Fragmentation of the settlor's role : identifying whose intention matters in fundraising appeal collection trusts

Article

Accepted Version

Fragmentation of the Settlor's Role – Identifying Whose Intention Matters in Fundraising Appeal Collection Trusts

David Wilde, Associate Professor of Law, University of Reading

Introduction

Lawyers are used to referring to 'the settlor' of a trust. And, in particular, to interpreting trusts according to 'the intention of the settlor'.[1] But is it always clear exactly *whose intention* should be consulted? This article will examine fundraising appeal collections, which pose these difficulties in perhaps their most complex form. It will be suggested that the courts may need to look at the intentions of as many as four separate categories of people in order to interpret such a trust.

Meaning of 'the settlor' – and fragmentation of the settlor's role

By way of background, it is perhaps helpful to consider the basic meaning in trusts discourse of 'the settlor'. *Snell's Equity* says:[2] 'The settlor … is the person who creates the trust. He defines the terms of the trustee's powers and duties and constitutes the trust by vesting the trust assets in the trustee.' Thus, the settlor is generally thought of as doing two things to create a trust: (1) declaring the terms of the trust, and (2) donating the trust property. For convenience these two roles will be referred to here as the 'declaratory' role, declaring the trust terms, and the 'contributory' role, providing the trust property.[3]

Of these two roles, the *contributory* role is key to our use of the word 'settlor'. The primary use of the word 'settle' is to denote the dedication of property to a trust. Lawyers speak naturally about 'settling property on trust'. Whereas they speak about 'declaring' trust terms rather than 'settling' them.[4] Our *core* understanding of 'settlor' is, therefore, as the person performing the contributory role. But since furnishing the trust property carries with it the prerogative to decide how that property should be used, the settlor will typically also assume the declaratory role. Hence, we usually have a standard model of 'the settlor' in mind, in which both roles are performed together by the same person: 'the settlor'.

However, the central contention here will be that, sometimes, habitually thinking in terms of this standard model, with its resultant focus on 'the intention of the settlor' when interpreting a trust, is potentially misleading. There is scope for error when this mindset

---

[1] By 'intention' the law means, of course, (at least in general) a party's *apparently manifested* intention, discerned according to usual interpretative techniques: Lynton Tucker, Nicholas le Poidevin, and James Brightwell (eds), *Lewin on Trusts* (20th edn, Sweet & Maxwell 2020), ch 7.

[2] John McGhee and Steven Elliott (eds), *Snell's Equity* (34th edn, Sweet & Maxwell 2020), para 21.010.

[3] Settlors also have an important third role in the creation of trusts: selection of the trustees. The personal qualities and skills of those selected can have a significant impact on the operation of a trust; although the settlor's power of selection is overlaid by rules under which those initially appointed may later be replaced at the instigation of others. This role of the settlor in the creation of a trust is not material for present purposes. Likewise, a settlor can also assume other important roles in the later operation of the trust, which are not generally relevant here. These can include acting as trustee – either as sole trustee, or jointly with others. Short of acting as trustee, the settlor may also reserve powers. Or influence the trustees, for example through a letter of wishes. However, of course, one role the law notably does *not* give a settlor is a right to enforce the trust.

[4] The expression 'settling the trust terms' is, of course, encountered; but 'settling' is being used there as an ordinary English word – as in, 'After deliberation I have settled my plans' – rather than as a trusts law term of art.

encounters a non-standard situation; and in particular when it encounters a less common but entirely straightforward phenomenon readily observable in trusts generally, which will be referred to here as 'fragmentation' of the settlor's role. That is, sometimes – in relation to a single trust – the two activities of declaration and contribution are, in fact, undertaken *by different people*: in other words, the standard dual roles of the settlor sometimes get *fragmented* between two (or even more) people. In particular, a contributory settlor may exercise their prerogative to determine how the property they furnish should be used by *simply assenting to trust terms declared by someone else*. Furthermore, performance of *each individual role*, declaration or contribution, looked at on its own, may also sometimes be *fragmented* between multiple persons: with multiple parties responsible for the declaration; and/or multiple parties responsible for contribution. This is easily demonstrated.

Standard creation of a trust

The classic mode of setting up a trust is for a settlor to both determine the terms of the trust and furnish the trust fund. However, even in this usual scenario, there is in truth typically a modest degree of 'fragmentation' *within* the declaratory role. That is to say, although we would say the settlor decides the terms of the trust, in practice settlors usually share this decision making about the trust terms with their legal advisers, to a significant extent. Settlors will give general instructions, but their lawyers will often make decisions about the technical content of the trust instrument, with some degree of independence, within the parameters set by their clients – with those clients often having little or no real understanding of these details. So, although courts, when interpreting trust instruments, may say they are seeking 'the intention of the settlor', in judgments this has often elided into 'the intention of the drafter'. For example, the true position is exposed by comments in *Twinsectra Ltd v Yardley*.[5]

The emphasis on the intention of those drafting may have to be all the greater where several *different* settlors are executing the same trust instrument, thereby fragmenting the contributory role between themselves.

Occupational pension trust funds

It is obvious that the standard dual roles of a settlor – declaratory and contributory – sometimes get fully fragmented between different people. A conspicuous example is where a new member joins a long-established occupational pension trust fund. The new member is contributory settlor in respect of their membership;[6] but the new member has played no part in the declaratory function – the terms will have been determined by others long ago. The new member merely assents to the already existing terms on a 'take it or leave it' basis. This is the most straightforward type of fragmentation.

There will (usually) also be obvious fragmentation *within* the contributory role itself: with numerous members contributing to the fund, plus contributions by others, such as by employers.

---

[5] [2002] UKHL 12, [2002] 2 AC 164. A lender company advanced money to a borrower's solicitors on written terms, drafted by the lender's lawyers, which were interpreted by the House of Lords as creating a *Quistclose* trust, because that was their objective meaning; although it was unclear whether the lender company had that subjective intention, or understanding. Lord Hoffmann delivering the leading judgment said [17]: 'As for [the 'moving spirit' behind the lender company] Mr Ackerman's understanding of the matter, that seem (*sic*) to me irrelevant. Whether a trust was created and what were its terms must depend upon the construction of the undertaking. Clauses 1 and 2 cannot be ignored just because Mr Ackerman was not particularly interested in them.' Lord Millett, delivering the other substantial judgment on this point, said [71]: 'A settlor must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant. If he enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter into them. Whether paragraphs 1 and 2 of the undertaking created a *Quistclose* trust turns on the true construction of those paragraphs.'

[6] *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399 (PC), 1409.

However, looking at the declaratory role alone, there will (usually) be a single declaration establishing the terms of the trust and therefore only minimal fragmentation *within* the declaratory role – of the limited sort identified in relation to standard trusts, between those instructing and those drafting.

This pattern of fragmentation – clear fragmentation *between* the declaratory and the contributory roles, and clear fragmentation *within* the contributory role, but no major fragmentation *within* the declaratory role – has been recognised to have important implications for how the terms of such a trust should be interpreted.[7]

Fundraising appeal collections

When an appeal is made for donations to a fundraising collection, on first impression we may appear to have a similar pattern of fragmentation to occupational pension trust funds: clear fragmentation *between* the declaratory and the contributory roles (the appeal founders declare its terms and donors contribute), and clear fragmentation *within* the contributory role (with multiple contributors), but only possible modest fragmentation *within* the declaratory role (between those instructing and any lawyers drafting). But, upon examination, we find a more complex instance of fragmentation: with potentially significant additional fragmentation *within the declaratory role*. This fragmentation of the declaratory role will now be considered in stages.

Appeal founders performing the initial declaratory role – assisted by any legal advisers

There is clear authority that the makers of a fundraising appeal perform the initial declaratory role. They declare the objects, and other terms, of the ensuing trust: the contributors merely accept these (although, of course, an individual contributor *might* attempt to impose a special trust on their particular donation; the issue then being whether this had been accepted by the appeal collectors). In *Re Gillingham Bus Disaster Fund*,[8] where the issues focused on the objects of the trust, all three members of the Court of Appeal appeared to make this clear. Lord Evershed MR said:[9]

> 'No doubt a contributor must be taken to have transferred the property in his gift to the three mayors with the intention of its being held and applied by them for the purposes stated in their published appeal.'

Romer LJ said:[10]

> 'It seems to me that the intention of a donor in writing a cheque or putting a coin in a collecting box, and the legal effect of his so doing, was to vest in the trustees a legal interest in the subject-matter of his contribution coupled with an obligation, enforceable in equity, to apply the gift in accordance with the provisions of the appeal.'

Ormerod LJ said:[11]

> 'The same considerations apply, in my judgment, whether the contributions to be considered consist of substantial sums paid by cheque by individual donors, or of small

[7] *Barnardo's v Buckinghamshire* [2018] UKSC 55, [2019] 2 All ER 175, [14]-[15].
[8] [1959] Ch 62 (CA).
[9] [1959] Ch 62 (CA), 73.
[10] [1959] Ch 62 (CA), 76.
[11] [1959] Ch 62 (CA), 78.

> coins put in collection boxes at football matches, and on other similar occasions. The large contributors may take more care to ascertain how the money is to be applied, but all the contributors must, in my view, be taken to have given their contributions to be held and applied for the objects set out in the [appeal] letter.'[12]

It is not untypical for a fundraising appeal to be launched quickly, in response to a tragedy, without taking due legal advice. The courts have indicated that a flexible approach to the interpretation of such lay-prepared appeals is appropriate. Wynn-Parry J, deciding a flood disaster appeal had charitable objects, said in *Re North Devon and West Somerset Relief Fund Trusts*:[13]

> '[O]n the principles disclosed by the authorities, the question is solely one of construction of this comparatively short [appeal] document … [I]t is legitimate, and, indeed, necessary to remember that this appeal was issued only three days after the disaster … and it bears the stamp of having as its authors people who had not had time, if indeed the desirability ever crossed their minds, of consulting their legal advisers. In the case of a document issued in such circumstances it does not appear to me to be proper that the court should be astute to fix on any particular word or words and give to it too wide or, in some circumstances, too narrow a meaning.'

Of course, where lawyers are consulted, they are liable to have their usual input into the trust's terms.[14]

Appeal contributors performing the initial declaratory role?

However, there is an opposing strand of thought: that *contributors* to a fundraising appeal perform the initial declaratory role; and that what the appeal founders say is merely evidence of what the contributors might intend. This no doubt stems for our tendency to think of the provision of trust property as the core of the settlor's role and our habit of interpreting a trust by reference to 'the intention of the settlor'. But it is submitted that this view of fundraising appeal collections is wrong and might potentially lead to further error.

For example, a recent case strongly suggesting that contributors to a fundraising appeal perform the declaratory role is *Mohammed v Daji* (also known as *Mohammed v Mohammed*).[15] Judge Neil Cadwallader, sitting as a High Court judge, emphasised repeatedly that it was the intentions of the contributors to a fundraising appeal – to build a mosque – that determined the terms of the trust. In particular, he said:[16]

> 'It is agreed between the parties that … issues for determination [include:]

---

[12] *Re Hillier's Trusts* [1954] 1 WLR 700 (CA) does not appear to depart from this guiding principle about how the objects and terms of a trust are to be identified but does show the practical problems that can arise. The case involved the collection of a charitable fund over a number of years, from a variety of sources, based on a series of appeals each evidently stated in differing terms, with some appeals giving donors the option to stipulate a choice from a range of specific uses for their individual contributions within the overall appeal cause, and with the court providing for an inquiry into whether any donors had gone further by imposing personal terms on their donations.

[13] [1953] 1 WLR 1260 (Ch), 1263.

[14] For Charity Commission guidance urging the taking of legal advice, see *Charity Emergency Appeals: Starting, Running and Supporting Charitable Emergency Appeals (CC40)* (as updated 31 October 2022) Charity emergency appeals: starting, running and supporting charitable emergency appeals (CC40) - GOV.UK (www.gov.uk); and *Charity Fundraising Appeals: Appeal Wording and Record Keeping* (31 October 2022) https://www.gov.uk/government/publications/charity-fundraising-appeals-for-specific-purposes.

[15] [2023] EWHC 2761 (Ch).

[16] [2023] EWHC 2761 (Ch), [23]-[26].

> (1) In the circumstances, with what objective intention on the part of the donors and lenders was £1.4 million contributed for the purchase of the Land? …

I take the following general propositions of law, which I take to be uncontentious, from *Tudor on Charities*, 11th ed., 18-048ff …

> "At one level the law is clear: a donation will be held for the purposes intended by the donor. That intention will be ascertained objectively by reference to the terms on which the donor made his gift to the recipient; construed against the factual background known to the donor …"[17]

In the present case, the active parties are agreed that a donation will be held for the purposes intended by the donor ... That intention will be ascertained objectively by reference to the terms on which the donor made his gift to the recipient; construed against the factual background known to the donor (or, as leading Counsel for the Claimants put it, "available to" the donor – but I did not understand him to mean more than "known").

That is an approach consistent with the general rule that a lifetime settlement is to be interpreted by ascertaining the objective intention of the settlor: see *Lewin on Trusts* 20th ed., at 7-004 and 7-005. The admissible circumstances in construing a lifetime settlement do not include the subjective intention of the settlor: *ibid*. That applies equally here. A charitable donor is indistinguishable in principle from any other settlor of trust funds: see *Charity Commission v. Framjee* [2014] EWHC 2507 at para.28 (d). *Re Church Army* (1906) 94 LT 559 concerned a charitable society which had solicited and received some donations. The question was, what were the terms of the trust on which the charitable society held those donations. The answer did not depend on the intention of the charitable society. It depended on the intention of the donors. As Collins MR put it at 198:

> "The real question at the heart of the whole thing is, What is the intention of the donor?"[18]

I did not understand there to be any difference between the parties over this proposition, which applies to charitable appeals as it does to formal charitable settlements.'

The judge reduced the terms of the appeal to merely evidence of the contributors' intentions:[19]

---

[17] Although note that this passage from *Tudor*, as quoted by the judge, also included a further section, which has been omitted from the text here; because it was not made the focus of what the judge later went on to say. That section from the *Tudor* quotation, omitted here, arguably stands in contradistinction to the wording from the book that the judge focused on. It said (emphasis added): 'If a simple appeal is made for funds for particular purposes which are in law charitable, then as soon as funds are received pursuant to it a charitable trust will be constituted. Those funds will be held on trust *for the purposes which have already been referred to in the terms of the appeal*.'

[18] The context of this statement in *Re Church Army* (1906) 94 LT 559 (CA) was that a corporate charity had provided donors with a form on which to indicate which of the charity's various projects the money should go towards supporting. The donors' intentions obviously counted in the *limited* sense that the charity gave them a set of options to select from. But, of course, all of the options to which they could dedicate their donations were *as set by the charity*.

[19] [2023] EWHC 2761 (Ch), [27]. See also para [28].

> 'It is still a question of ascertaining the intention of the donors. The terms of the appeal to which the donors have responded will be at least good evidence, and perhaps (depending on the facts) determinative evidence, of the intention of the donors as ascertained objectively.'

The difficulties of this approach can perhaps be illustrated by considering the background to the *Mohammed v Daji* litigation. The fundraising in the case was marked by factional intrigues, financial machinations, including false representations of authority, and general disagreement. Suppose, hypothetically, in such a context, that a public meeting is held in a particular locale to discuss an ongoing appeal. Statements are made there about how the fund will be applied. These statements are made with the appearance of authority, but by people who in truth merely *hope* to secure control of the fund. They do not actually represent the appeal and are in no position say how the fund is to be applied. And their statements are inaccurate. The judge would apparently have treated such statements as relevant to forming the intentions of the contributors at the meeting – which of course he regarded as determining the terms of the trust. Should statements by these interlopers bind the appeal collectors to trust terms they know nothing about, running contrary to the real content of their appeal?

The dilemma for the law can perhaps be illustrated by reference to an old case, entirely outside the category of fundraising appeals: *Re Skinner's Trusts*.[20] A settlor's will left money on trust to publish a book he had written, the profits of which would contribute to a college fund for his grandson. There was an issue as to the *objects* of the trust. Page Wood V-C classified this as a *beneficiary trust*, for the grandson, rather than a *purpose trust*, for the purpose of securing publication of the settlor's own book. He identified the trust object – as person or purpose – by reference to the settlor's apparent intention, asking which object he principally intended to benefit. The judge said:[21]

> 'This case appears to be near the border line between these classes of authorities; but I think, upon the whole, that the benefit of the legatee must be taken as the guiding rule. The primary intention is clearly to benefit the legatee.'

Suppose a similar grandfather-author today who, instead of putting his own money into the venture, *launches a fundraising appeal*, on the same terms as set out in the will, to get the book published for the benefit of the grandson. The first donor writes, 'I am delighted to support such a worthy publication – although I do not approve at all of your spoiling your grandson in this way'. The second donor writes, 'I am delighted to do anything to support your charming grandson – although I really doubt the world needs another book on this topic'. The first donor is clearly seeking to back the publication of a book; the second donor is clearly seeking to benefit an individual. On what terms will the grandfather author hold the trust fund he collects? If we follow 'the intention of the settlor' – meaning the provider of trust property – there are apparently two distinct trusts arising from these two donations. One is a purpose trust for publication of the book – which appears to fail as a non-charitable purpose trust, leading to a resulting trust for the contributor (or their estate if dead); the other is a beneficiary trust for the grandson, which would of course be valid. But it is submitted the correct view is to recognise a complete separation of the dual settlor roles here. That is, to say that the trust is declared by the grandfather-author alone, as the appeal initiator: it is his intentions that must be discerned to identify the objects and terms of the trust fund he collects – while the contributors merely donate funds on set, given terms. In other words, the donors' respective statements are merely

[20] (1860) 1 John & H 102, 70 ER 679.
[21] (1860) 1 John & H 102, 70 ER 679, 106.

expressions of their *motives* for contributing to a trust fund, the terms of which they had no control over. Consequently, there is only a single trust fund, on the terms of one single declaration.

A more contemporary illustration of the same point might be a crowdfunded online trust. An interesting and increasingly common example is funds raised to pay litigation costs, from supporters of a cause supposedly being furthered by legal action. Suppose a litigant is suing in an action that the political left or right, or any other group, would be sympathetic towards, as furthering their agenda. The litigant uses a crowdfunding platform to appeal for donations on trust, saying, in effect, 'Contribute towards my litigation costs and support the worthy cause that I am championing'. What is the object of this trust?[22] If we were to regard the intentions of the donors, most will see themselves as supporting a political cause – suggesting a problematic non-charitable purpose trust.[23] But it is submitted that the views or intentions of these contributors are irrelevant to determining the objects of the trust. The declaration of trust, determining the objects and terms of the trust, is made by the litigant who launches the appeal *alone.* And the trust will inevitably be a beneficiary trust for them.[24] The courts lean strongly towards finding a beneficiary trust rather than a non-charitable purpose trust in cases where both a person and a purpose are potentially being served.[25]

The better view, therefore, is that the initial declaratory role in a fundraising appeal is performed by the appeal's organisers – sometimes with input from their legal advisers.

The trustees performing a clarifying declaratory role – assisted by any legal advisers

It seems clear that *the trustees of the fund* can then sometimes – in that capacity – perform a further part of the declaratory role: by clarifying the terms of the trust. Often the appeal organisers will *themselves* collect the fund and serve as trustees of it. But sometimes they will nominate *others* to collect donations and to serve as trustees. So we may now be considering a contribution to the declaratory function by further parties. And again *their* legal advisers may have an input.

A common fundraising scenario is for the appeal cause to be initially identified in only outline form: then later a trust deed on more detailed terms is executed by the trustees. Although described here as a 'clarifying' role, the clarification can be fundamental: determining the very objects of the trust – and even, it seems, whether the trust is a charitable trust for the public or a private trust for beneficiaries.

The trustees' power to execute a clarifying declaration was established by the decision in *A-G v Mathieson*.[26] The approach there was approved by the Supreme Court in *Shergill v*

---

[22] On the general framework of trusts involving crowdfunded litigation costs, see further, David Wilde, 'Trusts of Crowdfunded Litigation Costs – Purpose Trusts or Beneficiary Trusts?' (2024) 30 T&T 94.

[23] Although we might again conceivably face the problem of a divergence of views amongst contributors: for example, a donation with the online comment attached, 'I strongly disapprove of your lawsuit, but you have always been a good friend to me, so here is my donation to support you' – suggesting a beneficiary trust.

[24] Paying for them to either receive services or the discharge of a liability. For the general nature of such beneficiary trusts, see David Wilde, 'Trusts and Purposes – Settlors Assigning Purposes to Beneficiary Trusts' (2023) 36 TLI 141.

[25] Charlie Webb and Tim Akkouh, *Trusts Law* (5th edn, Palgrave 2017), para 4.6, discusses the authorities. No matter how much the litigant who launches the appeal may believe they are ultimately advancing a political cause – pursuing a purpose – that would be merely a matter of *motive* behind the creation of the trust: the *object* of a trust is who or what the trust is designed to benefit *directly by execution of the trust's declared terms*, and this trust stipulates payment of their bills. For the distinction between motive and object, see *Re King* [1923] 1 Ch 243 (Ch), 245.

[26] [1907] 2 Ch 383 (CA).

Khaira,[27] where the judgment observed:[28] 'There does not appear to have been much discussion or development of the principles laid down in the *Mathieson* case, either in the textbooks or in the cases.' And the judgment later reiterated:[29] '[T]he law in this area is surprisingly undeveloped…' At least some elaboration will be attempted here.

The general understanding appears to be that the proposition laid down in *A-G v Mathieson* is restricted to charitable trusts. However, on analysis, this seems not to be correct: the case seems in truth to lay down a principle applicable to trusts in general.

A-G v Mathieson viewed as a decision about charitable trusts only

On the conventional understanding of *A-G v Mathieson* – which limits it to a decision on charitable trusts only – the case shows that, where donations are made to a charitable appeal collection stated in general terms, those collecting the fund have implied authority from the donors to declare the specific trusts affecting the fund; within the limits of what is reasonable. Cozens-Hardy MR, delivering the leading judgment held:[30]

> 'When money is given by charitable persons for somewhat indefinite purposes, a time comes when it is desirable, and indeed necessary, to prescribe accurately the terms of the charitable trust, and to prepare a scheme for that purpose. In the absence of evidence to the contrary, the individual or the committee entrusted with the money must be deemed to have implied authority for and on behalf of the donors to declare the trusts to which the sums contributed are to be subject. If the individual or the committee depart from the general objects of the original donors, any deed of trust thus transgressing reasonable limits might be set aside by proper proceedings instituted by the Attorney-General, or possibly by one of the donors. But unless and until set aside or rectified, such a deed must be treated as in all respects decisive of the trusts which, by the authority of the donors, are to regulate the charity. And it is irrelevant to urge that the donors did not originally give any express directions on the subject…'

The focus of this passage is on the donors impliedly *authorising* the appeal collectors to make a declaration of trust. It has been suggested above that, in truth, appeal organisers perform the declaratory role as to the trust objects and terms of a fundraising appeal collection, rather than the contributors; so the present author would prefer to say that the appeal collectors impliedly *assume* a discretion over the detailed formulation of the trust and the donors impliedly *acquiesce* in this. The change is minimal.

This could be understood as a rule peculiar to charitable appeal collections only: part of the special treatment of charities. That is, a rule related to the wider principle established in *Moggridge v Thackwell*:[31] a gift bearing a general charitable intent will not fail because it lacks details about how the property is to be used, or gives impracticable details – in those situations details, or new practicable ones, will be supplied.

A-G v Mathieson viewed as a decision going beyond charitable trusts

However, *A-G v Mathieson* need not be understood as an authority limited to charitable donations specifically. Indeed, it is far from clear that the donation in issue in the case was charitable – that is, exclusively charitable. An examination of the facts suggests it was not. From 1876, the Reverend Wilkinson led the Mildmay Mission to the Jews, which had no formal constitution or statement of its purposes. Wilkinson held its funds and other assets personally.

---

[27] [2014] UKSC 33, [2015] AC 359.
[28] [2014] UKSC 33, [2015] AC 359, [27].
[29] [2014] UKSC 33, [2015] AC 359, [34].
[30] [1907] 2 Ch 383 (CA), 394.
[31] (1803) 7 Ves 36, 32 ER 15 (affd (1807) 13 Ves 416, 33 ER 350).

The mission carried on a range of activities, all of which were apparently taken by the court to be charitable (under one head of charitable purpose or another).[32] In 1884, a lady offered a substantial donation. Wilkinson asked her how it was to be used and she suggested a second convalescent home. He suggested a home and school for children instead. She responded, 'Use it for that or any other way you like'. The donation was in fact used to found a home and school for children. Given the growth in the mission's assets, a deed of trust was executed in 1885, which was held to be binding, declaring the Mission's property was held on trust: 'To preach the Gospel of our Lord Jesus Christ to Jews in Great Britain and Ireland (and also in foreign parts if it is deemed desirable), employing in the prosecution of the work medical missions, convalescent homes, inquirers' homes, homes for destitute children, agencies for procuring employment and assisting emigration, night schools for children, sewing classes for women, and various kinds of organizations for ministering discriminately to the temporary needs of the Jews, and for promoting the salvation of their souls.'

In short, the situation in *A-G v Mathieson* was a mission carrying out an expanding variety of seemingly charitable works, but with no constitution limiting it to serving charitable purposes only; and its leader receiving a donation, to be used in 'any … way you like'. It is hard to see that as the imposition of an *exclusively* charitable trust.[33] Granted the donation was, by implication, not an outright beneficial gift to Wilkinson – not usable for personal purposes – but was instead implicitly a gift on trust for purposes. But was there anything to limit those purposes to legally charitable purposes?[34] Would the donor have had any grounds for complaint if some or all of the donation had been used for philanthropic but, legally, non-charitable purposes? It is submitted that no such complaint could have been made; because it would *not* be correct to characterise this donation as on trust for *exclusively charitable* purposes – to be identified more fully in due course. This was, instead, a donation that could be used for charitable or non-charitable purposes; with the recipient empowered to decide how to use it; and he in fact determined to subject the property to a charitable trust.[35]

Note further that the declaration of the charitable trust in the 1885 deed was expressly made *revocable*. Assuming it is possible, on general principle, to make a charitable trust revocable – as it seems to be[36] – the power to revoke in *A-G v Mathieson* (if the analysis above is correct) was a power to revoke and use the property for philanthropic, but not necessarily legally charitable, purposes.

---

[32] The mission's activities seemingly included: a medical mission home and dispensary; a general mission home and reading-room; a printing house and inquirers' home; and a convalescent home in connection with the medical mission.

[33] Although the 1885 trust deed contained a recital – whether accurate or not – that the property had been donated 'for charitable purposes'.

[34] Contrary to the view expressed here, Cozens-Hardy MR would seemingly have been inclined to say that there was a trust specifically for the purposes of the proposed home and school ([1907] 2 Ch 383 (CA), 395): 'I have thought it right to approach the consideration of the case on the assumption that the money was given to and accepted by Mr. Wilkinson for the purposes of the mission, but free from any restrictions or conditions. I doubt whether this is the true result of his evidence and of the statements in the report for 1884, in which it is treated as a "special gift for home for Jewish children." But as this point was not taken in the Court below, I prefer not to base my decision upon it.'

[35] Of course, there could not be a valid trust for purposes including non-charitable philanthropic purposes, seemingly meaning the donation was technically held on a resulting trust for the donor upon receipt. But the recipient would nevertheless have had the donor's *authorisation* to use the money for philanthropic purposes until the donor revoked that authorisation, or died so as to terminate it: Paul Matthews, Charles Mitchell, Jonathan Harris, and Sinéad Agnew (eds), *Underhill and Hayton Law Relating to Trusts and Trustees* (20th edn, LexisNexis 2022), para 10.139.

[36] Hubert Picarda, *The Law and Practice Relating to Charities* (4th edn, Bloomsbury Professional 2010), 380.

A-G v Mathieson principle as an instance of an executory trust

It has been suggested recently that the *A-G v Mathieson* principle is explicable as an instance of an executory trust.[37] Judge Neil Cadwallader, sitting as a High Court judge, made the suggestion in these terms in *Mohammed v Daji*:[38]

> '[W]here a charitable trust is initially created by donors in general or vague terms, it is open to the trustees to execute a more specific deed which limits the terms of the trust, provided it does not conflict with the terms on which the donors made their donations: *Attorney General v Mathieson* [1907] 2 Ch 383…
>
> The principle bears many similarities to, and (although nothing turns on the point for present purposes) may be identical with, the law relating to executory trusts.'[39]

It is hard to see *A-G v Mathieson* itself, on its particular facts, as involving an executory trust.[40] But it is much easier to see an executory trust arising from application of the principle in *A-G v Mathieson* to the general run of fundraising appeal collections. If this scenario *does* produce executory trusts, these would be executory trusts arising from *implication*, rather than the usual express statement of an executory trust obligation. The suggestion appears to be that those collecting the appeal fund impliedly undertake to donors to do all that is reasonably required to make the appeal fund functional, in line with its generally stated cause; and insofar as this requires a declaration of trust to be made, they assume an obligation to do so – an implied

---

[37] David Wilde, 'Executory Trusts: the Scope for their Creation (including within Fundraising Appeals)' (2024) 30 T&T (forthcoming), attempts to explain this term: 'The expression "executory trust" does not have a single straightforward meaning: it is used in multiple senses. It is only possible to describe the meaning *usually* intended when lawyers talk about "executory trusts" as a distinctive type of trust, constituting a discrete area of trusts law. That *core* understanding seems to be as follows. An executory trust exists where property is held on a current trust, but there is an obligation to execute a further, final trust instrument respecting the property, involving new terms. The party subject to the obligation to execute new trust terms may or may not be the trustee holding the trust property; and the party subject to the obligation to execute new trust terms may have had that obligation imposed on them by another or may have chosen to assume it unilaterally. The obligation to execute new trust terms only designates those terms in general outline, so that fuller details for those terms have to be devised by the party subject to the obligation. If the obligation was *imposed* on the party subject to it, this involves a duty to discern and give effect to the intentions of the party creating the obligation, while nevertheless exercising some degree of discretion over the precise terms. If the obligation was *assumed*, rather than imposed, accordingly there is instead a free discretion to formulate the trust terms, but within the limits set by the statement of the obligation assumed.'

[38] [2023] EWHC 2761 (Ch), [30]-[32].

[39] Fundraisers appealed for money to establish a London mosque. They used gifts and loans donated to purchase land in their names, as trustees, in 1996. The trustees executed a declaration of trust, bearing the same date as the land transfer, but not actually made until 1998 on the judge's findings. This was held to be a binding declaration of the charitable trusts on which the land was held: until 1998 there had been 'in effect' an executory trust over the funds raised, with the contributors authorising the trustees to declare a finalised trust, in line with the contributors' intentions, later: [2023] EWHC 2761 (Ch), esp [151]. (See above for criticism of the idea that the *contributors* perform the declaratory role in a fundraising appeal collection.)

[40] As analysed above, the case seems to have involved a donation purportedly on trust for philanthropic, but not necessarily charitable, purposes. This was therefore technically an invalid trust, because it went beyond the limits of charitable purposes. But it nevertheless constituted a valid authorisation to use the property for philanthropic purposes. It is hard to see that there existed the necessary elements for an executory trust: a subsisting trust, plus an obligation to declare a further trust. If the case is understood as involving an executory trust, it would then be apparent authority for the proposition that there can be a valid executory trust obligation to declare a trust for either charitable or non-charitable purposes – which, of course, could only be effectually carried out by subsequently declaring a charitable trust. cf Peter Luxton, *The Law of Charities* (OUP 2001), para 25.21.

executory trust obligation – which involves, in turn, the assumption by them of a discretion over the detailed formulation of the trust, a discretion impliedly acquiesced in by the donors.[41]

If this is correct, it constitutes an additional reason for saying that the principle in *A-G v Mathieson* is not limited to charitable trusts. The overwhelming majority of *express* executory trusts have been private trusts – indeed *express* charitable executory trusts have been something of a rarity.[42] It would be extraordinary, then, to exclude private trusts from the recognition of *implied* executory trusts.

A-G v Mathieson principle: the scope of the trustees' discretion – trusts that may be either charitable or for beneficiaries

It can easily happen that a fundraising appeal collection is launched for a cause stated in general terms, which terms are capable of later being refined into *either* a charitable trust or a non-charitable trust by a definitive declaration of the trusts. An example is given in *Hanbury and Martin*:[43]

> 'Problems can arise when public appeals for donations are made after some accident or disaster, if insufficient thought has been given to the question whether the fund is to be charitable or not. Such was the case with the loss of Penlee Lifeboat in Cornwall in 1982, when over £2million was donated by the public to the dependants of the lost crew, numbering eight families. If charitable, the fund would attract tax relief but, contrary to the expectations of some donors, it could not be simply divided amongst the families, as charitable funds, being essentially public in nature, cannot be used to give benefits to individuals exceeding those appropriate to their needs. Any surplus would … under the cy-près doctrine … be applied to related charities. If, on the other hand, the fund was not charitable, it would not attract tax relief, but could be distributed entirely among the dependants [as beneficiaries] … In the *Penlee* case it was decided, after negotiations with the Attorney General and the Charity Commissioners, to forego tax relief and to treat the fund as private, so that the money could be divided among the families.'

It does not appear to have been *necessary* to see this Penlee fund as non-charitable. The initial appeal indicated a non-charitable fund; but a clarification very shortly after indicated a charitable fund – although significant donations had arrived spontaneously before either the appeal or the clarification.[44] After another tragedy at sea that had claimed fewer lives (six), a fund for the relief of their dependants was treated as charitable, with the dependants treated as a sufficient section of the public, seemingly within what would today be 'the relief of those in need because of … financial hardship' (under Charities Act 2011, s 3(1)(j)): *Cross v Lloyd-*

---

[41] In *Re Orphan Working School and Alexandra Orphanage's Contract* [1912] 2 Ch 167 (Ch) Parker J applied the *A-G v Mathieson* principle where the ultimate declaration of trust made *appeared* possibly to be for wider objects than the terms of the initial fundraising appeal had mentioned, saying, '[W]e have subscriptions which, on one construction of what was done, may be said to have been subscribed for a special purpose [a new school], but the committee who received the subscriptions, acting no doubt with more information than we have after all these years have passed, had trusts declared which were in fact general trusts [for any purposes decided on by the fundraising charity]; but it seems to me that … the committee are the agents for declaring the trusts, and what they declare is prima facie to be considered as carrying out the intention of the donors…'

[42] Although they can be found: for example *Harris v Sharp* [2003] WTLR 1541 (CA – decided in 1989).

[43] Jamie Glister and James Lee (eds), *Hanbury and Martin Modern Equity* (22nd edn, Sweet & Maxwell 2021), para 15.065 (note omitted).

[44] See the account by Hubert Picarda, 'Spontaneous Disaster Funds' (1982) 132 NLJ 223.

Greame.[45] Therefore, there appears to have been an option to treat the Penlee fund as either charitable or non-charitable – with the trustees choosing the latter. The trustees appear to have simply administered the Penlee fund as a beneficiary trust, in the reasonable belief (having consulted the Attorney-General) that this would not be challenged. However, it is suggested that, technically, the correct approach would have been to treat the fund collection as an implied executory trust, and to follow this up with the declaration of a beneficiary trust. Without such an approach, technically, the fund appears to have been on a trust that should have failed for uncertainty of objects – if it really was not possible to say from the terms of the appeal and clarification whether the fund was committed to being a charitable or a non-charitable trust.[46]

What is being suggested here might appear to some to amount to a legal monstrosity. The suggestion is that there can be valid executory trusts where, although the objects are known in outline terms – supporting the bereaved families in the Penlee case – the objects are not yet sufficiently determinate to know whether the executory trust is charitable or non-charitable. *Can there be a valid trust where we do not know that?* Charitable trusts, of course, are exempt from the requirement of certainty of objects: but to apply that proposition we need to know that the trust is *exclusively* charitable. Otherwise, surely a trust – even an initial executory trust pending a final declaration – *must have* sufficiently certain objects? The answer, it is suggested, is that the law only requires the objects of a trust to be certain *or ascertainable*: and the objects of an executory trust will be ascertained when the duty to execute a final declaration of trust is performed.

Although the expression 'certain or ascertainable' is a familiar one, it is not one that has been explored in great depth. There is a degree of ambiguity over exactly what it means. Would it extend to this situation? Here the objects of the trust can only be 'ascertained' *through a party performing a duty under which they have a significant discretion as to the final outcome*. Can that be encompassed within the scope of what the law means by 'certain or ascertainable'? It is suggested that it can. To take a comparator, everyone accepts that a declaration of trust by a testator over 'the residue of my estate' is valid.[47] The law's requirement of certainty of trust property is satisfied: although the residue of an estate is not certain property it is nevertheless ascertainable property – it is calculable by the deceased's personal representatives performing their duty by deducting expenses from assets. It might be thought that this is a mechanical process, with an inevitable predetermined mathematical outcome. And often it may be. But it *can* involve the exercise of considerable discretion by the personal representatives: for example, over whether to pursue or settle substantial legal actions.[48] We

---

[45] (1909) 102 LT 163 (Ch). Peter Luxton, *The Law of Charities* (OUP 2001), para 5.03, specifically views the case as, 'Outside the relief of poverty'. See generally David Wilde and Imogen Moore, 'Charity Law's Transition from "Poverty" to "Financial Hardship"' (2021) 34 TLI 249.

[46] In reality, it appears such niceties of trusts law can get fudged in disaster appeal cases, in the face of public sentiment. An illustration is provided by Michael Chesterman, *Charities, Trusts and Social Welfare* (Weidenfeld and Nicolson 1979), 339-44 (notes omitted): 'On 21 October 1966 a huge coal-tip belonging to the National Coal Board collapsed, crushing a school-house and about forty other buildings in the small Welsh village of Aberfan. One hundred and sixteen children (belonging to 99 families) and 28 adults were killed, and another 29 children injured. A public appeal launched almost immediately by the local mayor attracted nearly 99,000 separate donations. Within about two months, the fund totalled £1.5 million and it ultimately closed at nearly £1.75 million … The committee ultimately opted for a charitable form of words… The aftermath is instructive. In September 1967, the fund's management committee came to make its first substantial distributions to bereaved families … The suggestion that these should be graded according to "need" … provoked such bitter opposition within Aberfan (and indeed, some of the donors) that eventually the charity commissioners' sanction had to be obtained to the distribution of a flat sum of £5,000 to each bereaved family, irrespective of its financial circumstances … [T]his was probably a technical breach of trust … Aberfan is a striking example of [an activity which is charitable in the popular sense, though not in law] …'

[47] *Palmer v Simmonds* (1854) 2 Drew 221, 61 ER 704.

[48] Trustee Act 1925, s 15.

can therefore have property that is ascertainable only *through a party performing a duty under which they have a significant discretion as to the final outcome*. This looks equivalent to what the posited executory trust would involve.

The Attorney-General would, of course, have standing in relation to an executory trust that might or might not become charitable; just as the office has standing in relation to a final declaration of trust, where there is scope to dispute whether it is charitable or not – a trust that may or may not end up being interpreted by the court as a charitable trust.

There is a striking comparison between the posited executory trust, one that might or might not become charitable – with its obligation and discretion – and a *discretionary trust*, where the trustees have a discretion to select between beneficiaries and charitable objects, which of course is perfectly valid.[49] The difference between such an executory trust and such a discretionary trust is more a matter of form than substance. It is submitted that the posited executory trust should be recognised in the law.

A-G v Mathieson principle: application to trusts for beneficiaries

If the argument made here is accepted, it follows, of course, that the principle in *A-G v Mathieson*, and the executory trust it seemingly involves in the context of fundraising appeal collections, will operate equally in relation to an appeal collection for an individual or individuals that is clearly *not* charitable from the outset, because it is obviously for private rather than public purposes – unquestionably a beneficiary trust.[50] However, the principle could only apply if there was seen to be a sufficient uncertainty as to the terms on which the fund had been collected: a court might conclude the terms of the collection were such that they instead conferred a simple outright beneficial interest for the individual or individuals the fund was raised for. For example, in *Re Johnson*[51] a fund was collected by appeal for a mother whose son had drowned attempting to rescue a child, leaving her unprovided for. Most of the fund was raised through a newspaper letter saying, 'a subscription list had been opened … to provide for the immediate needs of the widowed mother'. A smaller part was raised by a letter to private individuals saying, 'you will realise that a sum of at least £500 is necessary to be of any use for investment purposes, to provide … a small weekly pension'. Simonds J held that the mother was absolutely entitled to the fund and ordered it should be paid to her. He rejected the argument of the fundraisers that there was, in effect, an executory trust:[52]

> 'The plaintiffs say that [the fund] is in their hands as trustees, and that it is for them to declare the trusts and to say how it shall be invested, and for them to say that, if they do not utilise the whole fund, there will be a resulting trust for the subscribers.'

Simonds J instead treated this as a collection of money on terms that it was for the mother, *simpliciter*. In particular, he emphasised that the only reference to possible investment and payment of a pension was in the private letter. This was, therefore, on the facts, the only implication that the trustees might hold the fund into the future; and it was in truth a weak one, given that investment and a pension was merely presented as one option and was in any case

---

[49] *Salusbury v Denton* (1857) 3 K & J 529, 69 ER 1219. (For fundraising appeal collections expressly in the form of private trusts in favour of beneficiaries, but with a discretion to make payments to charity, see Peter Luxton, *The Law of Charities* (OUP 2001), paras 25.10 and 25.16.)

[50] Although the notion that fundraising appeal collections can involve executory trusts has been presented here as a recent suggestion, it is in truth an old one in the context of private trusts: see the argument of counsel for the subscribers in *Re The Abbott Fund* [1900] 2 Ch 326 (Ch), 329.

[51] [1938] 2 All ER 173 (Ch).

[52] [1938] 2 All ER 173 (Ch), 176.

quite consistent with the fund being handed to the mother to invest herself. This was, therefore, simply a collection of money *for the mother*. Simons J concluded:[53]

> 'In the present case, there is a trust for the benefit of Mrs Johnson. It is unqualified and absolute. The money was collected for Mrs Johnson, and she is entitled to it. I can find nothing in the expression of the trust as to the mode of application.'

The contributors performing a supplementary declaratory role – with regard to surpluses

So far, it has been suggested that the makers of a fundraising appeal perform the initial declaratory role with respect to the collected trust fund; the trustees may sometimes then make a clarifying declaration; and either of these parties may engage lawyers to take responsibility for drafting the detail of their declaration. It appears the *fund donors* may then have a supplementary declaratory role – as to the destination of any surplus.

The terms of a fundraising appeal (whether as initially made or as clarified later), launched for a particular purpose – for example, to pay for a medical procedure – may provide expressly or by implication for what is to happen to any surplus trust funds collected, once that purpose is completed or in case it proves impossible. But, if there is no such provision, the law appears to (in effect) ask whether the donors made any supplementary trust declaration to govern the destination of the surplus – invariably an implicit declaration, of course, to be deduced from the circumstances.

Surpluses in fundraising for beneficiaries

Considering first the case law on fundraising appeals for beneficiaries.[54] In *Re The Abbott Fund*,[55] a trust fund was raised from subscribers to maintain two impoverished deaf and mute women. Stirling J began his judgment by saying:[56] 'The difficulty in this case arises from the fact that there is no declaration of trust … We have no information as to the terms on which this fund was handed over …' This is most naturally read as implying that the founder of the collection appeal was the party who initially set the trust's terms – that is, he was recognised as performing the declaratory role – but he had not made a satisfactorily comprehensive declaration. The judge inferred that it was intended the women should be entitled only to expenditure from the fund on their maintenance: the fund was not absolutely theirs, forming part of their estates at their deaths. When they died what remained went back on resulting trust to the subscribers. The judge did not indicate *whose* intention governed this matter; but he presumably meant he was now resorting to the intention of the subscribers. He said:[57]

> 'The ladies are both dead, and the question is whether, so far as this fund has not been applied for their benefit, there is a resulting trust of it for the subscribers. I cannot believe that it was ever intended to become the absolute property of the ladies so that they should be in a position to demand a transfer of it to themselves, or so that if they became bankrupt the trustee in the bankruptcy should be able to claim it. I believe it was intended that it should be administered by … the trustee or trustees [who] were

[53] [1938] 2 All ER 173 (Ch), 176.
[54] Not everyone would agree with the description of these funds as 'beneficiary trusts': on this point see David Wilde, 'Trusts and Purposes – Settlors Assigning Purposes to Beneficiary Trusts' (2023) 36 TLI 141.
[55] [1900] 2 Ch 326 (Ch).
[56] [1900] 2 Ch 326 (Ch), 330.
[57] [1900] 2 Ch 326 (Ch), 330-31.

> intended to have a wide discretion as to whether any, and if any what, part of the fund should be applied for the benefit of the ladies and how the application should be made.'

There seems to be confirmation that the court is *initially* concerned with the terms declared by the appeal founder, and then *subsequently* concerned with the intentions of the donors, to be found in the later case of *Re Andrew's Trust*.[58] That case produced an outcome that is frequently contrasted with *Re Abbott*, above. Money was collected from friends of a dead clergyman to pay for the 'education' of his infant children. Once they were grown up and their formal educations complete, the children were held entitled to what remained in the fund in equal shares. There was not a resulting trust for the fund subscribers this time. In reaching this decision, Kekewich J focused first on the terms set by the collector:[59]

> 'Here the only specified object was the education of the children. But I deem myself entitled to construe "education" in the broadest possible sense, and not to consider the purpose exhausted because the children have attained such ages that education in the vulgar sense is no longer necessary.'

He then added that, assuming this was not the correct interpretation, so that the issue in the case could not be determined solely by reference to the collector's terms in this way, he would then turn to the intentions of the subscribers:[60]

> 'Even if ["education"] be construed in the narrower sense it is, in Wood V.-C.'s language, merely the motive of the gift, and the intention must be taken to have been to provide for the children in the manner (they all being then infants) most useful.'

This was a reference to Page Wood V-C's statement of principle in *Re Sanderson's Trust*:[61]

> 'If a gross sum be given, or if the whole income of the property be given, and a special purpose be assigned for that gift, this Court always regards the gift as absolute, and the purpose merely as the motive of the gift, and therefore holds that the gift takes effect as to the whole sum or the whole income, as the case may be.'

This proposition, that the law 'always' interprets the gift in this way, has since been modified to the law *presuming* that this is the correct interpretation: *Re Osoba*.[62] Note that *Re Andrew's*, insofar as it applied the presumption, was therefore avowedly concerned with an *attributed* intention rather than any *real* intention. In *Re Abbott* and *Re Andrew's*, it is unlikely that anyone thought beyond the maintenance or education mentioned, so as to form any actual positive intention that the beneficiaries should have more than that. But in the *Re Andrew's* case, a rule that we now understand is a rebuttable presumption about intention was invoked to resolve the issue – and it seemingly *must* have been the contributors' intentions that was considered relevant given the formulation of the presumption. That presumption has doubtless emerged *precisely because* in such cases no one foresees the issue of a surplus, so as to form any actual intention: hence the law attributes, in a presumptive form, what it sees as the most likely intention of the typical donor, *had they thought about the issue*. This then throws up the

---

[58] [1905] 2 Ch 48 (Ch).
[59] [1905] 2 Ch 48 (Ch), 53.
[60] [1905] 2 Ch 48 (Ch), 53.
[61] (1857) 3 K&J 497, 69 ER 1206, 503. Querying the use of the word 'motive' in this formulation, see David Wilde, 'Trusts and Purposes – Settlors Assigning Purposes to Beneficiary Trusts' (2023) 36 TLI 141, 145-47.
[62] [1979] 1 WLR 247 (CA).

question whether the earlier *Re Abbott* case was correctly decided, and remains authoritative, given the presumption invoked in the later *Andrew's* case was not referred to there (although the presumption was based on ancient case law): the *Re Abbott* decision can only be justified if there was sufficient in the facts to rebut the presumption.[63]

So, in this type of case, the courts appear to be saying that the law starts with the terms of the appeal as stated by the founder of the collection. If those terms, correctly understood, (expressly or by implication) declare exhaustive terms as to the beneficial interest, that is an end of the matter. The founder of the collection has alone performed the declaratory role; and the donors have separately performed the contributory role. But if the founder's terms merely state a limited purpose, which is now at an end, the law turns to the intentions of the donors to determine whether the property was given *only* for that purpose; or whether any remaining funds were also intended for the beneficiaries, as an outright beneficial interest. And the law operates a presumption of the latter.

It looks as if the donors are now performing part of the declaratory role – filling in a gap in the founder's declaration, as to the extent of the beneficiaries' interests. It is submitted that, on analysis, this must indeed be correct; the donors are now (at least sometimes) performing a *supplementary* declaratory role. To demonstrate this, the first point to make is that the law recognises different donors to such a fund may have different intentions with regard to an apparent surplus in the fund – some may be found to have intended an outright beneficial gift to the beneficiaries; while others may be found not to have intended this, instead receiving what remains of their donation under a resulting trust (or even, as a further option, some may be found to have abandoned their surplus property, leaving it as bona vacantia). See for example the discussion in *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts*.[64] If it is accepted that there may be a resulting trust for some contributors but not others, this appears logically to mean that the terms declared by the original founder of the collection *cannot* have dedicated the apparent surplus in the trust fund to the benefit of the trust objects – that is the only way a resulting trust could arise for some contributors. While if other contributors are found to have given an unlimited beneficial interest to the trust objects – despite the (it is now clear) *limited* declaration of a beneficial interest by the founder – it would appear that the only mechanism capable of producing that outcome is a further (implied) declaration of (a supplementary) trust by those contributors. What other legal mechanism could produce the *additional* trust holding?[65] An apparently inevitable consequence of this – although

---

[63] See David Wilde, 'Collections for Individuals Generating Surpluses – Presumed Gift of Surplus; Resulting Trust; or Bona Vacantia?' forthcoming.

[64] [1971] Ch 1 (Ch). Goff J held surplus assets on termination of a non-charitable unincorporated association should not go to the members. This ruling has since been rejected. But his judgment remains valuable guidance on non-charitable fund-raising by individuals (ie, not within the structure of an unincorporated association, whose members own the fund) with regards to what happens to surplus funds from various sources.

[65] The cases in this area focus on the 'intention' of settlors. But it is important to note that intention on its own – without being manifested in an express or implied declaration – cannot create a trust interest. In *Re Vandervell's Trusts (No 2)* [1974] Ch 269 (Ch) (revd [1974] Ch 269 (CA)), Megarry J famously said (294): 'Normally the mere existence of some unexpressed intention in the breast of the owner of the property does nothing: there must at least be some expression of that intention before it can effect any result. To yearn is not to transfer.' It is easy to slip into believing the contrary in the context of resulting trusts, because intention *alone* is so commonly made central in judgments. In particular, in the case of presumed resulting trusts, intention is the only point interrogated – tending to perhaps create the false impression that intention alone is capable of moving property ownership. But where the evidence of intention interrogated supports, or is at least consistent with, the presumption of a resulting trust, the ensuing trust arises by *operation of law* under that presumption: it is outside the category of express trusts and needs no declaration for that special reason. And where that evidence of intention instead rebuts the presumption of a resulting trust, that intention combines with and confirms the apparent effect of the *act* of transferring property into the name of another, or purchasing it in the name of another, as constituting an outright gift: and such a case ends up being outside the category of trusts altogether. In the situation discussed in the main

somewhat counter-intuitive – is that there may not, in truth, be *one single trust* within the fund that has been collected; there may in fact several *different component trusts* within the overall collection, each on different terms. It is straightforward to talk about the ultimate terms of *the trust* in both *Re Abbott* and *Re Andrew's*, above, because all contributors in each case were viewed as having the same intention. But this will not necessarily be the case.

Surpluses in charitable fundraising

This view of the matter is in line with, and can perhaps be seen more clearly in, the courts' treatment of cases where the issue is whether a general charitable intent lies behind trusts of money donated to fundraising appeals for charity, so as to permit cy-près application where the express purpose of the fund fails from the outset.

In *Re Ulverston and District New Hospital Building Trusts*,[66] an appeal was made to finance the building and maintenance of a new hospital. Insufficient money was raised and the National Health Service Act 1946 supervened to preclude new voluntary hospitals. Some money had been contributed by named donors; the rest collected from unidentifiable sources, such as anonymous donors, street collections, sales, and entertainments. The Court of Appeal held that the purpose of the fund was to be determined according to the pronouncements of those collecting it, which was found to be limited to the building and maintenance of a new hospital, not wider medical provision.[67] The court then investigated the issue of general charitable intent with reference to the intentions of the donors.[68] And the court made clear it was looking at the potentially differing intents of individual donors.[69]

In both beneficiary trust surplus cases and general charitable intent cases, then, it seems that the appeal maker performs an initial declaratory role. And the donors may sometimes then perform a supplementary (implied) declaratory role in favour of the beneficiaries, or in favour of charity generally, ousting what would otherwise be a resulting trust.[70]

Donors have no other role in declaring the objects, or other terms, of fundraising appeal trusts

It might be tempting to follow the pattern seen in these familiar surplus cases about the intentions of donors when resolving *other* issues about the interpretation of fundraising appeal

---

text, any implied declaration of a supplementary trust would have to be evident from the nature and context of the act of donating.

[66] [1956] Ch 622 (CA).

[67] [1956] Ch 622 (CA), 630.

[68] [1956] Ch 622 (CA), 630-32.

[69] [1956] Ch 622 (CA), 634-43.

[70] At the risk of digressing, it should perhaps be briefly noted that the phrase 'the donors may sometimes then perform a supplementary (implied) declaratory role in favour of charity generally', might be thought inapposite when talking about cy-près application on an initial failure, pursuant to a 'general charitable intent' – for at least two reasons. First, not all charitable gifts are by way of a trust, of course: so cy-près application on an initial failure, pursuant to a 'general charitable intent', can happen where we are not dealing with a declaration of trust in the first place – as when we are dealing with a gift to a charitable company. In other words, the notion of cy-près application on an initial failure, pursuant to a 'general charitable intent' is one that extends beyond the law of trusts; and speaking of a 'supplementary (implied) declaration' is therefore potentially misleading. However, specifically in a trusts context the usage seems acceptable. Secondly, even when we are dealing with a declaration of trust, to talk about a 'supplementary (implied) declaration' may not seem an accurate description of what discerning a 'general charitable intent' involves. But the description is at least consistent with conventional statements of the law. William Henderson, Jonathan Fowles, Gregor Hogan, Julian Smith, and Laetitia Ransley (eds), *Tudor on Charities* (11th edn, Sweet & Maxwell 2022), para 9.018 says: 'The question of whether a donor had a general or paramount charitable intention is a question for the court of the construction of the relevant instrument or, where the gift was made orally, of the words used.' The book cites perhaps the most oft-quoted description of a 'general charitable intent', which fully bears out this account: *Re Wilson* [1913] 1 Ch 314 (Ch), 320-21. In any case, whether or not 'supplementary (implied) declaration' looks an accurate description, all that matters for present purposes is *whose* intent the law is interested in.

trusts. That is, the pattern of starting with the collection founder's apparent intention in the express terms of their appeal; and insofar as matters are unclear, resorting to the intentions of the donors to resolve any uncertainties. But it is submitted that, seductive as this course may be, adopting it would be in error.[71] It is important to note that the case law above involved situations where (1) the extent of the contributor's donative intent beyond the initial appeal terms (within the prerogative of the contributory role) and (2) the extent of the beneficial interest created (defined by a supplementary declaratory role) were essentially *two sides of the same coin*: one followed ineluctably from the other. It is submitted that this is the only time the pattern seen above holds: otherwise, the donor's intentions are *not* legally relevant to identifying the objects, or other terms, of fundraising appeal trusts. There is instead a neat fragmentation of the settlor's dual roles: the collection founders declare the trust, the trustees sometimes clarify it, and both may be assisted by lawyers; while the donors merely contribute on those set terms.

Conclusions

The standard model for trust creation, where a single settlor both provides the trust property and declares the trust terms, producing a consequent focus on 'the intention of the settlor' when interpreting the trust, conditions us to habitually look for the intention of the party providing trust property when interpreting a trust. However, having this preconceived notion in mind sometimes misleads us. In some trusts, the party providing the trust property does not declare the trust terms; they merely assent to terms declared by another – and it is the intention of that other party that must govern the interpretation of the trust. In fundraising appeal collections, both reason and the balance of authority show that it is *the makers of the appeal* – not the contributors – who, through the terms of their appeal, declare the initial trust on which the collected fund is held.

This initial trust may be an executory trust: that is, only outline objects and terms may have been declared, and an obligation to make a clarifying final declaration may have been impliedly assumed by *the trustees collecting the fund* (who may be the appeal initiators themselves, or other trustees they nominated to collect and administer the fund). An obligation involving a discretion assented to by the donors over the precise objects and terms of the trust – within the parameters of the initial appeal's terms. This power of the trustees to make a clarifying declaration may arise in fundraising appeals that are clearly charitable, for the benefit of the public; or those that are clearly private, for the benefit of beneficiaries; or those where the terms of the initial appeal could be refined into *either* a charitable or a private trust.

In either an initial declaration or a clarifying declaration of a fundraising appeal trust – as in the case of any other trust – lawyers may have been involved in drafting the trust terms. Consequently, in some technical matters a court may find itself looking for the '*intention of the drafter*' – rather than the appeal founders or their trustees – when interpreting the trust.

Finally, *the donors* may be found to have (in effect) made a supplementary declaration of trust as to the destination of any surplus funds in the collection. If all the donors take the same view, we can then say they have declared *at least some of* the terms on which the whole

[71] JE Penner, *The Law of Trusts* (12th edn, OUP 2022), para 7.45, perhaps flirts with this seduction: 'The problem of inferring the settlor's intention has been particularly acute in "appeal" cases, where an appeal has been made to raise funds to provide for individuals who have suffered some misfortune. It is obviously a vexed task to determine whether an amorphous group of often anonymous contributors had one intention or the other, and perhaps these cases should be regarded as in a class of their own.' The immediate context of this passage is a discussion of possible resulting trusts of surpluses in beneficiary appeals: so the reference to *the contributors' intentions* is, of course, correct. But the passage appears in a chapter concerned overall with determining whether persons or purposes are the objects of a trust: and any inference drawn by the reader that contributors' intentions determine that issue would be – *if the argument here is correct* – focusing on the wrong intention.

trust fund is held. But if the donors take divergent views, the outcome must be that there are in truth several different trusts, each held on different terms, within the overall collected fund.

The outcome is that four sets of intentions may need to be interrogated when interpreting a fundraising appeal collection trust.