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The nature of beneficiaries' rights—can there be a trust to observe a licence over property?

David Wilde*

Abstract

This article considers the nature of a trust beneficiary's rights. Specifically, it challenges a body of academic opinion that suggests it is not possible for a trust to exist where the only benefit conferred by the trust's terms on its beneficiary is that the trustee must observe a licence for the beneficiary to use the trust property, given that a licence is only a personal right not a property interest.

If a 'trust' for a beneficiary is to be recognised by the law, what sort of right must the trust's terms confer on its beneficiary? That fundamental question arises from the issue addressed here. A body of academic opinion has emerged suggesting that it is not possible for a trust to exist where the only benefit conferred by the trust's terms on its beneficiary is that the trustee must observe a licence for the beneficiary to use the trust property. This article will suggest, to the contrary, that such a trust is perfectly possible.

A body of academic opinion has emerged suggesting that it is not possible for a trust to exist where the only benefit conferred by the trust's terms on its beneficiary is that the trustee must observe a licence for the beneficiary to use the trust property

It is clear that there can be a public, charitable trust to observe a licence for the public to use property.[1] But the sole concern here is private trusts for beneficiaries. (Although the question does immediately suggest itself: if there can be charitable trusts to observe licences for the public, what is problematic about private trusts to observe licences for beneficiaries?)

The argument that there cannot be a trust to observe a licence for a beneficiary

The view that there cannot be a trust to observe a licence for a beneficiary has appeared principally in response to the views of the Court of Appeal in *Ashburn Anstalt v Arnold*,[2] that where a landowner grants a contractual licence to a licensee and later sells the property to a purchaser who agrees to honour the licence, the purchaser can be bound by a constructive trust to give effect to the licensee's right, given that it would be unconscionable not to. The main focus of critics is that there are better mechanisms to resolve such a

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1. *Re Hadden* [1932] 1 Ch 133 (Ch). And some would maintain there is authority that a non-charitable purpose trust can exist for the purpose of observing a licence to use property for people who have standing to enforce the trust but are not beneficiaries: *Re Denley's Trust Deed* [1969] 1 Ch 373 (Ch). This is an arguable position, but it will be suggested below that this is not the best view of the law.

2. [1989] Ch 1 (CA) (overruled on other grounds by *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386 (HL)). Fox LJ, delivering the judgment of the Court of Appeal, obiter, called (23) 'a legitimate application of the doctrine of constructive trusts' earlier obiter dicta of Lord Denning MR in *Binions v Evans* [1972] Ch 359 (CA) 368–69.

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scenario than a constructive trust—about which nothing will be said here.[3] When critics add that a doctrinal line is being crossed in the law of trusts—there simply cannot be a trust to observe a licence for a beneficiary—it has the air of an afterthought: a point to bolster the main argument.

What precisely is the alleged doctrinal error here? The position of the critics appears to be this. The traditional basic definition of a trust is one where we speak of the trustee as the 'legal owner' and the beneficiary as the 'equitable owner'. Perhaps the most widely cited description of the core of a trust is that of Lord Lindley delivering the judgment in *Hardoon v Belilios*[4]: 'All that is necessary to establish the relation of trustee and cestui que trust is to prove that the legal title was in [one person] and the equitable title in [another].' Accordingly, it seems the beneficiary must be entitled to a definable beneficial proprietary interest in the trust assets. Basically, an entitlement to receive a distribution of income or capital from the trust, although this right may be postponed, contingent, or defeasible, and the beneficiary will often enjoy their interest by using the trust assets in specie rather than taking receipts—for example, occupying land rather than receiving rents from it.[5] Therefore, if a beneficiary is only entitled to receive a licence to use trust assets from the execution of a trust, which is a merely personal right—a permission given by one person to another—that is allegedly inconsistent with our concept of a trust. A succinct statement of this view is[6]:

> In truth . . . a *trust*, properly so-called, is not involved at all: the phrase "constructive trust" is not used in this context to reflect the conferral of a (proprietary) beneficial interest on the third party, but is used merely as a label which is not indicative of the substance of the remedy.[7]

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The counter-argument has to be that, overall the law of trusts is too complex to allow the entire range of beneficiary trusts to be fully comprehended within such conventional descriptions. Or, to quote Hackney,[8] 'Some judges have been so taken up with the proprietary model of the express private trust that

3. Except to observe that if the law is to find a trust, there is a question as to why it is being classified as a constructive trust rather than an express trust, at least where there is signed writing to satisfy Law of Property Act 1925, s 53(1)(b): CT Emery and B Smythe, 'The Imposition of Trusts by "Subject to" Clauses' (1983) 133 NLJ 798, 798–99.

4. [1901] AC 118 (PC) 123.

5. All would, of course, agree that discretionary trusts are different, in the sense that entitlements then depend on the trustees exercising their discretion in favour of *potential* beneficiaries.

6. Ying Khai Liew, *Rationalising Constructive Trusts* (Hart 2017) 339 (note omitted—see also 351–52). See further (limiting citation to books—where relevant journal articles can be found): William Swadling, 'Property: General Principles' in Andrew Burrows (ed), *English Private Law* (3rd edn, OUP 2013) paras 4.123–4.128, and also 'The Proprietary Effect of a Hire of Goods' in Norman Palmer and Ewan McKendrick (eds), *Interests in Goods* (2nd edn, LLP 1998) 492–513—cited with apparent agreement in Charlie Webb and Tim Akkouh, *Trusts Law* (5th edn, Palgrave 2017) 217; Nicholas Hopkins, *The Informal Acquisition of Rights in Land* (Sweet & Maxwell 2000) ch 4, esp 57–58; 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 3.048; Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Land Law Text, Cases, and Materials* (4th edn, OUP 2018) 230; Stuart Bridge, Elizabeth Cooke and Martin Dixon (eds), *Megarry & Wade: The Law of Real Property* (9th edn, Sweet & Maxwell 2019), para 10.023; Martin George and Antonia Layard (eds), *Thompson's Modern Land Law* (7th edn, OUP 2019) para 15.3.2.6.

7. More complex is criticism in Simon Gardner and Emily MacKenzie, *An Introduction to Land Law* (4th edn, Hart 2015) para 9.2.2, although it ultimately seems to resolve itself into the same point. The footnotes include: '[If a landowner constructive trustee shares differentiated occupation rights with the licensee beneficiary] the conventional wisdom is that where two or more people have trust rights entitling them to benefit from the asset simultaneously, the benefit must remain a single package to be enjoyed on a shared basis (ie on the basis of "unity of possession"). That is to say, the benefit may not be divided . . . so as to give the different people different pieces of it.' Unity of possession describes the necessary relationship between co-owners—at common law and in equity—subject to overlay by the Trusts of Land and Appointment of Trustees Act 1996. It does not describe a necessary relationship between an owner and a licensee. The supposition therefore again appears to be that a trust *must* involve a beneficial proprietary interest; so that we are necessarily dealing with beneficial co-ownership of a kind thought to be problematic. (Simon Gardner, 'Reliance-Based Constructive Trusts' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010) 89–90, appears to confirm this reading.) Simon Gardner, *An Introduction to the Law of Trusts* (3rd edn, OUP 2011) para 18.1 is to similar effect. His additional, second reason there for saying the trust description is inaccurate goes to the appropriateness of a trusts approach, rather than adding anything regarding the possibility of a trust to observe a licence in principle.

8. Jeffrey Hackney, *Understanding Equity and Trusts* (Fontana 1987) 28.

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they have tended to undersell, if not to miss, the richness of the trust model.'

A contrary view

Smith is more open-minded about constructive trusts to observe licences, in his insightful book[9] (although concerned about the consequences of such a constructive trust for *subsequent* purchasers). He says[10]: 'One generally expects beneficial rights under trusts to be of a proprietary nature. Unfortunately, the law of trusts is not so straightforward.'[11]

Case law supports trusts to observe licences for beneficiaries

The authority of these cases might be challenged, but it seems that express trusts to observe licences for beneficiaries have long been recognised by the courts. Moreover, they are routinely created, in popular demand, and serve a socially valuable purpose. A common situation is the deceased owner of a home creating by will a trust over it conferring a 'right of residence', typically on a surviving partner for their life, which can have the effect of creating a trust to observe a licence.[12] In *Re Gibbons*,[13] the Court of Appeal recognised a distinction established by the case law, depending on the interpretation of the will, between such a trust conferring a life interest—a recognised property right—and conferring instead a mere right to reside—a licence. At least some wills have been treated as creating merely trusts to observe licences. So, in *Parker v Parker*[14] Kindersley V-C specifically held a testator's trust giving his sons a right to reside for life did not confer a life interest, only (in effect) a licence. In *May v May*,[15] Fry J specifically held a right of residence for life granted by a testator under a trust for his widow was a 'licence' not a 'life estate'. In *Re Anderson*,[16] Sargant J specifically found a right to reside for life granted by a testator under a trust for his widow to be a 'licence' and no more. In *Morss v Morss*,[17] the Court of Appeal endorsed *Re Anderson* as 'a clear statement of the law'[18] and 'the true approach'.[19] In *Shanks v IRC*,[20] Russell LJ countenanced a right of residence trust might confer a 'purely personal right'.[21] His judgment was later approved by the House of Lords in *IRC v Miller*.[22] *Re Goddard*[23] contains a recent suggestion that common modern practice in wills is to intentionally confer only a right to reside, not a life interest. Practitioner works specifically advise about creating trusts with a right of residence *only*—a trust to observe a licence—and provide appropriate precedents.[24]

9. Roger J Smith, *Property Law* (10th edn, Pearson 2020) 498–500.
10. ibid 499.
11. Smith continues (ibid, notes omitted), 'It is possible to set up purpose trusts and discretionary trusts, at least so long as there are identifiable human beneficiaries.' While the point is valid, we have already set aside charitable purpose trusts and discretionary trusts as exceptional situations; while non-charitable purpose trust are recognised to be 'anomalous' (*Re Endacott* [1960] Ch 232 (CA), 246, Lord Evershed MR, delivering the leading judgment). Smith continues, 'Take a trust under which the trustees have power to provide for the education of B, a beneficiary. It is difficult to define B's interest in terms of conventional interests such as a fee simple or life interest.' Presumably a power *combined with a duty* is to be understood here, not simply a 'power'—the object of a 'power', without more, has no interest. But the situation where there is a duty is illuminating: it is developed in illustration below. Smith continues, 'Closer to our present context, it may be possible to create a trust to enable a person to reside in a house, without creating a life interest.' An important point that we turn to immediately.
12. Another frequent scenario, which should be distinguished, is where partners are equitable tenants in common of a shared home. One dies and by will leaves their half undivided share in the property on trust for adult children, subject to a right of residence for the surviving partner for life. Here the right of residence does *not* confer a licence: the surviving partner already has a right to occupy as owner of the other half undivided share. The intended effect of the right of residence is instead to remove from the children's inherited undivided half share any right to occupy, or demand an occupation rent from the partner, or sell during the partner's lifetime.
13. [1920] 1 Ch 372 (CA).
14. (1863) 1 New Rep 508.
15. (1881) 44 LT 412 (Ch) 413.
16. [1920] 1 Ch 175 (Ch) 180.
17. [1972] Fam 264 (CA). The pronouncement was obiter: the case concerned a consent order, rather than a trust, to observe a licence.
18. ibid 275 (Davies LJ).
19. ibid 278 (Megaw LJ).
20. [1929] 1 KB 342 (CA) 363–64.
21. But held that occupation enjoyed pursuant to it would nevertheless be taxable, despite the appearance of the word 'property' in the statutory charging provisions.
22. [1930] AC 222 (HL;S) 233 (Lords Buckmaster and Blanesburgh) and 239 (Lord Warrington).
23. [2020] EWHC 988 (Ch), esp [56] and [58].
24. For example, see RFD Barlow, RA Wallington, SL Meadway and JAD MacDougald (eds), *Williams on Wills* (10th edn, LexisNexis 2014) vol 2, ch B8, esp at para 208.20—headed '*Whether to provide a life interest or only a right to reside*'.

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It seems that express trusts to observe licences for beneficiaries have long been recognised by the courts

There has been academic support for the view that life rights of residence sometimes confer only licences.[25] But also academic rejection,[26] based on a statement by Vinelott J in *Ungurian v Lesnoff*[27] that, 'A person with a right to reside in an estate during his or her life, or for a period determinable on some earlier event, has a life or a determinable life interest as the case may be . . .'. However, the only authority cited for this assertion, *Re Boyer's Settled Estates*,[28] does not substantiate it; indeed that was a decision of Sargant J, who held there was merely a licence for life in *Re Anderson*.[29] Even if the assertion were correct, it would be something of a Pyrrhic victory to slash through the existing case law with the trusty sword of doctrinal purity, just to insist that the cases all involved life interests—when a personal right of residence as stipulated in some of the cases would have to be a 'life interest' stripped of its most proprietary aspects such as the ability to assign the interest or to rent out the property, and left looking indistinguishable from a licence. And this could not explain all right of residence trusts: for example, a right of residence for my son until he reaches the age of 25, with the property then to be sold and the proceeds distributed to others, cannot be explained away as a life interest.

Beyond right of residence trusts, additional support for the view there can be trusts to observe licences for beneficiaries is found in the decision in *Re Denley's Trust Deed*.[30] Land was declared to be held on trust (limited within the perpetuity period) 'for the purpose of a recreation or sports ground' for the employees of a company, numbering several hundred. Under the terms of the trust, the employees were (subject to any regulations made by the trustees) said to be entitled to the use and enjoyment of the land. This was held to be a valid trust. At times, Goff J seemed to regard it as a type of valid non-charitable purpose trust,[31] but at other times he seemed to regard it as a beneficiary trust instead.[32] There is some weak judicial support for this being a purpose trust.[33] But in *Re Grant's Will Trusts*,[34] Vinelott J stated the better view: '[*Re Denley*] on a proper analysis . . . falls altogether outside the categories of . . . purpose trusts.' He expressly added that he saw no difficulty about a beneficiary trust simply to observe a permission to use land.[35] *Re Denley* was, therefore, seemingly a conventional beneficiary trust—albeit for a large number of beneficiaries—and, with the support of *Re Grant*, also helps to show there can be a beneficiary trust to observe a licence to use trust assets. Commenting on *Re Denley* at the time, Davies observed,[36] 'Neither in theory nor in practice need private trusts be confined to beneficial interests of a stereotyped form.' And writing later, Lord Millett (albeit before judicial appointment) saw no difficulty with *Re Denley*—which he specifically classified as a beneficiary trust—being a trust to observe a licence.[37]

25. JA Hornby, 'Tenancy for Life or Licence' (1977) 93 LQR 561.
26. Jonathan Hill, 'The Settled Land Act 1925: Unresolved Problems' (1991) 107 LQR 596, 598.
27. [1990] Ch 206 (Ch) 226.
28. [1916] 2 Ch 404 (Ch).
29. Above n 16.
30. [1969] 1 Ch 373 (Ch). The case also endorses the right of residence trusts. Goff J used as an example (388): '[A] trust to permit a number of persons – for example, all the unmarried children of a testator or settlor – to use or occupy a house or to have the use of certain chattels; . . . no one would suggest, I fancy, that such a trust would be void.'
31. Esp at 383–86.
32. Esp from the bottom of 386.
33. *Re Lipinski's Will Trusts* [1976] Ch 235 (Ch). In an unclear judgment, Oliver J made some statements indicating *Re Denley* involved upholding non-charitable purpose trusts and purporting to follow this approach. But these appear to be only unhelpful obiter dicta, given the decision in *Re Lipinski* related to property seemingly held on trust for beneficiaries, an unincorporated association, subject to the contract between them, not on a purpose trust; and it was specifically about a stipulated purpose that could be disregarded rather than being binding. (*Gibbons v Smith* [2020] EWHC 1727 (Ch) tends to confirm this view.)
34. [1980] 1 WLR 360 (Ch) 370.
35. ibid 370–71.
36. JD Davies, 'Trusts, Purposes and Powers' (1968) ASCL 437, 438.
37. PJ Millett, 'The *Quistclose* Trust: Who Can Enforce It?' (1985) 101 LQR 269, 280–82.

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Beyond right of residence trusts, additional support for the view there can be trusts to observe licences for beneficiaries is found in the decision in Re Denley's Trust Deed

The apparent nature of beneficiaries' rights is consistent with trusts to observe licences

Turning to a consideration of whether trusts to observe licences for beneficiaries can be justified in principle. There seems to be nothing unacceptable about a trust where the benefit to be conferred on the beneficiary is only a personal right against the trust assets, such as a licence to use them, rather than a definable beneficial proprietary interest in the trust assets.

Execution of trusts often confers only personal rights on beneficiaries

It should be noted that, even where a beneficiary has a recognisable beneficial proprietary interest in the trust assets (for example, a life interest conferring a right to income), *in practice* it is routine for beneficiaries to receive only personal rights from the execution of such trusts. Trust payments to beneficiaries are regularly made by transfer into the beneficiary's bank account. The credit balance in a bank account is simply a personal right: arising from a contractual agreement with the bank.[38] And the rights under an ordinary bank account are invariably non-assignable by the terms of the account: although there is, of course, the right to instruct the bank to make payments and transfers from the funds in it. We (justifiably) attach the label 'personal property' to the chose in action constituted by a credit balance in a bank account: but the fact is that, analytically, we are dealing with a non-assignable personal right—indistinguishable in those characteristics from a licence to use property. It could be said that payment by bank transfer is simply a matter of practical convenience: in principle the trust gives a right to legal tender—notes and coins. But the fact that only non-assignable personal rights are regularly conferred *in practice* to execute trusts should make us question whether there is anything inherently wrong with trusts that *specify* conferring only rights of this nature. And if the terms of a trust, or the standard terms and conditions of an institutional trustee engaged by a settlor, specifically stipulated for payment to the beneficiary by bank transfer, is it seriously suggested there would no longer be a recognisable trust, because it was now a trust to confer only a personal right?[39] Designations such as 'personal right' and 'property right' can be useful analytical tools: but they are our servants, not our masters—they should not dictate to us what kinds of trusts can be created.

It should be noted that, even where a beneficiary has a recognisable beneficial proprietary interest in the trust assets (for example, a life interest conferring a right to income), in practice it is routine for beneficiaries to receive only personal rights from the execution of such trusts

Trusts can exist where beneficiaries have no recognisable beneficial proprietary interests

It seems it is entirely possible to create trusts where the beneficiary has no recognisable beneficial proprietary interest in the trust assets. Trusts can provide for payment for a beneficiary to receive services, or for payment of a beneficiary's liabilities. The beneficiary may be relieved of the burden of paying for these things personally, and therefore enjoy an increase in net wealth similar to the effect of receiving property. But no property is to be received directly or indirectly from the trust. The beneficiary's only entitlement is that the trust

38. In *Foskett v McKeown* [2001] 1 AC 102 (HL), Lord Millett, delivering the leading judgment, said (127–28): 'We speak of money at the bank, and of money passing into and out of a bank account. But of course the account holder has no money at the bank. Money paid into a bank account belongs legally and beneficially to the bank and not to the account holder . . . There is merely a single debt of an amount equal to the final balance standing to the credit of the account holder.'

39. My own occupational pension trust fund provides: 'Pensions are payable only to a pensioner's bank account, or in such other manner as the trustee company thinks fit. . .' (*Rules of Universities Superannuation Scheme*, rule 34.2, as at 30 March 2020). Presumably at least some of the academics who argue that trust terms cannot confer only personal rights are also members.

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assets be expended for the beneficiary's good: and an entitlement that property be expended for one's good is not a property right. For example, consider the common type of trust in *Re Osoba*,[40] 'for the training of my daughter ... up to university grade'. Such a trust is liable to be executed by paying for the beneficiary to receive services: paying her university fees. Or by discharging an existing liability of the beneficiary: paying off her student loan. The beneficiary would then receive no property directly or indirectly from the trust. In fact, in *Re Osoba* the daughter's education was completed and the Court of Appeal held she was nevertheless entitled to the trust fund: the reference to paying for her education was interpreted as merely the motive for an outright testamentary gift, rather than a limitation restricting what she was entitled to. But had the settlor's intention been interpreted so as to limit the daughter's benefit to spending on her education, she would have been entitled only to that expenditure.[41] What recognised beneficial proprietary interest in the trust assets does that involve? There is, it is suggested, no property we can call her equitable owner of. It is recognised that a beneficiary in such a position has no beneficial interest capable of assignment.[42] It could be argued that the daughter could nevertheless exercise her power under the rule in *Saunders v Vautier*,[43] and demand that the amount of expenditure she was demonstrably entitled to for her education should be paid to her instead of being spent on her education: for example, demand that the amount needed to pay off her student debt be paid to her instead—because, for example, she would rather leave the debt in place and spend the money on a holiday.[44] This makes her look like owner of at least part of the trust property. However, this impression is created, not by *the carrying out of the trust*, but by a rule of equity that allows the beneficiary *to collapse the trust*. The trust itself, according to its terms, does not entitle her to any property.

> *It seems it is entirely possible to create trusts where the beneficiary has no recognisable beneficial proprietary interest in the trust assets. Trusts can provide for payment for a beneficiary to receive services, or for payment of a beneficiary's liabilities*

General analysis of beneficiaries' rights supports the possibility of trusts to observe licences

On the best analysis of the nature of a beneficiary's equitable interest, it seems entirely unproblematic for our conception of the trust for a beneficiary to have no recognisable beneficial proprietary interest in the trust assets, only an entitlement to some personal right from execution of the trust, such as a licence. Nolan explains[45] a beneficiary's equitable interest is in fact a 'bundle of rights'.[46] In particular, there are two core rights: first, a right against the trustee(s) to due performance of the trust, which is a personal right against the trustee(s) alone,[47] and secondly, a right to exclude

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40. [1979] 1 WLR 247 (CA).
41. *Re Sanderson's Trust* (1857) 3 K&J 497, ER 1206. Although the case shows that if the beneficiary's own money has already been spent on the purpose, that amount can be recovered from the trust by the beneficiary (or their estate, if dead)—so the beneficiary has a right to receive property from the trust in that circumstance and can be regarded as having become equitable owner to that amount. A characteristically excellent analysis of such cases is JE Penner, *The Law of Trusts* (11th edn, OUP 2019) paras 9.31–9.46.
42. *Re Coleman* (1888) 39 Ch D 443 (CA) 451.
43. (1841) 4 Beav 115, 49 ER 282. The case held that a beneficiary who is *sui juris*—adult and of sound mind—and is entitled to the whole beneficial interest, can terminate a trust and take the property out, even though this violates the terms of the trust. A trust said the beneficiary should receive property at 25; he was held able to take it out as soon as he was adult. It follows that several beneficiaries can do this: if they are all *sui juris*, between them entitled to the whole beneficial interest, and unanimously agreed.
44. The student debt is a contingent liability: contingent on sufficient future earnings. For that reason, it is suggested she has not so far spent her own money within the meaning of *Re Sanderson*, above n 41, so as to have *already* acquired an equitable property right to that amount under the trust—she has so far, in substance, spent only the Student Loan Company's money. She would be using *Saunders v Vautier* to *become* owner.
45. RC Nolan, 'Equitable Property' (2006) 122 LQR 232.
46. ibid 254.
47. Described ibid, 236. He adds there: 'However, in particular circumstances, and for particular purposes [this right] might be regarded as proprietary, for the distinct reason that it constitutes a "cashable right" in the hands of a beneficiary, whether or not it is also transmissible. After all, general notions of "property" or "ownership" are not always those used for a particular purpose.'

others in general from the benefit of the trust assets, which is a property right.[48] Lord Sumption JSC provided strong judicial support for such a view in the Supreme Court in *Akers v Samba Financial Group*.[49] Trusts to observe licences are fully compatible with this analysis and so, it is suggested, quite unexceptionable doctrinally.

A beneficiary's equitable interest is in fact a 'bundle of rights'

Advantages of recognising trusts to observe licences for beneficiaries

It would be unfortunate if the law were to say there cannot be trusts to observe licences for beneficiaries. As mentioned previously, rights of residence trusts are in widespread use; they are an arrangement that settlors wish to be free to make; and arguably they serve a socially useful housing function. There seems to be no good reason for the law to reject all this. It can be added, more generally, that it increases the flexibility available to settlors if the law recognises trusts to observe licences. For example, to adapt an illustration given by Penner[50]:

> [A] trustee could [be directed to] use trust funds to buy a car in his own name, ie taking title to the car as a trust asset, and then [licence] the car to Lionel. This would be the safest way of dealing with those irresponsible or feckless Lionels of this world whose existence or perceived existence preys upon the imaginations of fretful settlors – if Lionel had a bad gambling habit, for instance, keeping the car as trust property and just licensing him to use it would prevent Lionel from selling it and blowing the proceeds playing online poker.[51]

Conclusion

The trust is a hugely flexible institution. The typical trust is one where the beneficiary is entitled a definable beneficial proprietary interest in the trust assets. But not every beneficiary trust follows this pattern. There can be trusts whose terms confer only a personal right on the beneficiary, such as a trust to observe a licence for the beneficiary to use the trust assets, or indeed where their execution confers no new right—proprietary or personal—such as a trust to extinguish the beneficiary's liabilities. Such trusts are established by authority and consistent with the most persuasive overall analysis of the nature of beneficiaries' rights.

There can be trusts whose terms confer only a personal right on the beneficiary, such as a trust to observe a licence for the beneficiary to use the trust assets, or indeed where their execution confers no new right—proprietary or personal—such as a trust to extinguish the beneficiary's liabilities

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

49. [2017] UKSC 6, [2017] AC 424, [82]-[83] (obiter); cited with approval in Paul S Davies and Graham Virgo, *Equity and Trusts: Text, Cases and Materials* (3rd edn, 2018 OUP) 60.

50. JE Penner, *The Law of Trusts* (11th edn, OUP 2019) para 2.11.

51. Penner's original example involves an illustration of how a trustee may *choose* to behave within a discretionary trust; he is not discussing a case where the settlor *stipulates* a trust to observe licence. Although the licence arrangement would, of course, be possible as an exercise of the trustee's discretion within the framework of a discretionary trust, obviously a straightforward trust direction to observe the licence gives the settlor greater control.

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