Ch).
[43] [1943] Ch 422 (Ch), 427.
[44] [1943] Ch 422 (Ch), 427-28. He added, obiter, that he would have upheld the gift as charitable anyway (432-35).
[45] In *Re Lipinski* [1976] Ch 235 (Ch), 245-47, Oliver J suggested that it appeared to involve a purpose trust with no ascertainable beneficiaries. See also *Re Astor's Settlement Trusts* [1952] Ch 534 (Ch), 546; and *Re Grant* [1980] 1 WLR 360 (Ch), 369.
[46] *Re Osoba* [1979] 1 WLR 247 (CA).
[47] *Re Sanderson's Trust* (1857) 3 K&J 497, 69 ER 1206.
[48] Where this is the case, such a donation, with a binding stipulation for specific use, would not be owned in equity by the association members, subject to the contract between them in its rules, as its general fund are, because the gift has not been given to the association outright. It must be held separately by the property-holding officers of

even if it is not a supportable example on its facts – because of a difficulty in seeing the members as beneficiaries of the specific purpose in that particular case – there will be other scenarios where the members are more obviously the beneficiaries of a stipulated purpose. This will produce a valid beneficiary trust *limited to spending on a particular purpose alone*. However, a donor's stipulations that money be spent only for a particular use may sometimes be treated instead as merely a non-binding indication of wishes, leaving the association free to spend the money on anything as a simple accretion to their general funds.)[49]

Should the rule against perpetual trusts still apply to donations to non-charitable unincorporated associations?

Indisputably the rule against perpetual trusts *was* applied in the past to donations to non-charitable unincorporated associations, as this survey of the cases has shown. And it will be argued here that the modern cases since continue to apply the rule. But a troubling question is whether the rule against perpetual trusts *should* still be applied, given our modern understanding of property holding by these associations. Now that we clearly understand the property of non-charitable unincorporated associations is held on a beneficiary trust for the members, subject to the contract between them in the rules, which perpetuity rule applies in principle to an element of continuous endowment? The position appears to be as follows.

The rule against remoteness of vesting applies to the initial vesting of a donation in an association

If a donation is made to a non-charitable unincorporated association – which, of course, is presumed to be subject to the contract/trust-holding approach – the rule against remoteness of vesting must apply to the initial vesting of the gift in the association members. In the typical case of an immediate gift to the association, there will be no issue to consider under that rule. The rule will only have to be considered if the gift is delayed into the future, so that the gift is then subject to the contingency of being a member of the association at that future date. The rule against remoteness of vesting was seen as applicable in this way by Lawrence Collins J in *Re Horley Town Football Club*.[50]

It is unclear whether the rule against remoteness of vesting or the rule against perpetual trusts should apply to an element of a continuous endowment

If the donation contains a stipulation for it to be held as a continuous endowment, there is then scope for legitimate disagreement as to whether the rule against remoteness of vesting or the rule against perpetual trusts should be applied to that aspect of the gift.[51]

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the association, on trust to spend it in the prescribed manner. But it remains a beneficiary trust for the members. (For discussion of beneficiary trusts where the beneficiaries are not equitable owners of the trust assets, see David Wilde, 'The Nature of Beneficiaries' Rights – Can there be a Trust to Observe a Licence over Property?' (2021) 21 T&T 208.)

[49] *Re Lipinski* [1943] Ch 422 (Ch), 427: a testamentary donation 'solely' for new association buildings was held an outright gift, not limited to use for new buildings. In *Re Turkington* [1937] 4 All ER 501 (Ch) a testamentary donation 'as a fund to build a suitable [Masonic] temple in Stafford' was similarly held an outright gift, not limited to use for the building, specifically to prevent violation of the rule against perpetual trusts. However, this appears to have been unnecessary: even if the stipulation for a building was binding, there was no further stipulation (unless inferred) that the building acquired be retained – the association would be free to sell the building and spend the proceeds. Contrast *Re Topham* [1938] 1 All ER 181 (Ch) where a stipulation for spending on an association building was found binding; and a requirement that it be retained as a continuous endowment was – unjustifiably – inferred, causing the gift to fail as a perpetual trust.

[50] [2006] EWHC 2386 (Ch), [2006] WTLR 1817, [91] and [115].

[51] Assuming the stipulation is binding. For the possibility that it might be treated as a non-binding expression of wishes, see above n 49.

It is possible to argue that a stipulation for continuous endowment logically means it must be a trust for current *and future* members, subject to the ongoing contract in the association's rules. There is therefore a gift to a class including a sequence of future members, each given an interest in the property contingent upon becoming a member of the association and on retaining membership, vesting only on becoming a member; and the law applies the rule against remoteness of vesting to gifts of such future contingent interests.

However, it is equally plausible to say, to the contrary, that there are no gifted future contingent interests involved, to which the rule against remoteness of vesting could be applied. The donor's gift stipulates for a continuous endowment. It does not stipulate for any future interests. The donor may *expect* that there will be future members but has not *stipulated* any interests for them. The association is free to hold the endowment but decide to admit no more members; or only 'associate members' on terms conferring no beneficial interest in the association's assets. A donor's mere expectations do not create trust obligations – even when expressed as 'precatory words', let alone when they are simply inarticulate assumptions. If a testator gives a life interest to A, 'in the confident expectation that A will use the income to benefit B', it is trite law that the testator has not declared a trust conferring a beneficial interest on B: if A does give anything to B, that was A's choice and the gift came from A not the testator.[52] Likewise, no matter how much the donor may expect the association to admit new members, we can say that when it does admit them, it is the association's admission to membership that confers an interest in the association's assets on them – not any stipulation by the donor of the endowment. On this view, there simply are no stipulated future interests by the donor to apply the rule against remoteness of vesting to. The donor's gift was, and remains despite the direction for a continuous endowment, on trust for the *current* members, subject to the contract between them. This appears to have been the view of Lawrence Collins J in *Re Horley Town*:[53] after applying the rule against remoteness of vesting to the initial vesting of the gift in the association members, he said, 'Their interests as members devolve with the other Club property under the Club rules'.

This analysis becomes more strained if the donor specifically refers to benefiting future members; or if the association's rules require it to be open to future applicants satisfying a description; and especially if such open entry is obligatory, such as through affiliation to another body. But the courts might conceivably be prepared to gloss over such points for the sake of a simple one-size-fits-all approach suiting the vast majority of cases – that would be consistent with their general approach in this area.[54] A donor's words can be construed as merely precatory;[55] rules can be viewed as subject to change; affiliations can be seen as subject to discontinuance.

Variance in the textbook treatment of the subject

So, in conclusion, it is not absolutely clear-cut which perpetuity rule should be applied to an element of continuous endowment. Overall, the books are fairly evenly divided on the point. *Lewin on Trusts* seems to believe the rule against perpetual trusts continues to apply to donations to non-charitable unincorporated associations on trust for the members as beneficiaries subject to the contract between them – although suggesting that this contract/trust-holding interpretation is harder to reach when an element of continuous endowment is

[52] *Re Adams* (1884) 27 Ch D 394 (CA).
[53] [2006] EWHC 2386 (Ch), [2006] WTLR 1817, [115].
[54] Most obviously, their refusal to distinguish between inward-looking and outward-looking associations.
[55] Outside the context of associations, a donor's 'wish' has been held non-binding because merely precatory: *Re Diggles* (1888) 39 Ch D 253 (CA). Likewise, a donor's 'desire': *Re Hamilton* [1895] 2 Ch 370 (CA). And even a very detailed list of 'wishes': *Re Williams* [1897] 2 Ch 12 (CA).

stipulated by the donor.[56] Other books endorsing the traditional application of the rule against perpetual trusts are *Thomas and Hudson*,[57] *Hanbury and Martin*,[58] *Parker and Mellows*,[59] *Pearce and Stevens*,[60] and Watt's textbook.[61] On the other hand, *Underhill and Hayton* believes the rule against remoteness of vesting applies to donations to non-charitable unincorporated associations with stipulations for continuous endowment if they are on trust for the members as beneficiaries.[62] Likewise, *Hayton and Mitchell*,[63] *Virgo and Davies*[64] plus Virgo's separate textbook,[65] *Hayley and McMurtry*,[66] and Hudson's latest text.[67] The specialist texts on unincorporated associations appear similarly divided.[68]

The practical significance of which rule applies

Originally, it would not have mattered which rule applied to an element of continuous endowment in a donation to a non-charitable unincorporated association. Both the common law rule against remoteness of vesting and the rule against perpetual trusts would have reached the same result.[69] But statute has now reformed the rule against remoteness of vesting; while, on the usual view of the law, it has left the rule against perpetual trusts unaltered.[70]

There are now two statutory regimes for remoteness of vesting, differing in their details: one under the Perpetuities and Accumulations Act 1964, and the other Perpetuities and Accumulations Act 2009. Which applies depends on the date of a donation. For the purpose of illustration, we shall assume a donation in the form of a continuous endowment, for an unlimited time, made to a non-charitable unincorporated association *today*. If we apply the traditional rule against perpetual trusts – on the view that there is only a gift to the current members – the gift is void. But if we instead apply the reformed rule against remoteness of vesting – on the view that there is a gift to current and future members – the perpetuity period is the Act's mandated 125 years;[71] the Act confers validity on the gift while we 'wait and see'

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[56] Lynton Tucker, Nicholas le Poidevin, and James Brightwell (eds), *Lewin on Trusts*, (20th edn, Sweet & Maxwell 2020), paras 5.066 and 6.143.

[57] Geraint Thomas and Alastair Hudson, *The Law of Trusts* (2nd edn, OUP 2010), paras 8.103-8.104. (Although doubt is cast on whether this is the only rule that might apply: para 8.107.)

[58] Jamie Glister and James Lee (eds), *Hanbury and Martin Modern Equity* (22nd edn, Sweet & Maxwell 2021), paras 16.018-16.019.

[59] AJ Oakley (ed), *Parker and Mellows: The Modern Law of Trusts* (9th edn, Sweet & Maxwell 2008), paras 7.044-7.045.

[60] Robert Stevens and Warren Barr (eds), *Pearce & Stevens' Trusts and Equitable Obligations* (7th edn, OUP 2018), 291-92.

[61] Gary Watt, *Trusts & Equity* (9th edn, OUP 2020), paras 3.4.6.1-3.4.6.2.

[62] David Hayton, Paul Matthews, and Charles Mitchell (eds), *Underhill and Hayton Law Relating to Trusts and Trustees* (19th edn, LexisNexis 2016), paras 8.179-8.180.

[63] Ben McFarlane and Charles Mitchell (eds), *Hayton and Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies* (14th edn, Sweet & Maxwell 2015), para 7.079.

[64] Paul S Davies and Graham Virgo, *Equity and Trusts: Text, Cases and Materials* (3rd edn, OUP 2019), 304.

[65] Graham Virgo, *The Principles of Equity and Trusts* (4th edn, OUP 2020), 213.

[66] Michael Haley and Lara McMurtry, *Equity and Trusts* (5th edn, Sweet & Maxwell 2020), para 6.45.

[67] Alastair Hudson, *Principles of Equity and Trusts* (Routledge, 2016), 107.

[68] The rule against perpetual trusts is treated as applicable by Jean Warburton, *Unincorporated Associations: Law and Practice* (2nd edn, Sweet & Maxwell 1992), 45-46, and by Nicholas Stewart, Natalie Campbell, and Simon Baughen, *The Law of Unincorporated Associations* (OUP 2011), ch 3, esp paras 3.10 and 3.22. But David Ashton, Paul W Reid, and Ian Snaith (eds), *Ashton & Reid on Clubs and Associations* (3rd edn, Bloomsbury Professional 2020), ch 8, esp para 8.9, seems to treat the rule against remoteness of vesting as applicable, citing with approval *Hayton and Mitchell*, above n 63.

[69] At least on a conventional view of the law. A *possible* distinction was suggested in 'The Rule Against Perpetual Trusts: Part 1 – Trusts for Non-Charitable Purposes' (2021) 35 TLI 149, 156-58: that any *possibility* of remote vesting violated the former rule while it may be that only a *probability* of perpetual duration violates the latter.

[70] However, see below, under the heading, '*Does the common law perpetuity period still apply to donations to non-charitable unincorporated associations under the rule against perpetual trusts?*'

[71] Perpetuities and Accumulations Act 2009, s 5.

whether the association endures that long;[72] and if it does, it appears that under the Act's 'class closing rules' the association members at that date become the outright beneficial owners of the endowment.[73] They could, of course, choose to leave it in the association, and may well be bound to do so by the association's rules: but it would no longer be restricted by the terms of the original gift to being a continuous endowment for future members.

The courts' continued application of the rule against perpetual trusts to donations to non-charitable unincorporated associations in the modern era

The courts have continued to apply the rule against perpetual trusts to continuous endowment elements within donations to non-charitable unincorporated associations right through to today; despite recognition that *beneficiary* trusts are involved, which some would say makes the rule against remoteness of vesting applicable instead. And they have left statutory reform to the rule against remoteness of vesting unmentioned, carrying the implication that the rule against remoteness of vesting is not in issue.

The courts continued to apply the rule against perpetual trusts despite recognition that the property of non-charitable unincorporated associations is held on a beneficiary trust

As the contract/trust holding approach to property holding by non-charitable unincorporated associations emerged into its modern form, the courts appear, from the outset, to have treated the rule against perpetual trusts as still applying to donations to these associations – despite the recognition that they were held on beneficiary trusts. In *Neville v Madden* Cross J said:[74]

> '[I]t may be a gift [is in the contract/trust holding category] … 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.'

This seems clearly a reference to the rule against perpetual trusts; although, unfortunately, it involves an incorrect statement of the rule – reviving the heresy that it is the power to divide rather than expend the capital that is required. In *Re Recher* Brightman J adopted this statement.[75] But his own review of the law provided a measure of correction, also quoting passages from earlier cases indicating that freedom to expend within the association is the relevant test.[76]

The courts continued to apply the rule against perpetual trusts despite statutory reform of the rule against remoteness of vesting

Re Recher was decided after the Perpetuities and Accumulations Act 1964, although the matters in question preceded it, so the Act could have no application. However, a reference to the Act would nevertheless have been appropriate, in passages of the judgment reviewing the general law in the area; but it appears to have been overlooked.

Re Lipinski's Will Trusts[77] involved matters to which the Perpetuities and Accumulations Act 1964 was applicable, if the rule against remoteness of vesting were thought relevant. But the Act was not mentioned and the rule against perpetual trusts was applied

[72] Perpetuities and Accumulations Act 2009, s 7.
[73] Perpetuities and Accumulations Act 2009, s 8.
[74] [1962] Ch 832 (Ch), 849.
[75] [1972] Ch 526 (Ch), 540-41.
[76] [1972] Ch 526 (Ch), 540.
[77] [1976] Ch 235 (Ch).

instead. The testator left property to the Hull Judeans (Maccabi) Association, a small non-charitable unincorporated association operating a Jewish youth club, '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'. Oliver J upheld the gift. He found that there was no stipulation for a continuous endowment: the donor's specific direction for the use of the property was only a non-binding indication of the donor's wishes leaving the association free to use the money as they wished.[78] He treated the rule against perpetual trusts as applicable and followed the correct statement of the rule by the House of Lords in *Re Macaulay*[79] that there is no perpetuity if the association is free to expend the capital of a donation.[80] Here, on his interpretation of the gift, the association was free to spend the money; and free to sell off any building it might choose to purchase and spend the proceeds.

The problematic case of *Re Grant*

Likewise, *Re Grant*[81] was decided after the Perpetuities and Accumulations Act 1964 and the Act was potentially applicable. Once again, however, the Act went unmentioned.[82] Vinelott J, again, seemingly assumed the rule against perpetual trusts continued to apply to donations to non-charitable unincorporated associations – adopting the quotation from Cross J in *Neville v Madden* set out above.[83] Regrettably, Vinelott J applied the error in Cross J's statement as part of his decision – thereby breathing new life into the heresy that it is the power to divide rather than expend capital that is required by the rule against perpetual trusts. Even more regrettably, Vinelott J appeared to some to transmute this misunderstanding of the rule against perpetual trusts into a new free-standing proposition about the validity of gifts to non-charitable unincorporated associations – divorced altogether from the issue of perpetuity – that is now being widely cited.

In *Re Grant*, the testator left property 'for the benefit of the Chertsey Headquarters of the Chertsey and Walton Constituency Labour Party …' An argument that this was a valid gift to the members of the constituency party beneficially, subject to its rules, with an expression of wish – not a trust – that it be used for headquarter purposes was rejected.[84] It was held an invalid non-charitable purpose trust. As part of his reasoning, Vinelott J said:[85]

> 'It must, as I see it, be a necessary characteristic of any gift [on trust for the members of a non-charitable unincorporated association subject to the contract in its rules] that the members of the association can by an appropriate majority (if the rules so provide), or acting unanimously if they do not, alter their rules so as to provide that the funds, or

[78] [1976] Ch 235 (Ch), 243-50.
[79] [1943] Ch 435n (HL), 436.
[80] [1976] Ch 235 (Ch), 245-46. In doing so, he appeared indifferent as to whether he was dealing with a beneficiary trust or a purpose trust: [1976] Ch 235 (Ch), 243-50, saying (250) 'all roads lead to the same conclusion'. (The possible validity of a wide range of non-charitable purpose trusts had recently been suggested by *Re Denley* [1969] 1 Ch 373 (Ch).)
[81] [1980] 1 WLR 360 (Ch).
[82] The judge seemed unmindful of the Act even when dealing with issues *clearly* involving the rule against remoteness of vesting: [1980] 1 WLR 360 (Ch), 368 (when discussing a gift to present *and future* members) and 371 (the final sentence).
[83] Quoted at [1980] 1 WLR 360 (Ch), 365.
[84] Even if there *was* a binding trust stipulation requiring use for headquarter purposes only, this was, in fact, not necessarily problematic: either for the general validity of the trust, which (provided headquarter purposes were sufficiently certain) could be seen as a valid beneficiary trust, with the beneficiaries to be benefited in a particular way, rather than as an invalid non-charitable purpose trust; or from the perspective of the rule against perpetual trusts, which is satisfied despite freedom to spend the trust capital being limited to only certain association purposes. On both points, see the discussion of *Re Price* [1943] Ch 422 (Ch), above n 42.
[85] [1980] 1 WLR 360 (Ch), 368.

> part of them, shall be applied for some new purpose, or even distributed amongst the members for their own benefit.'

He held this test was not satisfied, because the constituency party's rules included no power of division and gave control over their amendment to the national party. The main argument here will be that this statement of the law is simply wrong. However, it should also be pointed out that – assuming this statement of the law is in fact correct – the judge's conclusion seems to have been wrong on his own test. It was true that, by the terms of the constituency party's rules, the national party's control over those rules and their amendment meant that it was practically impossible for the members of the constituency party to divide its property between them while applying the rules. But the judge's stated test includes the words 'or acting unanimously': and the constituency party members could have unanimously agreed to abandon the rules – just as the parties are free to agree to abandon any contract between them – thereby dispensing with the restrictions in the rules.[86] We are therefore left confused as to what *sort* of obstacle to division between the members – supposedly – invalidates a gift. It is tolerably clear that a statement in the rules that the members may not divide the association's property is not seen as invalidating a gift, if the rules give the members a power to amend them.[87] But if the rules do not – and more particularly if they stipulate that a third party holds a power of veto over amendments – it is unclear whether a gift is invalidated, on this approach: *Re Grant* appears to *say* that the possibility of unanimous agreement among the members to abandon the rules – including any third-party veto they contain – overcomes the problem, but to then *decide* that it does not. If the obstacle to division is outside the rules and entirely beyond the control of the members, even acting unanimously – for example, it is in a statutory provision – then presumably as an a fortiori case this would invalidate a gift, on this approach.

The correctness of this part of the judgment will be challenged here first on the basis that Vinelott J was simply purporting to apply the rule against perpetual trusts, as he appears to have been; and then secondly according to the view taken by others that he was instead enunciating a free-standing proposition about the validity of gifts to non-charitable unincorporated associations, unrelated to perpetuity.

The freedom to divide as a requirement of the rule against perpetual trusts

If Vinelott J was simply purporting to apply the rule against perpetual trusts in *Re Grant*, this led to the grotesque result that a donation the association was entirely free to spend, and would doubtless have spent within not many years, was invalidated as a 'perpetual trust'.[88] It was a revival of the error that the rule against perpetual trusts requires freedom to *divide* capital, whereas all it actually requires is freedom to *expend* it. The decision looks inconsistent with that in *Re Ray*.[89] More importantly it is in conflict with the authoritative statement of the law by the House of Lords in *Re Macaulay*,[90] 'Nor again is there a perpetuity if the Society is at

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[86] See further Brian Green, '"Love's Labours Lost": a note on *Re Grant's Will Trusts*' (1980) 43 MLR 459.

[87] See especially *Re Recher* [1972] Ch 526 (Ch), 539 – quoted with approval in *Re Grant* [1980] 1 WLR 360 (Ch), 366-67.

[88] There was a *possible* interpretation of the will (adverted to in passing by Vinelott J at [1980] 1 WLR 360 (Ch), 371) under which there was a violation of the rule against perpetual trusts. The gift to the constituency party was qualified by the words 'provided that [its] headquarters remain in what was the Chertsey Urban District Council Area (1972), if not, I declare that the foregoing provision shall not take effect and in lieu thereof I give all my said estate to the National Labour Party absolutely'. On a natural reading, this proviso imposed a condition as to the location of the headquarters at the date of the testator's death. But if it was interpreted instead as a stipulation that the capital of the gift must be kept intact in case *at any time in the future* the location of the headquarters moved outside the designated area, triggering a gift to the national party instead, that would involve a stipulation for the perpetuitous holding of the capital.

[89] Above n 33.

[90] [1943] Ch 435n (HL), 436 (Lord Buckmaster).

liberty in accordance with the terms of the gift, to spend both capital and income as they think fit …'[91]

Tettenborn saw *Re Grant* as a 'disturbing' statement of the rule against perpetual trusts, given how many associations must have similar rules; and questioned why the rest of the association's funds – such as members' subscriptions – do not equally violate the rule against perpetual trusts.[92]

One final observation on this point. If it is accepted that the proposition in *Re Grant* is merely an aspect of the rule against perpetual trusts – albeit a misunderstanding of that rule – then those textbooks that believe the rule against remoteness of vesting, rather than the rule against perpetual trusts, now applies to continuous endowment aspects of donations to unincorporated associations on trust for the members, could be accused of *inconsistency* when they state the proposition from *Re Grant* as part of the current law.[93]

The freedom to divide as a free-standing requirement

In *Re Grant*, there is a gap of three pages between Vinelott J's initial quotation of Cross J's misstatement of the rule against perpetual trusts in *Neville v Madden* – as requiring association members be free to divide property between themselves – and Vinelott J's own later problematic statement of the requirement of a freedom to divide. This has some to conclude the latter was a free-standing proposition, unconnected with the rule against perpetual trusts.[94]

If the statement in *Re Grant* – that members of a non-charitable unincorporated association must be free to divide its assets between themselves on the contract/trust holding approach – is viewed as a free-standing proposition, independent of the rule against perpetual trusts, we are left with the question, '*Why* must they be free to divide?' Webb and Akkouh pose the question and can see no reason.[95]

Penner seems to interpret *Re Grant* as saying that an inability through affiliation to freely divide an association's property between the members is somehow inconsistent with its being an unincorporated association; but calls this a doubtful proposition, citing authority indicating the contrary – to which others have been added here.[96]

Rickett supports the proposition in *Re Grant* as a free-standing one, seemingly on the basis that, if the members of an association are unable freely to divide its property between

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[91] To the contrary, some limited support for *Re Grant* might allegedly be found in one statement within the judgment of the Privy Council in *Leahy v A-G for New South Wales* [1959] AC 457 (PC). A donation to a non-charitable order of nuns was found to be an unlimited continuous endowment contrary to the rule against perpetual trusts. Viscount Simonds expressed doubt whether the nuns had power to (486) 'put an end to their association and distribute its assets'. But it appears that this was not stated as an application of the rule against perpetual trusts at all: it is in a passage of the judgment where he is ruling out the possibility that the gift was an absolute beneficial one to the individual nuns for their own personal use. In any case, he plainly did not regard the point as decisive, as he said there was no evidence on the matter. And the statement is preceded by a review of the cases (478-85) largely consistent with the freedom to spend – not divide – being the test for the rule against perpetual trusts.

[92] AM Tettenborn, 'Legacies and Local Labour Parties' (1980) 130 NLJ 532, 533. In *Re Grant*, Vinelott J suggested members' subscriptions were in a different position ([1980] 1 WLR 360 (Ch), 374); but this now seems to have been swept away, both by statements of higher authority and by a directly contrary decision – below n 103 and n 112.

[93] Texts cited above at n 62 to n 67. See *Underhill and Hayton*, para 8.181, *Hayton and Mitchell*, para 5.091, *Virgo and Davies*, 308; Virgo's separate textbook, 214-15; and *Hayley and McMurtry* paras 6.37-6.38. However, some of these books, at least, do not appear to see the *Re Grant* proposition as solely related to perpetuity – below n 97.

[94] Lynton Tucker, Nicholas le Poidevin and James Brightwell (eds), *Lewin on Trusts*, (20th edn, Sweet & Maxwell 2020), para 5.066, appears to treat the supposed rule as *both* a free-standing proposition and an aspect of the rule against perpetual trusts within the same paragraph.

[95] Charlie Webb and Tim Akkouh, *Trusts Law* (5th edn, Palgrave 2017), sect 4.13.

[96] JE Penner, *The Law of Trusts* (11th edn, OUP 2019), paras 9.96-9.97, citing *Neville Estates Ltd v Madden* [1962] Ch 832 (Ch), a case of a charitable religious association. See also the category of cases involving non-charitable religious associations adverted to in connection with *Re Ray*, above n 33.

themselves, this *definitionally means* they have no beneficial interest, so that a donation cannot be held on a trust for them as beneficiaries subject to the contract in the rules: it can only be received on a purpose trust.[97] In other words, the inability to divide is inconsistent with beneficial ownership. But, with respect, is it? Suppose A and B, in the expectation of inheriting land as co-owners, agree by covenant with one another not divide it or its proceeds of sale between themselves personally without the consent of a third party, C; but it is stipulated that otherwise A and B are free to do whatever they like with the property towards some project A and B have agreed between themselves to pursue, including selling it and spending the proceeds for these joint purposes. We now have a situation similar to the supposed problem in *Re Grant*. But would anyone dispute that A and B are entitled to their inheritance, and become recognisably beneficial owners of the land? If that is true of two beneficial co-owners, why is it not true of multiple beneficial co-owners in an association?[98]

A seemingly related argument was made by Widdows.[99] Although writing before *Re Grant*, he argued in favour of its approach, suggesting that if the members of an association are unable freely to divide its property between themselves, a donation to the association does not 'vest' in the membership, and there can be no certainty it will ever 'vest', so as to satisfy the rule against remoteness of vesting. This seems to involve a notion of the vesting of beneficial ownership similar to Rickett's and so elicits the same response.

If the freedom to divide is understood as an *ongoing* free-standing requirement throughout an association's life, Luxton suggests this is 'unnecessarily restrictive' causing problems such as stripping associations of the freedom to mortgage their property.[100]

Finally, we now have the authority of the cases mentioned below – including a pronouncement of the Court of Appeal – that the law as laid down in *Re Grant* is indeed a (purported) application of the rule against perpetual trusts rather than a free-standing proposition.

Conclusion on Re Grant

In *Re Grant*, Vinelott J added towards the end of his judgment:[101]

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[97] CEF Rickett, 'Unincorporated Associations and their Dissolution' (1980) 39 CLJ 88, esp 96. A similar view appears to be expressed by David Hayton, Paul Matthews, and Charles Mitchell (eds), *Underhill and Hayton Law Relating to Trusts and Trustees* (19th edn, LexisNexis 2016), para 8.181; and by Ben McFarlane and Charles Mitchell (eds), *Hayton and Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies* (14th edn, Sweet & Maxwell 2015), para 5.091. Paul S Davies and Graham Virgo, *Equity and Trusts: Text, Cases and Materials* (3rd edn, OUP 2019), 308 may tend in the same direction; but cf the apparent link to perpetuity instead in Graham Virgo, *The Principles of Equity and Trusts* (4th edn, OUP 2020), 214.

[98] There was an additional factor that clearly weighed heavily with Vinelott J in *Re Grant* ([1980] 1 WLR 360 (Ch), 374), which could be thought to point against beneficial ownership. Under the constituency party's rules, the national party's control was such that it could – in theory, no matter how unlikely this might be in practice – dictate use of the constituency party's funds: to the point that the national party could compel the constituency party to transfer any of its property to the national party. But again, is that inconsistent with beneficial ownership by the members of the constituency party? If we add to the scenario in the text that A and B also grant C an option to purchase the land for a nominal amount during their period of ownership, so that a third party effectively has a standing right to demand a transfer of the property, again would anyone dispute that A and B are beneficial owners in the meantime? Beneficiaries are often liable to have trust property taken from them – by creditors, divorcing spouses, the tax authorities, etc – but they nevertheless do have a beneficial interest. In *Re Ray*, n 33, the gift to the convent was seen as valid despite the Bishop's apparent power under its constitution to demand the convent's property and to veto any change to the constitution removing this power.

[99] Kelvin Widdows, 'Trusts in Favour of Associations and Societies, *Re Lipinski's Will*' (1977) 41 Conv 179, esp 184.

[100] Peter Luxton, 'Gifts to Clubs: Contract-Holding is Trumps' [2007] Conv 274, 280.

[101] [1980] 1 WLR 360 (Ch), 374 – quoting Brightman J in *Re Recher* [1972] Ch 526 (Ch), 536.

> 'It would astonish a layman to be told there was a difficulty in his giving a legacy to an unincorporated non-charitable society which he had, or could have, supported without trouble during his lifetime.'

Frankly, the reasoning and decision in *Re Grant* perplexes this lawyer…[102]

The cases since *Re Grant*

The cases since *Re Grant* follow the same pattern. They treat the rule against perpetual trusts as still applicable to continuous endowment elements within donations to non-charitable unincorporated associations – rather than the rule against remoteness of vesting – despite modern recognition that beneficiary trusts are involved. The Perpetuities and Accumulations Act 1964 is unmentioned, even in cases where, given the timing of the matters in question, the Act should have applied, if the rule against remoteness of vesting were thought to be in issue. The supposed rule in *Re Grant* – that members of the association must be free to divide a donation between themselves – is stated; usually with explicit recognition that this is a (purported) application of the rule against perpetual trusts, as opposed to being a free-standing proposition. And this supposed rule is even taken to the bizarre extreme of saying, and indeed deciding in one case, that if the members are not free to divide, even *membership subscriptions* are received on an invalid perpetual trust.

In *News Group Newspapers Ltd v SOGAT 1982*,[103] local branches and chapels of a trade union were found to be unincorporated associations, validly holding their own local assets separately from the national union's assets, with the unrestricted freedom to dissolve and divide their assets between the members. The Court of Appeal treated the rule against perpetual trusts as applicable. The proposition in *Re Grant*, requiring members be free to divide assets, was accepted and linked back to being an issue under the rule against perpetual trusts, rather than a free-standing proposition.[104] And the case shows that, despite the contrary view of Vinelott J in Re *Grant*,[105] logically the proposition must apply to members' subscriptions, not just outside donations; since members' subscriptions were all that the proposition was applied to in *News Group v SOGAT* – although the test being satisfied, nothing was invalidated as a consequence. By focusing on the freedom to divide, rather than expend, the court was, of course, applying the *wrong* test for the rule against perpetual trusts. That is, obviously, a strong thing to say about a Court of Appeal decision; but two judges specifically adverted to their lack of a Chancery background,[106] with the third also coming from a common law background,[107] and we have the higher authority of the House of Lords as to the correct test.[108] The court did not refer to the Perpetuities and Accumulations Act 1964. However, little can be read into this regarding whether the rule against remoteness of vesting or the rule against perpetual trusts is applicable in modern times to payments to non-charitable unincorporated associations involving an element of continuous endowment – *because no element of continuous endowment was involved in the case*. The fact that the rule against perpetual trusts was thought

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[102] Vinelott J's quotation was itself inapt: Brightman J originally said this as a reason to uphold gifts, whereas Vinelott J used it as apparent vindication for striking one down. (And this inapt use has been repeated by others.) It is pure speculation, but it may be that Vinelott J was happy to find a reason to invalidate the gift. It has been observed that 'Mr. Grant … clearly did not want his blood relations to benefit from his estate…' (GA Schindler, '*Re Grant's Will Trusts*' (note) [1980] Conv 80, 82). It is not clear from the reports that Wilson Phelps Grant had any *close* relatives. But such relatives and dependants are now better protected from the neglect of testators by the Inheritance (Provision for Family and Dependants) Act 1975.

[103] [1986] ICR 716 (CA).

[104] [1986] ICR 716 (CA), 721 (Lawton LJ) and 727 (Glidewell LJ).

[105] [1980] 1 WLR 360 (Ch), 374.

[106] [1986] ICR 716 (CA), 724 (Lloyd LJ) and 726 (Glidewell LJ).

[107] Lawton LJ.

[108] Above, n 40.

to be relevant to such a case helps to demonstrate what an outlandish interpretation of that rule *Re Grant* involves.

Re Horley Town[109] involved a declaration of trust by a donor dating from before the application of the Perpetuities and Accumulations Act 1964 in favour of a non-charitable unincorporated association. Any element of continuous endowment was limited to the common law perpetuity period by a royal lives clause. As already mentioned, Lawrence Collins J indicated that the rule against remoteness of vesting applied to the initial vesting in the association; and thereafter later members' interests arose from conferral of membership by the association rather than the terms of the declaration of trust.[110] By inference, only the rule against perpetual trusts could therefore be applicable to any element of continuous endowment. The judge also accepted the requirement stated in *Re Grant* that the members must be free to divide assets (without indicating whether or not he viewed it as linked to perpetuity) but found the requirement was satisfied on the facts – despite the conferral of outside voting rights.[111] If we assume – as the authorities indicate – that the requirement in *Re Grant* is a (purported) application of the rule against perpetual trusts, the fact that it was apparently thought potentially capable of invalidating a donation despite *a specific limitation to the perpetuity period* again serves to illustrate what an unacceptable statement of that rule the *Re Grant* requirement involves.

Re St Andrew's (Cheam) Lawn Tennis Club Trust[112] also dealt with matters dating from before the application of the Perpetuities and Accumulations Act 1964. Land was sold at an undervalue to a non-charitable unincorporated association, a tennis club associated with a church, and conveyed to trustees independent of the club on the terms of an invalid declaration of trust.[113] Arnold J decided, correctly, that the element of gift from the vendor in the cut-price sale was therefore held on a resulting trust for the vendor's estate. But Arnold J also decided, with respect incorrectly, that this resulting trust for the vendor's estate included the value contributed by the club through its payment of the reduced purchase price. His basic reasoning was that,[114] it could not be the property of the club – held on trust for the members subject to the contract between them in its rules – because under (what were assumed to be) the club's rules, on its termination its property fell under the control of the church; and the rules could only be changed with the consent of the church. In effect, he applied the law as stated in *Re Grant* (although that case was not cited to the judge: he relied instead on the passage quoted in *Re Grant* from *Neville v Madden* that equates the inability of members to divide a donation to an association with a perpetual trust). The judge inappropriately treated the association's funds raised from membership subscriptions as 'gifts' to it and effectively classified them as invalid perpetual trusts.[115] So, the extraordinary decision does seem to have been inadvertently reached

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[109] [2006] EWHC 2386 (Ch), [2006] WTLR 1817.
[110] Above, n 50 and n 53.
[111] [2006] EWHC 2386 (Ch), [2006] WTLR 1817, [116]-[117].
[112] [2012] EWHC 1040 (Ch), [2012] 1 WLR 3487.
[113] Although invalid not simply as a perpetual trust for the club to play tennis as is sometimes suggested based on Arnold J's statement ([45]) 'the trust deed is an attempt to achieve the legally impossible: a perpetual trust for a non-charitable purpose, namely to enable the members of the club to play tennis'. The deed aimed at this result, but through the framework of a declaration of trust that was stated to be for a range of problematic objects: see esp at paras [46]-[51] of the judgment, where 'the real problem' is identified.
[114] [2012] EWHC 1040 (Ch), [2012] 1 WLR 3487, [57]-[63].
[115] Some of the purchase price came from loans made to the club being written off, which could be seen as outside 'gifts' from the lenders intended to be on the terms of the invalid trust declaration: but any resulting trust should then be for those lenders not the vendor. And some of the price came from fund-raising sales: such proceeds are usually seen as the property of an association's members – the customer got what they paid for under a contract and has no further rights to the property. Some would prefer to see such payments as, in reality, 'gifts': but, again, then any resulting trust would be for the payer, not the vendor of the land; and there is the possibility the payer would be said to have abandoned the property as bona vacantia.

(in a somewhat complex scenario), that – if we misunderstand the rule against perpetual trusts as requiring freedom to divide rather than freedom to expend – the members' inability freely to divide their association's assets between themselves will mean that *any* contribution, even the subscriptions of its members, *is* paid to the association on an invalid perpetual trust. Regarding the decision in the case, surely no perpetuity issue can arise from a resulting trust interest arising immediately in favour of such a club's membership because a declaration of trust fails from the outset, with the club membership entirely free to then expend the property as it wishes.

In *Panton v Brophy*,[116] an outside trustee was found to have been holding a lease on trust for the members of a non-charitable unincorporated association as beneficiaries, subject to the contract between them formed by the rules of the association. The association's rules provided: 'The income and property of the Club … shall be applied solely towards promotion of the objects of the Club. No portion of them shall be transferred directly or indirectly to members.' Without the benefit of full argument,[117] Master Clark rejected a suggestion that a violation of the rule against perpetual trusts was involved.[118] That rule was stated as laid down in *Re Grant* (although again that case was not mentioned, the misstatement of the law it had taken from *Neville v Madden* being cited instead). The decision was not based on the ground that the members had power to vary the rule laying down there could be no division of the association's assets between the members. Instead, the basic reasoning was that some non-charitable unincorporated associations may be outward-looking, conferring no personal benefits on their members, yet can validly receive property under the contract/trust holding analysis[119] – with the implication that personal benefit cannot be an essential ingredient. This involves paying lip service to the proposition in *Re Grant*, but then not applying it for a reason that, in effect, means it should never apply. It would, of course, be more straightforward to simply say the proposition in *Re Grant* is just wrong. The Perpetuities and Accumulations Act 1964 was not referred to. However, again, little can be read into this regarding whether the rule against remoteness of vesting or the rule against perpetual trusts is applicable in modern times to payments to non-charitable unincorporated associations involving an element of continuous endowment – *because no element of continuous endowment was involved in the case*. Once again, we have the strange spectacle that – based on the proposition enunciated in *Re Grant* – the rule against perpetual trusts was thought to be in issue in such a case.

In *Gibbons v Smith*,[120] land had been held by trustees of a now dissolved non-charitable unincorporated association.[121] The Perpetuities and Accumulations Act 1964 was potentially applicable, if the rule against remoteness of vesting were thought to be involved, but was not mentioned. Roth J applied the rule against perpetual trusts; stating the law as laid down in *Re Grant* (although again that case was not mentioned, the misstatement of the law it had taken from *Neville v Madden* being applied instead) with the supposed test that the members must be free to divide the assets being held satisfied.[122]

It is quite clear, therefore, that the courts are still treating the rule against perpetual trusts as applicable to continuous endowment elements within donations to non-charitable unincorporated associations.

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[116] [2019] EWHC 1534 (Ch), [2019] L&TR 24.
[117] [2019] EWHC 1534 (Ch), [2019] L&TR 24, [31].
[118] [2019] EWHC 1534 (Ch), [2019] L&TR 24, [89].
[119] Although the association in the case was not of this sort: it was a rowing club.
[120] [2020] EWHC 1727 (Ch), [2020] WTLR 947.
[121] Despite citation of dicta from *Re Denley* [1969] 1 Ch 373 (Ch) about purpose trusts, the declared non-charitable trusts to provide (primarily) recreational facilities for members of the club, founded for railway workers, was ultimately held to be a trust for the members as beneficiaries subject to the contract between them: [2020] EWHC 1727 (Ch), [2020] WTLR 947, [56].
[122] [2020] EWHC 1727 (Ch), [2020] WTLR 947, [56]-[57].

Does the common law perpetuity period still apply to donations to non-charitable unincorporated associations when applying the rule against perpetual trusts?

We explored previously the possibility that, for the purposes of the rule against perpetual trusts, the common law perpetuity period no longer applies today to declarations of non-charitable purpose trusts – trusts of imperfect obligation – because the rule against perpetual trusts *always* cross-refers to the current perpetuity period applicable to the rule against remoteness of vesting.[123] The case for saying it no longer applies to donations for non-charitable unincorporated associations is stronger. As mentioned, both the Perpetuities and Accumulations Act 1964[124] and the Perpetuities and Accumulations Act 2009[125] expressly purported to leave the rule against perpetual trusts untouched by statutory reform to the rule against remoteness of vesting. But they both provided for this by saying (basically) that the Acts should not affect 'the rule of law' that limits the duration of non-charitable *purpose* trusts. The statutes appear to have overlooked that, with the emergence of the contract/trust-holding approach, the rule against perpetual trusts now applied to *beneficiary* trusts in the case of donations to non-charitable unincorporated associations. Accordingly, it is perfectly possible to argue that for a donation to a non-charitable unincorporated association today, the perpetuity period for the rule against perpetual trusts is 125 years[126] – either on the basis of the suggestion made previously that the rule against perpetual trusts always cross-refers to the current perpetuity period applicable to the rule against remoteness of vesting; or on the alternative basis that the literal wording of the 2009 Act extended the 125-year period to the context of associations, because its provision supposedly preserving the rule against perpetual trusts was unwittingly worded so as to preserve that rule's operation only in the context of purpose trusts and not beneficiary trusts.[127]

Assuming the intention was to leave the rule against perpetual trusts wholly unaffected by the reforms to perpetuity periods in those Acts, it seems we would have to read the provisions in the Acts as meaning that the Acts should not affect 'the rule of law' limiting the duration of non-charitable purpose trusts – *that is, the rule against perpetual trusts, wherever that rule applies, including in the case of beneficiary trusts for non-charitable unincorporated associations*. Or, we have to understand 'purpose trusts' as including, in this particular context, beneficiary trusts for non-charitable unincorporated associations, *where the beneficiaries are to be benefited by purposes stipulated in the rules of the association*. Neither is very elegant, but some reading of this sort would be needed to conclude that the rule against perpetual trusts remains governed by the common law perpetuity period in all contexts, including that of associations.

However, again, there is no evidence of a positive Parliamentary intention to keep in place the common law perpetuity period here. There was simply an assumption by the Law Commission that it probably applied; and a conscious decision not to review its merits –

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[123] 'The Rule Against Perpetual Trusts: Part 1 – Trusts for Non-Charitable Purposes' (2021) 35 TLI 149, 155-56.
[124] Perpetuities and Accumulations Act 1964, s15(4).
[125] Perpetuities and Accumulations Act 2009, s 18.
[126] Perpetuities and Accumulations Act 2009, s 5.
[127] Paul Matthews, 'The New Trust: Obligations Without Rights?' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (OUP 1996), 12, interpreted the similar wording of the 1964 Act in this way. (His further view (17) that the 1964 Act's 'class closing' provisions would also apply for the purposes of the rule against perpetual trusts – and seemingly also its 'wait and see' provisions – does not appear, with respect, justified by the wording of that Act. Likewise the 2009 Act.)

including in relation to associations.[128] The 125-year period could legitimately be understood to apply to gifts made today.

How should the law approach continuous endowments for non-charitable unincorporated associations today?

The courts still see the rule against perpetual trusts as applicable to donations to non-charitable unincorporated associations. If this is correct, the best the courts can do toward upholding such gifts when they stipulate for a continuous endowment is to view, in a gift made today, the permitted period as 125 years.[129] And – as suggested previously in relation to trusts of imperfect obligation[130] – to understand the law as saying that an endowment is only invalid if it will probably (rather than possibly) exceed the period.[131] And to adopt Sheridan's suggestion that a limitation to the period should be implied where no greater maximum period is stated;[132] although, unfortunately, as with trusts of imperfect obligation, in the specific context of donations to non-charitable unincorporated associations this once again looks inconsistent with a line of cases.[133] Again, it could be urged that Sheridan's argument was not considered in those cases – but this looks a bold argument. An approach combining these three elements would validate the vast majority of such endowments – given the probable future lifespan of most associations. But some gifts would fail.

However, the courts do have the alternative of saying that the modern cases treating the rule against perpetual trusts as continuing to apply to elements of continuous endowment in donations to non-charitable unincorporated associations are per incuriam – views taken in the absence of argument or consideration to the contrary. These donations involve beneficiary trusts, which can be understood as involving a stipulation for a succession of future contingent interests for members. And if this interpretation is adopted, it means that in principle the rule against remoteness of vesting applies, rather than the rule against perpetual trusts. So that, for a gift made today, the perpetuity period is 125 years;[134] the gift is valid while we 'wait and see' whether the association endures that long;[135] and if it does, it seems that under the 'class closing rules' the association members at that date become the outright beneficial owners of the endowment[136] – although it will usually remain association property under the contract in its

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[128] 'The Rule Against Perpetual Trusts: Part 1 – Trusts for Non-Charitable Purposes' (2021) 35 TLI 149, 155-56. To complete one of the quotations there, Law Commission, *Rules against Perpetuities and Excessive Accumulations* (Law Com No 251, 1998) para 1.14 (note omitted, emphasis added): 'any consideration of the rule against inalienability belongs more properly in a review of the law governing non-charitable purpose trusts *and unincorporated associations*. It was therefore expressly excluded from the Consultation Paper'.

[129] Perpetuities and Accumulations Act 2009, s 5 – applicable despite s 18, for reasons explained above.

[130] 'The Rule Against Perpetual Trusts: Part 1 – Trusts for Non-Charitable Purposes' (2021) 35 TLI 149, 156-58.

[131] There seems to be nothing in the case law to support this suggestion in the specific context of donations to non-charitable unincorporated associations, to add to what was found in relation to trusts of imperfect obligation. It would perhaps be reading too much into *Re Wightwick's Will Trusts* [1950] Ch 260 (Ch) to try to claim support from the case, but it is at least consistent with the suggestion made. A testatrix left an endowment to a non-charitable anti-vivisection society to continue until vivisection was universally outlawed. Wynn-Parry J held this invalid under the rule against perpetual trusts, but not by simply pointing to a possibility the endowment might last beyond the common law perpetuity period. He said rather (265): '…it appears to me that it can be no overstatement to say that it tends to a perpetuity, because it is hardly possible to imagine that the court could ever be satisfied, on evidence, that the condition on which the payment is to determine had been satisfied.'

[132] LA Sheridan, 'Trusts for Non-Charitable Purposes' (1955) 17 Conv 46, 54-55.

[133] *Re Clark's Trust* (1875) 1 Ch D 497 (Ch), *Re Sheraton's Trusts* [1884] WN 174 (Ch), *Re Swain* (1908) 99 LT 604 (Ch), *Re Clifford* (1911) 81 LJ Ch 220 (Ch) (the relevant gift is omitted from [1912] 1 Ch 29), *Re Patten* [1929] 2 Ch 276 (Ch), *Re Jones* (1929) 45 TLR 259 (Ch), *Re Macaulay's Estate* [1943] Ch 435n (HL), *Leahy v A-G for New South Wales* [1959] AC 457 (PC).

[134] Perpetuities and Accumulations Act 2009, s 5.

[135] Perpetuities and Accumulations Act 2009, s 7.

[136] Perpetuities and Accumulations Act 2009, s 8.

rules, despite being freed from any obligation to retain it as a continuous endowment by the terms of the gift.

The latter alternative is more benign. Although if the courts are inclined to treat stipulations as to use – including those directing retention of capital – as merely non-binding indications of wishes, the choice between the two alternatives may be less significant than appears.[137] But there must be a limit to how far the courts will go in finding clearly expressed stipulations by donors to be non-binding.

There is a very large and diverse range of non-charitable unincorporated associations. Some are doubtless worthier than others. But taking them as a whole, given their overall social value, are there reasons today for the law not to take a generous approach here?

Conclusions

The courts – and many commentators – regard the rule against perpetual trusts as limiting the duration of continuous endowment donations to non-charitable unincorporated associations. Certainly the rule was applied to these historically. If it continues to apply, it could be viewed as operating in a liberalised manner today: in a gift made now, the permitted period could be seen as 125 years; the endowment could be seen as invalid only if it will probably (rather than possibly) exceed the period; and – albeit only with considerable stretching of the authorities – a limitation to the period could be implied in where no greater maximum period is stated.

But there is a case for saying the rule against perpetual trusts no longer applies to such donations in the modern law, despite the courts' assumption that it does. Instead, arguably, the rule against remoteness of vesting is the appropriate rule to apply to any element of continuous endowment. The reasoning would be that, with the growing recognition since the 1960s that the general funds of such associations are beneficiary trusts rather than purpose trusts – held by the property-holding officers on trust for the members subject to the contract between them in the association's rules – continuous endowment donations should be understood as a gift to a class including a sequence of future members, each given an interest in the property contingent upon becoming a member of the association and on retaining membership; making application of the rule against remoteness of vesting appropriate. The arguments for and against this analysis seem evenly balanced as a matter of principle. It is equally possible to say that such a donation contains no stipulation for gifts to future members: there is merely an expectation that there will be future members, and those future members acquire their interest in the association's assets through the association's conferral of membership rather than the terms of the donor's gift; making the continued application of the rule against perpetual trusts appropriate. Applying the rule against remoteness of vesting, rather than the rule against perpetual trusts, would validate more gifts. For a donation made today, the perpetuity period would be 125 years; the gift would be valid while we 'wait and see' whether the association endures that long; and if it does, seemingly under the 'class closing rules' the association members at that date would become the outright beneficial owners of the endowment.

Whatever the conclusion on that point, the requirement laid down in *Re Gant*, that a non-charitable unincorporated association can only validly receive a donation if the association members are free to divide it between themselves personally – which has been extended in the cases, somewhat unnoticed, to also include any receipt, such as a membership subscription – should not be regarded as representing the law. In its origins, this was a misinterpretation of the rule against perpetual trusts. That rule, properly understood, including on House of Lords authority, required only that the terms of a donation left an association free to *expend* the capital within the perpetuity period, rather than *divide* it. And if the *Re Grant* requirement is today

[137] Above n 49.

understood instead as a free-standing proposition, unrelated to the rule against perpetual trusts, it has no apparent justification.

Postscript

I have used the name the 'rule against perpetual trusts' throughout these two articles, rather than the admittedly more common name the 'rule against inalienability'. I explained in the first article my reasons for believing it is the better name and I stand by them. But, on reflection, it is perhaps too much to ask lawyers to abandon established terminology. However, if the 'rule against inalienability' is to continue in use, it is desirable to identify a way in which the name can fully make sense – something seemingly not currently articulated anywhere. To justify the name, I would suggest that it needs to be explained and understood that, in this context, the word 'inalienability' is being used in a *different sense* from the conventional sense in which that word is used in the 'rule against restraints on alienability' – where it means alienation of property to a *new owner*. What those who prefer the name the 'rule against inalienability' must be taken to mean is that the trust fund cannot be alienated to *any other use*, because it is bound by the trust for too long a period – even if all of its constituent elements are freely alienable to *other owners* while executing the trust: the trust capital can be sold off to new owners and replaced with other trust investments; and the trust income can be paid to new owners in the course of expenditure on performance of the trust. However, I remain of the view that the 'rule against perpetual trusts' is the better name: to make clear the duration of the trust obligation is the core issue and to avoid confusion over what is intended by 'inalienability'.