Trusts of imperfect obligation

Article

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Abstract

This article seeks to briefly examine what is known about the so-called 'trusts of imperfect obligation'—valid non-charitable purpose trusts for monuments, animals, and (probably) religious ceremonies. In particular, it considers the suggestions sometimes made that the 'Pettingall order' provides an enforcement mechanism for them, or that they are really 'powers' misclassified as 'trusts'.

Introduction

By way of exception to the general rule against non-charitable purpose trusts, an established line of cases shows trusts can validly be created for a limited range of non-charitable purposes. These exceptional situations are usually called the 'trusts of imperfect obligation':[1] there is recognised to be a trust obligation, but with no one to enforce it. We have only a few lines from judgments to help us understand the *nature* of these trusts of imperfect obligation. This note will attempt to briefly elucidate what we know.

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Non-charitable purposes for which trusts of imperfect obligation can be created

The Court of Appeal accepted there is a list of purposes for which trusts of imperfect obligation may be created, in *Re Endacott*.[2] There appear to be up to three surviving categories—each of which needs its boundary with charitable trusts carefully delineated.

(1) to pay for building funeral/ memorial monuments; and caring for graves or associated monuments

Trusts are permitted for the purposes of paying for a memorial monument

Trusts are permitted for the purposes of paying for a memorial monument for oneself—for example, *Trimmer v Danby*[3] where a trust in the artist JMW Turner's will to build a monument to him in St Paul's Cathedral was upheld.[4] Likewise paying for a memorial monument for another—for example, *Musset v Bingle*[5] where a testator's trust to build a monument to his wife's first husband was upheld.[6] Also paying for tending graves and associated monuments: one's own—for

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1. Walter G Hart, 'What is a Trust?' (1899) LQR 294, 302.
2. [1960] Ch 232 (CA), 246-47.
3. (1856) 25 LJ Ch 424.
4. Also, *Makeham v Hooper* (1792) 4 Bro CC 153, 29 ER 826; *Limbrey v Gurr* (1821) 6 Madd 151, 56 ER 1049; *Mellick v President and Guardians of the Asylum* (1821) Jac 180, 37 ER 818; *Adnam v Cole* (1843) 6 Beav 353, 49 ER 862. In *Adnam v Cole* a trust for 'such a monument to my memory, as my trustees shall think fit' appears to have been executed by building a memorial chapel—but the decision was that the trustees had spent excessively given the overall terms of the will. Today, it seems clear that a direction for erection of a memorial *building* would not be seen as within the scope of these valid trusts of imperfect obligation: *Re Porter* [1925] Ch 746 (Ch).
5. [1876] WN 170 (Ch).
6. Also, *Masters v Masters* (1718) 1 P Wms 421, 24 ER 454; *Makeham v Hooper* (1792) 4 Bro CC 153, 29 ER 826. In *Re Jones* (1898) 79 LT 154 (Ch) it was assumed a testator's direction to build a monument on private land to the philosopher John Locke was a valid trust.

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example, *Lloyd v Lloyd*[7] where a testator's trust for the maintenance of his own tomb was held upheld[8]—or another's—for example, *Re Hooper*[9] where a testator's trust for the care and upkeep of family graves, monuments, and a vault was upheld. (But it seems that funding the building of public monuments to revered figures, and presumably their maintenance, is charitable;[10] and paying for the maintenance of any memorial within a church or similar place of worship is charitable.)[11]

A deceased's personal representatives have a common law right and duty to pay the deceased's funeral expenses, to the extent of the deceased's estate.[12] The expenses must be reasonable in all the circumstances, which may extend to a tombstone.[13] But it has been observed:[14]

> [T]he decided cases [on trusts of imperfect obligation] go much further than funeral expenses. [*Footnote*:] And, moreover, funeral expenses take priority of creditors. It has never even been suggested that a testator can prefer the glory of his own memory to the payment of his debts.

(2) to pay for the care of specific animals

Trusts are permitted for the purpose of paying for maintenance of one's pets or other particular animals

Trusts are permitted for the purpose of paying for maintenance of one's pets or other particular animals—for example, *Re Dean*[15] where a testator's trust for the maintenance of his horses and hounds was upheld.[16] (But paying for the care of animals in general, rather than specific animals, is charitable.)[17]

(3) a probable category: to pay for performance of private religious ceremonies for souls

Trusts appear to be permitted for the purpose of paying for religious ceremonies for souls to be performed in private

Trusts appear to be permitted for the purpose of paying for religious ceremonies for souls to be performed in private, and it has been judicially assumed these are non-charitable. In *Re Hetherington*,[18] Browne-Wilkinson V-C left open the question whether a trust for *private* masses, which he considered would not be charitable, would nevertheless be a valid trust, saying of *Bourne v Keane*:[19]

> [The decision of the House of Lords in *Bourne v Keane* that trusts to pay for masses were valid] might have been

7. (1852) 2 Sim NS 255, 61 ER 338.
8. Also, *Pirbright v Salwey* [1896] WN 86 (Ch), where the trust upheld included providing flowers.
9. [1932] 1 Ch 38 (Ch).
10. Charities Act 2011, s 3(1)(f), the advancement of heritage. In *Murray v Thomas* [1937] 4 All ER 545 (Ch), 550, Clauson J said, obiter, that paying for a war memorial would be charitable. This itself perhaps better fits within the advancement of citizenship under Charities Act 2011, s 3(1)(e), as a public exemplar of the sacrifice of the fallen; but presumably a similar approach would apply to public monuments to worthy individuals. Note that in *Trimmer v Danby*, above, n 3, the settlor paying for a public monument to himself was held non-charitable, despite the fact that he was a celebrated artist: a private egotistical purpose was presumably believed to be involved. Whereas the suggestion in *Murray v Thomas*, above, that a local community collecting for a war memorial would be charitable was made despite the obvious fact that probably a number of those contributing would be commemorating lost loved ones: a public purpose was presumably thought to be involved. See *Re King* [1923] 1 Ch 243 (Ch) showing the 'motive' for creating a charitable trust—as distinct from the trust's 'objects'—need not be charitable: it can be the personal motive of commemorating a loved one.
11. Charities Act 2011, s 3(1)(c), the advancement of religion; *Hoare v Osborne* (1866) LR 1 Eq 585 (Ch). The case law creates a distinction between a trust to build a personal monument to oneself or another in a place of religious worship, which is not charitable, because for private purposes, *Trimmer v Danby*, above, n 3; and a trust to maintain it once built, which is charitable, because it is accepted to be for the public purpose of maintaining that place of religious worship and thereby advancing religion, *Hoare v Osborne*, above.
12. *Rees v Hughes* [1946] KB 517 (CA), 524–25, 528.
13. *Goldstein v Salvation Army Assurance Society* [1917] 2 KB 291 (DC).
14. DC Potter, 'Trusts for Non-Charitable Purposes' (1949) 13 Conv (NS) 418, 422.
15. (1889) 41 Ch D 552 (Ch).
16. Also, *Pettingall v Pettingall* (1842) 11 LJ Ch 176; *Mitford v Reynolds* (1848) 16 Sim 105, 60 ER 812; *Re Howard, The Times* 30 October 1908 (Ch); *Re Haines, The Times* 7 November 1952 (Ch).
17. Charities Act 2011, s 3(1)(k), the advancement of animal welfare; *Re Grove-Grady* [1929] 1 Ch 557 (CA).
18. [1990] Ch 1 (Ch), 9. A testatrix's trusts to pay for masses to be said for the repose of her own and her family's souls were held valid charitable trusts, because it was decided the trusts should be presumed to be for *public* masses.
19. [1919] AC 815 (HL).

> reached either on the basis that a trust for Masses is a valid charitable trust or on the basis that a trust for Masses is one of that anomalous class of cases where a trust for a non-charitable purpose is valid: see the discussion in *Morris and Leach on Perpetuities*, 2nd ed. (1962), p. 307 *et seq.*

However, it has been questioned academically whether these might in fact be charitable trusts.[20] (But this case law demonstrates clearly that paying for public—rather than private—religious ceremonies is charitable.)[21]

This is a closed list of 'anomalous' categories

The categories mentioned constitute a closed list of situations where non-charitable purpose trusts may be created

Re Endacott, above, made clear the categories mentioned constitute a closed list of situations where non-charitable purpose trusts may be created: only the kinds of purpose upheld in past cases will be upheld in future trusts; the past cases were 'anomalous' and the anomaly should not grow. So, in that case the testator's trust for 'some useful memorial to myself' was invalid because a 'useful' memorial could be many things. Lord Evershed MR said:[22]

> [I]n my judgment, the scope of these cases (and I can call them anomalous because they have been so called both in the book of Mr. Morris and Professor Barton Leach[23] and in the course of the argument) ought not to be extended. So to do would be to validate almost limitless heads of non-charitable trusts, even though they were not (strictly speaking) public trusts, so long only as the question of perpetuities did not arise; and, in my judgment, that result would be out of harmony with the principles of our law . . . [This trust] would go far beyond any fair analogy to any of those decisions.

Can they only be created by will?

It seems that all the anomalous cases upholding non-charitable purpose trusts involved declarations by will. The approach in *Re Endacott* (above), that a non-charitable purpose trust declared today must fall clearly within the past precedents to be valid, may therefore mean that these trusts can only be created by will, like in the past cases, not inter vivos. No case seems to have expressly ruled they can only be created by will,[24] but some writers have assumed it.[25] The point is probably of little practical importance: it is unlikely a settlor would declare such a trust inter vivos—there are better ways of achieving these purposes while alive.

The trust must comply with the rule against perpetual trusts

A trust of a type that is permitted to exist as a non-charitable purpose trust will only be valid if its duration complies with the rule against perpetual trusts.[26]

Reason these trusts are valid

They are 'policy driven exceptions validated because ordinary people expect them to be valid'.

The best explanation as to why these categories of trust are accepted, despite the law's general rejection of non-charitable purpose trusts, appears to be that they are 'policy driven exceptions validated because ordinary

20. Jamie Glister and James Lee (eds), *Hanbury and Martin Modern Equity* (22nd edn, Sweet & Maxwell 2021) para 16-012: 'Even where the masses are said in private, the trust is arguably charitable on the basis that public benefit can be found in the endowment of the priesthood.' (And see CEF Rickett, 'An Anti-Roman Catholic Bias in the Law of Charity?' [1990] Conv 34, esp 40–43.)

21. Charities Act 2011, s 3(1)(c), the advancement of religion.

22. [1960] Ch 232 (CA), 246–47.

23. JHC Morris and W Barton Leach, *The Rule Against Perpetuities* (2nd edn, Stevens & Sons 1962).

24. In *Re Astor's Settlement Trusts* [1952] Ch 534 (Ch), 547, Roxburgh J did describe them, obiter, as 'a group of cases relating to horses and dogs, graves and monuments - *matters arising under wills* and intimately connected with the deceased . . .' (emphasis added).

25. For example, Graham Virgo, *The Principles of Equity and Trusts* (4th edn, OUP 2020) sect 7.2.2 puts these trusts under the heading, '*Testamentary Trusts of Imperfect Obligation*', saying, 'There are some exceptional cases in which non-charitable purpose trusts created by wills have been recognized as valid.' The fullest discussion seems to be AJ Oakley (ed), *Parker and Mellows: The Modern Law of Trusts* (9th edn, Sweet & Maxwell 2008), para 3.094. A distinguishing feature of testamentary trusts is, of course, that it is certain 'the settlor could not re-settle the property' if returned under a resulting trust on failure of the declared trust: Alastair Hudson, *Principles of Equity and Trusts* (2nd edn, Routledge 2021), para 4.2.6.

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

people expect them to be valid'.[27] And it has been suggested that,[28] in contrast to these modest matters, it was the grandiosity of settlors' later designs that led the courts to be unwilling to expand the recognition of these valid trusts of imperfect obligation to include schemes such as those in the line of modern cases starting with *Re Astor's Settlement Trusts*, where Roxburgh J said:[29]

> [I]t is not possible to contemplate with equanimity the creation of large funds devoted to non-charitable purposes which no court and no department of state can control, or in the case of maladministration reform.[30]

The nature of trusts of imperfect obligation

In *Trimmer v Danby*,[31] where JMW Turner directed his executors to use a sum to build a monument to him in St Paul's Cathedral 'among those of my brothers in art', which they were willing to do, Kindersley V-C held:[32]

> I do not suppose that there would be any one who could compel the executors to carry out this bequest and raise the monument; but if . . . the trustees insist upon the trust being executed, my opinion is that this Court is bound to see it is carried out.

In the absence of anyone with standing to sue for this, the court will not order performance by the trustee.

So, the position seems to be this. In the absence of a beneficiary, there is no one with an interest able to seek enforcement of the trust; and in the absence of anyone with standing to sue for this, the court will not order performance by the trustee. It can be inferred that if the nominated trustee is unwilling to perform the trust, the court will equally not take the usual step of replacing the trustee in order to ensure 'A trust does not fail for lack of a trustee'.[33] It is treated as purely a matter of choice for the nominated trustee whether to carry out the trust.[34] If the nominated trustee chooses not to carry out the trust, the trust has failed, and the inevitable outcome is a resulting trust.[35] However, if the nominated trustee does choose to carry out the trust, the judge said in the passage quoted above 'this Court is bound to see it is carried out'. It is unclear how far the court will go in this direction. Will it now make positive interventions to ensure the trust is carried out—which would be odd, the court having previously indicated it would not take steps to secure performance of the trust—or will it make purely negative interventions to ensure the trustee does not pocket the money, and that it goes on the resulting trust if the trustee does not carry out the trust?

The 'Pettingall order'

Where the trustee professes to the court willingness to perform the trust, the court makes a 'Pettingall order': from the case of *Pettingall*

27. Martin Dixon, personal communication cited in Mark Pawlowski and Jo Summers, 'Private Purpose Trusts – A Reform Proposal' [2007] Conv 440, 446. A modest survey indicating contemporary use of all the recognised categories of non-charitable purpose trust was reported by James Brown, 'What Are We to do with Testamentary Trusts of Imperfect Obligation?' [2007] Conv 148.

28. Roger BM Cotterrell, 'Some Sociological Aspects of the Controversy Around the Legal Validity of Private Purpose Trusts' in Stephen Goldstein (ed), *Equity and Contemporary Legal Developments* (Hebrew University of Jerusalem 1992).

29. [1952] Ch 534 (Ch), 542.

30. Jonathan Garton, Rebecca Probert, and Gerry Bean (eds) *Moffat's Trusts Law: Text and Materials* (7th edn, CUP 2020), 222, characterise donors' proposed projects into the modern era as involving 'a perceptible shift . . . towards purposes more contentious (*Bowman v Secular Society Ltd* [atheism: [1917] AC 406 (HL)]), more abstract (*Re Astor* [international relations and the press: [1952] Ch 534 (Ch)]) and more eccentric (*Re Shaw* [new alphabet: [1957] 1 WLR 729 (Ch)]) . . .'

31. (1856) 25 LJ Ch 424.

32. (1856) 25 LJ Ch 424, 427.

33. JG Riddall, *The Law of Trusts* (6th edn, Butterworths 2002), 221, sees it as the likely inference that this usual approach would not be followed. (For the usual approach, see *Mallott v Wilson* [1903] 2 Ch 494 (Ch), inter vivos trusts; *Re Smirthwaite's Trusts* (1871) LR 11 Eq 251 (Ct Ch), trusts by will. There is an exception where the settlor intended participation of the nominated trustee to be essential: *Re Lysaght* [1966] Ch 191 (Ch).)

34. In the case of a normal trust, if the named trustee is dead—rather than unwilling to act—their personal representative takes over the trust in their place; and they can under Trustee Act 1925, s 36, secure appointment of a replacement trustee. If the trustee named to carry out a trust of imperfect obligation is dead, presumably their personal representative stands in their place and has the same choice whether or not to carry out the trust; or to secure appointment of a replacement trustee, who then has the same choice whether or not to carry out the trust.

35. *Re Shaw* [1957] 1 WLR 729 (Ch), 745; *Re Endacott* [1960] Ch 232 (CA), 246. In the case of a testamentary trust, the resulting trust is for those entitled to that part of the estate on the failure of the trust: those, if any, given the residue of the estate; or those entitled under the statutory intestacy rules otherwise.

v Pettingall,[36] applied in *Re Thompson*.[37] The court ordered the property be released to the trustee, but on the condition of receiving an undertaking from the trustee to carry out the trust, and ordered that if it was not performed those entitled to the property on failure of the trust had liberty to apply to the court.[38] The courts did not indicate what those entitled to the property on failure of the trust had liberty to apply for and this has led to diametrically opposed interpretations of the order: that they can apply for the enforcement of the declared trust[39] or that they can apply saying that trust has failed and claiming the property under a resulting trust.[40]

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They might be inclined to apply for either. They might sentimentally want the settlor's wishes honoured, or even support the carrying out of the declared trust on its merits (they might at least want Great Uncle Walt's will respected, or even believe it a thoroughly good thing that a monument to Great Aunt Lulu be erected). Or, they might want to claim the property for themselves under a resulting trust (they might see Walt's declared trust as a monumental waste of £10,000—pun intended—which they would rather have in their bank accounts).

But what would a court be prepared to give them? If the court recognised no jurisdiction to order the carrying out of the trust previously, presumably it still has no such jurisdiction. Its power would be to punish the trustee for failing to abide by the undertaking given: and it would seem inconsistent for the court to use this power in a coercive manner calculated to indirectly secure what it pronounced previously it would not directly order—performance of the trust. So, it would appear to be simply a matter of admonishing or punishing the trustee for wasting everyone's time. The property itself would now presumably be seen as held on resulting trust.

An enforcement mechanism?

The view is sometimes expressed that the Pettingall order provides an enforcement mechanism for these trusts of imperfect obligation—a solution to there being no beneficiary to enforce the trust.[41] But this appears not to be the case. First, there will invariably be no such order in place. Personal representatives will aim to administer a settlor's estate without resort to litigation. Going to court to obtain such an order would be a wholly exceptional situation, certainly not the norm. Secondly, although the order may secure a trustee's undertaking to observe the trust, this appears to add nothing in terms of enforceability: for the reasons given above, it appears that the trust was and remains one the court will not

36. (1842) 11 LJ Ch 176.

37. [1934] Ch 342 (Ch). In that case, a trust for the non-charitable purpose of 'the promotion and furthering of fox-hunting' was upheld. Today, the case is generally regarded as irrelevant to the issue of which non-charitable purposes a trust can validly be declared for; because fox-hunting, in the traditional sense doubtless intended by the testator, is now illegal. This must be correct, given the approach in *Re Endacott* (above, n 22) that valid non-charitable purpose trusts are anomalous and the past precedents should not be extended—otherwise, *Re Thompson* might reasonably be seen as authority for a wider proposition, that non-charitable trusts can be validly created for promoting and furthering *other things*. Moreover, *Re Thompson* looked like an aberration anyway. The other valid trusts of imperfect obligation can be rationalised as involving arrangements around death—monuments, provision for pets, religious ceremonies—described as 'concessions to human weakness or sentiment' by Roxburgh J in *Re Astor* [1952] Ch 534 (Ch), 547, quoting Sir Arthur Underhill. But as JHC Morris and W Barton Leach, *The Rule Against Perpetuities* (2nd edn, Stevens & Sons 1962), 218–19, observed, '[*Re Thompson*] cannot be supported as . . . a concession to human weakness or sentiment (since persons who engage in fox-hunting are not conspicuous for either of these qualities).'

38. In *Pettingall* (1842) 11 LJ Ch 176, 177, liberty to apply was given in general terms to all parties; whereas the order in *Re Thompson* [1934] Ch 342 (Ch), 344, was 'in case the legacy should be applied . . . otherwise than towards the [purpose], the residuary legatees are to be at liberty to apply'. The former seems preferable. The latter does not obviously cover *non-application* of the property by the trustee. Prolonged non-application, without good excuse, should be seen as a failure of the trust; and even short-term non-application in the case of a trust to maintain animals. There might also be a surplus to claim on completion, or other failure, of the trust.

39. Either because they have standing to seek enforcement of the trust itself (OR Marshall, 'The Failure of the Astor Trust' (1953) 6 CLP 151, esp 154); or because they have standing to seek enforcement of the undertaking given by the trustee to carry out the trust (Graham Virgo, *The Principles of Equity and Trusts* (4th edn, OUP 2020), 206). There was some loosely-worded encouragement of the view that they could seek enforcement of the declared trust in the case law: *Re Astor* [1952] Ch 534 (Ch), 546; *Re Endacott* [1960] Ch 232 (CA), 246.

40. 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 5.008.

41. Even judicially—see the 'loosely-worded' dicta above, n 39.

order to be performed. The consequence of breach of the undertaking seems to be that the declared trust is regarded as having failed and the court will enforce a resulting trust instead. Thirdly, even if—which seems unlikely—the attitude of the courts on breach of the trustee's undertaking were instead to be to then seek to secure performance of the trust, those entitled to the property on failure of the trust, with liberty to draw the court's attention to the breach, would have no financial incentive to do so if it was with a view to pursuing performance of the trust rather than claiming the property for themselves under a resulting trust—nothing to gain—although they might (as acknowledged above) sometimes have sentimental reasons to do so. Fourthly, those entitled to the property on failure of the trust, and therefore to apply, might be unascertainable anyway;[42] or, indeed, they might even happen to be the trustee(s). Finally, if this really is a viable enforcement mechanism, then why does it only validate the recognised trusts of imperfect obligation and not *all* non-charitable purpose trusts; given the key reason these trusts fail is said to be simply the absence of an enforcement mechanism?

The truth appears to be that what secures the performance of these trusts is the honesty and decency of trustees. Insofar as the law is involved at all, it is the deterrent effect of the criminal law of property offences, underpinning that general honesty and decency, that can take credit as the 'enforcement mechanism' here[43]—and animal neglect offences, in the case of trusts for animals. So, in response to the question, 'Who is there to enforce trusts of imperfect obligation?' the best answer may be 'The police, of course . . .'. This is obviously an imperfect 'enforcement mechanism'[44]—but it appears to be the best the law has. In other words, the civil law of trusts operates in a wider legal context, including the criminal law: and this should inform our evaluation of the risks of non-performance posed by private trusts lacking a beneficiary to enforce them.

In response to the question, 'Who is there to enforce trusts of imperfect obligation?' the best answer may be 'The police, of course . . .'.

Are these really powers misclassified as trusts?

It has been suggested that these trusts of imperfect obligation are, in fact, powers of appointment—appointing to purposes rather than persons—that have been incorrectly called 'trusts': they are powers because the trustee may choose to pursue the purpose, but there is no one able to enforce any obligation to do so.[45] There is an element of truth to this; but ultimately it is not a persuasive classification.

Powers held by fiduciaries also have duties attached

It has been pointed out that,[46] a fiduciary holding a power also owes duties: fiduciary duties. That is, to give consideration to exercise of the power, and to exercise it—or not—according to the intention with which it was created.[47] In the case of a power for a person, these duties are enforceable by the object of the power, who can complain about an improper failure to consider or exercise it.[48] In the case of a power for a purpose, there would be no one to enforce the fiduciary duties owed to the object of the power.[49] So, by calling these trusts of imperfect

42. Although beneficiary trusts might similarly have only unascertainable beneficiaries notionally available to enforce them, of course.
43. LH Leigh, 'Trusts of Imperfect Obligation' (1955) 18 MLR 120, 136.
44. With only possible punishment for keeping the property on non-performance and with no consequences for defective performance: the police will not be interested if the trustee builds Great Aunt Lulu's monument in entirely the wrong cemetery.
45. RE Megarry, '*Re Astor*' (1952) 68 LQR 449 (note), esp 450–51.
46. Lionel Smith, 'Understanding the Power' in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart 2004), 71–72.
47. *McPhail v Doulton* [1971] AC 424 (HL), 449.
48. And the person who takes the property in default of exercise of the power can complain about an improper positive exercise of it.
49. It is possible to confer on a trustee a merely personal power that does not carry fiduciary duties; but that is not the usual position—a power given to a trustee is presumed to be virtute officii ('by virtue of the office'): *Re Smith* [1904] 1 Ch 139, esp 144, and Lynton Tucker, Nicholas le Poidevin, and James Brightwell (eds), *Lewin on Trusts* (20th edn, Sweet & Maxwell 2020), paras 28.020 and 28.065.

obligation 'powers' instead, we do not solve the problem that there is no one able to enforce the duties involved: we simply move the problem along a little. (Indeed, on one view of the law, the duties—with no one to enforce them—could be *practically the same* in the case of a power as they would be for a trust: because the logical outcome of saying that consideration must be given by a fiduciary to exercise of a power, and it must be exercised—or not—according to the intention with which it was created, is that if the settlor indicated very clearly that a power was to be exercised, for example in a letter of wishes, there is then, in effect, a duty to *exercise* the power, not merely appropriately consider its exercise. And authority can be cited supporting this logical outcome: apparently stating that trustees *are* sometimes under a duty to exercise a power they have been given.)[50]

A sense of duty in the trustee was intended

Furthermore, there are convincing reasons for continuing to say that trusts of imperfect obligation are 'trusts'. Gardner explains:[51]

> *There are convincing reasons for continuing to say that trusts of imperfect obligation are 'trusts'*

> In the hands of compliant trustees . . . an unenforceable trust is not only an intelligible concept; but also one distinct from other concepts such as a power, a moral obligation, and absolute ownership. Telling such trustees that they had any of these would create different effects on their minds, and thus in their behaviour, from telling them that they had a trust. A power would signify that it was for them to choose whether to carry out the object in question or not . . . but compliant trustees regard their legal duties as such and try to perform them properly, irrespective of their enforceability. As most trustees seem to be compliant, this observation can properly persuade us to regard trusts without legally enforceable duties as nonetheless legal institutions.

Other trusts have been recognised despite there being no one to enforce them

It can be added that the courts have in another context—at least historically and as the result of statute—seemingly recognised there *can* be a 'trust' despite there being no beneficiary with a legal right to enforce it, so that the trustee has the option whether or not to carry it out. That is, where land was transferred to a trustee, but the settlor's declaration of trust in favour of a beneficiary failed to comply with the statutory formalities required for a declaration of trust over land. The outcome was said to be an unenforceable 'trust', which the trustee could choose to carry out.[52]

Is a power for a purpose possible anyway?

We have assumed that it is possible to create a power of appointment for a purpose rather than a person. But it should be noted that this is, in itself, not wholly free from doubt.[53] And, if it is possible, then as suggested above, this could lead to powers *that there is effectively a duty to exercise*—but with no one to enforce the duty—indistinguishable in this respect from unenforceable duties to carry out non-charitable purpose trusts that the courts have generally refused to uphold.

50. *Brown v Higgs* (1803) 8 Ves 561, 32 ER 473 (affd (1813) 18 Ves Jun 192, 34 ER 290).
51. Simon Gardner, *An Introduction to the Law of Trusts* (3rd edn, OUP 2011), 234 (note omitted).
52. See generally David Wilde, 'Formalities for Declaring Trusts of Land' [2021] Conv 264.
53. In *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164, a power was apparently treated by the House of Lords as being validly for a non-charitable purpose: to loan money for a property purchase by the borrower. See Lord Hoffmann delivering the leading judgment, [13] and [16]; and Lord Millett delivering the other substantial judgment on this point, [101]. James Penner, 'Lord Millett's Analysis' in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart 2004) says that (57), based on the analysis in *Twinsectra*, 'the validity of *Quistclose* trusts is itself proof that powers [of appointment] for abstract purposes are valid in English law' (despite his own analysis that the 'power' in the case was merely a personal authorisation). But it can be argued this was instead a power for a person, to be benefited in a particular way: through the purchase of property on his behalf by way of a loan to him. Similarly, the other authority usually cited to show there can be a power of appointment for a purpose, *Re Douglas* (1886) 35 Ch D 472 (CA), involved a power to appoint to organisations pursuing purposes, which could be seen as a power for persons not purposes—given the way that unincorporated associations are now understood to hold their property. Likewise, *Re Wootton* [1968] 1 WLR 681 (Ch), although there are wider dicta in the case (688). JG Riddall, *The Law of Trusts* (6th edn, Butterworths 2002) argues *Re Clarke* [1923] 2 Ch 407 (Ch) decided powers for non-charitable purposes are invalid. But this case can be read as saying that only powers for *uncertain* purposes are invalid. Smith, above n 46, suggested a power could not be held by a fiduciary for a non-charitable purpose because there would be no one to enforce the fiduciary duties.

Conclusions

The trusts of imperfect obligation are indeed an anomaly—an understandable concession to the desire to make arrangements around death. There is a 'trust', but with no one to enforce it; even where a 'Pettingall order' has been made. The trustee can choose whether or not to carry out the declared trust; and if they choose not to, there is a resulting trust instead. But, on balance, it seems wrong to suggest the arrangement is therefore a 'power' rather than a 'trust'. The settlor intended a *duty*—it was a *trust* in the pre-legal sense of the word. It would send the wrong signal to call it a power. And this is not the only situation where the law appears to have recognised a 'trust' with no one able to enforce it. Our ultimate conclusion has to be the obvious one that, for those who wish to create trusts of imperfect obligation—a trust with no one to enforce it—selection of the trustee is especially important: the reliability of the person the settlor entrusts with their affairs.

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