

- 5 Council of Europe, Cultural Heritage Committee, Draft Recommendation of the Committee of Ministers to member States concerning heritage education, CC-PAT (97)O15 rev, 14 March 1997.
- 6 Convention N° 66 on the Protection of Archaeological Heritage, 1969 : "...all remains and objects, or any traces of human existence" (Article 1); Article 1 of the Convention N° 121 on Protection of Architectural Heritage 1985 lists "monuments, groups of buildings and sites; Convention N° 143 on Archaeological Heritage 1992 adds that heritage is "a source of collective memory".
- 7 Cf; Charter of the United Nations signed in San Francisco on 26 June 1945, Article 71. Theoretically, commercial companies also qualify as NGOs and in fact they do under Article 25 of the European Human Rights Convention enabling 'non-governmental organisations' to lodge complaints. Normally, however, they are not classified together with associations and foundations.
- 8 Loi N° 87-573 du 23 juillet 1987 sur le développement du mécénat relative aux fondations.

9 'Le Monde', 18 March 1997.

- 10 Sources: Council of Europe, Multilateral meeting on Associations and Foundations, Strasbourg 27-29 November 1996, Summary table of replies to questionnaire; Ulrich Drobnig, 'Zur Entwicklung des Stiftungsrechts in Osteuropa', Festschrift für Ernst-Joachim Mestmäcker, Baden-Baden, 1996.
- 11 Ms Morris's report will be included in the work mentioned below (next footnote).
- 12 The proceedings of this Round Table will be published by Kluwer Law International. The Declaration calls on (i) governments to enact tax legislation favouring NGOs and their benefactors, (ii) intergovernmental organisations to promote the recognition of transborder giving and (iii) the Europhil Trust to initiate a working party to prepare common international standards for favorable and equal treatment of NGOs and their benefactors.



PAUL KEARNS

Monuments in the Law of Trusts

This paper is designed to illustrate the private sponsorship of the protection and maintenance of monuments in the context of the English law of trusts. It will first examine the nature of a trust, a concept unfamiliar to many continental lawyers, then proceed to focus on the types of trust that most directly affect monuments, giving case law illustrations. Regrettably, most of the law in this area is somewhat archaic so the legal language may seem foreign even to English lawyers. It is hoped that despite this difficulty, the basic framework of the characteristic operation of trusts law relating to monuments will be tolerably clear. The relevant non-charitable purpose trusts and charitable trusts originate in the aims of a settlor or testator who, for present purposes, can be considered a private sponsor of the trusts he sets out to achieve, though this is not the language habitually used in the English law.

A peculiarly English phenomenon, that has spread to kindred legal systems, a trust is a relationship, recognised by Equity¹, initiated by the settlor or testator, which arises when property is vested by him or her in persons called trustees who are obliged to hold such property for the benefit of other persons called beneficiaries. The interest of the beneficiaries will usually be laid down in the instrument creating the trust, but may be implied or imposed by law. The subject matter of the trust must be some form of property. The beneficiaries' interests are proprietary in the sense that they can be bought and sold, given away or disposed of by will, but they will cease to exist if the legal estate in the property comes into the hands of a bona fide purchaser for value without notice of the beneficial interest. For the purposes of this article, such a description of a trust is adequate, the precise definition of a trust being generally considered by all experts to be elusive².

Trusts can be classified in a plethora of ways. On one analysis, there can be simple and special trusts, statutory trusts, implied and resulting trusts, constructive trusts and express trusts. Within the category of express trusts are executed and executory trusts, completely and incompletely constituted trusts, private and public trusts, discretionary and fixed trusts, protective trusts, secret trusts and, the most important trusts regarding monuments, non-charitable purpose trusts and charitable trusts.

For a trust to be valid, three certainties must be present: certainty of words, certainty of subject and certainty of object. First, with regard to certainty of words, since "Equity looks to the intent rather than the form", it is unnecessary to use specific technical expressions to constitute a trust. All that needs to be conclusively ascertained is an intention to set up a trust. Respecting certainty of subject, only if the property subject to the trust is clearly identified can the trust be valid; and, finally, regarding certainty of object, for the trust to be valid it must be for the benefit of individuals, except if it is a particular brand of non-charitable purpose trust or a charitable trust, which happen to be the two most usual situations in which we find monuments featuring. When a settlor declares a trust he must also comply with any formalities as well as satisfy "the three certainties", and unless he has declared himself trustee, he must do everything he can to ensure that the trust property is transferred to the trustees. If no steps are taken to transfer the property, or further action is required by the settlor to effect such a transfer, the trust will be deemed incompletely constituted.

Let us now examine monuments in first, non-charitable purpose trusts, and second, in charitable trusts, in both of which contexts monuments are most often in issue in contrast to other trust environments.

Non-charitable purpose trusts

Whereas a private trust is essentially a (valid) trust in favour of ascertainable individuals and a charitable trust is a (valid) trust for public purposes, which are treated in law as charitable, a question for consideration is whether or not it is possible to establish a (valid) trust for non-charitable purposes. These are sometimes referred to as trusts of imperfect obligation and as a general rule they are void. However, there are a number of exceptions which have arisen to the general rule including trusts for building or maintaining monuments and sites, tombs and graves.

In the case of *Re Hooper*³, a testator left trustees £1000 to provide, "so far as they can do so and ... for as long as may be practicable", for the care of: (a) a grave and monument in Torquay cemetery, England; (b) the care and upkeep of a vault containing the remains of the testator's wife and daughter; (c) the care and upkeep of a grave and monument in Ipswich, England; (d) the care and upkeep of a tablet and window in a church, to the memory of various members of the testator's family. Maugham J. held that the first three aforementioned gifts for the care and upkeep of the graves were non-charitable but were nevertheless valid purpose trusts which had also been limited in perpetuity⁴. As the trustees were willing to carry out the purposes, it was held that they should be permitted to do so. The fourth aforementioned gift was held to be charitable, the implications of such decision we will deal with later⁵. In *Trimmer v Danby*⁶, the testator here also gave £1000 to his executors but directed them "to lay out and expend the same to erect a monument to my memory in St. Paul's Cathedral, among those of my brothers in art". The bequest was upheld by Kindersley V-C who commented thus: "I do not suppose that there would be anyone who could compel the executors to carry out this bequest and raise the monument; but if the residuary legatees or the trustees insist upon the trust being executed, my opinion is that this Court is bound to see it carried out. I think, therefore, that as the trustees insist upon the sum of £1000 being laid out according to the direction in the will, that sum must be set apart for the purpose." Significantly, the rule against purpose trusts in general is directed mainly in this monuments category against bequests and gifts which involve the maintenance of a monument, tomb or grave, as this would go on indefinitely, as emphasised in the case of *Mussett v Bingle*⁷. Here, the testator gave £300 to be applied in the erection of a monument to his wife's first husband, and £200, the interest of which was to be applied in keeping up the monument. It was held that the latter direction was void for perpetuity⁸.

In the case of *McCaig v University of Glasgow*⁹ the testator left all of his substantial estate to be used to build statues of himself, together with towers in conspicuous places on his estates; and Lord Kyllachy said in judgment, viz. "I suppose it would be hardly contended ... if the purposes ... were to be slightly varied, and the trustees were, for instance, directed to lay the trustor's estate waste, and keep it so; or to turn the income of the estate into money, and throw the money yearly into the sea; or to expend income in annual or monthly funeral services in the testator's memory..." No such purpose, he opined, would be consistent with public policy. Similarly, in another Scottish case, *McCaig's Trustees v Kirk-Session Etc.*¹⁰, the testatrix directed that eleven bronze statues cost-

ing not less than £1,000 each should be erected in Scotland to various members of her family. This form of memorial was also refused validity because it was considered wasteful and of benefit to nobody.

The Court of Appeal case of *Re Endacott*¹¹ involved a trust the purpose of which was held "of far too wide and uncertain a nature"¹¹ to qualify within the class of monument cases cited because it was a gift of about £20,000 to the North Tawton Devon Parish Council for the purpose of providing some useful memorial to the testator. As also suggested by the Scottish cases discussed, it would seem that there is a particular reluctance on the part of the courts to uphold grandiose schemes as opposed to reasonable ones, a policy actually articulated in the case of *Re Astor*¹², though not in the context of monuments. The Law Reform Committee¹³ endorsed this approach and recommended that it should be permissible to use the income of "a limited sum of money" for the maintenance of a grave, tomb or monument (in perpetuity). The Parish Councils And Burial Authorities (Miscellaneous Provisions) Act 1970 now provides that a burial authority or a local authority may agree with any person in consideration of the payment of a sum by him, to maintain (a) a grave, vault, tombstone, or other memorial in a burial ground or crematorium provided or maintained by the authority and (b) a monument or other memorial to any person situated in any place within the area of the authority to which the authority has a right of access but with the caveat that no agreement may impose on the authority an obligation with respect to maintenance for a period exceeding ninety-nine years from the date of that agreement.

Charitable trusts

1. General

A trust by the terms of which the income is to be applied exclusively for charitable purposes is treated very favourably by the law. Such a trust is valid even though it is a purpose trust. The Attorney-General is in charge of enforcing it and it may exist perpetually. Many extant charitable trusts were founded over five hundred years ago. It is unproblematic if the trust fails to provide with reasonable certainty its charitable objectives because certainty of intention to apply monies for charitable purposes is sufficient; and if there is doubt as to the specific charitable purpose, the Charity Commissioners or the court, or in some cases the Crown, will construct a charitable scheme.

As long ago as 1601, the Statute of Elizabeth¹⁴ was passed and in accord with it Commissioners were appointed to supervise the enforcement of charitable gifts and to monitor the abuse of charitable gifts, a circumstance that had come about after the Reformation. The preamble to the Statute listed the most common and important charitable purposes. Although the Statute was repealed by the Mortmain and Charitable Uses Act 1888, the preamble was expressly retained. Even though it itself was repealed by S. 38 (4) of the Charities Act 1960, its effect as an index of charitable purposes is preserved in the case law.

In the case of *Commissioners for Special Purposes of Income Tax v Pemsel*¹⁵, Lord MacNaghten summarised the scope of charitable trusts. "Charity in its legal sense," he

said, "comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community not falling under any of the preceding heads." The subject of monuments and sites is not restricted to any of these heads, and we shall see that it is a transversal category falling under one or another head depending on the facts of the trust in question. As Viscount Simonds said in *IRC v Baddeley*¹⁶, "There is no limit to the number and diversity of ways in which a man will seek to benefit his fellow men". If the courts can find an analogy between an object already held to be charitable and a new object claimed to be charitable, a new charitable trust will result. Where a gift is made to one charity with a gift over to another in the occurrence of certain events, the gift is devoted to charity throughout and there is only a change of charitable objects. So, in *Re Tyler*¹⁷, a gift to charity A, subject to that charity maintaining the testator's tomb and, if it failed to do so, a gift over to charity B, was valid. However, if A had not been a charity in this case, the gift would have been void.

Monuments, memorials and sites are prominent in the law of charitable trusts. In *Re King*¹⁸, for example, a bequest for the erection of a stained glass window in a church was primarily intended by the testator as a memorial to himself but this did not prevent the gift being considered as charitable under the head of advancement of religion. In *Re British School of Egyptian Archaeology*¹⁹, the pertinent trusts were under scrutiny for charity by Harman J. The trusts' terms were "to excavate, to discover antiquities, to hold exhibitions, to publish works and to promote the training and assistance of students": all in relation to Egypt. The conclusion reached by Harman J. here was that the purposes were charitable as being educational. He also implicitly accepted that the object of archaeological research was charitable as an independent unit. In *Re Pinion*, it was held that the trusts' object was to perpetuate the testator's own name and repute of his family as a monument to them rather than to serve public utility or educational needs. The subject of the trusts was the testator's studio and its various "objets d'art". In a memorable judgment Harman L.J. stated: "I can conceive of no useful object to be served in foisting upon the public this mass of junk." So it is not every memorial that will satisfy the English test for charity, and the judgment in *Re Pinion*²⁰ implies a threshold of artistic merit that a monument has to transcend before it can be held of charitable character *per se*.

Gifts for providing and maintaining places of worship are charitable under the head of religion²¹, as are the provision of furniture and ornaments in such places²² and the maintenance of any part of the fabric of a church such as the chancel²³, the bells²⁴, the organ²⁵ and the churchyard site or burial ground²⁶. Gifts to maintain a parsonage or vicarage are also charitable²⁷. Under the head of "Trusts of other purposes beneficial to the community", the preservation of sites of historic interest or natural beauty are also held to be charitable²⁸, as are botanical gardens²⁹.

2. Cy près

When a charitable trust fails, the cy-près doctrine, derived from Anglo-French, may be applicable. Under this doctrine, the courts will, where appropriate, apply the property of a

failed charitable trust as nearly as possible to the original object for which it was given. Before 1960, when the Charities Act 1960 came into force, it was only possible to apply the cy-près principle where the object of a trust had become impossible or impracticable. It was not permitted to apply the cy-près rules in a case where the trust was deemed a financially wasteful way of affecting the charitable object or where it was considered that, in view of the changing needs of society, the charitable object was no longer appropriate. To eradicate the problem s.13 of the Charities Act 1960 was enacted. It provides that in certain set circumstances the original purposes of a charitable gift can be modified so the property can be applied cy-près; for example, where the original purposes, in whole or in part, have been as far as may be fulfilled or cannot be carried out, or, at least, cannot be effected according to the directions or spirit of the gift. In theory the cy-près doctrine can accommodate trusts pertaining to monuments but to date there are no practical examples that have come before the courts.

3. Exclusive charity

To be charitable, the purpose of a trust must be exclusively charitable and not merely include purposes which are charitable. Where a trust's purposes are deemed beyond the limits of legal charity the court may reach one of a few solutions. It can decide that the non-charitable purposes are only incidental so the trust remains vital. Conversely, it can decide the trust is void because it could, for example, wholly serve non-charitable purposes. Finally, the trust fund could be separated into parts, some being applicable to charity and some not. However, this particular step can only be taken where the terms of the trust instrument can be interpreted as directing such a division. For a settlor attempting to create a charitable trust involving monuments and sites, it would be relatively easy to satisfy the "exclusively charitable" requirement for a valid charitable trust by focusing the trust clearly only on its (supposed) charitable subject, linking it only with what are already established charitable purposes, for example, and keeping keen attention on its public benefit.

4. Tax exemptions

In *Dingle v Turner*³⁰, Lord Cross stated: "Charities automatically enjoy fiscal privileges which with the increased burden of taxation have become more and more important and in deciding that such and such a trust is a charitable trust the court is endowing it with a substantial annual subsidy at the expense of the taxpayer..." In England, the income of a charity applied for the charitable objects of that charity is exempt from income tax³¹, corporation tax³², national insurance surcharge³³ and capital gains tax³⁴, and a charity has the advantages of lower stamp duties and remission from VAT in certain circumstances. There is also a fifty per cent. remission of rates on hereditaments occupied by the charity wholly or mainly for its charitable purposes, and a remission from rates at the discretion of the local authority. More specifically, no charge is made to Inheritance Tax in respect of transfers to the National Gallery, British Museum, National Trust, local authorities, government departments, universi-

ties and various other museums and galleries. A court is naturally cautious to grant charitable status to trusts when the significant tax advantage motive underpins the plea for charity. In the context of charitable trusts pertaining to monuments and sites, the removal of such financial burdens is undeniably attractive but it is obviously wise as well as candid to ensure the (supposed) charitable purpose and (alleged) public benefit are the central and unambiguous kernel of the trust, and reason for the trust, when aspiring to charitable status.

Conclusion

In conclusion, the law of trusts presents a novel paradigm for continental lawyers unfamiliar with its somewhat idiosyncratic frames of reference. In the specific context of monu-

ments and sites we are to be grateful that the English law often sees fit to privilege trusts for immovable cultural heritage as either valid non-charitable purpose trusts or charitable trusts. It is to be hoped that the criteria discerned from the trusts case law for the creation of both valid monument purpose trusts and charitable trusts are sufficiently comprehensible to an international audience to be practically useful should the occasion of the use of the trust mechanism arise. In the course of the continued contemporary private sponsorship of museums and sites within the jurisdictions of the Anglo-American legal family, the Equitable framework for favourable and efficient handling of monument and site issues is now more predictable in practice than some of the older seemingly *ad hoc* case law decisions may appear to indicate. The trust is a benefit for the genuine not a snare for the unwary.



Footnotes

- 1 Equity is a branch of the English law which, before the Judicature Act 1873 came into force, was applied and administered by the Court of Chancery: the field of equity is delineated by a series of historical events, and not by *a priori* plan or theory. The division between law and equity is less marked than it was over a century ago, but it is still necessary for various reasons to know whether a rule originates at law or in equity. There is not space to deal with those here. See, further, Pettit, *Equity And the Law of Trusts*, (4th. ed.), Chapters 1 and 2.
- 2 Many attempts have been made to define a trust but none is completely satisfactory. See, further, *Halsbury's Laws of England* (3rd. ed.) Vol. 38, pp. 809-810; also Underhill, *Law of Trusts And Trustees* (13th. ed.), p.1, and Keeton and Sheridan *Law of Trusts* (10th. ed.), pp. 2-6.
- 3 [1932] 1 Ch. 38.
- 4 The "perpetuity rule" is one of the ways in which the English law has insisted on the observance of a practical policy against the tying up of property for an undue length of time. Its detail need not be considered here.
- 5 *Infra*, Charitable Trusts, main text.
- 6 (1856) 25 L J Ch 424.
- 7 [1876] WN 170.
- 8 See note 4 *Supra*.
- 9 (1907) SC 231.

- 10 (1915) SC 426.
- 11 [1960] Ch. 232.
- 12 [1952] Ch. 534.
- 13 Fourth Report (1955), s. 53.
- 14 More officially known as the Statute of Charitable Uses.
- 15 [1891] AC 531 at 583.
- 16 [1955] AC 572.
- 17 [1891] Ch. 252.
- 18 [1923] 1 Ch. 243.
- 19 [1954] 1 WLR. 546, [1954] 1 A11 ER 887.
- 20 [1965] Ch. 85.
- 21 *Re Parker* (1859) 4 H & N 666.
- 22 *Re Manser* [1905] 1 Ch. 68.
- 23 *Hoare v Osborne* (1866) L R 1 Eq 585.
- 24 *Turner v Ogden* (1787) 1 Cox 396.
- 25 *Attorney-General v Oakover* (1936) 1 Ver. Sen. 536.
- 26 *Re Vaughan* (1886) 33 Ch. D. 187.
- 27 *Attorney-General v Bishop of Chester* (1787) 1 Bro. CC. 444.
- 28 See *Re Verrall* (1916) 1 Ch. 100; *Re Cranston* [1949] 1 Ch. 523.
- 29 *Harrison v Southampton Corp.* (1854) 2 Sm. & G. 387.
- 30 [1972] AC 601.
- 31 ICTA 1970 s. 360.
- 32 ICTA 1970 s. 250 (4).
- 33 FA 1977 s. 55.
- 34 CGTA 1979 S. 145.

FRANZ NEUWIRTH

Funding the Restoration of the Architectural Heritage The Austrian Experience

Austria is a federal state – it consists of nine federal provinces (*Länder*). In compliance with the Austrian constitution protection of monuments falls within the scope of federal administration whereas questions of regional planning, building regulations (including townscape care) and nature protection fall within the legislation and responsibility of the federal provinces. European levels of national, regional and local administration correspond within the Austrian borders to federal authorities, provinces and municipalities. Most taxes are collected by federal authorities and refunded to re-

gional and local governments through tax compensation although regional and local governments have the right to collect taxes within their scope of interest in certain cases.

Monuments – grants and tax deductions

Monument protection in Austria is regulated by the Law for the Protection of Monuments enacted in 1923 and amended in 1978 and 1990. Monuments according to this law are all immovable and movable objects created by man whose pres-