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**Article**

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# Article

# Executory trusts: the scope for their creation (including within fundraising appeals)

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## ABSTRACT

This article seeks to explain what is meant by an 'executory trust'. It argues that widely cited case law, suggesting an executory trust is only valid if it includes a highly detailed explanation of the intended final trust, is inconsistent with the weight of authority overall and may be wrong. And it argues that fundraising appeal collections may often give rise to executory trusts. Accordingly, it is suggested that executory trusts—a topic only mentioned at all in about half of trusts textbooks—may be more practically significant than is usually thought.

## INTRODUCTION

This article seeks to explore what is meant in the law by the term 'executory trust'. Upon examination, it will be suggested that these trusts may have a greater scope for operation than is generally believed. This is for two reasons. First, because seemingly well-established case law placing limits on the creation of executory trusts has, arguably, not been sufficiently scrutinised and may well be wrong. And secondly, because recent case law apparently confirms what until now had only been suspected: that there can be implied executory trusts and that this explains what regularly happens in fundraising appeal collections. (This is, of course, without necessarily recommending the use of executory trusts. In general, there is much to be said for instead having all of the terms of a trust clear and finalised from the outset and thereby having all of the trust's consequences fully planned out—such as its tax results.)

## MEANING OF 'EXECUTORY TRUSTS'

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, then 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.

That precis—albeit admittedly convoluted—description now requires significant elaboration.[1]

### Possible meanings of 'executory'

The word 'executory' can be used in either of two senses when describing a trust. One is to denote merely that the trustee's duties under the trust have not yet been carried out: that is, the obligations imposed by the terms of the trust have still to be *executed*. When used in this sense, *every trust* is (wholly or partly) an 'executory' trust, until discharged. But that is not the meaning of the word for present purposes. Instead, here 'executory' means that an obligation to *execute* a

[1] On *amending* an existing trust by executory means, see *Newell Trustees Ltd v Newell Rubbermaid UK Services Ltd* [2024] EWHC 48 (Ch), esp [110]–[123].

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trust instrument, declaring a trust's terms, has been imposed or assumed. Lord Cairns distinguished these two senses of 'executory' in *Sackville-West v Viscount Holmesdale*[2]:

> My Lords, the second codicil to the will of the testatrix, Lady *Amherst*, creates what is commonly described as an 'executory trust', that is to say, not a trust which remains to be executed, for in this sense all trusts are 'executory' at their creation, but a trust which is to be executed by the preparation of a complete and formal settlement, carrying into effect, through the operation of an apt and detailed legal phraseology, the general intention compendiously indicated by the testatrix. The codicil is, in fact, equivalent to directions or instructions for a settlement.

## Possible meanings of 'trust'

Having identified the relevant meaning of 'executory', there are then at least three different usages of the word 'trust' to be separated out.

### *A future trust*

The first possible meaning of 'trust' is *merely an anticipated future trust*. Accordingly, sometimes the expression 'executory trust' is used to describe the situation where an obligation to create a trust has been imposed or assumed, but no property stands dedicated towards that trust yet.[3] However, although such usage is not uncommon, again that is not how the expression 'executory trust' is generally understood. The standard view is that the expression must refer to some form of actual—already subsisting—trust arrangement.[4] That is, the word 'trust' is being used in either the second or third senses, now to be identified.

### *A current preliminary trust*

The second possible meaning of 'trust' is *a presently existing—albeit preliminary—trust*. That is, property is in the hands of a trustee, or trustees, on an initial trust, which is to be superseded later by the finalised trust, when the obligation to execute a trust instrument is fulfilled. This preliminary trust over the property represents, of course, a straightforward use of the word 'trust'. The preliminary trust may be one of at least three different kinds. The preliminary trust may be a *provisional version* of the finally intended trust; which interim version is to be superseded later by execution of a more detailed, definitive trust instrument over the property.[5] Or the preliminary trust may consist of *holding the property subject to an express trust requirement to create the finally intended trust*; that is, the content of the preliminary trust is (at least in part) holding the property subject to a declared duty to execute the intended trust instrument.[6] Or the preliminary trust may be a *constructive trust, comprising an obligation to deliver the property into the finally intended trust*; in particular, where a party has undertaken for consideration to settle specific property they are holding, by subjecting it to an intended trust instrument, and by virtue of the maxim 'Equity regards as done that which ought to be done' that party already holds the property on a constructive trust to give effect to the intended trust.[7]

### *Property within an unadministered estate*

However, it is necessary to also include within the expression 'executory trust' a third, more strained, use of the word 'trust': because many of the leading cases on the topic involve this different scenario. The third possible meaning of 'trust' is *where property is still held within the unadministered estate of a testator, whose will has directed it to be subjected to a trust declaration later*. That is, a testator has left property by will, to be held on trust, with instructions for the execution in due course of the trust instrument to govern it.[8] In this situation, of course, technically there is arguably not quite yet a trust—not even an interim trust, while the trust instrument is being drafted. Because any property left by a deceased, including property left on trust, is initially owned outright by their personal representatives, subject to legal duties to administer their estate, until those personal representatives assent to the property vesting in the intended recipient, thereby constituting any designated trust.[9] How far it is appropriate to treat a

[2] (1870) LR 4 HL 543 (HL), 571. This case is examined below.

[3] For example, *Re Anstis* (1886) 31 Ch D 596 (CA), 607.

[4] For example, Jamie Glister and James Lee (eds), *Hanbury and Martin Modern Equity* (22nd edn, Sweet & Maxwell 2021), para 2.030: '[I]n an executory trust … [t]he property is immediately subject to a valid trust, but it remains executory until the further instrument is duly executed.'

[5] A modern instance has been occupational pension trust funds. For example, in *Davis v Richards & Wallington Industries Ltd* [1990] 1 WLR 1511 (Ch), by an interim trust deed a group of companies established a pension scheme for its employees in 1975. The deed provided that the companies and the trustees would execute, within 24 months, a definitive trust deed containing rules made by the parent company with the approval of the subsidiaries and the trustees for the administration of the scheme and fund. In 1982, the definitive deed was executed by the parent company and the trustees. Scott J held the definitive deed to be effective. But, in case that conclusion was wrong, he went on to consider, obiter, whether the court could have executed the executory trust by order: deciding that it could. Other examples can also be found. In *Mayn v Mayn* (1867) LR 5 Eq 150 (Ct Ch), a settlor agreed by deed to settle £800 on beneficiaries, with himself as one of the trustees, and 'in the meantime, and until such declaration should be made [to] appropriate and retain the said sum of £800 upon the like trusts', which he did; but he died without ever finalising the settlement. Page Wood V-C gave effect to the detailed terms he believed had been intended for the final settlement.

[6] Examples include *Shelley v Shelley* (1868) LR 6 Eq 540 (Ct Ch), where a testatrix left jewellery to her nephew, but subject to a trust obligation to settle it, at the latest by his will, in a manner designed to ensure—within the rule against remoteness of vesting—that it should so far as possible pass through a sequence of eldest sons as family heirlooms. (Followed in more modern times in *Re Steele's Will Trusts* [1948] Ch 603 (Ch).) Also *Nash v Allen* (1889) 42 Ch D 54 (Ch), where a testator left property on trust for his daughter; but with a direction, in the event of her marriage, to settle the property on a marriage settlement. And *Harris v Sharp* [2003] WTLR 1541 (CA—decided in 1989), where a settlor paid his solicitors £50,000 accompanied by a memorandum with outline instructions for a charitable trust, saying 'The said sum is to be regarded as being held by you my solicitors for the said charitable purpose…' which was held to mean the solicitors held it on a charitable trust to establish the outlined trust.

[7] An important scenario historically was articles for marriage settlements: see Paul Matthews, Charles Mitchell, Jonathan Harris, and Sinéad Agnew (eds), *Underhill and Hayton Law Relating to Trusts and Trustees* (20th edn, LexisNexis 2022), art 6.

[8] See for example the leading case of *Sackville-West v Viscount Holmesdale* (1870) LR 4 HL 543 (HL), explained at length below. A modern example is *Pengelly v Pengelly* [2007] EWHC 3227 (Ch), [2008] Ch 375, where a testator's will left property to trustee executors, '[T]o hold upon such trusts as they shall in their absolute discretion decide, for a class of beneficiaries as they shall decide, such class [the decision was to rectify the will by inserting here the word "only"] to include some or all of the following living at my death, or born within 80 years thereafter, namely my children, my grandchildren and their respective present future or former spouses, and widows and widowers. Such settlement shall be established by a deed executed by my trustees not later than two years after my death and shall contain such powers and provisions as my trustees shall decide including (but without prejudice to the generality of the foregoing) the power to vary the terms of such trusts, create sub-trusts and determine such trust or sub-trusts. The assets of my estate utilised to establish such trust fund shall be such as my trustees shall in their discretion decide whether or not the same are of an income-producing nature'. (The decision is usually taken to imply—although the judge does not expressly say—that the executory trust would have failed without the rectification, due to a lack of clarity as to the class who could benefit.)

[9] *Attenborough & Son v Solomon* [1913] AC 76 (HL).

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deceased's personal representatives, initially holding their property, as 'trustees' is not a simple question.[10] So, *sometimes*, when judges or the textbooks say there is an 'executory trust', technically it is only debatable whether there is any trust in existence—although the relevant property has been furnished by the settlor as part of their unadministered estate.[11]

### Distinguishing 'executory trusts' from 'self-executing trusts': the need to identify the underlying intention when formulating the final trust's provisions or to exercise a discretion over them

It is generally said that there is only an 'executory trust' in the true sense of that expression if, in order to draft the detailed final trust provisions, there is a need to *discern the intention* of the party creating the obligation to execute a trust; as opposed to simply *duplicating the set wording* indicated by them. That is, there must be some scope for decision-making. In a widely cited statement of principle, Lord St Leonards said in *Egerton v Earl Brownlow*[12]:

> [Considering] the sense which a Court of Equity puts upon the term 'executory trust.' A Court of Equity considers an executory trust as distinguished from a trust executing itself, and distinguishes the two in this manner:– Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the Court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates?

As ever, usage varies: for example, contrast Lord Truro, seemingly not treating this as a requirement for an 'executory trust', in the same case.[13]

But isolating the true, limited sense of 'executory trust'—where decisions about intention are required—has been deemed important in much of the case law: because a different approach to interpretation has been said to operate in the case of *true* executory trusts. It has been said that in other trusts, technical expressions will be given their technical meaning; but in executory trusts, this is not necessarily the case—with the focus being on underlying intention prevailing.[14]

However, it should be noted that sometimes executory trust obligations are unilaterally *assumed* by a party rather than being imposed by another: for example, a company establishing an occupational trust fund may do this be an interim trust deed, undertaking an obligation to draft a final trust deed.[15] In this scenario, to identify a true executory trust—with a requirement of decision-making—we would have to say that the obligation must involve the *exercise of a discretion* over the final trust terms; rather than speaking about a need to discern the intention of some other party who imposed the obligation.

## AN EXECUTORY TRUST MAY CONFER ON THE FINAL TRUST DRAFTER A DISCRETION OVER THE CONTENT OF THE FINAL TRUST'S TERMS—INCLUDING A DISCRETION OVER BENEFICIAL ENTITLEMENTS

Although the party responsible under an executory trust arrangement for devising the ultimate trust's detailed terms must—obviously—stay within any instructions they have been given, or parameters otherwise set, it is clear that their brief can be understood as conferring a discretion over the precise content of the final terms: *including a discretion over the beneficial entitlements framed*.

This was settled in the leading case of *Sackville-West v Viscount Holmesdale*.[16] A testatrix's will recited, '[I]t is my intention to settle [property] by my said will in a course of settlement to correspond, as far as may be practicable, with the limitations of [a specified peerage], and the deeds for carrying into effect such settlement are about to be prepared, but cannot at present be completed.' The will then left property to trustees, '[U]pon trust, as soon as conveniently may be after my decease [to create a settlement] in a course of entail to correspond, as nearly as may be, with the limitations of [the peerage], and the provisoes affecting the same contained in the letters patent conferring the said dignity, in such manner and form, and with all such powers, provisoes, declarations, and agreements as the [trustees] shall consider proper, or as their counsel shall advise.' The trustees asked the court to supervise the drafting of the settlement, which it agreed to do. The testatrix's intention was held by the House of Lords to be to create a strict settlement of the property; rather than to adopt with regards to the property the precise wording limiting the peerage, which wording would have had a very different substantive effect if copied across to limit the property. Lord Hatherley LC, dissenting, had a restricted view of the nature of executory trusts: the trustees were limited to simply implementing the instructions given as to beneficial entitlements, according to their apparent intent; with purely technical or administrative additions by the trustees. The trustees could exercise no creative role with regard to the beneficial entitlements. For example, he objected to the majority going beyond the testatrix's instructions by introducing powers for charging the estate with jointures for wives and portions for

[10] See Roger Kerridge, *Parry and Kerridge: The Law of Succession* (13th edn, Sweet & Maxwell 2016), paras 23.48–23.54.
[11] Or it may be the settlor has furnished purchase money, to buy the property to be held on trust: for example, *Stanley v Coulthurst* (1870) LR 10 Eq 259 (Ct Ch).
[12] (1853) 4 HL Cas 1, 10 ER 359, 210.
[13] (1853) 4 HL Cas 1, 10 ER 359, 181. See also Lord Westbury in *Sackville-West v Viscount Holmesdale* (1870) LR 4 HL 543 (HL), 566: 'Again, an executory trust may be created by a reference to some existing settlement of property … In the case last supposed there is clearly an executory trust; but the manner of executing it is defined by the author, and the Court has no other duty than that of carrying the direction so given into effect. In such a case the settlement, or entail, referred to is, in fact, the model for the settlement directed to be made.'
[14] See, for example, *Re Bostock's Settlement* [1921] 2 Ch 469 (CA). Paul Matthews, Charles Mitchell, Jonathan Harris, and Sinéad Agnew (eds), *Underhill and Hayton Law Relating to Trusts and Trustees* (20th edn, LexisNexis 2022), para 6.3 comments: 'The abolition or simplification of technicalities involving words of limitation has made the difference between executed and executory trusts much less significant since the Law of Property Act 1925, ss 60, 130, 131, and since the abolition of entails in [the Trusts of Land and Appointment of Trustees Act 1996, Sch 1, para 5].' (The issues involved historically are clearly and concisely illustrated in AJ Oakley (ed), *Parker and Mellows: The Modern Law of Trusts* (9th edn, Sweet & Maxwell 2008), paras 5.074–5.079.)
[15] Above, n 5.
[16] (1870) LR 4 HL 543 (HL).

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children, by analogy to what the testatrix had done in a previous testamentary settlement design, which design had been abandoned and superseded by the final version of her will. He said[17]:

> I think that in extending the doctrine of executory trusts to a case in which it is necessary to depart most materially from the model proposed by the testatrix, and to insert powers of jointuring and of raising portions without any guide but that of a previous settlement of an entirely different character, upon a family already possessed of a title and large estates, the Court will assume the power of making a will for a testator far beyond anything warranted by authority, or by principle derived from authority.

The majority disagreed. Lord Chelmsford referred to the 'discretion' of the trustees on this point[18]:

> There is, perhaps, a little more difficulty with regard to the powers of jointuring and portioning younger children, on account of there being no amount mentioned within which the discretion of the trustees is to be exercised… [I]t appears to me that if the trustees had introduced into a settlement such powers, with amounts corresponding to the sums mentioned in the [previous settlement design], their discretion could not have been successfully questioned.

And Lord Cairns added in similar terms[19]:

> It appears to me that … the very wide words in the codicil, which directs the settlement to be made "in such manner and form, and with such powers, provisoes, declarations, and agreements as the trustees shall consider proper," [gives rise to a] discretion of the trustees, or of the Court to which the trustees have now handed over their duty … I cannot … think that if an executory instrument, on its proper construction, authorizes the insertion of powers of jointuring and portioning, the absence of any mention of amount ought to be an insurmountable difficulty … In the present case I cannot doubt that the words of the general direction given to the trustees, and to which I have already referred, are quite large enough to include these powers [of jointuring and portioning]; nor do I think that if the trustees had executed a settlement containing them a bill could have been maintained to have them expunged. The testatrix had inserted such powers in her will. It cannot, I think, be doubted that they would have found their place in the deeds which she states were to be prepared; and, as regards the amounts of jointures and portions, although, as I have said, the provisions of the revoked will are not binding on the trustees, their discretion would not, in my opinion, be wisely exercised if, without some specific reason, they were in the new settlement to depart from the amount so fixed. I think, therefore, no such specific reason being suggested, powers of jointuring and charging portions should be given to the tenants for life to the same extent as in the original will.

## AN EXECUTORY TRUST OBLIGATION TO CREATE A FINAL TRUST THAT IS AMBIGUOUS AS TO ITS INTENDED TERMS MUST STILL BE CARRIED OUT—IF A MEANING CAN BE ESTABLISHED

A lack of clarity within an executory trust, as to the final trust terms required to be declared, need not be an obstacle. *Re Potter's Will Trusts*[20] shows that an executory trust obligation must be carried out notwithstanding that the terms it indicates for the final trust are unclear, if it is possible to give them a meaning—if necessary, with assistance from the court. The testator's badly drafted will left property 'in trust for my infant daughter … to be paid to her on … day of marriage … such marriage to be with the consent of her guardian … Provided such marriage is with the consent of the guardian or guardians for the time being of this my will who I direct shall cause such share to be properly secured by settlement for my said daughter's benefit and that of any children she may have.' The will later said: 'In the event of my said daughter leaving any child children or issue of any child or children whether married with her guardians' consent or otherwise then the said [property] to vest absolutely in such child children or issue in such manner as she my said daughter shall by will appoint or in default of appointment then to such child children or issue equally as per stirpes and not per capita.' The question was whether this directed a settlement, occasioned by marriage, which could be limited to provision only for children of the daughter's marriage, as Bennett J held at first instance[21]; or whether the settlement had to provide for all of the daughter's children, born in the course of that marriage, or after its end, in line with the latter clause, as the Court of Appeal ultimately held in a claim for rectification—the question arising after the daughter's husband died, and she went on to have further children. Lord Greene MR, delivering the appeal judgment, said[22]:

> It is a fundamental rule in the interpretation of wills that effect must be given, so far as possible, to the words which the testator has used. It is equally fundamental that apparent inconsistencies must, so far as possible, be reconciled, and that it is only when reconciliation is impossible that a recalcitrant provision must be rejected. Even in that case, of two irreconcilable provisions, it is the later that prevails, but in the present case there is no need to have recourse to this rule of despair.

[17] (1870) LR 4 HL 543 (HL), 560–61.
[18] (1870) LR 4 HL 543 (HL), 564–65.
[19] (1870) LR 4 HL 543 (HL), 576–77.
[20] [1944] Ch 70 (CA).
[21] [1943] Ch 255 (Ch); revd [1944] Ch 70 (CA).
[22] [1944] Ch 70 (CA), 77.

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## AN EXECUTORY TRUST MUST INCLUDE A SUFFICIENTLY DETAILED AND CLEAR EXPLANATION OF THE INTENDED FINAL TRUST(?)

We have encountered a House of Lords decision that an executory trust may confer a discretion over the precise content of the final trust, including its beneficial entitlements, in *Sackville-West v Viscount Holmesdale* above. And a Court of Appeal decision indicating that an executory trust must be given effect to, even if it lacks clarity as to the terms intended for the final trust, provided it is possible to find a meaning, in *Re Potter's Will Trusts* above. Given this, it is incongruous to see the textbooks focusing so much instead on what appear to be merely questionably-reasoned obiter dicta in a High Court judgment, tending in the opposite direction. *Re Flavel's Will Trusts*[23] is widely cited for the proposition that an executory trust obligation must include *sufficiently detailed and clear* indications as to the content of the intended final trust.[24] It can, of course, be said that this is merely a qualification to, rather than a contradiction of, the earlier authorities. However, the overall tenor of what the judgment says on this point seems wrong; its reasoning appears flawed; and its precedent value should be doubted.

In *Re Flavel*, a testator left property on trust 'for formation of a superannuation and bonus fund for the employees of Sidney Flavel & Co. Ltd such fund to be established and constituted in such manner as my trustees shall in their absolute discretion think fit'. Stamp J held, as a primary ground of decision, that the directed trust would be void under the rule against remoteness of vesting because the contemplated trust was for all future employees. And, the judge said, it would not be appropriate to limit the provision within the perpetuity period, because that would exclude beneficiaries the testator had intended to benefit.[25] He added as a further objection that an executory trust direction needs to give more detailed and clearer instructions than the testator had provided[26]:

> There is a further difficulty in giving effect to the direction. Mr Millett on behalf of the employees, is no doubt right that here we have an executory trust and that since the beneficiaries consist of a class of persons, namely, the employees for the time being of the company, the trust does not fail for want of cestui que trust; see cases such as *Morice v. Durham (Bishop of)* (1804) 9 Ves. 399, and *Houston v. Burns* [1918] A.C. 337. Nevertheless, it appears to me that the testator has offended the axiom that a testator cannot leave it to trustees to make a will for him. Although the beneficiaries are specified, and although they are to take benefits on superannuation, the rest is left in obscurity.
>
> By what yardstick are the superannuation benefits to be calculated or measured? To what extent is the capital of the fund to be resorted to to augment those benefits? Above all, to whom, and upon what basis, are bonuses to be awarded? No doubt it would, as Mr Millett submits, be well within the capacity of any of those counsel whom I see before me to draw a deed which could appropriately be called a superannuation and bonus fund. But having done so, how could one say that that deed so drawn gave effect to the testator's intention, unless that intention simply was to leave it to his trustees to determine upon what trust for the benefit of the superannuated employees the fund should be held?
>
> Of course, where a testator has directed that a settlement be made upon a named person and his children, the court can execute the trust, but it appears to me that a direction to settle property for the benefit of a class of employees such as is here contemplated, is beyond the limits of the doctrine of executory trusts. Before that doctrine can be applied, one must in my judgment, be able to ascertain from the language of the will directing the setting up of a trust, at least in general terms, the trusts which one is to impose on the property to be settled.

This could be regarded as obiter, in view of the main ground of decision. And it is perhaps worth noting that, by the date of the hearing, provision for the employees was no longer needed: by then the company had an independent pension fund up and running. One might wonder whether Stamp J would have taken the same view had the employees not already been provided for.

Moreover, the judge's reasoning was centrally based upon 'the axiom that a testator cannot leave it to trustees to make a will for him…'. But, whatever ancient authority may endorse that 'axiom', it has been entirely exploded in modern times. The supposed general rule against delegation of testamentary power was comprehensively rejected, with compelling logic, by Hoffmann J in *Re Beatty*.[27]

Further, as quoted above, the judge said, '[H]ow could one say that [a deed prepared by the trustees] gave effect to the testator's intention, unless that intention simply was to leave it to his trustees to determine upon what trust for the benefit of the superannuated employees the fund should be held?' But that evidently *was* the testator's intention: why should it not be acted upon? How materially different is that from a discretionary trust, such as the trust in *McPhail v Doulton*,[28] upheld in *Re Baden's Deed Trusts (No 2)*,[29] where the chairman and

[23] [1969] 1 WLR 444 (Ch). Accepted by further dicta in *Pengelly v Pengelly* [2007] EWHC 3227 (Ch), [2008] Ch 375, [10].

[24] The sentiments in the case are cited without criticism in: Lynton Tucker, Nicholas le Poidevin, and James Brightwell (eds), *Lewin on Trusts* (20th edn, Sweet & Maxwell 2020), para 7.003; Paul Matthews, Charles Mitchell, Jonathan Harris, and Sinéad Agnew (eds), *Underhill and Hayton Law Relating to Trusts and Trustees* (20th edn, LexisNexis 2022), para 6.2; John McGhee and Steven Elliott (eds), *Snell's Equity* (34th edn, Sweet & Maxwell 2020), para 22.027; Jamie Glister and James Lee (eds), *Hanbury and Martin Modern Equity* (22nd edn, Sweet & Maxwell 2021), para 2.030; Philip H Pettit, *Equity and the Law of Trusts* (12th edn, Oxford 2012), 75; AJ Oakley (ed), *Parker and Mellows: The Modern Law of Trusts* (9th edn, Sweet & Maxwell 2008), para 5.073.

[25] Distinguishing (at [1969] 1 WLR 444 (Ch), 447–48) the case of *Miles v Harford* (1879) 12 Ch D 691 (Ch). cf *Humberston v Humberston* (1716) 1 P Wms 332, 24 ER 412.

[26] [1969] 1 WLR 444 (Ch), 446–47.

[27] [1990] 1 WLR 1503 (Ch). (But see Lionel Smith, 'What is Left of the Non-Delegation Principle?' in Birke Häcker and Charles Mitchell (eds), *Current Issues in Succession Law* (Hart 2016).)

[28] [1971] AC 424 (HL).

[29] [1973] Ch 9 (CA).

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managing director of a company established a trust to serve as a non-charitable corporate employee benefit fund, 'for the benefit of any of the officers and employees or ex-officers or ex-employees of the company or to any relatives or dependants of any such persons'?

*Re Flavel* also looks out of line with prior practice on executory trusts. *Lewin on Trusts* comments on earlier practice in these terms[30]: 'Executory trusts have historically been enforced by the court notwithstanding a lack of certainty in the instrument creating them as to the content of the intended trust provisions.' The book cites in particular the Irish case of *Brenan v Brenan*,[31] where Chatterton V-C held enforceable an executory trust for children to be 'suitably provided for'.[32] The degree of uncertainty accepted in that case—although on a smaller canvas—looks not dissimilar to that rejected in *Re Flavel*.

Finally, the approach in *Re Flavell* looks at odds with modern pension fund practice, under which it appears that executory trusts have conferred a very wide discretion as to the design of occupational pension trust funds. In *Vaitkus v Dresser-Rand UK Ltd*,[33] for example, an interim trust deed of 1998 included an undertaking by the employer company to execute a definitive deed by 1990, although this was delayed until 1992 (and then replaced in 1998). Both the interim deed and the final deed gave the company extensive power to alter any of the trusts—indeed with retrospective effect. This appears to have been, overall, an executory trust arrangement (to which no exception was taken by the court) giving the employer company power to devise *any* occupational pension trust fund it wished (within the limits of the law). This was, of course, an executory trust obligation *assumed* by the employer company, rather than one *imposed* at the dictation of another party, such as a testator. But it is not clear that this should make any difference—the need for the court to be able to oversee compliance with the obligation is the same in either case.

The abstract proposition that *Re Flavel* states—that an executory trust obligation must include sufficiently detailed and clear indications as to the content of the intended final trust—is perhaps something of a truism. But this proposition should *not* be taken as requiring any more than that it must be possible to make *basic practical sense* of the obligation.[34] The purported concrete application in *Re Flavel*, to the facts of the case, of the proposition that an executory trust obligation must include sufficiently detailed and clear indications as to the content of the intended final trust demonstrates a far more restrictive approach than that the obligation must merely make simple practical sense. For the reasons given, it looks wrong. It is submitted that these obiter dicta in *Re Flavel* should not be followed: that is, there is no good reason why executory trust obligations should not be permitted to confer *wide discretions*—such as can be created elsewhere, most particularly in discretionary trusts.

## IMPLIED EXECUTORY TRUSTS

What may be expressed can, of course, also be implied. Accordingly, it has been suggested recently that the law may recognise *implied* executory trusts—that is, obligations to create trusts, with a discretion over their formulation, that arise from implication. Judge Neil Cadwallader, sitting as a High Court judge, made the suggestion in these terms in *Mohammed v Daji* (also known as *Mohammed v Mohammed*)[35]:

> [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.

The suggestion is that the doctrine of executory trusts could explain what regularly happens in fundraising appeal collections, where the appeal cause is initially stated in only outline form, then later a trust deed in more detailed terms is executed. 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 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.

The basis of this suggestion is *A-G v Mathieson*.[36] The approach was approved by the Supreme Court in *Shergill v Khaira*,[37] whose judgment observed[38]: '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 later reiterated[39]: '[T]he law in this area is surprisingly undeveloped…'

[30] Lynton Tucker, Nicholas le Poidevin, and James Brightwell (eds), *Lewin on Trusts* (20th edn, Sweet & Maxwell 2020), para 7.091 (note omitted). The word 'historically' is presumably an acknowledgement that the modern approach may now be different, after *Re Flavel*. That case is not cited at this point in the book, although *Pengelly v Pengelly* [2007] EWHC 3227 (Ch), [2008] Ch 375, which accepts its authority, is cited.

[31] (1868) 2 IR Eq 266 (VC's Ct).

[32] He admittedly said (273) 'the objection for uncertainty … is not free from difficulty'; adding as a special consideration in favour of enforcement despite any uncertainty that 'when, as here, one party to a contract has obtained fulfilment of it, and enjoyed the benefit of its performance, the Court will go much farther to compel him to perform his part than it otherwise would do'. *But he also later adverted to similar executory trusts under marriage articles being routinely executed* (274).

[33] [2014] EWHC 170 (Ch), [2014] Pens LR 153.

[34] This is perhaps the spirit of what was said by Lord Colonsay in the majority in *Sackville-West v Viscount Holmesdale* (1870) LR 4 HL 543, (HL), 570 (latter emphasis added): 'We are here dealing with what, in the law language of *England*, is called an executory trust. The instrument does not profess to carry into execution the purpose of the testator. It professes only to express the purpose or intention of the testator, and to give to other persons power and instructions for carrying that intention into execution. *The intention may be more or less clearly expressed, the direction or instruction may be more or less explicit.*'

[35] [2023] EWHC 2761 (Ch), [30]–[32].

[36] [1907] 2 Ch 383 (CA). (cf *Fafalios v Apodiacos* [2020] EWHC 1189 (Ch).)

[37] [2014] UKSC 33, [2015] AC 359.

[38] [2014] UKSC 33, [2015] AC 359, [27].

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In *A-G v Mathieson*, Cozens-Hardy MR, delivering the leading judgment, held[40]:

> 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.[41] It is perhaps a strong reading of what Cozens-Hardy MR said, but it is suggested that there also lies within the first sentence—'a time comes when it is … *necessary* … to prescribe accurately the terms of the charitable trust' (emphasis added)—a recognition that there is equally a *duty* lying on the appeal collectors to make the declaration: an obligation most naturally seen as arising from an undertaking the appeal collectors make to the donors to do all that is reasonably required to make the appeal fund functional, in line with its generally stated cause.[42] If this is correct, we have both the obligation and the discretion required for an executory trust.

The prevailing current understanding appears to be that the reasoning in *A-G v Mathieson* is restricted to charitable trusts. However, insofar as it is correct to explain the mechanism described in the case as simply an executory trust, the judgment seems in truth to lay down an approach equally capable of applying to trusts in general. The author has sought to demonstrate that point at length elsewhere.[43] The analysis can perhaps helpfully be briefly summarised here. In outline, it is suggested that *A-G v Mathieson* was not a charity case at all. That is, it did not involve a gift subject to an exclusively charitable trust. It was a donation to a mission that carried out philanthropic works. All of those works appeared to be charitable at the time: but there was nothing constitutionally restricting the mission to charitable works in the legal sense. The gift to the mission was ultimately on terms that it was to be used in 'any … way you like'. This, therefore, seems, when correctly analysed, to have been a gift on a purported trust for general philanthropic, but not necessarily charitable, purposes. Not being limited to charitable purposes only, this purported trust inevitably failed and there was technically a resulting trust for the donor. But the gift nevertheless constituted sufficient authorisation for the mission to declare a valid charitable trust over the property, which it subsequently did. Equally, *A-G v Mathieson* did not itself involve an executory trust on its own facts: there was no obligation imposed on, or assumed by, the mission to declare a trust. But the principle stated in *A-G v Mathieson* could be seen to give rise to an executory trust in the general run of fundraising appeal collections. This would include collections for causes that could be refined into *either* charitable trusts or beneficiary trusts: such as a collection for victims of a tragedy, which could later be declared a charitable trust limited to the relief of their needs, or could instead be later declared a straightforward beneficiary trust for the victims. The initial uncertainty over the objects of the collected fund would not be problematic, because the law only requires the objects of a trust to be certain *or ascertainable*—and here ascertainment would follow from the trustees carrying out their executory trust obligations. Equally, it seems possible in principle to apply the approach in *A-G v Mathieson* to fundraising appeal collections that, while in some respects requiring elaboration, are clearly beneficiary trusts from the outset.

## CONCLUSIONS

A definition of what is usually meant by the expression 'executory trust' has been attempted here. Basically, 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, which terms are only designated in general outline by the obligation, so that fuller details for those terms have to be devised by the party subject to the obligation, in line with its terms.

*Re Flavel*[44] is usually cited for the proposition that an executory trust obligation must include sufficiently detailed and clear indications as to the content of the intended final trust, and in particular as establishing a high bar as to what is required. But the authority of pronouncements in that case has been challenged here: because they are obiter; they neglect prior authority; they rely on reasoning since rejected; and they look inconsistent with the modern trusts landscape, especially the expansion of discretionary trusts and the use of executory trusts in modern occupational pension trust fund practice.

[39] [2014] UKSC 33, [2015] AC 359, [34].
[40] [1907] 2 Ch 383 (CA), 394.
[41] The better view is that the *appeal organisers* declare the trust objects and terms of a fundraising appeal collection, rather than the contributors, who merely assent to the set terms. So it is more accurate 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. See David Wilde, 'Fragmentation of the Settlor's Role—Identifying Whose Intention Matters in Fundraising Appeal Collection Trusts' (2024) 38 TLI (forthcoming).
[42] Insofar as this appears a strong reading, note that others have read the passage in the same way. See the Supreme Court judgment, recounting the submissions of counsel, in *Shergill v Khaira* [2014] UKSC 33, [2015] AC 359, [23] (emphasis added): '[I]t is said that there is a general principle that, where money or other property is made over to trustees for "somewhat indefinite" charitable purposes, it is open to the trustees (*indeed it may be incumbent on them*) to ensure the preparation of a more formal and more specific document setting out the terms of the trust.'
[43] See David Wilde, 'Fragmentation of the Settlor's Role—Identifying Whose Intention Matters in Fundraising Appeal Collection Trusts' (2024) 38 TLI (forthcoming).
[44] [1969] 1 WLR 444 (Ch). Accepted as authoritative by further dicta in *Pengelly v Pengelly* [2007] EWHC 3227 (Ch), [2008] Ch 375, [10].

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*Implied* executory trusts now appear to have been recognised in *Mohammed v Daji*,[45] as an explanation of what often happens in fundraising appeal collections, where the appeal cause is initially stated in only outline form, then later a trust deed on more detailed terms is executed.

Executory trusts may therefore have a wider scope for operation than is generally thought.

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[45] [2023] EWHC 2761 (Ch), [30]–[32].

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