

Where an unincorporated association is dissolved

Law



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An unincorporated association, such as a club or society, has two or more members bound by a common purpose. With mutual rights and duties arising from a contractual agreement between members which form the rules of the association. The association though has no legal personality, thus is unable to hold property. The beneficial ownership of the property though is influential in determining how the association's assets will be divided on dissolution. The case law in this area is based on two theories of beneficial ownership, contract and trust. A number of tensions have arisen though in light of these two theories which are based on differing principle and authority.

Ownership of property in unincorporated associations is generally through the officers of the association. With the property vested to them to hold on trust for the members as the beneficiaries, or under contractual obligations which form the rules of the association.

Problems arise with the legal form that gifts to the association take. For leaving property for the purpose of a non-charitable association, is traditionally held invalid under the beneficiary principle. However, there are there are some very rare cases of exception, whilst in *Re Denley's Trust Deed*, a non-charitable purpose trust was found valid where it was for the benefit of ascertainable individuals. Subsequently, in *Re Grant's Will Trust*, doubt was cast over the decision in *Re Denley*, thus leaving much uncertainty in the area.

Gifts made absolutely to members outright though are valid, although the settlor here will be unable to place any obligations on the members

regarding how the property is employed. This can be partly resolved though where the gift is made for the benefit of present and future members. Hence only the income from the assets are used preventing the members from taking the whole assets for their own personal use. However this is subject to the perpetuity period, where the gift is limited in the time it can be used.

In *Re Recher's Will Trusts*, the court found a solution to give greater effect to the settlor's intention whilst validating the gift. By construing the gift as an accretion the association's funds held by the officers, which is to be spent according to the rules. Although this still allows for misuse of the funds there is a greater degree of control, where the settlor can attempt to insert rules that deal with how the money is spent.

Dissolution or winding up of the association will involve the division of its assets, and is likely to be subject to a number of claims. In making its decision the courts will look generally at the source of the funds and the intention of the settlor, construing that the property was transferred through contract or trust.

The present law as seen in *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (no. 2)*, employs the contractual approach, with the funds being held on contract for the members. Therefore on dissolution the funds are divided equally between the members at the date of dissolution. Where past members are seen to disclaim their contractual interest on resignation from the association or death.

This though is subject to any relevant statutory instrument or provision within the association's rules regarding the distribution of assets on winding up. Where this is not found a standard implied term will be construed such that equal shares are awarded, where members were entitled to equal benefits whilst the association was still operational. This forming the prima facie rule.

In *Re Sick & Funeral Society of St John's Sunday School*, Goff J. held, the level of benefits and burdens was provided for within the contract. Thus members either paid full subscription to receive full benefits or paid half subscriptions for half benefits. This was considered sufficient to construe terms allowing for distribution on winding up to be based on contributions. The length of membership though was held irrelevant by Megarry V. C. with older members having received greater benefits than the new members.

Although such a construction of implied terms is not prohibited in the later case of *Re Bucks*, it is unlikely that such a broad view would be favoured over the prima facie rule. For problems will arise where the ratio between benefits and burdens are seen to vary greatly, leaving calculations of entitlement impractical.

Another earlier case *Re West Sussex Constabulary's Children and Benevolent Fund Trusts*, is also seen to contradict the judgement in *Re Bucks*. Where in dissolution of a similar fund to that found in *Re Bucks*, a totally different solution was found. Goff J. concentrated on the sources of the fund in interpreting how the money was to be divided. Whilst the contributions of the members was acknowledged as being held on a contractual basis, thus

divided equally. Funds collected through raffles and entertainments were held bona vacantia. Where the money had been paid as part of a contract which had been performed, therefore these funds were ownerless. Bona vacantia was also found to be the solution for funds raised through anonymous donations in collection boxes. For the donors had disclaimed their interests in the property through anonymously donating, thus the property was ownerless. The final source of contributions was other donations and legacies, which were judged to be held on a resulting trust, under the legal fiction that donors expected to recover the property, where dissolution occurred.

It has been suggested that Goff J.'s failure to employ the contractual approach has been due to the association being outward-turning, thus only third parties would benefit. Hence in giving effect to the intentions of the settlor, the members were not the prima facie beneficiaries of the fund. However, *Re Bucks*, also involved an outward-turning association, where Walton J. subsequently distinguished *Re West Sussex*, as an association not falling under the Friendly Societies Act 1896. Furthermore, Walton J. expressed disagreement over the principles applied by Goff J., where the nature of the association was irrelevant. For all unincorporated associations were to be considered as essentially homogenous to facilitate employing standard implied terms. However, there are differences in the intentions of settlors according to whether the association is inward or outward-turning.

The law though fails to recognise this unless the association is a unincorporated charity. Where, if the property is intended to be used for charitable purposes, on dissolution the cy-pres doctrine will be enforced.

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Otherwise the dissolution does not distinguish between the nature of unincorporated associations.

Therefore, the principles used to determine the present law as seen in *Re Bucks*, can be seen to follow the approach of authorities such as *Re Recher*, whilst differing from that of the authorities such as *Re West Sussex*. The judgement in *Golcar*, may also be different under the principles of the new law which aims *prima facie* to impose standard implied terms into the rules of associations, where no provision suggest otherwise.

Trust, is the other interpretation in case law, of how funds are beneficially owned in unincorporated association. Where the property is held on trust for the members resulting back on dissolution and the subsequent failure of the trust. Problems arise though where the trust device may fall foul of the perpetuity rule. Furthermore, purpose trusts do not necessarily fail on dissolution of the society, only where the purpose is in the society itself as an institution opposed to the activities of members. Whilst the construction of contributions to funds as trusts often involve a degree of artificiality as seen with the legacies in *Re West Sussex*.

In *Re Printers and Transferrers Amalgamated Trades Protection Society*, the court found subscriptions of the present members of the dissolved fund to be held on a resulting trust. Hence determining that members would recover their contributions accordingly. Whilst in *Re Hobourn Aero Components Air Raid Distress Fund*, the fund was judged a resulting trust for past and present members. Difficulties though may arise in the identification of remote past members and the size of their contributions. Thus the solution

as advocated in *Re Printers* would be employed, where the contributions proved unascertainable.

The solution employed in *Re Printers*, though is not actually a trust, but a combination of trust and contract. For whilst the contributions are held on trust for the members, on death or resignation, the contract between the club and the member is dissolved, acting as a disclaimer of interests.

In a pure trust though, disclaiming of interests will lead to *bona vacantia*, as seen in *Re West Sussex*, resulting in problems over perpetuity.

Until recently, the present law left little scope for trusts on dissolution, favouring the contract approach. For once contributions had been paid into the funds, individual interests no longer existed in that contribution, only beneficial interests in the fund as a whole existed through contract.

However, in *Davis v Richards & Wallington Industries Ltd*, the obiter considerations of Scott J. created a degree of uncertainty in the law, indicating a possible change in judicial opinion over the use of trusts in this area. The case involved the dissolution of a pension fund, from which an analogy was drawn with unincorporated associations. Although a valid deed existed to determine the distributions of funds, Scott J. discussed the consequences of invalidity.

The fund had three sources of contributions, employers, employees and money transferred from other funds. The employer's contributions which were provided under contract, were construed though as being held under resulting trust. Where the intentions of the settlor were similar of to that in

the legacies in *Re West Sussex*. Initially, it seems conceptually difficult to reconcile the payment under contract with the creation of a trust. However, under the House of Lords decision in *Barclays Bank v Quistclose Investments Ltd*, the use of such a device seems valid. Where an interest in the money is retained through trust, which will result back in event of failure to employ the funds as intended. A problem that arises with such an application though, is that the creditors of the association will find it more difficult to recover their interests on bankruptcy, the resulting trust taking priority.

Scott J. further held that a resulting trust will be inferred unless it is absolutely clear that it is to be excluded. The intention of the employees though, was interpreted as disclaiming their interests in their contributions. How this intention was construed is uncertain though, with Scott J. failing to elaborate, or explain why the contributions are not divided between the members through a contractual approach. Gardner suggests that Scott J. may have overlooked *Re Bucks*, in his judgement, thus leaving such uncertainty over any distinction.

Until the reasoning in *Davis* is clarified, the uncertainty over the previously settled present law is likely to remain. For whilst the present law advocates the employment of a contractual approach, dividing shares equally under a prima facie rule. *Davis* marks a shift towards the use of trusts and division according to contribution.

Equality and the prima facie rule though, is seen to provide certainty in the law over the distribution of assets on dissolution. This though it may be argued is at the expense of fairness, where the contributions of individual

members is not taken into account. Other notions of fairness though indicates that equality is fair, under 'equity is equality', thus the present law is not contrary to principle under this construction.

The use of equality can be seen to be contrary to principle though. For entitlement to equal benefits under contract does not necessarily infer a equal share of the property on dissolution. Where factors such as the size of contributions should influence how the assets are to be distributed. With several judges having commented in how such a basis for distribution may be fairer. Therefore whilst Walton J. correctly employs the contractual approach as seen in *Re Recher and Golcar*, in solving the entitlement problem he can be seen to misapply the principles.

This could be applied through the use of principles of property and equity. For example, the idea of tenants-in-common, if employed here would allow common ownership and division according to contribution. However, the problems regarding enforceability of the settlor's intention remain.

The courts though are reluctant to combine elements of contract with property law. As expressed in *Re Bucks*, where Walton J. refused to use equitable principles in determining the division of property, despite acknowledging its flexibility. Equity being irrelevant where the relationships within the association were bound by contract, thus the use of the contract to resolve the problem of entitlement. As seen though, the principles that were relied on under the contract approach may be misapplied. Although, the integration of equity and contract has been seen in authorities such as *Quistclose*, this has created problems to creditors on liquidation.

Furthermore, privity of contract is likely to be undermined by the implication of trust devices into contract. Under contract law, the approach in *Re Bucks* may actually be flawed for on dissolution of the association, this would render the contract governing the association frustrated and therefore discharged. Hence the members would recover their contributions from the fund.

The use of the *prima facie* rule may also be seen as contrary to authority. Where equality was only applied as a last resort, when the courts were unable to ascertain the size of individual contributions.

The courts in cases such as *Re Bucks*, have expressed their desire to follow the principle of giving effect to the settlor's intentions when distributing the assets. However, surely by implying standard terms into the rules of associations this is reducing flexibility and the ability to give effect to the settlor's intentions? Where the assets will be divided among the members regardless of the intentions unless the gift is construed as a purpose trust for a unincorporated charity.

In fact, the decision in *Re Bucks*, is seen as result-oriented, where the judges have found the solution which retains the distinction between trust and contract, and is easiest to employ for the courts and associations. This is also reflected in the twisting of legal principles in *Re Printers*, to produce an easily ascertainable class who are entitled to a share on dissolution.

Although the use of common sense to produce a practical solution to the distribution of assets should not be discouraged. The priority of the judges

must be to find a solution that divides the assets as fairly as possible, which would involve giving effect to the settlor's intentions.

Therefore, although the present law may be construed as contrary to certain principles and authorities. It may also be viewed as merely a further extension of other principles and authorities. For in an area of uncertainty, where both case law and principles fail to provide a clear picture for the courts to follow in resolving the issues, such contradictions are somewhat inevitable. Finally, the use of a result-oriented policy by judges has resulted in principle and authority being further contradicted.