

**CHARITABLE INTENTION IN THE CY-PRES DOCTRINE AND
RELATED TRUSTS PRINCIPLES**

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by

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ABSTRACT

This thesis provides the first extended taxonomy of charitable intention in the law of schemes. It does so in order to identify the legal functions of intention and suggest critical doctrinal ('black letter') reforms so that those functions can be better carried out. Where appropriate, it draws on Australasian statutory and common law innovation. It contrasts developments in those related jurisdictions as a reference point for English reform.

Two functions of intention are identified. In the context of established trust reform, intention is one element of a broader process of 'balanced variation'. The original intention of the donor is balanced against broadly defined effectiveness standards. By contrast, in the context of testamentary construction, intention has a different role. It is constructed simply to make a failed will possible to effect. Efficacious reform is possible with regards to both those functions, and so this thesis proposes a series of common law and legislative changes.

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This thesis is dedicated to my parents.

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CHAPTER ONE: INTRODUCTION

The law of schemes is recognisably a single doctrine, a self-contained set of rules, principles and procedural steps. But that doctrine has more than one function. It is used both in a testamentary and in a trust reform context. Where it is applied to wills, it is largely a system of construction. Through the legal analysis of testamentary language, it seeks to ascertain the true intention of the testator, and consequently effect his wishes. By contrast, where it is applied to the reform of established trusts, intention plays a different role. In that reform context, donor intention is an element in an array of other considerations. It is a factor *to be taken account of* in the process of variation.

Across the two contexts, this thesis provides a doctrinal taxonomy of the role of intention in the law of charitable schemes. It does so as a precursor to addressing a wider question: whether the treatment of intention should be reformed so that it can better perform its two legal functions.

1. The First Function of Intention: ‘Balanced Variation’ in the Context of Established Trust Reform

Prior to the enactment of section 13 of the Charities Act 1960,¹ the law of schemes existed on an entirely common law basis. Alteration cy-pres was a rare event. In the circumstances where it was permitted, the courts were highly deferential to donor intention, refusing to authorise variation except in compelling

¹ Which has been re-enacted as Charities Act 1993, s 13(1) and subject to modification, as Charities Act 2011, s 62(1)

circumstances. Their guiding principle was concern not to disturb the form of the original gift. Farwell LJ made the point with some force in *Re Weir Hospital*,² where he stated in relation to the proposed reform of an established trust:

It is contrary to principle that [a donor's] wishes should be set aside, and his bounty administered not according to his wishes but according to the view of the Commissioners...³

There was a judicial policy of restraint operating in favour of leaving dedicated property undisturbed.⁴ The policy was well established, so in *Philpott v Saint George's Hospital*,⁵ the Attorney General's request to build a new hospital building at an existing almshouse site was refused, even though the plan might have led to a beneficial use of funds. Sir John Romilly MR expressly rejected interference saying that: '...instances of charities of the most useless description have come before the Court, but which it has considered itself bound to carry into effect.'⁶ Regardless of its utility, the court would effect the original intention behind the trust.

² [1910] 2 Ch 124

³*Ibid* 138. Farwell LJ referred to 'a testator'. Although the trust had been established for some years, it had initially been founded by will. In the context of discussion about established trusts, the word is omitted for clarity.

⁴ See also *Mills v Farmer* (1815) 35 ER 597 where Lord Eldon permitted a scheme only with reluctance.

⁵ (1859) 27 Beav 107

⁶ *Ibid* [112]

Pre-legislation, there was also concern that if variation became easy, then potential donors might lose an incentive to give. In *Re Weir Hospital*,⁷ Farwell LJ thought that to encourage founders it was, ‘eminently desirable that no doubt should be cast on the security and permanency of their bequests.’⁸ The same point was noted in the *Report of the Committee on the Law and Practice Relating to Charitable Trusts* (“Nathan Report”),⁹ which states in a summary of witness evidence:

Any tampering, it is said, with the founder’s intentions, except in circumstances which present no practical alternative, will tend to dry up the springs of charity...¹⁰

This donor deference caused serious difficulty over time. Perpetual foundations inevitably tend towards ineffectiveness. As far back as the nineteenth century, a Charity Commissioner named Arthur Hobhouse compiled a list of obsolete charities unalterable at common law.¹¹ Many illustrations are striking, such as Pursglove School where the curriculum was entirely restricted to Latin subjects,¹² and Tancred Hospital which was described as wretched and subject to scandals.¹³ Some seventy years later, to illustrate that point that such wasteful charities endure through time, Lord Beveridge revisited the

⁷ *Weir* *supra* note 2

⁸ *Ibid* 138

⁹ *Report of the Committee on the Law and Practice relating to Charitable Trusts* (Cmd 8710) HMSO, London, 1951

¹⁰ *Ibid* [316]

¹¹ Hobhouse, *The Dead Hand: Addresses on the Subject of Endowments and Settlements of Property* (Chatto & Windus, 1880)

¹² *Ibid* 80

¹³ *Ibid* 65

Commissioner's list, detailing their persistence into the twentieth century. His survey caused him to urge a change in legal policy, arguing in a spirit subversive to the policy of the common law that donors: 'would welcome a sympathetic living hand to make gifts always a cause of happiness, however conditions might change.'¹⁴

Against this conflicted back-drop, the proposals in the Nathan Report, initiated by the post-war Labour government, marked a carefully crafted compromise. After hearing extensive evidence, it proposed enabling the reform of those trusts: '...not serving the community as they might if some relaxing of the cy-pres doctrine was introduced...' ¹⁵ But although in favour of enabling reform, the report did not propose that original intention should be ignored or forgotten. It had an altogether different policy at its heard. The report proposed that in any given case, intention would be *balanced* against the social need to make charities effective. It should be taken into account as part of the decision process. The report is express on the point:

In setting forth the principles on which the doctrine should be relaxed our intention is to strike a balance between the spirit and intention of the founder and the claims of the present.¹⁶

¹⁴ Beveridge, *Voluntary Action: A Report on Methods of Social Advance* (Allen & Unwin, 1948) 200

¹⁵ Nathan Report *supra* note 9 at [105]

¹⁶ *Ibid* [365]

In the following legislation, courts were given a discretionary power to carry out this balancing act. They were directed to reform trusts where they had become ‘unsuitable’ or ‘ineffective’,¹⁷ but crucially, they were also required to consider ‘the spirit of the gift’ (that is, original intention) in the process. Subsection 13(1)(e)(iii) of the Charities Act 1960,¹⁸ is indicative. It permitted variation cy-pres where purposes have:

ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the spirit of the gift.

Although the new law permitted reform in certain circumstances, it was no carte blanche for variation. Intention is balanced against the need for effectiveness. The scheme-maker is given a discretionary power to decide on a case-by-case basis which elements are the most important. And so a new system of cy-pres reform was introduced, permitting the ‘balanced variation’ of trust purposes.

This thesis assesses the process of balanced variation in the law and proposes substantive reforms that might allow it to better take effect. In doing so, it draws upon significant Australasian statutory innovation directed at the reform of established trusts, using them as a comparative reference point.

2. The Second Function of Intention: Realistic Construction of Wills

¹⁷ Charities Act 1960, ss 14(1)(c), 14(1)(d), 14(1)(e)(ii), 14(1)(e)(iii)

¹⁸ Now Charities Act 2011, s 62

Legislation closely regulates the cy-pres reform of established trusts.¹⁹ But it is a tightly focussed enterprise. The law of schemes is concerned with more than the reform of existing charities. The bulk of the doctrine relates to questions of testamentary construction in the context of failed wills.

When a court reads a will, it is not ‘balancing’ intention against other factors, it is merely trying to discover the testator’s wishes so that they can be carried out. This function of intention is acknowledged in testamentary cases, so in *Attorney General v Forde*,²⁰ Wilson J stated with striking clarity:

I have always understood that the law was that a testator could leave his property by will to whomsoever he liked and in any way he liked provided he did so without infringing any rule of law, and that the duty of the court was simply to read the will, find out what it meant, and carry out that meaning so far as it was not contrary to law.²¹

Yet it is not always possible to do precisely as the testator wished. Countless things can go wrong with a charitable will which in turn make it very difficult to effect. So a nominated charitable organisation might have closed before the testator’s death; he may have left insufficient funds to carry out his plans, or he may have left funds to a cured disease or eradicated social problem. Where a testamentary gift fails in this manner, the law must rely on rules of construction

¹⁹ For a detailed and elegant analysis of the law immediately prior to statute see Sheridan and Delaney, *The Cy-pres Doctrine* (Sweet & Maxwell, 1959)

²⁰ [1932] NI 1

²¹ *Ibid* 12. See also *Re University of London Medical Sciences Fund* [1909] 2 Ch 1, 8

to give meaning to the testator's words. In *Mellows: The Law of Succession*, it is noted:²²

[The court] adopts the so-called 'rules of construction'. These are not in any sense rules of law which are binding on the testator they are... more often than not in order to give some, rather than no, meaning to the will.²³

Much of the law of schemes is concerned with the construction of intention in this sense. It is a good faith, if sometimes imperfect, attempt to work out what the testator would have wished to happen in the circumstances affecting the will.

Although rarely the subject of academic attention, the area is far from static. In recent times, new principles have emerged permitting courts to construct failed gifts by will.²⁴ Such principles relate largely to a single issue: the allocation of testamentary property in circumstances where a testator nominates a charity that does not exist. They direct judges to closely consider the intention of the donor during the process of construction, and their emergence has led to new treatments of the donor's wishes. Even so, all the principles remain good-faith

²² Jones, *Mellows: The Law of Succession* (5th edn, Butterworths, 1993)

²³ *Ibid* [10.4]

²⁴ The law has developed in relatively small number of key cases: *Re Faraker* [1911-1913] All ER Rep 488; *Re Lucas* [1948] Ch 248; *Re Vernon's Will Trust* [1972] Ch 300; *Re Finger's Will Trust* [1972] 1 Ch 286; *Kings v Bultitude* [2010] EWHC 1795

attempts to discover and effect intention. As Vaughan Williams LJ stated in *Re University of London Medical Sciences Fund*:²⁵

...I am sure that neither the learned counsel or the appellants meant to suggest that... the Courts have ever thought it right to be benevolent with a testator's money contrary to the plain intention of the will.²⁶

This thesis evaluates the complex methods of intention construction developed by the courts. It does so on the basis of efficacy: whether or not they have provided a realistic method of determining the testator's genuine intention. Drawing on Australasian developments, it proposes reforms in the English jurisdiction which might better serve realistic construction by the courts.

3. Structure of Argumentation

The two functions of intention are entwined in a single and complex doctrine. Consequently, they are assessed within an over-arching taxonomy of the law. Following this introduction, chapter two identifies the key characteristics of intention in the law of schemes. It is the first sustained attempt to do so. Intention is characterised in terms of its 'abstract' and 'definite' elements and the core features of charitable validity are set in the context of the scheme-making jurisdiction. It is then shown that, with only the most limited of

²⁵ [1909] 2 Ch 1

²⁶ *Ibid* 8

exceptions, the donor must have made an objectively valid charitable gift in order for the scheme-making jurisdiction to apply.

Focussing on legislation and established trust reform, chapter three assesses the process of balanced variation at the cy-pres ‘trigger stage’. It explicates, for the first time, a common law ‘non-intervention’ principle. It then contrasts the common law with the new statutory policy, explaining the operation of balanced variation in detail. Drawing on Australasian innovation, it identifies a glitch in the English statutory regime. Despite the legislative policy, where an ineffective charity might be ‘salvageable’ by charity trustees, it remains impossible to reform the trust under legislation. Substantive legal reform is then proposed to better effect balanced variation at law.

Chapter four assesses the cy-pres general charitable intention, evaluating whether it is a realistic method of testamentary construction. It provides the first sustained taxonomy of an expansive area. The analysis shows that construction of the general charitable intention, being largely based on the formalistic application of precedent, is an artificial method of construction. It argues that Australasian innovation in this area does not lead to realism, and so an ‘alternative’ English common law approach is proposed which better allows the law to perform its testamentary function of realistic construction.

Chapter five relates to the law of perpetual dedication, a legal rule that once a gift has been applied to charity it will remain so applied forever. Again, it

provides one of only a few detailed taxonomies of an expansive area of testamentary case-law. As a result of analysis, it is seen that perpetual dedication is a weak rule regularly overcome by the courts. Gifts are often relinquished from charity, although the law has found no coherent basis for doing so. The chapter draws on Scottish case-law to propose an alternative and more realistic treatment of intention, whereby the practicability of gifts might be ‘trialled’ before they are treated as dedicated.

Returning to statutory principles and the reform of established trusts, chapter six looks at balanced variation at the cy-pres application stage. In the light of a detailed taxonomy, it is shown that at common law, there is no ‘as near as possible’ standard in operation. For a long period, the courts and the Charity Commission for England and Wales (“Charity Commission”) have taken effectiveness standards into account when devising the new purposes of trusts. Australasian statutory innovation is assessed against the flexible common law backdrop. Finally, it is argued that English legislation, which provides statutory considerations to guide the scheme-maker’s discretion, is the more conceptually coherent approach.

Chapter seven examines the construction of intention in testamentary surplus cases. The chapter highlights two conflicting lines of cases. With reference to rarely analysed authorities, it shows that there is no conceptual agreement in the case-law as to how the ‘excess’ element of charitable gift should be treated. From the perspective of realistic intention construction, it is argued that the

concept of ‘excess’ bequest is unsound in these circumstances. Donors intend to give a ‘complete’ gift and do not consciously divide their bequests into ‘excess’ and ‘required’ elements. In order to effect intention realistically, the law should treat the total gift as being vested in charity from the point of donation.

Chapter eight assesses the interplay between testamentary construction and the law regulating failed public appeals. It charts the complex relationship between cy-pres intention and so-called ‘out and out’ gift intention at common law. In the light of that analysis, it highlights conceptual problems and proposes substantive reform to the law. Alongside illustrating the need for basic legislative reform, it is argued that the law has a ‘blind spot’ in relation to the size of public appeal gifts. In that context, small gifts could coherently be treated as indicating a cy-pres particular charitable intention.

Chapter nine charts the nature of intention in prerogative cy-pres cases. From the perspective of realistic intention construction, it is argued that the law of prerogative schemes is insufficiently developed to permit the proper interpretation of wills. The scarcity of relevant cases means that the prerogative jurisdiction is unable to provide realistic and predictable treatment of the testator’s wishes. Abolition of the prerogative jurisdiction is proposed so that the process can be brought within the ordinary law of schemes.

Chapter ten examines the distinction between the cy-pres and administrative jurisdictions. Despite authority supporting an objective test, it is argued that attention to the intention of the donor is the only way to police the borderline between cy-pres and administrative schemes. It is proposed that this end can be achieved by following settled common law cases, without reference to legislation.

Chapter eleven evaluates the treatment of intention in relation to new principles of testamentary construction. It first assesses the evolving treatment of intention in the ‘general purpose trust’ construction, with particular reference to bequests for incorporated and unincorporated charities. It then proceeds to analyse the role of intention in the ‘successor organisation’ construction, highlighting conceptual problems with regard to the function of intention in the rule. Finally, it is proposed by way of substantive reform, that in the light of its deep-rooted conceptual problems, the ‘successor organisation’ construction should be amalgamated with the ‘general purpose trust’ construction. Establishment of a single rule would facilitate the coherent precedential development of the law.

Chapter twelve concludes the analysis by reviewing the reform proposals detailed in the thesis. It groups the substantive reform proposals thematically before assessing the likelihood of reform.

4. Delineating Schemes: A Map of the Principles

The evolving treatment of intention is analysed in the context of three trusts rules: the cy-pres doctrine, administrative schemes and the ‘successor organisation’ rule. Although each rule can be used to alter trusts, it will do so according to a different conceptual basis and method. At the end of the process, a scheme will be written. That document provides a new constitutional document for the charity.

i. Cy-Pres Alteration of Charitable Purposes

The cy-pres doctrine permits the alteration of charitable objects. Under the rule, it is possible to vary the object of a charitable trust so that the property is applied to new purposes. There are two varieties of cy-pres, ‘judicial’ and ‘prerogative’²⁷. Of the two, judicial cy-pres is by far the most extensively developed.

a. Judicial Cy-Pres

At common law, the judicial cy-pres doctrine is triggered where there has been a failure of a charitable object. Failure has been taken to mean that it is not possible or practicable or possible to effect the trust.²⁸ While it is still common for the courts to use that terminology in the testamentary context,²⁹ those common law triggers have been substantially relaxed by statute. Under statute,

²⁷ For general discussion see Mulheron, *The Modern cy-près Doctrine: Applications and Implications* (UCL, 2006) 23-30

²⁸ *Re Wilson* [1913] 1 Ch 314, 231; *Re Packe* [1918] 1 Ch 437, 442

²⁹ See for example *Phillips v Royal Society for Birds* [2012] EWHC 618 at [18]

the judicial cy-pres doctrine can *inter alia* be triggered where the donor's gift has become 'unsuitable' or 'ineffective'.³⁰ Actual impossibility or impracticability, as it was defined in the common law, is no longer required.

Judicial cy-pres can be divided into two types. In the first type ('initial failure'), the doctrine is triggered before the gift has vested in charity. Initial failure cases have arisen largely in the context of failed gifts by will.³¹ In the second type ('subsequent failure'), the doctrine is triggered, either (i) after it has vested in charity,³² or much more rarely, (ii) in circumstances where although it was *possible* for the gift to vest in charity, no vesting actually occurred.³³ Subsequent failure cases normally concern established charitable trusts and so they do not concern testamentary construction.

There is a fundamental difference between initial and subsequent failure cases. Gifts subject to initial failure are at risk of lapse out of charity, while as a general rule, subsequent failure cases are perpetually dedicated and cannot lapse.³⁴ However, even in initial failure cases, lapse can be prevented where the donor evinces a general charitable intention.³⁵ That type of intention occurs where, despite the specific language of the gift, the donor had a general purpose

³⁰ Charities Act 2011, ss 62(1)(c), 62(1)(d), 62(1)(e)(ii) and 62(1)(e)(iii)

³¹ Public appeals cases are an exception to this. See chapter eight.

³² *Re Slevin* [1891] 2 Ch 236

³³ *Re Tacon* [1958] Ch 477; *Phillips* *supra* note 29.

³⁴ See *Kings* *supra* note 24 at [40]

³⁵ Of the many cases on point: *Re Wilson* *supra* note 28; *Re Lysaght* [1966] 1 Ch 191; *Re Woodhams* [1981] 1 WLR 493

at the forefront of his mind. If such an intention is found, the court will set the failure of the original gift to one side, and save the gift for charity.³⁶

In all cy-pres cases, the court will apply the gift to new charitable purposes. At common law, it was commonly said that the court must apply the gift ‘as near as possible’ to the original purposes intended by the donor.³⁷ Under statute, this is not the case. In the process of finding new objects for the charitable property, the court will have regard for two other considerations *as well* as the ‘as near as possible’ principle. Those considerations are: (i) the spirit of the original gift,³⁸ and (ii) the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances.³⁹

b. Prerogative Cy-Pres

Prerogative cy-pres is far less common than the judicial version. It is different from judicial cy-pres in two key ways. First, it arises where there is no trust attached to the gift.⁴⁰ It is a Crown and not a court jurisdiction. Second, in contrast to judicial cy-pres, it has not been put on a statutory footing.

Outside those two differences, prerogative cy-pres is structurally very similar to the ordinary common law rule. It is triggered by the ‘failure’ of the donor’s gift, and it makes the same distinction between ‘initial’ and ‘subsequent’ failure

³⁶ *Wilson Ibid* 321

³⁷ *Re Avenon’s Charity* [1913] 2 Ch 261; *Re Stane’s Will* (1853) 21 LTOS 261

³⁸ Charities Act 2011, s 62(2)(a)

³⁹ Charities Act 2011, s 62(2)(b)

⁴⁰ See *Re Bennett* [1960] Ch 18 at 24; *Moggridge v Thackwell* (1803) 32 ER 15 at 32

cases. In initial failure cases, a general charitable intention is required in order to prevent a lapse, but in subsequent failure cases the gift is treated as perpetually dedicated to charity.⁴¹

ii. Administrative Alteration of Non-Purposive Provisions

While the cy-pres doctrine is used to alter the purposes of a charitable trust, the administrative jurisdiction is more limited. It can only alter the non-purposive elements of a trust.⁴² Such schemes are required where administrative provisions attached to a trust inhibit effective use of the property. They are used both in the context of testamentary cases and of established trusts in circumstances where administrative alteration would allow the gift to be used more effectively.⁴³

A second type of administrative scheme is a ‘general purpose trust’ scheme. It evolved largely from a single key case: *Re Vernon’s Will Trust*.⁴⁴ This type of scheme operates as an alternative to lapse in the testamentary context. Where a testator leaves a gift to a particular charitable trustee, but that trustee either no longer exists or refutes the gift, the court will construct the gift as being for a general charitable purpose independent from the character of the trustee. Where this is the case, a new trustee can be substituted by the court under the administrative jurisdiction. That trustee will then be able to effect the trust.

⁴¹ *Slevin* *supra* note 27

⁴² *Re JW Laing Trust* [1984] Ch 143; see Luxton, ‘In Pursuit of “Purpose” Through Section 13 of the Charities Act 1960’ [1985] Conv 313

⁴³ See *Forrest v Attorney General* [1986] VR 187 at

⁴⁴ *Vernon’s* *supra* note 24. For a recent application see *Kings* *supra* note 24.

This means that the court has provided a new administration in the form of a substituted trustee.

iii. The ‘Successor Organisation’ Construction

The ‘successor organisation’ construction emerged during the twentieth century as a new method of preventing testamentary lapse. The principles evolved from a foundational Court of Appeal case: *Re Faraker*.⁴⁵ The rule is not purely administrative, because its application alters the purposes of the trust. Nor is it a cy-pres principle, because it is said to operate in circumstances where the gift has not ‘failed’.⁴⁶ The core rationale of the construction is that where a gift is made to a charitable organisation which has undergone substantial restructuring, the gift will not necessarily lapse. So long as the organisation continues to exist in some tangible sense (i.e. there is a ‘successor organisation’ in existence), and provided that there is a general charitable intention, the successor charity can give good receipt. This is the case even where the successor organisation has undergone far-reaching reform.⁴⁷

5. Delineating Schemes: A Map of the Scheme-Making Bodies

The law of schemes is dominated by first-instance, single-judge cases from the Chancery Division of the High Court. However, in recent times, the number of

⁴⁵ *Faraker* *supra* note 24

⁴⁶ Mulheron makes this point in *The Modern Cy-pres Doctrine* *supra* note 27 at 30. See also Martin, ‘The Construction of Charitable Gifts’ (1974) 38 *Conv 187*.

⁴⁷ For example *Re Bagshaw* [1954] 1 WLR 238; *Re Lucas* [1948] Ch 424

decided cases has lessened considerably. The Charity Commission administers by far the larger number of schemes under its concurrent jurisdiction with the High Court.⁴⁸ Recently, the Charity Tribunal has been established as a third scheme-making body.⁴⁹ To date, the First Tier Tribunal, which has the same powers as the Commission, has considered two scheme cases.⁵⁰

This section sets out the role and powers of each scheme-making body and details the links between them. In the light of these institutional relationships, it then briefly explains the terminology adopted throughout the analysis.

i. The Court

Historically the power to make schemes was vested exclusively in the Court of Chancery.⁵¹ That scheme-making jurisdiction emerged as an element of the Chancery Court's inherent jurisdiction over trusts, and outside of borderline cases,⁵² the power remains rooted in that trusts context. In modern times, the Chancery Division maintains an 'overseeing role'; it decides complex and controversial cases.

⁴⁸ Charities Act 2011, s 69

⁴⁹ Tribunals, Courts and Enforcement Act 2007, s 3

⁵⁰ *Ground v Charity Commission* CA/2011/005 First-tier Tribunal (Charity), 29th November 2011; *Aliss v Charity Commission* CA/2011/007 CA/2011/007 First-tier Tribunal (Charity), 17 May 2012

⁵¹ *Nathan Report* *supra* note 9 at 71

⁵² See *Liverpool and District Hospital for Diseases of the Heart v Attorney General* [1981] Ch 193. For an analysis of application of the cy-pres doctrine to charitable companies: Dawson and Alder, 'The Nature of a Proprietary Interest of a Charitable Company or a Community Interest Company in its Property' (2007) 1 *TLI* 3

In more recent times, a concurrent jurisdiction with the Charity Commission has been established by legislation.⁵³ A far-reaching consequence of that concurrent jurisdiction is that now only a small proportion of cases are decided in court.⁵⁴ Despite the reduced volume of judicially determined cases, the Chancery Division remains responsible for the precedential development of the law as a Senior Court of Record.

The character of the cases decided by the Chancery Division is largely determined by restrictions on the Charity Commission's jurisdiction. The court will decide those cases that the Commission cannot. Limitations on the Commission create the space for the court's continuing role.

A first limitation is subsection 70(1)(a) of the Charities Act 2011, which prevents the Charity Commission from trying or determining title where there is a dispute between a charity (or a trustee), and a person holding or claiming property adversely to the charity. The clause is of particular importance in testamentary cases, where disputes as to title arise on the construction of impossible or impracticable wills. For this reason testamentary disputes over title are still decided by the courts. In that circumstance there is a dispute as to title; the next-of-kin might claim that a will has failed and so the testamentary property should result back to them, while a legatee charity or the Attorney

⁵³ Charities Act 2011, s 69

⁵⁴ Claims being brought under the Civil Procedure Rules, pts 7, 8.

General might argue that the testator has in fact made a successful charitable gift that requires a scheme in order to direct the executors.⁵⁵

A second limitation is subsection 70(1)(b) of the Charities Act 2011 which prevents the Commission definitively determining whether a charge or trust exists on property. This is again most likely to direct testamentary cases to the Chancery Division. Where there is any doubt that the testator has not made his gift by means of trust, the case will go to court;⁵⁶ the Commission is excluded from the interpretative role.

A final limitation is subsection 70(8) of the Charities Act 2011 which prevents the Commission from exercising its jurisdiction where there is an issue of a contentious character or a special question of law or fact. The Commission is also limited under a catch-all clause, providing that if there is ‘any other reason’ that the Commission might consider it better that the court adjudicates, then the Commission has no jurisdiction to decide.⁵⁷ This ensures that complex ‘points of law’ issues remain determined by the court.⁵⁸

ii. The Charity Commission

⁵⁵ *Kings* *supra* note 24

⁵⁶ See *Bennett* *supra* note 40

⁵⁷ Charities Act 2011, s 70(8)(b)

⁵⁸ *Varsani v Jesani* [1999] Ch 219; *White v Williams* [2010] EWHC 940

The large majority of schemes are made by the Charity Commission under its concurrent jurisdiction with the High Court.⁵⁹ As a consequence of the statutory limits on its jurisdiction detailed above, the Commission is not responsible for ‘overseeing’ the law. It merely has an administrative function, making schemes in those circumstances that are non-contentious. In contrast to the Court its decisions do not carry precedential weight.

In parallel with the Chancery Division, the Commission can make schemes in the context of wills.⁶⁰ In these testamentary cases, the Commission will be contacted by the executor of a problematic will. That executor will be motivated to obtain a scheme so as to direct the application of the testator’s property. While the Commission is able to provide such schemes, as a matter of policy it will not do so unless the gift has failed outright (i.e. it impossible to effect). In this regard, the Commission’s Operational Guidance ‘Will Cases: Redirecting Failed Charitable Legacies’ instructs staff that ‘comfort orders’ will not be provided for executors.⁶¹ It is Commission practice to instruct the executor to effect his own construction of the will.⁶²

Yet the bulk of Commission schemes are not testamentary. The majority of the Commission’s schemes are made to ‘reform’ charities that have already been established.⁶³ In these reform circumstances, section 61 of the Charities Act

⁵⁹ Charities Act 2011, s 69

⁶⁰ *Ibid*

⁶¹ Charity Commission ‘OG 505’ (14th March 2012)
http://www.charitycommission.gov.uk/About_us/pogs/g505a001.aspx

⁶² *Ibid*

⁶³ Charities Act 2011, s 62(1)(e)(iii)

2011 places trustees under a duty to apply for a scheme if such a scheme would secure effective use of the property. If a trustee unreasonably refuses or neglects to apply for a scheme, but the Commission is of the view that he ought to do so in the interests of the charity, the Commission is able to proceed even without the trustee's application.⁶⁴ However, in order to do so, the Commission must wait until a period of forty years has passed from the establishment of the trust.⁶⁵

Where the Commission intends to make a scheme, it is under certain obligations with regard to providing notice. Section 88 of the Charities Act 2011 provides that where the Commission intends to make a scheme, it must invite public representations and give notice.⁶⁶ Yet the Commission has discretion not to give public notice where it considers it to be unnecessary.⁶⁷

iii. The Tribunal

Prior to the coming into force of the Charities Act 2006, appeals against Commission decisions (including schemes decisions) had to be made to the Chancery Division of the High Court. The process was not generally regarded as satisfactory: the Prime Minister's Strategy Unit Report 'Private Action, Public Benefit'⁶⁸ noted a widespread perception that the process was expensive

⁶⁴ Charities Act 2011, s 69(5)(a)

⁶⁵ Charities Act 2011, s 69(5)(b)

⁶⁶ Charities Act 2011, s 88(2)(a)

⁶⁷ Charities Act 2011, s 88(4)

⁶⁸ Cabinet Office Strategy Unit, *Private Action Public Benefit: A Review of the Charities and Wider Not-for-Profit Sector*, London 2002

and prone to delay, that appeals were rarely heard and that as consequence decisions of the Charity Commission were largely unchallengeable.⁶⁹

In response, the report proposed a new Charity Tribunal, with faster and more cost-effective procedures.⁷⁰ The Charity Tribunal was established by the Charities Act 2006, and reformed shortly afterwards by the Tribunals Courts and Enforcement Act 2007. There is now a two tier system, comprised of an upper and lower tribunal. The First Tier Tribunal has no wider powers than the Commission,⁷¹ but the Upper Tribunal, being a Superior Court of Record, is able to oversee the precedential development of the law.⁷²

In the schemes context, the Tribunal has an ‘appeals’ function. Under the new framework, an appeal can be brought against any decision made by the Commission under its concurrent scheme-making jurisdiction with the High Court.⁷³ In each case, the Tribunal must consider afresh the decision of the Commission and may take new evidence into account.⁷⁴ The Tribunal has power to: quash the scheme and send it back to the Commission; substitute the scheme; or add to it.⁷⁵ In this manner, a new scheme-making body has been created by the legislation.

⁶⁹ *Ibid* at [7.76]. See also McKenna, ‘Should the Charity Commission Be Reformed?’(2011-12) 14 *Charity Law and Practice Review* 1

⁷⁰ *Ibid*

⁷¹ Charities Act 2011, ss 315(1), 315(2), 319(5)

⁷² Tribunals, Courts and Enforcement Act 2007, s 3(5)

⁷³ Charities Act 2011, schedule 6 columns 1 and 2

⁷⁴ Charities Act 2011, ss 319(4)(a), 319(4)(b)

⁷⁵ Charities Act 2011, schedule 6 column 3

A broad class of people have standing to bring the case. That class is comprised of the trustees of the charity, or ‘any other’ person affected by the decision.⁷⁶ The Attorney General may also initiate a case.⁷⁷ The legislation accords him a potentially influential role in the appeals process; he is able to intervene in proceedings brought by other parties,⁷⁸ and the Tribunal may at any stage direct that all the necessary papers are sent to him.⁷⁹

iv. A Note on Terminology

This thesis frequently refers to ‘the court’ as a general scheme-making body. In view of the Commission’s concurrent jurisdiction with the High Court, the phrase should be taken to include ‘the Court and Charity Commission’ unless the context suggests otherwise.

⁷⁶ Charities Act 2011, schedule 6 column 2

⁷⁷ Charities Act 2011, s 319(2)

⁷⁸ Charities Act 2011, s 318(4)

⁷⁹ Charities Act 2011, s 318(2)

CHAPTER TWO: THE DEFINITION AND FUNCTION OF INTENTION IN THE LAW OF SCHEMES

This chapter provides an analytical overview of the features and function of charitable intention so as to establish key concepts for later critique. In order to draw out that character it examines little-known cases alongside the more familiar authorities of Charity Law. The first characteristic is conceptual; definite charitable intention is abstractable. Although gifts are normally intended for a specific charitable purpose, that purpose must relate to a more plastic ‘head’ of charity. A second characteristic is that, in the law of schemes, donors must express their intention in a certain objectively recognised manner in order for their gifts to be valid. The law is blind to the subjective intentions of the donor.

1. Abstract Intention

Charitable intention takes a unique doctrinal form. Although donors intend definite and targeted gifts, their objects can always be abstracted to something wider. Donors might choose a particular charitable organisation or,¹ more rarely, set out a particular plan or vision for their trustees to administer.² But specific gifts can be abstracted to more general purposes. So a gift to a school can be abstracted to educational purposes,³ or a gift to a soup kitchen can be

¹ *Re Ovey* (1885) 29 Ch D 560; *Re Rymer* [1895] 1 Ch 10 (CA), *Re Broadbent* [2001] EWCA Civ 714

² Sometimes in some detail: *Re Wilson* [1913] 1 Ch 314; *Re Woodhams* [1981] 1 WLR 493; *Re Lysaght* [1966] 1 Ch 191

³ *Wilson* *supra* note 2

treated as being for the relief of poverty.⁴ This abstractive feature of charitable intention is of fundamental importance to the scheme-making jurisdiction.

i. The *Process* of Abstraction

It takes a judge to abstract the gift. He will do so by reference to abstract charitable objects found at law. In the New South Wales case *Attorney-General v Perpetual Trustee Co (Ltd)*,⁵ Dixon and Evatt JJ stated:

The reason why the specific directions given by an instrument declaring a charitable trust receive effect is because they tend to a purpose falling within the legal description of charity. The existence of that purpose is, therefore, the foundation of a valid trust.⁶

And so the donor's definite intention must be linked to a broader purpose recognised by law. Until recently,⁷ those purposes were commonly categorised under four broad 'heads'. In the well-known case, *Income Tax Special Purpose Commissioners v Pemsel*,⁸ Lord Macnaghten defined the heads of charity. He said it:

...comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of

⁴ *Biscoe v Jackson* (1887) LR 35 Ch D 460

⁵ (1940) 63 CLR 209

⁶ *Ibid* 223

⁷ The refined 'heads' of charity were first put on a statutory footing in the Charities Act 2006, s 2(2), re-enacted as the Charities Act 2011, s 3(1)

⁸ [1891] AC 531

religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.⁹

Section 3(1) of the Charities Act 2011 divides those heads into a longer list. Despite that refinement, the statutory definition contained in the Act still draws heavily on the *Income Tax Special Purposes Commissioners v Pemsel*¹⁰ classification. The first three ‘heads’ are largely the same.¹¹ There is also a final broad category (m), including purposes recognised as charitable, but not contained in the statute, purposes analogous to or within the spirit of the statute and (at a step of further remove) purposes analogous to or within the spirit of those purposes. Subsection 3(1) Charities Act 2011 provides a list of the refined purposes:

- (a) the prevention or relief of poverty
- (b) the advancement of education
- (c) the advancement of religion
- (d) the advancement of health or the saving of lives (e)the advancement of citizenship or community development
- (f) the advancement of the arts, culture, heritage or science
- (g) the advancement of amateur sport
- (h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity
- (i) the advancement of environmental protection or improvement
- (j) the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage
- (k) the advancement of animal welfare
- (l) the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services
- (m) purposes recognised by existing charity law, and those developed by analogy from it.

⁹ *Ibid* 583

¹⁰ *Pemsel* *supra* note 8

¹¹ Charities Act 2011, s 3(1)(a)-(c). S 3(1)(a) refers to the prevention *or relief* of poverty, whereas *Pemsel* refers only to prevention.

However definite the donor's intention, in order for it to have the form of a charitable gift, it must be linked to one of those more abstract purposes. So for example, a specific gift to the Battersea Dogs' and Cats' Home is likely to be charitable because it is linked to (k): 'advancement of animal welfare'. Alternatively, a specific gift to detoxify river water is likely to be charitable because it is linked to (i) 'the advancement of environmental protection or improvement'.

This legal link between definite gifts and more abstract purposes is of far-reaching importance in the context of schemes. In some circumstances, the link has allowed the courts to say that the donor had an intention that was in fact *more abstract* than the definite language of his gift. The courts find that the donor really does have an abstract intention despite the definite nature of the gift.

A striking example can be found in *Re Royce*.¹² In that case, a large gift of residue was left to the Vicar and Churchwardens of Oakham Church 'for the benefit of the choir' but the gift was far in excess of what was needed for the purpose. Simonds J abstracted the definite gift to the choir to the level of a charitable purpose. He found that it was in fact a gift for the 'advancement of religion'. The judge stated:

¹² [1940] Ch 514

...a gift simply for the musical services in a church is not charitable unless there is an underlying charitable intention. The charitable intention (and I use the word "charitable" in its legal sense) in giving money for the purpose of musical services in a church is for the advancement of religion, and it is only the particular mode of carrying out that intent which is indicated when the testator directs that it is to be applied in the promotion of musical services.¹³

The link between 'definite' and 'abstract' intention has been recognised in other contexts. In the Privy Council case, *Mayor of Lyons v Advocate General of Bengal*,¹⁴ Sir Montague E Smith stated in relation to the cy-pres doctrine:

The principle on which the doctrine rests appears to be, that the Court treats charity in the abstract as the substance of the gift...¹⁵

In *Attorney General for New South Wales v Perpetual Trustees Co Ltd*,¹⁶ Latham CJ, although sceptical of the process, described the same method of abstraction in some detail:

In every case of a charitable gift there is a charitable intention. By a process of abstraction it is always possible to disengage that intention in the case of any particular gift and then to argue that the intention so

¹³ *Ibid* 521

¹⁴ (1876) LR 1 App Cas 91

¹⁵ *Ibid* 113

¹⁶ [1940] 63 CLR 209

discovered is an intention which is general and not particular in character. A gift for the relief of poverty in a particular village subject to precise directions limiting the benefits to be taken by individuals and the manner in which those benefits are to be conferred or enjoyed can accurately, but not completely, be described as a gift for the relief of poverty. So also any gift for the establishment of a school in a particular place can be described, once again accurately but not completely, as a gift for the advancement of education.¹⁷

There is a further dimension to this understanding of intention. Often, courts have found an ‘intermediate’ level of abstract intention. While they have not gone so far as to abstract the gift to a ‘head of charity’, they have been prepared to go some of the way. For example, a gift to a cottage hospital specialising in ears and throats might be abstracted to accommodate a general hospital ward with the same focus.¹⁸ This ‘intermediate abstraction’ can be seen from *Re Broadbent*,¹⁹ where a gift was left to an iron-framed church in Stalybridge, but that church had closed before the death of the testatrix. So as to prevent a lapse, the court looked for abstract intention. Mummery LJ stated:

The court must ascertain whether the intention of the testator was to benefit a charitable purpose promoted in the work of the named institution, as distinct from an intention to benefit only the named

¹⁷ *Ibid* 216

¹⁸ *Hutchinson's Will Trusts*, *Re* [1953] Ch 387

¹⁹ [2001] EWCA Civ 714

institution in the carrying out of its charitable purpose at or in connection with particular premises.²⁰

The judge was searching only for an ‘intermediate’ level of abstraction. Although the particular church had closed, it was sufficient that the testatrix intended a gift for ‘the work’ of the institution. In contrast to Simonds J in *Re Royce*,²¹ the judge did not find it necessary to look for a highly abstract intention for ‘the advancement of religion’.

While the precedents have refined the meaning and function of intention in different contexts, this core understanding of ‘definite’ and ‘abstract’ intention recurs throughout the law.

ii. The First Function of Abstract Intention

The abstractable nature of intention is more than of mere conceptual interest. It has two important practical functions in the law of schemes. The first function of abstract intention is to *rescue* gifts that would otherwise be lost to charity. It will be seen that cy-pres,²² prerogative,²³ ‘general purpose trust’,²⁴ and ‘successor organisation’,²⁵ schemes each use intention in this manner. Although judges might employ different terminology depending on the precedential context, it is normally referred to as ‘general intention’. Where the

²⁰ *Ibid* [36]

²¹ [1940] Ch 514

²² See for example *Biscoe v Jackson* (1887) LR 35 Ch D 460 (CA); *Re Woodhams* [1981] 1 WLR 493

²³ *Re Bennett* [1960] Ch 18

²⁴ See for example *Kings v Bultitude* [2010] EWHC 1795; *Re Broadbent* [2001] EWCA Civ 714 (CA)

²⁵ See for example *Re Faraker* [1911-1913] All ER Rep 488; *Re Lucas* [1948]

donor has the necessary type of abstract of intention there will be no resulting trust or lapse.

The rescue function of abstract intention can arise in two closely related circumstances. First, it can operate to prevent a resulting trust. *Re Abbott Fund*,²⁶ illustrates the rule in that context. A large sum had been raised by subscription for two deaf and dumb sisters in Cambridge. Although the ladies' father had amply provided for the sisters' care, a trustee had absconded with the fund. Out of sympathy, Cambridge subscribers established a private trust for the well-being of the sisters. The ladies did not exhaust that fund in their lifetimes, and so upon their deaths, the surplus reverted to the subscribers. It was merely a private trust, and so with the expiry of the objects the money was returned.

Gifts to charitable objects are different. Where the donors make gifts with the requisite abstract intention, they do not result. For example, if the subscribers in *Re Abbot Fund*,²⁷ had created a charitable trust, not just for the two sisters, but for the relief of poverty in general, it might have been possible to 'rescue' the gift. Providing that the subscribers had an abstract intention, the property could have been applied to the relief of poverty in perpetuity, thereby denying the subscribers a return. The gift would have been 'rescued' for charity.

²⁶ [1900] 2 Ch 326

²⁷ *Ibid*

In the case law, the rescue function of abstract intention is more commonly found in a second and closely related circumstance: testamentary lapse. Where a non-charitable gift is made by will, but that gift proves impracticable to effect, it will lapse to the residuary estate. Then, in the normal course, it will pass to the next of kin as if there had been an intestacy, or if there are no next of kin, it will pass to the Crown. In *Re Withall*,²⁸ Clauson J stated:

It is familiar law that if a testator leaves property to A. B. and A. B. predeceases the testator, the gift to A. B. lapses: A. B. is not there to take it.²⁹

Culsha v Cheese,³⁰ provides an example of a non-charitable gift being subject to testamentary lapse. A testatrix left a gift to three trustees for their use and the use of their heirs and assigns. She also left gifts to residuary legatees. Unfortunately all three trustees predeceased the testatrix. Hoping to receive a share of the money, the son of one of the deceased trustees claimed that the property should pass to him. The court refused to distribute property in that manner; the gift to the trustees was ineffective and so the testatrix's property had lapsed into her residuary estate.

By contrast, where the nominated object is charitable, the gift can be rescued for charity. In the testamentary context, this means that the gift will not pass to

²⁸ [1932] 2 Ch 236

²⁹ *Ibid* 240

³⁰ (1849) 7 Hare 236

the residuary estate. Instead, provided that the testator has the requisite abstract intention, it will be applied to a more abstract object. If in *Culsha v Cheese*,³¹ the testatrix had made her gift for a charitable purpose rather than a private individual, and if she had the requisite abstract intention, then her gift might have been rescued from lapse.

Where abstract intention is used to rescue gifts, the court takes the view that although the definite gift cannot be effected, its more abstract counterpart is workable. The judge will ‘save’ the gift by bringing into effect a new and more abstract trust.

iii. The Second Function of Abstract Intention

Abstract intention has a further and equally important function in the cy-pres doctrine. Sometimes, after it has been established as a trust, the donor’s definite gift is ‘varied’ by the courts. Where this is the case, the judge will take account of the donor’s abstract intention in that process of trust reform. Intention is used in this manner in both the cy-pres doctrine,³² and in the context of administrative schemes.³³ It is normally referred to as ‘the spirit of the gift’.³⁴

³¹ *Ibid*

³² See for example *Peggs v Lambe* [1994] Ch 172; *Re Lepton’s Charity* [1972] 1 Ch 262

³³ See for example *Forrest v Attorney General* [1986] VR 187; *Re Laing Trust* [1984] Ch 143

³⁴ See for example the Charities Act 2011, s 62(2)(a); *Re Campden’s Charities* (1881) 18 Ch D 310, 333

This function of intention has long been acknowledged in the case law, and so it was stated in *Attorney General v Sherbourne Grammar School*:³⁵

This Court has a further power and authority when the objects contemplated by the founder cannot be carried into effect, to direct the application of the revenues of the charity to promote objects in accordance with the *spirit of the original foundation*, the actual compliance with which has become impossible.³⁶

The abstract intention of the donor will be taken into account during the process of variation. One classic example of reform, reported by Hobhouse in the nineteenth century,³⁷ relates to the *Norwich Foundation for a Sermon in Low Dutch*.³⁸ There had been a Dutch congregation in Norwich, which from 1619 had benefited from various endowments for the minister and poor of the congregation. Over the years, the congregation dwindled away. But some centuries later, a 1906-7 enquiry by an Assistant Charity Commissioner revealed that the endowments were being used to pay £30 a year to the minister of the Dutch Church in the City of London. He received the fund in return for a yearly sermon to a small congregation of Dutch extraction. After introducing the sermon in Dutch, the minister would proceed in English, because most of the congregation could not understand the Low Dutch language.

³⁵ (1854) 18 Beav 256

³⁶ *Ibid* [280]-[281]. Emphasis added.

³⁷ Hobhouse, *The Dead Hand: Addresses on the Subject of Endowments and Settlements of Charitable Property* (Chatto & Windus, 1880)

³⁸ *Ibid* 106

The charity, being thought wasteful by the Commission, was reformed. In the process of reform, however, it is clear that abstract intention was taken into account. The Commission did not have a completely free hand in choosing new purposes for the trust. In the event, the fund was applied to the Netherlands Christian Sailors' Union in London, as well as other societies concerned with the spiritual welfare of Dutch people. The trust was reformed so that it could be used more effectively, but it was still applied to religious well-being of people from that country.

And so where an existing trust is being varied, abstract intention will flavour the process of reform. Where it is given emphasis, it will prevent the new purposes of the trust from being far removed from the original spirit behind the gift.

2. Schemes and Objective Charitable Validity

Alongside its abstractable nature, there is another conceptually important aspect to charitable intention. The law will not effect the subjective intention of the donor as a charity. If a gift is to be valid, subjective charitable wishes must be manifested in an objectively valid manner. Lord Macnaghten noted in the influential case, *Income Tax Special Purposes Commissioners v Pemsel*,³⁹ that:

...if a gentleman of education, without legal training, were asked what is the meaning of "a trust for charitable purposes," I think he would most

³⁹ [1891] AC 531

probably reply, “That sounds like a legal phrase. You had better ask a lawyer”.⁴⁰

Alternatively, as Hawkins eloquently explained in the nineteenth century, subjective intention is, ‘the fundamental and necessary basis of the legal effect of the writing,’ yet: ‘expression is the outward formality annexed by the law.’⁴¹ With particular reference to the law of schemes, this section looks at the formal requirements that must be satisfied in order for the gift to be recognised as charitable.

i. Framing Subjective Motivation so that it is Recognised as Objectively Charitable by Law

The law is blind to subjective intention. That means that a gift that is not expressed correctly at law will fail and no scheme will be available to save it. But it also means that a donor who does not truly have a subjective charitable intention can frame his gift in such a way that it is recognised by law. In that circumstance, the cy-pres doctrine will apply. Donors may not be motivated by a desire to give to charitable purposes, but provided they make a formally charitable gift, that ‘non charitable’ motivation will be irrelevant. In turn, if the donor has made a valid charitable gift, the scheme-making power will be applicable to the trust.

⁴⁰ *Ibid* 584

⁴¹ Hawkins, ‘On the Principles of Legal Interpretation, with Reference especially to the Interpretation of Wills’ (1858-1863) 2 *Juridical Society Papers* 298 at 302

While there are rare and unfortunate examples of donors leaving money to charity out of perniciousness or spite towards their family,⁴² by far the most common ‘non-charitable’ motivation is the creation of a personal memorial.⁴³ This is because although gifts to establish personal memorials are not validly charitable *per se*,⁴⁴ the law of charities can still be indirectly used to commemorate the donor’s name.

Provided that the gift is made for validly charitable purposes, subjective motivation is irrelevant. This permits the donor (who wishes to be memorialised) to establish, a scholarship,⁴⁵ or a home,⁴⁶ bearing his name. While his sole intention may be to create a memorial in his name, the law will still recognise it as a charity if the formal requirements of validity are met.

Such ‘memorialising’ charitable gifts are relatively common. The applicability of the doctrine in such circumstances can be seen from *Gilmore and Others v Uniting Church in Australia Property Trust*.⁴⁷ By her will, a testatrix named Martha Le Cornu left directions that an existing Methodist church should be demolished and replaced with a new building named the ‘P.H. Le Cornu Memorial Church’ in commemoration of her husband. Inside the new church there was also to be a window erected in memory of the testatrix. There was not enough money to carry out the plan, and over time the congregation of the

⁴² See *Mills v Farmer* (1815) 35 ER 597 at [56]

⁴³ *Gilmore and Others v Uniting Church in Australia Property Trust* (1984) 36 SASR 475; *Re Gwilym* [1952] VLR 282

⁴⁴ *Re Endacott* [1960] Ch 232

⁴⁵ See *Re Woodhams* [1981] 1 WLR

⁴⁶ *Re Good Will Trusts* [1950] 2 All ER 653

⁴⁷ *Gilmore* *supra* note 43

existing church had dwindled. Finally, after the Methodist Church in Australia merged into a wider organisation, the building was transferred to the Aboriginal Evangelical Fellowship of Australia. Faced with this failure of the gift Millhouse J sought to construct a cy-pres general charitable intention. This was the case even though it is likely that the testatrix's subjective intention was only to create a memorial to herself. On the facts of the case, the judge found that the testatrix had only a particular charitable intention and so the gift lapsed.

In the Victorian case, *Re Gwilym*,⁴⁸ the cy-pres doctrine was also considered in the context of a 'charitable memorial'. By her will a testatrix directed that her house should become a museum known as the 'Gwilym Art Gallery and Museum'. There were insufficient funds to carry out the plan and so lapse was in question. Smith J noted:

... that the testatrix had lived the whole of her life in this house and that, as appears from the direction that her name is to be attached to the museum and art gallery, she desired to establish a permanent memorial to herself.⁴⁹

Regardless of her subjective motivation, it was uncontroversial in the case that she had satisfied the requirements for an objectively valid charitable trust and so the application of the cy-pres doctrine was considered, although it was held that the testatrix had only a particular charitable intention and so the gift lapsed.

⁴⁸ *Gwilym* *supra* note 43

⁴⁹ *Ibid* 285

In neither case was the ‘true’ motivation of the testatrix considered by the court; it was sufficient that a valid charitable gift had been made. The cy-pres doctrine will apply in any circumstance where the donor has made such a gift because the subjective motivation of the donor is not relevant to its application.

ii. Donor Intention Should be Formally Expressed so that it Complies with the Objective Requirements of Legal Validity

Most donors will not be trying to trick the law. Their subjective intention will ‘match’ the law’s objective requirements. In order for the scheme-making jurisdiction to apply, the donor’s intention must be expressed so that it coincides with three objective requirements. First, they must formally intend to advance one of the listed purposes in section 3 of the Charities Act 2011, second their intention must be compliant with the law’s public benefit requirement, and third, their gift must be for an exclusively charitable purpose.

a. First Objective Requirement: Legally Recognised Purposes

Unless the donor expresses his intention so that it coincides with a legally recognised purpose,⁵⁰ his gift will not be for a valid charitable purpose. In turn, the scheme-making power cannot be applied to the gift. This is illustrated by *Cunack v Edwards*,⁵¹ where Smith LJ was called upon to decide whether funds held by the Helston Equitable Annuitant Society could be applied under the cy-pres doctrine. The fund was established to provide for the widows of its

⁵⁰ Now listed in Charities Act 2011, s 3

⁵¹ [1896] 2 Ch 679

subscribers, who received annuities in proportion to the length of time that their husbands had paid into the fund. Upon the death of the last widow-annuitant, there remained a surplus of £1250. The judge found that the value of the remaining fund could not be applied cy-pres on the basis that gifts for widows, without more, were not charitable. He stated:

No case has been cited, nor can I find one, in which such a gift has been held to be charitable, to which cy-près applies.⁵²

Even in circumstances where the donor expresses himself to have a ‘general charitable intention’, the schemes jurisdiction will not be applied if the gift itself is not for a charitable purpose. A non-charitable gift cannot be converted into a charitable one simply by use of the expression ‘valid charitable purpose’.

In *Re Sander’s Will Trusts*,⁵³ there was a gift to provide dwellings for the working classes and their families resident in the area of Pembroke Dock. The testator, who had been a solicitor, went on to state that the income from the trust should be applied in furtherance of his general charitable intention.

Contrary to the view of the testator, Harman J held that the gift to the working classes was not of itself charitable. His finding was on the basis that being a member that class did not necessarily denote poverty, and therefore the gift was not within the established legal list of valid charitable purposes. For that reason, despite the expert legal knowledge displayed by the testator, he could

⁵² *Ibid* 685

⁵³ [1954] Ch 265

not be said to have truly had a general charitable intention; he had no sort of charitable intention at all. And so the cy-pres doctrine did not apply on the facts.

The same approach was taken in *Re Jenkin's Will Trust*.⁵⁴ A testatrix had left a gift to an anti-vivisection organisation. Following the decision in *National Anti-Vivisection Society v IRC*,⁵⁵ Buckley J found that the gift was not for a valid charitable purpose. However, it was argued in the case that the context of the will (which contained a series of successful charitable bequests to valid animal welfare charities), evidenced a general charitable intention in favour of animal welfare, and so the cy-pres doctrine should be applied. Buckley J rejected the argument finding:

...the principle of noscitur a sociis does not in my judgment entitle one to overlook self-evident facts. If you meet seven men with black hair and one with red hair you are not entitled to say that here are eight men with black hair. Finding one gift for a non-charitable purpose among a number of gifts for charitable purposes the court cannot infer that the testator or testatrix meant the non-charitable gift to take effect as a charitable gift when in the terms it is not charitable...⁵⁶

⁵⁴ [1966] Ch 249

⁵⁵ [1941] AC 31

⁵⁶ [1966] Ch 249, 256

As a result of the testatrix's non-charitable intention, the schemes jurisdiction could not be applied to the gift. It was not relevant that the other bequests in the will showed a concern to promote a valid charitable purpose. Unless the gift is made for an objectively valid charitable purpose, the scheme-making power will not apply.

b. Second Objective Requirement: Public Benefit

In order for the scheme-making jurisdiction to be available, the donor's intention must also be expressed so that it coincides with an objective public benefit requirement. A subjective belief that a purpose is for the public benefit will not do. The requirement is a core element of the meaning of 'charitable purpose'. Section 2 of the Charities Act 2011 provides:

2 Meaning of "charitable purpose"

- (1) For the purposes of the law of England and Wales, a charitable purpose is a purpose which—
(a) falls within section 3(1), and
(b) is for the public benefit...

Subsection 4(2) Charities Act 2011 provides that the public benefit requirement is not to be presumed in relation to any of the purposes set out in subsection 3(1) of the same Act. And so a subjective belief that the gift is for the public benefit is not sufficient; the nature of the requirement is determined by the

court. This in turn allows legal control of the types of purpose that satisfy the requirement. Russell J stated obiter in *Re Hummeltenberg*:⁵⁷

In my opinion the question whether a gift is or may be operative for the public benefit is a question to be answered by the Court by forming an opinion upon the evidence before it.⁵⁸

In a recent case before the Upper Tribunal (Tax and Chancery Chamber), *Independent Schools Council v Charity Commission for England and Wales*,⁵⁹ a definition was attempted:

The first aspect is that the nature of the purpose itself must be such as to be a benefit to the community: this is public benefit in the first sense....

The second aspect is that those who may benefit from the carrying out of the purpose must be sufficiently numerous, and identified in such manner as, to constitute what is described in the authorities as 'a section of the public': this is public benefit in the second sense.⁶⁰

⁵⁷ [1923] 1 Ch 237

⁵⁸ *Ibid* 242

⁵⁹ [2011] UKUT 421

⁶⁰ *Ibid* 145

On this view, unless the gift satisfies the requirement in both senses it will not be a valid charitable purpose. In turn the court's scheme-making power will not apply to it.⁶¹

i. *Public Benefit in the First Sense*

The first sense in which a gift must be for the public benefit relates to the intrinsic value of the trust in question. This area of law is both controversial, and in a state of development.⁶² An unsettled issue relates to whether *all* gifts for charitable purposes listed in subsection 3(1) Charities Act 2011,⁶³ are inherently for the public benefit regardless of the manner in which the purpose is manifested. On this view, for example, a gift for the advancement of education would be for the public benefit for the intrinsic reason that the advancement of education is a charitable purpose.

In two recent decisions, the Upper Tribunal (Tax and Chancery Chamber) has sought to clarify the law. The Tribunal rejected the view that all gifts for charitable purposes are inherently for the public benefit. With reference to the charitable status of independent schools, in *Independent Schools Council v Charity Commission for England and Wales*,⁶⁴ the Tribunal found that it should be shown in each case that a gift for 'the advancement of education' is of

⁶¹ For consideration of this division, see Jaconelli, 'Adjudicating on Charitable Status – A Reconsideration of the Elements' [2013] 2 *Conv* 122

⁶² See Luxton, 'Opening Pandora's Box: The Upper Tribunal's Decision on Public Benefit and Independent Schools' (2013) 15.3 *CLPR* 27

⁶³ With the logical exception of (m) which leaves open the possibility of new charitable purposes being recognised.

⁶⁴ *Independent Schools Council* *supra* note 59

benefit. The Tribunal took the same view in relation to gifts for the prevention or relief of poverty in *Attorney General v The Charity Commission & Others*.⁶⁵ According to the reasoning in that case, a gift for the relief or prevention of poverty must also be manifested in such a way as to meet the public benefit requirement. Not all gifts for the relief of poverty would be treated as satisfying the requirement.

While the Tribunal takes the view that this ‘first sense’ understanding of public benefit existed in the case law before the enactment of the Charities Act 2006, it was not clearly expressed in the law. Consequently, there are no examples of the scheme-making power being denied to a gift that did not satisfy the public benefit requirement in this first sense. Yet as a matter of doctrinal logic, if a gift were to be made in such terms, no scheme would be available.

ii. Public Benefit in the Second Sense

The second sense of public benefit (that a sufficiently significant section of the community should benefit from the gift) is more firmly established in the case law. A clear explication of the rule was provided by Lord Wrenbury in *Verge v Somerville*:⁶⁶

To ascertain whether a gift constitutes a valid charitable trust... a first inquiry must be whether it is public – whether it is for the benefit of the

⁶⁵ [2012] UKUT 420 (TCC)

⁶⁶ [1924] AC 496

community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may for instance be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot.⁶⁷

In *Independent Schools Council v Charity Commission for England and Wales* the Tribunal stated the rule in *Verge v Somerville* as being:⁶⁸

...the question whether or not a gift is charitable [involves] an inquiry whether it is public or private – that is to say whether or not it is for the benefit of the community or an appreciably important class of the community.⁶⁹

There are few examples of schemes being denied as a consequence of a trust failing to satisfy the public benefit requirement in the second sense, although *Attorney General v Forde*⁷⁰ is on point. In the case, an estate owner had directed in his will for six houses to be built for the widows of persons residing on his land. His will stated that funds should be applied to the maintenance of the houses, as well as to provide a modest income for the widow occupants. The scheme had been established for some years, but over time it had become very difficult to find qualified individuals to live in the houses. In consequence,

⁶⁷ *Ibid* at 499

⁶⁸ *Independent Schools Council supra* note 59

⁶⁹ *Ibid* [47]

⁷⁰ [1932] NI 1

the Attorney General submitted that the houses were held on charitable trust and should be applied cy-pres.

Contrary to the Attorney General's arguments, in the Court of Appeal, it was found that Matthew Forde had not established a valid charity. This was because *inter alia*, the arrangement was of an inherently private nature. There was no public benefit and so the cy-pres doctrine was excluded. Andrews LJ held:

In a word, it was created, and has necessarily remained for almost a century, an entirely private estate trust or charity. As such, abuses or breaches of trust may be controlled by the Court of Chancery not under its charitable, but under its general jurisdiction with regard to trusts. Such proceedings should not be instituted and cannot, in my opinion, be maintained by the Attorney-General who represents the public; and the doctrine of cy-pres is inapplicable to such trusts.⁷¹

Similar logic was applied in *Re Hobourn Aero Components Limited Air Raid Distress Fund*.⁷² A World War Two munitions factory had established a 'benevolent' fund with two purposes. The first purpose was the provision of support for employees serving in His Majesty's Forces. The second was the provision of support for those munitions workers who had suffered damage from air-raids. At the end of the War, it was submitted by counsel that the payments to the fund had been applied to charitable rather than benevolent

⁷¹ *Ibid* 29

⁷² [1946] Ch 194

purposes. This in turn would have meant that the surplus could be applied cy-pres. On the facts of the case, Cohen J found that the fund was undoubtedly for charitable purposes, but because the funds were to be applied *privately* to the employees, it lacked the requisite public benefit. In consequence, the cy-pres doctrine was not available and the balance resulted to the munitions workers.

Gifts that do not satisfy the public benefit requirement are not validly charitable, and so the scheme-making jurisdiction does not apply to them. In order for the jurisdiction to bite the donor must express his gift so that it coincides with the law's objective determination of a charitable purpose for the public benefit. If his intention is not manifested in that manner, then there can be no scheme.

c. Third Objective Requirement: *Exclusively Charitable Purpose*

In order for the scheme-making jurisdiction to apply, the donor must also manifest his intention as a gift solely for charitable purposes. However, the rule is subject to a limited exception. In exceptional circumstances, salvaging legislation will apply to perfect an otherwise invalid gift. This in turn allows the scheme-making jurisdiction to bite. Even so, for the very large majority of donors, unless they express their gift as exclusively charitable, the scheme-making jurisdiction will not apply.

i. *The Prima Facie Rule*

The over-arching rule, that the cy-pres doctrine cannot be applied unless the donor's intention is manifested in an objectively valid form, also finds expression in the context of invalid trust provisions. Legal problems arise where donors make dispositions to charitable and non-charitable objects. As a general rule, in such circumstances, the gift will fail.

Invalid gifts can be categorised. A first type of invalid trust arises where the testator makes a disposition containing for a gift for a broad (and potentially non-charitable) purpose. In this instance, the language of the gift will *unify* non-charitable and charitable elements in one expression. The best known example remains the early nineteenth century case *Morice v Bishop of Durham*,⁷³ where a testatrix left a gift 'to dispose of the residue to such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve of'. Although such benevolent and liberal objects might as a 'matter of fact' include valid charitable purposes, the meaning of the expression was considerably broader than those charitable purposes recognised as a 'matter of law'. The Lord Chancellor allowed the gift to lapse. He held that:

⁷³ (1804) 32 ER 556

...there is no specific purpose pointed out to which the residue is to be applied... the trusts may be completely executed without bestowing any part of this residue upon purposes strictly charitable.⁷⁴

There is a second category. In contrast to this first type of ‘unified’ invalid gift, a formally distinct instance arises where a testator makes a disposition to charitable and non-charitable purposes in the alternative. So in *Chichester Diocesan Fund v Simpson*,⁷⁵ a testator directed that his residue be left ‘for such charitable institution or institutions or other charitable or benevolent object or objects in England’. Part of the gift was undoubtedly charitable, but his alternative gift for benevolent objects was not. The House of Lords held itself unable to *omit* the word ‘benevolent’ and create a valid charitable gift. Lord Simonds noted:

On the plain reading of this will I could only come to the conclusion that the testator intended exclusively to benefit charitable objects if I excised the words "or benevolent" which he has used. That I cannot do.⁷⁶

In both circumstances there is no valid charitable gift and the scheme-making jurisdiction will be excluded. Perhaps surprisingly, the rationale for this objective rule has only very once been considered in the courts. In *Re Diplock*,⁷⁷ Harman J explained that the legal logic for excluding the cy-pres

⁷⁴ *Ibid* 659

⁷⁵ [1944] AC 341

⁷⁶ *Ibid* 370

⁷⁷ [1940] Ch 253

doctrine from invalid gifts lay in the fact that there was no human object to enforce the non-charitable trust. He explained:

The Crown has never assumed the right to come to the Court and ask for the execution of a philanthropic trust; it has only assumed the right to come to the Court and ask for the execution of a charitable trust, and accordingly, if there is a gift for philanthropic purposes, it suffers from the vice of not having a beneficiary, ascertained or ascertainable, in whose interest the Court can administer the trust.⁷⁸

ii. The Scheme-Making Jurisdiction in the Context of Salvaging Legislation

For the large majority of donors, if a gift has not been expressed in exclusively charitable language it will fail. In turn the scheme-making jurisdiction will not be able to rescue it. Yet in one rare but conceptually interesting circumstance, the scheme-making jurisdiction can be applied even where the donor's gift was objectively invalid. Special legislation might 'salvage' the gift so that it will be read as a valid charitable trust. Following that process, the scheme-making jurisdiction will bite because a valid gift has been created by statute. Where a gift has been salvaged, the jurisdiction bites even though the donor has failed to express his intention correctly.

The Charitable Trusts (Validation) Act 1954 performs this salvaging function. But, unfortunately, it is both of limited effect and unclear application. A first,

⁷⁸ *Ibid* 259

and practically significant, limitation is that the English legislation acts only retrospectively on invalid trust provisions taking effect before 16th December 1952.⁷⁹ A second, and conceptually problematic, limitation is that the legislation has at times been given an unclear interpretation by the courts.

The legislation is complex. Subsection 1(1) of the Charitable Trusts (Validation) Act 1954 defines a relevant trust as being:

Any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless be used for purposes which are not charitable.

In order to interpret the statutory language, it is necessary to consider the two judicial law categories relating to ‘non-exclusive’ charitable purposes. It has been judicially accepted that one type of ‘non-exclusive’ purpose (gifts for charitable and non-charitable purposes in the alternative) could be salvaged by the legislation.⁸⁰ This is because gifts of this nature ‘could be used for exclusively charitable purposes’ in accordance with section (1) of the Charitable Trusts (Validation) Act 1954. The court can straightforwardly omit the non-charitable element. Consequently, after the trust has been salvaged, the scheme-making jurisdiction can be applied to it.

In relation to the other common law category of ‘non-exclusive’ charitable purposes unified in a single expression, the law is not clear. In *Re Gillingham*

⁷⁹ Charitable Trusts (Validation) Act 1954, s 2(2)

⁸⁰ *Re Saxone Shoe Co Ltd's Trust Deed* [1962] 1 WLR 934, 956-7

Bus Disaster Fund,⁸¹ a group of Royal Marine Cadets had been killed by a bus in a dark tunnel. In response, three local mayors wrote a letter to the *Telegraph* so as to raise funds for ‘defraying the funeral expenses, caring for the boys who may be disabled, and then to such worthy cause or causes in memory of the boys who lost their lives as the mayors may determine’. Such purposes are not exclusively charitable. The gift for ‘worthy’ purposes was an example a ‘unified’ invalid provision.

At first instance, Harman J found that the salvaging legislation did not apply to the unified invalid gift. For this reason it could not salvage the trust. Harman J found that subsection 1(1) of the Charitable Trusts (Validation) Act 1954 did not apply on the basis that it was:

Intended to cure dispositions whereby part of the trust fund is devoted to charitable purposes and part to purposes not charitable, or not wholly charitable, so long as the whole of the money could be devoted to charity by excluding words which were too wide or too vague.⁸²

The law was left unclear. In the Court of Appeal, a majority found that the legislation did not apply to the case, but on different grounds, and so Harman J’s position was left unconsidered.⁸³ If Harman J’s view were to stand, the relationship between the scheme-making jurisdiction and the salvaging legislation would be different depending on whether the gift was of a ‘unified’,

⁸¹ [1958] Ch 300

⁸² [1958] Ch 300, 306

⁸³ Although it was treated as binding by Cross J in *Re Harpur’s Will Trusts* [1961] Ch 38, 46

or, ‘alternative’ type. That is, the jurisdiction would apply to invalid gifts effective before the 16th of December 1952 provided that they were for the ‘alternative’ type of invalid trust. By contrast, the scheme-making jurisdiction could never apply to an invalid gift of the unified type.

However, later cases have taken a different conceptual tack to Harman J. First, it has been held that trusts that contain a ‘flavour’ of charity are salvageable under subsection 1(1) of the Charitable Trusts (Validation) Act 1954.⁸⁴ So in *Re Wyke’s Will Trusts*,⁸⁵ a disposition for trustees ‘to be used at their discretion as a benevolent or welfare fund or for welfare purposes for the sole benefit of the past, present and future employees of the company’ was held by Buckley J to contain, ‘a notion or flavour of charity.’⁸⁶ That flavour was relevant in relation to his decision to salvage the trust under subsection 1(1) of the legislation.

Second, it has been held that so long as the gift ‘could’ be applied to charitable purposes, then the salvaging legislation will apply. This approach was taken by Hart J in *Ulrich v Treasury Solicitor*.⁸⁷ In the case, a pre-1952 trust for ‘widows and children’ had been established. It was held that without more, gifts for such objects are not validly charitable, although it is conceivable that trustees could apply funds to those objects in a charitable manner, for example, a gift to poor children and widows. The trust was therefore established for a ‘unified’ invalid

⁸⁴ *Re Saxone Shoe Co Ltd’s Trust Deed* [1962] 1 WLR 943, 958

⁸⁵ [1961] Ch 229

⁸⁶ *Ibid* 245

⁸⁷ [2005] 1 All ER 1059

object of the first type. On the facts of the case, the judge found that the salvaging legislation did apply. Hart J stated:

[Section 1(1) Charitable Trusts (Validation) Act 1954] proceeds on the hypothesis, for the purposes of the definition only, that the provision in question is valid (or at least capable of construction) both in respect of the possible charitable and the possible non-charitable objects. It thus asks one to consider, in the case of a (notionally valid) provision which permits both charitable and non-charitable applications of property, whether the whole "could" be applied for charity. Another way of putting that question is to ask whether anyone would have a legitimate complaint if the whole were applied for charity.⁸⁸

On the basis that i) the trust for widows and children 'could' be applied to charitable objects, and ii) no-one would have had legitimate complaint if that had happened, Hart J was prepared to salvage the gift.

If Hart J's reasoning were to be followed in future, it would broaden the circumstances in which the scheme-making jurisdiction might be applied to an invalid gift. It would mean that 'unified' gifts could also be salvaged prior to the application of the scheme-making jurisdiction. In this manner, a charitable intention that was not expressed in validly charitable terms might nevertheless be the subject of a scheme.

3. Conclusion

⁸⁸ *Ibid* [29]

This chapter provides an analytical taxonomy of charitable intention in the law of schemes. Intention has two key characteristics.

A first, and conceptually striking, feature is that charitable intention is abstractable. Although donors make gifts in a definite form, it is always possible for the judge to take that definite gift and abstract it into one of the wider charitable purposes listed in section 3(1) of the Charities Act 2011. The specific purpose links to the general.

The law puts this doctrinal characteristic to work. Where a testamentary gift fails and it is not possible to effect the definite intention of the donor, the court might rescue a more abstract version of it. And so a failed gift in pursuit of a specific scholarship might be effected as a gift for the general advancement of education, or a gift to definite soup kitchen might be effected as an abstract gift for the relief of poverty. Even if a specific gift cannot be effected in a trust, a more abstract version can be.

Abstract intention has a further role to play. Where a trust has been established, but is in need of reform, the scheme-maker will take account of the donor's wishes. The new trust will respect the abstract spirit of the original gift. So intention is closely interwoven into the law of schemes. It is used both in the rescue of failed trusts and in the reform of established organisations.

The second feature is better known, but equally important. Charitable validity is objective. The law is blind to the subjective intention of the donor. In order for his gift to be valid (and in order for the scheme-making jurisdiction to

apply) the donor must manifest his wishes in a certain legally prescribed way. His gift must be i) for a purpose listed in section 3(1) of the Charities Act 2011, ii) for the public benefit as objectively understood by the courts, and iii) for an exclusively charitable purpose. Outside of exceptional cases ‘salvageable’ under subsection 1(1) of the Charitable Trusts (Validation) Act 1954, if the donor fails to manifest his intention in the correct manner, then the scheme-making jurisdiction will not apply.

CHAPTER THREE: ‘BALANCED VARIATION’ AND THE CY-PRES TRIGGERS

In order for the court to apply the cy-pres doctrine, it must first be triggered by a legally prescribed event. At common law it was rarely triggered. The bar was set high so that only ‘impossible’ or ‘impracticable’ trusts were amenable to cy-pres reform. Reform was a rare event. Out of deference to the original intention behind the trust, the courts were very reluctant to permit variation.

In testamentary construction cases decided under common law, impossibility and impracticability are still applied as a working rule.¹ However, in cases directed at the reform of established trusts, there has been a sea-change in approach. Following the Nathan Report,² original intention is no longer the sole concern of the courts. It has become one discretionary consideration amongst others guiding the discretion of the scheme-maker. In the process of variation, it is balanced against effectiveness standards.

This chapter evaluates the effectiveness of the new model. It provides a taxonomy for both the common law, and cases decided under statute. In the light of that analysis, it assesses the efficacy of balanced variation. Contrasting

¹ *Phillips v Royal Society for the Protection of Birds* [2012] EWHC 618; *Kings v Bultitude* [2010] EWHC 1795; *Re Woodhams* [1981] 1 WLR 493; *Re Lysaght* [1966] 1 Ch 191

² *Report of the Committee on the Law and Practice relating to Charitable Trusts* (Cmd 8710) HMSO, 1951

the English statute with Australasian innovation, it sets out substantive proposals for reform.

1. The Non-Intervention Principle and Common Law Triggers

Prior to legislative reform, the cy-pres doctrine was triggered only in tightly restricted circumstances. For a long period, there was a stable rule in operation that the doctrine would only be occasioned where a gift was either impossible or impracticable for the trustees to effect. There was a legal principle of non-intervention. In *White v Williams*,³ the Court explained the pre-statutory position:

Prior to 1960, jurisdiction to direct the application of property held on charitable trusts cy-près... required it to be shown that it had become impossible or impracticable to carry out the specified purposes. The court's jurisdiction was substantially expanded, originally by section 13 of the Charities Act 1960...⁴

The substantial body of case law defining the terms impossibility and impracticability is unified by a common feature. There was, at common law, a

³ [2010] PTSR 1575

⁴ *Ibid* [16]

far-reaching judicial reluctance to disturb the original intention behind the trust.

Consequently ineffective charities were not easily varied cy-pres.

i. Impossibility

‘Impossibility’ at law carries its natural language meaning. It occurs where there is an absolute frustration of the donor’s intention; the trigger presents the courts with a very high threshold that must be passed before the doctrine can be applied. The clearest instance of impossibility is the disappearance of a once-existing charitable object. Even in such compelling circumstances of failure, the common law non-intervention policy can be seen to have an effect. Judicial reluctance to interfere even in circumstances where a charitable object has disappeared is evident in *Attorney General v The Earl of Craven*.⁵ In that case, a gift had been made both for the reception of plague patients and to provide them with a burying-place. By the time the case was considered, there had been no instances of the disease for a very long time. Yet the charity was held not to have failed. Sir John Romilly MR said:

Who can say that the disease, properly speaking, called the Oriental Plague, may not occur again? I go into no speculations of what

⁵ (1856) 21 Beav 392

constitutes a plague or not... [the oriental plague] visited this country in 1665; but can anybody say that it will never rise again?⁶

The case is exceptional. Most examples of an object ceasing to exist are unambiguous, leaving the court with no option but to alter the trust. The same instances of absolute failure recur in the law with some frequency. So at common law, the courts have with regularity found ‘impossibility’ where a bequest is left to a charitable organisation that does not exist.⁷ *Re Slatter’s Will Trusts*⁸ is a clear illustration: a testatrix made a gift to a tuberculosis hospital in New South Wales, but by the date of her will, owing to the successful campaign against the disease, the hospital had closed. Plowman J summarised the absolute nature of the failure:

The hospital as I have said closed down in 1955; it closed down because it had become redundant. There is no evidence that its work was ever transferred elsewhere, there simply ceased to be a need for the work.⁹

This is core case impossibility. Compelling circumstances will cause the court to intervene,¹⁰ where outside of allowing lapse, there is no alternative but to permit a variation of the trust.

ii. Impracticability

⁶ *Ibid* [409]

⁷ *Re Ovey* (1885) 29 Ch D 560; *Re Rymer* [1895] 1 Ch 10; *Fisk v Attorney General* (1867) LR 4 Eq 521

⁸ [1964] Ch 512

⁹ *Ibid* 526

¹⁰ Although alternative principles were applied in the case itself. Criticism in Hutton, ‘The Lapse of Charitable Bequests’ (1969) 32 *MLR* 288

It is not just absolute failure that triggers the cy-pres doctrine at common law. It is also triggered in circumstances of impracticability: where the donor's object is possible in theoretical terms, but real-world considerations mean that it is practically frustrated. Although the natural language meaning of 'impracticability' encompasses a broad range of circumstances stretching from 'problematic' to 'impossible', at common law the non-intervention principle is still applied. Outside of exceptional cases,¹¹ 'impracticability' has represented a high threshold. It is found where there is no realistic way in which the donor's object could be effected.

The nature of practical frustration is vividly illustrated by *Attorney General v Gibson*,¹² where by a will written in 1670, a testatrix had made a gift for the redemption of slaves. She allowed her trustees discretion as to how the plan should be effected. Following the Abolition of Slavery Act 1833, the redemption of slaves became impossible in the British colonies. It was argued in the case, that the fund might still be usefully applied in the Barbary States, and so it was said that her gift remained *theoretically* possible. Even so, owing to practical difficulties in effecting the will outside of British colonies, the trust was held to fail and the cy-pres doctrine was triggered.

¹¹ *Dominion Student Hall Trust v Attorney General* [1947] Ch 183; *Re Morgan* [1955] 1 WLR 738
¹² (1835) 2 Beav 317

Despite the difference in terminology, it can be seen that at common law cases of impracticability are not far removed from impossibility. Both instances represent circumstances where alteration is compelling. This common law rule had the effect of protecting donor intention from reform. Once his wishes were locked in the trust, only high-threshold circumstances could cause their alteration.

2. The Impact of Statute

Directed at the variation of established trusts, statutory reform has radically altered the common law position. Under legislation, impossibility and impracticability have been abolished and replaced by a lengthy list of statutory triggers. In three legislative restatements of the law (section 13 of the Charities Act 1960, section 13 of the Charities Act 1993 and section 62 of the Charities Act 2011)¹³ the non-intervention principle has been replaced by a discretionary model of balanced variation. The current section 62 triggers can be paraphrased as being where:

- a. The purposes cannot be carried out at all.¹⁴
- b. The purposes cannot be carried out according to the directions given by the donor.¹⁵
- c. The purposes have been fulfilled.¹⁶
- d. The purposes are no longer charitable.¹⁷
- e. The trust purposes are unsuitable and ineffective.¹⁸

¹³ Each restatement repealing the one before it.

¹⁴ Charities Act 2011, s 62(1)(a)(ii)

¹⁵ *Ibid*

¹⁶ Charities Act 2011, s 62(1)(a)(i)

¹⁷ Charities Act 2011, s 62(1)(e)(ii)

¹⁸ Charities Act 2011, s 62(1)(e)(iii)

- f. A specified class of people or area is no longer suitable.¹⁹
- g. The charity's funds could be more effectively used in conjunction with other and separate charity funds.²⁰
- h. The purposes have been taken over by the state.²¹
- i. An administrative area has ceased to exist.²²

The taxonomy of the statute is rarely explored. Not all of the section 62 triggers expand the courts' jurisdiction, some are easily reconcilable with the common law non-intervention principle. It cannot be described as 'user friendly'; the statute does not categorise the different types of triggers. It merely lists the cy-pres circumstances without any attempt at categorisation. As a prerequisite to a reform analysis, this section classifies the triggers in terms of their relationship with the common law.

i. Triggers that do not Challenge the Non-Intervention Principle

Some triggers might be characterised as a codification of the common law approach. They represent circumstances of compelling failure where the court has no choice but to intervene and vary the trust cy-pres.

a. Purposes cannot be Carried Out at all

The word 'impossibility' is not contained in the English statute,²³ but subsection 62(1)(a)(ii) of the Charities Act 2011 has the same effect. It states

¹⁹ Charities Act 2011, s 62(1)(d)(ii)

²⁰ Charities Act 2011, s 62(1)(c)

²¹ Charities Act 2011, s 62(1)(e)(i)

²² Charities Act 2011, s 62(1)(d)(i)

that the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-pres are:

- (a)where the original purposes, in whole or in part—
 - (ii)cannot be carried out...

Since the doctrine has been put on a statutory footing, such instances of impossibility have only received scant judicial attention, but it can be seen from the Charity Commission reports and guidance that they have not gone away. For example, the Commission's report on the *Bequest of Mabel Elizabeth Kiddle deceased for Children's Orphanage*,²⁴ is a classic example of testamentary impossibility. A testatrix left a gift by will to 'the Children's Orphanage, at Hawkhurst, Sussex'. The solicitors for the personal representative discovered that the testatrix had likely meant to benefit the Dr Barnado's Home at Babies Castle, Hawkhurst. Dr Barnado's claimed the bequest, and it was applied to another institution run by that charity. In a familiar common law testamentary scenario, there was no question of effecting the donor's intention; it was completely unworkable as a consequence of closure.²⁵

b. Purposes Cannot be Carried Out According to the Directions Given by the Donor

²³ Although it persists in some Australasian jurisdictions: Variation of Trusts Act 1994 (Tasmania), s 5(2); Charitable Trusts Act 1962 (Western Australia), s 7(1)(a); Charitable Trusts Act 1957 (New Zealand), s 32(1)

²⁴ *Report of the Charity Commissioners for England and Wales* (1969), 20

²⁵ Unfortunately in its reports, the Commission does not normally describe which statutory trigger was employed. For that reason they can only be used as illustrative examples of case facts.

Alongside outright impossibility, subsection 62(a)(ii) of the Charities Act 2011 also encompasses a form of common law impracticability. Strictly construed, it does not impact upon the non-intervention principle. The subsection can be applied to those trusts which cannot be carried out according to the directions given and the spirit of the gift. Just as at common law, highly impracticable gifts can be altered cy-pres. However, there is a change of focus. The question for the court is not solely whether the gift is impracticable. Under statute, the court must ask the more complex question: does strict application of the terms of the trust defeat the underlying spirit of the gift?

Subsection 62(1)(ii) provides that the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-pres are:

- (a)where the original purposes, in whole or in part—
 - (ii) cannot be carried out, or not according to the directions given and to the spirit of the gift.

Re Lepton's Charity,²⁶ illustrates the process. By a will of 1715, a testator named Joseph Lepton had devised land upon trustees to pay £3 per annum to a minister. Any surplus income was to be applied:

....unto such poor aged and necessitous people legally settled within the town of Pudsey as shall subsist without the town allowance at the discretion of his trustees.²⁷

²⁶ [1972] 1 Ch 276

For 253 years, the trustees paid the sum of £3 a year to the minister of the Pudsey Congregational Chapel. While at the time of the bequest, £3 had represented three fifths of the income, by the time of the case, that income had risen to £791 a year. This meant that the minister received only a very small fraction of the trust's benefit. Pennycuick VC found that a predecessor of subsection 62(1)(a)(ii) of the Charities Act 2011,²⁸ was applicable:

The intention underlying the gift was to divide a sum which, according to the values of 1715, was modest but not negligible, in such a manner that the minister took what was then a clear three fifths of it. This intention is plainly defeated...²⁹

The approach in *Re Lepton's Charity*,³⁰ marks a limited intervention in compelling circumstances. The testator had intended a three fifths division of the income to go to the minister, but that underling intention was defeated by the passing of the time. While in a strict sense, the testator's intention was still workable, in a practical sense (taking into account abstract intention) it was frustrated.

c. The Purposes have been Fulfilled

²⁷ *Ibid* 277

²⁸ Charities Act 1960, s 13(1)(a)(ii)

²⁹ *Lepton* *supra* note 26 at 285

³⁰ *Ibid*

‘Fulfilment’ relates to the circumstance where the donor’s wishes have been successfully effected and completed. The trigger does not challenge the non-intervention principle because it only applies in circumstances where the intention behind the gift has been exhausted. Subsection 62(1)(a)(i) of the Charities Act 2011 states that the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-pres are:

- (a)where the original purposes, in whole or in part—
 - (i)have been as far as may be fulfilled

There has been no judicial consideration of this trigger. It is rarely used. Despite the lack of authority, an illustrative set of facts can be found in the Charity Commission’s report on the *Old Contemptibles Association*,³¹ which had been founded after the First World War so as to foster the spirit of the Contemptible Little Army of 1914. One of the charity’s primary purposes was to promote the spirit and attitude of voluntary service to the country that moved the men of the British Army in 1914. With the passing of time, their number dwindled substantially and by 1974 the members, who were all aged above 80, decided to wind up the charity. The Charity Commission report notes that:

³¹ Report of the Charity Commissioners for England and Wales (1977), 36

It is unusual for a charity's beneficiaries to be qualified by virtue of participation in some historical event, and inevitably such a charity lacks that element of perpetuity which characterises most charities.³²

The purposes of the charity were no longer capable of being effected, and so a part of the funds was applied towards the relief of poverty amongst the Old Contemptibles and their widows. The purpose had been completed, so there was no choice but to apply the statutory cy-pres doctrine.

d. The Purposes are no Longer Charitable

The donor's gift may cease to be charitable as a consequence of social change, or as a consequence of legislation. Subsection 62(1)(e)(ii) triggers the doctrine where the original purposes, in whole or in part, have ceased since they were laid down:

ceased, as being useless or harmful to the community or for other reasons, to be in law charitable.

Again, being a compelling circumstance of failure, the provision does not challenge the non-intervention principle. If the donor's intention is not valid at law, then the court will have no alternative but to apply it cy-pres.

A first circumstance where the trigger might apply occurs where a gift has ceased to be charitable as a result of social change, but without legislative or

³² *Ibid*

precedential change. This can be seen in relation to the Charity Commission's decision to decline to register as charities gun and rifle clubs.³³ That decision was taken contrary to the early authority in *Re Stephens*,³⁴ where a gift was made: to the National Rifle Association to be expended by the council for the teaching of shooting at moving objects in any manner they may think fit, so as to prevent as far as possible a catastrophe similar to that at Majuba Hill.³⁵ Prior to the Commission's decision, the trust in *Re Stephens* was found to be valid on the basis that it would make the trained individuals more efficient if they were called up to serve in the army.

The trigger is not a new power, it reflects the common law position. There are dicta to the effect that where, after a period of time a purpose ceases to be charitable, the cy-pres doctrine will apply. In *National Anti-Vivisection Society v IRC*,³⁶ Lord Simonds stated:

If by a change in social habits and needs, or, it may be, by a change in the law the purpose of an established charity becomes superfluous or even illegal, or if with increasing knowledge it appears that a purpose once thought beneficial is truly detrimental to the community, it is the duty of trustees of an established charity to apply to the court or in suitable cases to the charity commissioners or in educational charities to

³³ *The City of London Rifle and Pistol Club, The Burnley Rifle Club* (1993) 1 Decisions of the Charity Commissioners 4-13; see Luxton, *Making Law?: Parliament v The Charity Commission* (Politeia, 2009)

³⁴ (1892) 8 TLR 792

³⁵ Noted in *Re Drifill* [1950] Ch 92, 95

³⁶ [1948] AC 31

the Minister of Education and ask that a cy-près scheme may be established.³⁷

It is notable that subsection 62(e)(ii) includes trusts that have become ‘harmful’, but it otherwise reflects Lord Simmond’s dicta.

A second circumstance where the trigger applies is where the law has been changed by the court or legislature.³⁸ Again, this parallels the common law position. In *Attorney General v Vint*,³⁹ a testator left a gift to provide porter for the aged inmates of the Dartford Union Workhouse. Rules of the Poor Law Commissioners, produced under the Poor Law Amendment Act, prohibited the introduction of liquors into the workhouse and so the gift as the testator had described it could not be carried into effect. Sir JL Knight Bruce VC held:

Care must be taken that the law be obeyed, and that no fermented liquors be introduced, except in conformity with the Poor Law Amendment Act. If fermented liquors should be prohibited, then the fund may be applied in some manner so as to give the old people in the union tea, sugar and the like.⁴⁰

³⁷ *Ibid* 74

³⁸ For an argument that the removal of charitable status from certain independent schools may not trigger the cy-pres doctrine on the basis that such non-charitable entities would not be useless or harmful, see Jaconelli, ‘Independent Schools, Purpose Trusts and Human Rights’ [1996] *Conv 24*

³⁹ (1850) 3 De G & Sm 704

⁴⁰ *Ibid* 705

A court acting under this trigger will have no choice but to reform the gift. If a donor's purposes have ceased to be charitable after a period of time, it is not legally possible to allow the trust to remain unchanged. It has failed absolutely.

ii. Discretionary Triggers that Challenge the Non-Intervention Principle

Section 62 of the Charities Act 2011 is far more than just a codification of the common law approach. Whereas at common law, judges have been historically reluctant to intervene and vary trust purposes, following legislative change, they have a wide power to alter trusts. In contrast to those triggers involving absolute failure, a number of the statutory circumstances allow the courts a great deal of discretionary flexibility. Albeit taking different statutory formulations, they each direct the court to balance the suitability, or the effectiveness of the original purposes against the original intention of the donor.

As is appropriate with such broad language, there have been no English attempts to define the words 'suitable' and 'effective'. They are broad, discretionary effectiveness standards. The closest a court has come to a definition can be found in *Northern Sydney and Central Coast Area Health Service v The Attorney General for New South Wales*,⁴¹ where Windeyer J

⁴¹ [2007] NSWSC 881

stated in relation to identical statutory language in the New South Wales provision:⁴²

The clear purpose of this section is to allow schemes to be ordered even if, strictly speaking, the trust purpose can in some way be carried out albeit not in an economic and most effective or beneficial way.⁴³

No narrower definition would be possible. The statutory expression invites courts to utilise their case-by-case discretion. It is a process of balanced variation dependent on the informed opinion of the scheme-maker. In England, this important point has been judicially remarked by Morritt LJ in *Versani v Jesani*, where he noted that the statute contained: ‘contexts which require the court to make a value judgment.’⁴⁴

a. The Purposes are Unsuitable and Ineffective

The broadest trigger is found in subsection 62(e)(iii) of the Charities Act 2011. The provision states that the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-pres:

- (e) where the original purposes, in whole or in part, have, since they were laid down—
 - (iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the appropriate considerations.

⁴² Charitable Trusts Act 1993 (NSW), s 9(1)

⁴³ *Northern Sydney* *supra* note 41 at [26]

⁴⁴ *Versani v Jesani* [1999] Ch 219, [24]

The subsection allows trusts that are still practically workable to be reformed.

In order for the court to intervene it is sufficient that, in the opinion of the judge, the trust has ceased to be suitable and effective.

The process of discretionary reform received extensive judicial consideration in *Varsani v Jesani*,⁴⁵ where a Hindu sect that had split into majority and minority factions following allegations of misconduct directed at the group's founder.

The groups were unable to co-operate, and the minority group argued that the trust had failed because it was no longer possible to carry out the founding precepts of the sect. In consequence of this problem, the minority asked the court to provide a definition of the group's original precepts, and then to determine which group was still following the essential tenets of the faith.

Morritt LJ noted that under the common law, it would have been necessary to meet the demand of the minority before a cy-pres scheme was triggered. He stated in relation to a predecessor of section 62 of the Charities Act 2011:

But for the jurisdiction conferred by section 13 of the Charities Act 1993 there would be much to be said for the submission for the minority group. It could not be said that it was either impossible or impracticable to carry out the purposes of the charity so as either or both of the groups

⁴⁵ *Ibid*

professed faith of Swaminarayan according to the teaching and tenets of Muktajivandasji.⁴⁶

And so on the view of the judge, prior to statute the court would have been forced to define the tenets of the faith before deciding whether or not the gift had failed. Under statute, that exercise in definition was not necessary; the cy-pres doctrine could be applied even if the original trust had not failed. Morritt LJ continued:

Now the jurisdiction to make a cy-pres scheme depends on whether the case falls within one or other of the paragraphs of section 13(1). The relevant test in this case is now whether the original purpose has ceased to provide a suitable and effective method of using the property...⁴⁷

The court was able to side-step the difficult issue of defining original donor intention. It enjoyed discretion; it did not have to decide precisely upon which religious trusts the property was held.

Unfortunately, outside of *Varsani v Jesani*,⁴⁸ the discretionary provision has received scant judicial attention in England.⁴⁹ But the reform of an old, but practically workable, trust can be illustrated by the Charity Commission's

⁴⁶ *Ibid* [20]

⁴⁷ *Ibid* [22]

⁴⁸ *Ibid*

⁴⁹ See *Lepton* *supra* note 26 at 285

report on a *Gift to Highgate School*.⁵⁰ The Victorian Philanthropist Baroness Burdett-Coutts had presented the Governors of Highgate School in North London with 30 Greek manuscripts to be used for teaching purposes. The manuscripts had originally been placed in the school library, but had later been moved to the Clerk's office and entirely forgotten about. The manuscripts were of considerable value and the school took the view that they could be put to better use if they were sold. The Commission agreed, applying the gift cy-pres to the debt incurred on the conversion of a school library. The alteration took place in circumstances where the original intention was strictly workable. While it is not difficult to think of better uses for the manuscripts than teaching in a school, they could have been put to that application.⁵¹

Subsection 62(1)(e)(iii) is a broad and flexible trigger. It operates as a ‘catch-all’ circumstance, allowing reform where the scheme-maker is of the view that a trust is unsuitable or ineffective. The other discretionary triggers in the statute are conceptually similar, although pertaining to more specific circumstances.

b. A Specified Class of People or Area is No Longer Suitable

Subsection 62(1)(d)(ii) is more focussed than subsection 62(1)(e)(iii). It provides that the original purposes of a charitable gift can be altered to allow the property given, or part of it, to be applied cy-pres:

⁵⁰ *Report of the Charity Commissioners for England and Wales* (1987), 11

⁵¹ See also *Report of the Charity Commissioners for England and Wales*, ‘The Royal Cornwall Home for Children, Falmouth’ (1974), 16 where a strictly viable charity for destitute girls was varied cy-pres in light of financial difficulties.

- (d) where the original purposes were laid down by reference to...
- (ii) a class of persons or an area which has for any reason since ceased to be suitable, regard being had to the appropriate considerations, or to be practical in administering the gift

The subsection condenses two cy-pres occasions. The first is where a specified class of individuals have ceased to be suitable. The second is where a specified area has ceased to be suitable. Both permit reform in circumstances where the donor's intention is still workable in strict terms.⁵² They are discretionary; the scheme-maker must apply his own judgement so as to decide whether or not the trigger bites. And so the provision can be characterised as special instance of the more general subsection 62(1)(e)(iii).

i. Trusts for Unsuitable Classes of Persons

With regards to gifts to unsuitable classes of persons, there is authority that such trusts are not amenable to cy-pres alteration at common law. So in *Re Buck*,⁵³ a gift was left to a friendly society designed to provide for the relief of members, children and widows of the society in distressed circumstances. At the time of the case there were just three annuitants left. Having found that the organisation was validly charitable, Kekewich J went on to consider whether, in the light of the small membership, the gift was practicable. He held:

⁵² For similar comments on the impact of the subsection on the common law, see Sheridan and Delaney, *The Cy-Pres Doctrine: First Supplement* (Sweet and Maxwell, 1961), 11

⁵³ [1896] 2 Ch 727

It does not follow... that because it is still existing it has not failed practically. It seems to me that the institution has failed, except so far as it is necessary to provide for this particular annuitant.⁵⁴

Following the enactment of legislation, *Buck* does not reflect the contemporary legal position. *Peggs v Lamb*,⁵⁵ which was decided under the predecessor to subsection 62(1)(d)(ii),⁵⁶ shows how the non-intervention principle has been relaxed. Just as in *Buck*,⁵⁷ there was a trust for an unsuitable class, but under statute it was possible to trigger the doctrine. From time immemorial Freemen of the Ancient Borough of Huntingdon had enjoyed grazing rights over certain lands. Over the years, the benefit of those rights had been converted into various alternative sources of income from the land which were shared equally between the Freemen. Membership of the class was restricted to sons of Freemen born in the ancient borough. Over time, this membership qualification led to a decline in the number of Freemen. As a consequence of the diminishing size of the class in combination with a rise in the value of their entitlements, the Charity Commission invited the trustees to apply for a scheme.

Morritt J found that while in previous centuries the Freemen had been important both in terms of numbers and economic importance, that was no longer the case. He held that the trust's restriction to a narrow class was no

⁵⁴ *Ibid* 735-736

⁵⁵ [1994] Ch 172

⁵⁶ Charities Act 1993, s 13(1)(d)(ii)

⁵⁷ *Buck* *supra* note 53

longer a suitable way of effecting the gift. It was applied cy-pres so that all inhabitants of the ancient borough might benefit from the trust.

ii. Trusts for Unsuitable Areas

Subsection 62(1)(d)(ii) has received no judicial consideration in the context of gifts for unsuitable areas, although the Charity Commission's report on *Clarence House Trust, Hartlepool, Cleveland*,⁵⁸ is illustrative. In 1925, a building named Clarence House was given to trustees for the benefit of transport workers in the dock area of the Port of the Hartlepool. In 1956 the building was sold and its value applied for the benefit of dockers in the same area. The trustees were unable to spend the money, causing the Charity Commission to prepare a scheme extending the area of benefit to all dock workers in the jurisdiction of the Tees and Hartlepool Port Authority. Yet, in the event, the trustees rejected that scheme, preferring instead to apply the gift to the general charitable benefit of the inhabitants of Hartlepool. Unfortunately, from the report it is not clear whether it was strictly possible to expend the fund for the benefit of the Port of the Hartlepool alone. Even so, the report illustrates the type of circumstance where a trust for a particular location might be reformed.

iii. The Charity's Funds Could be More Effectively Used in Conjunction with Other and Separate Charity Funds

⁵⁸ Report of the Charity Commissioners for England and Wales (1979), 30

A final discretionary trigger applies where the gift can be more effectively used through amalgamation of funds with another charity. Subsection 62(c) of the Charities Act 2011 states that the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-pres:

- (c) where—
(i) the property available by virtue of the gift, and
(ii) other property applicable for similar purposes,
can be more effectively used in conjunction, and to that end can suitably, regard being had to the appropriate considerations, be made applicable to common purposes

The provision triggers the doctrine on ‘suitability’ and ‘effectiveness’ grounds, and so it is a relaxation of the common law. Again, it can be characterised at a specific version of 62(1)(e)(iii) which contains the same statutory language.

There is no English case law on point, but the Victorian case *Melbourne Anglican Trust Corporation v Attorney General*,⁵⁹ (which was decided under an identical Victorian statutory provision) is illustrative.⁶⁰ The authority relates to the amalgamation of three estates, each of which had originally been donated for the accommodation and recreation of Anglican Clergy. A scheme was proposed whereby certain property on one of the estates would be sold and the funds would be used to purchase new units.

The merger was permitted by the court, but it was also held to be subject to certain limitations; the trustees had proposed that one of the properties should

⁵⁹ [2005] VSC 481

⁶⁰ Charities Act 1978, s. 2(1)(c) (Victoria)

be made available to necessitous non-clergy at a nominal rate, even though this form of charity was not permissible in the original trust instrument. Gillard J prevented such an extension of the benefit on the basis that:

[Circumstances] have not changed to such an extent to in any way cut across the original purposes which were to benefit Anglican clergy. In my view, s. 2 does not enable this Court to approve the scheme to enable persons other than Anglican clergy or lay member of the Anglican Church licensed by a Bishop a Diocese to occupy the premises at a nominal payment.⁶¹

Employing its discretion, conjunction of funds was acceptable to the court, but that conjunction could not also be tied to an expansion of the beneficial class. A radical shift from the intention of the donor was not permissible, and so to that extent the intention behind the gift was protected from alteration.

iii. Non-Discretionary Statutory Triggers

The most conceptually interesting contrast in the statute is between i) those triggers that restate the common law and ii) those triggers which give judges a case-by-case discretion to decide whether or not trust purposes have ceased to be suitable or effective. But the statute is not binary. There is another category:

⁶¹ *Melbourne Anglican Trust Corporation* *supra* note 59 at 52

certain triggers expand the common law, but without according discretion to the scheme-maker.

a. The Purposes have been Taken Over by the State

Subsection 62(1)(e)(i) of the Charities Act 2011 is a focussed trigger; it does not direct the judge to consider whether or not use of the cy-pres doctrine is suitable or effective. It is non-discretionary, applying automatically where a trust purpose is adequately provided for by the state. The statute provides that the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-pres:

- (e) where the original purposes, in whole or in part, have, since they were laid down—
 - (i) been adequately provided for by other means

Although it is a non-discretionary trigger, it still marks a relaxation of the non-intervention principle at common law. Prior to the enactment of statute, the duplication of a charity's work by the state was not a sufficient trigger for the cy-pres doctrine. In *Attorney General v Day*,⁶² by a will dated 1709, a testator had left a gift to construct and maintain a causeway. Under the Local Government Act 1888, the causeway had been declared to be a main road, and so it came under the control of the local council. For a long period, surplus income from the gift was paid to a library at Cambridge University. Following a state take-over of the charity's work, the University argued that the testator's gift had failed and that the entire fund should be applied towards the library.

⁶² [1900] 1 Ch 31

But North J found that there was no failure; the gift could be applied to a state trustee. He stated:

The fund is devoted to a charitable purpose, namely, the repair of the road, and it seems to me that the persons in whom the road is vested, and who are under the liability to repair it, have the benefit of these trusts which have been created for providing the sums I have mentioned for that purpose⁶³

The original intention remained technically workable, and so cy-pres alteration was prohibited. Under the contemporary law, subsection 62(1)(e)(i) has relaxed that position. Under the statute, the state take-over of a charitable service is sufficient to trigger the cy-pres doctrine. This can be illustrated by the Charity Commission's report on The *Hermitage Lands* charity,⁶⁴ which closely parallels the facts of *Attorney General v Day*.⁶⁵ A highway charity had been established in 1776 by a conveyance of land, the income from the land was to be applied towards the repair and support of a causeway or pavement. By the time the case came to the attention of the Commission, the causeway had become part of the A51 trunk road between Nantwich and Tarporley. Responsibility for maintenance of the road lay with the Ministry of Transport and the income from the charity was being paid to that government department.

⁶³ *Ibid* 36

⁶⁴ *Report of the Charity Commissioners for England and Wales* (1972), 19

⁶⁵ *Day* *supra* note 62

The case came to the attention of the Charity Commission after it was proposed that the charity lands should be sold, although that plan was apparently rejected. Instead, the Commission applied a predecessor of subsection 62(1)(e)(i) so as to trigger a cy-pres scheme diverting the funds from the state.⁶⁶ The new objects of the charity were for the amelioration of the nearby townships of Calveley and Wardle. The Commission noted that funds could be devoted to the provision of a public clock, beautifying and improving the neighbourhood, helping in the provision of a recreation ground or village hall, or providing a bus shelter.

The two different decisions in relation to the same trust neatly illustrate the effect of statute. While at common law even a state takeover of a purpose would not trigger the cy-pres doctrine on the basis that the intention behind the gift was still workable, under statute it is possible to alter the terms of the trust.

b. An Administrative Area has Ceased to Exist

Another non-discretionary trigger arises where an area of benefit ceases to exist as a result of administrative change. Subsection 62(1)(d)(i) of the Charities Act 2011 provides that the doctrine will apply:

- (d) where the original purposes were laid down by reference to—
 - (i) an area which then was but has since ceased to be a unit for some other purpose

⁶⁶ Charities Act 1960, s 13(1)(e)(i)

There are still no recorded uses of this trigger, but it has been academically noted that the provision goes further than the common law, because the disappearance of an administrative unit (such as a local authority area, or an economic development zone) does not render the donor's original intention impossible.⁶⁷ The gift could continue to be applied according the historic boundaries of the 'area of the unit' even though it has ceased to exist in administrative terms.

4. 'Balancing' Intention Under the New Statutory Model

Of the three classes of triggers, the discretionary subsections are the most significant. Those subsections introduce flexibility to the law. They direct the court to reform trusts on the basis of a case-by-case judgement of whether or not purposes have ceased to be suitable and effective. Insofar as the non-intervention principle is displaced, this marks a new model of cy-pres.

Yet merely introducing judicial discretion is not the policy aim of the statute. It provides for a system of balanced variation whereby the court, in the exercise of its judgement must take account of both the abstract intention of the donor and the need to reform obsolete and low utility trusts. In light of this policy goal, it directs the scheme-maker to take account of two factors ('appropriate considerations') at the trigger stage. Subsection 62(2) of the Charities Act 2011

⁶⁷ *Ibid*

provides that, in section 62(1), the statutory phrase ‘appropriate considerations’ means:

- (a) (on the one hand) the spirit of the gift concerned, and
- (b) (on the other) the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes.

These considerations apply in the discretionary subsections: where the gift is better used in conjunction,⁶⁸ where beneficiary class or area is altered,⁶⁹ and under the broad catch-all trigger of unsuitability and ineffectiveness.⁷⁰ In this statutory scheme, intention has a new role. Taking the form of the ‘spirit of the gift’, the abstract intention of the donor is used to balance reform pressures. A scheme-maker deciding whether one of the discretionary triggers applies, will set abstract intention against prevailing social and economic circumstances. And so intention has become one of two considerations taken into account where the doctrine is triggered.

i. The Spirit of the Gift

In the process of balanced variation, the first consideration, the spirit of gift, will either act as a ‘brake’ or ‘impetus’ to reform. If the donor has a very abstract spirit, then the scheme-maker’s discretion will be guided to variation cy-pres. By contrast if the donor has a narrow and particular spirit, his

⁶⁸ Charities Act 2011, s 62(1)(c)

⁶⁹ Charities Act 2011, s 62(d)(ii)

⁷⁰ Charities Act 2011, s 62(e)(iii)

discretion will be guided in the opposite direction.⁷¹ The statutory phrase has been subject to judicial definition in England. In *Re Lepton's Charity*,⁷² Pennycuick VC said:

It must, I think, be equivalent in meaning to the basic intention underlying the gift, that intention being ascertainable from the terms of the relevant instrument read in the light of admissible evidence.⁷³

Morritt LJ further explained in *Varsani v Jesani*:⁷⁴

The concept is clear enough, namely, the basic intention underlying the gift or the substance of the gift rather than the form of the words used to express it or conditions imposed to effect it.⁷⁵

In many instances where it has been considered,⁷⁶ taking account of the spirit has acted as an impetus for the triggering of the cy-pres doctrine.⁷⁷ That impetus effect can be seen in *Forrest v Attorney General*,⁷⁸ which was decided under legislation very closely related to that in England.⁷⁹ A testator had left funds to be applied to authorised charities at the discretion of the trustees. The relevant organisations were those institutions, bodies, funds or purposes, which

⁷¹ This point is also made by Warburton, 'The Spirit of the Gift' (1995/6) 3 *Charity Law and Practice Review* 1, 3

⁷² *Lepton* *supra* note 26

⁷³ *Ibid* 285

⁷⁴ [1998] 3 All ER 273

⁷⁵ *Ibid* 234

⁷⁶ *Peggs* *supra* note 55; *Lepton* *supra* note 26; *Varsani* *supra* note 44

⁷⁷ See *Lepton* *supra* note 26

⁷⁸ [1986] VR 187

⁷⁹ Charities Act 1978, s 2(1)

at the date of the testator's death, were not covered by section 100 of the Administration and Probate Act of the State of Victoria, or of section 8 of the Estate Duties Assessment Act 1914-56 of the Commonwealth. It was submitted by counsel that the limitation on the class was unduly restrictive for two reasons. First, a large number of charities had been established since the testator's death. Second, the class of potential recipients was diminishing. Nathan J considered that in such circumstances, the correct approach would be to:

...determine whether they can be carried out in accord with the fundamental intention of the testator as revealed by interpreting the will as a whole or with the assistance of evidence...⁸⁰

The judge took the fact that a very large class of charities had been nominated as evidence that the testator had a sufficiently intention abstract to act as an impetus for variation cy-pres.

The opposite, 'braking' effect of the donor's spirit has not yet appeared in the authorities,⁸¹ although counsel attempted to use the consideration in this manner in *Peggs v Lamb*,⁸² where (as it has been seen)⁸³ a trust operated for a very small and diminishing class of Huntingdon Freemen. After the Charity Commission had invited a scheme, counsel argued that accounting for the true

⁸⁰ *Forrest* *supra* note 78 no pp in available transcript

⁸¹ See Warburton 'The Spirit of the Gift' (1995/6) 3 *CLPR* 1

⁸² *Peggs* *supra* note 55

⁸³ *Ibid*

spirit of the gift would prevent the doctrine from being triggered. It was submitted:

The spirit of the gift is the benefit of the freemen. The charitable trust is still capable of benefiting the freemen and should be allowed to continue to do so.⁸⁴

The argument was rejected. On the view of the judge, the spirit of gift was to benefit the whole borough of Huntingdon, and he felt that intention was abstract enough to encourage reform.

ii. Changed Social and Economic Circumstances

There is another element to balanced variation. The spirit of the gift consideration focuses the mind of the judge on the abstract intention of the donor. For a period,⁸⁵ it was the sole statutory consideration balancing the judge's discretion, but since the Charities Act 2006, the legislation has contained another balancing consideration.⁸⁶ Subsection 62(2)(b) of the Charities Act 2011 guides the discretion of the court by directing it to take

⁸⁴ *Ibid* 175

⁸⁵ The spirit of the gift consideration was brought in as a stand-alone concept by the Charities Act 1960, s 13

⁸⁶ Charities Act 2006, s 18

account of a second factor: changed social and economic circumstances prevailing at the time of the proposed alteration of the original purposes.⁸⁷

Owing to matters of procedure, it seems likely ‘changed social and economic circumstances’ will always be an impetus to alteration. The appropriate considerations only receive attention in circumstances where the reform of a trust is at issue. Consequently, if prevailing social and economic conditions had made the trust *more useful* than it had been in the past, the trustees would not apply for cy-pres alteration. A scheme will normally only be considered where prevailing social and economic conditions have created an impetus for reform. For this reason, consideration of the prevailing social and economic circumstances at the time of the proposed reform will normally run opposite to consideration of intention. It shifts the focus of attention away from the mind of the donor.

The new statutory expression has not yet received judicial attention at the trigger stage of the cy-pres process, although the Charity Commission has sought to provide an illustrative explanation in their casework guidance:⁸⁸

The meaning of "social and economic circumstances prevailing at the time of the proposed alteration" is not defined, but is about evaluating the ongoing usefulness of the charity's trusts. This provision enables the

⁸⁷ Charities Act 2011, s 62(2)(b); the consideration was first introduced by the Charities Act 2006, s 15(3)(b)

⁸⁸ Charity Commission, ‘OG 02’ (14th March 2012) <<http://ogs.charitycommission.gov.uk/g002a001.aspx>>

Commission to consider other relevant factors alongside the spirit of the original gift in deciding whether a cy-près occasion has arisen...⁸⁹

Even prior to the enactment of subsection 62(2)(b) of the Charities Act 2011, it was the practice of the Charity Commission to take account social and economic circumstances. Notably, attention has been given to modern methods of welfare delivery. The Commission states in its Operational Guidance:⁹⁰

In some cases the provision of specific articles such as food or fuel may no longer be the most practical means of relieving financial hardship or other forms of disadvantage.⁹¹

The Commission's report on the *Charity of Robert McDougal for the Allotments Committee Fund*,⁹² demonstrates the point. The charity was established in the depression era in order to provide allotments to people in poverty. The charity operates in Monmouth and Rhonda, an area which the contemporaneous Coalfields Distress Committee had described as being in a state of dereliction owing to:

The high rent of the land, the extreme poverty of the people and a deepening sense of the hopelessness of life.⁹³

⁸⁹ *Ibid* 1.1

⁹⁰ *Ibid*

⁹¹ *Ibid* 1.1

⁹² *Report of the Charity Commissioners for England and Wales* (1972), 19

⁹³ *Ibid* 20

In the past, the allotments had provided both a useful source of food and an occupation for people facing long periods of unemployment. But over the years, demand for the allotments had fallen away. This was true even though the area continued to suffer from poverty. In this context, even under the pre-2006 law, the Commission prepared a scheme allowing the trustees to assist unemployed people in distress in such ways as they thought fit. Economic changes acted as an impetus to variation cy-pres.

iii. Balancing the Appropriate Considerations

The statutory ‘appropriate considerations’ interact with each other; they must be balanced. The court will take both into account when it decides whether or not the doctrine has been triggered. It creates an overarching picture of both the ‘spirit of the gift’ and ‘social and economic circumstances’. That picture feeds into the discretionary judgement of whether or not a scheme is necessary.

The new legal approach is a manifestation of the policy behind statute. It has been seen that at common law, the donor’s intention was protected by the non-intervention principle. Under statute, it receives no such protection, but it is not ignored by the court. The spirit of the gift is balanced against prevailing and social economic circumstances. And so intention is treated as one factor in part of a larger picture.

Most case reports are either brief, or concerned only with a single aspect of law. Consequently there is scant illustration of this ‘picture-creating’ process, but the recent decision of the First Tier Charity Tribunal, *Aliss v Charity Commission*,⁹⁴ is both detailed and indicative of the process of guided and balanced discretion. The case involved the merger of two schools: ‘King Edward and Queen Mary School’ in Lytham St Annes and ‘The Arnold School’ in Blackpool. The organisations felt that the local market was too small to sustain two schools and the Charity Commission was in agreement. For that reason, the Commission sealed a scheme under the predecessor to subsection 62(1)(c) of the Charities Act 2011 on the basis that the property could be used more effectively in conjunction.⁹⁵

The King Edward and Queen Mary School had been administered under a trust named ‘The Lytham Schools’, whereas the Arnold School was administered by a national organisation named the ‘United Church School Trust’. The Charity Commission had sealed a scheme allowing the site of the King Edward and Queen Mary School to be leased to United Church School Trust. That trust then proposed the sale of the Arnold School site. Parents of children at the King Edward and Queen Mary School appealed against the Charity Commission’s scheme. *Inter alia*, they argued that the spirit of the gift was limited to the ethos of the particular school. But the Tribunal, using its guided discretion, balanced the picture differently. The Tribunal treated the spirit as

⁹⁴ *Aliss v Charity Commission* CA/2011/007 First-tier Tribunal (Charity), 17 May 2012

⁹⁵ Charities Act 1993, s 13 as amended by Charities Act 2006, s 15

being to benefit the local area. With reference to evidence from the past practice, and the history of the school in relation to the provision of bursaries,⁹⁶ it found the spirit to be, ‘the provision of education for the poor children of Lytham St Anne’s.’⁹⁷ Consequently, it was an impetus, rather than a brake on reform.

In line with the statutory appropriate considerations, changed social and economic conditions carried weight with the Tribunal. The phrase was treated as importing even wider considerations than the financial position of the school. The Tribunal took into account, *inter alia*, such factors as the availability of free education for children in the UK, an understanding that various schools are able to better cater for different educational needs, and the surplus of school places in the local area.⁹⁸ And so the Tribunal’s interpretation of the interaction between the ‘appropriate considerations’ caused it to reach the balanced conclusion that subsection 62(1)(c) applied and that the school property could be used more effectively in conjunction.

Aliss v Charity Commission,⁹⁹ provides a clear illustration of the role of intention in the statute. It is one element in a ‘picture-creating’ process. Its character will be different in every case, depending upon the other elements of the picture. The scheme-maker will interpret the different elements and come to

⁹⁶ *Ibid* [1.5]

⁹⁷ The report details that the Appellants eventually accepted this point [8.3.2]

⁹⁸ *Ibid* [8.4.1]

⁹⁹ *Ibid*

a conclusion as to whether or not cy-pres reform is appropriate. The operation of the ‘appropriate considerations’ will always be fact-specific.

5. Further Developing Balanced Variation

The statutory reforms have achieved their policy goal. In the reform of established trusts, the donor’s intention is no longer the ‘starting point’ for the scheme-maker. It is now just one of two considerations guiding a discretionary and balanced power of alteration. Consequently of low ineffective and obsolete trusts can be reformed at law. But there is scope for further case-by-case flexibility in the statute. This final section shows how, in one circumstance, the statute may continue to prevent discretionary judicial intervention contrary to the policy underpinning statute. It then draws on Australasian legislation in order to suggest legislative change in the English context.

i. A ‘Ghost’ of the Non-Intervention Principle

Under the English statute, there is an anomalous circumstance where, contrary to the policy of the statute, judges do not enjoy balanced discretion. If a court considers that, on the facts of the case, proactive effort on behalf of the trustees might ‘salvage’ an ineffective trust from long term decline or impracticability, it will not be amenable to variation cy-pres under statute. The courts cannot intervene even where it might be beneficial. Such a scenario is not difficult to imagine, for example, working to rescue a charity that continues to be

potentially salvageable carries attendant risks; the trustees may fail in their enterprise after substantially diminishing the charity's funds.

This is a matter of statutory wording. The legislation is directed at purposes that have definitively *stopped* functioning in a certain way. So for example in order for the broad catch-all subsection 62(1)(e)(iii) to trigger the doctrine, the original purposes must have *ceased* to be suitable and effective. As a matter of interpretation, purposes that may cease to be suitable and effective, but may also be salvageable by the action of trustees will not trigger the doctrine.

A recent application of subsection 62(1)(e)(iii) illustrates the point. The trustees of *The Sir Edward Heath Charitable Trust* asked for a scheme so that they could sell 'Arundells', the historic home of Edward Heath.¹⁰⁰ The former Prime Minister had left the property on trust so as to preserve the building, but unfortunately visitor numbers had been poor. The trustees were attempting to sell the property so that some funds could be preserved, but the Commission had received a large number of public representations stating that maintenance of the house had not ceased to be a suitable and effective use of the property.

The reviewer noted:

¹⁰⁰ Charity Commission, 'Sir Edward Heath Charitable Trust: Decision of the Charity Commission as to whether to make a Scheme' < <http://www.charitycommission.gov.uk/media/93121/sehcfdec.pdf>> accessed 20th September 2013

...that Arundells has not been properly marketed, that the opening hours and booking system deter many people, that visitor numbers can and should be much higher bearing in mind the location of the house.¹⁰¹

The existing trusts had the *potential* to be effective and so the cy-pres doctrine could not be applied even under the broadest statutory trigger. There remained proactive ways in which funds could be raised, the Commission directed the trustees to investigate methods of meeting the charity's shortfall in income without resorting to the sale of the property.

The automatic restriction on applying the cy-pres doctrine to salvageable trusts runs counter to the wider policy of the statute. In ordinary cases, the court has a discretion whether or not to intervene. In relation to salvageable trusts, there is no discretion or flexibility at the trigger stage. Trustees will always be expected to work proactively in order to save it on its original terms. This is a ghost of the non-intervention principle; the court is barred from considering use of the doctrine.

ii. The Case for an Inexpediency Trigger

A solution to the anomaly would be to provide for the reform of trusts where they are inexpedient. Rather than prevent variation in relation to problematic charities that have not yet ceased to be suitable and effective, statute might

¹⁰¹ *Ibid* at [5.6]

permit use of the cy-pres doctrine for the straightforward reason that it would benefit the trust. That is the statutory position in New Zealand and Western Australia (which share identical cy-pres legislation).¹⁰² In those jurisdictions the common law non-intervention principle has been entirely displaced. Trusts can be altered cy-pres:¹⁰³

...in any case where any property or income is given or held upon trust, or is to be applied, for any charitable purpose, and it is impossible or impracticable or inexpedient to carry out that purpose.

New Zealand and Western Australia have adopted a very different model to that in England. It is a single ‘stand-alone’ trigger that does not direct the court to take account of any other considerations than impossibility, impracticability or inexpediency. The inclusion of the third ‘inexpediency’ trigger *prima facie* gives a maximum discretion to the courts; cy-pres can be triggered on the simple basis that it would be *advantageous* for the charity to undergo a scheme. Owing to a lack of case law, definitions of ‘inexpediency’ are thin on the ground, but in *Re McElroy Trust*,¹⁰⁴ counsel suggested:

...the term inexpedient was introduced to expand the power of the Court to order variations to charitable trusts in order to avoid inconvenient or undesirable results that were not captured by the terms impossible or

¹⁰² Charitable Trusts Act 1962, s 7(1)(a) Western Australia); Charitable Trusts Act 1957, s 32(1) New Zealand

¹⁰³ The legislation in the two jurisdictions is presented differently, but is the same in substance. Whereas in Western Australia Charitable Trusts Act 1962, s 7(1)(a)-(d) presents the triggers in a separated form, in New Zealand the Charitable Trusts Act 1957, s 32(1) sets out the triggers in a single paragraph.

¹⁰⁴ [2002] 3 NZLR 99

impracticable... the term authorised the Court to make an assessment of efficiency and beneficial nature of the way the trust operates and whether it could be operated more expediently in another way.¹⁰⁵

The South Australian case, *Re Trusts of Kean Memorial Trust Fund*,¹⁰⁶ is directly on point. It illustrates the far-reaching and negative effect of denying an inexpediency trigger in those instances where a trust is potentially salvageable. A fund had been established for the purpose of establishing a grassed play area adjoining a primary school. The original scheme envisaged the purchase of two distinct zones of land, but owing to the prohibitive cost and the length of time necessary to achieve the plan, the trustees sought a cy-pres scheme. Rather than salvage the plan, the trustees wished to develop the curriculum and upgrade school buildings. Besanko J rejected their application for a scheme on the basis that (in the South Australian jurisdiction) inexpediency was not sufficient to trigger the cy-pres doctrine:

I do not think the criterion provides the basis for a scheme merely because it is expedient or because it involves the use of trust property for purposes considered more useful or beneficial. I do not think [the subsection] authorises a scheme in circumstances where the point has not yet been reached where the application of the trust property in accordance with the original purposes is not reasonably practicable even

¹⁰⁵ *Ibid* [20]

¹⁰⁶ (2003) 86 SASR 449

though the needs of the school in the areas of curriculum development and the upgrading of buildings are pressing.¹⁰⁷

The plan was salvageable, and in the absence of an expediency trigger, the trustees were expected to proactively try and effect the original plan. That was the case even though the trustees considered that the original plan was highly impracticable and expensive. Just as in England, the anomalous ghost of the non-intervention principle was present.

iii. Fitting Inexpediency into Balanced Variation

Inclusion of an inexpediency trigger into English law would provide flexibility in circumstances where trusts are in decline or highly impracticable, but still potentially salvageable by the trustees. It would no longer be necessary to show that gifts have ceased to be suitable and effective. Such a reform is appropriate in policy terms because it meshes with the wider English statutory principle of permitting discretionary intervention in trusts. But if it is to do so, it cannot stand alone. The English model is one of guided and balanced discretion. That is, in applying the statutory triggers, judges must consider both the abstract intention of the donor as well as social and economic circumstances. Only after creating a fact-specific picture can they decide whether or not to reform trusts.

¹⁰⁷ *Ibid* [68]

The New Zealand and Western Australian legislation provides no statutory guidance as to how the courts' discretion should be carried out. It is a stand-alone trigger. But a key difficulty with the absence of statutory guidance can be illustrated by *Re McElroy Trust*.¹⁰⁸ The case concerned a gift of a farm made by two brothers. Their will provided that the value of their estate should be applied to Anglican agencies delivering rest home care. Over some years, funds were paid periodically to local Church of England charities, but the trustees asked for a scheme on the basis that, in their view, the brothers' plans had become inexpedient. Their submission related to social and economic changes. They noted that, in modern times, the state largely provided for rest home care by direct transfer of public funds to the agencies and, in light of changed social attitudes, that the brothers' money could be better spent on non-residential purposes. O'Regan J rejected the application. The judge stated:

...it is unfashionable to support residential facilities, but it does not follow that it is inexpedient to do so if there is still a need for residential facilities as well as institutions providing them.¹⁰⁹

And so by itself, the inclusion of an inexpediency trigger in statute is insufficient to bring appropriate reform. In the case, social and economic circumstances had changed since the foundation of the trust, and the trustees' submission was that funds could be more expeditiously spent in light of that change. Under the English guided model, the judge would have been directed

¹⁰⁸ *McElroy* *supra* note 104

¹⁰⁹ *Ibid* [51]

to consider those concerns as part of his judgement. His discretion would have been focussed. If an inexpediency trigger were to be included in the English statute, it should only be applicable in the light of the statutory ‘appropriate considerations’. That would enable judges to consider inexpediency in accordance with the policy of the statute: balancing donor intention against the need to reform low utility and obsolete trusts.

6. Conclusion

This chapter assesses the role of intention at the cy-pres trigger stage. Directed at the reform of established trusts, legislation has transformed the old approach. Whereas at common law the courts were reluctant to intervene and change the purposes of a trust, under statute they operate a policy of balanced variation. On a case-by-case basis, the scheme-maker will use his discretion to assess effectiveness standards alongside the original intention of the trust.

The reform has been conceptually successful, although in one instance it is incomplete. A ghost of the non-intervention principle remains in relation to potentially salvageable trusts. If there is a possibility that the trustees might be able to rescue the original donor’s plans, under the current English law, it is not possible to intervene. This is the case even in circumstances where non-intervention carries attendant risks. For this reason, it is proposed that English law should take a lead from Western Australia and New Zealand, where it is

possible to reform trusts on the basis of inexpediency. Provided that legislation was drafted so that inexpediency could take its seat within the broader system of English balanced variation, it would make a useful conceptual and practical contribution to the law.

CHAPTER FOUR: TOWARDS A MORE REALISTIC CONSTRUCTION OF THE GENERAL CHARITABLE INTENTION

The cy-pres doctrine substantially evolved as a special branch of will construction. In this testamentary context, gifts come to court as a consequence of initial failure: the doctrine is triggered before the donor's testamentary trust can be established. The causes of this failure are various and extensively considered in chapter three.

In testamentary cy-pres cases,¹ a unique rule of intention construction has developed. In order for lapse to be prevented, the donor must evince a special type of abstract intention. This is called general (as opposed to particular) charitable intention. Where such general intention is constructed by the court, gifts are saved for charity. There will be no lapse. Windeyer J stated the law in relation to failed testamentary gifts:²

If there is a gift to a particular body for its purposes, the gift must lapse; if there is evidence of a general charitable intention but the gift would otherwise fail then a *cy-près* scheme should be ordered...³

The nature of the general charitable intention has rarely received academic attention.⁴ That is surprising. The rule of construction has been developed over

¹The general charitable intention requirement has also been extended to the context of public appeals. See Chapter Eight.

² *Permanent Trustee v Attorney General of NSW* [1999] NSWSC 288

³ *Ibid* [7]

a long period in a large body of cases, and it has a unique character. It is a rule apart in Equity, providing judges with a special framework for the construction of wills.

The most striking feature of the general charitable intention construction is its precedential character. Recurring characteristics in wills are taken, on the basis of past precedent, to indicate general or particular intention. And so no judge constructing a general charitable intention will come to the document with a blank mind. Instead, he will consider the substantial body of authority relating to past wills and apply that law to the document in front of him. He constructs intention from past cases. After many years of precedent, the judicial decision-making process has become highly refined.

This chapter evaluates the common law method in light of the testamentary imperative that wills should be construed in a realistic manner. It then compares the common law with statutory innovation in Australasia before developing an alternative model.

1. The Distinction Between General and Particular Purposes

The general charitable intention can be constructed even though bequests are normally made for *particular* objects. Although testators do occasionally make

⁴ Taxonomies can be found in Mulheron, *The Modern Cy-près Doctrine: Applications and Implications* (UCL, 2006), 75-86; Picarda, *The Law and Practice Relating to Charities* (Butterworths, 1977), 243

gifts to broad heads of charity, such instances are rare.⁵ Using the trust form, donors are able to stamp their identity upon their gifts. They are able to specify, with a high degree of precision, which charitable purpose the property should be applied to. This ability to shape the trust around personal preferences will often be a key motivation for donation.

It has been seen that as a matter of legal form, every particular gift must relate to a more general object. So a gift to a cottage hospital must relate to the advancement of health,⁶ or a gift to establish a school relates to the advancement of education.⁷ The general charitable intention relies upon this characteristic of charitable gifts. Judges searching for a general charitable intention will divide testator intention into ‘particular’ (definite) and ‘general’ (more abstract) classes. The court applies an either/or test; where there is a general charitable intention, the failed gift will be saved for charity, but where there is a particular intention, the gift will lapse.⁸

The most regularly cited test for the construction of a general charitable intention belongs to Parker J in *Re Wilson*.⁹ The judge formulated a general charitable intention as being where:

In the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a

⁵ Although see *Moggridge v Thackwell* (1802) 7 Ves. Jr. 36, 32 E.R. 15.

⁶ *Re Vernon's Will Trust* [1972] Ch 300

⁷ *Re Wilson* [1913] 1 Ch 314

⁸ *Ibid* at 321

⁹ *Ibid*

direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect. In that case, though it is impossible to carry out the precise directions, on ordinary principles the gift for the general charitable purpose will remain and be perfectly good, and the Court, by virtue of its administrative jurisdiction, can direct a scheme as to how it is to be carried out.¹⁰

A lapse-causing particular charitable intention is defined as being:

...where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift,— a gift for a particular purpose— and it being impossible to carry out that particular purpose, the whole gift is held to fail. In my opinion, the question whether a particular case falls within one of those classes of cases or within the other is simply a question of the construction of a particular instrument.¹¹

There are a number of judicial formulations pointing to the same distinction.¹²

In *Re Rymer*,¹³ Herschell LC drew out the concept in the context of gifts to charitable institutions:

¹⁰ *Ibid*

¹¹ *Ibid*

¹² See *Re Woodhams* [1981] 1 WLR 493 for a judicial statement of the different tests.

¹³ [1895] 1Ch 19

There is a distinction well settled by the authorities. There is one class of cases, in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect; if that mode fails, the Court says the general purpose of charity shall be carried out. There is another class, in which the testator shews an intention, not of general charity, but to give to some particular institution; and then if it fails, because there is no such institution, the gift does not go to charity generally; that distinction is clearly recognised; and it cannot be said that wherever a gift for any charitable purpose fails, it is nevertheless to go to charity.¹⁴

The distinction between general and particular intention is conceptually straightforward, but evidencing that intention and effecting it has proved extraordinarily difficult. Over the course of a large number of authorities, a highly refined body of precedential rules has developed.

2. Precedential Construction of General Intention

The construction of testamentary intention is tightly governed by authority. It is a precedential method of construction. The court will interpret the words of the testator's will in the light of case law. Lord Eldon stated in *Mills v Farmer*:¹⁵

¹⁴ *Ibid* 31

¹⁵ (1815) 35 ER 597

After a long series of decisions, testators are supposed, in the eye of the law, to know the rules by which Courts are guided in their administration of the law, as well in the cases of charities as in those of individuals.¹⁶

The process has produced interpretive rules. Over a long period, a large body of law has developed giving meaning to the various indications of intention that might occur in the will. In turn those precedents will guide future judges in their construction of wills.¹⁷ Lord Eldon explained the process of precedential construction in *Attorney-General v Mayor of Bristol*:¹⁸

The construction in these cases, I take it, must be considered to go upon intention, and the different rules furnished by the cases I have mentioned, are to be considered as *indicia* of the intention.¹⁹

And in *Mills v Farmer* the same judge held:

There is no question, that the Court has not the power to make a will for the testator, but only to carry into execution that which he has made himself; and this it can do only by giving to it such a construction as

¹⁶ *Ibid* 606

¹⁷ See Halback, ‘Stare Decisis and Rules of Construction in Wills and Trusts’ (1964) 52 *California Law Review* 921

¹⁸ (1820) 2 JAC & W 294

¹⁹ *Ibid* 317

former precedents have established to be the right construction in every particular instance.²⁰

This section develops a taxonomy of the precedents as they apply to the various testamentary ‘indications’ of intention.

i. The ‘List Rule’

A precedential rule of construction has emerged to the effect that a list of gifts in a will indicates a general charitable intention. The courts have been prepared to read the failed gift, *ejusdem generis*, in the context of the surrounding dispositions. The Master of the Rolls stated in *Attorney General v The Iron Monger’s Company*:²¹

When a testator gives one charitable fund to three several classes of objects, unless he excludes by most express provisions the application of one portion to the purpose to which the others are destined, it is clear that the Court may thus execute his intention in the event of an impossibility of applying that portion to its original destination. The character of charity is impressed on the whole fund; there is good sense in presuming that...²²

²⁰ Mills *supra* note 15 at 612

²¹ *Attorney General v The Iron Mongers’ Company* (1834) 39 ER 1064

²² *Ibid* 1068

In the case, the testator's will contained a list of highly distinct objects, including the redemption of British slaves in Turkey or Barbary, a gift to charity school in London, the payment of Church of England ministers, and a gift to 'decayed members' of the Ironmongers' Company'. Despite the disparate nature of the objects the fact there was a list of purposes in the will was sufficient indication of a general charitable intention. The character of charity was impressed upon the whole fund.

In this regard, *Attorney General v The Iron Monger's Company*,²³ is exceptional. Later judges have applied the principle only in circumstances where the listed charities share similar purposes. This view was clearly expressed by Sir Robert Megarry VC in *Re Spence*:²⁴

...it seems to me that in such cases the court treats the testator as having shown the general intention of giving his residue to promote charities with that type of kindred objects, and then, when he comes to dividing the residue, as casting around for particular charities with that type of objects to name as donees. If one or more of these are non-existent, then the general intention will suffice for a cy-pres application.²⁵

A striking example of the rule's application is *Re Satterthwaite's Will Trusts*.²⁶ A testatrix described as having once been a household word in circles where

²³ *Ibid*

²⁴ [1979] Ch 483

²⁵ *Ibid* 494

²⁶ [1966] 1 WLR 277

lawn tennis is played, told a bank official that she hated all human beings and that she would leave everything to animals. She then presented him with a will written on brown paper. The bank official advised her to make a formal will and the testatrix requested that he compile a list of animal charities. He did so, as far as he could remember, by reference to the London classified telephone directory. She then added further organisations to his list.

The name of one of the organisations in the will ‘The London Animal Hospital’ corresponded with a private veterinary surgeon, and not a charity. It was registered in the name of a Mr Rich, who claimed that he should receive the gift beneficially. It was held by the Court of Appeal, that because all the other gifts were for the advancement of animal welfare, the testatrix had shown a general intention in favour of charity and so the gift was applied to cy-pres charitable purposes. Russell LJ stated the list rule:

Here I have no doubt from the nature of the other dispositions by this testatrix of her residuary estate that a general intention can be discerned in favour of charity through the medium of kindness to animals.²⁷

Gifts containing lists of charitable dispositions are relatively common, but *Re Spence*²⁸ places a limit on the use of the rule. In the case, a testatrix left a gift, to ‘the Old Folks Home at Hillworth Lodge Keighley for the benefit of the patients’. The Home had closed before the death of the testatrix. In the same

²⁷ *Ibid* 286

²⁸ *Spence* *supra* note 24

will, the testatrix had also left a gift to another charitable organisation: a blind home. Sir Robert Megarry VC took the view that the list rule is unlikely to be applied in circumstances where there are only two charitable gifts listed. He held:

I do not say that a general charitable intention or a genus cannot be extracted from a gift of residue equally between two: but I do say that larger numbers are likely to assist...²⁹

*Re Spence*³⁰ might be said to have curtailed the application of the rule of construction. Even so, ‘the list rule’ is a well-entrenched method. A judge applying the rule can do so on the basis of the testator’s will alone. The form of the testator’s gift is analysed in the context of precedent so as to determine whether or not it will lapse.

ii. The ‘Detail Rule’ in *Re Wilson*³¹

A further rule of precedential construction relates to the level of detail contained in the will. The more detailed the testator’s gift, the more likely it is that he had a particular charitable intention.

One of the legal attractions of the trusts form is that it is relatively easy to impress a number of detailed conditions onto the gift. Even a relatively

²⁹ *Ibid* 495

³⁰ *Ibid*

³¹ *Wilson* *supra* note 7

straightforward gift to an institutional legatee such as a school, or a cottage hospital, can specify how the funds should be applied. The donor might restrict the use of money to certain subjects, or classes of patients.

Where there are a mass of conditions contained in the will, that mass is taken to be an indication of a particular charitable intention. In essence, the testator is assumed to be attached to his plans. It is thought unlikely that he would take the trouble of imagining a detailed scheme if a general charitable purpose was truly at the forefront of his mind.³²

The rule was applied in *Re Wilson*,³³ where a testator left a gift to establish a school in his local area, but there was not enough money to effect the gift. His will outlined a highly specific vision; the school and a school master's house were to be paid for by the voluntary subscription of landowners and proprietors in specified parishes. The schoolmaster was to teach Latin, Greek and the elementary parts of mathematics to a timetable; scholars were to go free, but the cost for other pupils was to be 2s 6d at Midsummer and quarter pence at Christmas. Considering all the detail, Parker J was unwilling to find a general charitable intention. He noted:

³² Spence *supra* note 24

³³ Wilson *supra* note 7

I am not justified in holding that I can disregard all the particular directions and construe the gift as a general gift for the purposes of promoting higher education.³⁴

*Re Good's Will Trusts*³⁵ marks the clearest application of the rule in *Re Wilson*.³⁶ A gift was left to purchase land, build six or more rest homes and maintain the complex out of income. But unfortunately insufficient funds were left for the project. The apartments were to contain a living room, a sleeping apartment, and outside domestic conveniences, all on one level. Regulation for the running of the homes were set out in the will, including the qualifications for the residents (referred to as ‘inmates’ by the testator), and powers of removal, management and government. In these circumstances, Wynn-Parry J applied *Re Wilson* directly, finding that the detailed scheme indicated that there was only a particular charitable intention. The judge noted that:

The gift in question is so particular in its language as to exclude the possibility of saying that there is any intention of any sort beyond the intention that the particular charitable purpose should be carried into effect.³⁷

³⁴ *Ibid* 324

³⁵ [1950] 2 All ER 653

³⁶ *Wilson* *supra* note 7

³⁷ *Good's* *supra* note 35 at 656

By contrast, the New South Wales case, *Re Blaxland*,³⁸ applies the detail rule in *Re Wilson*,³⁹ but turns it on its head. In the decision, a *lack* of detail in a will was taken to indicate general charitable intention. A testatrix had left a gift to the ‘Church of England Homes’ organisation, directing that her gift be used to establish a home for sick children. It was the considered opinion of the homes organisation that establishment of the home for sick children would be impossible. There would not be sufficient demand for the service, and it would be uneconomic both to establish and operate. For that reason, they were unable to accept the gift in the form in which had been made.

In these circumstances, Hardie J took the view that the bequest had been made with a general charitable intention; a conclusion reached because the gift had not been made in particular terms. There was no specification of where the home was to be erected, or as to how it was to be operated and financed. Nor was it clear which categories of sick children the home was to cater for. And so the judge stated:

In my view, the general portion of the gift directing the use and application of the money for the establishment of a home for sick children is the dominant and effective expression of the wishes of the testatrix.⁴⁰

³⁸ *Re Blaxland* [1964-5] NSWR 124

³⁹ *Wilson* *supra* note 7

⁴⁰ *Blaxland* *supra* note 38 at 127

The effect of the New South Wales construction is to give the rule in *Re Wilson*,⁴¹ a double-edge. Where there is a mass of detail, there is likely to be particular charitable intention, but where there is a lack of it, then a general charitable intention may be found.

While underpinned by an intuitive logic, the ‘detail rule’ is another formal method of construction. The judge looks for the relevant characteristic in the will and upon finding a mass of detail is more likely to construct a particular charitable intention. He will apply the precedents to the will in order to construct the intention in the document.

iii. Precedential Construction of Intention where the Nominated Organisation has Never Existed

Another precedential rule of construction deduces intention from the non-existence of a charitable legatee. Where a gift is left to a charitable organisation, but upon the reading of the will it transpires that the nominated organisation never existed, then a general charitable intention will very likely be found. The core principle underpinning this rule of construction is that the testator has failed to make a successfully particular request. So as a matter of logic, he must have intended a general gift. Or, as Sir Robert Megarry VC stated in *Re Spence*:⁴²

⁴¹ *Wilson* *supra* note 7

⁴² *Spence* *supra* note 24

...where the testator has been unable to specify any particular charitable institution or practicable purpose, and so, although his intention of charity can be seen, he has failed to provide any way of giving effect to it. There, the absence of the specific leaves the general undisturbed.⁴³

The leading decision on the matter is *Re Davis*.⁴⁴ In the case, a testatrix left a gift in ostensibly particular terms to the ‘Home for the Homeless, 27, Red Lion Square, London’. No such institution could be found. Buckley J took the view that in such circumstances, the court will ‘lean in favour of charity’. He stated:

...where there is a gift to a charity which has never existed at all [the court will] lean in favour of a general charitable purpose, and will accept even a small indication of the testator’s intention as sufficient to shew that a purpose, and not a person, is intended.⁴⁵

In fact no generosity of construction was needed in the case. Buckley J was able to find a general charitable intention based upon another formal indication of intention in the will. The judge was able to save the bequest, *inter alia*, on the basis that it was surrounded by a list of gifts to other charitable organisations.

⁴³ *Ibid* 493

⁴⁴ [1902] 1 Ch 876

⁴⁵ *Ibid* 884

The rule was applied unambiguously in the Victorian case, *Re Constable*.⁴⁶ A testatrix had left a gift to the ‘Methodist Homes for the Aged at Cheltenham’, but that organisation had never existed. Applying the English authorities, Pape J found a general charitable intention. On the view of the Victorian judge, the mere nomination of a fictitious organisation would, by itself, be sufficient for the construction of a general charitable intention.

This method of construction differs from the ‘list rule’ and the ‘detail rule’, but it is still a formal approach to construction. While the judge will not be constructing the form (i.e. the language and structure) of the will itself, he will construct the form of the gift. Where that will nominates a legatee that does not exist, a judge applying past precedents, will be guided to the conclusion that there is a general charitable intention.

iv. Gifts to Expired Organisations

Where the testator nominates an organisation which once existed, but has expired, it is taken to be a precedential indication of a particular charitable intention. The approach was crystallised by the Court of Appeal in *Re Rymer*,⁴⁷ where a testator had left £5000 to the rector of St. Thomas' Seminary in Westminster for the education of priests in the diocese ‘for the purposes of such seminary’. At the time of his death, the seminary had closed, transferring its operations to Birmingham.

⁴⁶ [1971] VR 742

⁴⁷ *Rymer* *supra* note 13

Lindley LJ found the gift to the institution was the substance of the testator's direction, but that lapse was not automatic in every case because, 'once you arrive at the conclusion that a gift to a particular seminary or institution... "for the purposes thereof," and for no other purpose ... then the doctrine of *cy-près* is inapplicable.'⁴⁸ While this approach characterises institutional gifts as being for the purposes of the nominated organisation, those purposes are constructed as being very particular indeed. Consequently, a court following this logic will likely find a particular charitable intention. As Lord Herschell explained:

The testator had in view particular institutions, and although their objects may be the same, he graduates his bounty towards them, shewing for instance, that it was the education of orphans at this or that institution which he had in his mind, and not merely the education of orphans, if I may say so, at large.⁴⁹

The well-known case *Re Harwood*,⁵⁰ illustrates the operation of the precedential rule. In the case, a testatrix had made three bequests to 'the Wisbech Peace Society, Cambridge', to 'the Peace Society of Belfast', and to the 'Peace Society of Dublin'. The Wisbech society had once existed, but the Peace Society of Belfast had never existed and 'the Peace Society of Dublin' appeared to be a misdescription of an expired institution.

⁴⁸ *Ibid* 34

⁴⁹ *Ibid* 27

⁵⁰ [1936] Ch 285

The gift to the non-existent Belfast society was construed as gift for the general purpose of promoting a peace society connected with Belfast. The gift to the misdescribed Dublin society was construed as being for the intention of any peace society connected with Dublin. Yet no general charitable intention was found for the gift to the Wisbech society because the organisation had once existed and had been successfully identified in the will. In relation to the expired organisation Farwell J found that:

The difficulty of finding any general charitable intent in such case if the named society once existed, but ceased to exist before the death of the testator, is very great.⁵¹

An interesting Australian refinement to the rule can be found in the Victorian case *Foundling Hospital and Infant's Home v Trustees Executors*.⁵² A testator had left a sixth of his residuary estate to his wife for life, gift over to a charitable institution named the 'Foundling Hospital and Infants' Home, Melbourne'. At the time of writing his will, the nominated institution had not been yet been built. It was to be established by a provision in his wife's separate will. For a time her will duly provided that an institution named the 'Foundling Hospital and Infants' Home, Melbourne' should be set up. However after her husband's death, she revoked her will and the institution was in fact never built. In these circumstances the court was called upon to decide whether

⁵¹ *Ibid* 287

⁵² 'Foundling Hospital and Infants' Home v Trustees Executors' (1946) 19 Australian Law Journal 383

the testator had a general charitable intention in relation to the non-existent institution.

The court found that the planned home had been the essence of the testator's gift. Rich J held that the testator had intended nothing other than to complement the plans of his wife: He stated:

... the testator's mind was set on operating with his wife in the upkeep of a Home for the benefit of foundlings and infants and as a memorial of the Marshalls.⁵³

In view of this limited intention, there was no general purpose evident and consequently there was no general charitable intention. The gift was held to lapse.

The rule, again, relies upon a formal logic. The testator is fixed with intending a gift to a specific institutional legatee *per se*, or the very specific purposes served by that legatee. The form of the gift determines the type of intention the testator held. The judge will be guided to a finding of a particular charitable intention based upon that form.

v. Positive Indications of General Intention must be Present to Prevent Lapse

⁵³ *Ibid* 384

A final precedential rule is that, where there are no indications of intention other than the particular gift, it is likely to lapse. There must be positive indications of intention in the will in order for the gift to be saved for charity.

In *Re Packe*,⁵⁴ a gift of a cottage was left to the Poor Clergy Relief Corporation to provide a retreat for Church of England Clergymen or their wives. The testatrix further stated in her will that if the Corporation should decline the gift, then alternatives could be found. It was not possible to find any suitable trustees who were prepared to take the cottage, and so the question arose as to whether there was a general charitable intention which would permit the gift to be applied cy-pres to alternative charitable purposes. Neville J found that no such intention could be constructed:

I can only say that, after studying this will with care, I cannot find on the part of the testatrix any hint of any general charitable intention. So far as anything is disclosed by the will, one cannot say whether she had any intention of any sort beyond the intention that the particular charitable purpose which she expressed should be carried into effect.⁵⁵

The principle that there must be some positive indication of general intention in order for ‘general charitable intention’ to be constructed is also well illustrated by two Australian cases. First, in the New South Wales case *Attorney General*

⁵⁴ [1918] 1 Ch 437

⁵⁵ *Ibid* 442

v Powell,⁵⁶ a testatrix had left a gift to a Presbyterian church. Unfortunately, the will contained a blank space (presumably to be filled in at a later date) and did not name any particular church to receive the gift. On appeal, the court was unable to find a general charitable intention. Innes J stated:

...it is necessary that the general charitable intention should be gathered from the will itself, either from express words, or by fair and reasonable implication... Now, here all that we can gather from the will itself is an intention to benefit some particular church...⁵⁷

Second, in the South Australian case *Re Hodge*,⁵⁸ a gift was left so as to establish a home for stray animals. Unfortunately insufficient funds were left at the date of death. No general charitable intention was found because there was no positive evidence of it in the will. Napier CJ applied *Re Wilson*⁵⁹ and found:

In the present case the disposition takes the form of a gift for the particular purpose of establishing and maintaining the institution to which it refers, and I can see [sic] nothing in the will that enables me to say that the testatrix had any other intention.⁶⁰

The rule that there must be a positive indication of general intention in the will is logical considering the formal approach to construction adopted by the

⁵⁶ (1890) LR (NSW) Eq 263

⁵⁷ *Ibid* 269

⁵⁸ [1940] 1 Ch 260

⁵⁹ *Wilson* *supra* note 7

⁶⁰ *Ibid* 241

courts. The judge will be constructing positive indications in the form of the bequest. If those positive indications do not exist, then the gift will lapse.

3. Criticism of Precedential Construction

Despite its considerable refinement over a large number of cases, the precedential method of general intention construction is open to criticism on grounds of artificiality. It is an unrealistic method of discerning the true intention of testators because close attention to precedent ties the hands of judges in any given case. It removes their discretion because they must always proceed with reference to past wills. These difficulties have been judicially acknowledged. In the New South Wales Case, *Attorney General v Perpetual Trustee*,⁶¹ Dixon and Evatt JJ observed:

A distinction in trusts declared for charitable purposes has thus come to exist which, however clear in conception, has proved anything but easy of application.⁶²

Precedential construction binds judges to decisions in past wills and prevents them from coming to a flexible and appropriate decision in varied circumstances. In *Attorney General v Public Trustee*,⁶³ Hope JA made the point directly. A testatrix had left a gift to the general purposes of the ‘Margaret Reid

⁶¹ (1940) 63 CLR 209

⁶² *Ibid* 225

⁶³ (1987) 8 NSWLR 550

Orthopaedic Hospital', an organisation which had closed before her death. The orthopaedic hospital had been run by an umbrella organisation named 'The New South Wales Society for Crippled Children' which continued to exist at the date of the judgement. At first instance, McLelland J had followed precedents in relation to the formal indications present in the will. The report states of the first instance judge:

He referred, among other things, to what he regarded as an established principle that it is very difficult to find a general charitable intention when the testator elected a particular charity, taking some care to identify it, and the charity ceases to exist before the testator's death, and that it was much easier to find a general charitable intention where the charity described in the will has never existed.⁶⁴

On appeal, Hope JA did not follow precedent. Despite the strength of past decisions, he constructed the will on its own terms. The judge found *inter alia* that the gift was for the 'general purposes' of the closed hospital. He held that the gift could be construed as being intended for the wider umbrella society, rather than the specific closed hospital. In reaching his conclusion, the judge appeared to reject the process of precedential construction. He noted with some irony:

⁶⁴ *Ibid* 552

One of the problems in this area of the law is the mass of reported decisions on particular cases. It is as if most decisions on whether negligence had been established on particular facts are reported.⁶⁵

The judge continued:

I would also like to emphasise what has been said so often, namely, that little assistance is to be obtained from a consideration of decisions in other wills... Whilst a reference to decisions in other wills may throw light on matters that may well be taken into account, they throw little if any light on how they should be taken into account in any particular set of circumstances.⁶⁶

Outright rejection of the precedential method is rare, but not unique. In the South Australian case *Executor Trustee v Warbey*,⁶⁷ three sisters had left funds for the establishment of a Church of England hospital in the Diocese of Adelaide with surgical and midwifery sections. The sisters had left sufficient funds, but in view of the very weak demand for such a service, the synod refused to accept the gift.

Bray CJ carefully constructed the language of the will, looking for indications of a general or particular intention. But the judge candidly admitted he had wavered on the appropriate construction. On this point, he memorably noted

⁶⁵ *Ibid* 553

⁶⁶ *Ibid* 554

⁶⁷ (1973) 6 SASR 336

that he had been invited to, ‘toss a penny, though [counsel], said that in the interests of charity the penny should be a double-headed one.’⁶⁸ After admitting that the language of the will was ambiguous in terms of the construction of general intention, Bray CJ continued:

To decide this question it is often necessary to have recourse to something approaching more nearly to divination or intuition than to interpretation in the accustomed sense, but I have to fulfil the obligation imposed on me by the law.⁶⁹

Bray CJ did find a general charitable intention, but his comments show his doubts with regard to the precedential process. Such doubts extend to the point where the judge candidly stated that he was ‘divining’ intention rather than following the precedential method of construction.

Legal ambiguity is unsatisfactory in testamentary cases where judges seek to effect the genuine intention of testators. And so it is unsurprising that there have been sustained attempts at reform. These have varied across the jurisdictions. In England, it has been left to judges to suggest new approaches, whereas in Australia and New Zealand there has been a sustained attempt at statutory reform. The next two sections evaluate the statutory alterations to the common law in the light of the testamentary imperative that wills should be constructed realistically.

⁶⁸ *Ibid* 345

⁶⁹ *Ibid* 346

4. Australasian ‘Abolition’: Treatment of Intention

In Western Australia,⁷⁰ New Zealand,⁷¹ and South Australia,⁷² the general charitable intention has been put on a statutory footing. While the stream of cases has been slow, a body of interpretive case law has now developed. Unfortunately it can be seen that technical drafting problems have given the law an unclear effect. Although it is possible to read the Australasian legislation as abolishing the general charitable intention, the best view in all jurisdictions is that the law does not have that effect.

Even when successful, abolition is not as radical a reform as might first appear. Although it prevents gifts from lapsing, it is not a renunciation of the donor’s intention *per se*. Courts will still have to account for intention later in the process of cy-pres reform.⁷³ Abolition is a change to the treatment of intention at a specific point the process of cy-pres trust alteration. Where abolition is successful, it would prevent the courts from applying the common law precedential method of general intention construction at the point of initial testamentary failure.⁷⁴

⁷⁰ Charitable Trusts Act 1962, s 7(1)

⁷¹ Charitable Trusts Act 1957, s 32

⁷² Trustee Act 1936, s 69B

⁷³ See Chapter Six

⁷⁴ See Chapter Three

Unfortunately the ‘abolishing’ statutes have proved difficult for judges to interpret, causing the law to become both unclear and complex. This section unpicks technical difficulties and assesses the judicial response to abolition.

i. Western Australia and New Zealand

In Western Australia and New Zealand,⁷⁵ on one reading of the shared statute, the common law general charitable intention requirement has been abolished completely. However an alternative and better entrenched view is that the statute has not done so. The legislation in those jurisdictions provides that property may be applied for another charitable purpose:

...in any case where any property or income is given or held upon trust, or is to be applied, for any charitable purpose, and it is impossible or impracticable or inexpedient to carry out that purpose, or the amount available is inadequate to carry out that purpose, or that purpose has been effected already, or that purpose is illegal or useless or uncertain, then (*whether or not there is any general charitable intention*) the property and income or any part or residue thereof or the proceeds of sale thereof shall be disposed of for some other charitable purpose, or a combination of such purposes, in the manner and subject to the provisions hereafter contained in this Part.⁷⁶

In *Re Palmerston North Halls Trust Board*,⁷⁷ there is obiter dicta comment suggesting that the general charitable intention has been successfully abolished by the statute. In the course of a description of the legislation, Wild CJ stated in relation to section 32 of the Charitable Trusts Act 1957 (New Zealand) that:

⁷⁵ Section 32 Charitable Trusts Act 1957 (New Zealand) and section 7 Charitable Trusts Act 1962 (Western Australia).

⁷⁶ *Ibid* emphasis added

⁷⁷ [1976] 2 NZLR 161

The presence or absence of a general charitable intention becomes immaterial to the application of the section.⁷⁸

But his comments are isolated and do not reflect the later precedents. Later New Zealand authorities have expressly rejected abolition. Those cases have had the effect of preserving the common law precedential method of construction. The reason for this preservation relates to the specific wording of the legislation. Courts have been directed to subsection 32(3)(a) of the New Zealand statute.⁷⁹ The subsection states that property will not be disposed of under the cy-pres legislation if:

...in accordance with any rule of law the intended gift thereof would otherwise lapse or fail and the property or income would not be applicable for any other charitable purpose.

On a plain reading, the subsection preserves the common law rules; the extensive authorities determining that the non-existence of a general charitable intention will lead to lapse must qualify as a ‘rule of law’ for the purposes of the subsection. And so in light of this drafting, the common law precedential method has been maintained. In *Alacoque v Roache*,⁸⁰ a testatrix left a gift for the benefit of a convent at Eltham. The convent had closed eight months before the testatrix had died causing a failure of the gift. In such circumstances there is a risk of lapse at common law. Somers J directly considered the impact of

⁷⁸ *Ibid* 164

⁷⁹ Also Charitable Trusts Act 1962, s 7(3)(a) (Western Australia)

⁸⁰ [1998] 2 NZLR 250

subsection 32(1) and took the view that the law of lapse remained intact. The judge stated:

The whole of section 32(1) is subject to the preservation of the common law about lapse which applies to the case of charitable gifts where the stated purposes or objects are an indispensable part of the trust to which effect cannot be given – where, in short, there is no discernible general charitable intention.⁸¹

After consideration, the judge could not find any evidence of a general charitable intention in the will and so the gift lapsed to the next of the kin. The common law approach was also followed in *Re Pettit*,⁸² where the existence of a general charitable intention was treated as a prerequisite to any application of the statute. In the case, a testatrix named Mrs Pettit had made a gift to ‘the Doctors Widow Fund’. Her will further directed that ‘the controlling officers of [the Fund] may be communicated with through the British Medical Journal’.⁸³ Unfortunately, following the death of the testatrix, that Journal was unable to say which organisation Mrs Pettit might have meant. In such circumstances, the gift was construed by the court as being for a fictitious charitable organisation. Chilwell J rejected any use of the statute *unless* a general charitable intention could be found at common law. He stated:

⁸¹ *Ibid* 256

⁸² [1988] 2 NZLR 513

⁸³ Constructed as a valid charitable gift under section 61B of the New Zealand Charitable Trusts Act 1957

Because the Doctors Widows Fund never existed as an institution Mrs Pettit's bequest to it would lapse or fail and would not be applicable cy-pres for any other charitable purpose unless Mrs Pettit is attributed with a general charitable intention. If no, then the bequest lapses and the next of kin take. If yes, then 32(1) applies.⁸⁴

A general charitable intention was found. The judge followed the common law rule that a gift to a non-existent organisation indicated a general charitable intention, and this in turn permitted the judge to save the gift for charity.

The experience in Western Australia and New Zealand is so closely tied to the particular wording of the legislation in those jurisdictions that is difficult to draw lessons relevant to the English context. In the light of judicial disagreement over the meaning of the law, it is self-evident that the language of the legislation in Western Australia is not a successful reform model. As a 'testing ground' for conclusions about the success or otherwise of abolishing precedential construction, the legislation is of little use. Yet the wider lesson, that statutory reform of the cy-pres doctrine requires clear and express drafting, is significant in technical terms. The complexity of the law in this area is such that anything other than direct drafting is likely to create interpretive difficulties.

ii. South Australia

⁸⁴ *Ibid* 546

The law in South Australia is also marked by technical complexity. Section 69B of the Trustee Act 1936, which sets out the cy-pres triggers in that jurisdiction, makes no mention of the common law general charitable intention requirement. The omission has led to differing interpretations. Although some commentators,⁸⁵ and one authority,⁸⁶ have treated the common law general charitable intention requirement as abolished. In an opposing line of cases,⁸⁷ the courts have continued to follow the precedential method. Such ambiguity again clouds clear lessons, but the general charitable intention requirement has survived abolition.

Aston v Mount Gambier Presbyterian Charge,⁸⁸ is the sole South Australian case to treat the statute as supplanting the need to construct a general charitable intention. A testatrix left a gift by her will to ‘Mount Gambier Presbyterian New Church Building Fund’. At the time the will was written, there had been a building fund in existence which had the purpose of building a new church on Pick Avenue, Mount Gambier. By the time of the testatrix’s death, the fund had been used in the construction of an alternative building at a different site.⁸⁹ Duggan J decided the case *both* under common law and under statute. Considering the common law, the judge found that a general charitable intention could be constructed on the basis of the will before him. He stated:

⁸⁵ Dal Pont, *Law of Charity* (Lexis Nexis Butterworths, 2010) 426, Mulheron *supra* note 4 at 11

⁸⁶ *Aston v Mount Gambier Presbyterian Charge* [2002] SASC 332 at [35] per Duggan J

⁸⁷ *Re Rowell* [1982] 31 SASR 361, *Re Pace* [1985] 31 SASR 336, *Australian Executor Trustees v Ceduna District Health Services* [2006] SASC 286, *Re Harden* [1992] SASC 3667

⁸⁸ [2002] SASC 332

⁸⁹ Trustee Act 1936, s 69B, which lists the circumstances in which cy-pres might be triggered, makes no reference to the general charitable intention requirement

I am of the view that the terms of the gift in the will could be varied by either a cy-pres scheme under the common law or a trust variation under the Act. As the conditions precedent for employing the cy-pres doctrine are more demanding than the requirements under the Act, particularly in relation to a general charitable intention, it would seem wise to employ the statutory power.⁹⁰

Although it is clear that Duggan J thought the common law requirement to be supplanted, the case is isolated. It cannot be regarded as a correct statement of South Australian law. Other courts have proceeded on the basis that the general charitable intention must still be precedentially constructed. The most recent example of the precedential approach is *Australian Executor Trustees v Ceduna District Health Services*.⁹¹ In the case, a gift had been left to an elderly persons' village which had been legally dissolved before the death of the testator. Treating the gift as failed, Vanstone J still thought it necessary to examine the bequest for a general charitable intention and concluded, after consideration of past precedent, that the gift was for the particular narrow objects of the dissolved corporation. He found that in such circumstances, no general charitable intention could be constructed.⁹² The case, which was decided after *Aston*, marks a straightforward application of the common law precedential rule.

⁹⁰ *Ibid* [43]

⁹¹ *Australian Executor Trustees supra* note 87

⁹² *Ibid* [34]

In parallel with Western Australia and New Zealand, a lack of clear and direct drafting has left the law open to differing judicial interpretations. By making no direct mention of the general charitable intention requirement, section 69B of the Trustee Act 1936 has provided insufficient guidance to the courts. Ambiguous drafting leads to unsatisfactory law. But in this context, despite scant authority, it is possible to draw out more than a technical lesson in clear drafting. Although there are only a small number of authorities on point, a judicial stance in favour of preserving the common law method of precedential construction can be discerned. That stance is motivated by a concern that testamentary intention should be accounted for. In *Australian Executor Trustees v Ceduna District Health Services*, Vanstone J directly stated:⁹³

The task of the court in construction of a will is to determine the intention of the testator, having regard to the words of the will.⁹⁴

Since the judge continued to construct a particular charitable intention on a common law basis, the comment must express an inclination in favour of precedential intention construction at the point of initial testamentary failure.

*Re Harden*⁹⁵ provides a further illustration of the same judicial concern. In the case, a testatrix had *inter alia* left a gift to St Andrew's Presbyterian Church for the general purposes of its meals on wheels service. Unfortunately, the gift was

⁹³ *Ibid*

⁹⁴ *Ibid* [10]

⁹⁵ *Harden* *supra* note 87

not possible to effect. St Andrew's Presbyterian Church had merged with a larger organisation and its meals on wheels service had been taken over by a central administration. Olsson J was able to find a general charitable intention, but he did so only after consideration of the English precedential authorities.⁹⁶ His finding of a general charitable intention was based upon the 1861 case *Marsh v Attorney General*,⁹⁷ where a gift to the president of the Deal Nautical School had been saved as a gift for education, rather than as being for the institution *per se*.⁹⁸ Again the judge was anxious to effect the testamentary intention of the donor. He described himself as proceeding on:

...a fair reading of the will of the testatrix in the context of the historical circumstances which gave rise to it.⁹⁹

The experience of reform in South Australia has been technically difficult. That difficulty obscures clear conclusions with regard to the impact of abolishing the common law general charitable intention requirement. But despite scant authority and differing judicial approaches to the effect of statute, a substantive lesson can be drawn from the South Australian experience. Outside of one isolated case, judges have continued to construct intention according to the precedential model. The courts have also explicitly stated their concern that the donor's testamentary intention should be effected. In those cases where judges

⁹⁶ *Spence supra* note 24

⁹⁷ (1861) 2 J & H 61

⁹⁸ And so the judge decided contrary to the precedential rule that gifts to expired charitable organisations indicate a particular charitable intention, but he did so only after finding a contrary (and rarely cited) precedent.

⁹⁹ *Harden supra* note 87 at [30]

set out to discover intention, they do not put the common law to one side and treat the general charitable intention requirement as abolished.

The point is a limited one. A ‘survival’ of the common law general charitable intention is not an endorsement of the precedential method *per se*. No judge has stated that precedential construction leads to a realistic treatment of intention. The most that can be drawn from the South Australian experience is that, when faced with a choice between ‘abolition’ of intention construction and reliance on the common law method, most judges have chosen the latter course. Precedential construction of the general charitable intention has been thought better than taking no account of intention at the point of testamentary failure.

5. Presumption

In New South Wales, the general charitable intention is statutorily presumed.¹⁰⁰ Again, this is only a limited reform to the cy-pres doctrine; it reverses the onus of proof where a party is seeking to prevent lapse. The statute up-ends the common law position: general intention is presumed, but the particular intention must still be constructed. Subsection 10(2) of the Charitable Trusts Act 1993 in New South Wales provides that:

Requirement for general charitable intention of donor

- (1) This Part does not affect the requirement that trust property can not be applied cy pres unless it is given with a general charitable intention.
- (2) However, a general charitable intention is to be presumed unless there is evidence to the contrary in the instrument establishing the charitable trust.

¹⁰⁰ Charitable Trusts Act 1993, s 10(2)

Insofar as the precedential method is preserved subject only to a reversal of the onus of proof, the reform is a small one. While it makes a finding of a general charitable intention more likely, it leaves the traditional common law approach to construction in place.

The process can be illustrated by the decision in *Permanent Trustee Company Ltd v Attorney General*.¹⁰¹ In the case, a testatrix made a gift to the ‘Margaret Reid Orthopaedic Hospital’. That hospital had ceased to exist before the death of the testatrix. Windeyer J took the view that, as a matter of precedential construction, there was a general charitable intention. There was a gift with a ‘kindred object’ in the will which, taking the will as a whole, suggested a broad motivation.¹⁰² He did not however rely on the common law construction. The judge decided the case on the basis of the statutory presumption. He found that because there was no contrary evidence in the will, the testatrix was fixed with a general charitable intention.¹⁰³ It can be seen from the case that, in contrast to ‘abolishing’ statutes, the legislation has had an unambiguous effect. There is no longer a need to proactively construct general intention, unless there are indications of a precedential particular charitable intention in the will. In the absence of such indications, general intention is presumed.

¹⁰¹ [1999] NSW SC 288

¹⁰² See *Spence* *supra* note 24

¹⁰³ *Ibid* [10]

But the presumption does nothing to make the precedential method of construction more realistic. Under subsection 10(2) it is still necessary for the court to carefully consider the indications in the will in the light of past precedent. The common law approach is preserved subject to a presumption.

McLean v Attorney General of New South Wales,¹⁰⁴ illustrates how highly refined arguments continue to form the basis of litigation in New South Wales.

A testator had given a gift to the incorporated Cessnock Crippled Children's Association for the purposes of an expired disabled children's school in the town. Counsel for the next-of-kin put forward a number of very detailed submissions in an attempt to overcome the statutory presumption of a general charitable intention. *Inter alia*, counsel argued that because it was not possible to find the contents of the memorandum and articles of association, the court was unable to discern whether or not the organisation had served general or particular purposes. Counsel further argued that because the will did not nominate a named office holder to receive the gift that it was likely intended to be an out and out gift free from any trust. Finally, counsel made the technical submission that as the phrase 'crippled children' was used to refer to the donee association, it did not refer to the purpose of the gift.¹⁰⁵ Campbell J. rejected the submissions in turn, concluding that they did not overturn the legislative

¹⁰⁴ *McLean v Attorney General of New South Wales* [2002] NSWSC 853

¹⁰⁵ *Ibid* [65]

presumption in favour of a general charitable intention.¹⁰⁶ The artificial common law method of construction remained intact.

Subsection 10(2) of the Charitable Trusts Act 1993 reverses the common law onus of proof so that the court must positively construct a particular charitable intention, but that is the extent of the legal change. The precedential method of construction has been preserved, and so the process remains artificial.

6. A More Realistic Method of Discerning Testamentary Intention¹⁰⁷

Neither presumption nor abolition leads to a better treatment of intention. In order to meet the testamentary imperative that the donor's intention should be realistically effected, another judicial approach is needed. The seeds of an alternative already exist in the English cases, although the method has not been extensively analysed or developed. Courts would be well served by adoption of a non-precedential, discretionary rule that frees the judge from the shadow of past wills and allows for case-by-case decision-making. One rare but clear statement of an alternative belongs to Vinelott J in *Re Woodhams*.¹⁰⁸ It can be taken as a starting point for the new model:

One way of approaching the question whether a prescribed scheme or project which has proved impracticable is the only way of furthering a

¹⁰⁶ *Ibid* [66]

¹⁰⁷ Parts of this section are made up of published work: Picton, 'Reconstructing Charitable Intention', [2013] 15 CLPR 125

¹⁰⁸ *Woodhams* *supra* note 12

charitable purpose that the testator or settlor contemplated or intended, is to ask whether a modification of that scheme or project, which would enable it to be carried into effect at the relevant time, is one which would frustrate the intention of the testator or settlor as disclosed by the will or trust instrument interpreted in the light of any admissible [sic] evidence of surrounding circumstances.¹⁰⁹

The approach does not rely on the common law method. It is a discretionary model. There are three parts to the formulation (i) identification of the essential elements of the gift, (ii) modifying the gift, and (iii) the role of admissible evidence. This section will develop Vinelott J's three-tier approach and evaluate its use as a potential alternative to precedential construction.

i. Identifying the Essence of the Gift

The new test is best understood if a different legal phraseology is adopted. In place of constructing a ‘general’ intention, the court might look for an ‘essential’ charitable intention. Although it remains a form of abstract intention, there is a shift in focus. The phrase reinforces the discretionary element of the test. While general intention is constructed through an analysis of recurring precedential indications, essential intention is *case specific*. It directs the court to the nature of the particular gift before it. The judges must find the essence of the gift.

¹⁰⁹ *Ibid* at 503

The approach is rare, but it can be fleshed-out with reference to existing cases.

A first method of discerning ‘essential’ from ‘inessential’ intention is to ask what the testator would wish to happen if he had known about the failure of their gift. This approach is evident in the South Australian case *Warbey v Executor Trustee*.¹¹⁰ In circumstances where plans to establish a hospital could be realised, Bray CJ held:

...what would each of the testatrices have intended if she had known what I now know... Would she have abandoned the whole idea of benefiting the care of the sick under the auspices of the Church of England? Or would she have acquiesced in some other method of doing so?¹¹¹

Bray CJ went on to find that the testatrices would have preferred to abandon the general hospital with surgical and midwifery sections than to abandon the gift entirely.

A second and more direct way of putting the question is simply to ask which elements of the gift were most important to the testator. In *Re Lysaght*,¹¹² a testatrix had attempted to establish studentships at the Royal College of Surgeons. Unfortunately, her will contained a specific restriction on the scholarships, attempting to exclude people of Jewish or Roman Catholic faith

¹¹⁰ (1973) 6 SASR 336

¹¹¹ *Ibid* at 345

¹¹² *Lysaght* [1966] Ch 191

from the benefit of the gift. The College took the view that the discriminatory provision was ‘invidious and so alien to the spirit of the college's work as to make the gift inoperable in its present form’, and so it was unable to accept the gift unless the discriminatory provision was deleted.

Buckley J held that the provision of the scholarship at the College was the testatrix's essential purpose, and saved the gift for charity by omitting the discriminatory restriction. He found that it was possible to detach the inessential purpose (the provision excluding Jews and Roman Catholics) from the essential one (the scholarships). The judge held:

The impracticability of giving effect to some inessential part of the testatrix's intention cannot, in my judgment, be allowed to defeat her paramount charitable intention.¹¹³

A judicial switch from general to essential intention has marked advantages in light of the testamentary imperative that wills should be read in a realistic manner. The courts are no longer being asked to apply precedents decided in relation to past wills. Instead, they are focussed on the nature of the particular gift in the will before them; they are looking for its essence. The judge makes this assessment as a precursor to asking whether the gift can be altered cy-pres. Thus essential intention is less artificial form of abstract intention than its

¹¹³ *Ibid* 207

precedential counterpart; it is conceptually focused on the ‘core’ or ‘essence’ of the gift that the testator has actually made.

ii. Assessing Whether the Testator’s Essential Intention is Modifiable

The second step in the discretionary process is to assess whether the gift can be modified without destroying its essence. This directs the judge to make a case-by-case assessment of whether or not a particular gift can be altered without its core purposes being defeated. Whether or not it can be modified is fact-specific.

Vinelott J developed the concept in *Re Woodhams*.¹¹⁴ In the case, a testator gave his residuary estate to two music colleges in order that they should establish scholarships in commemoration of his name. The testator had restricted the gift to male absolute orphans, but in view of the contemporary decline in their number, the colleges were unwilling to accept the funds. The judge considered himself able to delete the restriction to absolute orphans. He held that it was not essential to the scheme that the scholarships should be restricted and that ‘the scheme or mode of achieving a charitable purpose can be modified without frustrating his intention.’¹¹⁵ On the facts of the case, the gift could be modified by the court.

¹¹⁴ *Woodhams* *supra* note 12

¹¹⁵ *Ibid* 505.

The concept of ‘modification’ is realistic because it anchors the judicial assessment to the testator’s original gift. This can be illustrated by *Re Crowe*,¹¹⁶ where a testatrix had left a gift for a scholarship to the Royal Naval School. She had attached three conditions to her gift: it was to be given to a naval officer’s daughter; it was to be given to the best pupils; and the scholarships were to be in the Russian and Spanish languages. Unfortunately the college did not provide Russian classes.

Slade J considered the different ways in which the gift could be modified. First, it could be altered so that the scholarship was in Spanish alone; second, it could be altered so that it would be for Russian and ‘some other’ language; and third, it could be altered so that it was for Russian and Spanish at a different institution. The judge found that none of these modifications were possible without frustrating the testatrix’s intention. The gift was allowed to lapse.

It is implicit in this reasoning that the alteration was restrained by the testatrix’s essential intention. All the testatrix’s terms were vital to the gift. It was not open to the judge to transform the bequest into a ‘gift for the advancement of education’, or any other highly abstract purpose. The decision in favour of lapse was rooted in a realistic appraisal of the testatrix’s intention.

¹¹⁶ *Re Crowe* (unreported), October 3, 1979

An echo of Vinelott J's discretionary approach in *Re Woodhams*,¹¹⁷ is evident in the Australian case, *Re Lambert*.¹¹⁸ A testator had made a gift so as to provide scholarships for protestant boys from certain schools to train in aviation. Bright J held that the gift might not be practicable. The judge continued to construct intention on the basis that the testator could be presumed to endorse a modification of his gift. He stated:

I think that in the present case the purpose was paramount. The purpose was to create a trust to educate a section of the public in the science of aviation. If the scholarship proposal proves impracticable (by reason of difficulties in setting a suitable curriculum, or shortage of suitable boys), a scheme may be settled *cy-près*. I cannot think that the testator would have regarded his purpose as frustrated by either of those matters. I think he would have said, "Well, if I can't do it this way I shall have to think of another way to do it." That is precisely what a *cy-près* scheme does.¹¹⁹

The gift could be modified without frustrating the testator's essential intention. The court took a fact-specific approach to whether the testator's intention would be frustrated by modification. On that realistic basis, it was possible to modify the gift. By the operation of the discretionary rule, the court was able to avoid the difficulties inherent in precedential construction. The judge can

¹¹⁷ *Woodhams* *supra* note 12

¹¹⁸ (1967) SASR 19

¹¹⁹ *Ibid* 24

proceed on a case-by-case basis without the application of precedents to formal indications of intention that occur in the will. And so the new task for judges, directing them to first find essential intention and then query whether that intention can permissibly be modified results in a more realistic treatment of testamentary intention.

iii. Admissible Evidence and Case-by-Case Decision-Making

The final stage in the new method of construction would be to look beyond the will and, where possible, seek out the genuine intention of the testator from admissible evidence. Real-world evidence can be used to assess whether modification is permissible without frustrating genuine intention. This is a far-reaching change. It shifts the focus of the judge from formal construction of a document to the real life of the testator. He is able to develop a realistic picture of his wishes and inclinations as part of the process of will construction.

Traditionally judges have not considered evidence of intention beyond the words contained the actual document before them. The historic rule being that: ‘in a court of construction... the enquiry is pretty closely restricted to the contents of the instrument itself to ascertain the intentions of the testator.’¹²⁰ In *Mannai Investment Co Ltd v Eagle Star Assurance*,¹²¹ Lord Hoffmann explained the rationale behind the established position. He said that courts were suspicious of background evidence on the basis that it may be adduced in

¹²⁰ *Greenough v Martin* 162 ER 281, 243 per Sir John Nicholl.

¹²¹ [1997] AC 749

favour of interested parties, such as members of the testator's family. Judges had also been concerned to promote certainty of construction, taking the view that background evidence might lead to arguments about what the new evidence means, and what impact that meaning might have upon the outcome of the case.¹²²

This traditional approach to extrinsic evidence has often meant that the court would not look beyond an often very simply phrased will. Yet more recent decisions have shifted away from the historic principle. In *Re Finger's Will Trusts*,¹²³ Goff J saved the gift for the 'National Council for Maternity and Child Welfare' after finding, 'I am entitled to place myself in the armchair of the testatrix and I have evidence that she regarded herself as having no relatives.'¹²⁴ Circumstantial evidence was also adduced in *Kings v Bultitude*,¹²⁵ where a gift had been left to an expired church. The court considered *inter alia*, pictures of the church notice board and a witness statement from a former member of the congregation.

The court may adduce direct evidence of the testator's intention (e.g. materials written by the testator himself). Section 21 of the Administration of the Justice Act 1982, permits the court to adduce direct evidence where the will is either meaningless or ambiguous, and in *Re Broadbent*,¹²⁶ Lady Justice Arden held in

¹²² *Ibid* 779

¹²³ *Re Finger's Will Trusts* [1972] 1 Ch 286

¹²⁴ *Ibid* 299.

¹²⁵ [2010] EWHC 1795

¹²⁶ [2001] EWCA Civ 714

the Court of Appeal that as a result of the section, direct evidence of the testator's intention was admissible in circumstances where a gift had been made to an expired church. However, she did not in fact rely on direct evidence in her own judgement.¹²⁷

Inevitably, extrinsic evidence will not be of help in every case. For example in the New Zealand case *Alacoque v Roache*,¹²⁸ Somers J noted, 'it is hardly possible to assume the testatrix's armchair for apart from the fact that she was a spinster... we know nothing of her.'¹²⁹ But in others, extrinsic evidence might shine light on the testator's underlying motivation in making the gift. It could for example, reveal a strong personal connection with a nominated institution,¹³⁰ thereby suggesting that the identity of the organisation was essential to the testator. Or it could uncover strongly held ethical beliefs suggesting that the nominated institution was a vehicle for a more essential purpose.¹³¹

Under the new and more realistic test, extrinsic evidence has an extra role to play. The judge might use evidence to see if modification of the gift is a *practical possibility*, permitting the court to look beyond the will and enquire whether an alternative plan could realistically be followed through. In *Re*

¹²⁷ *Ibid* at [44].

¹²⁸ *Alacoque* *supra* note 80

¹²⁹ *Ibid* 252

¹³⁰ See *Satterthwaite* [1966] 1 WLR 277

¹³¹ See *Kings* *supra* note 99

Woodhams,¹³² Vinelott J provided *Re Mitchell's Will Trust*,¹³³ as an example of the principle. A testator had given property to provide four hospital beds reserved for injured workmen from particular collieries. The hospital, fearing that the beds would be under-used, disclaimed the gift. Cross J looked beyond the words of the will and assessed the practical implications of modifying the gift. It might have been possible to prevent lapse if the hospital were prepared to guarantee that some beds would always be *available* for workmen from the collieries. But the evidence was that the hospital was unable to make that promise. The adduction of extrinsic evidence showed that, while there might be some flexibility in the testator's essential intention, modification of his gift was not a practical.

The adduction of extrinsic evidence would assist judges in their use of the new model. First, it makes it possible for judges to 'peer beyond' the will in the process of discovering what the testator's essential intention actually is. Second it makes it possible for judges to assess whether modification is a real-word possibility. In contrast to the precedential method of construction, the alternative judicial process is rooted in empirical facts beyond the formal wording of the will.

7. Conclusion

¹³² *Woodhams* *supra* note 12

¹³³ *Re Mitchell's Will Trust* (1966) 110 SJ 291

The general charitable intention requirement is an exception to a broader pattern of dove-tailing statutory reform in both England and Australasia. In England, it has been left on a common law footing, but in Australasia it has been subject to extensive statutory reform. In all jurisdictions under consideration, the law has undergone a process of evolution. That reform is necessary; the common law approach is marked by artificiality. Judges rely on a refined body of precedential rules in order to construct general intention. In order to decide whether or not the requisite type of intention exists, they must search a will for ‘indications’ of intention. They will then rely on past judgements to tell them what those indications mean. The process is unrealistic because it removes judicial discretion by directing the court to consider a present case in light of past judgements.

With regard to the testamentary imperative that wills should be interpreted in a realistic manner, the Australasian reforms have not been successful. Abolition is both technically problematic and the subject of judicial resistance. In those cases where courts have expressed concern to discover the intention of the testators they have continued to employ the precedential method of construction. This is the worst of all worlds, the law has become ambiguous and the artificial common law approach has persisted unreformed. Presumption is also open to criticism. It leaves the artificial precedential method intact, subject only to a reversal of the onus of proof. In place of constructing a general charitable intention, counsel instead strive to persuade the judge that

there is a particular charitable intention. They do so with reliance upon the refined body of precedent developed under the traditional method.

Realistic discovery of donor intention is possible, but it requires a new approach. Courts must put to one side the precedential method of construction in favour of a less artificial discretionary model. A more realistic method can be pieced together from the case law. First there should be a shift in the manner in which abstraction intention is conceptualised. Rather than seeking a precedentially determined general intention, the court should look for a case-specific essential intention; the judge should discover the ‘core’ or ‘essence’ of the gift in front of him. Second, in assessing whether or not the cy-pres doctrine should apply, the judge should enquire whether it is practically possible to alter the gift without frustrating the testator’s real wishes. Finally, extrinsic evidence should be adduced to better guide judge in relation to the two questions. By piecing together the real-world context of the testator’s gift, the court will be better able to determine both what the essential purpose of the gift might be, and whether modification is practically possible.

CHAPTER FIVE: A NEW APPROACH TO PERPETUAL DEDICATION

Perpetual dedication signifies the principle that once property is dedicated to charity, it will remain so applied forever.¹ The area is dominated by testamentary case-law. As a *prima facie* rule, perpetual dedication applies regardless of the testator's state of mind when he made gift. If the donor's plan is frustrated after dedication, there will be no lapse; the court will apply the property cy-pres. Romer LJ stated in *Re Wright*:²

Once money is effectually dedicated to charity, whether in pursuance of a general or a particular charitable intent, the testator's next-of-kin or residuary legatees are forever excluded.³

This is not a matter of case-by-case intention construction. It is a precedential rule. So in the Northern Irish decision, *Re Hardy*,⁴ Megaw J found a gift to be perpetually dedicated, stating:

I feel that I am not at liberty as a court of first instance to do otherwise than to follow that authority, though I feel that in deciding as I do I am not carrying out the intention of the testatrix.⁵

¹ See for example *Re Faraker* [1911 – 1913] All ER Rep 488; *Re Lucas* [1948] Ch 424; *Re Bagshaw* [1954] 1 WLR 238

² [1954] Ch 347

³ *Ibid* 362

⁴ [1933] NI 150

⁵ *Ibid* 157

Despite the rule, in some instances, donors have been able to oust the cy-pres doctrine and cause lapse. In those cases, in place of applying the cy-pres doctrine without regard to intention, the courts have done the opposite. They have followed the donor's intention and wrested the gift from charity.

This chapter provides a taxonomy for the cases as they relate to perpetual dedication. Then in light of that taxonomy, it considers an innovation in Scottish law to draw out contradictions in the English approach and to suggest a more realistic treatment of intention.

1. The Nature of Perpetual Dedication

The law of perpetual dedication comprises two elements. Both elements define circumstances in which lapse is precluded without construction of intention. First, there is a well-established rule that gifts failing subsequent to vesting cannot lapse. Second, there is a less well-acknowledged rule relating to gifts that have not vested. In that circumstance, courts have found non-vested gifts to be perpetually dedicated on the basis that they were at some point in time hypothetically possible.

i. Subsequent Failure: The Rule in *Re Slevin*⁶

*Re Slevin*⁷ is the leading case on the principle of perpetual dedication. It establishes a clear rule; if the gift was at any point in time possible, then lapse

⁶ [1891] 2 Ch 236

is forever excluded. A testator had left a simple legacy to the Orphanage of St. Dominic's Newcastle-Upon-Tyne, but although the organisation was in existence at his death, it closed before the gift had been paid over to it. In these circumstances the gift could not be carried out as the testator had intended, and so the question arose as to whether the gift should lapse. At first instance, Stirling J held that the gift should pass into the residuary estate. He stated:

It is clear... that the testator intended to benefit not [the orphanage owner] personally, but the institution...⁸

But on appeal, a different approach was taken. The case was decided by analogy with the position of gifts to natural legatees. It was said that the orphanage had survived the testator, and so the gift had become the property of the organisation on death:

The legacy became the property of the legatee upon the death of the testator, though he might not, for some reason, obtain the receipt of it until long after.⁹

On this logic, it was irrelevant whether or not the testator had evidenced a general charitable intention. The gift had been at one point in time possible, and consequently there could be no lapse.

⁷ *Ibid*

⁸ *Ibid* 382

⁹ [1891] 2 Ch 236, 241

This rule has come to be referred to as ‘subsequent failure’. Provided that the gift becomes impossible after vesting, then there will be no need to construct a general charitable intention. Lapse is excluded.

With regards to the timing of failure, the rule has reached considerable refinement. In *Kings v Bultitude*,¹⁰ the minister of an independent Catholic congregation had left a gift to her own church. Although the church had once been a thriving organisation, by the time of the minister’s death it had only a very small congregation. Upon hearing that the testatrix had died, that congregation dispersed, and the church could no longer be said to exist as a charity.

In these circumstances, the court was presented with a difficult question: whether the charity had ceased to exist before, or after, the testatrix’s death. Proudman J held that the church had expired at the very moment of death. This in turn meant that there could be no *subsequent* failure. She held:

It seems to me that if an institution and its purposes come to an end by virtue of a death there is nothing for the legatee to inherit and it is [sic] becomes impossible to carry out the purposes at the moment of death.

Logically it cannot therefore be a case of subsequent impossibility.¹¹

¹⁰ [2010] EWHC 1795

¹¹ *Ibid* [26]

This is more than a merely technical question. Where there is subsequent failure, it is not necessary to construct a general charitable intention.

ii. Beyond Subsequent Failure: Perpetual Dedication where the Gift is Hypothetically Possible at Death

The second element of the law of perpetual dedication is theoretical. In some cases, gifts have been held to be effectively dedicated on the basis that at the point of death, the testator's gift was *hypothetically* possible. This is not an instance of 'subsequent' failure because as a matter of fact, the gift was never possible at any point in time.

In *Re Tacon*,¹² a testator settled his residuary estate on his daughter for life, with remainder to her children. In the event of his dying without issue, he directed that one sixth of the residuary estate should be applied to establishing a convalescent home. The testator's daughter had no children, but the gift could not straightforwardly be carried out. On her death the charitable gift was worth £10000, an insufficient sum to fulfil the testator's plans. Equally, at the death of testator the gift had also been insufficient, being worth just £2,400.

Even though the value of the gift had always been inadequate to carry out the testator's plan at any point, the Court of Appeal did not find it to be impracticable. It was held that, at the time the will was written, there had been

¹² [1958] Ch 447

a reasonable prospect of sufficiency. This in turn meant that, in a hypothetical sense at least, the gift had not been impracticable. Romer LJ found:

In my judgement, it cannot rightly be said that a hypothetical reasonable person, looking forward in 1922 to the future and assessing the prospect of it becoming impracticable at some time to carry the charitable trust into execution, would be precluded from taking into account (inter alia) what money might one day be available for the purpose...¹³

A similar hypothetical issue arose in *Re Moon's Trust*.¹⁴ A testator left a gift providing that upon the death of his wife, funds should vest in the Gloucester Street Wesleyan Church at Devonport for the carrying on of mission work. On the death of the testator, the gift was practicable; the chapel was functioning and its trustees would have been able to receive the gift. However the testator's wife died towards the end of the war and at that point its practicability was open to doubt. Gloucester Street had been very badly bombed and there was a proposal on behalf of the Admiralty to extend the Devonport Dock-yard into the area.

Roxburgh J did not find it necessary to determine at which point in time practicability should be judged from. He held that even if practicability was judged from the war-time period, because the future of the area was in doubt, it could not be said for certain that the gift was impracticable even upon the death

¹³ *Ibid* 458

¹⁴ [1948] 1 All ER 300, also *Re Wright* [1954] Ch 347

of the testator's wife. Even so, he suggested obiter that the correct date should be the death of the testator:

... I think that case is a decision that the question whether or not the charity or the charitable purpose lapses has to be ascertained at the moment when the charity trustees become absolutely entitled to the legacy, that is to say, at the moment of the testator's death...¹⁵

2. Beyond the *Prima Facie* Rule: Cases where Donor Intention ‘Ousts’ Perpetual Dedication

In a number of lesser-known authorities, donors have been able to overcome perpetual dedication. In such instances, the law is not blind to donor intention. Instead, it proactively strives to effect it by wresting otherwise dedicated gifts out of charity. As such, these authorities reveal a far-reaching contradiction in the law. Insofar as they attempt to effect intention, they follow an alternative rationale. Perpetual dedication is not a strictly enforced rule.

i. Gift-Over Out of Charity

Sometimes wills contain charitable gifts with a gift-over out of charity. The testator will state that if a certain event arises after vesting, a non-charitable object should receive his property. The most straightforward way to do this is by way of a gift-over arising on a subsequent condition. This form of drafting

¹⁵ [1948] 1 All ER 300, 304

is characterised by a complete clause, tied to an independent clause which may operate to defeat it.¹⁶ An example of a gift-over arising in the context of a subsequent condition is, ‘a gift on trust to Liverpool University *on condition that* it continues to offer education in law; gift-over to my residuary estate’.

If the gift-over arising on a subsequent condition is restricted to the correct perpetuity period, the effect of the formulation is to oust the cy-pres doctrine and side-step the principle of perpetual dedication. The court will follow the testator’s direction and apply the property to non-charitable objects, rather than decide upon new charitable purposes cy-pres. But the formulation does not necessarily have that effect. At common law, if the testator does not specify a date of vesting for the gift-over that is within the perpetuity period, it might be void for remoteness.

In its 1998 report, ‘The Rules Against Perpetuities And Excessive Accumulations’,¹⁷ the Law Commission states the common law rule:

- (1) A future interest in any type of property will be void from the date that the instrument which attempts to create it takes effect, if there is a possibility that the interest may vest or commence outside the perpetuity period.

¹⁶ See generally Picarda, ‘The Law and Practice Relation to Charities’ (Butterworths, 1977) 211

¹⁷ Law Commission, *The Rules against Perpetuities and Excessive Accumulations* (Law Com LC251, 1998)

(2) For these purposes, the perpetuity period consists of one or more lives in being plus a period of 21 years and, where relevant, a period of gestation.¹⁸

Where there is a gift-over and a possibility that a condition subsequent will cause property to vest outside this perpetuity period, the gift to the second donee will be held to be void. In *Re Bowen*,¹⁹ a testator left a gift to establish a school named the ‘Wann-I-for Charity School’, a day-school in Wales. He directed that his gift had been made ‘for ever thereafter’. But the testator attached a gift-over arising upon a subsequent condition; he stated that if a government should ever establish a system of general education the gift should pass to his residuary estate. Stirling J found that that the gift-over was defeated saying that:

...there is an immediate disposition in favour of charity perpetuity, and not for any shorter period... the residuary legatees take a future interest conditional on an event which need not necessarily occur within the perpetuity limits. It follows that the gift-over is bad...²⁰

Avoiding the gift-over, while leaving the first trust in operation, leaves the door open for the cy-pres doctrine to apply. This is the case even though the testator has expressly tried to control the future vesting of the property himself. In *Re*

¹⁸ *Ibid* 3

¹⁹ [1893] 2 Ch 491

²⁰ *Ibid* 496

Peel's Release,²¹ the donor had released an acre of land to trustees, so as to establish a school. It was a term of the deed that if the gift should be defeated at a future date, then it should pass to the donor's heirs. The school had insufficient income, and over a period of years, the site became derelict. The number of students became very small, and the school became unable to pay a schoolmistress.

Finding the gift over to private persons to be void for perpetuity, Sarjant J was able to apply the doctrine. The judge adopted the Attorney General's argument that the gift was perpetually dedicated to charitable purposes and that the cy-pres doctrine could be applied. He stated:

...to hold otherwise would be to strike at the foundation of the cy-pres doctrine as applied in a long series of cases of high authority.²²

And so *Re Peel's Release*²³ sits on the interface between the cy-pres doctrine, the rule against remoteness of vesting, and the principle of perpetual dedication. On this approach, it is not possible for the testator to wrest that property out of charity by including a gift-over to a private person in his will. In this manner, the law prioritises the rule against remoteness of vesting over the testator's ability to control his property.

²¹ [1921] 2 Ch 218

²² *Ibid* 225

²³ *Ibid*

But there is another layer to the rule. At common law, it might be possible to create *determinable* interest in charity.²⁴ Where the donor does so, it is possible for him to wrest his gift from charity. Determinable interests terminate without reliance on any separate clause; the limiting clause is integral to the duration of the estate, not independent from it.

At common law, such clauses are unaffected by the rule against remoteness of vesting, and so with careful drafting it is possible to oust the cy-pres doctrine and side-step the principle of perpetual dedication. An example of a determinable interest would be, ‘gift on trust to Liverpool University *until* it ceases to provide education in law; gift-over to my residuary estate’. This formulation would be valid even though the residuary legatees might receive the gift outside the perpetuity period.

*Re Randell*²⁵ provides an example of the principle. A testatrix left a sum on trust, so as to pay the income to the incumbent of the district church of the Holy Trinity at Hawley ‘so long as he permitted the sitting to be occupied free’. In case pew rents were charged, she directed that the gift should fall into her personal residuary estate.

North J found that the gift-over was evidence of a bequest, ‘for a particular limited purpose’, and held that the gift must lapse. The gift-over to the

²⁴ See Davies, ‘Evading Charity Reform – A Re-Examination of Determinable Charitable Gifts’ (1961) *Conv* 56

²⁵ (1888) 38 Ch D 213

testatrix's residual personal estate, was nothing other than an accurate statement of the law in relation to determinable interests: if pew rents were charged, the gift would lapse to the next-of-kin regardless of whether or not the testatrix had directed it her will.

This had the effect of ousting the cy-pres doctrine; the testatrix's intention was followed in its place. Although the result was reached through technical reasoning, in coming to this conclusion, the judge was also motivated to avoid a situation where a gift which had been limited by the testatrix might be applied cy-pres to new charitable purposes against her express wishes. North J noted:

It seems to me startling to say that the Charity Commissioners might, if they pleased, make a new scheme for the application of this income in any way they pleased, possibly for the benefit of the incumbent, and possibly not, and that when they have done that, although the very purpose for which the scheme is created, and for which the money is given, can no longer be carried into effect, yet the money is to be applied for a totally different purposes.²⁶

The principle in *Re Randell*²⁷ was directly applied in *Re Blunt's Trusts*,²⁸ although Buckley J did not consider in any detail whether or not the gift had been drafted as a determinable interest. A testatrix left a gift for Bicknor

²⁶ *Ibid* 216

²⁷ *Ibid*

²⁸ [1904] 2 Ch 767

National Schools, declaring that if the funds necessary for carrying on the schools should be raised as a result of an Act of Parliament, then the gift would be void and result to the residuary estate. This eventuality did occur with the passing of the Education Act 1902. The judge held,

There is no necessity to resort to the gift over. The gift over is a direction that the fund shall fall into her residuary estate. That is where it would go by law if the gift had failed.²⁹

The extent to which the law of remoteness prevents testators from ousting the cy-pres doctrine will, at common law, turn largely on the manner in which the will is drafted. While it is possible to oust the doctrine at common law, it is undeniably a technically complex process.

This position has been altered by statute, although there has been no judicial consideration of the point. First, those wills written before April 6th 2010, will be subject to the Perpetuities and Accumulations Act 1964. Both determinable interests and conditions subsequent are caught by the legislation,³⁰ although they are affected differently.

The 1964 Act will prevent a determinable interest from lasting in perpetuity.³¹ Such a gift will be caught by the ‘wait and see’ rule. On the facts of *Re*

²⁹ *Ibid* 772

³⁰ Perpetuities and Accumulations Act 1964, s 12

³¹ *Ibid*

Randell,³² if during the perpetuity period pew rents were to be claimed, then the gift would result. If the period had expired, the gift would become perpetually dedicated in charity. Being a valid common law interest, the testator could specify an 80 year perpetuity period.³³ If he did not do so, the period would be 21 years.³⁴

A condition subsequent would no longer be immediately invalid. Instead the perpetuity period would run according the varying classifications in section 3 of the Perpetuities and Accumulations Act 1964. In the case of a donor by will, the perpetuity period would be 21 years.³⁵ And so hypothetically, on the facts of *Re Bowen*,³⁶ the gift would not be perpetually dedicated from the moment of death. There would be a period of 21 years in which the establishment of a national education system would cause a lapse. At expiration of that period, then the gift would be dedicated.

Second, in relation to wills written after April 6th 2010, the law has been greatly simplified. Such gifts are subject to the Perpetuities and Accumulations Act 2009, which establishes a single 125 year perpetuity period,³⁷ and expressly applies to both determinable interests,³⁸ and conditions subsequent.³⁹ The gifts

³² *Randell* *supra* note 25

³³ Perpetuities and Accumulations Act 1964, s 1

³⁴ Perpetuities and Accumulations Act 1964, s 3(4)(b)

³⁵ *Ibid*

³⁶ *Bowen* *supra* note 19

³⁷ Perpetuities and Accumulations Act 2009, s 5

³⁸ Perpetuities and Accumulations Act 2009, s 1(7)(a)

³⁹ Perpetuities and Accumulations Act 2009, s 1(4)

in both *Bowen*⁴⁰ and *Randell*⁴¹ would be subject to that uniform period before becoming perpetually dedicated.

ii. The Construction of a Particular Charitable Intention Under the Cy-Pres Doctrine

The rule can be overcome another way. In some exceptional cases, the courts have been prepared to put perpetual dedication to one side on the basis of precedential cy-pres intention construction. Courts have held that provisos wresting gifts from charity, while potentially invalid in themselves, are evidence of a particular charitable intention. In these rare instances, gifts that have been dedicated to charity are released from it.

Re Cooper's Conveyance Trust,⁴² provides a clear example. The Honourable Mary Howard had made a gift to establish the 'Howard Orphan Home', located near Kendal. She attempted to provide for the closure of the orphanage in her will. She included a gift over, which she intended to operate in favour of 'the person or persons who shall be entitled to the mansion house called Levens Hall', in circumstances where the orphanage had ceased to operate.

After 90 years in operation, the Orphan Home closed, and the court was called upon to decide upon the ownership of the property. Upjohn J found that the gift-over was invalid. However, Upjohn J did not consider that the operation or

⁴⁰ *Ibid*

⁴¹ *Randell* *supra* note 25

⁴² [1956] 1 WLR 1096

non-operation of the gift-over was determinative in the matter before him. Instead he decided the case on the basis of intention construction. The judge held:

What, however, seems to me clear is that the donor desired the charity to continue only while it could be carried on as an orphan girls' home...

When that particular charity came to an end, in my judgement, she evinced the clearest possible intention that the property was to go over to the non-charitable purpose mentioned in her will.⁴³

The judge found that the invalid gift-over evidenced a cy-pres particular charitable intention. On the basis of that construction, the property resulted to the testatrix's estate.

A similar approach was taken in *Gibson v South American Stores*.⁴⁴ In that case, a company had established a fund by deed for necessitous ex-employees and their dependants. The deed included a clause allowing the company to 'rescind, alter or modify' the trust, although it did not specify a time limit on the power. Over a number of years, the fund developed a large surplus and the company exercised the clause. The clause was potentially invalid in light of the law of remoteness of vesting.

⁴³ *Ibid* 1104

⁴⁴ [1950] Ch 177

Again the case was not decided through analysis of the formal operation of clause; the court did not decide whether or not it was valid. Instead, the clause was taken to be evidence (alongside other indications in the deed) of a cy-pres particular charitable intention on behalf of the company. The construction of particular intention was sufficient to release the gift from charity. Evershed MR held:

I feel myself compelled to conclude that there was never here a general charitable intention, but only an intention to make this particular provision for this company's... own employees and their families.⁴⁵

Finally, in *Re Talbot*,⁴⁶ a trust was established for the United Methodists' Chapel at Batley. The gift was made subject to the proviso that if the church should become merged with another organisation then a gift over should operate in favour of the testator's nieces and nephews. The church had in fact merged with others upon the creation of a new organisation, the United Methodist Church. Maugham J considered the issue as a matter of intention construction. He held,

...having regard to the will as a whole, it is a gift to effect a particular mode of charity in a case where there is no general charitable intent... there would be no ground for the application of the cy-près principle.⁴⁷

⁴⁵ *Ibid* 201

⁴⁶ [1933] Ch 895

⁴⁷ *Ibid* 902

Despite these obiter comments, on the facts of the case, the judge did not follow this construction. Instead he relied upon section 18 of the Methodist Church Union Act 1929 which had the effect of making the Batley church a ‘continuing’ rather than a new church. Nevertheless, had the issue been free from legislation, is clear that the judge would have allowed the gift to lapse as a matter of intention construction.

3. An Alternative Approach

In this complex area of law, there are two contradictory principles in play. On the one hand, it is established that gifts that (i) fail subsequent to vesting, or (ii) were at some point in time hypothetically possible to effect, are perpetually dedicated regardless of the donor’s intention. Yet on the other hand, an opposing rule is established that donors can oust dedication by (i) technical drafting of a determinable interest, or (ii) by evincing a particular charitable intention. This contradiction reveals an underlying artificiality in the law. It is blind to donor intention in some cases, only to effect it others.

In Scotland, an alternative approach has developed that has potential to avoid this contradiction. In that jurisdiction, it is possible to ‘wait and see’ whether or not the trust will fail before holding that the property is permanently vested in charity. If after the end of the perpetuity period, it becomes impossible to effect donor intention, the gift us is not automatically dedicated. The court retains a discretion.

The rule was developed in the Inner House case *Cuthbert's Trustees v Cuthbert*.⁴⁸ Lieutenant-Colonel Thomas Wilkinson Cuthbert, who resided in a stately home named Badcall, left the building to provide a holiday home for nurses. It was envisaged that the women would pay to stay and that the costs would cover the maintenance of the property. At a hearing in 1938, the testator's next-of-kin had raised an objection claiming that the scheme was uneconomic and incapable of fulfilment. Lord Keith had taken an innovative approach. He held that while it would be costly to fully enquire into practicability, that if the trustees were to attempt to carry out the scheme and find it impracticable, then the gift would still lapse. This amounted to an experiment; the gift could be trialled.

In the event, it was not economic to run Badcall as a holiday for nurses; it was remotely located, attracting only relatively small numbers, and it was expensive to maintain. When the next-of-kin brought a claim, Lord Guthrie held that in light of events, the gift had in fact been impracticable from the start. It had never vested. He stated:

...the bequest has been shown by experiment to be incapable of receiving practical effect, because of geographical, financial, and other

⁴⁸ (1958) SLT 315

circumstances... Accordingly, in my opinion, [the disposition] has never “taken effect”.⁴⁹

This experimental approach avoids the contradictions found in English law. Scottish law has found a flexible and discretionary compromise between perpetual dedication and intention construction. A trial is permitted, but if that experiment fails, dedication is not automatic; the court retains control of the eventual destination of the gift at the end of the trial. Consequently, there is no artificial division between those cases where the law is blind to intention, and those cases where it seeks to effect it. The court can decide on a case-by-case basis.

Despite the advantages of the principle, a later Outer House authority, *Edinburgh Corporation v Cranston's Trustees*,⁵⁰ has given *Cuthbert's Trustees* a restrictive reading. In *Edinburgh Corporation*, a gift was left for twelve poor tailors, but on condition that they were temperance society members. A first instance court allowed the trustees to ‘experiment’ and attempt to find the requisite number of trustees. However, it proved very difficult to find suitably qualified individuals, and after intensive efforts, just two poor tailors were found. This left ten out of twelve parts of the gift unused. Consequently, in the Outer House, the trustees claimed that after a failed *Cuthbert's Trustees* type experimentation, the gift had lapsed owing to a lack of a beneficial class.

⁴⁹ *Ibid* 318

⁵⁰ (1960) SC 244

Despite *prima facie* similarity between the two cases, the trustees in *Edinburgh Corporation* were not able to persuade the Court that there had been a lapse following the experiment. The Outer House held that the trustees' success in finding two poor tailors was sufficient for the trust to have 'taken effect'. Lord Guthrie, apparently attempting to restrict the case to its facts, stated directly in relation to gift of the manor house in *Cuthbert's Trustees*:

That was a case in which the facts were very special.⁵¹

And he further held:

In *Cuthbert's Case* and in the present case, the practicability of the bequest was put to the test of experience, but this certainly does not mean that that course should always be followed. These cases were somewhat exceptional, and it is more usual to find the question of practicability decided at the opening of the bequest.⁵²

While the Outer House did not directly overrule the 'wait and see' approach, it is at best a luke-warm treatment of the innovation. And in the long period following the decision, no further Scottish cases have implemented a trial. However, it would be unfortunate if the innovation were to wither on the vine unacknowledged by other jurisdictions. The rule in *Cuthbert's Trustees*, points the way for the development of a coherent case-by-case treatment of intention.

⁵¹ *Ibid* 254

⁵² *Ibid*

It side-steps the artificial division between those cases where intention is effected and those where it is not. In its place, the rule allows a practical compromise between intention and workability in any given set of facts.

4. Conclusion

The law relating to perpetual dedication is of foundational importance in relation to the law's treatment of intention. It governs the circumstances in which donors can control their property. But the rule is contradictory. There are two opposed lines of cases: those in which the law is blind to donor intention and those in which it strives to effect it by permitting lapse.

Scottish innovation points the way to a coherent role for intention. In place of an artificial 'either/or' approach to dedication, the rule in *Cuthbert's Trustees* allows for case-by-case decision-making. Rather than forcing the court to choose between 'blindness' to intention and ousting dedication entirely, it permits a trial of the gift's practicability. For the length of the perpetuity period, the courts can 'wait and see'. If it transpires after such an experiment that the gift as donor intended it is not practical, then dedication is not automatic. The court retains a practical discretion over the eventual destination of the gift.

CHAPTER SIX: ‘BALANCED VARIATION’ AT THE CY-PRES APPLICATION STAGE

The application stage is the point in the cy-pres process where new purposes are chosen. Traditionally the stage has been thought to be governed by an ‘as near as possible’ principle directing the court to find highly proximate purposes to those the donor intended.

This chapter provides a detailed analysis of the relevant cases, both decided in the courts, and those cases detailed in the Charity Commission report. It shows something surprising. Outside of a small line of cases, there is no ‘as near as possible’ principle in operation. Even at common law, the courts take effectiveness standards into account.

The statutory ‘balanced variation’ approach is analysed against this common law backdrop. It is shown that to be a conceptually successful model in comparison with certain Australasian alternatives.

1. The ‘as Near as Possible’ Principle Strictly Understood

Simply stated, the ‘as near as possible’ principle directs judges to choose highly proximate purposes at the application stage. It is a donor-orientated rule because it prevents courts from straying far from the original intention behind the trust. Some authors have gone so far as to treat the donor-orientated

principle as being *synonymous* with the cy-pres doctrine. One leading author notes in that spirit:¹

The doctrine of *cy-près* is one of approximation. The court must search out and ascertain the intention of the testator and must exercise discretion in awarding the fund in question to such charitable institution which can most nearly give effect to that intention. Under no circumstances can the judgement of the court be capriciously substituted for that of the donor or testator.²

Although rare, the same position can be evidenced in judicial comment. In the 1796 case *Attorney General v Whitchurch*,³ Arden MR held:

The Court will not administer a charity in a different manner from that pointed out, unless they see that though it cannot be literally executed, another mode may be adopted by which it may be carried into effect in substance without infringing upon the rules of law.⁴

And in a recent testamentary construction case, *Phillips v Royal Society of Birds*,⁵ HHJ David Cooke stated:

¹ Picarda, *The Law and Practice Relating to Charities* (Butterworths, 1977)

² *Ibid* 304. See also Bourchier-Chilcott, 'The Application of the *Cy-près* Doctrine to Trusts for Charitable Purposes' (1912) 27 *LQR* 169

³ (1896) 3 Ves 114

⁴ *Ibid* 144

⁵ [2012] EWHC 618

[The court] may direct that the funds be applied cy-pres, that is to say by the court directing a scheme which will see the funds used in a manner as close as possible to that which the deceased intended.⁶

This strict approach to cy-pres marks out the donor's intention as the reference point for any new charitable purpose chosen by the court. Yet only a small number of cases apply the 'as near as possible' principle strictly.

They are few enough in number to be analysed in turn. *Re Prison Charities*,⁷ concerned the application of charitable funds applied to the relief of prisoners for debt after the law of imprisonment for debt had been abolished. The Attorney General had proposed a scheme with objects far-removed from those of the original trusts; he suggested that a school should be established for the benefit of children convicted of crimes. The trustees of the debt charities objected to the Attorney General's scheme on the basis that it did not conform to the cy-pres principle, saying that that it would be possible to find purposes that were more closely analogous to the original trusts.⁸ Sir James Bacon VC agreed. He accepted that the Attorney General's scheme might be beneficial as it would, 'relieve present misery and perhaps prevent future crime...' ⁹ But he held that by itself that was not a sufficient basis for a scheme. Although the judge refrained from outlining a more proximate scheme, he held that:

⁶ *Ibid* [27]

⁷ (1873) LR 16 Eq 129

⁸ *Ibid* 148

⁹ *Ibid* 149

The funds may be applied in a manner much more consonant to the intentions of the donors...¹⁰

Re Avenon's Charity,¹¹ provides a similar illustration of the ‘as near as possible’ principle in operation. An ancient charity had been established to provide a sermon in the London Parish of West Ham. Over the years, the value of the gift had increased substantially and the Attorney General proposed a scheme for its reform. He suggested that 25% of the trust income should be applied to the provision of public lectures, and that the remaining 75% should be applied to church purposes. Warrington J rejected the proposed scheme. The judge took that the view that a ‘sermon’ must be for a religious purpose and that it would be inappropriate to apply the funds to public lectures. He stated:

...in my judgement the object of the settlor was a strictly religious object, and the scheme ought to preserve the religious character of the charity...¹²

The judge was prepared to set out relatively specific directions for the scheme. He held that fund should be applied towards the employment of assistant curates, and towards the expenses incurred by the Vicar through visitation and religious instruction.

¹⁰ *Ibid* 148

¹¹ [1913] 2 Ch 261

¹² *Ibid* 276

Finally, the relationship between the ‘as near as possible’ principle and adherence to the donor’s original intention can be seen in *Re Stane’s Will*.¹³ A testatrix had left a gift to a trustee named Mr Larcher, according him a discretion to apply the gift amongst the poor and needy of the Parish of Great Baddow. Unfortunately, Mr Larcher had predeceased the testatrix. Kindersley VC disapproved of the nature of the gift. The judge stated the point directly:

Now it seems to me that great mischief might arise from the actual distribution of [the gift] amongst the poor.¹⁴

Despite his disapproval, the judge would not accede to an alternative scheme to apply the funds towards the education of poor children in local National Schools. The ‘as near as possible’ principle forced the judge to adhere to the donor’s original intention, even though he was hostile to the nature of the gift on policy grounds.

Re Prison Charities, *Re Avenon’s Charity*, and *Re Stane’s Will*, are exceptional cases. In those decisions, the courts chose a purpose that adhered closely to the testator’s original intention; they applied the ‘as near as possible principle’. It was irrelevant whether more effective purposes could have been effected. In a larger body of decided cases, the courts have taken effectiveness factors into account at the application stage.

¹³ (1853) 21 LTOS 261

¹⁴ *Ibid* 261

2. Effectiveness Considerations at Common Law

Strict common law adherence to the ‘as near as possible’ principle is unusual. Courts regularly take account of utility factors at the application stage. There are so many cases on point that it can be stated as a general common law rule that at the application stage, courts consider effectiveness criteria alongside the ‘as near as possible’ principle.

i. Practicability of New Objects

The most obvious reason why original intention may not be adhered to arises where there is no feasible object proximate to the gift. This is not a direct challenge to the ‘as near as possible’ principle; a judge may anxiously apply the rule, only to find that the ‘next nearest’ possible purpose is very far removed from the original gift. However, the requirement of practicability does show that, at the most basic level, the judge must take account of effectiveness. There is no use in re-establishing a trust, only for it to fail again.

A well-known example of the practicability problem is *Attorney General v The Iron Mongers' Company*,¹⁵ where a gift had been left for the redemption of slaves in Barbary or Turkey. By the time of the case, slavery had been prohibited and so it was not possible for the court to find a closely related object. In the event, the gift was applied towards far-removed educational purposes. Lord Cottenham observed:

¹⁵ (1841) 41 ER 469

There is necessarily great latitude in exercising the jurisdiction over charity funds where the direct object of the donor fails; and therefore very different opinions may be formed upon that subject in the same case. A charity may be cy-pres to the original object, which it seems to have no trace of resemblance to it, but which may be very properly adopted if no other can be found having a nearer connection.¹⁶

The exercise of this latitude is vividly illustrated by *Attorney General v Wansay*.¹⁷ In that case, the court posited a number of hypothetical examples of practicability, each one being more remote from the original purposes. A gift had been left to provide annual apprenticeships for two sons from a particular Presbyterian congregation from a particular parish. There were not enough suitably qualified boys in the parish for the trust to be usefully practicable. In these circumstances, the Lord Chancellor directed how the gift might be altered ‘as near as possible’. The underlying principle in his reasoning was that a *practicable* scheme must be effected. If highly proximate purposes could not realistically be carried out, then it would be necessary to undertake a more radical alteration in order for the scheme to be workable. The judge provided three possible schemes for the charity, the first being the most ‘cy-pres’, the last being the most practicable. He held (i) the surplus could be applied to sons from other parishes; (ii) if that was not possible, it could be applied to

¹⁶ Ibid 477. Although it should be noted that another disposition in the will was for educational purposes. Finding that one gift had failed, the House of Lords applied to another of the testator’s stated charitable objects.

¹⁷ (1808) 15 Ves 231

daughters of the parish, (iii) for the sons of Presbyterians generally; and (iv) for the building of a Presbyterian school.

ii. Judicial Policy

Occasionally, judicial policy has prevented the new scheme from closely adhering to the original intention of the donor. This is an effectiveness consideration. The courts impose their policy view with regards to the new purpose; rather than apply the gift ‘as near as possible’, courts have diverted the gift to purposes that they consider desirable. The courts have reserved the right to assess the social utility of the testator’s original gift. In *Re Weir Hospital*,¹⁸ Cozens Hardy MR stated:

Wherever the cy-pres doctrine has to be applied, it is competent to the Court to consider the comparative advantages of various charitable objects, and to adopt by the scheme the one which seems most beneficial.¹⁹

Historically, it is in relation to dole charities that judges have been most willing to set aside the ‘as near as possible’ principle. In *Re Campden Charities*²⁰ updating a dole charity ‘as near as possible’ was rejected both on the basis of unfeasibility and because the court considered the gift to be of inherently low utility. Lady Campden had established the dole in 1643. At that time, she

¹⁸ [1910] 2 Ch 124

¹⁹ *Ibid* 132

²⁰ (1881) 18 Ch D 310

directed that a sum should be distributed twice a year from the church porch in the parish of Kensington. The value of her gift had increased substantially over the years, and the trustees were no longer distributing funds according to her wishes. Although it was strictly possible to do so, Jessell MR held that the court would not apply the gift ‘as near as possible’ on the basis that such a charity would be impracticable:

...ought we, sitting here simply to interpret the law, to hold ourselves bound by the words of the will to distribute this large sum of money in doles of this fashion? I think we ought not. As I said before, we must consider not only the change in amount, but the changes in circumstances... Could she have intended to distribute 500 sovereigns every half-year among the poor of a large town like *Kensington*. There was no such idea in her mind.²¹

But the judge expressly stated that the as near as possible principle would not be justified in relation to a low utility gift:

...we know that extension of doles is simply the extension of mischief. That is a very good reason for not extending them if we can help it.²²

Consequently, the fund was applied to a range of new purposes, none of which were directly related to the charity. The case is not isolated, similar reluctance

²¹ *Ibid* 327-328

²² *Ibid*

to apply the ‘as near as possible’ principle to a dole can be seen in *Marchant v Attorney General*.²³ Again, a historic dole was operating in Kensington. Over a period of time, a large surplus of funds developed, but the Court of Appeal refused to apply the excess ‘as near as possible’ in favour of a reformed and extended dole. Instead, the Court took the view that it was not possible to translate the testator’s historic intention into the modern day.

Judicial policy is also apparent outside the context of doles. A strong reformist note was struck by the House of Lords in the Scottish case, *Clephane v The Lord Provost of Edinburgh*.²⁴ The site of a hospital had been bought by a railway company for a large sum. By a scheme, the Court of Session had directed that it was not necessary to re-establish the hospital charity. A primary purpose of the original hospital trust was the relief of poverty, and the court found that this object could be met by an alternative means of ‘out-door relief’. On appeal to the House of Lords, Lord Westbury defended the radical change of direction for the former hospital on effectiveness grounds:

In the progress of society, however, with the greater diffusion of wealth, and the growth of population, the means originally devised may become inadequate to the end...²⁵

²³ (1866-67) LR3 Eq 424

²⁴ (1869) LR I Sc & Div 417

²⁵ *Ibid* 421

These judgements show the courts directly prioritising policy considerations above the ‘as near as possible’ principle. Judges have been prepared to put the principle to one side so as to proactively reform trusts.

3. Practical Administrative Considerations

The ‘as near as possible’ principle is not only challenged by effectiveness considerations. Practical administrative points might also influence the court. While they are not significant in terms of legal policy, they illustrate real-world limitations at the application stage of the cy-pres process.

i. Expense of Searching for Bodies to Receive Funds and Administer the Scheme

Finding the ‘next nearest’ charity might be prohibitively expensive, particularly where the scheme relates to a small fund. In the New South Wales case, *Grant v Attorney General*,²⁶ there was a fund comprised of government grants and public subscription for the FESPIC games (a sporting tournament for people with disabilities). A scheme was necessary because the games, which had been restricted to the Far East and Pacific Island region, had been abolished and replaced by a tournament across the whole of Asia. The court held that the fund could be divided between two charitable organisations, the New South Wales Wheelchair Sporting Association, and the Blind Sporting Association. While it is clear that those two organisations had proximate purposes, the judge was

²⁶ 2009 NSWSC 51

aware that others might be found. Even so, he refrained from attempting to find them on the basis of cost. Bryson AJ stated:

I felt some concern that the scheme deals only with two charitable bodies which operate in the relevant field whereas there may be one or more others which might feel that they have claims for consideration. If I were dealing with a much larger fund I might well have required an enquiry surveying the charitable bodies which operate in New South Wales in relevant ways, or I might have given directions requiring advertisements and calling for applications.²⁷

In this manner, questions of financial expediency affected the application of the ‘as near as possible’ principle. The court was mindful of the size of the fund and the practical difficulties associated with finding bodies to administer it.

ii. Administrative Difficulty in Applying the ‘as Near as Possible’ Principle

Application of the ‘as near as possible’ principle might be theoretically possible but highly impracticable to administer. In one striking New South Wales case, *Attorney General v Fulham*,²⁸ the court used the cy-pres jurisdiction to retrospectively assent to a breach of trust. Adherence to original intention was set aside in favour of administrative practicality. The purposes of the new scheme were not ‘as near as possible’ to the donors’ original

²⁷ *Ibid* [38]

²⁸ [2002] NSWSC 629

intentions; they formalised the trustees' breach of trust. To do otherwise, was considered to be administratively impossible.

The decision concerned a charity, which had been formed in 1941, named the 'Leichardt Lilyfield Ex-Service Memorial Trust'. It had formerly operated a memorial hall building for returned sailors, soldiers and airmen. That hall had been sold for a large sum, and the charity accumulated a considerable balance. Acting in good faith, but contrary to the trust instrument and without consent, two of the trustees had distributed the charity funds to number of other charities. In these unusual circumstances, the court was called upon to permit a cy-pres scheme which would have the effect of ratifying the errant trustees' distributions. On a strict 'as near as possible' approach, this would not have been permissible because the trustees had distributed funds to charities with varying objects. However, it was acknowledged that recovery of the donations would be a long and difficult process. In such circumstances Bryson J was prepared to take account of practical concerns. He stated directly:

In deciding what cy-pres scheme to adopt I feel that I must yield to claims of practicability and expediency. I should avoid any decision which would produce or might or might tend to produce disputation over the recovery of donations... Claims of practicability appear to me

to require a course which will bring the unhappy history of the Hall Trust to a relatively early close...²⁹

Accounting for the risk of further litigation and issues of practicability has much to commend it in such administratively difficult circumstances. The ‘as near as possible’ principle was set aside in favour of administrative expediency.

iii. Likelihood that a Litigating Charity will Receive a Pay-Out

There is a further, and more common, practical administrative limitation on the ‘as near as possible’ principle. Where a charity is involved in litigation it is very likely that it will receive a share of the funds. The litigating organisation will likely be motivated by the expectation of a pay-out, and the case reports show that very often it will not be disappointed.³⁰ This indirectly prevents the court from adhering to the ‘as near as possible’ principle because organisations with the most proximate purposes may not be involved in the litigation.

So in *Re Songest*,³¹ a testatrix had made a gift ‘upon trust for the Disabled Soldiers’, Sailors’ and Airmen’s Association absolutely’. The trustees of the will made a list of the possible organisations. Two of those organisations, ‘The Incorporated Soldiers’, Sailors’ and Airmen’s Help Society’, and ‘The Star and

²⁹ *Ibid* [83]

³⁰ *Re Finger’s Will Trusts* [1972] 1 Ch 286; *Phillips v Royal Society for Birds* [2012] EWHC 618; *Re Vernon’s Will Trust* [1972] Ch 300; *Re Alchin’s Trusts* (1872) LR 14 Eq 23; *McCormack v Stevens* [1978] NSWLR 517

³¹ [1956] 1 WLR 897

Garter Home for Disabled Sailors, Soldiers and Airmen', came forward to claim the gift. Lord Evershed MR held that:

...in the circumstances, there are but two possible beneficiaries... and the claims of both of them are nicely and indeed equally balanced. It would, therefore, as I think, follow that any cy-pres application would inevitably be by way of equal division.³²

Consequently, the gift was divided between the two litigating organisations. Yet the unusual facts of the case show that expediency in awarding the litigants came at the cost of adherence to donor intention. After a division between the litigating charities had been ordered, a third claimant 'The Disabled Sailors' and Soldiers' Workshops, Bournemouth' came forward in light of publicity surrounding the case. In a continuation of the proceedings, the Attorney General submitted (unreported) information which, if adduced at trial, would have left the court in no doubt that it was the correct organisation. In these circumstances, the other litigants acceded to the Bournemouth charity.

While dividing the gift between the litigating charities is undoubtedly a practical approach in ambiguous circumstances, *Re Songest*³³ shows that process inevitably involves a certain 'rough justice' in relation to donor intention.

³² *Ibid* 901

³³ *Songest supra* 31

4. The Approach of the English Charity Commission

When exercising its concurrent jurisdiction with the High Court,³⁴ the Charity Commission has not put the ‘as near as possible principle’ into operation; the Commission takes utility considerations into account at the application stage. Although Commission decisions do not carry precedential weight, they are of considerable practical importance. A large number of decisions have been taken by the body and so its decisions impact greatly upon charities.

For a long period, the Commission has been under policy pressure to carry out effectiveness-orientated changes at the application stage. In 1976, *The NCSS Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations*,³⁵ expressed its view the ‘as near as possible’ principle should not be rigidly applied by the Commission. Just over a decade later, the 1987 *Report on the Efficiency Scrutiny of the Supervision of Charities* (the Woodfield Report),³⁶ picked up the same theme, recommending that the Commission relax the ‘as near as possible’ principle at the application stage.³⁷

In response to the Woodfield Report, the Charity Commission set out six principles, each of which gave it considerable latitude in choosing new

³⁴ Charities Act 2011, s 69

³⁵ NCSS, *The Effect of Charity Law and Practice on Voluntary Organisations* (Bedford, 1976). For an overview of various policy reports see O’Halloran et al, ‘Charity Law and Social Policy’, (Library of Public Policy and Public Administration vol 10, Springer, 2010)

³⁶ Woodfield, Binns, Hirst and Neal, *Efficiency Scrutiny of the Supervision of Charities* (HMSO, 1987)

³⁷ *Ibid* 85

purposes.³⁸ Here the principles are ‘matched’ with cases contained in the Commission’s reports so as to illustrate that body’s relaxed approach to the ‘as near as possible’ principle at the application stage.³⁹

i. Commission Principle: *Descriptions or classifications of charitable purposes should not be treated as rigid or mutually exclusive*

The Charity Commission has only rarely been prepared to change the purposes of a charity from one traditional *Pemsel* ‘head’ to another. The Commission, however, expressly states that such fundamental changes of purpose are possible.⁴⁰ Where it does so, there will very often be a tension with the ‘as near as possible’ principle. The new purpose will represent an effectiveness orientated transformation of the charity and consequently the donor’s original intention will be a low priority.

One instance of a complete change of purpose, and a circumstance where effectiveness was prioritised over original intention, can be found in the Commission’s report on *The Bridge Trust, Bideford, Devon*.⁴¹ The historic charity had been established for the maintenance of a 13th century bridge connecting East and West Bideford in Devon. It had paid for the light, paving, cleansing and repairs of the bridge for several centuries. Unfortunately,

³⁸ *Report of the Charity Commissioners for England and Wales* (1988) 12. The principles are still contained in the Commission’s Operational Guidance, ‘OG 02’ (14th March 2012) <<http://ogs.charitycommission.gov.uk/g002a001.aspx>>

³⁹ Although the Commission published the principles in 1988, some of the examples from the reports date back to before that year. This is evidence that the Charity Commission has longed acknowledged its flexible power at the application stage

⁴⁰ *Operational Guidance* *supra* note 38

⁴¹ *Report of the Charity Commissioners for England and Wales* (1973), 16

following a collapse of part of the bridge, the trustees were unable to pay for full repairs. The Ministry of Transport took over ownership of the bridge and accepted liability for its upkeep and the trustees agreed to pay the sum of £1000 a year to the Ministry.

The report details that as a consequence of a past scheme, the bridge trust had already had its purposes extended to encompass education. The trust was able to pay over any residue to the Bideford Grammar school, although over the years, the costs of the bridge had exhausted the income of the charity. In consequence of the new arrangement with the Ministry of Transport, an even wider scheme was provided by the Commission. The Bridge Trust was also permitted to apply any left-over income to the ‘relief of persons in need and resident in the Borough of Bideford’. This extension of the purposes meant that the charity could pursue an entirely new, and more effective, charitable goal.

ii. Commission Principle: *Legal points should be balanced by practical considerations*

Strict adherence to the ‘as near as possible’ principle inevitably results in the down-playing of practical considerations; the key concern will be proximity to the original intention. In its report entitled *Royal Holloway and Bedford College*,⁴² the Commission showed its willingness to prioritise the financial

⁴² Report of the Charity Commissioners for England and Wales (1992) [41]-[45]; For criticism of the application see L Sheridan, ‘Cy-près Application of Three Holloway Pictures’ (1993/4) 2 *Charity Law and Practice Review* 181

implications of a scheme above the ‘as near as possible’ principle as it exists in strictly decided cases.

The College was in serious financial difficulty. It had an accumulated deficit of £1.4 million in 1991, which was predicted to rise to £1.8 million in 1992/1993.

This problem was worsened by the material state of the College’s buildings. The estate needed extensive repairs over a ten year period, and the likely cost of those repairs was estimated at £7 million. Attempting to find a way out of their financial impasse, the College sought to sell parts of its art collection.

By an independent charitable trust, the College held a valuable art collection. The art had been donated by the founder of the University ‘for the decoration of the College’. In response to the College’s lack of funds, the Commission effected a scheme which permitted the sale of works by Gainsborough, Constable and Turner. The income received from the sale was to be applied in the first place for the maintenance, security and upkeep of the picture gallery of the College, then to the maintenance and improvement of the College, and finally in any other way which will further the general purposes of the College.

In this manner, the Charity Commission prioritised the financial need of the College over the original intention of the donor. The strict ‘as near as possible principle’ was discounted. Under the terms of the scheme it was possible for art which had been intended for decorative purposes to be applied directly to the delivery of teaching and research. The ‘as near as possible’ principle was de-

prioritised in favour of a practical concern for the College's difficult financial situation.

iii. Commission Principle: *Care should be taken not to place undue emphasis on one part of a charity's trusts over another*

Strict adherence to the 'as near as possible' principle may lead the scheme-maker to emphasise certain purposes to the detriment of others which could usefully be encouraged by the scheme. For example a charity providing an under-used playing field might be prevented from selling that field if the scheme-maker takes the view that the location of the charity is unchangeable. In that circumstance, the field's location would be prioritised over concerns relating to the utility use of charitable property.

An example of the Commission being prepared to de-prioritise certain purposes can be found in its report on *Barnado's Charities for Sea Training of Boys*.⁴³ In that case, the trustees of Dr Barnado's sought a scheme for £40,000 held for the purpose of endowing beds for young boys in certain designated sea training establishments. The charity was the trustee of over 28 such charities, but over the years, demand had fallen and many of those organisations providing beds had closed. The Charity Commission provided for a relatively radical change of purposes. While the scheme stated that funds should be applied for the maintenance of boys in sea-training establishments, it also said that if it was not possible to do so the funds could be applied to the general purposes of the

⁴³ Report of the Charity Commissioners for England and Wales (1975), 14

charity. The Commission did not insist that the funds should be applied to sea-training regardless of the practicability of the gift.

iv. Commission Principle: *In some circumstances it may be acceptable to exclude part of a charity's existing purposes*

It is common for donors to make gifts on complex trusts. For example, a gift might be given to a Catholic girls' school so as to establish a scholarship. In that instance the gift reflects religious, educational and gender-specific concerns. Strict adoption of the 'as near as possible' principle requires the scheme maker to find a very close match to each element of the charity's trust objects. This may not always be desirable in effectiveness terms. Under the Commission's guidance, the scheme may omit core elements of the trust.

The Charity Commission's report on *The Northcote Children's Emigration Fund for Australia*,⁴⁴ shows a flexible approach. The charity had been founded following a testamentary gift from the Right Honourable Alice Stephen Baroness Northcote. The charity was established both for the relief of poverty and the advancement of education. By her will, the Baroness had directed the establishment of the 'Northcote Children's Emigration Fund for Australia' for the purposes of 'enabling and assisting poor children' to emigrate to Australia and start a new life. When the children arrived in Australia, they became wards of the state of Victoria where they were provided with schooling which was also provided by the charity.

⁴⁴ Report of the Charity Commissioners for England and Wales (1974), 14

By the time of the scheme in 1974, child emigration to Australia had virtually ceased. In consequence of this social change, the trustees put forward a proposal for the reform of the charity. That proposal was purely educational; there was no direct provision for the relief of poverty. The Commission accepted the scheme with the effect that the charity could provide scholarships ‘assisting students who are resident in the United Kingdom by awarding grants or scholarships to enable them to study in universities and colleges in Australia’.

The Commission de-prioritised the ‘as near as possible’ principle in favour of establishing a more effective trust. It was prepared to exclude the ‘relief of poverty’ element in favour of educational purposes.

v. Commission Principle: *No part of a charity’s trusts is unalterable*

The Commission is prepared to make fundamental change to core elements of the trust. This might mean a radical organisational change resulting in a more effective application of funds. An example of far-reaching organisational reform is found in the Commission’s report on *The Florence Nightingale Hospital*.⁴⁵ The charity was established around 1850 as a hospital for Invalid Gentlewomen. Located in Lisson Grove, St Marylebone, it provided medical and surgical treatment for gentlewomen of small means. Following the establishment of the National Health Service, the ageing of its building, and the

⁴⁵ *Report of the Charity Commissioners* *supra* note 43

gradual disappearance of the type of individual that the charity was established to care for, the charity had expanded its beneficial class to encompass ‘women of limited means with professional, secretarial or administrative qualifications’.

However, in 1974 the trustees asked the Charity Commission for a radical scheme. They felt that the best interests of the charity would be served by selling the site in Lisson Grove. The Commission permitted them to do so, reforming the trust into a grant-making charity. Its main function became the provision of money, equipment and other items to the sick and disabled; preference still being given to those with professional, administrative or secretarial backgrounds. The Commission set aside any preference for maintaining the charity in its original form. The core trusts were radically reformed so that funds could be used more effectively

When the reports are taken together, it can be seen that the Commission has been prioritising the effective use of funds over the ‘as near as possible’ principle. That approach is precedentially justified at common law; in a number of cases, the courts have followed the same path. The considerable latitude at common law has had a far-reaching practical effect in England. Even before the enactment of ‘balanced variation’ orientated legislation, it was possible to reform trusts on effectiveness grounds.

5. Legislative Reform and the Balanced Variation Policy Goal

The application stage has been put on a statutory footing both in England and certain Australasian jurisdictions.⁴⁶ The legal context in which that legislation operates is nuanced. In contrast to the trigger stage, the reforming legislation does not take effect against a background of a strictly enforced donor-orientated rule. Instead, there is a far more ambiguous common law picture. Cases following the ‘as near as possible’ principle do exist at law, but they are off-set by a large number of cases where effectiveness (or administrative considerations) have been prioritised by the courts. It is not accurate to state the law in terms of a strict ‘as near as possible’ principle, and so the policy goal of balanced variation must be assessed against this already flexible back-drop.

i. Complete Discretion in New Zealand and Western Australia

Section 7 of the Western Australian Charitable Trusts Act 1962 and section 32 of the New Zealand Charitable Trusts Act 1957 permit schemes to be made without any reference to the ‘as near as possible’ principle. On the plain reading of the statutes, the court has complete discretion as to how the charitable property should be applied. In the two jurisdictions (which share identical legislation) the statutes provide that where the doctrine is triggered, property:

⁴⁶ Charitable Trusts Act 1962 (Western Australia), s 7; Charitable Trusts Act 1957 (New Zealand), s 32

... shall be disposed of for some other charitable purpose, or a combination of such purposes...⁴⁷

This permits the court to apply the gift to *any other* charitable purpose. The potential breadth of this discretion was acknowledged in the New Zealand case, *Re Whatman*,⁴⁸ where Tompkins J stated that the court:

...is not, however, bound by the cy-pres doctrine as a guiding principle, and may, if the original charitable purpose cannot be carried out, approve a scheme without regard to its resemblance to the old purpose.⁴⁹

And so according to the view of the judge, the ‘as near as possible’ principle had been put to one side. The discretion provided by the statute has also been academically noted. Ford and Lee state:⁵⁰

...when the provisions apply the scheme need not be cy-pres at all, for the funds available for application may be disposed of “for some other charitable purpose” without restriction to purposes near as possible to the original.⁵¹

Despite the *prima facie* breadth of judicial discretion in the legislation, the statute has been precedentially limited by the courts. In a line of authorities,

⁴⁷ *Ibid*

⁴⁸ (Wellington, 16 July 1965)

⁴⁹ Case cited in *Re Twigger* (1984) 3 NZLR 329, 341

⁵⁰ Ford, Lee, *Principles of the Law of Trusts* (The Law Book Company Limited, 1983)

⁵¹ *Ibid* 938

courts have not only followed the common law, but have adopted the strict ‘as near as possible’ approach found only in a small number of English cases. In the New Zealand Case, *Re Goldwater*,⁵² TA Gresson J stated in the context of his consideration of the statute:

The substituted trust under any scheme, must, (for which I now substitute ‘should’) in my view, accord as closely as is reasonably possible in the changed circumstances to the terms of the original trust...⁵³

To similar effect, in the New Zealand case, *Re Twigger*,⁵⁴ Tipping J also chimed with the strictest common law position:

...this Court has held in the series of decisions which I have traversed, that those promoting a scheme under Part III should seek to substitute beneficiaries or purposes resembling as closely as possible in the changed circumstances those which originally commended themselves to the person who established the trust.⁵⁵

*Re Twigger*⁵⁶ illustrates the practical effect of strict adherence to the ‘as near as possible’ principle in the New Zealand context. A testator had left a substantial gift of income to three charitable organisations. Over time, two of those

⁵² [1967] NZLR 754

⁵³ *Ibid* 755

⁵⁴ *Twigger* *supra* note 49

⁵⁵ *Ibid* 342

⁵⁶ *Ibid*

organisations, namely the ‘Christchurch Female Refuge’ and the ‘Canterbury Orphanage’ had become defunct. The trustees applied for a scheme so that the income for the defunct organisations could be applied to new purposes. They proposed that a number of child and women orientated charities should receive percentages of the income. Objecting charities petitioned the court in the hope that they might be included in the scheme. Tipping J enforced the ‘as near as possible’ principle strictly. He observed that the original nominated orphanage served very similar purposes to an existing charity named ‘The Cholmondeley Children’s Home’, and found that it should be included. That organisation was a traditional residential home in the mould of the testator’s original gift. By contrast, the judge rejected the inclusion of a charity named ‘Whakatata House’. That organisation was a therapeutic day centre for children with developmental delays Tipping J stated:

The day unit is certainly a worthy project, but of all the organisations and projects discussed before me, to my eye it is the furthest from John Twigger’s original intent, even allowing for changed social conditions and emphasis.⁵⁷

The adoption of the ‘as near as possible’ principle was significant. Although Whakatata House was thought to serve worthy purposes, it did not benefit under the scheme. The result is contrary to the English policy of balanced variation, or even common law flexibility, because donor intention was

⁵⁷ *Ibid* 349

proactively prioritised over effectiveness considerations. Despite considerable room for manoeuvre in the common law and apparent maximum discretion in the legislation, New Zealand precedent follows the strictest common law approach.

The sole Western Australian case on point follows the same pattern. In *Christian Brothers v Attorney General*,⁵⁸ a gift by will provided that boys from a Catholic agricultural college in Bindoon should be equipped with money, land and tools so that they could set up on their own as farmers. Unfortunately, the gift had never been put to use for the testatrix's intended purpose, and many years after her death the College petitioned for a scheme. A relatively far-reaching variation was proposed: that the gift should be applied in the form of scholarships, or other forms of financial assistance to students attending or wishing to attend the agricultural college. Yet Templeman J rejected the College's proposed scheme on the basis that it was not close enough to the testatrix's original intention. The judge stated:

Of course it is now impossible to advance persons... in the way envisaged by the testatrix. It may be possible only to relieve their poverty... that was in essence, the purposes of the original trust.⁵⁹

In place of permitting the gift to be used for future students of the agricultural college, the judge directed a scheme in favour of boys who had attended the

⁵⁸ [2006] WASC 191

⁵⁹ *Ibid* [32]

original organisation. In this manner, the judge held himself bound to the ‘as near as possible’ principle.

In the light of the English balanced variation model, legislation in Western Australia and New Zealand does not hold out a successful model of common law reform. Although the statutes provide complete discretion to the courts, a strict common law ‘as near as possible’ approach has been followed. That approach has been adopted though the ordinary common law contains a large number of decisions where the strict ‘as near as possible’ principle has not been followed.

ii. Legislation and Balanced Variation in England

In England, the legislation has produced a sharply contrasting approach to Western Australia and New Zealand. Just as at the trigger stage, the legislative model seeks to guide the discretion of the court so that it takes into account a balance of factors. Subsection 67(3) of the Charities Act 2011 sets out the considerations that the scheme-maker must assess when effecting a new scheme. It provides:

- (3) The matters are—
 - (a) the spirit of the original gift,
 - (b) the desirability of securing that the property is applied for charitable purposes which are close to the original purposes, and
 - (c) the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances.

Each consideration is accounted for in conjunction, and subsection 67(3)(b), which resembles the common law ‘as near as possible’ principle, is just one factor of three. Alongside it, subsection 67(3)(a) provides that the court must also consider abstract intention (referred to as the spirit of the gift), and subsection 67(3)(b) provides that the court must consider the suitability and effectiveness of the new purposes in the light of current social and economic circumstances. And so this final consideration reflects those reforming triggers at the trigger stage of the cy-pres process, directing the court to discretionary standards.

Several years after the cy-pres application stage was put on a statutory footing,⁶⁰ there is still scant judicial consideration of subsection 67(3) of the Charities Act 2011. Consequently, the full picture of its impact remains in a state of development. Nevertheless, there are sufficient relevant examples to flesh out the meaning of the statutory language.

a. Abstract Intention at the Application Stage

The subsection 67(3)(a) ‘spirit of the gift’ consideration directs the court’s attention to the donor’s original charitable intention, but it operates in contrast with the ‘as near as possible’ principle. The consideration allows the court to account for a more abstract type of intention. The scheme-maker must have

⁶⁰ Charities Act 2006, s18; re-enacted as the Charities Act 2011, s 67

regard to the over-arching vision of the donor. That vision is treated as being distinct from, and broader than, the donor's precise wishes.

Just as at the trigger stage, consideration of abstract intention has a dual edge: a highly abstract spirit will be an impetus for reform, whereas a less abstract version will inhibit it. In the sole English judicial consideration of subsection 67(3)(a), *White v Williams*,⁶¹ the spirit was abstract enough to encourage reform. As a result of a schism in the Bibleway Church UK, the defendant trustees had title to an ecclesiastical building in Lewisham, but had split from the group that used the property for worship. In these difficult circumstances, the claimant trustees argued that the trust had failed. Briggs J interpreted the constitutional documents and found a highly abstract spirit. In his view, the contested property should be used as the place of worship and witness of the local congregation, an undoubtedly more effective use of the property

Although it was decided without reference to any legislation, the Queensland case *Re Peirson Memorial Trust*,⁶² illustrates the impetus effect of a highly abstract spirit. Two sisters had made gifts of property to Presbyterian trustees for the establishment and maintenance of a training farm for orphans or children of poor parents. While the farm was profit-making, the approach to care for disadvantaged children had changed dramatically over the years. The trustees wished to provide counselling and care for whole families, while ensuring that the children stayed (where possible) in a stable family

⁶¹ [2010] EWHC 940

⁶² [1995] QSC 308

environment. The judge allowed the scheme, taking into account what he thought to be a progressive spirit behind the trust:

I am persuaded that the spirit of the gift is amply satisfied by the proposed scheme. Whilst the Misses Peirson might be somewhat bewildered were they to revisit the Wide Bay District now with the eyes of the 1940's and 50's, I am persuaded that their impulse to charity would by no means have been stifled by the revelation of social disintegration amongst many of the residents of that area and its effect on young people. That, in a sense, is what they were concerned to address. Their ideals were clearly both lofty and practical and will continue to be implemented by the proposals in the new deed.⁶³

So the judge in the case found a spirit broad enough to embrace change in pursuit of effectiveness. This radical and abstract spirit encouraged the judge to alter the terms of the sisters' gift in favour of a more effective scheme.

The alternative (inhibitive) edge to the spirit of the gift concept can also be seen from its common law use in certain Australasian cases. So in the New South Wales case *Kyle Williams Home Trust v Attorney General*,⁶⁴ a testatrix had directed that her property, together with five acres of land, be used to establish a retreat for convalescent children named the 'Kyle Williams Home'. Although it operated for a number of years as a non-convalescent children's

⁶³ Ibid [9]

⁶⁴ [2011] NSWSC 323

home, the testatrix's gift was never applied to the testatrix's purpose. Over time, it became clear that the precise terms of the gift could not be effected. The impracticability of the gift caused the plaintiff to seek a sale of the specific property. White J found the spirit of the gift was insufficiently abstract to justify a change of purpose. He stated:

If the property can be used for a purpose which is within the spirit of the trust, albeit not for the specific purpose provided for by the will, then that would be a material consideration in settling the terms of the scheme.⁶⁵

The judge called for further advertisements to be made so that the charity might be put to a use that was closer to the testatrix's intention. The narrow spirit was an inhibition to reform.

b. Effectiveness at the Application Stage

Another statutory consideration, subsection 67(3)(c) of the Charities Act 2011, directs the court to take account of the need for suitable and effective purposes in the light of current social and economic circumstances. The subsection encourages effectiveness-orientated 'updating' of charities and consequently it is likely to encourage fundamental change. Yet the precise language of the statute is difficult to define. In parallel with section 62(2)(b) at the trigger

⁶⁵ *Ibid* [30]

stage, use of the words ‘suitable’ and ‘effective’ operate as a broad discretionary standard operating in favour of utility-based reform. The effect of the phrase can be pieced together from limited authority and from the practical approach of the Charity Commission prior to legislation.

With regards to authority, subsection 67(3)(c) received limited definition in *White v Williams*,⁶⁶ where (as it has been seen),⁶⁷ a schismatic congregation sought a scheme so that it could obtain title to the property in which it worshipped. The constitution of the schismatic congregation included a clause related to religious education and was therefore slightly broader than the original trust on which the religious buildings were held. Briggs J, giving subsection 67(3)(c) brief consideration, interpreted it in tension with the ‘as near as possible’ principle. In his view, consideration of social and economic circumstances made it appropriate that new charitable purposes should include both the advancement of education in accordance with Christian principles and the promotion and fulfilment of alternative charitable purposes. The subsection inclined the judge towards a more fundamental reform of the original trust.

Outside of that short consideration, the subsection has not received further judicial attention. Nevertheless, the contexts in which it is likely to be important can be illustrated from the Charity Commission’s reports, published over a long period of years. Some reports evidence concern with suitability and effectiveness. In this respect, the Commission has noted:

⁶⁶ *White* *supra* note 61

⁶⁷ *Ibid*

Changes in social conditions and legislation dealing with community services often overtake the original purposes of a charity and we are then asked for advice on how the original intention of the founder can best be adapted to contemporary needs.⁶⁸

Attention to suitability and effectiveness will be particularly relevant in relation to trusts for the relief of poverty. This is clear from the Charity Commission report in relation to *Chipping Barnet Poor Allotments*.⁶⁹ That charity had been established out of enclosed land in the early nineteenth century. The allotments were rented so that coal could be purchased for poor inhabitants in the area. By the early twentieth century, the income from the land was not sufficient to buy coal, and so the Commissioners had authorised the sale of the land. The profit was invested and the income of the charity increased. By the 1960s, social and economic change meant that the trustees had to apply for another scheme. The report details the cause of the application as being that:

With the march of progress, the recipients of free coal have been told they may not burn it in future as they now live in an area designated as “smokeless”.⁷⁰

The Charity Commission was able to provide a scheme changing the type of fuel provided by the charity; the trustees started to provide electricity and gas.

⁶⁸*The Royal Cornwall Home for Children, Falmouth, Report of the Charity Commissioners for England and Wales* (1974), 16

⁶⁹*Report of the Charity Commissioners for England and Wales* (1962), 21

⁷⁰*Ibid*

This was combined with an active investment policy so as to keep up with inflation. In this manner, the Commission's scheme enabled the charity to adapt to changed social and economic circumstances.

Effectiveness concerns are also directly relevant to charities established for declining industries. This can be seen from the Commission's report on the *Sailors' Home and Red Ensign Club*.⁷¹ The charity had provided a home for seamen while on shore in the Port of London. However by the 1970s, the Port was in decline and a number of the docks had closed. The trustees had been forced to close the Home and applied for a scheme to sell the building. The Commission permitted the sale and provided that part of the funds could be applied to the Marine Society, a charity for the professional development of seafarers in relation to jobs disconnected with the sea.

In both circumstances, it seems unlikely that the original donors to either charity would have envisaged such fundamental alterations of purpose. The fuel allotment was transformed into a charity for the provision of electricity and the Sailor's Home closed, its funds being applied to the benefit of professional development. Accounting for effectiveness encourages the updating of charities at the application stage.

⁷¹ *Report of the Charity Commissioners for England and Wales* (1975), 16

c. Balanced Variation: Interaction of the Considerations

English legislation directs the court to have regard to the three considerations conjunctively,⁷² and the considerations will interact differently depending on the facts of a particular case. Just as at the trigger stage, the interplay between statutory considerations will lead to a different result in any given instance. With regards to the balanced variation policy goal, the model is successful. A system of guided discretion in operation, so in any given case, the scheme-maker will be directed to consider factors pertaining to both intention and effectiveness. The scheme-maker is given discretion, while simultaneously being guided by both intention and effectiveness considerations.

The balanced interplay between the statutory factors is illustrated by the recent First Tier Tribunal decision, *Ground v Charity Commission*.⁷³ The case shows clearly the discretionary relationship between the statutory factors; each party put forward a different interpretation of their effect. The charity had operated a Church of England infants' school in the village of Dunsfold, but had shut its doors in the face of local opposition. The defendant trustee, the Guildford Diocesan Board sought a far-reaching change of object, petitioning *inter alia* to apply the value of the property to non-educational and non-local objects.

⁷² Section 67(2)

⁷³ CA/2011/005 First-tier Tribunal (Charity), 29th November 2011

As a consequence of the flexible and discretionary character of the statutory considerations, the residents were able to put forward an interpretation favouring their case.⁷⁴ They suggested, *inter alia*, that the spirit of the gift was to provide a largely secular school for the residents of Dunsfold,⁷⁵ and that the purposes ‘closest to’ the original intention was the provision of an inherently local school. With reference to effectiveness criteria, the residents submitted that regard to ‘current social and economic circumstances’ should cause the Tribunal to account for the possibility that state funding might be available to provide a ‘free school’ in the Village.⁷⁶

The Tribunal, in the use of its case-by-case guided discretion, considered each of the factors in turn and came to a different conclusion to that of the residents. It did not accept that the spirit of the gift was purely educational. Instead, it took the view that there had been an historic and important religious element to the trust. The Tribunal also expressly found that it was not bound to apply the funds ‘as near as possible’ to the original trust. In relation to effectiveness criteria, considerations of social and economic circumstances were given attention. It was directly stated:⁷⁷

[Social and economic circumstances have] equal weight to the other considerations in S14B(3), however it seems right to give it more prominence than one otherwise might in circumstances where the

⁷⁴ The Commission and the Diocesan Board of Finance also proposed schemes

⁷⁵ *Ground supra* note 73 [4.5]

⁷⁶ *Ibid* [5.6]

⁷⁷ *Ibid* [5.18]

Charity property has stood empty for some years, its condition continues to deteriorate, and any proposed occupier of the property will doubtless be required to expend a considerable sum in bringing it back to us.

In the final result, the Tribunal's scheme was a fact-specific compromise between the statutory factors. It was decided that preferential consideration should be given to the provision of a school in Dunsfold, but the letting of the property was permitted if such provision was not possible. Even so, any income was to be applied to local community and local educational purposes. The Guildford Board were prevented from applying the fund Diocese-wide.

Ground v Charity Commission,⁷⁸ shows the English model balanced variation in operation. The original intention of the donor (represented by the 'as near as possible' principle and the 'spirit of the gift') will be weighed against the 'updating' function inherent in account for the suitability and effectiveness of purposes in light of social and economic change. Original intention remains relevant to English law, albeit balanced against other factors. The scheme-maker is empowered to reach a fact-specific conclusion in any given case.

6. Conclusion

It is a surprising feature of this area of law that there is no 'as near as possible' principle at common law. Instead, the courts have long taken into account

⁷⁸*Ibid*

administrative ease and effectiveness standards. Against this backdrop, balanced variation in English statute is far from a radical reform. It formalises an existing process.

Reform in Western Australia and New Zealand has had a counter-intuitive effect. A highly discretionary system permitting judges to apply gifts to *any* new charitable purposes has not been taken up the courts. Instead, they have followed a strict as near as possible principle. The Australasian approach is stricter than that which is found in the English common law. In the light of this counter-intuitive outcome, adoption of the Australasian model would not be beneficial in the English context. English balanced variation has produced a conceptually coherent discretionary system, whereas statute in Western Australia and New Zealand has not.

CHAPTER SEVEN: A MORE REALISTIC APPROACH TO TESTAMENTARY SURPLUS

Sometimes testators leave very large amounts in pursuit of a relatively modest plan. This circumstance, characterised as a ‘surplus’ or an ‘excess’ gift, will trigger the cy-pres doctrine. Subsection 62(1)(b) of the Charities Act 2011 sets out the circumstances where a surplus of funds can be applied cy-pres as being:

where the original purposes provide a use for part only of the property available by virtue of the gift

The trigger relies on its own logic.¹ The gift is separated into two parts. The first part is the amount *required* to meet the testator’s charitable object. On ordinary cy-pres principles, that part is perpetually dedicated to charity so long as the gift was practicable at the moment of death.² This in turn means that there is no need to construct a general charitable intention.

The second part is the *excess* of property, and the appropriate treatment of this second part is a vexed issue at law. It is not clear from the authorities whether or not that excess part of the gift is perpetually dedicated in its entirety, or whether that part has remained unapplied. This conceptual problem relates closely to the construction of intention; if the surplus part of the gift is treated as being perpetually dedicated, then there is no need to construct intention in order to apply the gift to new charitable purposes under the cy-pres doctrine. If

¹ It is for this reason that subsection 62(1)(b) of the Charities Act 2011 is considered separately from the other triggers in section 62(1).

² *Re Moon’s Trust* [1948] 1 All ER 300; *Re Tacon* [1958] Ch 447

it is not treated as perpetually dedicated, then if lapse is to be avoided, it will be necessary to construct a general charitable intention for that part of the gift.

In contrast to those areas that have seen significant reform, this chapter looks at an area *in need* of further common law development. It will be seen that two irreconcilable lines of authority have become frozen in the case law. Yet neither of those approaches adequately assesses the true charitable intention of the testator. They rely on the application of doctrinal rules rather than seeking to identify the true thought processes of the testator when he made the gift. For that reason, an alternative and more realistic approach will be suggested.

1. Cases Where General Charitable Intention Has Been Constructed

In a number of testamentary cases, the courts have found it necessary to construct a general charitable intention in order to apply the excess cy-pres. The logic behind these authorities is that the surplus part of the gift has not been applied to charity, and so that part of the gift is subject to an initial failure.

On this reasoning, it will not be relevant whether or not the excess arises after a period of time. In *Re Stanford*,³ a testator left a sum to the University of Cambridge on trust to complete an etymological dictionary of Anglicised words and phrases. Upon completion of the project, there was a surplus of funds. The University argued that the gift was vested in charity to the exclusion of any resulting trust.

³ [1924] 1 Ch 73

Eve J found that construction of a general charitable intention was necessary to stop the surplus from resulting. He stated:

I cannot bring myself to hold that in making this bequest he had any general charitable intention or indeed any intention beyond the obvious one of getting one or other of the Universities to produce the work. In these circumstances I do not think there is any case for the application of the cy-près doctrine; there is a resulting trust for the testator, and those claiming under him, of the surplus moneys.⁴

On the facts, the judge found that the testator evinced only a particular charitable intention. His sole intention was to see completion of the project, and so the surplus should result. Without a general charitable intention, the judge found that the gift could not be kept in charity.

In contrast to *Re Stanford*,⁵ most of the authorities concern gifts where the excess was immediately apparent on death. Such cases are dominated by residuary gifts. In these instances, where it has been thought necessary to construct a general intention, the residual form of the gift has consistently been held to be an important indicator of a broad gift to charity. It has been thought that a gift of residue implies an intention to devote all the property in the will to charitable purposes.

⁴ *Ibid* pp 78-79

⁵ *Ibid*

A special rule of will construction has emerged. So in *Attorney General v Hurst*,⁶ the residual character of a gift was relied upon as a means to construct general intention. A testator directed that a gift of residue should be applied for the clothing, or putting out to trade or business of two children in the parish of Raventon, and one child in the parish of Little Woolston. The gift was well in excess of the specific purposes, so the next-of-kin argued that it should lapse to them. The court rejected the argument, holding:

...here the testator is general in his intention, and I think he has manifested it to give all the residue ; and if the surplus is too much for the particular purpose mentioned, yet the object being general, the number shall be increased.⁷

The strongest contemporary example of the importance of the residual character of gifts in the construction of general intention is *Re Raine*.⁸ In the case, a testatrix had left a gift for the continuation of the parish seating of a church in Romaldkirk. While the gift was of some £2,550, no large increase in the number of seats was needed or even possible, so it was only practical to spend £411 of the gift on the testatrix's desired purpose. Although the sole apparent indication of a general charitable intention was the gift of residue, Vaisey J found it sufficient to save the gift. He noted:

⁶ (1790) 2 Cox 167

⁷ *Ibid* 168

⁸ [1956] Ch 417

... where a testator has shown an intention to use the whole of a residue, or the remaining portion of a residue, for a charitable purpose, it is not necessary to do more than to find that intention, namely, an intention to part with the whole subject-matter of the residuary gift for a charitable purpose.⁹

Although these cases are dominated by the residual nature of the bequests, it is clear that in each, the court thought it necessary to construct a general charitable intention for the surplus part of the gift. It is a special instance of the ordinary process of precedent-based cy-pres construction. Where a judge finds a residual gift, the precedents direct him to finding a general charitable intention so as to save the gift to charity.

2. Perpetual Dedication and Hypothetical Possibility

By contrast other authorities have treated surplus gifts as perpetually dedicated. This in turn means that there is no need to construct intention. The entirety of the gift is applied forever.

Unfortunately, those cases where surplus gifts are treated as perpetually dedicated do not always contain consideration of the reason for doing so. In *Re Douglas*,¹⁰ a testatrix left a gift to her husband for life, and made a gift of residue by the words: ‘any little money left for Milstead churchyard’. In fact

⁹ *Ibid* 423

¹⁰ *Re Douglas* [1905] 1 Ch 279

the residue was of a substantial value. Kekewich J noted that: ‘it was not her intention to leave between 3000l. and 4000l. for a purpose which would have been answered by a small proportion of that sum.’¹¹ Without any consideration of the cy-pres doctrine, the judge straightforwardly found that she had disposed of the entire value in perpetuity.¹²

In *Re King*,¹³ the cy-pres doctrine was directly considered, but the judge found that it was not necessary to construct a general charitable intention in order to save the gift from lapse. A testatrix left a gift of residue so that a stained glass window could be erected in memory of her Father. The size of her gift was larger than the estimated cost. The next-of-kin argued that the gift should not be applied cy-pres, but Romer J rejected the position. In a short judgement, he cited with approval a passage from the second edition of *Tyssen’s Law of Charitable Bequests*,¹⁴ to the effect that, where a gift is made for a particular charitable purpose which is sufficiently provided for without the gift, the gift will be applied cy-pres.¹⁵ On that basis, the judge applied the surplus gift to new purposes without construction of a general charitable intention. The gift was treated as perpetually dedicated.

Both *Re Douglas*¹⁶ and *Re King*¹⁷ prevented lapse of the excess without the construction of intention. Yet neither case contains extensive doctrinal

¹¹ *Ibid* 281

¹² *Ibid*

¹³ *Re King* [1923] 1 Ch 243

¹⁴ Tyssen, *The Law of Charitable Bequests* (2nd edn, Sweet & Maxwell, 1921)

¹⁵ *King* *supra* note 13 at 246

¹⁶ [1905] 1 Ch 279

consideration why that should be so. The excess was treated as perpetually dedicated without judicial consideration of how such an approach could be justified in doctrinal terms.

Others shed more light on the basis by which gifts in excess might be saved for charity. In *Re Monk*,¹⁸ a gift had been left to establish a ‘coal fund’ in the testator’s native village of Foxton. The scheme was very complex. Money was also left to create a loans fund for the benefit of poor and deserving inhabitants of the parish. Detailed restrictions were placed upon the loans; the size of the loans were limited; no interest was to be charged and no inhabitant could have more than one loan. The testator also specified that only inhabitants below the age of thirty five were entitled to a loan and that only one sixth of the loans fund was to be lent out in any one year.

Any surplus was to be invested, and eventually re-applied to the fund. In light of the small population of Foxton and the extensive conditions placed upon the fund, the next-of-kin claimed that there was no chance of the small number of qualified borrowers being able to exhaust the fund. They reasoned that the gift was not perpetually dedicated and so it should lapse.

The Court of Appeal rejected the argument of the next of kin. The gift was saved for charity on the basis that the complicated scheme amounted to a subsequent condition. The court reasoned that the testator did not intend his

¹⁷ *Ibid*

¹⁸ [1927] 2 Ch 197

plans to be a pre-condition to vesting and so the entire sum was perpetually dedicated on death. If it later transpired that the scheme was impracticable, then the gift could be applied cy-pres without the construction of intention.

The excess was only *hypothetical* and so it did not fail on death. It was possible that the whole fund could be used, so it was successfully vested in charity.

Lawrence LJ stated:

In order to constitute a partial failure of a charitable trust such as this, the next of kin would, in my opinion, have to prove that it was impossible that the whole sum could ever be required for the purposes of the trust - a fact which, in view of the nature and scope of the trust, is incapable of proof.¹⁹

In the view of the court, the question of whether or not the excess had failed could not be definitively answered either way. In the presence of doubt, the gift was treated as having been perpetually dedicated on death.

The Canadian case, *Re Anderson*,²⁰ took a similar approach. A gift which on death *may* have been excessive was held to be effectually dedicated. The doubt as to whether the gift was truly excessive saved the gift for charity. A testatrix left a trust of residue to provide a religious book for the use of the second and third grades of public schools in Woodstock. In view of the numbers of

¹⁹ *Ibid* 214. Cf Winder, ‘The Cy-près Application of Surplus Charitable Funds’ (1941) 5 *Conv NS* 198
²⁰ [1943] 4 DLR 268

children qualified to benefit from the gift, it was acknowledged that the gift was likely to be in excess of the amount of money needed to fulfil the object. Plaxton J did not allow the surplus to result to the next of kin. He held that because it was theoretically *unpredictable* whether the fund might be required in future years, the gift was saved for charity.

This is far-reaching. It has been seen that in order for a gift to be perpetually dedicated, *hypothetical* practicability is enough to prevent lapse.²¹ So for example, in *Re Tacon*,²² a testator left a gift to his daughter for life, and then to establish a convalescent home. There was insufficient money available on his death, and upon the death of his daughter there was even less. In such circumstances, the court was prepared to say that the gift had not failed. At the death of the testator there had been a level of unpredictability in relation to the value of his gift. In view of the fact that it might hypothetically have increased in value over his life time, the gift was held to be perpetually dedicated.

If hypothetically possible gifts are perpetually dedicated, then the surplus part of gifts must also be dedicated. It cannot be said with absolute certainty in any case that a gift is excessive. It is possible (even if unlikely) that circumstances will change so that the excess can be applied. For example, in *Re Anderson*,²³ Plaxton J considered the possibility that the population of Woodstock would increase sufficiently to exhaust any surplus. It is difficult to think of any

²¹ *Tacon* *supra* note 2; *Moon* *supra* note 2

²² [1958] Ch 447

²³ *Anderson* *supra* note 20

surplus gift that is not hypothetically possible in that sense; unexpected circumstances might intervene in every case. And so if the logic is adopted, surplus gifts are effectively prevented from lapsing.

3. Complete Gifts: A More Realistic Approach

Although they take different approaches, the two lines of cases do share a conceptual similarity. They both treat the testator's gift as *divided* into a 'required' and an 'excess' element. The difference between the two lines of authorities relates only to how the excess is treated. In those cases where a general charitable intention is constructed, the excess is conceptualised as not being perpetually dedicated. And in those cases where no general charitable intention is constructed, the gift is treated as being perpetually dedicated on the basis that it was always hypothetically possible to effect.

Application of this conceptual logic has led to development of opposing lines of authority; judges have not been able to agree on how to treat the 'excess' element of the gift. Yet both approaches contain a significant flaw. They fix the testator with having made a type of gift that it is unlikely he ever intended. He is fixed with making a gift of two halves, the 'required amount' and the 'excess'.

This is unrealistic. Donors do not intend to make divided gifts; they have no motivation to do so. Rather, they make complete and unified bequests to

charity after having apportioned a particular part of their estate. That psychology is recognised in an early case. In *Arnold v Attorney General*,²⁴ a testator after making specific legacies, left his manor along with lands woods and appurtenances, so that £120 could be paid per annum to charitable uses. In fact the yearly value of the manor was £240 per annum. The court did not allow the surplus to result to the legal next-of-kin, as it adopted the argument that:

... the Testator's intent plainly appeared by his will to dispose all his Estate to wholly charitable Uses, and that the Words of the Will were sufficient to carry the whole Estate to that purpose...²⁵

The testator's intention was to make a 'complete' gift to charity. At no point did he intend to make a divided gift. And for that reason, the complete gift was kept in charity without any question of lapse.

Although the two contradictory lines of cases are long standing, an alternative and more coherent approach is possible. The early method in *Arnold* can be extended. In place of conceiving of gifts in terms of 'required' and 'excess' funds, the courts could treat the testator's gift as a single unified bequest. In turn, it could be said in each case of 'surplus' that the testator has made a complete and successful gift that has been fulfilled. On this logic, the doctrine would be triggered at moment the testator's plan was completed; the excess would not be the *cause* of failure, merely an incident of completion after

²⁴ (1698) Show Parl Cas 22

²⁵ *Ibid* [24]

vesting. In this circumstance, on ordinary principles, the cy-pres doctrine would be triggered on fulfilment of the testator's successful plan.

As a consequence of treating gifts as unified and complete, the role of the cy-pres doctrine would then be limited to finding new purposes upon the fulfilment of the testator's directions. The gift would have been perpetually dedicated and so there would be no need to construct a general charitable intention.²⁶ In turn, the conceptually vexed issue of whether or not the 'excess' has been perpetually dedicated would disappear.

The mechanism for this approach already exists in the statute. Subsection 62(1)(a)(i) of the Charities Act 2011 covers the instance where the testator's gift has been completed, permitting the doctrine to be triggered where:

- (a) ...the original purposes, in whole or in part—
 - (i) have been as far as may be fulfilled

Consistent application of the subsection would have the doctrinal advantage of removing the inconsistency from the case law. So for example, in *Re Raine*,²⁷ where a very large gift was made for the completion of a stained glass window, the gift would be treated as perpetually dedicated at the moment of death, and the cy-pres doctrine would become applicable once the window had been erected. In *Re Anderson*,²⁸ the gift to provide religious books for public school children in Woodstock would be applicable cy-pres at the point at which the

²⁶ *Re Slevin* [1891] 2 Ch 236, *Re Wright* [1891] 2 Ch 236

²⁷ *Raine* *supra* note 8

²⁸ *Anderson* *supra* note 20

plan had been satisfactorily effected. Any remaining property could be applied cy-pres.

As well as being more realistic, treating ‘surplus’ gifts as instances of unified and complete bequests that have been fulfilled has the potential to bring this difficult line of cases back into the fold. In place of treating them as conceptually unique, they become an ordinary case of cy-pres failure decided on well-established principles. The sting is drawn from the conceptual problem.

i. Conclusion

In contrast to those areas that have seen significant reform and development, the law as it relates to testamentary surplus has stood still for a long period. Two lines of contradictory cases have become settled in the case law. The logic of both lines of authority is that gifts divided into two parts. First, the *required* element of gift (which is treated as perpetually dedicated), and second, the *excess* part. With regard to that second part, the law is unclear as to whether or not it is perpetually dedicated, or whether a general charitable intention should be constructed.

The current law is both contradictory and unrealistic. Donors do not intend to make such divided gifts; they make complete and unified bequests to charity. In light of this psychology, it is suggested that the nature of ‘surplus’ gifts should be reconceived. Instead of treating the bequest as being comprised of a

‘required’ element and an ‘excess’ element, it should be treated as a unified and complete gift. This would allow for the cy-pres doctrine to be triggered at the point (after vesting) that the testator’s plan had been fulfilled. As well as better reflecting the true intention of donors, this approach ‘side-steps’ the contradiction inherent in the current law by treating surplus gifts as an ordinary instance of cy-pres subsequent failure upon fulfilment of the testator’s plan.

CHAPTER EIGHT: RESOLVING CONCEPTUAL UNCERTAINTY IN THE CONTEXT OF FAILED PUBLIC APPEALS

The cy-pres doctrine evolved largely in the context of endowments, and is shaped by that context. The large majority of cases concern the construction of a single donor's intention. They also involve close consideration of a particular will. The law as it relates to public appeals is different, so it is unsurprising that the cy-pres doctrine has been challenged in fresh circumstances.

In a public appeal case, if there is any relevant document for the court to construct at all, it is likely to be a brochure or an advert that has been seen by large numbers.¹ The court will be constructing not just the single intention of a sole testator, but the 'mass intention' of a large number of donors. To this end, Wynn-Parry J stated in *North Devon and West Somerset Relief Fund Trusts*:²

It is to be observed in that case the court had to construe a will, the instrument by which a single donor had made the disposition which gave rise to the question. A number of authorities were cited to me, most of which arose substantially in that way. I have to consider a very different type of case, one in which I have to discover the intention of many hundreds – it may be thousands – of donors, and the only document that I have to assist me is not a document brought into

¹ See *Re Hillier's Trusts* [1954] 1 WLR

² [1953] 1 WLR 1260

existence by any one of those donors, but by those who invited them to become donors.³

This chapter looks at the treatment of intention in this alternative context. It charts common law principles that emerged specifically to construct intention in appeals cases and, in the light of the principle that intention construction should be as realistic as possible, assesses the difficult new relationship between the common law and statute.⁴

1. Perpetual Dedication: A Lack of Clarity

Most charitable public appeals fail because they are either over-subscribed, or under-subscribed. Either too much has been raised, or not enough. The two categories relate differently to the principle of perpetual dedication.

i. Undersubscribed Appeals

Where there is an instance of an undersubscribed appeal, there is a clear line of authority that there is an initial failure. The case will be governed by ordinary cy-pres rules. The gift was never practicable and so in the absence of a general charitable intention, it will result back to the donors. The principle is illustrated

³ *Ibid* 1265-66

⁴ This chapter focuses on charitable intention leaving issues relating to the failure of non-charitable appeals outside of its scope. On that issue, see Picarda, ‘Spontaneous Disaster Funds’ [1982] *New Law Journal* 223; Luxton, *Charity Fund-Raising and the Public Interest: An Anglo American Perspective* (Avebury, 1990) 120. For an analysis of Australian legislation that is able to validate non-charitable trusts see Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2010), 487

by the Victorian case, *Beggs v Kirkpatrick*,⁵ which was decided after close consideration of the English principles. Funds had been raised for an organisation which was to be known as the ‘Ripon Peace Memorial Hospital’. Land had been bought, and a considerable sum was raised. But it became clear to the trustees after a period of years that it would not be possible to raise a sufficiently large sum to effect their plans. Adams J had no doubt that a general charitable intention should be constructed at law. He stated:

As the law now stands, the consequence of such a trust failing *ab initio* is that subject to one qualification referred to hereafter, the funds must be returned to the donors unless it appears that the accomplishment of the particular purpose did not exhaust the charitable intention of the donor, and that his substantial intention was to advance some wider charitable purpose, although by means of the particular purpose.⁶

This logic is a straightforward translation of ordinary cy-pres principles to the charitable public appeals context. There were insufficient funds donated for the object to be achieved. Consequently, the donations had never been perpetually dedicated in charity, so in the absence of a general charitable intention they would be returned to the donors upon failure.

ii. Oversubscribed Appeals

⁵ [1961] VR 764

⁶ no pp in report

In the context of oversubscribed appeals, cases have taken varying approaches. There is a parallel with the irreconcilable case law in the context of testamentary surpluses. While some cases have treated appeal surpluses as perpetually dedicated, others have not. And so it is not clear whether a general charitable intention must be constructed in oversubscribed appeals cases.

In one outlying case, the gift resulted without any consideration of the intention of the donors. In *Re British Red Cross Balkan Fund v Johnson*,⁷ funds had been raised by subscription to assist the sick and wounded of the Balkan War. A large sum was raised, some of which was unexpended by the end of the conflict. The subscribers were issued with a circular and asked whether the fund could be applied to the general purposes of the Red Cross. Some subscribers dissented, and called upon the court to determine the issue. Astbury J found that there was a resulting trust for all the subscribers. He did so without consideration of the cy-pres doctrine or the general charitable intention requirement. The gift was straightforwardly presumed not be perpetually dedicated. The judge stated:

The balance belongs to all the subscribers rateably in proportion to their subscriptions, and subscribers who wish their money returned and are unwilling to leave for the general purposes of the society are entitled to

⁷ [1914] 2 Ch 419

such proportion of their subscriptions as the total amount unexpended bears to the total amount subscribed.⁸

Some later cases have also taken the view that oversubscribed funds are not perpetually dedicated. In those cases, the construction of a general charitable intention has been thought necessary to prevent a resulting trust. A clear example is *Re North Devon and Somerset Relief Fund Trusts*,⁹ where a surplus of funds had been raised after torrential rain in North Devon had caused loss of life and damage in the area. Wynn-Parry J noted that the appeal was not just local in nature, but had also been designed to benefit holidaymakers that had been injured. This informed his finding of a general charitable intention for the benefit of the community. The fact he felt it necessary to do so, shows that he did not treat the gift as perpetually dedicated.

*Re North Devon and Somerset Relief Fund Trusts*¹⁰ is directly on point and so it must be taken to represent the current English position. Yet in related jurisdictions, an opposite approach has been taken.¹¹ For example in the Northern Irish case, *Re Lord Mayor of Belfast's Air Raid Distress Fund*,¹² the Lord Mayor of Belfast inaugurated an appeal immediately after a 1941 air raid. Over the course of time, it became clear that there was a surplus of funds. The court considered that the gift was perpetually dedicated. He held:

⁸ *Ibid* 421

⁹ [1953] 1 WLR 1260

¹⁰ *Ibid*

¹¹ Beggs *supra* note 5

¹² [1962] NI 161

The present case is one of supervening failure, that is to say the charity actually got under way and carried on for a number of years and then the purpose became impracticable of performance.

And he continued:

Thus it seems, and I so hold, that once the charitable fund becomes vested in the charity a resultant trust to the donor or next-of-kin or others is excluded for ever.¹³

It seems that conceptual problems from the law of testamentary surplus have been directly translated across to the new appeals surplus context. In some authorities, the courts have treated the excess ‘part’ of the gift as not being perpetually dedicated. This means that a general charitable intention must be constructed to prevent a resulting trust. However an equally plausible interpretation of the law is that the entire gift was dedicated to charity at the moment of disposition. This would mean the gift was perpetually dedicated and that there could be no resulting trust. Consequently, it is not clear whether it is necessary to construct general intention in cases of surplus.

2. New Common Law Principles: A Complex Overlay

In the context of both undersubscribed and oversubscribed appeals, a number of new principles have evolved. This judicial innovation is a consequence of

¹³ *Ibid* 166

the adaptation of construction principles to a new circumstance. The cy-pres doctrine, having developed in the context of single donors has been moulded to fit new terrain. At the same time, an alternative ‘out and out’ approach developed. This section examines the character and coherence of these judicial adaptations.

i. Out and Out Intention

A number of cases have found that charitable public appeal donors have made gifts ‘out and out’. This type of intention is present where a gift is made without an expectation of the property being returned.

Here, two types of ‘out and out’ gift will be examined. The first ‘*general* out and out’ gift is most commonly acknowledged in the case law. In that circumstance, the gift will be perpetually dedicated to general charity. The second ‘*specific* out and out’ gift is less well developed, although it is considered *obiter* in *Re British School of Egyptian Archaeology*.¹⁴ A ‘specific out and out’ gift is not perpetually dedicated. Where the specific purpose fails, property will pass to the Crown.

a. ‘Out And Out’ Gifts with General Intention

There will be a general out and out gift where funds are given for a general charitable purpose without expectation of return. In that instance, it is

¹⁴ [1954] 1 WLR 546, 552

perpetually dedicated to charity. There is a direct parallel between ‘general out and out’ gifts and those made with a general charitable intention in the cy-pres doctrine. Both prevent a resulting trust. Jenkins LJ stated *Re Ulverston and District New Hospital Building Trusts*:¹⁵

If they have parted with their money out-and-out, they must be taken to have done so with a general charitable intention, or, in other words, to have devoted their money irretrievably to charity.¹⁶

This type of ‘general out and out’ intention was found in *Re Wokingham Fire Brigade Trusts*,¹⁷ where a voluntary fire brigade had closed. The organisation had been funded in part by subscription. In 1942, following the establishment of a National Fire Service, the Brigade’s fire engines were bought by the state. Danckwerts J was called upon to decide how the proceeds of sale should be distributed; the subscribers argued that the proceeds should result to them.

After first finding that the organisation was charitable, the judge continued to hold that there was no resulting trust for the benefit of the subscribers. He reasoned that the gifts had been made ‘out and out’. They had been made with no intention of seeing the money returned upon failure. He stated:

I think that subscribers intended to part with all interest in the subscriptions when they made them for the benefit of this public

¹⁵ [1956] Ch 622

¹⁶ *Ibid* 632

¹⁷ [1951] Ch 373

purpose. I do not believe that at that time they had any intention as to the future disposal of the money... The only thing which I think they took into account was the provision of the fire brigade, or the equipment for the fire brigade; and that being so, the funds were subscribed out-and-out for a charitable purpose.¹⁸

The logic of ‘general out and out’ gifts is well suited to the charitable public appeals context. It has been applied to those circumstances where small donations are made on a relatively casual basis. There are two types of casual donation: collecting boxes and gifts made under ‘contract’.¹⁹ Collecting box donations occur in the familiar circumstances where a donor parts with a small sum, perhaps at a street collection, in church or at the entrance to a supermarket. ‘Contract’ donations occur where the donor receives some kind of reward in return for parting with property.²⁰ For example, a donation made so as to take part in a tombola or lottery. In *Re Welsh Hospital (Netley) Fund*,²¹ PO Lawrence J stated:

So far as regards the contributors to entertainments, street collections, etc., I have no hesitation in holding that they must be taken to have parted with their money out and out. It is inconceivable that any person paying for a concert ticket or placing a coin in a collecting box presented to him in the street should have intended that any part of the

¹⁸ *Ibid* 377

¹⁹ *Re West Sussex Constabulary’s Widows, Children and Benevolent Fund* [1971] Ch 1, 10

²⁰ *Ibid*

²¹ [1921] 1 Ch 655

money so contributed should be returned to him when the immediate object for which the concert was given or the collection made had come to an end. To draw such an inference would be absurd on the face of it.²²

This strong language reflects the common sense view that small casual donors ('contract' and 'collection box') do not expect a return of their funds. The development of 'general out and out' gifts at common law is an example of the judicial adaptation of the law to new circumstances. In those cases where the cy-pres doctrine evolved, judges were very often constructing the will of a single donor who might realistically expect a return of funds. The 'general out and out' approach recognises that such donors have not abandoned their interest.

b. Out And Out Gifts with Specific Intention

There is another layer of complexity. A second type of disposition has the character of a 'specific out and out' donation. That category of gift is not perpetually dedicated. The property might be given only to a *specific* purpose. In such circumstances, while there can never be a resulting trust, there is no general gift to charity. The gift will be treated as *bona vacantia*. In *Westdeutsche Landesbank Girozentral v Islington LBC*,²³ Lord Browne-Wilkinson stated:

²² *Ibid* 660-661.

²³ [1996] AC 669

If the settlor has expressly, or by necessary implication, abandoned any beneficial interest in the trust property, there is in my view no resulting trust: the undisposed-of equitable interest vests in the crown as *bona vacantia*.²⁴

In consequence, the court will not automatically apply it to an alternative charitable purpose. This ‘specific out and out gift’ approach was considered in *Re British School of Egyptian Archaeology*,²⁵ in the case of subscribers to a charity founded by the well-known archaeologist Finders Petrie. After the death of the archaeologist, the organising committee requested that the remaining funds should be applied to the establishment of an educational scholarship.

Harman J permitted the request, holding that the subscribers had applied the fund perpetually to charity. The judge continued, however, to consider the scope of the ‘out and out’ approach. First he expressly questioned the applicability of perpetual dedication in the context of charitable public appeals.²⁶ Second, he developed the view that a gift might be given ‘out and out’, to a specific purpose and not to general charity. Harman J stated:

I am told that if the court decides that a subscriber did not intend to have his money back in any event, he must be taken to have had a general

²⁴ *Ibid* 708

²⁵ *British School of Egyptian Archaeology* *supra* at note 14

²⁶ *Ibid* 552

charitable intent. I am not sure that the two things are synonymous. I do not think that follows. I think that a man may well say: "I parted with my money to this society; I do not reserve any right to have it back," without having any positive intention that it should go to an analogous society...²⁷

On this reasoning there would be a 'specific out and out' gift, and the property would not be perpetually dedicated. The property would pass to the Crown as *bona vacantia*.

ii. Adaptation of the Cy-Pres Principles: Mixed 'Out And Out' and Cy-Pres Reasoning

Cy-pres and 'out and out' reasoning do not exist separately from each other. A further judicial innovation in the context of charitable public appeals is to *mix* the logic of 'general out and out' gifts and cy-pres intention. Judges have been prepared to find that the presence of 'general out and out' gifts in a fund 'cross infects' the other gifts. The general intention behind the 'out and out' gifts can also be imputed to the other donors.

a. Imputed Intention Through 'Cross Infection'

The logic behind the 'cross infection' approach is that a donor who is aware that he is contributing to a fund that contains general out and out gifts will not expect to have his money returned. This has been treated as sufficient evidence

²⁷ *Ibid* 553

for the courts to fix the other donors with a general intention under cy-pres principles.

The key case behind this innovation is *Re Welsh Hospital (Netley) Fund*.²⁸ A hospital had been built by public subscription at Netley in Wales. The charity treated soldiers suffering from illness during the First World War. After the War ended, the hospital was closed, leaving a surplus of funds.

Funds were collected from two categories of donor. First, money was raised by the means of special events targeted at small donors. These included concerts, church collections and street entertainments. In relation these small donors, PO Lawrence J found out and out gifts. That is, the donor made the gift without any intention whatsoever of seeing the gift result upon failure. PO Lawrence J found that those donors must have a general out and out intention.²⁹

The second category of donor had made gifts of larger sums, using a slip attached to campaign literature. PO Lawrence found that this second category of donor must have known that they were contributing to a fund that included out and out donations. For that reason, they were fixed with having the same intention. The subscribers were also held not to have intended a return of their money. The judge stated:

²⁸ *Welsh Hospital* *supra* at note 21

²⁹ *Ibid* 660

They must, I think, also be taken to have known that the total funds collected from every source would be applied for the purposes of the charity without discriminating between the moneys derived from any particular source.³⁰

Those subscribers that did not have a general out and out intention were ‘cross infected’ with a general charitable intention under cy-pres principles.

The approach in *Re Welsh Hospital (Netley) Fund*³¹ was followed in *Re Hillier’s Trusts*.³² In that case, donations were collected for the improvement of voluntary hospitals in South Buckinghamshire and East Berkshire. A particular and prominent feature of the campaign was a proposed new voluntary hospital in Slough. After funds had been collected over a period of years, the appeal became impossible as a consequence of the establishment of the National Health Service.

Funds were raised in four different ways. A first category of donors gave before any campaign literature was published. A second category of donors gave as a result of fundraising activities by local clubs and committees, including *inter alia* flag days, whist drives, dances and collecting boxes. A third category of donors had received a campaign brochure; they signed seven year covenants subscribing to the fund. A fourth category of donors, who had

³⁰ *Ibid* 661

³¹ *Ibid*

³² [1954] 1 WLR 700

also received the campaign brochure, used a different form making a single capital donation. Crucially, categories three and four (i.e. those individuals who had received the brochure) were given the option of directing that their gifts should be applied solely to the proposed Slough hospital.

The key issue in the case was whether those donors in categories three and four who had chosen specifically to donate to the Slough hospital were entitled to a return of their funds. By a majority, the Court of Appeal held that they were not so entitled. The court reasoned that, despite their specific gifts, those donors could be fixed with the general intention inherent to the rest of the fund.

Evershed MR stated:

... all contributions should, in the absence of special circumstances, be taken to contribute on terms common to all; and the only such terms possible in the present case deny any right to a return of their money to all subscribers..³³

There was a mix of gifts, including those gifts given by means of collection boxes, and other fundraising activity. This was treated as evidence that the donors who had specifically nominated the Slough Hospital had a general charitable intention under cy-pres principles.

A closely related approach emphasises the *anonymity* of small donors. Anonymous donors are untraceable, and so it cannot realistically be said that

³³ *Ibid* 713

when they parted with their money, they had any expectation of return. An admixture of anonymous and identifiable donors led to ‘cross infection’ in *Re Dover Battle of Britain Memorial Hospital Fund*.³⁴ A collection had been organised in Dover to build a hospital. The collection had two objectives: the building of a hospital and maternity home, and the commemoration of individuals who had fought in the Battle of Britain. The pamphlet associated with the fund contained a target sum of £250,000, but the figure proved impossible. With the proposed establishment of the National Health Service, subscriptions fell off and only £33,000 was raised.

The fund had received a mix of gifts. It contained donations from named individuals as well as gifts from anonymous donors from collection boxes, whist drives, special appeals and collections. This mix of sources caused Upjohn J to impute a general charitable intention to the known subscribers. The entire fund was applied cy-pres to a new purpose.

b. *Re Ulverston*:³⁵ Rejection of ‘Cross Infection’ General Intention

The ‘cross infection’ analysis was rejected by the Court of Appeal in *Re Ulverston District New Hospital Building Trusts*.³⁶ A long running campaign to build a voluntary hospital in the Ulverston area failed as a consequence of the Establishment of the National Health Service. The funds came from a mix of

³⁴ *The Times*, June 29, 1955

³⁵ [1956] 1 Ch 622

³⁶ *Ibid*

sources. Large donations from identifiable individuals were mixed with small donations from anonymous donors.

In contrast to *Re Hillier's Trusts*,³⁷ identifiable individuals had come forward in the expectation that their contributions might be returned.³⁸ In this context, the court declined to find a common intention for both 'anonymous' and 'identifiable' donors. The gifts were returned to the traceable donors on the basis that they had only a particular intention. In a far-reaching judgement, Jenkins LJ sought to restrict the scope of the 'cross infection' principle to the specific facts of *Re Hillier*.³⁹ He stated with reference to the case:

Evershed M.R. was not seeking to lay down a general principle to the effect that in all cases where a fund of this kind is found to include contributions from anonymous sources, a general charitable intention must be imputed to the named subscribers, however clear it may be that their subscriptions were solicited and made solely and exclusively for one particular purpose.⁴⁰

Jenkins LJ further sought to restrict the scope of the 'general out and out' principle. The judge found that if a small anonymous collection box donor was positively identifiable, then that donor would in his view be entitled to a return.

The judge stated:

³⁷ *Hillier's Trusts* *supra* note 32

³⁸ Evershed MR mentioned this at 643

³⁹ *Hillier's Trusts* *supra* note 32

⁴⁰ *Ibid* 640

Even if a general charitable intention is rightly to be attributed to the anonymous contributors to collection boxes, neither the fact that they have chosen to contribute in that way, nor the named subscriber's knowledge that anonymous contributions have been made in that way, seems to me to have any bearing on the intention of the named subscriber.⁴¹

For his part, Evershed MR also sought to qualify his previous holding in *Re Hillier*.⁴² He found that 'cross infection' reasoning would depend on the facts of the particular case. It was not an automatically applicable principle:

I did not intend for myself to lay it down (and I do not think it would be right so to do) that the fact of anonymous donations being made and sought contemporaneously would control in favour of a general charitable intention gifts made by name in response to an appeal which, according to its natural and proper interpretation, was an appeal for a single and particular purpose. On the other hand, I cannot for my part accept the view that the fact of contemporaneous anonymous donations must always be irrelevant in determining the intention, general or particular, of named subscribers.⁴³

⁴¹ *Ibid* 643

⁴² *Ibid*

⁴³ *Ibid* 642

*Re Ulverston*⁴⁴ put a halt to a line of cases in which resulting trusts were prevented through ‘cross infection’ reasoning. Insofar as Jenkins LJ sought to establish an expectation of return for identifiable collection box donors, the case also challenges the ‘general out and out’ principle as whole. However the common law has not been left in a state of certainty. It is unclear i) in which circumstances cy-pres or ‘out and out’ intention will be applied and also ii) whether a mixing of ‘out and out’ gifts and ordinary gifts is sufficient to impute the ordinary donors with a cy-pres general charitable intention.

3. Conceptual Problems: Statutory Reform in Relation to Unidentifiable Donors

*Re Ulverston*⁴⁵ was the last in the line of authorities. Just four years after the case, the law in relation to failed charitable public appeals was put on a statutory footing.⁴⁶ The evolution of this special branch of intention construction has come to a halt, preventing judicial clarification of complex issues. Failed public appeals are now largely dealt with under statute by the Charity Commission under their concurrent jurisdiction with the High Court.⁴⁷

The relationship between the statute and common law intention construction is conceptually problematic.⁴⁸ This section will first set out the operation of the

⁴⁴ *Ulverston* *supra* note 35

⁴⁵ *Ibid*

⁴⁶ Charities Act 1960, s14. Provisions now contained in Charities Act 2011, s 63

⁴⁷ Failed appeals dealt with by CC

⁴⁸ For a cogent account see Wilson ‘Section 14 of the Charities Act 1960: A Dead Letter?’ [1983] *Conv* 40

statute; it will then assess its relationship with the common law with regard to intention construction.

i. Statutory Prevention of a Resulting Trust where Gifts are Made for Specific Purposes

Where an appeal for specific purposes fails there are two statutory mechanisms to prevent it from lapsing. First, if donations are made as a response to ‘certain solicitations’ giving notice that upon failure the gift will be applied for general purposes, then a resulting trust might be prevented. Second, even if the gift is not made in response to ‘certain solicitations’, unidentifiable donors might still be fixed with a gift for general purposes.

a. Gifts In Response To ‘Certain Solicitations’

Recently the legislature has added an extra procedure enabling trustees to prevent a resulting trust in the event of failure. It is possible for a charitable public appeal to be organised issuing a legally determined statement.⁴⁹ That statement will inform donors that in the event of failure, their gift will be taken to have been given to general purposes. Where such a statement is used, the operation of a resulting trust is prevented.

Section 65 of the Charities Act 2011 sets out the terms of the statement. It provides that gifts given for specific purposes in response to ‘certain solicitations’ will be applied cy-pres, unless the donor actively declares at the

⁴⁹ Charities Act 2011, s 65

time of the gift that he does not want the property returned. Subsection 65(2) of the Charities Act 2011 provides:

- (2) A solicitation is within this subsection if—
(a) it is made for specific charitable purposes, and
(b) it is accompanied by a statement to the effect that property given in response to it will, in the event of those purposes failing, be applicable *cy-près* as if given for charitable purposes generally, unless the donor makes a relevant declaration at the time of making the gift.

Where ‘certain solicitations’ are made, unless the donor issues a ‘relevant declaration’ to the effect that he does not have a general intention, there will be no resulting trust.

b. Gifts not in Response to ‘Certain Solicitations’

The section 65 procedure for solicited donors is dependent on a statement being issued as part of the appeal. Even where it is not, legislation may still operate to prevent a resulting trust for the benefit of unidentifiable and unascertainable donors who have not disclaimed their right to a return of property.⁵⁰ If after advertisements and enquiries have been made,⁵¹ the appeal donors are unidentifiable or unascertainable, subsection 63(1) Charities Act 2011 states:

- (1) Property given for specific charitable purposes which fail is applicable *cy-près* as if given for charitable purposes generally, if it belongs—
(a) [to a donor who] ... cannot be identified or cannot be found, or
(b) to a donor who has executed a disclaimer in the prescribed form of the right to have the property returned.

⁵⁰ Charities Act, s 63(1)(b) excludes donors who have written a disclaimer from the scope of the legislation. Where there is a written declaration but the donor cannot be identified after prescribed steps to identify the donor have been taken, then under section 63(7) he can also be treated as having executed a disclaimer under section 63(1)(b).

⁵¹ See *Re Henry Wood National Memorial Trust v Moiseiwitsch* [1966] 1 WLR 1601

Alongside ordinary unidentifiable and unascertainable donors, the legislation is stated to apply to collecting box donors, those donors who have given by means which are ill-adapted for distinguishing individual gifts, and ‘contract’ donations through lotteries and sales. Subsection 64(1) provides:

- (1) For the purposes of section 63 property is conclusively presumed... to belong to donors who cannot be identified, in so far as it consists of—
 - (a) the proceeds of cash collections made—
 - (i) by means of collecting boxes, or
 - (ii) by other means not adapted for distinguishing one gift from another, or
 - (b) the proceeds of any lottery, competition, entertainment, sale or similar money-raising activity, after allowing for property given to provide prizes or articles for sale or otherwise to enable the activity to be undertaken.

Where there is a donation from an unidentifiable ‘collecting box’ or ‘contract’ donor, the statute provides that the court should proceed as if the donor had a general charitable intention. Unidentifiable donors are fixed with a general intention so that their gifts can be applied cy-pres without enquiry into their state of mind when the gift was made.⁵²

c. A First Conceptual Problem: Out and Out Gifts

Both sections 63 and 65 are stated to apply to gifts for ‘specific purposes’. That is, donors giving in response to certain solicitations, and donors who are unidentifiable or unascertainable must have given to a specific purpose in order to be covered by the legislation.

⁵² See generally Luxton, *Charity Fund-Raising and the Public Interest: An Anglo-American Legal Perspective* (Avebury, 1990) 136-153

A first problem arises in relation to gifts made with ‘out-and-out’ intention. It has been seen that in *Re British School of Egyptian Archaeology*,⁵³ Harman J did characterise out and out intention in a *specific* form; that type of intention would be caught by the statute. But that case was not typical; out and out intention has most commonly been constructed in a *general* form.

On a literal reading of the legislation, where donors make gifts with a general out and out intention, neither section 63 nor section 65 will apply. Those donors made gifts for general purposes, so the operation of the statute is excluded.

The problem is incidental, rather than fundamental. It has already been seen that at common law, gifts given with a general out and out intention are perpetually dedicated to charity. Consequently, it is not necessary to rely upon the statute in order to prevent a resulting trust upon the failure of an appeal.

However the Commission does apply the statute in circumstances where it is at least arguable that the donor has a general out and out intention. For example in its report on *South Scarborough Swimming Pool Association*,⁵⁴ the Commission details its application of the statutory predecessor to section 63 Charities Act 2011,⁵⁵ to an undersubscribed appeal. A swimming pool association raised some £4000 in the hope of providing a public swimming

⁵³ *British School of Egyptian Archaeology* *supra* note 14

⁵⁴ *Report of the Charity Commission for England and Wales* (1980), 38

⁵⁵ Charities Act 1993, s 14

bath. Unfortunately, it became clear to the association that it was unlikely to be able to raise enough money to build the pool and so an application for a scheme was made to the Charity Commission. The report notes that part of the fund was raised by, ‘dances, social evenings, sponsored events etc.,⁵⁶ and that those donors were unidentifiable. On common law principles, those donors would likely be fixed with a general out and out intention. The Commission, however, proceeded on the basis that the statute was applicable; the fund was applied cy-pres to the general benefit of the inhabitants of Scarborough.

d. A Second Conceptual Problem: Donors with Cy-Pres Intention

The same problem arises in relation to those donors with ordinary cy-pres intention. Donors with a cy-pres general charitable intention are excluded from both sections 63 (unidentifiable and unascertainable donors) and 65 (solicitees) of the statute; those subsections are stated only to apply to gifts for ‘specific’ purposes. Again, this is an incidental rather than a fundamental problem. Gifts from donors with a cy-pres general charitable intention are perpetually dedicated to charity. It is not necessary to rely on statute in order to prevent a resulting trust.

Under the cy-pres doctrine, application of the statute depends on the donor having a particular charitable intention. That state of mind correlates with a gift

⁵⁶ *Report of the Charity Commission supra* 54

for specific purposes.⁵⁷ And so where it is present, the statute can be applied unproblematically. In its report on *Stewartby United Church Building Fund*,⁵⁸ the Charity Commission proceeded on the basis that a cy-pres particular charitable intention existed. A church building fund had been established, but the purpose of the fund was rendered impossible because the project had been completed without using the funds raised. The Commission treated the gift as being made with a particular charitable intention. The report states in reference to a statutory predecessor of section 63 of the Charities Act 2011:

In this case money was raised for a particular charitable purpose which in the event could not be carried out. Such cases are not uncommon and in the absence of a general charitable intention the procedure for dealing with them is provided under section 14 of the Charities Act.⁵⁹

On the Commission's construction, the gift was made for specific purposes, and so the Commission was able to apply the gift cy-pres.

But it is not always easy to find such intention. In this regard, the Commission's reports assume too much. The issue can be illustrated by the report on *South Petherton Swimming Pool Fund, Somerset*.⁶⁰ An appeal to build a swimming pool was abandoned because rising inflation made it impossible to raise sufficient funds. The Commission applied a predecessor to

⁵⁷ *Re Wilson* [1913] 1 Ch 314; *Re Packe* [1918] 1 Ch 437

⁵⁸ *Report of the Charity Commissioners for England and Wales* (1969), 20

⁵⁹ *Ibid*

⁶⁰ *Report of the Charity Commissioners for England and Wales* (1982), 20

section 65 of the Charities Act 2011.⁶¹ The report describes the purpose of the appeal as being ‘the provision of a pool so that young people could be taught to swim.’ Yet if the purpose of the fund was so general as teaching young people to swim, it is arguable that the donors to the fund had a general charitable intention. In turn, if they had a general charitable intention, the statute ought not to have been applied. In light of the complexity of the law in this area, it is not clear that Commission applied the statute correctly.

e. A Third Conceptual Problem: the Definition of Failure Under Statute

Both sections 63 (unidentifiable and unascertainable donors) and 65 (solicitees) apply to gifts for specific purposes that have failed. Failure has a special definition in the statute. Section 66(1) of the Charities Act 2011 provides:

For the purposes of sections 63 and 65 charitable purposes are to be treated as failing if any difficulty in applying property to those purposes makes that property or the part not applicable cy-près available to be returned to the donors.

Failure is defined as being circumstances where property would be returned to the donors. This definition is different from the common law, where gifts can be described as having ‘failed’ even in circumstances where property will not be returned.⁶² For example, a gift that has been perpetually dedicated to charity for a period of time might fail as a result of obsolescence. Under cy-pres principles, that gift is perpetually dedicated and will not result.

⁶¹ Charities Act 1993, s 14

⁶² *Re Slevin* [1891] 2 Ch 236; *Re Tacon* [1958] Ch 447

In the light of this definition, the final problem affecting sections 63 and 65 of the Charities Act 2011 is more fundamental. In relation to a donor with an out and out intention to give to charity the sections will not *prima facie* apply. Donors with out and out intention do not expect, and are consequently not entitled to, a return of their money. They have abandoned their interest.

The definition in the statute, by associating ‘failure’ with ‘return’ appears to exclude out and out donations from its scope. This is problematic because subsection 64(1) of the Charities Act 2011 conclusively presumes unidentifiability for ‘collecting box’ and ‘contract’ donors. That means that insofar as it relates to ‘collection box’ and ‘contract’ donors, however, subsection 64(1) of the Charities Act 2011 applies to categories of donors that the common law fixes with an out and out intention.⁶³ Because those donors have no expectation of return at law, the statute cannot be applied to them; their gifts have not ‘failed’ in accordance with the definition of the statute. Consequently, subsection 64(1) is rendered redundant.⁶⁴ ‘Collection box’ and ‘contract’ donors are outside its scope.

4. Proposals for Reform

⁶³ See for example *Re Welsh Hospital* (Netley) Fund [1921] 1 Ch 655 at 663-661.

⁶⁴ Luxton suggests a way out of the impasse. The definition of ‘failure’ in the statute might not be considered as exhaustive of its legal meaning for the purposes of the subsection. It might instead be held to embrace circumstances of failure where there is no return at common law. Luxton, *Charity Fund Raising* *supra* note 52 at 144.

The legislation in this area is open to the most basic of criticisms. It is conceptually incoherent on its own terms. Unfortunately, the common law and the statutory understandings of intention do not fit together. *Prima facie* statute applies only in circumstances where (i) the donor has made a gift for a ‘specific purpose’ and (ii) that gift might be returned to the donor. But on a plain reading, only the cy-pres particular charitable intention is caught by the Act. Abstract common law intention (general out and out intention; cy-pres general charitable intention) is outside the scope of the legislation. Most fundamentally, this means that the statute does not apply to ‘contract’ and ‘collection box’ donors despite their express mention in subsection 64(1) of the Charities Act 2011.

This statutory problem is readily amenable to reform. The wording in sections 65 and 63 of the Charities Act 2011 could, without difficulty, be altered from ‘specific purposes’ to ‘charitable purposes’. This would have the effect of bringing general out and out intention and cy-pres general charitable intention within its scope. With similar ease, the wording of section 66(1) of the Charities Act 2011 might be altered so that ‘failure’ is no longer associated with return. That small legislative change would have the effect of bringing ‘collection box’ and ‘contract’ donations into the fold.

The common law complexities are less easily resolvable. The statute only applies to unidentifiable donors, and so gifts from identifiable individuals are left regulated by multi-layered judicial reasoning. In this complex legal

landscape, the effect of the case law in relation to identifiable donations is not clear: *Re Hiller* is authority that where ordinary identifiable gifts are mixed with out and out ('contract' and 'collection box') gifts, a general charitable intention will be imputed to the donor. By contrast, *Re Ulverston* is authority for the proposition that in most cases identifiable donors will be treated under ordinary cy-pres principles. Owing to a lack of contemporary case law on the subject, the common law relating to identifiable donors has been left in a state of uncertainty for a long period.

Just as elsewhere, attention to *realistic* construction of intention holds out the potential for coherent reform. The common law has blind spot, which in turn creates artificiality. It treats 'contract' and 'collection box' donations as different from ordinary gifts, but does not direct itself as to why this should be the case. The law categorises those donations as an abandonment of interest, without providing a firm conceptual foundation for doing so.

The explanation for the difference between 'contract' and 'collection box' gifts in relation to other dispositions ought not to be a matter of legal doctrine. At heart, the difference is a practical one; they are small. Donors do not expect their money back, even when they have given to a specific purpose, because they have parted with an inconsequential amount. This logic is rejected by the courts. So in *Re Hillier*, Lord Denning stated with characteristic picturesqueness:

Those who give of their abundance are just as charitably minded as the poor widows who give their mites. They should all be treated alike.⁶⁵

While the argument from equality is attractive, it is mistaken in this instance. ‘Contract’ and ‘collection box’ donors are by their nature giving small sums into a far larger charitable pool. Even for poor widows, the sacrifice is small. In contrast to a testamentary donor, gifts will not have been a result of extensive deliberation and assessment. They are relatively uninformed in the eventual destination of their gifts.

If this practical reality is accepted, it can be seen that there is no need for a special ‘out and out’ gift theory to govern identifiable public appeal donors. ‘Contract’ and ‘collection box’ donors can be dealt with under the ordinary law of cy-pres. The practical fact that they have parted with only a very small sum in a very particular context could be taken as evidence of a cy-pres general charitable intention. The courts can construct it from the circumstances: small public donors are not wedded to the plans, they have not deliberated extensively over the disposition, and so they have a form of abstract intention.

In turn this recognition has potential to simplify the law with regards to cross infection and imputed intention. The question in any given case is not whether intention was ‘out and out’ (‘contract’ or ‘collection box’) or imputed through cross infection (mixed funds). It is far more straightforward. A more realistic

⁶⁵ *Hillier's Trusts* *supra* note 32 at 715

question of construction in relation to identifiable public appeal donors is whether the size of the gift, in the public appeals context, is sufficiently small for a cy-pres general charitable intention to be constructed. In that manner, old principles can coherently govern the new circumstances.

5. Conclusion

Prior to the enactment of statute, the law's treatment of intention in charitable public appeals cases was in a state of development. During the first half of the twentieth century, ordinary cy-pres intention construction was used in failed public appeals cases. At the same time, an out and out gift approach had also emerged in the precedents. Following the enactment of the Charities Act 1960, cases in this area have become very rare indeed. Yet the law is problematic. Sections 65 and 63 of the Charitable Trusts Act 2011 *prima facie* provide mechanisms to prevent lapse in the context of failed public appeals. But they only apply to specific gifts that result at law. Consequently gifts from 'contract' and 'collection box' donors are outside the scope of the Act.

These conceptual problems are not noted in the Charity Commission's reports, where statute is treated as applying uniformly in circumstances that further investigation might show to be problematic. Reform is possible, and with regards to statute, relatively straightforward. Minor changes of wording would bring 'contract' and 'collection box' donors into the fold. But a wider problem remains, small gifts from identifiable donors are regulated by complex and

conflicting authorities. Again reform is possible, taking into account the principle that the law should be as realistic as possible. ‘Contract’ and ‘collection box’ donors might be brought under the ordinary cy-pres principles. If the law were to treat the small size of their gifts as evidencing a cy-pres general charitable intention, then traditional principles could coherently apply to this new area.

CHAPTER NINE: ABOLISHING THE PREROGATIVE CY-PRES DOCTRINE

In certain cases, the Crown reserves the right to dispose of a testator's property under the royal prerogative. The nature of this ancient power is not well known, and as a consequence, the role of charitable intention in the prerogative jurisdiction is obscure. Academic commentary is rare,¹ most authorities are of a considerable vintage, and cases rarely come to court.²

The distinction between the Crown and judicial jurisdictions was largely developed by Lord Eldon in the Nineteenth Century.³ That judge established a clear rule that the Crown's jurisdiction bites where a gift is made for a general purpose without the interposition of a trust.⁴ And conversely, that where no trust is present, the court will not be able to apply the gift cy-pres. Lord Eldon's clearest expression of the principle is in *Paice v Archbishop of Canterbury*,⁵ where he said:

¹ Although see Mulheron, *The Modern Cy-pres Doctrine: Applications and Implications* (UCL, 2006) 23-26

² The last English case being *Re Bennett* [1960] Ch 18, 24. For an analysis of the now obsolescent prerogative doctrine of superstitious uses see Bourchier-Chilcott, 'Superstitious Uses' (1920) 142 *LQR* 152

³ *Moggridge v Thackwell* (1803) 7 Ves Jr 36, *Paice v Archbishop of Canterbury* (1807) 14 Ves 364

⁴ *Ibid.* Although in modern times, the process of obtaining a scheme has become bureaucratised. The right to effect prerogative schemes has now been delegated to the Crown's Law Officers. The Attorney General has been able to direct prerogative schemes since 1986 and pursuant to the Law Officers Act 1997, s1. The power has also been extended to the Solicitor General.

⁵ *Ibid*

Where the bequest is to trustees for charitable purposes, the disposition must be in that mode: but, where the object is charity, without a trust interposed, it must be by Sign Manual.⁶

The same rule was stated in more recent times by Vaisey J in *Re Bennett*:⁷

If it was created by means of a trust, then the usual procedure would follow, and it would be for the court to decide, in the familiar way, by way of scheme what should be done with the disputed amount. If, on the other hand, the gift... is not by way of trust but a direct gift, then under a very long series of authorities... it falls to be dealt with by the royal prerogative.⁸

Taken together, the rules governing the construction of intention in prerogative cy-pres cases are relatively unelaborate; they parallel the common law cy-pres doctrine. But the rules of construction are subject to a problem. Where the prerogative jurisdiction arises, the gift will normally not be considered in the courts; it will be administered, without record, by the Crown.⁹ This procedure takes prerogative cases outside of the precedential system and, in the absence of recorded decisions, leaves the nature of the Crown power unclear. This chapter shows the problematic relationship between the prerogative and charitable intention, and suggests abolition as a mechanism of reform.

⁶ *Ibid* 372

⁷ *Bennett supra* note 2

⁸ *Ibid* 24

⁹ *Bennett supra* note 2 at 26

1. Clarification of Jurisdiction: Personal Representatives and Non-Substantive Trusts

Lord Eldon's central distinction between those wills that contain charitable trusts and those wills that do not is in need of further refinement. One leading author notes:

If the presence of a trust removes the case from the jurisdiction of the Crown, and brings it into the jurisdiction of the court, it is difficult to see how any testamentary gift is applicable under the Royal Prerogative, since all the property of the deceased devolves upon his personal representative upon trust.¹⁰

On this view, the appointment of personal representatives or administrators would be enough to oust the Crown's jurisdiction; their existence would create a trust for the administration of the estate and the gift would be amenable to judicial cy-pres. Taken to its logical conclusion, this has a far-reaching effect. It would mean that the Crown, which has long claimed to be able to administer gifts cy-pres, is acting beyond its power.

Despite the ambiguous nature of the rule, Crown practice can be rescued from the trap. Although it has been long established that the presence of a trust will oust the Crown's jurisdiction, that trust must be both *substantive* and

¹⁰ Picarda, *The Law and Practice Relating to Charities* (3rd Edn, Butterworths, 1999), 331

charitable. This understanding of the rule - that only substantive charitable trusts oust the courts' jurisdiction - is evidenced by the most recent judgment on the subject: *Re Bennett*.¹¹ In the case, a testatrix left a 25% share of residue to the Hospital for Incurable Women, Brompton Road, London. The organisation had never existed, and Vaisey J held that in the normal course, it would fall to him to direct the gift by way of a scheme, stating that:

... the matter seems on the authorities to depend almost entirely on this principle: was the gift to the non-existent beneficiary created by means of a trust or by a direct gift?¹²

In the case, the testatrix had nominated personal representatives. She directed them to apply the estate to charitable objects. According to the report, the will named these individuals as trustees. Yet despite their presence, the judge found that the gift was, 'ambiguous so far as the personality of the [charitable] legatee is concerned, not given by way of trust, but given straight away by way of immediate gift.'¹³ And so in *Re Bennett*,¹⁴ the prerogative jurisdiction was left unaffected by the existence of named personal representatives.

The Crown's current practice can be further explained by the fact that personal representatives are not, *prima facie*, charitable trustees. There is no case law directly on the point, but the Charity Commission guidance to its staff takes

¹¹ *Bennett Re* *supra* note 2

¹² *Ibid* 24

¹³ *Ibid*

¹⁴ *Ibid*

this view, stating that there is a difference between the capacity of a personal representative and trustee.¹⁵ The guidance explains, that in the view of the Commission, while personal representatives are in a fiduciary position in relation to the assets, they cannot become full trustees until the administration of the estate is complete.

2. The Character of the Rule

Although, in the light of *Re Bennett*, current Crown practice is not without jurisdiction, its operation is not clear. There are only very few cases that consider how the Crown might administer gifts, and those cases that do exist are mostly of a considerable vintage. A survey of authorities shows that the prerogative rule closely parallels the common law cy-pres doctrine. It involves a two-stage process. First, a general rather than a particular charitable intention must be constructed so as to avoid lapse. Second, the Crown will find new purposes to which it can apply the gift. From the scant case law, it can be seen that the construction of general and particular intention straightforwardly parallel the judicial cy-pres doctrine, but that the nature of the application stage is far less clear.

i. Particular Charitable Intention

¹⁵ Charity Commission OG505 Will Cases: Redirecting Charitable Legacies
http://www.charitycommission.gov.uk/About_us/pogs/g505a001.aspx accessed 30th December 2012

In order for a gift to be applied cy-pres under the prerogative jurisdiction, it is not sufficient for the testator merely to make a gift to a charitable object without the interposition of the trust. Just as in the ordinary common law, his intention is also relevant; where the gift is for a particular object, he will have only a particular charitable intention and so the gift will lapse to the residuary estate. With regards to the prerogative understanding of intention, it is stated in Tyssen's *The Law of Charitable Bequests*:¹⁶

...if there is deemed no general intention favour of charity, a gift to a specified object which does not exist at the testator's death fails.¹⁷

Judicial consideration of the point is unusual. The sole circumstance of failure to come before the courts arises where gifts are made to non-existent institutions.¹⁸ In such circumstances, the courts found that there was no general intention. The gift to the particular expired institution was the sum total of the testator's wishes. In *Re Ovey*,¹⁹ for example, a testator bequeathed £500 'to the Ophthalmic Hospital, near Hanover Square, London'. The intended institution had ceased to exist even at the time the will was written. The testator had made a gift to a definite institution, and so it was held that the gift had lapsed. Similarly, in *Fisk v Attorney General*,²⁰ cy-pres construction was considered when a gift was left to a The Ladies Benevolent Society in Liverpool. The

¹⁶ 2nd edn, Sweet & Maxwell, 1921

¹⁷ *Ibid* 231

¹⁸ See *Re Slevin* [1891] 1 Ch 373

¹⁹ (1885) LR 29 Ch D 560

²⁰ (1867) LR 4 Eq 521

Society had expired at the time the will was read, and again the property passed out of charity in the absence of a general gift.

ii. The General Charitable Intention

Just as in the judicial doctrine, in order for the ordinary prerogative jurisdiction to save the gift and prevent lapse, the testator must have a general charitable intention. Lord Eldon held in *Moggridge v Thackwell*:²¹

...where there is a general indefinite purpose, not fixing itself upon any object, as this in a degree does, the disposition is in the King by Sign Manual.²²

And he also stated by way of a unifying principle for the courts' scheme-making power:

All the cases prove that, where the substantial intention is charity, though the mode, by which it is to be executed, fails by accident or other circumstances, the Court will find some means of effectuating that general intention.²³

There are only a small number of cases on point. A clear instance of general intention is found where a gift is left to a general purpose by will. So in

²¹ (1802) 7 Ves Jr 36

²² *Ibid* 86

²³ *Ibid* 82

Attorney General v Herrick,²⁴ a gift to charitable and pious purposes was effected under a prerogative scheme. The same was also true in *Attorney General v Peacock*,²⁵ where there was a gift to the poor indefinitely.

Prerogative general charitable intention has also been found where gifts are made to non-existent charitable organisations. This relies on the same logic as gifts made explicitly to a general purpose; the gift is treated as being for the general purposes of the organisation.²⁶ So in *Re Maguire*,²⁷ a testatrix left a gift, ‘unto the Church Pastoral Aid Society in Ireland’. No such organisation existed, and no trust had been interposed. However, there was a society named the Church Pastoral Aid Society in England, which had the object of making annual grants to curates in need of assistance. The Ireland branch of the English Society was named ‘the Spiritual Aid Society for Ireland’. The judge held that there was an intention to benefit pastoral aid in Ireland and so the gift was applied to a society that could carry out the object.

Again, in *Re Clergy Society*,²⁸ a testatrix left a series of gifts to charities ‘established or carried on in London’. One of the named charities was ‘The Clergy Society’, but no such organisation existed in London. A general charitable intention was found. To this effect, the judge stated:

²⁴ (1772) Amb 712

²⁵ (1696) Rep Temp Finch 245

²⁶ Cf *Re Spence* [1979] Ch 483

²⁷ (1870) LR 9 Eq 632

²⁸ [1856] 69 ER 928

It has been argued that it must be intended for the clergy themselves, and not for their widows or families, and three of the societies before me provide for all these objects; but it seems reasonable to hold that a charitable bequest, intended for distressed clergymen, should extend to what is unfortunately the commonest form of distress among them, the destitution of their widows and children.²⁹

iii. Problems at the Application Stage

At the final application stage, a lack of available information is problematic. This is because in most of the decided cases, the courts have simply referred the property to the Crown. Where a prerogative scheme is sought, the personal representatives will apply to the Treasury Solicitor's Office with the grant of representation, and they will then receive a signed direction, providing information on how to apply the testator's gift.³⁰ The process will happen without any involvement from the court. While this arrangement is practical, no published records are kept of the scheme-making process and so it is not clear which principles are taken into account in deciding upon the new purposes for the scheme. There is no information provided by the Attorney General, and the

²⁹ *Ibid* 930

³⁰ Charity Commission 'OG 505' (14th March 2012)
http://www.charitycommission.gov.uk/About_us/pogs/g505a001.aspx B2.1

Charity Commission's guidance to staff states only that it plays no part in the direction of direct gifts.³¹

There is some limited evidence that the Crown's Law Officers adopt an 'as near as possible' principle when they decide on the new purposes for the gift. In 2001, the Solicitor General stated that the Crown attempts to find a charitable object which 'most nearly represents the testator's intention'.³² The Officer then continued to describe the prerogative treatment of direct gifts for cancer research, saying that there was a rota in operation distributing gifts between similar cancer charities.

Other than that scant evidence, there is an historic indication that the prerogative scheme-making power closely follows the court. In *Moggridge v Thackwell*,³³ Lord Eldon took the view that it made no difference whether the Court or Crown directed the scheme because the outcome would be the same.

He stated:

...whether this Court, or the King by Sign Manual, executes it, the constitution finds a trustee in the Court, or the King, to act in the one case as the Court would act; and, considering the King, *Parens Patriæ*, as one, who would act, exercising a discretion with reference to the

³¹ *Ibid*

³² HC Deb 12 July 2001: Col 641W

³³ *Moggridge* *supra* note 3

intention. Therefore there would not be, as there ought not, any difference in the execution...³⁴

Reliance on such scant evidence is unfortunate. In relation to the application of gifts under the prerogative power, there is insufficient evidence to enable assessment of how the testator's intention is treated. Interpretation of piecemeal, and historic, information is unsatisfactory. It is not possible to state with any certainty how the gift is applied by the Crown, and so in most cases, the testator's property is largely directed in the dark.

3. Moving the Law Forward

The law's treatment of intention in prerogative cases is unclear. This is as a consequence of a wider and more fundamental problem; prerogative cases, by their nature, do not come to court and so the basis of Crown procedure is unclear. It is a skeleton rule in need of flesh. Further, where judicial consideration does exist, the cases largely date from the Nineteenth Century and so it is no longer clear whether they represent the practice of the Crown's Law Officers. The remedy for such obscurity must be to bring cases back into the court system so that procedures and principles are recorded. There are two possible methods to achieve this end. First, the Crown might 'share jurisdiction' with the courts so that cases are reported. Second the prerogative

³⁴ *Ibid* 87

could be abolished entirely so that cases are decided in the ordinary precedential system.

i. A ‘Shared Jurisdiction’ Between the Courts and Crown

In two Canadian cases, a compromise has been effected, so that the courts have decided the case, while leaving the Crown power formally intact. This result is achieved through the judge deciding the case subject to the assent of the Attorney General. In *Re Conroy Estate*,³⁵ the testator had left a direct gift to the Cancer fund of British Columbia. No such fund existed, but two organisations made a claim to the gift; the Canadian Cancer Society, British Columbia and Yukon Division, and British Columbia Cancer Treatment and Research Foundation. Deciding how the gift should be allocated, Macfarlane J assumed jurisdiction. He stated:

...without intending to lay down any rule of general application, I am prepared... to direct that the residue be equally divided between the two institutions...³⁶

However the judge stated that his decision was: ‘subject to the approval of the Attorney General, whose approval may be signified by having counsel appearing for him approve the order.’³⁷ And so the Court and Attorney General

³⁵ *Re Conroy Estate* [1973] Carswell BC 108

³⁶ *Ibid* [19]

³⁷ *Ibid*

shared jurisdiction in the case. This method was more explicitly adopted in *Re Kunze Estate*,³⁸ where Smith J stated:

The court in each case is considering whether the court has any jurisdiction in the matter and concludes that, as a matter of practice, even though the issue falls to be determined by the Crown in the exercise of its prerogative *cy-près* jurisdiction, the court may assume jurisdiction to direct a scheme *cy-près*, but subject to the approval of the Attorney General.³⁹

The ‘shared jurisdiction’ approach has the advantage of simplicity. It permits the courts to hear cases through a mere change of practice. Provided that cases are reported, it might go some way to clarifying the principle. But it is an incomplete solution; it relies on there being a sufficient number of cases worthy of judicial attention. And that circumstance is unlikely. Although the number of prerogative cases decided by the Crown’s Law Officers is unknown, it is doubtful that they sufficiently numerous and of sufficient complexity to require the consideration of a judge. Yet without a stream of cases coming before the courts, no new body of principle could emerge.

ii. Statutory Abolition of the Prerogative

³⁸ *Re Kunze* [2005] Carswell Sask 312
³⁹ *Ibid* [34]

A stronger approach is needed. So as to bring about recorded cases, Parliament might abolish the Crown prerogative so that gifts made without the interposition of a charitable trust receive the same legal treatment as those gifts that do contain such trusts.

Although the prerogative cy-pres jurisdiction is long-standing, there is no doubt that it can be curtailed by law. The constitutional point is clear and well-established. So in the well-known 1610 *Case of Proclamations*,⁴⁰ Sir Edward Coke found that:

The King hath no prerogative, but that which the law of the land allows him.⁴¹

A further principle, that Parliament can abolish Crown prerogative by statute, is also beyond doubt. It was most clearly stated by Lord Dunedin in another well-known case, *Attorney General v De Keysers' Royal Hotel*:⁴²

It is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules. On this point I think the observation of the learned Master of the Rolls is unanswerable. He says: "What use would there be in imposing

⁴⁰ *Case of Proclamations* [1610] 77 ER 1352

⁴¹ *Ibid* 1354

⁴² [1920] AC 508

limitations, if the Crown could at its pleasure disregard them and fall back on prerogative?⁴³

In contrast to the Canadian ‘shared jurisdiction’ approach, statutory abolition would have the advantage of ‘merging’ the hitherto separate systems. The judicial doctrine is well developed, and cases are decided with sufficient frequency for the law to evolve. Where problems emerge, it is open to the courts to move the doctrine forward and resolve them. Abolition of the prerogative jurisdiction would bring an anomalous procedure into the fold, making it part of a wider and evolving system.

⁴³ *Ibid* 526

CHAPTER TEN: ADMINISTRATIVE SCHEMES AND THE DEFINITIONAL BOUNDARY WITH CY-PRES

In common with cy-pres schemes, the jurisdiction of the High Court to make administrative schemes is derived from the inherent jurisdiction of the Chancery Court over Charitable Trusts. Section 69 of the Charities Act 2011 extends the jurisdiction to the Charity Commission so that it shares a concurrent power to make administrative schemes with the Court. The distinction between a cy-pres scheme and an administrative scheme is that while the former alters the purposes of a trust, the latter does not.¹

Administrative schemes are used to modify the non-purposive terms of a trust so that it might operate more effectively. The key criterion enabling a modification scheme under the administrative jurisdiction is whether or not it is ‘expedient’ to alter the trust. In *The Will of Meshakov-Korjakin*,² the Supreme Court of Victoria defined the power:

The Court has a broad inherent jurisdiction to alter, delete or insert administrative provisions in a charitable trust where it is thought expedient to regulate the administration of the charity. Such schemes are intended only to modify the mechanics of how property devoted to

¹ *Re JW Laing Trust* [1984] Ch 143
² [2011] VSC 372

charitable purposes is to be distributed, and may not involve the charities' purposes...³

Despite a relatively large number of testamentary cases, the role of intention in this area of law is unclear. The law has not responded well to the enactment of specific cy-pres legislation, causing the distinction between 'administrative' and 'cy-pres' purposes to become both unsettled and artificial. This chapter draws out the problems in the law's treatment of intention and suggests a more realistic basis for its future development.

1. The Modification Must Promote the Spirit of the Gift

Expedient modification of the trust is not an end in itself. In order for the modification to be permissible it must facilitate the spirit of the charity. The Court will look for the abstract intention behind the gift and unless the alteration aids that intention, the modification will not be allowed. The leading case is *Re JW Laing Trust*,⁴ in which a benefactor made a gift of shares in his company. He directed that they were to be applied to charitable purposes subject to a distribution provision; the capital and income were to be distributed within his lifetime, or within ten years of his death.

The value of the fund had undergone a very rapid and unexpected growth. This meant that it was impracticable to distribute the fund within the time period set

³ *Ibid* [54]

⁴ *Laing* *supra* note 1

by the benefactor. The beneficiaries of the fund were various small Christian causes, unsuited to receiving large amounts of money. In light of the altered circumstances facing the charity, Peter Gibson J found it expedient to alter the terms of the trust so as remove the distribution requirement.

The judge was careful to note that the administrative change facilitated the underlying spirit of the gift. And in the case in question, the donor had in fact indicated an intention to remove the requirement. The judge also found that it was: ‘proper for the plaintiff to wish to continue to support the causes which the settlor himself wished the charity to support from its inception...’⁵

A similar approach was taken in the Nova Scotia case, *Re Sprott Estate*.⁶ A testator had left a gift to fund an annual scholarship, which was intended to lead to a book on dramatic and non-dramatic English Literature of the sixteenth and seventeenth centuries. The testator had provided a commission for a trustee university, but that university sought an administrative scheme to alter the manner in which the commission was calculated. The testator had provided for a commission of 2% of the uncapped income from the fund. For reasons of administrative convenience the university requested that the income should be capped at 5.5%. Of the capped income it would then deduct a 2.5% commission. Kennedy CJ found that while the university’s proposal would result in an administrative convenience for the trustee body, that convenience was not in itself sufficient to trigger the alteration. He stated:

⁵ *Ibid* 155

⁶ (2011) NSSC 327

It is my view that the use of the Court of its inherent jurisdiction to alter the terms of the Will should be restricted to changes that address the “spirit of the trust” and not be employed to address administrative efficiency.⁷

Unless the administrative change facilitates the underlying purpose of the trust, it will not be permitted. The modification must be an expedient method of facilitating that purpose

2. Definition of a Cy-Pres Purpose: the Role of Intention

An administrative modification must not alter the *objects* of the trust. The distinction between the alteration of administrative and purposive provisions has proved difficult to define in light of statute. At present, there is no clear test in the law.

i. The Distinction Between Cy-Pres Purposes and Administrative Provisions in *Re JW Laing Trust*⁸

One method of distinction is not directly concerned with the intention of the donor. That approach was developed by Peter Gibson J in *Re JW Laing Trust* in response to statute.⁹ In the case, counsel had argued that a requirement to distribute trust property within ten years of the benefactor’s death amounted to

⁷ *Ibid* [50]

⁸ *Laing* *supra* note 1

⁹ *Ibid*

a purpose of the trust. And so it was argued that its removal would amount to alteration cy-pres.

Counsel for the Attorney General submitted that a statutory predecessor to section 62 of the Charities Act 2011 was engaged.¹⁰ Peter Gibson J rejected the argument. Taking a novel view, he found that ‘purpose’ as defined by statute related to those objects to which property could be *applied* on trust. As the distribution requirement was not a property bearing object, it did not fall within the scope of the statutory cy-pres doctrine. Consequently, it was possible to alter the distribution requirement under the administrative jurisdiction.

In *Re JW Laing Trust*, Peter Gibson J acknowledged that prior to statute, the cy-pres doctrine had been used to alter non property bearing conditions. He considered *Re Robinson*,¹¹ where a gift had been left to a chapel subject to the provision that the minister should wear a black gown. Taking the view that the wearing of black gowns would be highly unusual, the chapel refused to accept the gift unless the requirement was omitted. The ‘black-gown condition’ was omitted from the trust; a process effected under the cy-pres doctrine.

With reference to the case, Peter Gibson J acknowledged that unless it could be said that funds were *applied* to the wearing of a black gown, then the omission of the requirement would not have amounted to a cy-pres purpose under his test. He sought to resolve the problem by use of a predecessor of subsection

¹⁰ Charities Act 1993, s 13

¹¹ [1931] 2 Ch 122

62(1)(a)(ii),¹² which provided that property could be applied cy-pres where the original purposes cannot be carried out, ‘according to the *directions* given and the spirit of the gift’. He termed the wearing of black gowns as a direction, so that it could be brought within the cy-pres statutory scheme. On his view, that brought it within the ambit of the statute.

ii. A More Realistic Approach at Common Law

Peter Gibson J’s approach is unrealistic. Under his method the *subjective importance* that the donor attached to the provision is not relevant to the question of whether that element is purposive. Instead, the issue for the court will be whether or not the donor was able, at law, to apply property to the object in question. If he was not, then the element is a mere direction, albeit one that is alterable under subsection 62(1)(a)(ii) Charities Act 2011 which provides for such directions.

Such reasoning is very unlikely to have occurred to the testator. It relies on a distinction between legally recognised charitable purposes listed in section 3(1) of the Charities Act 2011, and those elements of a gift that are not so listed. In order for the testamentary donor to have understood this distinction, he would have to have considerable legal knowledge.

¹² Charities Act 1960, s 13(1)(a)(ii)

However in a number of common law cases have taken a more realistic approach.¹³ The courts have treated directions to which property cannot be applied as part of the donor's purpose. They have done so because those directions are important to the donor's plan. For example, in *Re Wilson*,¹⁴ a gift was left to establish a school; the gift specified directions to which property could not be applied. *Inter alia* the testator specified the timetable to which students were to be taught, and the manner in which funds for the school master's house was to be raised. It is not possible to apply property to 'a manner of fundraising' or 'a school timetable', but those elements were still treated as central to his purpose. It was not possible to separate the directions; they were part and parcel of his charitable gift. Parker J stated:

I think that the whole gift is really in the testator's mind dependent upon it being feasible and possible to carry out these particular directions.¹⁵

Regardless of whether elements are property bearing, at common law, the entire gift is treated as the donor's purpose provided that the donor thinks it to be important. For example, in the Tasmanian case, *Re Annandale*,¹⁶ a gift was made to the psychology department of either the University of Queensland or New South Wales. The testatrix had nominated a particular trustee, named Professor Bernard Fenelon, to choose which department. Unfortunately, he absolutely refused to do so, and in response to that refusal, the court appointed

¹³ For example *Re Lysaght* [1966] 1 Ch 191; *Re Woodhams* [1981] 1 WLR 493

¹⁴ [1913] 1 Ch 314

¹⁵ *Ibid* 324

¹⁶ [1986] 1 Qd R 353

an alternative trustee. In doing so, the court proceeded under its cy-pres and not its administrative jurisdiction; it constructed a general charitable intention. After consideration of the authorities, Derrington J held:

In the present case, it is psychological research generally which is the prime purpose, and there is nothing to suggest that the specific features are more than a venture by the testatrix to express an efficient mode of execution, a process which certainly had some point to it as she no doubt saw it, but one which was quite subsidiary to her major purpose.¹⁷

Professor Bernard Fenelon was a nominated trustee; he was not a charitable object to which property could be applied. Yet he was treated as an element (albeit a subsidiary one) of the testatrix's purpose. The testatrix attached some subjective value to his role, and so the provision had to be altered under the cy-pres doctrine.

iii. Reconciling the Common Law and *Re JW Laing Trust*

Peter Gibson J's analysis is in opposition to this common law understanding of intention. On his definition of a 'cy-pres purpose' in *Re JW Laing Trust*,¹⁸ it is not relevant whether or not the donor considered an element of the gift to be a purpose. The sole question for the court is whether or not an object is property-bearing. The consequence of this approach is that the donor's genuine intention

¹⁷ *Ibid* 361

¹⁸ *Laing* *supra* note 1

is not addressed by the courts. The test between administrative and cy-pres purposes has become a technical process in which the real-world thought-processes of the donor are left unconsidered.

It is possible to rescue the law from this statutory trap. Luxton outlines a way in which Peter Gibson J's decision can be reconciled with the more realistic common law position.¹⁹ 'Purpose' in the main body of the section (i.e. subsections (a) to (e)) might be defined as 'property bearing' in accordance with *Re JW Laing Trust*. Subsection 62(1)(a)(ii) states:

- (a) where the original purposes, in whole or in part—cannot be carried out, or not according to the directions given and to the spirit of the gift

And so where a 'property bearing object' cannot be carried out according to the directions given and the spirit of the gift, it is alterable cy-pres. There is a further step to take. The word 'directions' in subsection 62(1)(a)(ii) might be read as being an element of the gift that the donor values. So a provision might only be termed as a 'direction' under the statute, 'if it is of sufficient importance to fall within the "spirit of the gift".²⁰ A direction is an important element of the donor's underlying intention.

On this view, under subsection 62(1)(a)(ii), 'alterable directions', are those elements of the gift which the donor believed to be important to his gift. This reconciles the common law (which also emphasises the donor's perspective)

¹⁹ Luxton, 'In Pursuit of "Purpose" Through Section 13 of the Charities Act 1960' [1985] *Conv* 313
²⁰ *Ibid* 316

with the statute. There is one further step in Luxton's analysis; 'purpose' in the introductory subsection should be read as encompassing this definition of 62(1)(a)(ii). Section 62(1) states:

62 Occasions for applying property cy-près
(1)...the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-près are-

Consequently the cy-pres doctrine is applied to alter the purpose of gift in circumstances where 'purpose' includes subsection 62(1)(a)(ii) directions that are important to the spirit of the gift. 'Purpose' has a different meaning in section 62(1) than in subsections (a) to (e).

This has a far-reaching effect on Peter Gibson J's test. The key question to determine whether or not an element of a gift is a 'cy-pres purpose' becomes, in essence, whether or not the donor subjectively values the provision. Where he does value the provision, the cy-pres doctrine will apply. Where he does not value it, the administrative jurisdiction will be used. The donor's genuine intention is returned to the heart of the test.

iv. Preserving the Realistic Common Law Test

Luxton's analysis successfully reconciles the more realistic common law approach with Peter Gibson J's statutory analysis in *Re JW Laing Trust*. But the solution comes with its own cost. It requires the court to apply a refined

interpretation of the statute. A specific meaning must be given to ‘direction’ in subsection 62(1)(a)(ii) of the Charities Act 2011, and again to ‘the original purposes of the gift’ in subsection 62(1). While the approach leads to a more realistic treatment of intention, it does so at the cost of technicality.

The same result can be achieved through simpler means. The court might straightforwardly treat the distinction between administrative and cy-pres schemes as being beyond the scope of the statute. That would allow the common law test to persist unchanged. This method was adopted by the Court of Appeal in *Oldham Borough Council v Attorney General*.²¹ In the case, a trustee council sought determination of whether it was possible to sell playing fields which they held for the benefit and enjoyment of local inhabitants. The fields were of significant value, and by selling them, the Council hoped to purchase new land and provide better facilities on a different site. At first instance, the Council had been prohibited from sale on the basis that their desire to sell the land could not be reconciled with any of the triggers in a predecessor of section 62 of the Charities Act 2011.²² The first instance court had taken the view that sale would be a cy-pres, rather than an administrative, change.

In the leading judgment of the Court of Appeal, Dillon LJ allowed the sale without invoking the cy-pres doctrine. He did so on the basis that prior to the

²¹ [1993] Ch 210

²² Charities Act 1960, s 13

enactment of the statute it would have been possible to sell the fields under common law. The judge stated:

[Sale] seems to have been the standard practice in the 19th century and I see no reason why Parliament should have intended to alter it by section 13 of the Act of 1960. That section is concerned with the cy-près application of charitable funds, but sales of charitable lands have, in so far as they have been dealt with by Parliament, always been dealt with by other sections not concerned with the cy-près doctrine.²³

The common law had survived the statute. Selling the land was an administrative and not a cy-pres change for the uncomplex reason that Parliament had not intended to reform the common law relating to administrative schemes. Dillon J further stated:

I come... to what I regard as the crux of this case, viz., the true construction of the words "original purposes of a charitable gift" in section 13 of the Act of 1960. Do the "original purposes" include the intention and purpose of the donor that the land given should be used for ever for the purposes of the charity...²⁴

Although it did not directly overrule his statutory analysis, the Court of Appeal preferred the common law test to Peter Gibson J's analysis in *Re JW Laing*

²³ *Laing* *supra* note 1 at 221

²⁴ *Ibid* 220-221

Trust. The determinative issue (or ‘crux’) of the case was the subjective intention of the donor (i.e. whether or not he wished the particular playing fields to be held on trust in perpetuity). The words ‘original purposes’ in the statute were given no technical meaning beyond that which had existed at common law.

Insofar as it directs the court to consideration of the subjective intention of the donor, the approach in *Oldham* leads to the same end as Luxton’s statutory analysis. However, it reaches the result by a direct route. It allows the judge to employ the realistic common law test without a process of refined statutory interpretation.

3. Conclusion

At common law, the subjective intention of the donor is used to distinguish between administrative and cy-pres purposes. If an element of a gift is subjectively important to the donor, then it is a ‘cy-pres purpose’ and the doctrine will bite. Unfortunately, in the light of statute, the issue has become far less clear.

In *Re JW Laing Trust*,²⁵ Peter Gibson J sought to distinguish between the administrative and statutory cy-pres jurisdictions without reference to donor intention. He found in relation to a predecessor of section 62 of the Charities

²⁵ *Laing* *supra* at note 1

Act 2011,²⁶ that in order for an element of gift to qualify as a cy-pres purpose, it must be a charitable object to which property can be *applied*. Yet this reasoning removes the intention of the donor from the process of distinction. The question becomes a matter of law, rather than of discerning the testator's wishes.

The more realistic common law approach should be rescued. Luxton's analysis reconciles attention to subjective intention with Peter Gibson J's test in *Re JW Laing Trust*. Yet his analysis comes at the cost of technicality; it requires refined meanings to be given to otherwise plain words in the statute. For that reason, an alternative approach is proposed. Following the decision of Dillon LJ in *Oldham County Council v Attorney General*, the courts should straightforwardly treat the distinction between administrative and cy-pres purposes as being beyond the scope of the statute. That would allow the common law test to persist unaffected.

²⁶ Charities Act 1960, s 13

CHAPTER ELEVEN: RATIONALISING NEW TESTAMENTARY PRINCIPLES

A large number of wills cases concern gifts to expired charitable organisations.

In modern times, the cy-pres doctrine has ceased to be the ‘first port of call’ for the courts in such cases. Alternative common law principles have emerged enabling the judicial construction of testamentary intention by different methods. If those methods do not apply, the court will then consider using the cy-pres doctrine.¹

Where a gift is left to an expired charity, in preference to the cy-pres doctrine, the courts will either construct a general purpose trust, or find a successor organisation that is able to receive the gift. Both methods avoid lapse by holding that the gift as it was made in the will has not failed. The testator is treated as having *successfully* created a purpose trust, or made a gift to a successor legatee.

The distinction between the general purpose trust and successor organisation rules has been acknowledged elsewhere,² although it has not received extensive academic consideration. This chapter builds on the taxonomy, looking at the treatment of intention in the new testamentary principles. It then points towards a ‘precedential’ route’ for the realistic development of the law.

¹ *Kings v Bultitude* [2010] EWHC 1795, [53]; *Re Lucas* [1948] Ch 424, 427

² Mulheron, *The Modern cy-près Doctrine: Applications and Implications* (UCL, 2006) 30-44; Martin, ‘The Construction of Charitable Gifts’ (1974) 38 *Conv* 187

1. Testamentary Gifts for General Purposes Without an Administration Provided

If a testator makes a gift on trust for a general purpose but neglects to provide a trustee, the gift will not fail. The court is able to ‘substitute’ a trustee to effect the general gift. This happens in two instances. First, the testator might nominate a person (either corporate or natural) to act as trustee,³ but that person does not do so. Second, the donor might nominate an unincorporated institution to hold the property on trust purposes. In that instance, it is usual to nominate an officer at the organisation who can give good receipt for the gift.⁴

The process of substitution is logically different from the cy-pres doctrine, and is best classed as a variety of administrative scheme. While under the cy-pres doctrine the testator’s *purpose* will not be possible to effect, by contrast under the general purpose scheme-making power, the *administration* will be problematic. The general purpose is possible to effect, and so the court will provide a new administration.

i. Effecting General Intention: the Principle in *Moggridge v Thackwell*⁵

The core principle in relation to general purpose trusts was fully worked out in the early nineteenth century case, *Moggridge v Thackwell*.⁶ Where the testator has made a gift for a general purpose (and consequently has a general

³ *Phillips v Royal Society for Birds* [2012] EWHC 618

⁴ See *McLean v Attorney General of New South Wales* [2002] NSWSC 853 at [63]

⁵ *Moggridge v Thackwell* (1802) 7 Ves 36

⁶ *Ibid*

intention) the court will save the gift from lapse. By a will dated 1779, a testatrix named Ann Cam, left a large gift of residue which was valued on death at £50000. She stated:

And I give the rest and residue of my personal estate unto James Vaston, of Clapton, Middlesex, gentleman, his executors and administrators; desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters...⁷

Unfortunately Vaston died before the testatrix, and so it was not possible to effect the gift as she had intended it. Counsel for the next-of-kin again argued that there had been a lapse. It was said that the testatrix had a ‘personal confidence’ in the nominated trustee. On this reasoning, Vaston was the only person who could lawfully carry out the testatrix’s charitable direction. Delegating the discretion to another body would amount to creating an alternative charity that the testatrix had never intended.

Contrary to this view, Lord Eldon found that he had jurisdiction to execute a scheme. While Vaston’s trusteeship was the mode of the gift, the testatrix’s general intention to benefit poor clergymen could be executed by the court independent from that mode. The trustee could be substituted. The judge found that gift was for general purposes (i.e. the benefit of poor clergymen with good

⁷ *Moggridge supra* note 5 at 38

characters) and not for Vaston himself. In consequence, there was a general charitable intention. The judge described the intention of the testatrix as:

...saturated and satiated with the idea of charity, and yet not to have had mind enough herself to determine upon the particular objects, was to devote her property to charity, and according to these precedents Vaston was only the means and instrument, by which that general intention was to be executed; and therefore this Court will carry that general intention into effect.⁸

A rule emerged: where there is a trust for general purposes (and therefore a general intention) the court will provide the administration for the trust.

ii. Development of the Principle in the Context of Gifts to Expired Charitable Organisations⁹

While relatively straightforward in the context of gifts to non-existent natural persons, the law's treatment of intention has become more complex where expired charitable organisations are nominated. Sometimes testators leave gifts to charitable organisations by will that have ceased to exist upon death. There will be no legatee to receive the gift, but it can be saved from lapse by construing it as a gift for general purposes in want of an administration.

⁸ *Ibid* 83

⁹ Parts of this section are made up of published work: Picton, 'Reconstructing Charitable Intention', [2013] 15 CLPR 125-15

In this context, the court will not *automatically* find a gift for general purposes. It might be found instead that the gift was intended only for the very particular purposes served by the nominated organisation. In that instance, there is no general purpose gift (or general intention) and so the gift will lapse.

Rules of construction have emerged to guide the court in this process of construction. They turn on the constitutional nature of the nominated charity. Where an unincorporated charity is nominated, the court will presume a gift for the general work of the charity, although it is possible to rebut the presumption, and find a gift only for its very specific purposes. On the other hand, where an incorporated charity is nominated, it is presumed that the testator did not intend a general trust. Instead, he is fixed with intending a particular gift to the incorporated body absolutely. It is only in exceptional circumstances that the presumption can be rebutted.

a. Construction of Intention where an Unincorporated Body is Nominated

Where an expired unincorporated charity is nominated in the will, the testator is presumed to have attempted to establish a trust for the general work of the charity. In *Re Meyers*,¹⁰ Harman J explained:

Where there is a gift to an unincorporated body of that sort it is not given to the mere bricks and mortar or to the beds or the carpets but for the purpose for which the work is carried on.¹¹

¹⁰*Re Meyers* [1951] Ch 543

The rationale for this principle is derived from the manner in which unincorporated charities hold property. They are unable to hold beneficially, and it is for that reason that the testator is fixed with having intended a trust.

Buckley J explained in *Re Vernon's Will Trusts*:¹²

Every bequest to an unincorporated charity by name without more must take effect as a gift for a charitable purpose. No individual or aggregate of individuals could claim to take such a bequest beneficially. If the gift is to be permitted to take effect at all, it must be as a bequest for a purpose, viz., that charitable purpose which the named charity exists to serve.¹³

In the absence of contrary evidence, a general purpose trust will be found wherever an expired unincorporated charity is nominated in the will. This was apparently the case in *Re Wedgwood*,¹⁴ where a gift to 'Saint Mary's Home for Women and Children of 15 Wellington Street Chelsea' was impossible to effect. The organisation had moved addresses, changed names, and had a new management, but the mere gift to an unincorporated charity was sufficient for Joyce J to hold that, 'the legacy in question is not given to any person or

¹¹ *Ibid* 549

¹² *Re Vernon's Will Trust* [1972] Ch 300

¹³ *Ibid* 303

¹⁴ *Re Wedgewood* [1914] 2 Ch 245 (Ch)

association, but really for a charitable purpose or object, namely, the carrying on of the work of St. Mary's Home.¹⁵

However if there is evidence that the gift was intended only for the very specific purposes served by the charity, the court will find a particular gift. It will hold that the ‘instrumentality’ of the nominated organisation was essential to the testator, and that the general purpose trust construction does not apply. In this circumstance, the testator is fixed with intending a gift that only the specifically nominated organisation could carry out. Buckley J continued in *Re Vernon's Will Trusts*:¹⁶

A bequest to a named unincorporated charity, however, may on its true interpretation show that the testator's intention to make the gift at all was dependent upon the named charitable organisation being available at the time when the gift takes effect to serve as the instrument for applying the subject matter of the gift to the charitable purpose for which it is by inference given. If so and the named charity ceases to exist in the lifetime of the testator, the gift fails...¹⁷

It is possible to rebut the presumption of a general charitable intention. This happened in *Kings v Bultitude*,¹⁸ although the exceptional nature of the facts suggests future courts will be unlikely to follow suit. The testatrix was the only

¹⁵ *Ibid* 249.

¹⁶ *Vernon's* *supra* note 12

¹⁷ *Ibid* 303

¹⁸ *Kings v Bultitude* [2010] EWHC 1795, [53]

minister of ‘The Church of the Good Shepherd’, a schismatic catholic church in London, and she had left her testamentary estate to her own Church. Upon her death, its small congregation had dispersed, leaving the Church without a congregation or a minister.

Counsel for the Attorney General submitted that there was a gift for a ‘reasonably traditional’ form of Christianity. Proudman J disagreed. Under the testatrix’s ministry, the judge found that the church had been ‘particularly dogged’ in pursuing a separate path from other schismatic Catholic churches. The charity had strayed from its constitution, and the church building had been used for idiosyncratic purposes, such as animal blessings and spiritualist evenings. So in view of these unusual facts, Proudman J held that the testatrix had no intention to benefit general Christian purposes.¹⁹ The gift was restricted to the particular church.

b. Incorporated Charities: Construction of Particular and General Gifts

Where an expired incorporated charity is nominated, an opposite rule applies; there is a strong presumption of a particular gift. The testator is taken to have intended a beneficial gift in augmentation of the incorporated charity’s assets, and therefore no trust for purposes. It is treated as an absolute gift for the incorporated body *per se*.

¹⁹ See Picton, ‘*Kings v Bultitude – A Gift Lost to Charity*’ [2011] 1 Conv 69

The logic behind the presumption of a particular gift is derived from the manner in which incorporated charities hold property as (in contrast to unincorporated charities) they are able to hold property beneficially, free from any trusts. HHJ David Cooke (sitting as a High Court judge) stated in, *Phillips v Royal Society for the Protection of Birds*:²⁰

...*prima facie* a gift to a body that is in fact incorporated is a gift to that body...²¹

The case provides the most recent example of the rule in operation.²² A testatrix had made a gift to the incorporated ‘New Forest Owl Sanctuary’, but at the time of her death, the charity was in the process of dissolution under what was then section 652 of the Companies Act 1985.²³ The gates to the Sanctuary had long been closed to the public, but although it had been removed from the register of charities, it had not yet been removed from the register of companies.

Counsel for the Attorney General submitted that the gift was on trust for the purposes of the Sanctuary, not an absolute gift for the company *per se*. But HHJ David Cooke rejected the submission, holding that there was:

²⁰ *Phillips* *supra* note 3

²¹ *Ibid* [19]

²² See Picton ‘*Phillips v The Royal Society for the Protection of Birds*; Construction of a Gift to a Charitable Company’ [2012-13] 15.2 CLPR

²³ Now section 1003 Companies Act 2006

...no indication in the will that [the testatrix] intended anything other than that the bodies to which she made her gifts would be entitled to use the funds as they thought fit for their purposes.²⁴

It has been judicially acknowledged that furtherance of the objects served by the charity will be a part of the real-world motivation behind the gift to the corporation. Buckley J noted in *Re Vernon's Will Trusts*:²⁵ ‘...the testator's motive in making the bequest may have undoubtedly been to assist the work of the incorporated body...’²⁶ Nevertheless, the motive is taken to be satisfied by a particular gift to the charity. This amounts to saying that while the testator might *hope* that the incorporated charity will carry out the intended work, he is presumed not to have established a general purpose trust to ensure that it does.

The presumption is rebuttable: ‘where the terms of the bequest indicate that the company is to hold it on a separate trust’. ²⁷ Essentially, the court must find that the testator intended a separation of legal and equitable title. He will then be taken to have attempted to make the corporate body trustee for his intended purposes.

This sets the bar high. The courts have been very reluctant to find a general purpose trust where an incorporated body is nominated. Even a gift expressly made ‘for the general purposes’ of an incorporated charity is not enough to

²⁴ *Phillips supra* note 3 at [22]

²⁵ *Vernon's supra* note 12

²⁶ *Ibid* 303

²⁷ *Phillips supra* note 3 at [19]

establish a general trust. The expression was used in *Re Arms (Multiple Sclerosis Research) Ltd*,²⁸ where a series of gifts were left to a multiple sclerosis charity. The charity was in insolvent liquidation. If it had been possible to construct a trust, the testatrix's gift would have been kept from the company's creditors. Despite the sympathetic facts, Neuberger J held the expression 'general purposes' in the will did not have a, 'special meaning'.²⁹ The gift was made beneficially in augmentation of the company's assets, and no trust could be constructed.

The sole case where a general trust intention has been found is *Re Meyers*.³⁰ A testator made a gift to a large number of unincorporated and incorporated hospitals in the same will. It directed that the gifts should be added to the invested funds of the charities, but that direction could not be carried out. Pursuant to vesting provisions in the National Health Service Act 1946, the nominated hospitals had been reformed into larger groupings, and their funds had vested elsewhere. In these circumstances, Harman J presumed valid trusts for the purposes of the unincorporated hospitals, and he then continued to give an identical construction to the incorporated hospitals.³¹

²⁸ [1997] 1 WLR 877

²⁹ *Ibid* 883

³⁰ *Meyers* *supra* note 10

³¹ *Ibid* at 541

The approach in *Re Meyers*³² is isolated, and in *Re Finger's Will Trust*,³³ Goff J restricted the judgement to its facts. The judge held that *Re Meyers* had been driven by the context of the particular will, stating:

The mere fact that residue is given to a number of charities, some of which are incorporated and others not, is not of itself a sufficient context to fasten a purpose trust on the corporation.³⁴

c. Artificiality: Over-Emphasis on the Constitutional Form of the Expired Charity

This construction suffers from artificiality. The strength of the presumptions directs the court towards unrealistic decision-making, a fact impliedly acknowledged by Goff J in *Re Finger's Will Trusts*.³⁵ The judge noted:

If the matter were *res integra* I would have thought that there would be much to be said for the view that the status of the donee, whether corporate or unincorporate, can make no difference to the question whether as a matter of construction a gift is absolute or on trust for purposes. Certainly drawing such a distinction produces anomalous results.³⁶

³² *Meyers supra* note 10

³³ [1972] 1 Ch 286

³⁴ *Ibid* 299

³⁵ *Ibid*

³⁶ *Ibid* 294

The multi-layered decision in *Re Finger's Will Trusts*³⁷ provides a ‘testing-ground’ for the robustness of the construction because in the case the presumptions led Goff J to two opposite conclusions, despite similar facts. The testatrix had left shares of residue to eleven named charities. Amongst the list were two expired organisations. ‘The Radium Commission’ was an unincorporated medical supply charity, which prior to the establishment of the National Health Service, had overseen the distribution and use of medical radio-active substances. Following the National Health Service Act 1946, there was no longer any need for the charity, and so the radium and other assets were transferred to the Minister of Health.

In relation to this unincorporated charity, Goff J. straightforwardly presumed a general purpose trust. The purposes of the Commission remained possible (being carried out initially by the Minister of Health, and then the Secretary of State for Social Services). And there was nothing in the will to suggest that the gift was restricted to the expired charity, so the judge directed a scheme.

A diametrically opposite approach was taken in relation to the other gift. ‘The National Council for Maternity and Child Welfare’, was an expired incorporated organisation. It had been a co-ordinating body for various welfare and training organisations, but the charity had terminated voluntarily before the testatrix’s death and transferred its surplus assets to another charity. With regards to this incorporated body, Goff J held that the purpose gift construction

³⁷ *Ibid*

could not apply, there being no indications (as determined by precedent) in the will to imply a purpose trust. And so the result of the construction was to fix the testatrix establishing a general purpose trust for the work of the Radium Commission, but a particular gift to the ‘National Council for Maternity and Child Welfare’. The construction was able to save one gift for charity, but not the other.

In the event, Goff J did not allow the gift to the incorporated National Council for Maternity and Child Welfare to lapse. He saved the gift through an alternative method: the cy-pres doctrine, but in light of the strong presumption of a cy-pres particular charitable intention where an expired charitable organisation is nominated, he did so only as a result of what he described as ‘very special’ circumstances. The judge noted that the expired Council was a co-ordinating body, rather than a charity with its own distinct identity, the testatrix had left a gift of her entire estate to charity, and the judge was able to ascertain that the testatrix considered herself as having no relatives. Though unable to use the general purpose trust construction, Goff J found a cy-pres general charitable intention in its place.

Despite this cy-pres ‘escape route’, the effect of the general purpose trust construction in the case is open to criticism. Its applicability in *Re Finger’s Will Trusts*³⁸ was dependent on the constitutional form of the expired charity, but it must be doubted whether the testatrix genuinely took account of the

³⁸ *Finger’s supra* at note 33

difference between incorporated and unincorporated charities when the will was written. Cotterrell suggests that testators are rarely aware of the legal difference between incorporated and unincorporated charities, noting that,³⁹

The average donor probably neither knows nor cares whether the donee charity has corporate status or not, and, if he does know, there is in general, no reason why this should influence his intention either to make his gift to the institution itself or to benefit the particular purposes of which it is the instrument.⁴⁰

The presumptions are based on the legal nature of charitable property holding, and so they are unlikely to relate to real-world knowledge held by the testator. In *Re Finger's Will Trusts*,⁴¹ while it is possible that the differing constructions placed upon her bequests genuinely reflected the testatrix's real-world intention, it must also be unlikely. In order for the opposing constructions to have been accurate, the testatrix would have had to be fixed with an unusually detailed level of legal knowledge. She would have known the legal difference between incorporated and unincorporated charities and the manner in which they hold property. In light of complexity of the rules, she would not have been typical.

d. An Australian Alternative

³⁹ Cotterell, 'Gifts to Charitable Institutions: A Note on Recent Developments' (1972) 36 Conv 198

⁴⁰ *Ibid* 203

⁴¹ *Finger's* *supra* note 33

A line of Australian cases have taken a different approach. In a limited number of authorities, courts have been prepared to presume that a gift to an incorporated charity was intended to be a trust for purposes. Incorporated and unincorporated charities are treated in the same way; the testator is fixed with having the same intention regardless of the constitutional form of the expired charity. In the New South Wales case, *Sydney Homeopathic Hospital v Turner*,⁴² Kitto J stated obiter in relation to both incorporated and unincorporated charities:

But if the objects of a body are limited to altruistic purposes, it is as an instrument of altruism that it is likely to attract benefactions. Very often, to say the least, it will be a proper inference, when a gift is made to such a body, that the donor intends the gift to operate as a devotion of the subject property to the relevant purposes, and that the donee accepts it as such. ...an inference arises that the gift is upon trust for charitable purposes...⁴³

This understanding, that where a gift is given to a body with altruistic purposes it is likely that there is a trust regardless of incorporation, was applied in *Sir Moses Montefiore Jewish Home v Howell*.⁴⁴ While the facts of the case are removed from the direct context of gifts to expired organisations, Kearney J's judgement relied upon the rule. The Montefiore Jewish Home was an

⁴² (1959) 102 CLR 188

⁴³ *Ibid* 222 -223

⁴⁴ [1984] 2 NSWLR 406

incorporated organisation, which was coincidentally the trustee of an unincorporated Jewish children's charity. A testator had left a gift to both Jewish charities. By deed, the ultimate division of the corpus was postponed until the expiration of a 'Royal Lives' clause.⁴⁵ The Montefiore Jewish Home petitioned for a distribution of the fund under the rule in *Saunders v Vautier*.⁴⁶

Kearney J found that the rule could only apply where the objects of a trust are indefeasibly and absolutely entitled. On the facts before him, he found that not to be the case. The Montefiore Jewish Home was treated as being entitled only to the beneficial interest. The judge stated after citation of Kitto J's dicta in *Sir Moses Montefiore Home v Howell*:⁴⁷

I consider that this more refined analysis exemplified in the judgment of Kitto J is the proper approach, and I accordingly do not consider that the rule enunciated in the English cases is an automatic rule which operates in all circumstances. In my view a disposition to a charitable corporation is to be treated as having presumptively the necessary elements creating a trust, so that the disposition to such a charitable corporation takes effect as a trust for the purposes of the corporation rather than as a gift to it to be applied as it sees fit.⁴⁸

⁴⁵ *Ibid* 408

⁴⁶ (1841) 4 Beav 115

⁴⁷ [1984] 2 NSWLR 406

⁴⁸ *Ibid* 416

Finally, the presumption of a trust in favour of expired incorporated charities was directly applied in the South Australian case *Australian Executor Trustees v Attorney General*.⁴⁹ A testator, named Mr Flinn, had left a gift to the incorporated Central Yorke Peninsula Hospital; he had received care at the institution. At the time of his death, while a medical clinic continued to operate on site, the nominated organisation had ceased to exist as a legal entity. Kourakis J applied *Sir Moses Montefiore Home v Howell*⁵⁰ so as to find:

...a charitable trust was validly created by Mr Flinn's testamentary disposition even though the nominated trustee, CYPH, no longer exists. The object of that trust is the provision of services at the Hospital...⁵¹

Treating incorporated and unincorporated charities in the same manner has much to commend it. It is unrealistic to fix testators with different types of intention depending on the constitutional nature of the expired charity. If a general gift was intended, it is just as likely that a general purpose trust was intended in the context of a gift to an incorporated charity as it is in the context of gift to an unincorporated one.

2. The Successor Organisation Construction

The successor organisation rule has also emerged as a method of testamentary intention construction. It is underpinned by a different conceptual logic to the

⁴⁹ [2010] SASC 348

⁵⁰ *Sir Moses Montefiore* *supra* note 47

⁵¹ *Ibid* [77]

general purpose trust cases: the basis of the rule is that where a gift is made to a physically or legally expired organisation, if there is an identifiable successor organisation that is able to receive the gift, then lapse may be avoided. The gift is paid to the successor. The rule is difficult to classify. It is not a cy-pres principle because it operates in circumstances where the gift has not failed. Nor is it administrative, because as will be seen, it enables substantive changes of purpose.

i. The Rationale behind the Construction

Charitable organisations sometimes undergo restructuring. Often, that change leads to the physical or legal expiry of the organisation. For example, two charities might merge in order to deliver services more effectively or because there has been a fall in local demand. Alternatively, trustees might take the view that the purposes served by their charity are in need of updating and establish a new charity by way of a scheme from the Charity Commission.

It has been seen that, under the cy-pres doctrine, the physical expiry of a charitable organisation will occasion a failure of the gift.⁵² The successor organisation construction takes a contrasting approach. Where a charity has closed, physical expiry will not necessarily occasion failure. Under the rule, it might be possible to construe the bequest as a successful disposition for the post-reform organisation. That new charity will be treated as a successor to the

⁵² *Re Ovey* (1885) 29 Ch D 560; *Re Rymer* [1895] 1 Ch 10, *Re Broadbent* [2001] EWCA Civ 714

expired organisation, and it will be able to receive the gift as if it were the nominated legatee.

The rationale behind the construction is originally derived from the perpetual nature of charitable trusts.⁵³ Where a charity undergoes reform, although it might expire in ‘bricks and mortar’ form, the funds it holds will not expire with it. They will continue to exist, perpetually dedicated to charity.⁵⁴ Providing that a successor body holds the funds of the expired charity, the gift will not fail.

The leading authority on point is *Re Faraker*.⁵⁵ In the case, a testatrix left a sum to a body identified as ‘Hannah Bayly’s Charity’, which was an institution for the benefit of poor widows living in a Rotherhithe parish. Before the will took effect, the Charity Commissioners had radically altered the legal position of the charity by a scheme. It had been merged with thirteen others to create a new charitable trust for the benefit of the poor. Yet owing to what Farwell L.J. called a ‘pardonable slip’ on behalf of the draftsman, the new organisation was in fact under no constitutional obligation to apply its funds to widows.

In a landmark judgement, the Court of Appeal reversed Neville J’s first instance finding that the gift had failed. It was held instead that the mere change of form had not destroyed the charity; the trust continued to exist and the testatrix’s gift could be augmented to its funds.

⁵³ *Re Faraker* [1912] 2 Ch 488

⁵⁴ *Ibid* 493

⁵⁵ *Ibid*

ii. Construction of General Intention

In order for a gift to be saved under the successor organisation rule, it is necessary for the court to construct a general intention. In *Re Withall*,⁵⁶ Clauzon J explained in relation to a gift to the expired Margate Cottage Hospital:

What is the operation of the will? The proceeds are to be paid to the Margate Cottage Hospital. That does not mean, as has been picturesquely said, the bricks and mortar; that means that they are to be paid to the persons administering the trusts to which the funds of the Margate Cottage Hospital are dedicated, as an accretion to those funds, to be used for those purposes.⁵⁷

This constructs the gift as being for a broad purpose. There is no question of a gift to the particular organisation because the bequest is construed as being for the general purposes of the expired charity. Wilberforce J directly noted in *Re Roberts*:⁵⁸

⁵⁶ *Re Withall* [1932] 2 Ch 236

⁵⁷ *Ibid* 242

⁵⁸ [1963] 1 WLR 406

...where there is a gift to a charity which can be interpreted as a gift for the purposes of the charity, that gift can take effect although the form of the charity has been altered...⁵⁹

The clearest example is provided by *Re Hutchinson's Will Trust*,⁶⁰ where in the application of the successor organisation rule, Upjohn J directly contrasted general and particular intention:

If this gift is a gift to a particular institution carried on in a particular place and for no other purpose, then, if that institution has ceased, there is a lapse, unless on the true construction of the will there is some overriding general charitable intention. But if it is a gift for the general work of that charity generally and it is to be construed as a gift in augmentation of the funds of the charity.⁶¹

In this manner, the successor organisation rule prevents the lapse of gifts through the construction of general intention, and this in turn permits the court to apply the gift to an organisation which is legally or physically distinct from the body that the testator nominated in his will. His intention is treated as broad enough to encompass the change of organisational form.

iii. Treatment of Intention: Continuance of the Original Charity

⁵⁹ *Ibid* 413.

⁶⁰ [1953] 1 Ch 387

⁶¹ *Ibid* 393

In its treatment of intention, the case law suffers from a conceptual problem: the successor organisation rule is dependent on the continuance of the original charity in some form. Where there is no continuance, the gift may lapse even if the testator is construed as having a general intention. Yet that continuance may be a matter of chance. It may not be related to the intention of the donor at all. The nature of continuance has been differently conceptualised in two alternative lines of authority. First, it has been held that the original nominated charity must continue in some tangible form in order to receive the gift. Second, in another line of cases, it has been held that the original charitable organisation must be legally perpetual.

a. Cases Relying on *Tangible* Continuance

In some cases gifts have been held to lapse because the original charity no longer existed in any tangible form. In *Re Morgan's Will Trusts*,⁶² a testatrix had made a gift to a cottage hospital. At her death it transpired that the organisation had vested in the Minister of Health free from trusts under the National Health Service Act 1946. Roxburgh J. found a gift for the purposes of the cottage hospital, but was only prepared to make the judgement on a finding of fact, that the hospital's work physically continued on the same site.⁶³ The judge stated:

⁶²[1950] 1 Ch 637

⁶³*Ibid* 643

There is a curious lacuna in the evidence in this case, because what to my mind is a fact of vital consequence is nowhere to be found stated in the evidence: it is that the work of the hospital has always since been and is still being carried on those premises. I regard that as of vital importance; my judgment proceeds upon that footing...⁶⁴

The continuing existence of tangible funds applied to the work of the original charity has also been treated as prerequisite to saving the gift.⁶⁵ In *Re Slatter's Will Trusts*,⁶⁶ a testatrix made a gift to a tuberculosis hospital in New South Wales, but by the date of her will, owing to the successful campaign against the disease, the hospital had closed. Plowman J. found a gift for the purposes of the institution, but allowed the gift to lapse on the basis that the charity's funds were exhausted:

Once one finds that there are no funds dedicated to the work which was carried on before the institution closed down, then it seems to me that the institution must cease to exist in such a way as to cause a lapse...⁶⁷

Finally, tangible continuance of the original charity was thought to be essential in *Re Vernon's Will Trusts*.⁶⁸ A testatrix had left funds to a dissolved incorporated hospital for crippled children, but despite the formal dissolution,

⁶⁴ *Ibid* 642

⁶⁵ Broadbent *supra* note 52

⁶⁶ *Re Slatter's Will Trusts* [1964] Ch 512

⁶⁷ *Ibid* 527

⁶⁸ *Vernon's supra* note 12

the general work of the hospital had been continued on site by a successor clinic.

Buckley J found that the nominated hospital had not expired and so the testatrix's gift was successful. The judge emphasised the importance of certain persisting features connecting the dissolved children's hospital with the clinic. The clinic had used the immovable furniture of the children's hospital, and had continued to carry out similar work on the same site. These persisting features caused the judge to find that the nominated charity had carried on in an abstract, 'unbroken continuance'. That continuance was an essential prerequisite for preventing lapse.

In terms of the law's treatment of intention, this logic is problematic. Whether or not the organisation has continued in a tangible form has nothing to do with the testator's intention. It is a matter of chance. And so focussing on the tangible continuance of the organisation sits uneasily with the construction of general intention. That intention is constructed, only for the courts to allow lapse on the basis of other non-intention related factors.

b. Cases Requiring the Existence of a Perpetual Trust

In other cases, the required 'continuance' of the original charity has been conceptualised as a legal rather than a tangible form: it has been held that the

rule will not be applied where the original expired organisation was not a *perpetual* charity.

The first case to impose the limitation was *Re Roberts*,⁶⁹ where a testatrix made a gift to an institution named the Sheffield Boys' Working Home. By a clause in the institution's trust deed, the charity could be wound up, and its funds applied to alternative charities in the city. By the date of the testatrix's death, that clause had been exercised and the funds applied to the general purposes of an organisation named the Sheffield Town Trust; a body with markedly different purposes from the Home.

The Sheffield Town Trust argued that it should be paid the bequest, but Wilberforce J held himself unable to apply the rule to the terminable organisation on the basis that the testatrix would not have foreseen the termination of the working home.⁷⁰

The restriction of the rule to non-terminable charities was developed in *Re Stemson's Will Trusts*,⁷¹ where a testator left a gift to an expired charitable company named the 'Rationalist Endowment Fund'. The body had terminated voluntarily by a power in its constitution and transferred its assets to another charity. After consideration of *Re Roberts*,⁷² Plowman J found that the *Re*

⁶⁹ *Roberts* *supra* note 58

⁷⁰ *Ibid* at 414

⁷¹ [1970] Ch 16

⁷² *Roberts* *supra* note 58

*Faraker*⁷³ construction could not be applied because the charitable company was not a perpetual body:

Where funds come to the hands of a charitable organisation, such as R.E.F., which is founded, not as a perpetual charity but as one liable to termination, and its constitution provides for the disposal of its funds in that event, then if the organisation ceases to exist and its funds are disposed of, the charity or charitable trust itself ceases to exist and there is nothing to prevent the operation of the doctrine of lapse.⁷⁴

The logic of the rule in *Re Stemson*,⁷⁵ means that unless the original charity had a perpetual form, then the successor organisation rule will not be applied. Even where a gift is made for general purposes, it may still lapse under the construction regardless of the testator's general state of mind. And so the logic is open to the same criticism as in those cases that require tangible continuance in order to prevent lapse. The existence or otherwise of a perpetual trust is largely a matter of chance. Allowing lapse on the basis that the nominated charity was not perpetual sits uneasily with the requirement that general intention should be constructed.

iv. Treatment of Intention: Application of the Gift

⁷³ *Faraker supra* at note 53

⁷⁴ *Ibid* 26

⁷⁵ [1970] Ch 16

Insofar as the successor organisation rule attempts to effect the testator's intention, there is a second conceptual problem. The successor organisation in receipt of the property might serve very different purposes from that of the original nominated organisation. The gift could be applied to a radically 'altered' legatee. Outside of cases where the testator has a highly abstract state of mind, this change of purpose cannot be justified by reference to the intention behind the testator's original gift.

In *Re Lucas*,⁷⁶ for example, a testatrix had left gifts to an institution identified as the Huddersfield Home for Crippled Children.⁷⁷ Before the date of the will the institution had closed, and in light of the closure, the Charity Commissioner had provided a cy-pres scheme to alter the organisation's purposes. Under a new constitution, in place of providing holidays at the Huddersfield Home, the new charity provided holidays in homes at various locations around the country.

The shift from provision of respite care in a local institution to the delivery of care in various locations is a substantial change of purpose. At first instance Roxburgh J found that the gift was for the upkeep of the particular home, rather than for, 'homes scattered up and down the country'.⁷⁸ Consequently, he held that the gift lapsed.

⁷⁶ *Lucas* *supra* note 1

⁷⁷ In fact at the time the testatrix made the will, the institution was named the Huddersfield Charity for Crippled Children (see *Re Spence* [1979] Ch 483, 488)

⁷⁸ *Lucas* *supra* note 1 at 182

Yet the Court of Appeal over-ruled Roxburgh J's decision and applied the successor organisation construction. It was found that it was possible to augment the gift to the funds of the successor charity. The bequest was treated as a general purpose gift, just as if the original legatee still existed. Lord Greene found:

[The gifts] took effect as gifts to that same charity in the reconstituted form in which it was continued under the scheme, that is to say as gifts in augmentation of the funds held by the trustees appointed by the scheme for the modified objects thereby prescribed.⁷⁹

And so the Court of Appeal in *Re Lucas*,⁸⁰ applied the gift to the successor charity, even though it served markedly different purposes from the original expired Home.

A similar disparity between the original and the successor charities is evident in *Re Bagshaw*.⁸¹ In the case, a testatrix left a gift to a charity which at the date of the will had operated a cottage hospital in Bakewell. By her death, its buildings and site had vested in the Minister of Health under the National Health Service Act 1946. Not all the funds were transferred, by a power in the trust deed, the trustees had renamed the charity and extended its purposes to cover the relief of necessitous ex-servicemen and women.

⁷⁹ *Ibid* 427

⁸⁰ *Lucas* *supra* note 1

⁸¹ [1954] 1 WLR 238

Applying the successor organisation rule, Danckwerts J augmented the gift to the reformed body. This construction was applied to the will even though the focus of the charity had switched from the advancement of health, to the relief of poverty.⁸² The legatee organisation had radically changed purposes.

The courts are alive to the problem, and in some cases, they have suggested measures to protect the testator's intention. In *Re Withall*,⁸³ a testatrix made a gift to a cottage hospital which had merged with a larger general hospital, but Clauson J found that the Attorney General might intervene to protect the testator's gift from inappropriate use.⁸⁴ Similarly, in *Re Faraker*,⁸⁵ Cozens-Hardy MR urged that the objects of the successor charity should be amended so as to explicitly provide for purposes of the original charity: the relief of widows.⁸⁶

However it will not always be possible to ensure that the successor body applies the gift in sympathy with the original expired charity's purposes. In *Re Bagshaw*,⁸⁷ while the successor charity remained constitutionally capable of spending funds on local health care, it appears from the case report that those purposes were no longer the real focus of the charity. The original cottage hospital had vested in the Minister of Health. In such circumstances, the successor charity may not have been institutionally capable of applying the

⁸² This point is also made by Jill Martin, 'The Construction of Charitable Gifts' (1974) 38 Conv 187.

⁸³ *Withall* *supra* note 56

⁸⁴ *Ibid* at 242

⁸⁵ *Faraker* *supra* note 53

⁸⁶ *Ibid* 494

⁸⁷ *Bagshaw* *supra* note 80

funds to anything other than its reformed purposes. The court did not effect the intention of the testatrix.

3. Moving the Law Forward

The successor organisation rule has become problematic. It has evolved far from the original rationale in *Re Faraker*,⁸⁸ so it has a ‘blind spot’ in relation to testamentary intention. In the original case, although Hannah Bayly’s charity had been amalgamated with a larger trust, the new charity was clearly effecting Hannah Bayly’s purposes. Farwell LJ noted the importance of the original purpose, stating with some irony:

Nobody suggests that there has been a failure of poor widows in Rotherhithe.⁸⁹

Later cases have expanded the rule so that it no longer gives the testator’s intention realistic treatment. Later cases have stretched the principle so that legacies can be applied to radically altered organisations with purposes far removed from the original nominated charity.

The successor organisation rule treads similar ground to the general purpose trust approach. Although the cases are clear that the successor organisation rule requires for the original charity to subsist in some tangible or legal form, that is

⁸⁸ *Faraker* *supra* note 53

⁸⁹ *Ibid* 495

not the sum-total of the rule. The cases look for both a general intention and for the original charity to persist.

The two rules both rely on general intention. At the intention construction stage, they are same, although the rules differ at the point of application. In light of their similarity, one precedential approach to reform would be ‘roll together’ the principles so that the successor organisation rule is subsumed under the new general purpose trust approach. This would not require far-fetched judicial creativity. Although later cases have taken a different tack, it is possible to read the judicial approach in *Re Faraker* as being informed by general purpose trust reasoning. In the case, Farwell LJ noted:

...one has to consider not so much the means to the end as the charitable end which is in view, and so long as that charitable end is well established the means are only machinery, and no alteration of the machinery can destroy the charitable trust for the benefit of which the machinery is provided.⁹⁰

In those sentences at least, the judge’s reasoning turns on general purpose trust logic. A distinction is made between the inessential institutional machinery and the general charitable purposes that such machinery serves. Farwell LJ did not emphasise the continuing formal existence of the original legatee.

⁹⁰ *Ibid*

In one more recent case, the two rules have been rolled together. In *Re Broadbent*,⁹¹ a gift was left to ‘Saint Mathew’s Church’, an iron-framed building in Stalybridge. The testatrix expressly left the gift to the general purposes of the church, but requested that her gift be spent on the upkeep of the building. St Mathew’s had suffered from a dwindling congregation and had closed before the testatrix’s death. The plot was sold pursuant to a power in the trust deed, leaving the trustees of the charity holding the value of the land. So the trust remained formally in existence, although the iron-framed church had been demolished.

The Court of Appeal found that the testatrix had established a trust for the general purposes of the charity, not a trust for the church ‘premises’.⁹² In reaching his decision, Mummery LJ rolled together general purpose trust and successor organisation authorities:

It appears from *Re Roberts*... and similar cases, such as *Re Rymer*, *Re Faraker*, *Re Withall*, *Re Lucas* and *Re Slatter’s WT*, that the court must ascertain whether the intention of the testator was to benefit a charitable purpose promoted in the work of the named institution, as distinct from an intention to benefit only the named institution in the carrying out of its charitable purpose at or in connection with particular premises.⁹³

⁹¹ *Broadbent* *supra* note 52

⁹² *Ibid* [15]

⁹³ *Ibid* [36]

And so in *Re Broadbent* at least, the court proceeded on the basis that the two principles were similar enough to be ‘treated as one’. This points the way towards abolition of the successor organisation rule. If later courts were to follow, an intention to promote a general purpose would be sufficient to save the gift regardless of whether the original organisation continued to have a formal existence. This would re-emphasise intention as a basis for jurisdiction, and supply a more realistic treatment of the donor’s testamentary wishes.

4. Conclusion

In the testamentary context, two common law rules have emerged. Both involve new treatments of intention. First, in relation to the general purpose trust construction, where a particular trustee is unable to effect a general purpose gift, the law will not let it fail. Where the rule is applied to expired charitable organisations, the law treats the gift as being for the general purposes of the charity. Consequently it is able to substitute a new organisational trust charity to effect the general purpose gift.

However this process relies upon a general purpose trust having been intended in the first place. New rules of construction have emerged to determine the question. Those rules turn upon the constitutional nature of the expired charity, and so a gift to an unincorporated organisation is presumed to be for general purposes, whereas a gift to an incorporated body is presumed to be made free from a general purpose trust.

Although well-established, this rule of construction is artificial. Relying upon the constitutional nature of the expired body as a means to construct trust intention is unrealistic. It fixes testamentary donors with a knowledge of the charity's constitution that they may not have in reality. The eventual allocation of testamentary property becomes a matter of constitutional chance.

The Australian approach is to be preferred. Although some Australian courts have adopted the general purpose trust method of saving gifts to expired charitable organisations, they have not made the same distinction between incorporated and unincorporated charities that is seen in England. Gifts are held to be intended for general trust purposes in all cases. And so the Australian variant of principle has the advantage of treating like case alike.

A second important evolution in the testamentary context is the development of the successor organisation rule. According to the rule, general intention is required to prevent lapse, and so where that intention is found not to exist, the gift will be lost to charity. Yet other lapse causing factors are disconnected from the donor's intention as it has been constructed by courts. Lapse will occur where the original nominated organisation has not continued to exist in some form.

The donor will not be able to predict whether or not the original organisation will have 'continued to exist' in such a manner, and so despite the formal requirement that general intention should be constructed, lapse might be caused

by factors independent of the donor's intention. Equally, although the construction seeks to effect the general intention of the donor, where the purposes of the 'successor organisation' are radically different from those of the original nominated organisation, this cannot be the case. Applying the gift to a radically altered organisation may defeat the testator's intention. In this manner, the treatment of intention in the rule is conceptually unclear.

In its treatment of intention, the successor organisation construction is unsatisfactory. But there is a route out the impasse. Insofar as they rely upon the construction of a general intention, the two testamentary principles are similar. And so they might coherently be 'rolled together' into method without demanding far-fetched judicial creativity. Subsumption of the successor organisation rule into the general purpose trust construction would allow for a more realistic treatment of intention; the courts would no longer apply gifts to radically altered successor organisations.

CHAPTER TWELVE: CONCLUSION

This thesis provides the first detailed taxonomy of the character and functions of intention in the law of schemes. As a result of that taxonomy, it has been possible evaluate the law's effectiveness in fulfilling those functions, and where the law is lacking, propose substantive doctrinal reforms.

Charitable intention has a dual edge. In the context of the reform of established trusts, intention is an element of a wider policy of balanced variation. It is a discretionary process, where the scheme-maker is directed to take account of intention alongside other factors. Trust reform proceeds flexibly on a case-by-case basis. By contrast, testamentary cases use charitable intention in a different way. Courts construct intention for the purpose of effecting a failed will. Over a long period of time, that task has proved difficult, leaving the law beset by artificiality.

1. Proposals for the Development of Balanced Variation in the Context of Established Trust Reform

With regards to the reform of established trusts, intention is balanced in statute against broadly defined effectiveness standards. Legislation has produced a discretionary, but guided, system. It was the express purpose of the Nathan Report¹ to introduce this flexible method; it set out a particular policy compromise so that intention became one element in a discretionary process.

¹ *Report of the Committee on the Law and Practice relating to Charitable Trusts* (Cmd 8710) HMSO, 1951

First introduced at the cy-pres trigger stage,² and further extended to the cy-pres application stage,³ the approach has proven to be broadly successful. It has provided a conceptually sound process of variation where, after consideration of statutory factors, scheme-makers are empowered to make case-by-case decisions.

This thesis has proposed further development of balanced variation at the trigger stage. There is an inconsistency in the process. In one circumstance a ‘ghost’ of the donor deferent common law approach remains, preventing the reform of trusts without consideration of balancing effectiveness standards.

In England, statute applies to purposes that have determinatively stopped operating in a certain way. The effect of the statutory language is to prevent intervention where a trust is potentially salvageable in future. This carries attendant risks. Trustees may be unwilling or unable to rescue an organisation in decline, but the law prevents intervention. In this circumstance, there is no balanced variation, only a bar to reform.

Australasian statutory innovation presents a way out of the problem. Shared legislation in Australia and New Zealand permits reform on the basis of inexpediency.⁴ That low-threshold standard avoids the English impasse but has potential to bring its own problems. A stand-alone inexpediency trigger

² First enacted as Charities Act 1960, s 13(1); re-enacted subject to modification as Charities Act 2011, s 62(1)

³ Charities Act 2011, s 67(3)

⁴ Charitable Trusts Act 1962, s 7(1)(a) (Western Australia); Charitable Trusts Act 1957, s 32(1) (New Zealand)

would jar with the English balanced variation framework. It would allow the reform of trusts without directing the mind of the court to donor intention. For that reason, it is proposed that if adopted in England, inexpediency should be brought explicitly within balanced variation. In applying the trigger, the court should also be directed to consider effectiveness considerations as part of the discretionary process.

By contrast, at the application stage it has been seen that the English model rests on a conceptually sounder footing than in the reform-minded Australasian jurisdictions. The shared legislation in Western Australia and New Zealand permits variation cy-pres for: ‘some other charitable purpose’.⁵ On its face, this is a highly discretionary legislative direction, but the effect of statute has been counter-intuitive. Despite the discretion in the legislation, courts have followed a strict ‘as near as possible’ approach at the application stage.⁶

Legal analysis of the ‘as near as possible’ principle in this thesis shows that outside of a relatively small line of little-known cases,⁷ the English common law contains no such strict principle. So in Western Australia and New Zealand, discretion without further guidance has led to a judicial approach defeating the plain reading of the discretionary legislation.

⁵ *Ibid*

⁶ *Christian Brothers v Attorney General* [2006] WASC 191; *Re Twigger* [1989] 3 NZLR 329; *Re Goldwater* [1967] NZLR 754

⁷ *Re Avenon’s Charity* [1913] 2 Ch 261; *Re Stane’s Will* (1853) 21 LTOS; *Re Prison Charities* (1873) LR 16 Eq 129

Fortunately, in England legislative reform has been more successful. Subsection 67(3) of the Charities Act 2011 follows the balanced variation policy found at the trigger stage. It directs the court to take account of original intention alongside the requirement that funds should be relevant in current social and economic circumstances. There are only scant authorities on point, but those cases that do exist,⁸ suggest that balanced variation works effectively at the application stage. It permits the scheme-maker to make a case-by-case decision appropriate to the circumstances in which the charity is being altered. The statute guides the discretion of the court.

2. Proposals for the Development of Realistic Intention Construction in Testamentary Cases

In its second function, testamentary intention is constructed so that a problematic gift can be effected even though the testator's plans cannot be carried out to the letter. Once called, 'a process of divination,'⁹ intention construction in the context of wills has proved notoriously difficult at law. Following detailed analysis, this thesis has made a number of proposals with the aim of making intention construction more realistic.

i. Rationalisation of the Rules of Construction

⁸ *White v Williams* [2010] EWHC 940; *Aliss v Charity Commission Aliss v Charity Commission* CA/2011/007 First-tier Tribunal (Charity), 17 May 2012; *Ground v Charity Commission* CA/2011/005 First-tier Tribunal (Charity), 29th November 2011

⁹ *Executor Trustee v Warbey* (1973) 6 SASR 336, 346 per Bray CJ

The *rules* of construction should be reduced in number. The various layers to the current law cause both complexity and conceptual difficulty. To this end, the thesis has proposed the abolition of prerogative cy-pres. Although the rule is ancient, there are insufficient cases to for it to be workable. It is a skeleton principle, where a lack of relevant authority leaves the law's treatment of intention unclear. Were the Crown's jurisdiction over schemes to be removed, it would have effect of bringing 'prerogative' schemes under the ordinary law.

In the same vein, rationalisation is suggested in relation to the 'successor organisation' construction. The principle, which developed from the seminal twentieth century case, *Re Faraker*,¹⁰ operates where a gift is left to a charitable organisation that has undergone radical restructuring, but continues to have some formal existence.

Unfortunately, the rule is problematic in terms of realistic intention construction. Where it is applied to testamentary gifts made to restructured organisations serving radically altered purposes from those imagined by the testator, the doctrine has no inbuilt mechanism for restraint. It permits the courts to award the testator's gift to the radically altered charity. Consequently, it cannot be said to realistically effect the donor's testamentary wishes. Building on authority laying the groundwork for a *de facto* merger of the

¹⁰ *Re Faraker* [1911-1913] All ER Rep 488

‘successor organisation’ and ‘general purpose’ constructions,¹¹ this thesis has proposed that the ‘successor organisation’ construction should be abolished.

Finally, in the context of failed public appeals, it has been proposed that ‘out and out’ gift construction should be abandoned in favour of ordinary rules of intention construction. Ordinary cy-pres intention construction can coherently govern failed public appeals, so long as it is acknowledged that very small gifts are likely to indicate general charitable intention. If this were accepted, ‘out and out’ gift construction could be coherently abandoned by the courts in favour of a unified cy-pres construction.

ii. Drawing on Real-World Understandings of Intention

This thesis also proposes that the law develop new and more realistic *understandings* of intention. Its most significant proposal relates to the cy-pres general charitable intention, where it is argued from the perspective of realistic construction, that the current method of precedential construction should be reformed. Currently a complex system of precedents is applied to wills in order to decide the nature of the testator’s intention. The courts must apply those precedents in any given case, and so they are denied flexibility. Being bound by the historic interpretations of past wills has led over time to a restrictive and artificial method of construction.

¹¹ *Kings v Bultitude* [2010] EWHC 1795; *Re Broadbent* [2001] EWCA Civ 714

This thesis has developed the approach of Vinelott J in *Re Woodhams*,¹² proposing that the courts (without regard to past precedent) should identify the essence of the failed testamentary gift in question. If that essence can be saved without destroying it, then it should be effected for charity. If it cannot, then the gift should lapse on the basis that intention cannot realistically be constructed. In this thesis, the skeleton principle set out by the judge in *Woodhams* has been fleshed out and developed into a workable method of construction.

Real-world understandings of intention would also be beneficial elsewhere in the doctrine. It has been argued that the general purpose trust construction should apply equally to incorporated and unincorporated charities. This is on the basis that, in reality, donors do not normally consider the corporate form of their nominated charity before they make the gift. And so the thesis proposes the adoption of an Australasian approach, whereby gifts to incorporated charities can be treated as signifying a general purpose trust.¹³

Again with reference to real-world logic, reform is proposed in the context of testamentary surplus gifts. Whereas the current law conceptualises the donor as having divided his gift into ‘required’ and ‘excess’ amounts, it is suggested that as a matter of fact, donors make single and complete gifts. The law should reflect that psychology by constructing donor intention on that basis. It is

¹² *Re Woodhams* [1981] 1 WLR

¹³ *Moses Montefiore Home v Howell* (1959) 102 CLR 188; *Sydney Homeopathic Hospital v Turner* [1984] 2 NSWLR 406

artificial to conceive of donors as having deliberately given an excess, so the entire gift should be treated as dedicated to charity.

Finally, with regards to the difficult distinction between administrative and cy-pres schemes, it is proposed that the law rely on the subjective intention of the donor. This thesis has shown that at common law, judges have used this method. Elements of a gift are treated as purposive (and consequently amenable to reform cy-pres) because the donor *thinks* they are important. In order for this realistic common law approach to be maintained, the statute should be put to one-side. Parliament did not intend the Charities Act 2011 to regulate the question.

3. Prognosis for Reform

The number of Charity cases in the Chancery Division has long been in decline, and the law of schemes has suffered from the drought. Even in past decades, schemes cases were likely to be decided at first instance. It is notable that in this area, there have been no Supreme Court cases, and the only House of Lords case directly on point dates back to the early Nineteenth Century.¹⁴

The area is dominated by a large number of single-judge decisions spanning centuries. This perhaps explains the complexity of the law. It is rare for lawyers to take a bird's-eye view, and it seems unlikely that there will be a Supreme

¹⁴ *Attorney General v The Iron Mongers' Company* (1834) 39 ER 1064

Court case on point. A reformer waiting for an over-arching analysis of the law from senior judges might have to wait a very long time indeed.

Even without the attention of senior judges, the reform picture is not bleak. In recent times, the most significant developments have come from the legislature rather than the courts. Where Parliament has acted in relation to schemes, it has been successful. The Nathan Report proposed a coherent discretionary system for the reform of established trusts. In the decades that followed, section 13(1) of the Charities Act 1960 ushered in an era where, within a framework of balanced variation, common law complexities were put to one side in favour of a conceptually coherent method of variation.

Perhaps surprisingly, the law of schemes is once again on the radar of legislative reformers. Following technical recommendations made in Lord Hodgson's review of the Charities Act 2006,¹⁵ the Law Commission is investigating cy-pres in the context of charities established by Royal Charter.¹⁶ Yet that is a very precise remit which is unlikely to touch on the issues developed in this thesis. It seems probable that any future relevant reform will occur piecemeal and unpredictably. This was the case with regards to elements of the Charities Act 2006, which put the cy-pres application stage on a statutory

¹⁵ Cabinet Office, *Trusted and Independent: Giving Charity back to Charities: Review of the Charities Act 2006*, July 2012, 137

¹⁶ Law Commission, 'Charity Law: selected issues'
<<http://lawcommission.justice.gov.uk/areas/charity-law.htm>> accessed 20th April 2014

footing.¹⁷ That reform came suddenly, without any directly relevant consultation documents being issued.

Still, reform might come by yet another, and more promising, route. It is no longer necessary to rely on the Chancery Division and Parliament to develop the law. The law of schemes has already seen two Charity Commission Decisions taken to the First Tier Tribunal.¹⁸ That body has no wider powers than the Commission,¹⁹ but where cases reach the Upper Tribunal, precedential changes in the law might be effected. Being a Superior Court of Record, the Upper Tribunal is able to create binding authority.²⁰ There is a special procedure in place; the Attorney General might now also initiate cases in the Upper Tribunal.²¹ The route is in its infancy. So far attention has been diverted by other concerns,²² but should the Attorney General decide to do so, that route into the Tribunal System has capacity to reform the law.

¹⁷ Charities Act 2006, s 14B

¹⁸ *Ground v Charity Commission* CA/2011/005 First-tier Tribunal (Charity), 29th November 2011; *Aliss v Charity Commission* CA/2011/007 CA/2011/007 First-tier Tribunal (Charity), 17 May 2012

¹⁹ Charities Act 2011, ss 315 (1), 315(2), 319(5)

²⁰ Tribunals, Courts and Enforcement Act 2007, s 3(5)

²¹ Charities Act 2011, s 319(2)

²² *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421; *Attorney General v Charity Commission for England and Wales* [2012] UKUT 420 (TCC)

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