Mr Justice Vinelott on unincorporated associations and gifts for non-charitable purposes

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Constructions employed to validate gifts and subscriptions to unincorporated associations include private trusts, charitable and non-charitable purpose trusts, and contracts. In this paper the author examines two English High Court decisions which throw new light on the limits of these orthodox constructions and establish a new construction — suspended beneficial ownership coupled with an equitable obligation. The author argues that this new construction extends beyond unincorporated associations, and provides an effective means of pursuing non-charitable purposes in general.

I. INTRODUCTION

Two recent English High Court judgments from Vinelott J. in the area of the structure of and holding of property by unincorporated associations are of considerable importance and interest. These are the judgments in *Re Grant's Will Trusts*[1] and *Conservative and Unionist Central Office* v. *Burrell (Inspector of Taxes)*.[2] It is proposed to examine the implications of these judgments in the light of an earlier paper by the present author.[3] There an early distinction was made between property regularly subscribed or donated by the members of an association, and property derived by way of gifts and the like from outside sources.

A. Property Regularly Subscribed Or Donated By Association Members

Here I concentrated upon the observations of Walton J. in *Re Bucks Constabulary (No 2)*[4] as indicating clearly the modern prima facie interpretation to be applied

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1 [1980] 1 W.L.R. 360.
2 [1980] 3 All E.R. 42.
3 C. E. F. Rickett, "Unincorporated Associations and their Dissolution" (1980) 39 Camb. L.J. 88.
4 [1979] 1 All E.R. 623.

in determining how such funds are held. These funds are prima facie liable to the "contract-holding theory":[5] that is, the members retain interests in the property because there is an implied contract between them determining the actual scope of such interests by providing for contractual rights and liabilities in the members towards one another. Subscriptions are generally paid to a treasurer or other officers of the association, and the recipients of these subscriptions will become the legal owners of them. For the purposes of the day to day administration of the association the treasurer or other officers will control the property, but will control it only as trustees, on trust for the members subject to their contract inter se. The contract will generally provide for the pursuit of some purpose being the motive for the association's establishment. In this rather loose sense, the property is actually held on "trust" for purposes, but a "trust" always subject to be ended by unanimous action of the members, or by action which is permitted by the contract inter se (usually contained in a set of association rules), bringing the association to an end. This particular trust can be referred to as an administrative trust. This administrative trust is not a resulting trust. The interests which the members retain in their subscriptions and sometimes acquire in property subscribed by former members are not interests under a resulting trust. The administrative trust is more in the nature of, though not identical with, an express trust, the terms of which are essentially discovered in the contract between the members.[6] In the event of the dissolution of the association, there will not be a distribution of the remaining property in proportion to the actual contributions of the members, past and present. Were the trust a resulting trust, such proportionate distribution would necessarily be the outcome. The application of the contract-holding theory leads instead to the corollary that distribution will be only to the members at the date of dissolution and will prima facie be "on the basis of equality, because, as between a number of people contractually interested in a fund, there is no other

5 See (1980) 39 Camb. L.J. 88, 99. The cases are *Neville Estates Ltd.* v. *Madden* [1962] Ch. 832; *Re Recher's Will Trusts* [1972] Ch. 526; *Re Lipinski's Will Trusts* 1976 Ch. 235; *Re Bucks Constabulary (No. 2)* [1979] 1 All E.R. 623. See Brian Green, "The Dissolution of Unincorporated Non-Profit Associations" (1980) 43 M.L.R. 626.

6 A particular difficulty for the contract-holding/administrative trust theory in the U.K. is the operation of the Law of Property Act 1925, s.53(1)(c), which requires that all dispositions of subsisting equitable interests must be made in writing. Purported dispositions are void unless this formality is complied with. If, as the contract-holding theory asserts, a member dies or resigns from an association and thereby forfeits (by virtue of the contract between the members) his interest in the association's property, how is this to be squared with s.53(1)(c), unless there is signed writing from the member or his agent? There has been, after all, a purported disposition of the member's subsisting equitable interest. It is arguable that the contract-holding theory gives rise to an implied rather than express trust, and that therefore the operation of s.53(1)(c) is excluded by s.53(2) which deals with the creation or operation of implied, resulting or constructive trusts. The strength of this argument depends upon two points — (a) that the term "implied" in s.53(1)(c) refers to a type of trust which is not merely limited to the historical categories of resulting trusts, but encompasses other original situations as well; (b) that the application of the contract-holding theory can be adequately presented as based upon an implication of reasonable intention, rather than on an actual expression of revealed intention. It appears that this problem is now likely to arise in New Zealand: see Property Law Amendment Act 1980 (N.Z.), s.2.

method of distribution if no other method is provided by the terms of the contract . . . " .[7]

There is one clear case where this contract-holding theory cannot be applied to a fund consisting of subscriptions. The members may have no proprietary interest because they have created an effective trust over any property subscribed by them. The trust may be charitable, or a fixed trust in favour of particular named persons, or a discretionary privete trust, or a non-charitable purpose trust. In this circumstance the treasurer or other officials of the association are trustees not for the members subject to the contract inter se, but for the charitable purposes, etc. Whether the subscribed funds of an association are subject to a trust of this sort or not is determined by an application of the normal test for certainty of intention as a prerequisite in the establishment of a trust. If the trust is charitable, the members have no interest at all.[8] In the other cases, there is the possibility of a resulting trust arising for the members in the event either of the initial failure of the trust (for want of satisfaction of a trust prerequisite as, for example, certainty of objects or beneficiaries) or of a failure to exhaust the full beneficial interest. Such resulting trust will provide interests in proportion to the actual contributions from all members past and present.[9] If the trust is a non-charitable purpose trust it can legally last only a specific period — when this trust ends, the contract-holding theory may then apply in the absence of some further specification. The members may therefore retain reversionary interests in property at present dedicated to a non-charitable purpose, which interests are regulated by the contract inter se.[10]

What happens if, rather than positively creating a trust over their subscribed funds, the members merely indicate an intention in the contract inter se not to retain any interest in the property? There may be a rule of the association, for example, forbidding the division of the funds at any time or in any circumstances between the existing members. There are three possible solutions. First, the rule might be disregarded in favour of the contract-holding theory. It would, however,

7 *Re Bucks Constabulary (No. 2)* [1979] 1 All E.R. 623, 637, per Walton J. See also, most clearly, *Re Sick and Funeral Society* [1973] Ch. 51, 59-60 (per Megarry J.). See also W. R. Atkin, "Unincorporated Associations — Distribution of Surplus Assets on Dissolution" (1979) 8 N.Z.U.L.R. 217. Cf. Brian Green, op.cit.

8 There may be a possibility of reverter or analogous interests in personality if the original charitable dedication is dressed up as a determinable interest. See, for example, *Re Randell* (1888) 38 Ch. D. 213; *Re Blunt's Trusts* [1904] 2 Ch. 767; *Gibson* v. *South American Stores (Gath and Chaves) Ltd.* [1950] Ch. 177. This rule appears to be recognised in the New Zealand Charitable Trusts Act 1957, s.32(3)(a), and it is not affected by the perpetuities legislation. Cf. infra n.20.

9 Where such a trust fails because it does not satisfy an initial prerequisite for the validity of a trust, it may be that resort could be had to the contract-holding theory, rather than, as would strictly be proper, to a resulting trust. This would be tantamount to turning a blind eye to the declaration of trust (which, although the declared trust does not actually come into existence, is at least clear evidence of the intention of the members not to retain any beneficial interest in their subscribed property by virtue of a contract-holding interpretation) in favour of the prima facie construction. When a trust fails because of a subsequent factor it will probably be impossible to fall back on the contract-holding theory, unless there is an expressed gift over to the association without more which is susceptible to that interpretation. Cf. Brian Green, op.cit.

10 Cf. supra n.8.

seem rather unsatisfactory and arbitrary to disregard an important term of the contract in order to establish a contractual basis for property holding.[11] Secondly, the rule might be interpreted as a declaration of trust by the members over their subscriptions, the terms of which are to be found in the "purposes" for which the association exists. This solution is unsatisfactory for two reasons. The interpretation would again of necessity be very arbitrary, because as already indicated there is no positive indication of a trust. Even assuming the rule to be a declaration of trust, there is no assurance that such a trust would, without more, be valid. In the event of the invalidity of the assumed trust, one would have to fall back on a resulting trust for all the members past and present proportionate to their contributions, since the contract-holding theory is already ruled out.[12] The third solution involves the interpretation of the rule as establishing a half-way house between contract-holding and trust, where there is for a time (while the association is alive and pursuing a particular function) a complete vacuum in the beneficial ownership of the subscribed funds. The rule indicates that the members retain no beneficial interest while the association exists to carry out the purposes for which it was set up, and for which the funds were subscribed; but that any subscriptions not ultimately used for the purposes for which they were subscribed must be returned to the members on the basis of the implied contract inter se. There being a complete vacuum in beneficial ownership, the legal holders of the property (usually the officers of the association) cannot claim absolute ownership of the funds.[13]

B. Property Donated From Outside Sources

On what basis is such property held? It is my view that the determining factor in such cases is the intention of the donor as reasonably inferred from the circumstances of the gift. Very often a gift will be to the "X Association" or to "the officers of the X Association". In such circumstances it is reasonable to infer that the donor intends to give his property to the members beneficially, but subject to the same restrictions which the members place on the use of their own subscribed funds.[14] The property is to be used in accordance with the rules of the association

11 A similar argument to that presented supra n.9 can be presented here. Why not simply turn a blind eye to the rule, as in n.9 to the declaration of trust, in favour of the prima facie contract-holding construction?

12 See, however, the arguments presented supra nn.9 and 11.

13 Vinelott J. hinted at this construction in *Grant;* see (1980) 39 Camb. L.J. 88, 110. It is ironic that Brightman J. in *Re Recher's Will Trusts* viewed the contract-holding theory as providing a half-way house between an absolute gift to the members individually and a valid trust: see [1972] Ch. 526, 539-540. The confines within which the contract-holding theory itself operates make it necessary to find a new half-way house between contract-holding and trust. In *Conservative Central Office* Vinelott J. has extended this new half-way house theory into the area of non-charitable purpose gifts.

14 There are two further constructions available for dealing with gifts intended for the members beneficially. (a) A gift might be intended as a gift for all members, present and future, beneficially. Such a gift fails because it cannot satisfy the perpetuity requirements for vesting of interests. (b) A gift might be intended as a gift to the existing members of the association beneficially as joint tenants or as tenants in common, so that each member is entitled, on severance as a joint tenant, whether or not he continues as a member of the

by which the members are contractually bound inter se — the contract-holding theory. This is the prima facie construction to be placed on straight gifts to unincorporated associations without more, and is supported by a number of recent cases — *Neville Estates Ltd.* v. *Madden*,[15] *Re Recher's Will Trusts*[16] and *Re Lipinski's Will Trusts*.[17] The construction is prima facie applicable regardless of whether the gift is an inter vivos donation or a testamentary gift, and regardless of the purpose for which the particular association exists.

However, because the assumption is made that the donor wishes his gift to be subjected to the restrictions applicable to subscribed funds, it necessarily follows that a gift to an association with a rule forbidding the division of association property at any time or in any circumstances between the existing members cannot logically be upheld on the contract-holding theory. The problems have already been highlighted. Can the half-way house solution be applied in the case of donations? Is there a complete vacuum in the beneficial ownership of donated property, subject to a contractual obligation to return undisposed of donations? How can the contract come into being? One cannot refer back to the contract between the members, since the donor is not paying a contractual due but making a voluntary gift. The donor may of course be a contracted member, but this matters not — one looks to the character of the donation and not to the status of the donor. If there is a contractual obligation in the officers of the association as legal holders of the donated property, it must be by virtue of an implied contract between themselves and the donor. Such a solution presents a considerable difficulty. Donations will cease to be donations (contrary to the most reasonable interpretation of the circumstances), and must be read instead as part of a contractual bargain. This seems most unreal in the case of a donation inter vivos, and it is clearly absurd in the case of a testamentary gift.[18]

What, then, of the trust solution? A donation, inter vivos or testamentary, can be made by way of trust if the donor shows an express intention to do so. The contract-holding theory is inapplicable, as the members clearly take no beneficial interests in the donated property. If the trust fails initially or subsequently there will, in the absence of a gift over, be a resulting trust in favour of the donor or his heirs, etc.[19] If the intended trust is charitable, a resulting trust cannot arise in New

association, to an aliquot share. Such a gift is valid. It is likely that these interpretations have essentially given way to the contract-holding interpretation, and they will thus not be discussed further here.

15 [1962] Ch. 832.

16 [1972] Ch. 526.

17 [1976] Ch. 235.

18 For further discussion see infra at text to n.89 and following.

19 It is probable that where donations on trust are made anonymously in a particularly obvious fashion (e.g., street collections) the property so donated will, in the event of the failure of the trust, be held for the Crown as bona vacantia, rather than on a resulting trust for all the donors. There is still, of course, no application of the contract-holding theory in such a circumstance. The logical resulting trust theory is simply ignored because of (a) the practical difficulties which would otherwise result, and (b) the presumed intention of anonymous donors to deny all interests in such donated property, thus making the property ownerless — a situation for which bona vacantia is the remedy. See *Re West Sussex Constabulary's Trusts* [1971] Ch. 1; but cf. *Re Hobourn Aero Components Ltd.'s Air Raid Distress Fund* [1946] Ch. 86, and *Re Gillingham Bus Disaster Fund* [1958] Ch. 300; affd. [1959] Ch. 62. The whole problem is discussed fully in (1980) 39 Camb. L.J. 88, 119-122.

Zealand.[20] To return to the question as yet unanswered — should a donation made to an association which has a rule denying the members any beneficial interest in the association's property be saved, at least prima facie, by construing the donation as one on trust for the purposes of the association, even though there is no clearly expressed declaration of trust in the terms of the donation itself? The arguments made earlier against the trust solution when discussing members' subscriptions to such an association are relevant here too. However, in the subscriptions situation the availability of the alternative half-way house solution added an argument against adopting the strained trust interpretation, whereas in the donation situation the unavailability of this alternative solution adds an argument in favour of the trust interpretation. Essentially, the point is that the trust interpretation is the least unreal of the possible solutions to a difficult problem.

It is against this background that the two decisions of Vinelott J. will be examined. *Re Grant's Will Trusts*[21] was discussed at various points in my earlier paper, and some of the discussion here will therefore necessarily be repetition. There has, however, been some further discussion of the case since that paper appeared, and those developments will be considered here.

II. RE GRANT'S WILL TRUSTS

This case deals with a testamentary gift to an unincorporated association.

A testator left all his real and personal estate to a local property committee for the benefit of the Chertsey Headquarters of the Chertsey and Walton Constituency Labour Party, providing these Headquarters remained in what was the Chertsey Urban District Council Area (1972). If this condition was not satisfied, the property was to go to the National Labour Party absolutely. The Chertsey and Walton C.L.P. had been formed after the redistribution of Parliamentary constituency boundaries in 1970. The old Chertsey C.L.P. had used as its Headquarters 36 Guildford Street, vested in named persons subject to a trust deed, and its management being in the hands of the general management committee of the Chertsey C.L.P. 36 Guildford Street was now Headquarters of the Chertsey and Walton C.L.P., being managed by a local property committee (see above), although the named persons continued to hold the property as trustees. These named persons, being also executors of the will, sought directions from the court concerning the validity of the gift.

A. The Findings

1. As a matter of construction, the gift was not on the trust of the trust deed under which 36 Guildford Street was held.[22]

2. In surveying "the principles which govern the validity of a gift to an unincorporated association"[23] Vinelott J. accepted the three-fold classification of Cross J.

20 See New Zealand Charitable Trusts Act 1957, s.32(1)(2). Note also ss.(3). These provisions avoid the need to satisfy the troublesome prerequisites for cy-près application.
21 [1980] 1 W.L.R. 360.
22 Ibid. 371.
23 Ibid. 365.

in *Neville Estates Ltd.* v. *Madden*[24] as an accurate statement of the law. Under this classification a gift might be interpreted as (a) to the members beneficially as joint tenants; (b) to the members beneficially subject to the contract-holding theory; (c) on trust for the association's purposes. He concentrated on the contract-holding theory,[25] which he characterised thus — [26]

> . . . the gift is to members of an association, but the property is given as an accretion to the funds of the association so that the property becomes subject to the contract (normally evidenced by the rules of the association) which govern the rights of the members inter se. Each member is thus in a position to ensure that the subject-matter of the gift is applied in accordance with the rules of the association, in the same way as any other funds of the association.

Vinelott J. then cited the statements of Brightman J. in *Re Recher's Will Trusts*[27] concerning the prima facie applicability of the contract-holding theory to the subscribed funds of members, and to both inter vivos donations from non-contracting parties and legacies, and stressed two points made therein. First, the contract-holding theory is prima facie applicable regardless of the purpose for which the association exists.[28] Secondly:[29]

> [i]t must . . . be a necessary characteristic of any gift within . . . [the contract-holding theory] that the members of the association can by an appropriate majority, if the rules so provide, or acting unanimously if they do not, alter their rules so as to provide that the funds, or part of them, should be applied for some new purpose, or even distributed amongst the members for their own benefit. For the validity of a gift within . . . [this theory] rests essentially upon the fact that the testator has set out to further a purpose by making a gift to the members of an association formed for the furtherance of that purpose in the expectation that although the members at the date when the gift takes effect will be free, by a majority if the rules so provide or acting unanimously if they do not, to dispose of the fund in any way they may think fit, they and any future members of the association will not in fact do so but will employ the property in the furtherance of the purpose of the association and will honour any special condition attached to the gift.

It was argued that this gift should be construed as a contract-holding gift to the members of the Chertsey and Walton C.L.P., with a super-added direction (but no trust) as to its particular use (i.e., for headquarters' purposes rather than for general party purposes).[30] Vinelott J. examined the rules governing the Chertsey

24 [1962] Ch. 832, 849.

25 Vinelott J. also examined that class of gifts to unincorporated associations which impose a trust. This is discussed below.

26 [1980] 1 W.L.R. 360, 365-366.

27 [1972] Ch. 526, 538.

28 [1980] 1 W.L.R. 360, 367-368. See also *Re Bucks Constabulary (No. 2)* [1979] 1 All E.R. 623, 626 (per Walton J.).

29 Ibid. 368. See also *Neville Estates Ltd.* v. *Madden* [1962] Ch. 832, 849 (per Cross J.).

30 It was also submitted that such a contract-holding gift was subject to a gift to the National Labour Party in defeasance of the contract-holding gift, if at the death of the testator the Headquarters were outside the Chertsey Urban District Council Area (1972). Vinelott J. thought this gift over would be void under the rule against perpetuities.

and Walton C.L.P., and gave two reasons why the gift could not be validated as a contract-holding gift. First,[31]

> the members of the . . . C.L.P. do not control the property, given by subscription or otherwise, to the C.L.P. The rules . . . are capable of being altered by an outside body which could direct an alteration under which the general committee of the C.L.P. would be bound to transfer any property for the time being held for the benefit of the C.L.P. to the National Labour Party for national purposes. The members of the . . . C.L.P. could not alter the rules so as to make the property bequeathed by the testator applicable for some purpose other than that provided by the rules; nor could they direct that property to be divided amongst themselves beneficially.

Secondly, the terms of the gift itself established that it was made on trust:[32]

> The fact that a gift is a gift to trustees and not in terms to an unincorporated association, militates against construing it as a gift to the members of the association at the date when the gift takes effect, and against construing the words indicating the purposes for which the property is to be used as expressing the testator's intention or motive in making the gift and not as imposing any trust.

One commentator, A. M. Tettenborn,[33] has questioned these findings. It is quite clear, however, that on the summary of the law already offered herein, Vinelott J.'s finding is correct. Tettenborn is essentially arguing that the law as it stands is inadequate and ought to be refined by a comprehensive statute. He argues that the bequest should have been upheld as being intended for the benefit of the members of the association, regardless of any "chimerical" distinction between gifts for members beneficially and gifts for the purposes of the association. The only realistic intent is to make a valid bequest to the particular association, which is a mixture of members and purposes. The gift should therefore have been upheld as a contract-holding gift, and the "only means by which the money is bound to its purposes is by the contract between the members, which contract amounts to an implied share of the property of the association . . . ".[34] This argument challenges, then, the very basis of Vinelott J's second reason for rejecting the contract-holding theory.

As to Vinelott J.'s first reason, Tettenborn appears to believe that this is a point only on the law of perpetuities.[35] He does not apparently accept that the existence of rules making it impossible for the members to control the destination of property by dissolution and distribution amongst themselves must logically indicate whether or not members are capable of retaining any proprietary interest in association property. A contract-holding solution cannot be applied without a very obvious turning of the blind eye!

Further, is Tettenborn's point on realistic intention really sound? Two points might be made about the testator. First, he had been a member of the Labour

31 [1980] 1 W.L.R. 360, 374. See for an attack on this finding Brian Green, " 'Love's Labours Lost': A Note on Re Grant's Will Trusts" (1980) 43 M.L.R. 459, 462-463.
32 Ibid. 375.
33 A. M. Tettenborn, "Legacies and Local Labour Parties" (1980) 130 New L.J. 532.
34 Ibid. 533.
35 It is a point very relevant to the law of perpetuities, for which see infra at text to n.45.

Party for 24 years, and an active constituency member for many years, holding the office of financial secretary of the old Chertsey C.L.P., and of the new Chertsey and Walton C.L.P. up until his death. It is reasonable to assume that he was familiar with the constitution of the C.L.P., and probably believed that the members did not own the C.L.P. property, donated or subscribed, in any way because of a combination of the rules themselves with the fact that the association was essentially not a members' or social club. Secondly, he would probably intend his bequest to be an accretion to the C.L.P.'s funds in the same way, for the purposes of the association. He might indeed be quite shocked to hear that the existing members of the association could together, dissolve the association and divide its property amongst themselves. He surely believed that such a course was impossible because it would be contrary to the constitution of the association.

Tettenborn suggests that after *Grant* there is only one way to achieve a valid bequest of the sort intended in that case, namely[36]

> to leave the property beneficially to the members of the committee of the organisation concerned in office at the time of the testator's death, subject to a strongly worded but pointedly unenforceable "direction" to use those funds for the benefit of the organisation . . . . the drawback to this method is too obvious to need explanation.

What is the essential difference between this method, and the contract-holding gift which Tettenborn asserts should have been the outcome of the case? Is the answer that the latter method gives one a certainty and security in numbers? Is a considerable number of beneficiaries less likely to divert the funds from their true purpose than is a small committee of beneficiaries?

3. In view of his second reason for rejecting the contract-holding theory, it is perhaps surprising that Vinelott J. did not discuss explicity the possibility that the *Grant* bequest created a valid non-charitable purpose trust. He did, however, examine in general terms the law on gifts to unincorporated associations purporting to impose trusts. From this examination it is obvious why he did not think this particular gift could succeed on this basis.

He concentrated his remarks on the prerequisite need for enforceability of trusts by beneficiaries, and adopted the often cited statement of Viscount Simonds in *Leahy* v. *Attorney-General for New South Wales*[37] as a correct analysis of the law. He limited acceptable beneficiaries to cestuis que trust, thus effectively confining the list of valid non-charitable purpose trusts to the famous anomalous cases, the "concessions to human weakness or sentiment."[38] Attempted trusts for the purposes of an unincorporated association not within the anomalous category will therefore fail ab initio for unenforceability.

36 Op. cit. 533.

37 [1959] A.C. 457, 479 "[A] trust may be created for the benefit of persons as cestuis que trust but not for a purpose or object unless the purpose or object be charitable."

38 *Re Astor's Settlement Trusts* [1952] 1 Ch. 534, 547 (per Roxburgh J.).

I have argued at length elsewhere[39] that Vinelott J. was wrong to distinguish *Re Denley's Trust Deed*[40] as not being concerned with purpose trusts. I might add here, to the arguments made earlier, the point that Vinelott J. made no mention of the approval of *Re Denley* as a purpose trust decision by Oliver J. in *Re Lipinski's Will Trusts,*[41] even though the latter case was cited to him and mentioned elsewhere in his judgment. *Re Denley* in effect extended the locus standi for the purposes of enforceability in trusts from the traditional cestuis que trust to factual beneficiaries.[42] Consequently, fewer gifts to unincorporated associations which impose purpose trusts will fail for unenforceability, since in some cases it will be shown that members have an adequate factual benefit to satisfy *Re Denley.* Had Vinelott J. accepted the *Denley* factual beneficiaries concept, would he then have upheld this gift? This is most unlikely, since the trust was for "headquarters' purposes",[43] and, unless the Headquarters provided, in addition to a political party's administrative centre, social or recreational facilities for members, the factual benefit to members would perhaps be too remote.[44]

In any event, the particular gift in its circumstances would fail for perpetuity. I have examined the perpetuity issue in some detail elsewhere.[45] Where a gift cannot be one for the members beneficially either because of its own terms (as in *Grant*) or because under the rules of the association the members cannot have any beneficial interest in the property held by the association (also the case in *Grant*), then for a valid purpose trust to exist, which complies with the perpetuity law, either the members of the association must under the terms of the gift read with the association's rules be able to dispose of the capital without any fetters, or the gift must be expressly limited in its duration to the relevant period of royal lives plus 21 years, or 21 years. This statement of the English law was the result of an analysis of the cases. The New Zealand law appears to be somewhat more liberal, as will become apparent. Clearly, the purported trust in *Grant* would fail for perpetuity on this basis.

39 (1980) 39 Camb. L.J. 88, 105-106. See also for similar criticisms Brian Green, " 'Love's Labours Lost': A Note on Re Grant's Will Trusts55 (1980) 43 M.L.R. 459, 461. Vinelott J. has said that a non-charitable purpose trust is a "legal impossibility": see *Conservative and Unionist Central Office* v. *Burrell (Inspector of Taxes)* [1980] 3 All E.R. 42, 60.

40 [1969] 1 Ch. 373.

41 [1976] Ch. 235. This omission of Vinelott J. is probably explained by the fact that he was of the view that Oliver J. construed the gift in *Lipinski* as a clear contract-holding gift. See [1980] 1 W.L.R. 360, 368. Cf. my own earlier discussion of *Re Lipinski* in (1980) 39 Camb. L.J. 88, 106-108; and Brian Green, op.cit. 461.

42 See L. McKay, "Trusts for Purposes — Another View" (1973) 37 Conv. 420, and L. McKay, "*Re Lipinski* and Gifts to Unincorporated Associations" (1977) 9 V.U.W.L.R. 1, for doubts about such a reading of *Denley.* See also G. Blake and W. Neville, " 'Common Sense' and Testamentary Gifts to Unincorporated Associations" (1977) 8 Sydney L. Rev. 520.

43 [1980] 1 W.L.R. 360, 374, (per Vinelott J.).

44 Cf. recreational facilities for employees in *Denley.* A different conclusion on the operation of the *Denley* concept in *Grant* is reached by Brian Green, op.cit. 463.

45 (1980) 39 Camb. L.J. 88, 101-104. This subject is also discussed fully in R. H. Maudsley, *The Modern Law of Perpetuities* (Butterworths, London, 1979), 171-176.

A point of some interest arises here. Had *Grant* arisen in New Zealand, and the trust been upheld on the human beneficiary ground under an application of the *Denley* reasoning, it would not have failed at the outset for perpetuity. By the New Zealand Perpetuities Act 1964, section 20(2),[46] the concept of wait and see during the common law period of a life in being plus 21 years is made applicable to any non-charitable purpose trust which is not otherwise void. One assumes that if the section is to mean anything substantial the concept will apply where there has been no express limitation of duration.[47]

4. Having held that under the rules the members could retain no beneficial interest in the property of the C.L.P., whether subscribed or otherwise, Vinelott J. then faced the obvious question as to the status of the subscribed funds held by the C.L.P. I have discussed critically elsewhere[48] his reasoning in this respect, but some repetition is necessary here. First, Vinelott J. did not see this issue in terms of an exclusive choice between a contract-holding application and a purpose trust. He had rejected both alternatives, and without a third the result would be most unsavoury — no C.L.P. governed by the model rules prescribed by the National Labour Party would validly hold "association" property in any way for C.L.P. purposes. Secondly, the third alternative, which Vinelott J. adopted, was an embryonic form of the half-way house already mentioned. He held that[49]

> subscriptions by members of the Chertsey and Walton C.L.P. must be taken as made upon terms that they will be applied by the general committee in accordance with the rules for the time being including any modifications imposed by the Annual Party Conference or the National Executive Committee.

Thirdly, he thought that if the C.L.P. were dissolved, "any remaining fund representing subscriptions would (as the rules now stand) be held on a resulting trust for the original subscribers."[50] However, this conclusion would follow only if there

46 Cf. Perpetuities and Accumulations Act 1964 (U.K.), s.15(4): "Nothing in this Act shall affect the operation of the rule of law rendering void for remoteness certain dispositions under which property is limited to be applied for purposes other than the benefit of any person or class of persons in cases where the property may be so applied after the end of the perpetuity period."

47 Had the *Grant* trust been upheld in England under an application of *Denley*, would it nevertheless have failed for perpetuity, or is it arguable that the "wait and see" provisions of the Perpetuities and Accumulations Act 1964 would have applied to save the gift initially? It is generally thought that s.15(4) of the Act (see supra n.46) excludes purpose trusts from the Act's ambit; but it is pointed out by Brian Green, op.cit., that the section refers only to trusts without human beneficiaries. Green asserts that a *Denley* purpose trust has human beneficiaries for the purposes of the Act, and is therefore within the scope of the wait and see provisions. If so, he says at 460, "[t]here would seem to be no reason why such trusts, even if of unconfined duration, should be declared invalid where they might duly cease within a period of causally relevant lives (if any) plus 21 years." My view is that this argument is not tenable because *Denley* "beneficiaries" are so classified only for the specific purpose of enforceability, and for no other. Cf. arguments in Hanbury and Maudsley, *Modern Equity,* (10th Ed. Stevens, London, 1976), 360-361; and in R. H. Maudsley, op.cit. 177-178. Maudsley argues that the effect of s.15(4), read with s.1, is to introduce an alternative 80 year perpetuity period (if expressly provided for in the trust instrument) in the case of non-charitable purpose trusts.

48 (1980) 39 Camb. L.J. 88, 110.

49 [1980] 1 W.L.R. 360, 374.

50 Idem.

were a purpose trust which had failed, either ab initio or subsequently upon the dissolution of the C.L.P. The reference to a resulting trust in the context of the new half-way house theory is therefore both mistaken and misleading. In *Conservative and Unionist Central Office* v. *Burrell (Inspector of Taxes)*[51] Vinelott J. accepted that his reference in *Grant* at this point to a resulting trust was misleading. He said:[52]

> The right of subscribers to the return of their subscriptions so far as not used for the purposes for which they were subscribed rests on an implied contractual term and not on a resulting trust.

Fourthly, Vinelott J. said that if the half-way house theory was correct so far as subscriptions were concerned,[53]

> it is fatal to the argument that the gift in the testator's will should be construed as a gift to the members of the . . . C.L.P. at the testator's death, subject to a direction not amounting to a trust that it be used for headquarters' purposes.

This statement could simply be taken as reiteration that the contract-holding theory was not applicable, but the implication from the way in which the argument is structured is that the half-way house theory is applicable to subscriptions, but not to donations, and clearly not to testamentary donations.[54]

B. Conclusions On Re Grant's Will Trusts

The outcome of the case is unfortunate. The luckless Mr Grant was doomed from the outset to failure in his understandable wish to leave his property on his death for the furtherance of the purposes of the association and general political movement of which he had been an active member for many years. He could only have achieved either a depressingly insecure dedication to purposes through a beneficial gift to individual identified members, or an effective dedication to a much emasculated class of purposes (even given acceptance of *Denley*). The statement of Brightman J. in *Re Recher's Will Trusts,* cited by Vinelott J., is very much to the point:[55]

> It would astonish a layman to be told that there was a difficulty in his giving a legacy to an unincorporated non-charitable society which he had, or could have, supported without trouble during his lifetime.

Brightman J. was able to tell his layman that the contract-holding theory would save his legacy. Vinelott J. was not so fortunate, and in applying the law as he found it (in my view correctly, although with reservations about his approach to *Denley*) he could find no way to save Mr Grant's legacy. As it was, he had to formulate a new concept to explain away the validity of Mr Grant's lifetime subscriptions.

51 [1980] 3 All E.R. 42. See my own criticisms earlier at (1980) 39 Camb. L.J. 88, 110.
52 Ibid. 64.
53 [1980] 1 W.L.R. 360, 374.
54 Cf. *Conservative and Unionist Central Office* v. *Burrell (Inspector of Taxes)* [1980] 3 All E.R. 42.
55 [1972] Ch. 526, 536. Cf. the context in which Vinelott J. cited the remark, at [1980] 1 W.L.R. 360, 374.

The case illustrates an inevitable characteristic of the law on unincorporated associations. Commencing with the premise that unincorporated associations are not juristic persons, thus having no independent legal identity, the law is forced to deal in an haphazard manner with the problems thrown up by the practical realities. The approach is haphazard because the factually distinct situation has to be encompassed within rules and principles which have been developed to deal with other factually distinct situations, such as trusts and contracts.[56] Perhaps the time has now clearly arrived when unincorporated associations should be accorded juristic personality, at least for a limited range of items, most notably questions of property.[57] An alternative solution might be to deem all property held by, or donated to, unincorporated associations as governed by the contract-holding validating construction.[58] It will be seen that such a course is doubly attractive following the decision in *Conservative Central Office.*

III. CONSERVATIVE AND UNIONIST CENTRAL OFFICE v. BURRELL (INSPECTOR OF TAXES)

Under section 238(1) of the United Kingdom Income and Corporation Taxes Act 1970, companies are liable to pay corporation tax. In section 526(5) a company is defined as meaning any body corporate or unincorporated association. The Conservative and Unionist Central Office was assessed to corporation tax on investment income and interest revealed in its Income and Expenditure Account, and appealed the assessment to the Commissioners for the Special Purposes of the

56 Cf. the Preface to Dennis Lloyd, *The Law Relating to Unincorporated Associations* (Sweet & Maxwell, London, 1938), iv. "In dealing with the law relating to unincorporated associations, a difficulty which has constantly to be faced is that it does not constitute a coherent and self-contained body of doctrine, as, for example, the law of contract or of corporations. This is because the condition of an unincorporated association is not in itself a status but simply indicates a residuary class comprising all societies not technically corporate."

57 An interesting analogy is the case of trade unions in English law. Although they are strictly unincorporated associations they have since 1901 been dealt with (at least for certain purposes) as quasi-corporations: see *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* [1901] A.C. 426; *Bonsor* v. *Musicians' Union* [1956] A.C. 104. In *Electrical, Electronic, Telecommunication and Plumbing Union (EETPU)* v. *Times Newspapers Ltd.* [1980] 3 W.L.R. 98, O'Connor J. reviewed the history of the quasi-corporation thesis, and concluded at 103 that the thesis had been developed only "because of the position imposed upon the unincorporated association by the Trade Union Acts . . . ". In *EETPU* it was held that the quasi-corporate status necessary for a trade union to maintain an action for defamation had been legislated away by the Trade Union and Labour Relations Act 1974 (U.K.), s.2(1). One assumes that if the quasi-corporate status of trade unions can be legislated away, quasi-corporate status for all (or even a limited range of) unincorporated associations can as easily be legislated into existence. Perhaps *Grant* illustrates most poignantly the need for legislative intervention of this sort. If trades unions are important in society, so are unincorporated associations (and particularly political organisations), and the status of the property of these latter bodies needs to be dealt with otherwise than haphazardly.

58 See for example the proposed Queensland Unincorporated Associations Act (Q.L.R C. Report No. 30).

Income Tax Acts. The Commissioners made the following statement in upholding the assessment:[59]

> The Conservative Party, comprising members of local Conservative constituency associations and those members of both Houses [of Parliament] who take the Conservative Whip, may properly be described as a voluntary and unincorporated association of individuals united on the basis of agreement in certain political tenets and principles and by acceptance of an established structure for regulating a political party.

Therefore, the funds held by the party treasurers for the use of the Central Office were held on behalf of the members of this unincorporated association. Central Office immediately requested the Commissioners to state a case for the opinion of the High Court.

The decision is of considerable importance for two reasons. First, the statute required Vinelott J. to determine whether there was a "body" equivalent to a "legal" unincorporated association before him. No statutory definition was provided, and Vinelott J. was left to apply the common law "definition". This is an extraordinary demand for Parliament to make in the light of the basic lack of legal personality which bedevils unincorporated associations. Although no factual association has legal personality unless it is incorporated, the statute implied the existence of two types of non-corporate associations: (a) those which are "recognised" in law in the sense that although principally there has to be resort to notions of contract, trust, etc., these notions are applied in a situation where there is a factually independent association, where the law at least acknowledges its existence and will provide mechanisms to deal with the problems created (particularly those of property holding) because it lacks full legal personality; and (b) those loose factual associations which warrant no special attention as independent "bodies". Vinelott J. approved a definition of recognised unincorporated associations, which itself might be used in any statutory provision of quasi-corporate status for such bodies. Secondly, in determining where the ownership of the Central Office funds was situated, Vinelott J. was able to add to his discussion in *Grant* of property holding by unincorporated associations, and in particular to enlarge upon and to extend the scope of his half-way house theory.

A. The Findings

1. Vinelott J. accepted the argument presented to the Commissioners by counsel for the Central Office that any "formal" unincorporated association would be identified by its three necessary characteristics, and would often possess three other usual characteristics. The necessary characteristics are:

(a) *Membership.* There must be members of the association. An unincorporated association cannot itself be a member of an unincorporated association, since it has no legal personality. There cannot therefore be an unincorporated

59 [1980] 3 All E.R. 42, 51.

association whose membership is simply the sum total of a number of other unincorporated associations.[60] Members must be legal persons.

(b) *Contract.* There must be a contract binding the members inter se which will usually be found in a set of written rules.[61]

(c) *Formation.* There must, as a matter of history, have been a moment in time when a number of persons combined or banded together to form the association.[62]

The usual characteristics might be helpful in some cases, but Vinelott J. stressed that they were by no means necessary.[63] They are:

(d) *Constitution.* There will normally be some constitutional arrangements for the meetings of members and for the appointment of committees and officers.

(e) *Adherence.* A member will normally be free to join or leave the association at will.[63]

(f) *Continuity.* The association will normally continue in existence independently of any change that may occur in the composition of the association.[64]

2. Could Vinelott J. agree with the Commissioners that the Conservative Party was an unincorporated association?[65] As a prerequisite to an application of the

60 Ibid. 55. The National Union of Conservative and Unionist Associations, to which all local constituency conservative associations (which are all unincorporated associations — 54) are affiliated, was not itself an unincorporated association unless it has as its members all the individual members of the local constituency conservative associations. Vinelott J. said of the National Union (without deciding the question) at 55 "[I]t is not an amalgam of the members of the different local constituency associations but a meeting place of delegates with an agreed constitution but no members."

61 Vinelott J. thought these first two characteristics to be "no more than an analysis of the concept of an unincorporated association": ibid. 58. These characteristics would exclude the looser "associations" which I referred to in (1980) 39 Camb. L.J. 88, 89. They would also exclude "associations" where it is simply unrealistic to say that a "legal" unincorporated association is intended, e.g. ladies' tea party clubs, informal bridge clubs, etc. There is no intention to create legal relations.

62 Vinelott J. pointed out that this characteristic followed logically from the first two, and that there might be evidential difficulties in pointing to the exact moment of formation: idem.

63 He instanced a possible exclusive members' club where the members joined for life and where there was no provision for the admission of new members: idem.

64 It appears from the case stated by the Commissioners that the latter accepted all six characteristics as essential, since (a) they cited a definition of an unincorporated association offered by counsel for the Central Office which encompassed explicitly at least the adherence characteristic, and (b) in determining the "Conservative Party" to be an unincorporated association they were careful to examine each characteristic, and affirm that it was present in the Party: ibid. 49, and 50-51. The proffered definition was (at 49): "An unincorporated association exists whenever persons who lawfully associate together to achieve a common purpose ('the members') bind themselves together by an enforceable contract by the terms of which (i) persons may, by agreeing to the terms of the contract, become members and (ii) persons may, by resiling from the contract cease to be members and (iii) so far as the law permits, only those persons who are, from time to time, members have a share in the assets, or are burdened by the liabilities of, the association."

65 [1980] 3 All E.R. 42, 51.

characteristics test, Vinelott J. examined the structure of the Conservative Party organisation.

There are three distinct elements in the structure: (i) The Parliamentary Party consisting of members of both Houses of Parliament taking the Conservative Whip. (ii) Each of the local constituency conservative associations, with its members, each association having a body of rules, and being itself an unincorporated association. The National Union of Conservative and Unionist Associations exists "to co-ordinate local constituency parties and to foster conservatism as a national movement."[66] All local constituency associations are affiliated to the National Union, which "is not an amalgam of the members of the different local constituency associations but a meeting place of delegates with an agreed constitution but no members."[67] (iii) The Central Office or Party headquarters, operating as a separate organisation, and serving and responsible to the Party leader.

The moneys of the Conservative Party are raised by party treasurers appointed by the Party leader and assisted by a constitutional board of finance. "The expenditure of the moneys raised is under the control of the Central Office and thus ultimately under the control of the leader of the party."[68] Although no rules exist to deal with the unlikely event of the Party leader's directing an improper or mistaken use of funds, the evidence indicated that the officers of Central Office controlling the funds might in such circumstances feel bound to put the funds out of the Party leader's reach.

The Party leader heads both the Conservative Party in Parliament and the Party organisation in the country, including Central Office. The leader is elected by ballot in the House of Commons and then "presented for election" at the Party Meeting being a gathering of representatives of the mass membership, and the Parliamentary Party.

The Commissioners had stated that persons became members of the Conservative Party either by joining a constituency party and paying the required subscription, or by taking the Conservative Whip in Parliament. Vinelott J. questioned this. First, it was[69]

> absurd to suppose that a member of parliament who crosses the floor thereby becomes a member of an unincorporated association, of the existence of which he was unaware and the membership of which carries a proprietary interest in funds under the control of the Central Office though with no obligation himself to subscribe to them.

Secondly, the Conservative peers would be odd-looking members, with no role, no liabilities and no rights. "They play no part in the election of the party leader, they need not be members of any local constituency association and they are under no obligation to contribute to the funds under the control of the Central Office."[70] The conclusion as to membership was simply unreal.

66 Ibid. 54.
67 Ibid. 55.
68 Ibid. 56.
69 Ibid. 59.
70 Ibid. 60.

For the Commissioners, a contract existed between the members of the Conservative party. In part it was in the rules of the National Union, in part in the rules regulating the Party Meeting, in part in the rules for the selection of the Party leader, and in part in the rules of local constituency associations. Vinelott J. also criticised this construction as unreal.[71] As neither the National Union nor the local constituency associations has any control over moneys held by the Central Office, these moneys could only be treated as belonging to the members if there was a link between the members and the Party leader,[72] since the latter had the power to direct expenditure of the funds. But the rules for the selection of the Party leader could not form part of a contract between the members of the party in Parliament and the mass membership — neither the National Union nor the constituency association were actively consulted. The representatives of the mass membership would merely approve the selection at the Party Meeting.

Vinelott J. could not agree that "the Conservative Party" is an unincorporated association within the characteristics test definition he accepted. This would be "to construct out of unpromising material an unreal entity."[73] He concluded that "the Conservative Party is a political movement with many parts (some of which are unincorporated associations) which in practice work together to a common end."[73]
3. Vinelott J. now faced counsel for the Crown's "overriding submission" that the existence of "Party property" made it impossible for him to resort to "the notion of an amorphous combination of a character unknown to the law" in describing the status of the Conservative Party.[74] The argument was that once the legal owner of property is identified, "he must be either a trustee holding on some effective trust . . . or he must be a beneficial owner."[75] The outcome, as regards property donated to the Conservative Party in the absence of an unincorporated association holding its property under the contract-holding theory,[76] must be either that a non-charitable purpose trust would arise (which was impossible

71 Ibid. 59.

72 Cf. the manner in which the Commissioners linked members' subscriptions with the expenditure of moneys by the Central Office: ibid. 58. "[T]hose contracting parties who pay subscriptions to local constituency associations do so on the basis that some part of what they subscribe may be applied as a contribution to the central funds of the Party. If the local constituency association . . . makes a contribution to central funds, the money will be applied by Central Office for Party purposes under the direction of the Party Treasurer subject to such general instructions as the Party Leader may be minded to give. A member having subscribed must be taken to have contracted wits his fellow members not to seek to withdraw his money but to permit it to be dealt with and applied for Party purposes as those with responsibility for such matters under the Party's "constitution" decide."

73 Ibid. 60.

74 Ibid. 52, and 60-62.

75 Ibid. 60.

76 The argument was that any donor intended to benefit the purposes of the Conservative Party and to divest himself of every proprietary interest in his contribution, and that effect could only properly be given to these desires "by inferring the existence of an unincorporated association, the members of which can then be treated as the owners of those moneys and the rules of which will in practice ensure that the moneys will be devoted to the intended purpose": ibid. 60. One assumes, therefore, that the contract-holding theory would be applied, as a remedial device.

in the case here);[77] or that "the moneys given to the party treasurers must belong beneficially either to the party treasurers or possibly to the party leader . . .",[78] a solution leading to severe and extreme practical inconvenience. Counsel for the Crown submitted that to avoid this latter conclusion an unincorporated association should be inferred, although he agreed the Conservative movement did not really lend itself naturally to this interpretation.

Vinelott J. rejected this argument of necessity as based on a false legal premise. There are situations in which the legal owners of property do not hold that property on trust and do not own it beneficially. Such a construction is appropriate in the case of an executor administering a will — he is neither trustee nor beneficial owner of the testator's property. There is a suspended beneficial ownership. Such suspense in the beneficial ownership might, said Vinelott J., be produced by contract, and might arise in other cases.[79] The beneficial ownership in the moneys controlled by the Central Office is suspended, thus making it impossible for the

77 I would say that the trust was not possible because inter alia the purposes were abstract or impersonal. Vinelott J., following his discussion of *Re Denley* in *Re Grant*, believes that other than the anomalous historical cases it is impossible to create a valid non-charitable purpose trust — "a legal impossibility" (at 60). See discussion supra text to n.38.

78 Ibid. 60.

79 Vinelott J. seemed troubled by the submission of Counsel for the Crown that an executor is akin to a trustee in that he is controllable by the court and accountable to the legatees (and presumably therefore the beneficial ownership lies with the testator's heirs). He did not attempt to refute this directly, but went on to cite two cases which he argued supported the concept of suspended beneficial ownership. *Wood Preservation Ltd.* v. *Prior* [1969] 1 All E.R. 364 was, as Vinelott J. accepted, a decision on the meaning of beneficial ownership in a special statutory context. Vinelott J. relied upon the statement of Lord Donovan at 367 that "[i]t is possible for property to lack any beneficial owner for a time, for example property which is still being administered by an executor which will go eventually to the residuary legatee." It is questionable whether Lord Donovan was stating a general principle, or was merely using the particular example of an executor to support his throw-away statement in the sentence immediately prior to the one quoted above. Vinelott J. also cited *Franklin* v. *Commissioners of Inland Revenue* (1930) 15 Tax Cas. 464 as revealing a suspended beneficial ownership, but did not deal directly with the statement of Rowlatt J. who said at 472 "I cannot see myself that there is any distinction between this case and the case of contingent interests under a trust fund . . .". The conclusion must be that the authority cited by Vinelott J. for his suspended beneficial ownership concept is at best rather weak.
Vinelott J. fails to meet an objection to suspended beneficial ownership which is based upon the law of resulting trusts. The proposition is most clearly put by Lord Denning M.R. in *Re Vandervell's Trusts (No. 2)* [1974] Ch. 269, at 320: "A resulting trust . . . is born and dies without any writing at all. It comes into existence whenever there is a gap in the beneficial ownership. It ceases to exist whenever that gap is filled by someone becoming beneficially entitled." Megarry J. in the same case, at 294, called these resulting trusts automatic: "The second class of case is where the transfer to B is made on trusts which leave some or all of the beneficial interest undisposed of. Here B. automatically holds on a resulting trust for A to the extent that the beneficial interest has not been carried to him or others. The resulting trust here does not depend on any intentions or presumptions, but is the *automatic consequence of A's failure to dispose of what is vested in him.*" (emphasis added). The underlying principle is that there can never be a suspended beneficial ownership, since beneficial ownership will either be effectively transferred or revert back to the intending transferor.

Party treasurers or Party leader to claim beneficial ownership. Vinelott J. held, however, that even though no trust obligation exists, the legal owners of the moneys are under an obligation to use them for the purposes for which they are given. Indeed, Vinelott J. would probably say that without some obligation the suspended beneficial ownership concept will be inapplicable.[80] He offered the following analysis:[81]

> It appears to me that if someone invites subscriptions on the representation that he will use the fund subscribed for a particular purpose, he undertakes to use the fund for that purpose and for no other and to keep the subscribed fund and any accretions to it (including any income earned by investing the fund pending its application in pursuance of the stated purpose) separate from his own moneys. I can see no reason why if the purpose is sufficiently well defined, and if the order would not necessitate constant and possibly ineffective supervision by the Court, the Court should not make an order directing him to apply the subscribed fund and any accretions to it for the stated purpose . . . . [I]t is not difficult to imagine a case where a fund was subscribed for a purpose which would meet these criteria . . . . [If the court will restrain the recipient of such fund from applying it otherwise than for the stated purpose] it appears to me that the recipient of the fund is clearly not the beneficial owner of it . . . . Equally, whilst the purpose remains unperformed and capable of performance the subscribers are clearly not the beneficial owners of the fund . . . . If the stated purpose proves impossible to achieve or if there is any surplus remaining after it has been accomplished there will be an implied obligation to return the fund and any accretions thereto to the subscribers in proportion to their original contributions, save that a proportion of the fund representing subscriptions made anonymously or in circumstances in which the subscribers receive some benefit (for instance, by subscription to a whist drive or raffle) might then devolve as bona vacantia.

This analysis is of considerable importance. There have been cases where property has been subscribed for the pursuance of a particular purpose (not being charitable), in circumstances where the subscribers do not constitute a formal unincorporated association in the sense indicated in Vinelott J.'s judgment, but where nevertheless there has been some element of "association". In relation to these cases, two questions have arisen. First, how does the recipient of the subscriptions hold the property? Secondly, if the purpose is incapable of performance, or has been performed leaving a surplus, what is to happen to the remaining property? Very often, the answer to the first question has been only impliedly provided in the direct answer to the second question. The Conservative Party not being an unincorporated association, *Conservative Central Office* v. *Burrell* falls into this category of case — here the subscriptions come from the mass membership, either directly or channelled to Central Office through the local constituency conservative associations. The subscriptions are for the pursuance of a collection of particular non-charitable purposes. What Vinelott J. has said in this case must therefore affect the future outcome of this class of case.

Two well-known decisions are illustrative of this point. First, in *Re Trusts of the Abbott Fund*[82] certain persons donated money to a fund to be applied in the

80 See his statement at 61, at letter C; and his discussions at 62-63, referred to herein.

81 Ibid. 62-63. For discussion on the pre-Vinelott J. law on the distribution of unused or surplus assets in a case where no unincorporated association exists, see (1980) 39 Camb. L.J. 88, 119-121. Cf. Brian Green, op.cit.

82 [1900] 2 Ch. 326.

upkeep and relief of two elderly ladies. When the latter died, a problem arose as regards the surplus remaining. Stirling J. held that the property did not belong to the ladies beneficially, but that it was administered by its recipients as a trust fund — presumably a non-charitable purpose trust. When the trust was performed, a resulting trust automatically arose over any remaining property, and the moneys would therefore be returned pro rata to the original subscribers.[83] Assuming that Vinelott J. is correct in saying that the existence of factual beneficiaries would not suffice to establish a valid non-charitable purpose trust,[84] would he then hold that because the purported purpose trust failed ab initio a resulting trust must come into existence immediately upon the subscriptions being received, and not later after the purpose has been achieved? If so, of course, the resulting trustees are in breach of trust in applying the funds for the relief of old ladies. Vinelott J. would be able to circumvent this problem by applying the suspended beneficial ownership concept, coupled with an obligation in the legal owners. Practically, of course, on the particular facts of *Abbott* the constructions of Stirling J. and Vinelott J. would lead to the same result. Vinelott J.'s construction is certainly necessary to deal with property holding in these cases if the class of non-charitable purpose trusts is to be severely limited.

The second case is *Re Gillingham Bus Disaster Fund.*[85] Donations were collected for a memorial fund for Royal Marine Cadets killed in an accident. Harman J. held, it seems, that a non-charitable purpose trust had come into existence.[86] As the purpose trust had been performed, the remaining funds were impressed with a resulting trust in favour of all the original subscribers (identified or anonymous) pro rata. He did not examine in detail the various sources of the subscriptions, but lumped them together. The evidence showed that the fund consisted of money donated by known persons, money collected anonymously in street collections, and money resulting from whist drives and concerts.

How would Vinelott J. decide this case? First, there would be no question of a non-charitable purpose trust with its attendant problems — there would simply be a suspended beneficial ownership with its prerequisite obligation. Secondly, the case illustrates that the suspended beneficial ownership concept might apply only to the "subscriptions" of identified donors, since all the property donated anony-

83 If the trust was a non-charitable purpose trust, the requirement of enforceability was satisfied by the existence of factual beneficiaries, being further support for *Denley*. The trust may, however, have been a charitable trust for the relief of poverty and thus not subject to a public benefit requirement, with the original charitable dedication determining on the death of the last lady; cf. supra n.8.

84 Cf. for a discusion of a similar case, c. E. F. Rickett, "Problems of Reasoning in the law of Truststt" (1978) 37 Camb. L.J. 219.

85 [1958] 1 Ch. 300. See discussion in (1980) 39 Camb. L.J. 88, 119-121.

86 As in the *Abbott* case, this finding must be questionable, as the *Denley* factual beneficiaries approach had not yet been clearly articulated. Of course, it is arguable that both *Abbott* and *Gillingham Bus Disaster Fund* are actually silent authorities for the factual beneficiaries concept. There is, however, a particular problem in *Gillingham,* which would not arise in *Abbott* — that of the application of the rule against perpetual duration (see also (1978) 37 Camb. L.J. 219).

mously or coming in from concerts or whist drives might devolve on the Crown when the purpose was achieved.[87] Presumably, a prorata division would need to be accomplished in the first place between subscriptions from identified persons and property from other sources, and this would be followed by a pro rata division within the funds set aside for identified persons. All property from other sources would go bona vacantia. The reasons for the distinction which Vinelott J. tentatively offers are found in the judgment of Goff J. in *Re West Sussex Constabulary's Trusts*.[88] Anonymous subscriptions should go to the Crown to prevent practical nonsense. Proceeds from whist drives and concerts, etc., appear not to be susceptible to the construction of a suspended beneficial ownership in the subscribers, since they are moneys paid out under a contract rather than in pursuit of a purpose — the "subscribers" in such a case get what they pay for. Hence bona vacantia is, it is argued, the only realistic option.

It is suggested that there exists here a real difficulty in the suspended beneficial ownership approach. The beneficial ownership is suspended simply because there is an implied obligation to return unused funds to the subscribers in the event of the purpose being achieved, or being impossible to achieve. If, however, we say that anonymous donors and "subscribers" by way of whist drives and concerts are not also beneficiaries of such an implied obligation, how can the suspended beneficial ownership concept apply to the property "subscribed" by them? In the case where such "subscribed" funds are mixed with funds from identified subscribers, it is possible, although technically incorrect, to treat the former as parasitic upon the latter. But what if a fund consists only of moneys subscribed anonymously? How can the suspended beneficial ownership concept be applied? There are two possible solutions. First, the distinctions drawn by Goff J. in *Re West Sussex* might be disregarded. Anonymous donors are entitled to an implied obligation in the recipients of their subscriptions to use the property for the particular purposes for which it was given — their entitlement is on exactly the same basis as that of identified subscribers, and the anonymous method of donating should not alter the situation. Persons who pay for whist drives and concerts associated with fund raising for the particular purpose are in reality as much subscribers as any others — it is unreal to hide behind technical contractual relations when (a) it is questionable whether there is an intention to create legal relations at all, and (b) the result is to deprive these "subscribers" of the reasonable expectation that their "donations" will be used for the advertised purpose and the liberty to claim that it should be so used. The second solution is to say that because there exists a rule of law which states that where donations for a purpose are made anonymously or are "subscriptions" made by way of whist drives, etc., the subscribers lose all interest in that property in favour first of the purpose and after that for the Crown, it therefore follows that the implied obligation of the recipients is owed automatically to the Crown.

87 It should be noted, in the light of difficulties which the distinction presents (to be discussed hereafter in the text), that Vinelott J. was not apparently totally convinced that the distinction would be drawn. It was he who used the word "might": see [1980] 3 All E.R. 42, 63.

88 [1971] Ch. 1. See the discussion of this case in (1980) 39 Camb. L.J. 88, 121-122.

Hence, the suspended beneficial ownership concept is applicable.[89] The second solution is to be preferred because it accepts the force of Goff J.'s reasoning in distinguishing particular funds by their source. We may therefore accept the statement of Vinelott J. as presenting an accurate incorporation of *Re West Sussex* into the suspended beneficial ownership concept.

B. Conclusions On Conservative Central Office

The foregoing discussion raises in a stark manner the important issue of the exact nature of the obligation binding the legal owners of the "subscribed" property. Vinelott J. thinks this obligation is a contractual one:

(i) It appears to me that if someone *invites subscriptions on the representation* that he will use the fund subscribed for a particular purpose, *he undertakes* to use the fund for that purpose . . .[90]

(ii) . . . the possible remedy of specific performance . . .[91]

(iii) The answer of counsel for the Crown to the solution I have endeavoured to formulate was that it confused property and contract. He said that the subscriptions are moneys given, not consideration for any contractual undertaking. I do not see why the fact that subscriptions are made for a stated purpose should not found an obligation binding on the recipient to use the moneys subscribed for that purpose, to keep them separate from his own moneys and to return them if this purpose is frustrated or if the funds subscribed are more than is needed to accomplish it.[91]

(iv) In the case of an inter vivos subscription the intention of the subscriber can be given effect by *the implication of contractual undertakings* . . .[92]

The first obvious result of this view is that the suspended beneficial ownership concept is not available in cases of testamentary gifts, where it is not possible to imply contractual undertakings. In order, therefore, to found a legal obligation in a legatee to devote the property bequeathed to the pursuit of a non-charitable purpose, resort must be had to a non-charitable purpose trust, with all its attendant limitations. If property was bequeathed to the Conservative Central Office "for party purposes", the bequest could only be validated as either a purpose trust (which is highly unlikely) or as a beneficial gift to the legal owners of Central Office property. A bequest would, therefore, probably fail.

If it can be shown that the implied obligation is not, regardless of Vinelott J.'s apparent view, based on contract, but is rather a type of general equitable obligation imposed as a remedy to deal with an otherwise difficult if not impossible situation, this particular limitation might disappear. If an equitable obligation is to be imposed in favour of living "subscribers", why not also in favour of dead "subscribers" through their estates?

Is Vinelott J.'s view on the contractual nature of the obligation tenable?[93] It is suggested that it is not. First, Vinelott J. indicated that donations from anonymous

89 This argument makes it unlikely that the implied obligation is contractual. It is rather more a general equitable obligation unrelated to contract. See text at "Conclusions On Conservative Central Office" below.

90 [1980] 3 All E.R. 42, 62 (emphasis added).

91 Ibid. 63.

92 Ibid. 64 (emphasis added).

93 See text supra nn.18 and 89.

"subscribers" and "subscribers" by way of whist drives, etc., are as susceptible to the new construction as are more regular and identified forms of subscriptions (e.g. by the mass membership of the Party). The problems attendant upon the distribution of surplus funds have just been canvassed. These problems resulted from the fact that to talk of contractual obligations in these circumstances would simply be unreal. There are difficulties in finding an agreement, and, in the case of whist drives, etc., in finding any consideration for the sort of contract envisaged, since participants in whist drives, etc. receive all they ever bargain for. Secondly, there will be some difficulty in talking of a contractual obligation in all those cases where it is unreal to say that the recipient of the donations is inviting subscriptions. Such an observation might, indeed, apply to the Central Office's moneys! Thirdly, if the legal owners subscribe to the purposes themselves, can they be under a contractual obligation owed to themselves? If the obligation is an equitable obligation with closer ties to the trust concept than to a contract, this difficulty is at least mitigated. It would be possible to talk of the legal owner as wearing two hats at the same time, as a trustee can. On the whole, it seems preferable to regard the obligation which makes possible the suspended beneficial ownership concept as a general equitable obligation. This might be subjected to considerable criticism on the basis of its lack of pedigree, and of its apparent width. The development might well meet with the same type of criticism that has greeted recent developments in the imposition of constructive trusts to remedy inequitable situations.[94] It is to be hoped that the development will be accepted, since it offers scope for dealing with some of the problems at present outstanding in the areas of gifts for non-charitable purposes, and the holding of property by unincorporated associations.

English and New Zealand law has adopted a restrictive approach to the giving of property for use in the pursuit of non-charitable purposes. One method is to give property absolutely to a person subject only to a moral obligation to use the property specifically for the expressed purpose. It is possible to create a legally enforceable obligation in the recipient only if (a) a trust relationship is expressed to exist, (b) the purpose to be pursued is limited to a particular historical class, or (following *Re Denley*) the pursuit of the purpose will factually benefit some identified person, (c) the purposes are expressed clearly,[95] and (d) the pursuit of the purpose is expressly limited to a particular period of time, although in New Zealand, as seen,[96] this requirement has not been an obstacle since 1964. We are not yet concerned with the pursuit of a purpose by the formation of an unincorporated association, or by donating property to an unincorporated association.

Vinelott J.'s introduction of the suspended beneficial ownership concept coupled with an implied but nonetheless legally enforceable obligation makes the trust method for pursuit of purposes obsolete, clearly so far as inter vivos donations are

94 See, for example, *Avondale Printers & Stationers Ltd.* v. *Haggie* [1979] 2 N.Z.L.R. 124 (per Mahon J.).

95 See, e.g. *Re Astor's Settlement Trust* [1952] Ch. 534, 547 (per Roxburgh J.); *Re Taylor* [1940] Ch. 481; *Re Price* [1943] Ch. 422.

96 See text supra n.47.

concerned, and, if the arguments presented as to the nature of the obligation are accepted, it is suggested also in the case of testamentary donations.

This new method, as applied in the case of inter vivos donations for the purposes of the Conservative Party,[97] reveals two apparent advantages over the trust method. First, there seems to be no limit to the duration of the dedication of property for the purposes. One assumes, for instance, that the Conservative Party as a political movement with various functional parts, including the Party treasurers and Party leader controlling the movement's money, is to continue indefinitely. Secondly, the range of pursuable purposes under the new approach is infinitely greater than even *Re Denley* would allow — it must extend to some cases of abstract and impersonal purposes, as is illustrated by the Conservative Party itself.

There is, however, one point on which the judgment of Vinelott J. is unclear. The suspended beneficial owner concept can only operate if "the purpose is sufficiently well defined, and if the order would not necessitate constant and possibly ineffective supervision by the court . . . ."[98] What does this mean? Vinelott J. gives one example which would not satisfy the criteria — the case of an explorer who invites subscriptions to a fund to finance an expedition to explore some unexplored area of the world. There are two examples which do satisfy these criteria. First, the Conservative Party itself. Secondly,[99]

> a fund raised by subscription for immediate distribution to a class of persons who were not objects of charity, the subscriptions being invited on terms which did not give rise to any private trust.

The distinction appears to be one of the degree of detail with which the purpose is stated, which controls the practicality of enforcement through the courts. It is a moot point whether there is creeping in also a judgment as to the worthiness of the purpose, but the exercise of such a judgment would be consistent with the general remedial nature of the concept. The ambiguity in this area is reminiscent of that surrounding the test of "administrative workability" in the area of certainty of objects in trusts, proffered by Lord Wilberforce in *McPhail* v. *Doulton*,[100] which still awaits adequate elucidation even in the light of the brave efforts of Templeman J. in *Re Manisty's Settlement*.[101]

How does this suspended beneficial ownership concept operate within the area of unincorporated associations? In *Re Grant* Vinelott J. accepted the prima facie application of a contract-holding solution, but pointed out that this would not be

97 Vinelott J. cited as a decision analogous to the case before him *Re Thackrah* [1939] 2 All E.R. 4. See [1980] 3 All E.R. 42, 64.

98 Ibid. 63. This limitation is a further argument against the obligation being contractual. If the obligation is truly contractual, then why does the court reserve to itself the power to limit the type of contract it will regard as valid; This limitation actually reflects, it is submitted, the basic remedial character of the implied/imposed general equitable obligation.

99 Ibid. 63. Cf. *Re Trusts of the Abbott Fund* [1900] 2 Ch. 326, and *Re Denley's Trust Deed* [1969] 1 Ch. 373.

100 [1971] A.C. 424. See L. McKay, "Re Baden and the Third Class of Uncertainty" (1974) 38 Conv. 269.

101 [1974] 1 Ch. 17.

possible where the gift was in terms of a trust or where the association's rules prevented the members retaining any beneficial interest in the association property. The testamentary gift in *Grant* failed because (i) there could be no contract-holding construction since the association's rules forbade the retention of a proprietary interest in the members; and (ii) there was no valid non-charitable purpose trust. Vinelott J. was prepared to hold that the members' inter vivos subscriptions were held validly and subject to a legal obligation in the officials of the local constituency association, because there was an implied contractual obligation and a suspended beneficial ownership which negatived any effect the rules as to members' positions vis-à-vis the association funds might otherwise have had. Such a half-way house solution could not be applied to save the testamentary gift because there could be no contractual obligation on the part of the association's officials. In *Conservative Central Office* v. *Burrell,* Vinelott J. stated as a summary:[102]

> A testamentary gift to a named society which is not an incorporated body must fail unless it can be construed as a gift to the members of an unincorporated association either as joint tenants or as an accretion to the funds of the association to be applied in accordance with its rules (commonly with a view to the furtherance of its objects).[103] But in the case of a testamentary gift there is no room for the implication of any contract between the testator and the persons who are to receive the bequest. In the case of an inter vivos subscription the intention of the subscriber can be given effect by the implication of contractual undertakings of the kind I have described.

This statement summarises correctly the position if the implied obligation is regarded as contractual. However, in *Conservative Central Office* Vinelott J. appears, in effect, to have gone beyond a contractual obligation and developed a general equitable obligation. If this is so, would *Grant* be decided differently now? Perhaps the testamentary gift could be validated by using the concept of suspended beneficial ownership coupled with an equitable obligation on the recipients owed to the testator's estate?

102 Vinelott J. excludes the alternative construction of validity — that the gift sets up a valid non-charitable purpose trust. His view of *Denley* explains this omission, as already discussed.

103 [1980] 3 All E.R. 42, 63-64. In the last sentence Vinelott J. is referring to the con tractual undertakings existing in cases of suspended beneficial ownership.