The America's Cup and the Law of Trusts: Mercury Bay Boating Club's 1988 K-Boat Challenge

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The author examines the litigation surrounding the 27th America's Cup regatta. The author argues that the deed of gift did not permit a defence of the Cup with a catamaran, and that even if it did, the San Diego Yacht Club failed to satisfy its fiduciary obligation of acting in the utmost good faith towards the Mercury Bay Boating Club. Finally, the author argues that the deed of gift is more accurately described as a non-charitable purpose trust for factual beneficiaries.

I INTRODUCTION

On July 17 1987, Sir Michael Fay issued a letter of challenge for the America's Cup to San Diego Yacht Club ("SDYC"; "San Diego"). He could not then have foreseen that an air of ill-will and acrimony would so pervade the 27th America's Cup regatta as to demonstrate its fragility "...in the face of the amoral quest for betterment, the hunger to win at any cost, even at the cost of destroying the game."[1]

The waters of San Diego Bay played host to two races for yachting's not-so-holy grail on September 7 and September 9 1988. SDYC's 60 foot catamaran *Stars & Stripes* defeated Mercury Bay Boating Club's 132.8 foot keeled monohull *New Zealand*[2] in both races, making the scheduled third contest unnecessary.[3] On the water at least, therefore, San Diego successfully defended the 27th America's Cup (the "Cup").

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1 A B Giamatti *Take Time For Paradise: Americans And Their Games* (Summit Books, USA, 1989) 62-63.

2 A catamaran has two narrow light displacement hulls joined by cross-members. The considerable beam (width) of a catamaran means no ballast other than crew weight is necessary to prevent the yacht capsizing. In contrast, a monohull has one large, heavier hull, and its narrower beam makes considerable lead ballast necessary to keep the yacht upright. This ballast is situated at the bottom of a deep keel.

3 *Stars & Stripes* won race 1 by 18 minutes, 15 seconds or 2.5 miles. It won race 2 by 21 minutes, 10 seconds or 4 miles. Had Dennis Conner sailed the catamaran to its potential, however, far greater margins could have been achieved. Conner pointed too high (into the wind), and when the windward hull flew clear of the water (thereby reducing drag and increasing speed) "... plop back down it went" ("A-Cup XXVII" *Santana*, October 1988, 43-48). According to co-designer Duncan MacLane, *Stars & Stripes* was designed to fly a hull in a mere 8 knots of wind ("Conner's Cat Unleashed" *Sea Spray*, July 1988, 25).

This paper has three main objectives:

(a) to determine whether, according to the terms of the 1887 deed of gift (the "Deed"), SDYC were permitted to defend the Cup in a catamaran;

(b) to decide whether, even if so permitted, SDYC could avail itself of that permission given its status as trustee with all the attendant duties and obligations which such a fiduciary position entails; and

(c) to determine the fundamental nature of America's Cup competition. If a document similar to Schuyler's 1887 Deed were drawn up today, would it be considered charitable? If not, can we interpret it as a non-charitable purpose trust after Goff J's model in *Re Denley's Trust Deed* ?[4]

In order to grapple adequately with these objectives, however, one must understand yachting concepts made relevant by the Deed, and to which any resolution of these objectives necessarily refers. A brief examination of events preceding the 1988 races is therefore valuable.

II ORIGIN OF THE AMERICA'S CUP

Cup tradition began on August 22 1851, with a race around the Isle of Wight for the One Hundred Guinea Cup. *America* was a 146 ton schooner and competed against 15 British vessels. The notorious English fog wrought havoc, yet *America* won easily. Queen Victoria observed the race from her royal yacht and on being informed of *America*'s victory responded "Oh indeed! And which is second ?" To this she received the exquisite reply "Madame, there *is* no second."[5]

America 's six owners returned to the United States and donated their trophy to the New York Yacht Club ("NYYC") in 1857 "...as a perpetual Challenge Cup for friendly competition between foreign countries."[6] The 1857 Deed thereby created a charitable trust under New York law, with the defending club as trustee. According to its terms, a foreign club might challenge in a vessel of between 30 and 300 tons, giving 6 months written notice of a match and disclosing its yacht's length, Custom House measurement, rig[7] and name.

The first challenge came in 1870 from John Ashbury. The NYYC, however, confronted Ashbury's *Cambria* with a fleet of 14 defending yachts, and *Cambria* finished

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4 [1969] 1 Ch 381.

5 S Levine "Pearl Harbour and the America's Cup" *National Business Review* , 17 June 1988, 42.

6 See Appendix A.

7 A yacht's "rig" is its arrangement of spars above deck. For example, a fractionally rigged sloop has one mast and a forestay which attaches at a point below the mast-head.

a distant 10th.[8] Fleet defences such as those which faced *Cambria* in 1870 and *America* in 1851 were precisely the sort of unfair 'match' Schuyler[9] had sought to avoid. This he made abundantly clear in a letter the following year, saying:[10]

It seems to me that the present ruling of the club [to conduct fleet defences] renders the *America*'s trophy useless as a 'Challenge Cup' and for all sporting purposes it might as well be laid aside as family plate.

Ashbury promptly challenged again with *Livonia* . However, the NYYC selected a defender from among 4 vessels upon each race day according to sea and weather conditions.[11] When the Canadian challenger *Countess of Dufferin* also objected to this practice in 1876, the NYYC wrote to Schuyler for advice. Schuyler's reply is unrecorded. However, the club subsequently abandoned the practice and Schuyler expressly prohibited it in the Deed of 1887.[12]

In 1881 the NYYC returned the Cup to Schuyler pending resolution of questions concerning administration of the trust, and then again in 1887. It is the 1887 Deed which governs modern Cup competition.[13]

III PREVIOUS COMPETING VESSELS

A 1870 - 1920

Schooners contested the first 3 Cup matches between 1870 and 1876.[14] The next 10 from 1881 through to 1920 involved cutters and sloops of varying design and length.[15] The most important determining factor for a monohull's potential hull-speed is load water-line ("LWL") length.[16] Essentially, the longer the yacht, the faster it is.[17] It is unsurprising, therefore, that yachts were handicapped according to LWL measurement.[18]

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8 M Kelly "A Question of Fair Play: The Legal Challenge for the America's Cup" *Northern News Review* , June 1992, 12-17.

9 G L Schuyler was the only surviving donor by 1870, and he died in 1890.

10 Letter dated 15 April 1871 from George L Schuyler to the editor of *The Spirit Of The Times*, a sporting journal, 10.

11 J Rousmaniere *The Mismatch Question and the America's Cup* (Unpublished paper, 1988),10. In the best of seven series, only two of the four actually raced. *Columbia* won two and lost one, while *Sappho* won the following two.

12 Schuyler added the phrase: "... the vessel when named must compete in all the races...." Above n 11, 11; Appendix C.

13 See Appendix C.

14 A schooner is a monohull with two masts, the foremost of which is shorter.

15 Both cutters and sloops are monohulls with one mast. American cutters, however, tended to have a wider beam and European sloops a deeper draught.

16 The distance between points where the stern and bow meet the water.

17 Convention dictates that potential hull-speed (in knots) may be found by calculating the square root of twice LWL length (in feet).

18 Affidavit of Bruce K Farr sworn to 29 April 1988, 5; affidavit of Stanley E Reid sworn to 21 April 1988, 26: "Following 1870; the next twelve matches, held between

A desire to race yachts with similar hull-speed potential is apparent, however, in the NYYC's choice of vessels throughout its tenure as trustee.[19]

In all except 2 matches between 1870 and 1920 the defender measured equal to, or even slightly smaller than the challenger.[20] When faced with *Atalanta* 's 64 foot LWL length in 1881, for example, the NYYC matched her with *Mischief* 's 61 feet.[21] This was despite earlier Cup vessels averaging 96 feet on the LWL.

Sir Thomas Lipton issued his fourth of five Cup challenges in 1907, specifying a match in J-class boats of no more than 75' on the LWL.[22] Argument ensued between Lipton and the NYYC, the latter refusing to accept any constraint upon its freedom to build any size yacht permitted by the Deed. More significantly, however, it subsequently agreed under the mutual consent clause[23] to race in the very 75' J-class yachts which Lipton proposed. *Resolute* ultimately measured 74' 9" on the LWL.[24]

B 1930 - 1987 Class Regattas

During the 1930s, competitors agreed to race under the Universal Rule in magnificent but fragile J-class yachts of approximately 81'-87' in LWL length. For 20 years after the 1937 match, however, the NYYC received no more challenges. Attempting to revive interest in the Cup, in 1956 the club obtained a court order amending the Deed. This reduced minimum LWL length from 64' to 44' and eliminated the requirement that the challenging vessel sail to a match "...on its own bottom."[25] These amendments allowed competition in the international twelve-metre class ("Twelves"). Twelves competed from 1958 until 1987 at three or four year intervals.

1876, and 1920, were sailed, by agreement, with time allowances, thereby equalizing any differences in their dimensions...." The 1887 Deed prohibits "any time allowances whatever" except with mutual consent. No such mutual consent was achieved, and therefore *New Zealand* and *Stars & Stripes* competed in an open race.

19 See Appendix D: Table of Dimensions. This is even more obvious under J-boat and 12-metre class rules.

20 The exceptions being in 1895 and 1899. In the former, *Defender* measured 1'7" longer than *Valkyrie III* , and in the latter; *Columbia* measured 5" longer than *Shamrock*.

21 See Appendix D.

22 75' was the maximum LWL length permitted under J-class rules at the time. This was amended by 1930; see below part II *B*: *1930-1987 Class Regattas*.

23 See Appendix C, para 9.

24 The disagreement between Lipton and the NYYC and intervention of WWI meant that while the race was originally scheduled for 1914, *Shamrock IV* did not meet *Resolute* until 1920. Compare the table of dimensions by J Rousmaniere (above n 11, 26) with that in the judgement appendices: CA 879, JA 2387.

25 *Mercury Bay Boating Club Inc* v *San Diego Yacht Club* 545 N.Y.S. 2d 693 (Appellate Division, 1 Dept. 1989), 695.

IV 1988 : "A NAUTICAL DOG AND PONY SHOW"[26]

A *A Valid Challenge ?*

San Diego initially ignored the challenge from Mercury Bay Boating Club ("MBBC";"Mercury Bay") and then advised there would be no formal response.[27] It called a press conference for September 2 to announce dates in 1991 for a multinational Twelves regatta.[28] Mercury Bay immediately commenced proceedings in the New York Supreme Court[29] requesting the court declare its challenge valid and enjoin SDYC from considering other challenges before its own.[30]

San Diego responded with an action for (retrospective) *cy pres* [31] amendment of the Deed to facilitate its 1991 plans. Judge Ciparick found Mercury Bay's challenge valid and accordingly granted the injunction sought. She refused *cy pres* relief because it is attainable only where "... the donor's specific charitable purpose is no longer capable of

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26 "America's Cup - America's Joke ?" *Latitude 38"*, February 1988.

27 Letter dated 27 August 1987.

28 Above n 8, 14. Convention adopted by the NYYC and Royal Perth Yacht Club ("RPYC") had been to announce plans for the next regatta in anticipation of a favourable final result, proposing venue, dates and desired vessels. Argument and arbitration proceedings between SDYC and the Sail America Foundation (contracted to manage the Cup defence) meant there was no such announcement, even 5 months after winning the trophy in Fremantle. In this vacuum, MBBC challenged according to the Deed's rules where there is no class of yacht adopted.

29 New York court hierarchy consists of a trial court named the Supreme Court; an appellate court named the Supreme Court Appellate Division; and the highest state court is the Court of Appeals: *The Blue Book: A Uniform System Of Citation* (15 ed, Harvard Law Review Authority, USA, 1991) 195-196. Most fiduciary issues arise pursuant to state law in the US, and in accordance with principles of federal constitutional law, are not susceptible to review by the US Supreme Court if adequately grounded in state law: C Massey "American Fiduciary Duty in an Age of Narcissism" (1990) 54 Sask LR 101,104.

30 To criticise MBBC for taking a sporting event into the court-room overlooks that unlike other sporting events, the Cup is governed by principles of New York trust law (See Johnson & Taylor "Revolutionizing Judicial Interpretation of Charitable Trusts" (1989) 74 Iowa LR 545, 548 n 8). Indeed, the instrument of assignment and acceptance whereby trusteeship transposed from the RPYC to SDYC includes an agreement that:

> ... the terms and conditions of the Deed of Gift shall be governed by, and construed in accordance with, such laws [of New York], and any proceedings for the amendment or interpretation of such terms and conditions shall be brought before the courts of the State of New York.

31 *Cy pres* means "as near as possible." "Where a clear charitable intention is expressed, it will not be permitted to fail because the mode, if specified, cannot be executed, but the law will substitute another mode *cy pres*, that is, as near as possible to the mode specified by the donor." Halsbury's Laws of England (4ed, Butterworths, London, 1974) vol 5,"The cy-pres doctrine", para 696, p 430. For the U.S. statement of the *cy pres* doctrine see: EPTL 8-1.1(c)(1).

being carried out under the precise terms of the trust."[32] If anything, Mercury Bay's challenge conformed more closely to Schuyler's envisioned charitable purpose than the highly restrictive class rules which govern Twelves. Judge Ciparick concluded that San Diego:[33]

> ... having accepted the cup pursuant to the terms of the deed, may either accept the challenge, forfeit the cup, or negotiate agreeable terms with the challenger.

B A Contemptuous Multihull ?

Thomas Ehman, chief executive for Sail America Foundation ("SAF")[34] wrote to Mercury Bay soon after, saying "... [a]ll design and construction elements, including such items as number of hulls and particulars of rigging, shall be of our choosing."[35] On January 22 1988, SAF announced plans to build two multihulls, but did not confirm the defender would be a catamaran until April 20.[36]

Mercury Bay filed suit seeking to hold San Diego in contempt of Judge Ciparick's earlier order,[37] contending that the order precluded a multihull defender, and required that San Diego race a "...like or similar..."[38] vessel. More specifically, this meant a monohull. The court declined to find San Diego in contempt as the 'type of vessel' issue had not been addressed in the previous proceedings. She therefore concluded: "[n]othing in this decision should be interpreted as indicating that multihulled boats are either permitted or barred under the ...[Deed]."[39]

The time had come for sailors to participate in the Cup and as recorded above, US-1 *Stars & Stripes* defeated KZ-1 *New Zealand* two-nil in the September series.

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32 *Mercury Bay Boating Club Inc* v *San Diego Yacht Club* Unreported, 25 November 1987, Supreme Court, IAS Part 15, 18.

33 Above n 32, 19.

34 SAF were a non-profit organisation contracted by SDYC to manage and implement the 1988 Cup defence.

35 Letter to MBBC dated 2 December 1987.

36 Affidavit of Andrew A Johns, sworn to 3 May 1988, 5.

37 Entered on 28 December 1987.

38 *Mercury Bay Boating Club Inc*8 v *San Diego Yacht Club* Unreported, 25 July 1988, Supreme Court, IAS Part 15, 2.

39 Above n 38, 8.

V INTERPRETING THE DEED OF GIFT - DO SCHUYLER'S WORDS EMBRACE A MULTIHULL ?

As stated in the introduction, the first of three objectives is to determine whether the terms of the 1887 Deed themselves admit a multihull defender. Resolving this issue necessarily involves a preliminary enquiry into what a court may consider as evincing the donor's intent. The New York Court of Appeals'[40] majority (the "majority")[41] cited "[l]ong-settled rules of construction..." to limit its enquiry to the four corners of the trust Deed.[42] Where the trust instrument is unambiguous, any reference to extrinsic evidence to add to, vary or contradict it is precluded. Designed to promote the integrity and reliability of written instruments, this rule is clearly enunciated in *Springsteen* v *Samson* [43] and *New York Life Insurance & Trust Co* v *Hoyt.* [44]

Commonwealth jurisdictions appeal to a similar policy, culminating in the same rule. It provides that only where language is susceptible to more than one meaning may a court refer to extrinsic evidence to settle the ambiguity and give effect to the donor's intention.[45]

In *Mercury Bay III*, however, the majority made two errors when applying this rule to the Deed:

(a) It considered the language of the Deed unambiguous with respect to the multihull concept.[46]

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40 Following the races, the parties petitioned Ciparick J to determine the rightful Cup holder. At *Mercury Bay Boating Club Inc* v *San Diego Yacht Club*, Unreported, 28 March 1989, Supreme Court IAS Part 15, 13 ("*Mercury Bay I* "), Ciparick J held that "San Diego clearly fell short of its obligations as trustee of the Deed of Gift,..." and consequently forfeited the Cup to Mercury Bay. The First Department reversed on appeal, stating that although the race between *Stars & Stripes* and *New Zealand* had been a "foregone conclusion" SDYC had complied with the Deed: *Mercury Bay Boating Club Inc* v *San Diego Yacht Club* 545 N.Y.S. 2d 693, 708 per Rubin J, ("*Mercury Bay II* "). MBBC subsequently appealed to the New York Court of Appeals.

41 The majority consisted of Wachtler CJ and Simons, Kaye, Bellacosa and Alexander JJ. Hancock and Titone JJ dissented.

42 *Mercury Bay Boating Club Inc* v *San Diego Yacht Club* 557 N.Y.S. 2d 851, 857 per Alexander J ("*Mercury Bay III* ").

43 32 N.Y. 703,706.

44 55 N.E. 299, 301 (1899), cited by the majority. See also: A W Scott *The Law Of Trusts* (4 ed, Little Brown & Co, USA, 1987) para 164.1, commenting on the US Restatement of Trusts 2d, s 164.

45 Ford & Lee *Principles Of The Law Of Trusts* (2 ed, The Law Book Co Ltd, Sydney, 1990) 71. Its counterpart in contract is the parol evidence rule. Both rules operate in absence of fraud, mistake, duress, ambiguity or any other ground for recession or rectification.

46 Above n 42, 857-859.

(b) While as a logical consequence it formally excluded extrinsic evidence,[47] the majority selectively but consistently referred to such evidence in rejecting Mercury Bay's case.[48]

The majority's use of such evidence tends, implicitly at least, to recognise the presence of ambiguity.

In that which follows, Part *A* reveals ambiguity in the very language of the Deed when confronted by a multihull. Part *B* contends that imprecision is inherent in language and breeds ambiguity and that, therefore, the extrinsic evidence rule should be cast into the dank, emaciated void for anachronistic legal principles. Part *C* assesses what effect the extrinsic evidence has upon interpreting the Deed, and more specifically, whether it permits or prohibits SDYC's catamaran.

A Ambiguity

In *Mercury Bay II*, Sullivan J held the rule excluding extrinsic evidence[49] applied because MBBC itself had (when seeking a declaration its challenge was valid), "... insisted that the Deed of Gift was clear and unambiguous...."[50] However, Sullivan J overlooked that in *those* proceedings MBBC's argument merely concerned those terms in the Deed which define a 'valid challenge'. Ciparick J held those terms *were* clear and unambiguous,[51] a conclusion from which SDYC did not appeal.

Following the races, argument shifted to whether the Deed permits a multihull defender. All three courts referred to the absence of any express words precluding

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47 Above n 42, 858.

48 For example, the majority stated: "[w]e note that the applicability of the required dimensions to multihull vessels is hotly contested by the parties before us, both of whom have submitted expert evidence...," thereby revealing its use of such evidence. It also referred to an historical event to criticise MBBC's position, saying: "...it was Mercury Bay, not San Diego, that departed the agreed-upon conditions of the previous 30 years." (Above n 42, 858).
Hancock J rejected the relevance of such an event in almost exasperated tones saying:

> And let there be no mistake about this. Contrary to the implications of the majority... opinions, the dispute is not about the propriety of New Zealand's conduct in issuing its challenge. [The] Supreme Court, in a prior proceeding, held that the 90-foot monohull fully conformed with all requirements of the Deed of Gift.

(Above n 42, 863).
For a comprehensive elucidation of this inconsistency in the majority argument, see Awad, below n 64.

49 Also known as the plain meaning rule.

50 *Mercury Bay Boating Club Inc* v *San Diego Yacht Club* 545 N.Y.S. 2d 693, 696.

51 Above n 32, 11.

catamarans.[52] To claim (as both the First Department and Court of Appeals did) that such silence evinces a clear and unambiguous intention *vis-a-vis* multihulls is misleading. Silence does not necessarily constitute permission. It is equivocal, induces doubt, and consequently ambiguous. Thomas J, of New Zealand's High Court agrees, saying: "[l]ack of ambiguity is surely to be found in the use of express words, *not* their absence."[53]

San Diego emphasised terms which declare a challenger entitled to a match against "... any one yacht or vessel...."[54] Schuyler inserted the word 'one' in 1881 solely to prohibit fleet defences; something which his letter to *The Spirit Of The Times* indicates he had intended to do by his original words: 'any yacht or vessel'.[55] One might, therefore, interpret both 'any' and 'one' as merely emphasising the same thing: that only *one* yacht could race each challenger (as MBBC contended).[56] On the other hand, the Deed could mean 'any' in the sense that anything whatsoever is permitted (as contended by SDYC).[57] This second interpretation is difficult to reconcile with the Deed's stated purpose of fostering "...friendly competition between foreign countries,"[58] simply because it enabled SDYC to sail a catamaran and thereby assure itself of victory regardless of MBBC's sailing skill. Nevertheless, it either demonstrates the Deed's ambiguity,[59] or it is not a valid interpretation. If not, then only MBBC's interpretation remains.

SDYC and the majority also took an artificial approach to determining what is meant by a 'match'. The court held that "[b]y limiting the defense to a single vessel, the deed *ensures* a 'match' which will be a one-on-one competition."[60] All design elements, it said, are therefore left to the defender's discretion. Match racing certainly involves a one-on-one competition. It involves more, however, than just that. It embraces some concept of equality or elimination of all prefatory advantage upon which one-on-one competition may commence. Indeed, some things are only said to match if identical.[61] The majority's interpretation is both simplistic and naive. Even if one rejects finding ambiguity upon the bare terms of the Deed a court may, nevertheless, consider extrinsic evidence due to the inherent ambiguity in language.

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52 *Mercury Bay Boating Club Inc* v *San Diego Yacht Club*, Unreported, 28 March 1989, Supreme Court IAS Part 15, 4; Above n 50, 695; Above n 42, 854, 857.

53 Thomas J "Mismatch or misjudgement: The Mercury Bay Boating Club Inc v San Diego Yacht Club et al" [1990] NZLJ 190, 191 (emphasis added).

54 Above n 42, 857.

55 See above n 10 and accompanying text.

56 Above n 42, 857.

57 Above n 42, 857.

58 See Appendix C.

59 After all, the majority accepted this interpretation when rejecting MBBC's case.

60 Above n 42, 857.

61 Another perspective is that it requires 'a level playing field'.

B *Inherent Ambiguity & The Consequential Need For Extrinsic Evidence*

(1) *Pacific Gas & Electric Co v G W Thomas Drayage & Rigging Co. Inc .*[62]

Hancock J made explicit and extensive reference to extrinsic evidence in interpreting the Deed.[63] The majority made covert use of the same "...when to do so supported its arguments,"[64] and, therefore, lend unsuspecting support to the argument that resort to extrinsic evidence is often necessary even when interpreting apparently 'unambiguous language'. The corollary, therefore, is even if one rejects finding ambiguity on the face of the Deed a court may, nevertheless, consider extrinsic evidence.

In *Pacific Gas*, the Californian Supreme Court cast doubt upon the parol (contract) form of the extrinsic evidence rule. The defendant contracted to replace the plaintiff's steam turbine "...at [its] own risk and expense...", while indemnifying the plaintiff "...against all loss, damage, expense and liability...."[65] When the casing fell causing $25 000 damage to the plaintiff's turbine, the defendant sought to adduce evidence showing both parties intended the indemnity to only cover injury to third parties. While finding the clause expressed in "...the classic language [of] ...a third party indemnity provision...," the trial court nevertheless held that the 'plain language' of the clause also indemnified the plaintiff against loss.[66]

Reversing on appeal, Traynor CJ recognised the inherent ambiguity in language for which the writer contends . He said :[67]

> This belief [in the possibility of perfect verbal expression] is a remnant of a primitive faith in the inherent potency and inherent meaning of words.

Traynor CJ emphasised that it is the parties' intentions from which contractual obligations flow, not "... the fact that they used certain magic words".[68] Further:[69]

> [a] rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it *seems* to the court to be clear and unambiguous, *would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained* .

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62 442 P. 2d 641 (1968).

63 Above n 42, 860.

64 A A Awad "The Litigation of the America's Cup Runneth Over With Inconsistencies: A New Approach To Interpreting Charitable Trusts" (1992) 12 Loyola ELJ 221, 231. The writer is indebted to A A Awad for an intelligent and cogent analysis of the *Pacific* case.

65 Above n 62, 643.

66 Above n 62, 643.

67 Above n 62, 643.

68 Above n 62, 644.

69 Above n 62, 644 (emphasis added).

To effectively assert that Schuyler could easily have prohibited catamarans by including an express stipulation that every boat 'must have only one hull' is to adopt a technique of interpretation which seeks out "...certain magic words".

Establishing a trust in the first place requires certainty of intention. *Re Kayford*, however, emphasised that "...it is well settled... a trust can be created without using the words 'trust', or 'confidence' or the like...."[70] Consistent with both *Re Kayford* and the opinion of Traynor CJ, is that when actually interpreting a trust the court must, primarily, seek to prosecute the donor's intention and not the literal effect of 'certain magic words'. Thomas J confirms this saying: "[a] Court's objective in examining a trust instrument is to ascertain the intention of the donor as the settlor of the trust. After all, it is the donor's gift."[71] Traynor CJ referred further to the fact that words "...do not have absolute and constant referents."[72] Meaning fluctuates according to content, circumstances, education and experience so that:[73]

> ...the meaning of a writing ... can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words.

(2) Is Pacific Gas *applicable?*

The 'plain meaning' or 'four corners' rule precludes extrinsic evidence to explain Schuyler's intention where the trust Deed is clear and unambiguous. The majority ostensibly found the Deed susceptible to no possible meaning other than that Schuyler permitted a race between a catamaran and monohull; an event described variously as a "mismatch";[74] "a nautical dog and pony show";[75] and by SAF president Malin Burnham as "a farce".[76] Its treatment of the ambiguity issue is inadequate given the relevance of the donor's intention and the need to consult the context in which the language of the Deed was employed.

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70 [1975] 1 WLR 279, 282.

71 Above n 53, 191.

72 Above n 62, 644.

73 Above n 62, 644-645 (citing *Universal Sales Corp* v *Press Mfg. Co.* 20 Cal. 2d 751, 756; 128 P. 2d 665, 669).

74 Above n 11; Brief on appeal on behalf of Mercury Bay Boating Club Inc 14 December, 1989, 38-39; "Acrimonious Cup : Mismatch on the Water; aggro on land" *Sea Spray*, October 1988, 17; *San Diego Union*, San Diego, USA, 8 September 1988; "A-Cup XXVII" *Santana*, October 1988, 43-48.

75 Above n 26.

76 Brief on appeal on behalf of Mercury Bay Boating Club Inc 14 December 1989, 19. Furthermore, Britton Chance, chief designer for SDYC said: "The ability to beat the monohull with a multihull would not be an issue. The multihull is going to win every time, barring bad design, bad construction or bad execution":"'Time's a wasting,' says designer of U.S. Cup defender" *Providence Journal*, 13 December 1988.

Traynor CJ refined the test for ambiguity saying:[77]

> [t]he test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible .

This is the better approach, because it recognises the donor's intention as paramount. Whether the Deed is ambiguous ought not depend on an individual court's linguistic analysis, conducted in a vacuum. Language may be susceptible to a meaning which only becomes apparent in the context of circumstances proved by extrinsic evidence - the *very circumstances* under which Schuyler executed the Deed.

Adherents to the 'four corners' rule of interpretation may dismiss Traynor CJ's opinion as confined to contract. They overlook, however, that the extrinsic evidence rule plays the same role whether in common law or equity. Ambiguity also dwells in logic, not merely in contract, so that such a useful and articulate definition merits general application.[78] A detailed assessment of the extrinsic evidence must now follow to determine what exactly was meant by the language employed.

C Resolving Ambiguity By Assessing The Extrinsic Evidence - Did Schuyler's 'Match' Sanction 1988's 'Mismatch' ?

(1) San Diego's 'all's fair in love and war' argument

As pointed out in Part IV *A* above, silence is neither permissive nor prohibitive. It acquires meaning only once its circumstantial background is understood. Therefore, SDYC's argument that because the Deed did not expressly prohibit using a catamaran it was permitted to sail one is simplistic and misconceived. It also ignores the fact that

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77 Above n 62, 644 (emphasis added).

78 The parol evidence rule is subject to consistent attack. *Pacific Gas* is certainly not novel in this, yet it provides perhaps one of the clearest examples of judicial disapproval. Those discussing the infirmities of the rule also include: R Childres & S Spitz "Status in the Law of Contract" (1972) 47 NYULR 1; H Hadjiyannakis "The Parol Evidence Rule and Implied Term: The Sounds of Silence" (1985) 54 Fordham LR 35; J Steyn "Written Contracts: To What Extent May Evidence Control Language?" (1988) 41 Current Legal Problems 23, and; N R Weiskopf "Supplementing Written Agreements: Restating The Parol Evidence Rule in Terms of Credibility and Relative Fault" (1985) 34 Emory LJ 93.

See also *Masterson* v *Sine* 68 Cal. 2d 222; 436. P. 2d 561 (1968) in which Traynor CJ also discussed and evaded the rule. The leading New Zealand case is *A M Bisley & Co Ltd* v *Thompson* [1982] 2 NZLR 696 in which the Court of Appeal demonstrated its willingness to admit parol evidence. It was prepared to construe the evidence as a collateral contract, or the entire transaction as partly written and partly oral. All three cases demonstrate judicial distaste for any rule which precludes consideration of relevant extrinsic evidence.

while the 1857 deed did not expressly prohibit fleet defences, Schuyler, nevertheless, did not permit them.[79]

(2) Contemporaneous writings by Schuyler

In his 1871 letter to *The Spirit Of The Times*, Schuyler addressed the issue of what constitutes a 'match' saying :[80]

> [a] match between two cricket or baseball clubs means one side against the other side; but the cardinal principle is that, in the absence of all qualifying expressions, 'a match' means one party contending with another party *upon equal terms* as regards the task or feat to be accomplished .

The evidence to follow demonstrates that a monohull racing a multihull is anything but a match race upon equal terms.

Schuyler said :[81]

> I cannot conceive of any yachtsman giving six months notice that he will cross the ocean for the sole purpose of entering into an *almost hopeless contest* for this Cup.

Hancock J quoted both of the above passages in his judgement.[82] San Diego clearly contravened them by "...choosing a boat that can't lose on the course...",[83] setting out to "jimmy the rules"[84] and staging a "rigged, quickie event"[85] in which victory by *Stars & Stripes* was a foregone conclusion.

Schuyler inserted the word 'one' into the 1881 deed to expressly prohibit fleet defences. The term 'any' had proved inadequate for this purpose. He therefore had in mind only the number of yachts which could fairly form a 'match' when drafting the phrase 'any one yacht or vessel'. In no way did Schuyler's use of 'any' refer to yacht *type*. By

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79 Above n 10, 10; Brief of Amici Curiae, Robert N Bavier Jr, John Bertrand, Courageous Sailing Centre of Boston Inc, Briggs Cunningham, William P Ficker, Sir James Hardy, Frederick E Hood, Ischoda Yacht Club, Arthur Knapp Jr, Graham Mann, St Francis Yacht Club, and Yale Sailing Associates: Yale-Corinthian Yacht Club, 19 December 1989. Membership of the amici fluctuated somewhat, with Briggs Cunningham and St Francis Yacht Club withdrawing their support from the brief. Pressure from SDYC precipitated such withdrawals, but members were also added, such as Australian, Alan Bond.

80 Above n 10, 3 (emphasis added). Even the First Department recognised this in *Mercury Bay II*: see above n 50, 700.

81 Above n 10, 10 (emphasis added).

82 Above n 42, 866.

83 Above n 26.

84 Thomas F Ehman of SAF quoted in the *San Diego Union*, San Diego, USA, 20 November 1987. The full quote is: "We'll jimmy the rules to win this thing in the same way the New York Yacht Club did so it could beat its challengers for 132 years." Ehman claimed he was misquoted.

85 *San Diego Union*, San Diego, USA, 4 December 1987, B-10.

reserving all design options, including the multihull type, San Diego clearly misinterpreted the Deed.

(3) Opinion In the sailing world

The overwhelming consensus among yachting observers was that the 27th America's Cup series was a ludicrous mismatch. Indeed, NYYC commodore Frank Snyder said:[86]

> [w]hat took place in the waters of San Diego confirmed what so many had predicted would be the case. To put a monohull and a multihull on the water together is *not to conduct a race or a competition of any kind* .

Chairman of the America's Cup Committee, member of SDYC and former America's Cup skipper Gerry Driscoll said : "[w]e never race catamarans against monohulls here. It's not a match."[87] Similarly, Tom Blackaller likened the races to a contest between Formula One and Indianapolis cars. Both are exceptionally fast designs, yet they are different types of vehicles. The Formula One car will "...win every time."[88]

Rudolph C Choy, an experienced multihull designer[89] cites greater stability, less weight, more advanced rigs and reduced drag through a smaller wetted surface area as the main speed advantages a multihull holds over a monohull. He concluded:[90]

> [c]ompetition between the two types of craft cannot be at present conducted on a fair competition basis. This is because the relative performances of monohulls and multihulls have little rational relationship.

New Zealand and *Stars & Stripes* could not, therefore, compete 'upon equal terms' as Schuyler demanded by the term 'match'.

(4) The 1887 Thistle challenge

Thistle arrived in New York measuring 1.46 feet longer on the LWL than stipulated in dimensions accompanying the challenge notice. *Volunteer* had been built specifically to match *Thistle*'s disclosed LWL, so Schuyler granted *Volunteer* a time allowance. The NYYC's furious reaction to *Thistle*'s LWL length is understandable given that LWL length is the most crucial factor in regulating potential hull speed.[91] This is only true,

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86 Affidavit of Frank V Snyder sworn to 12 October 1988, 2-3 (emphasis added).

87 *New Zealand Herald*, Auckland, New Zealand, 26 March 1988, 9.

88 The Associated Press, 25 May 1988, 0101EDT.

89 Affidavit of Rudolph C Choy sworn to 1 April 1988, 1-3. After talks with SDYC, Japanese/American Choy submitted a further affidavit which largely contradicted that sworn to on 1 April 1988. There is little reason, however, to doubt the accuracy and sincerity of the 1 April 1988 affidavit.

90 Above n 89, 2-3.

91 See above n 17.

however, of monohulls. Therefore, the dimensions specified by the Deed can only logically describe monohull yachts.[92]

Ciparick J recognised this fact,[93] as did Hancock J in his dissenting opinion in *Mercury Bay III*.[94] Past commodore of the RPYC Stanley Reid, however, puts it most succinctly:[95]

> The specifications of the challenging yacht required by the Deed are meaningful only in respect of a monohull yacht. In relation to a multihull vessel, the information required by the Deed is meaningless.

The majority held that the disclosure requirements merely eliminate the advantage of secrecy which would otherwise accrue to a challenger and, therefore, the specified dimensions are not relevant to whether the Deed precludes a catamaran defence.[96] This argument is demonstrably wrong in light of Schuyler's desire for a match 'upon equal terms' and condition that the trophy 'be preserved as a perpetual Challenge Cup for friendly competition between foreign nations.' Evidence of class racing from 1930 to 1987 and uniformly close dimensions since the first challenge in 1870 renders the majority's argument quite untenable.

(5) Catamaran status in 1887

While the catamaran had its inception in 1820, the "...first successful racing catamaran was not built until 1876..." by American, Nathaniel Herreshoff.[97] *Amaryllis* was 25' long overall and easily beat the class 3 monohulls in New York's Open Centennial Regatta. However, she was protested and disqualified on the grounds that a catamaran is not a yacht.[98]

Herreshoff did not dispute the disqualification, in fact, he wrote to the New York Centennial Committee suggesting a separate catamaran class be established within the

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92 Applying the formula in n 17, New Zealand's approximate potential hull-speed is 13.8 knots. The same formula when applied to *Stars & Stripes* predicts 10.5 knots, when it is capable of in excess of 22: Ballard "Sailing Back to the Future" *Sports Illustrated*, 7 December 1987.

93 *Mercury Bay Boating Club Inc* v *San Diego Yacht Club,* Unreported, 28 March 1989, Supreme Court IAS Part 15, 4.

94 Above n 42, 867, n 11.

95 Affidavit of Stanley E Reid sworn to 21 April 1988, 4.

96 Above n 42, 858.

97 Affidavit of Ian C B Dear sworn to 19 April 1988, 5.

98 James Michael, lawyer, member of the NYYC and its America's Cup Committee during 1971-1983, and holder of numerous administrative positions in yacht racing since 1938 stated: "In and around, 1887, catamarans were not regarded as 'yachts', but rather as experimental boats, or more often as 'freaks'": affidavit of James Michael sworn to 25 April 1988, 16.

regatta. Herreshoff "...would hardly have done this if he had desired, or thought it right, that catamarans should compete directly against monohulls."[99]

SDYC relied on the 32' *Nereid* as an example of a multihull permitted to race monohulls. *Nereid* failed to do well enough to even have her finishing time recorded in either regatta entered in 1877 or 1878.[100] Her failure is significant, because English yachting historian Ian Dear[101] and ex-America's Cup Committee member James Michael[102] both recite *Nereid* as the *only instance* in Schuyler's lifetime where a multihull competed directly against monohulls.

Furthermore, no catamaran built by 1887 came near the Deed's stipulated minimum LWL of 65'.[103] They certainly were not considered ocean going vessels and, therefore, unable to sail to a match on their 'own bottom' as challengers were obliged by the Deed.

D Conclusion

Part *A* demonstrates that if the interpretations of 'match' and 'any one yacht or vessel' contended for by Mercury Bay are not immediately accepted as correct, then there at least exists an ambiguity. Silence is entirely unemphatic, and for the New York Court of Appeals to equate silence with permission for SDYC's catamaran defence is most unsettling.

Part *B* illustrates the inherent ambiguity of language. To analyse the Deed in a linguistic vacuum, devoid of extrinsic evidence is consequently unsafe. Such an approach increases the danger of arriving at an interpretation contrary to the donor's intent and therefore, contrary to the basic objective of trust interpretation. Any rule which actually derogates from the goal it was meant to further should be revised or discarded. Traynor CJ did this in *Pacific Gas*, and arrived at a logical refinement to the rule precluding extrinsic evidence. A document is unambiguous only if the offered evidence does not tend "...to prove a meaning to which the language of the instrument is reasonably susceptible."[104] One may conclude, therefore, that using either the four corners approach *or* Traynor CJ's refinements, the Deed is ambiguous. The majority in *Mercury Bay III* was therefore wrong to preclude extrinsic evidence.

Once extrinsic evidence is assessed the majority's mistake is manifestly and emphatically compounded. Just as the Deed's silence did not endorse the fleet defences, Schuyler's same letter of 1871 prescribes a 'match upon equal terms'. Knowledgeable yachting consensus labelled the races a mismatch,[105] and SAF's own president declared

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99 Affidavit of Ian C B Dear sworn to 11 November 1988, 4.
100 Above n 98, 18.
101 Above n 97, 5.
102 Above n 98, 18.
103 Above n 98, 16.
104 Above n 62, 644.
105 See above n 74 & 82.

them "a farce".[106] A farce in no way constitutes a match as Schuyler defined it. San Diego breached the Deed by racing a catamaran and invited forfeiture of the Cup to Mercury Bay.[107]

VI CAN A *TRUSTEE* SAIL A CATAMARAN?

Even if upon a strict interpretation of its terms the Deed had permitted a catamaran, could SDYC could avail itself of that linguistic permission given its status as trustee? Resolving this question entails establishing the requisite standard of behaviour for a Cup trustee and assessing SDYC's actions against that standard.

A Standard of Behaviour

(1) The nature of the discretion

The Deed charges the trustee and Cup defender[108] with preserving the America's trophy "...as a perpetual Challenge Cup..." and provides that a challenger "...shall always be entitled to the right of sailing a match for this Cup..." upon giving the appropriate 10 months notice.[109] By *entitling* a challenger to a match, Schuyler confers a 'mandatory power' upon San Diego to select a defending yacht. It is a 'discretionary power', however, to the extent that San Diego could (absent our conclusions under Part IV) select any yacht or vessel whatsoever, propelled by sails alone,[110] and constructed in the United States (the "U.S.").

Section 187 of the U.S. Restatement of Trusts 2d (the "Restatement") contemplates this very situation: "[e]ven though it is the duty of the trustee to exercise a power, he may have discretion as to the time, *manner* and extent of its exercise".[111]

Commonwealth lawyers should note that while US terminology divides instructions to a trustee into 'mandatory' and 'discretionary' powers, these can not simply be equated with 'discretionary trusts' and 'mere powers' as described in *McPhail* v *Doulton*.[112] This is because, *by definition*, a discretionary trust both imposes a duty to exercise a discretion, *and* confers a further option as to the time, manner and extent of its exercise.

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106 Above n 76, 19.

107 Although San Diego later contested the appropriateness of forfeiture, Ciparick J endorsed it (above n 32, 19) as did counsel for San Diego in the contempt proceedings: Brief on appeal on behalf of the Mercury Bay Boating Club Inc, 14 December 1989, 52: see below Part V *B* (3).

108 Being one and the same.

109 See Appendix D.

110 The Deed in fact only expressly provides that the challenger be propelled by sails alone. Again, however, Schuyler's expectation of a 'match' clearly prevented SDYC defending in a power-boat. This is yet another example of where silence does not equate to permission.

111 Restatement of Trusts 2d, s 187, comment a (emphasis added).

112 [1970] 2 All ER 228.

Schuyler's direction that SDYC select a yacht is not, however, a discretionary trust. It is conceptually distinct. A discretionary trust comprises a discretion to allocate the trust property amongst a class of beneficiaries. In contrast, SDYC's discretion is to select a yacht to sail *against* MBBC. This is a 'managerial power', and lies somewhere on the spectrum in between 'discretionary trusts' and 'mere powers'.

(2) Control of 'managerial powers'

Despite there being no general standard of reasonableness for testing a trustee's decision in Commonwealth jurisdictions,[113] review of 'mere power' decisions is well settled. In *Karger* v *Paul*, for example, McGarvie J said:[114]

> ... it is open to the Court to examine the evidence to decide whether there has been a failure by the trustees to exercise the discretion in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred.

He also saw the reasons for, and manner of exercising the discretion as relevant.[115]

According to Megarry VC, a trustee must exercise a mere power "...in a responsible manner according to its purpose. It is not enough for him to refrain from acting capriciously; he must do more."[116] Ford and Lee conclude that a court may review the manner in which trustees exercise a discretion if they have "... acted dishonestly, *failed to exercise the level of prudence expected of fiduciaries*, or... acted in a manner prejudicial to the interests of a beneficiary."[117] In *Tabor* v *Brooks* the court held a trustee must not act "improperly or unreasonably", or "capriciously".[118]

This jurisdiction to review is applicable to SDYC's 'managerial power'. Conceptual distinction renders it unaffected by authority prohibiting judicial 'improvement' upon a trustee's decision under a discretionary trust.[119] Nor did Schuyler phrase SDYC's managerial power in 'absolute' or 'uncontrollable' terms which have made review difficult in the past.[120]

Furthermore, s 187 establishes a mechanism for reviewing a trustee's discretion. Hancock and Titone JJ give judicial sanction to applying it in the present situation.[121] It governs both 'managerial powers' and those to allocate the beneficial interest, and provides that a trustee must not 'abuse' her discretion. Consequently, she must act in

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113 P D Finn *Fiduciary Obligations* (Law Book Co Ltd, Sydney, 1977) 76.
114 [1984] VR 161, 164.
115 Above n 114, 164.
116 *In re Hay's Settlement Trusts* [1982] 1 WLR 202, 209.
117 Above n 45, 608 (emphasis added).
118 (1878) 10 Ch D 273, 277.
119 A W Scott *The Law of Trusts* (4 ed, Little Brown & Co, USA, 1987) para 187.
120 *Gisborne* v *Gisborne* (1877) 2 App Cas 300, 311 per Lord O'Hagan.
121 Above n 42, 870.

good faith, without improper motive or beyond the bounds of reasonable judgement.[122] To assess this, the following considerations are relevant factors:[123]

(1) the extent of discretion conferred...;
(2) the *purposes of the trust ;*
(3) the nature of the power;
(4) the existence or non-existence... of *an external standard by which the reasonableness of the trustee's conduct can be judged* ;
(5) the *motives* of the trustee;
(6) the existence or non-existence of *an interest in the trustee conflicting with that of the beneficiaries* .

We shall apply s 187 to San Diego's conduct in Part V *B* below.

(3) San Diego's 'but we're competitors' argument

SDYC contended that because it was the Cup defender and therefore a competitor, it ought not be held to the high standards of honesty and good faith implicit in 'undivided loyalty'.[124] On the contrary, however, SDYC's dual role as trustee/defender is *good reason* to demand from it the "punctilio of an honor the most sensitive".[125]

Lord Herschell said a fiduciary could not "... put himself in a position where his interest and duty conflict...."[126] It was the donor, however, and not the trustee who established SDYC's dual role which, by definition, includes a conflict of interest. This duality seriously increases the potential for abuse. Logically, therefore, a trustee/defender must make even more vigilant efforts to ensure it satisfies its duty to act in the "utmost good faith."[127]

While Schuyler established the trustee/defender role, it certainly does not follow that in so doing he lowered the requisite standard of behaviour. Fiduciary obligation is a default system of law[128] which, where deemed to exist, is applied inexorably. There is no provision for applying it in part or in diluted form. Rather, fiduciaries are bound by an "unbending and inveterate"[129] rule of strict liability. It is quite antithetical to speak of a calibration of fiduciary obligations.

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122 Above n 119; E C Halbach "Problems of Discretionary Trusts" (1961) 61 Col LR 1425, 1428.
123 Restatement of Trusts 2d, s 187, comment d (emphasis added).
124 Restatement of Trusts 2d, s 170. 'Undivided loyalty' comprises duties to avoid a conflict of interest and not to make a profit: above n 44, 393. See also *Farrington* v *Rowe McBride & Partners* [1985] 1 NZLR 83, 89 describing a solicitor's duty to her client of "absolute fairness and openness" and of "utmost good faith".
125 See below n 135.
126 *Bray* v *Ford* [1896] AC 44, 51.
127 See above n 124.
128 R Flannigan "Fiduciary Obligation in The Supreme Court" (1990) 54 Sask LR 45,45.
129 Below n 135.

For example, *LAC Minerals Ltd* v *International Corona Resources Ltd* [130] concerned the relationship between two large commercial mining companies. The Supreme Court of Canada discussed the 'scope' of fiduciary obligation in terms of which information disclosed by Corona constituted reposing trust and confidence in LAC. Even in such a commercial setting, however, no mention is made of some lesser standard of fiduciary obligation.

Furthermore, Schuyler's letter to *The Spirit Of The Times* in 1881, NYYC commodore Frank Snyder's view that sailing against *New Zealand* in a multihull is "...not to conduct a race or a competition of any kind," the irrelevance of dimensions in the Deed to multihulls, and the 'freakish' status of catamarans in 1887 overwhelmingly demonstrate that even if some lesser standard of behaviour were accepted, San Diego's choice of defending yacht nevertheless fell short of that lesser fiduciary standard.

(4) General fiduciary standards of behaviour

Apart from the very specific s 187 stipulations, the trustee/beneficiary relationship is a traditional category involving fiduciary obligations.[131] The ethos behind fiduciary theory is a desire to protect those who are vulnerable to the actions of,[132] or repose trust and confidence in another.[133] To achieve the desired level of protection, liability is strict.[134] Cardozo CJ eloquently described a trustee's fiduciary duty in *Meinhard* v *Salmon*, saying:[135]

> A trustee is held to something stricter than the morals of the marketplace. *Not honesty alone, but the punctilio of an honor the most sensitive* is then the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of the courts of equity when petitioned to undermine the rules of *undivided loyalty* by the disintegrating erosion of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd .

Canadian law requires a fiduciary to act in a manner consistent with the best interests of the beneficiary in all matters related to the undertaking of trust and confidence.[136] In

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130 [1989] 2 SCR 547; (1989) 61 DLR 14.

131 *Keech* v *Sandford* (1726) Sel Cas T King 61; 25 ER 223; *Campbell* v *Walker* 5 Ves Jun 678; 31 ER 801; *Frame* v *Smith* (1988) 42 DLR 81, 97.

132 The obligee is vulnerable, not in the ordinary sense of the word, but vulnerable to the unilateral power of another to exercise a discretion in such a way as to affect the obligee's legal or practical interests: *Frame* v *Smith* (1988) 42 DLR 81, 99 per Wilson J.

133 *Day* v *Mead* [1987] 2 NZLR 443, 458 per Somers J.

134 *Keech* v *Sandford* (1726) Sel Cas T King 61; 26 ER 223; *Phipps* v *Boardman* [1967] AC 46; [1966] 3 All ER 721; *Chan* v *Zacharia* (1984) 53 ALR 417.

135 164 N.E. 545, 546; 249 N.Y. 458,459 (1928) (emphasis added)

136 M V Ellis *Fiduciary Duties in Canada* (De Boo, Ontario, 1988) 1-2. The trust and confidence reposed in SDYC by MBBC is that SDYC will select a yacht which complies with Schuyler's stipulation for a 'match' and thereby carry out the purpose of the trust.

Canadian Aero Service Ltd v *O'Malley*,[137] the court held that fiduciary obligation has its roots in "... general standards... [of] loyalty, good faith and avoidance of a conflict of duty and self-interest."[138]

The majority evaded Cardozo CJ's pronouncement upon the exacting standard of trustee behaviour in *Meinhard* essentially by accepting SDYC's 'but we're competitors' argument.[139] As demonstrated above, such an argument is untenable. The majority's escape from the effect of *Meinhard* v *Salmon* truly makes Cardozo CJ's 'thunderous countenance' from across the Styx easier to envisage .[140]

Coupled with the authority to review described in Part V *A* (2) above, it is against the 'punctilio of an honor the most sensitive' which SDYC's 1988 decision to sail a catamaran must be assessed.

B Did SDYC Breach its Fiduciary Obligations ?

(1) The spirit of the Deed

In astonishing mood, the majority declared that "... San Diego fully complied with the terms and spirit of the trust instrument."[141] The very same trust instrument provides for "... friendly competition between foreign countries" and for a "match"[142] described by Schuyler as being "upon equal terms."[143] Can it seriously be argued that a trustee who, by its own admission turned the 27th Cup regatta into "a farce,"[144] a "foregone conclusion,"[145] took an "anything goes"[146] approach to deal with an "unwanted problem,"[147] and made it "virtually impossible for New Zealand to win"[148] fully complied with either the terms *or* the spirit of the Deed ?

(2) Section 187

Comment d to s 187 lists the trust's purpose as the second relevant consideration in determining whether a trustee abused her discretion. The preceding paragraph demonstrates how SDYC's catamaran defence breached both the spirit and purpose of the trust.

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137 (1973) 40 DLR 3d 371.
138 Above n 137, 384.
139 Above n 42, 859.
140 Phrase taken from an equally exquisite piece of prose by Thomas J. See above n 53, 194.
141 Above n 42, 859.
142 See Appendix C.
143 Above n 10, 3.
144 See above n 76 and accompanying text.
145 Above n 98, 11.
146 SAF Press release December 1987: vol 1, issue 2.
147 Dennis Conner quoted in *USA Today*, New York, USA, 9 September 1988, 6C.
148 *San Diego Union*, San Diego, USA, 3 December 1987.

The fourth consideration is 'the existence or non-existence of an external standard by which the reasonableness of the trustee's conduct can be judged'. Much of the evidence described when addressing the question of interpretation is relevant here, and indicates how illogical and patently unfair racing a catamaran against a monohull is. Such evidence included opinions by international yacht designers,[149] the incompatibility of catamarans with dimensions specified in the Deed,[150] and the close dimensions of past Cup boats.[151] Against this external standard, SDYC's conduct was manifestly unreasonable and inconsistent with both its fiduciary obligations and the donor's intent.

The fifth consideration under s 187 is SDYC's motive in choosing a catamaran. Furthermore, comment g underscores judicial preparedness to "... control the trustee in the exercise of a power where he acts from an improper even though not a dishonest motive."[152]

It is trite to say San Diego were entitled to try and retain the Cup. They could not do so, however, outside the confines of the Deed. San Diego chose a catamaran for its ability to "win every time".[153] Its motive was to deprive Mercury Bay of the 'match' 'upon equal terms' to which Mercury Bay was 'entitled' and assure itself of hosting a multinational event in 1991.[154] SDYC's motive behind sailing a catamaran was to

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149 Bruce K Farr & Stanley E Reid above n 18; Rudolph C Choy above n 89.

150 See above n 17; above n 89-92 and accompanying text.

151 See Appendix C.

152 Restatement of Trusts 2d, s 187, comment g.

153 Britton Chance above n 76.

154 San Diego anticipated a huge financial benefit similar to that enjoyed by Perth and New York as past hosts of Twelves regattas. SAF president Malin Burnham said:

> [i]f we have to race Fay in 1988, we want to be sure we can put this challenge away with little trouble. We don't want to risk San Diego losing the 1991 series.

(Brief on appeal on behalf of Mercury Bay Boating Club, 14 December 1988,18).

The *San Diego Union* reported that a Twelves event in 1991 "...could add $1.2 billion to the county's economy." (*San Diego Union*, San Diego, USA, 3 December 1987).

The mayor of San Diego Maureen O'Conner announced at a press conference shared with SAF representatives that at the behest of New York's Mayor Koch, the New York Attorney General would intervene on SDYC's behalf (Brief on appeal,14 n 9). Thus, the spectre of political interference seems also to evoke doubt about the Attorney General's motives as well. After all, while the Attorney General's office is charged with representing the interests of charitable beneficiaries (EPTL s 8-1.1(f)), it nevertheless asserted that:

> [t]here is... no requirement in the Deed of Gift that a match be 'fair and equal', nor should such a requirement be read into the Deed of Gift.

(Affidavit of Jill L Goodman sworn to 30 November 1988, 2).

The Attorney General simply did not fairly represent the trust beneficiaries by endorsing the view that SDYC had no obligation to give MBBC a fair race.

frustrate the express object of the donor.That is palpably improper, and a simple breach of trust.

(3) Manner of intervention

In her 25 November 1987 decision declaring MBBC's challenge valid, Ciparick J directed SDYC to either "... accept the challenge, forfeit the cup, or negotiate agreeable terms with the challenger."[155] Disqualification is the sanction applicable to sailing competitors who are found ineligible to compete. Indeed, counsel for SDYC conceded that disqualification was the proper remedy before Ciparick J at the contempt hearing saying:[156]

> ... if it appears at a later date that... San Diego has not defended the cup in accordance with the deed then it would be appropriate for Mercury Bay to come into court and *ask the Court to order a forfeiture of the Cup.*

Hancock J felt that despite SDYC's flagrant disregard for its duties as trustee to both MBBC and Schuyler's avowed purpose, SDYC should not forfeit the Cup. Instead, there should be a new series of races. With respect to the dissenting judges, this approach dilutes the full impact of fiduciary obligations at the remedial stage in a manner similar to the majority's acceptance of SDYC's 'but we're competitors argument'. Strict liability requires that a trustee disgorge any profit even if not made at the trusting party's expense.[157]

C Conclusion

The Deed imposed a 'managerial power' upon San Diego to select a defending yacht. This is conceptually distinct from a 'discretionary trust to allocate trust property among beneficiaries'. Its use is therefore open to review in a manner similar to 'mere powers'.

Section 187 applies to both 'managerial powers' and 'discretionary trusts', and provides for judicial intervention where a trustee abuses her discretion or acts beyond the bounds of reasonable judgement.[158] The application of s 187 to SDYC's managerial power has judicial sanction from Hancock and Titone JJ in *Mercury Bay III*.[159]

A trustee is held to the 'punctilio of an honour the most sensitive', for the trustee/beneficiary relationship exists upon a plane higher than the marketplace. The expected standard of behaviour is higher than that between contracting parties.[160] This is even more important where the trustee's position necessarily comprises holding an

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155 Above n 32, 19.
156 Brief on appeal on behalf of Mercury Bay Boating Club,14 December 1988, 52.
157 Above n 126, 47 ; R Flannigan "The Fiduciary Obligation" (1989) 9 Oxford Journal of Legal Studies 285, 299.
158 Above n 123, comment c.
159 Above n 42, 867.
160 See above n 135.

interest which conflicts with that of a beneficiary.[161] San Diego's conflict of interest augmented the potential for 'abuse' of its discretion as defined in s 187. Mercury Bay was, therefore, even more vulnerable to San Diego's managerial power than would a beneficiary in a more conventional trustee/beneficiary relationship. San Diego's argument in favour of a lesser standard of fiduciary obligation is entirely untenable. There is no authority for diluting the integrity of fiduciary standards. Rather, "unbending and inveterate"[162] authority fixes trustees with strict liability.

By selecting a 60' catamaran, SDYC committed a breach of trust. *Stars & Stripes* did not and was never intended to 'match' *New Zealand* 'upon equal terms'. Evidence deposed by international yacht designers and experts illustrates how catamaran design elements make it the inherently faster specie of yacht. Even if the Deed were interpreted upon its bare terms to admit a catamaran, SDYC could not avail itself of that permission. Doing so turned the 27th Cup regatta into a foregone conclusion, a farce, and a mismatch devoid of "competition of any kind."[163] SDYC's motive was woefully improper for purposes of s 187 and fiduciary standards generally, with its decision further coloured by a desire to stage a lucrative Twelves event in 1991. SDYC profited from its breach by retaining the Cup, and as trustee had a duty to disgorge that profit. Forfeiture, therefore, was the appropriate legal sanction as well as being consistent with yachting's usual rule of disqualification.

VII KEVLAR, CARBON FIBRE[164] & MILLIONAIRE OBSESSIONS - JUST HOW CHARITABLE IS THE AMERICA'S CUP?

"There is no question that the America's Cup trust is a valid New York charitable trust. Indeed, the majority points out that no one disputes this."[165] So said Hancock J in *Mercury Bay III*. The Cup, however, is subject to consistent popular attack upon grounds of elitism. It is certainly true that only those with cavernous pockets may compete. What then is the true position ? If it is not charitable, how else might the Deed be upheld as a valid instrument ?

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161 Hancock and Titone JJ endorse this: above n 42, 864.

162 See above n 135.

163 Above n 86.

164 Kevlar is an exotic sail fabric comprising laminated milar film and kevlar yarn. The result is a light, low-stretch sail-cloth. Carbon fibre is an extremely light material and has exceptionally high strength. It is brittle, however, making its impact strength relatively low. Load absorbing cells are therefore built into the spars and mast. Carbon fibre is also used to a limited extent in sail making.

Stars & Stripes utilised a rigid foil 'wing' sail which rotated in 4 sections to create the aerodynamic sail shape. It used a carbon/kevlar mix in the sail frame, over which was stretched transparent milar film.

165 Above n 42, 865.

A The Nature of 'Charity'

(1) The Statute of Charitable Uses 1601 (Eng)

Both Commonwealth and US jurisdictions base their definitions of 'charity' upon the preamble to the Statute of Charitable Uses 1601 (the "Statute").[166] It is the fountainhead for four recognised categories of charitable purpose. Lord Mcnaghten described these in *Commissioners for Special Purposes of Income Tax* v *Pemsel* as:[167]

> ... trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community not falling under any of the preceding heads.

A purpose trust is charitable if its purpose is both (by analogy) within "... the spirit and intendment of the preamble...,"[168] and of public benefit.[169]

(2) Sport and charity

Does the Deed satisfy these requirements ? It is well settled that a trust for promoting a 'mere sport' is not charitable.[170] The leading authority for this proposition is *In re Nottage* [171] where the testator bequeathed 2 000 pounds to the Yacht Racing Association of Great Britain. He directed his trustees to purchase a cup ('The Nottage Cup') annually and award it to the most successful yacht of the season. He said: "[m]y object in giving this cup is to encourage the sport of yacht-racing."[172] This is, arguably, somewhat similar in tenor to donating a cup upon the condition "... that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries."[173]

Lopes J, however, said:[174]

> ... a gift, the object of which is the encouragement of a mere sport or game primarily calculated to amuse individuals apart from the community at large, cannot upon the

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166 Above n 45, 821; preamble reproduced in Appendix E; W F Fratcher "Trusts in the United States of America" in *Trusts and Trust-Like Devices* (Wilson W A, London, 1981) 45, 53. The validity of charitable trusts in the US is not, however, dependent upon adoption of the Statute of Charitable Uses by the relevant state: Restatement of Trusts 2d, s 368, comment a.

167 [1891] AC 531, 583. One might note that the preamble's only express reference to religion is contained within "...Money... given... for repair of Bridges, Ports, Havens, Causeways, Churches, Sea-Banks and Highways...." (See Appendix E). The position of the Buddhist religion was deliberately left open in *Re South Place Ethical Society* [1980] 1 WLR 1472.

168 *Royal National Agricultural & Industrial Assoc.* v *Chester & Ors* (1974) 48 ALJR 304, 306; 3 ALR 486, 488; *In re Nottage* [1895] 2 Ch 649, 656 per Rigby LJ.

169 Above n 45, 829; Restatement of Trusts 2d, s 368 (f).

170 Above n 45, 867.

171 [1895] 2 Ch 649.

172 Above n 171, 650.

173 See Appendix C.

174 Above n 171, 656 (emphasis added).

> authorities be held to be charitable, *though such a sport or game is to some extent beneficial to the public.*

One might contend that the Deed does not promote a sport 'primarily calculated to amuse individuals' because the America's Cup would not be the event it is without tremendous public interest world-wide. Lopes J seems to exclude this argument, however in his final phrase italicised above. Lindley J agreed:[175]

> [n]ow, I should say that every healthy sport is good for the nation - cricket, football, fencing, yachting, or any other healthy exercise and recreation; but if it had been the idea of lawyers that a gift for the encouragement of such exercises is charitable, then we should have heard it by now.

Rigby LJ concluded:[176]

> [t]he Yacht Racing Association is a society of yacht-owners, the prizes are to be won by yacht-owners....There are many things which are laudable and useful to society which yet cannot be considered charitable, and this... is one of them.

In re Nottage was decided nearly 100 years ago, in an era where yachting certainly was elitist. That is not so true today. Further, Lord Mcnaghten said trusts "... are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor...."[177] Lindley LJ assumes that all charitable purposes have long since appeared. Society's needs and charities fluctuate with time. The law must never set its feet in concrete, lest it suffer the ridicule of those it serves.

Interestingly, s 38 of New Zealand's Charitable Trusts Act 1957 defines 'charitable purpose' in part IV of the Act to include "... (g) The promotion of athletic sports and wholesome recreations and amusements." This definition only applies, however:[178]

> ... to cases in which money has been raised for any charitable purpose by way of contribution, or by the sale of goods voluntarily contributed, or as the price of admission to any entertainment....

While the substantial entry fees paid by challengers could be construed as 'the price of admission' to an 'entertainment', the link is fatally tenuous. Cup syndicates provide the entertainment themselves. They are not admitted to an entertainment as contemplated by sections 38-39. Even if such provisions had been in force in New York in 1887, they would not have made the trust charitable, because Schuyler never provided for such fees.

While some argument can be made to distinguish *In re Nottage*, the court's unequivocal statements of law mean the Deed cannot establish a charitable trust in

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175 Above n 171, 655.
176 Above n 171, 656.
177 Above n 168, *Chester* (1974) 3 ALR 486, 583.
178 Section 39.

Commonwealth jurisdictions. Indicative of this is the High Court of Australia's decision in *Chester.*[179] The testator bequeathed his residuary estate for the purpose of "... improving the breeding and racing of homer pigeons."[180] The court felt that the trustee could apply the income of the estate to providing racing facilities and trophies and such an application "... would not be for charitable purposes."[181]

Mirroring Commonwealth terminology, the US Restatement declares "[a] trust merely for the promotion of sports is not charitable."[182] How then does one explain the New York Court of Appeals' passive acceptance of the Deed's charitable status? Section 368 of the Restatement offers some explanation as to why the trust continues in perpetuity today. It includes "... (e) governmental or municipal purposes;" and "... (f) other purposes the accomplishment of which is beneficial to the community" within the term "charitable purpose".[183] Huge financial benefits comprising trade booms, employment, publicity, tourism, and increased tax yields make hosting the Cup invaluable.[184] These could constitute governmental or municipal purposes and are certainly beneficial to the host community.

These ancillary benefits are incidental, however, to Schuyler's Deed and not his declared purposes at all. The Deed's initial acceptance in 1857, therefore, is inexplicable. The presence of these benefits does, however, tend to explain why today nobody disputes the Deed's charitable status.

Schuyler's Deed does not establish a valid charitable trust under either US or Commonwealth law. It has acquired a charitable mantle by virtue of judicial acquiescence, ancillary benefits, and the passage of time.

B A Non - Charitable Purpose Trust ?

Fratcher states that US law follows English precepts in this area. A closer reading of his article, however, reveals that US courts are less ready to uphold non-charitable purpose trusts than their commonwealth counterparts.[185] This may, in fact, constitute another factor which encouraged the courts to declare the Deed charitable. Accurately described, however, it prescribes a non-charitable purpose trust.

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179 Above n 168.

180 Above n 177, *Chester*, 487.

181 Above n 177, *Chester*, 489.

182 Restatement of Trusts 2d, s 374, comment n.

183 Restatement of Trusts 2d, s 368 .

184 See above n 154 for the political dimension to SDYC's Cup defence.

185 Above n 166, Fratcher, 55. The absence of named beneficiaries is assumed to mean the trust can not be enforced and devolves on a resulting trust. This indicates that US law has not yet recognised the full implications of *McPhail* v *Doulton* 's approach: see below n 201 and accompanying text.

(1) *The law pre-*Denley

Generally, a trust must have a human beneficiary to enforce it. Lord Evershed MR said in *Re Endacott* that:[186]

> [n]o principle perhaps has greater sanction or authority behind it than the general proposition that a trust by English law, not being a charitable trust, in order to be effective, must have ascertained or ascertainable beneficiaries.

This is commonly called the 'beneficiary principle'. It embodies judicial distaste for large funds not devoted to charitable purposes. According to *Re Astor's Settlement Trusts*,[187] a valid trust is either charitable, for persons, or one of the "anomalous"[188] beneficiary principle exceptions of trusts for "... horses, dogs, graves or monuments...."[189]

(2) *In re Denley's Trust Deed* [190]

17 years after *Astor*, Goff J refined the stark terms in which *Astor* and *Endacott* articulated the beneficiary principle. In *Denley*, the settlor left certain land upon trust as a sports ground for employees of his company. Goff J upheld the trust as valid saying:[191]

> [w]here... the trust, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals, it seems to me that it is in general outside the mischief of the beneficiary principle.

These individuals may be described as factual beneficiaries.[192] Essentially, if the Deed possesses ascertainable factual beneficiaries, it will not fail for lack of enforceability.

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186 [1960] 1 Ch 232, 246.

187 [1952] Ch 534; [1952] 1 All ER 1067.

188 Above n 186, 245.

189 Above n 186, 245.

190 Above n 4.

191 Above n 4, 383-384.

192 Acceptance of Goff J's analysis is evident in the *Quistclose* line of cases: *Barclays Bank Ltd* v *Quistclose Investments Ltd* [1968] 3 All ER 651; [1970] AC 567; *Carreras Rothmans Ltd* v *Freeman Mathews Treasure Ltd* [1985] 1 Ch 207; *Re EVTR* [1987] BCLC 646; *In re Northern Developments (Holdings) Ltd* (unreported) 6 October 1978, Sir Robert Megarry VC and in those involving unincorporated associations: *Re Lipinski's Will Trusts* [1976] Ch 235; [1977] 1 All ER 33; [1976] 3 WLR 522; but compare *Re Grant's Will Trusts* [1979] 3 All ER 359, 368 where Vinelott J construes *Denley* as a trust for persons.

(3) Ascertaining factual beneficiaries & the 'any given individual' test

To be valid, a trust must satisfy the "three certainties"[193] of intention, subject matter and objects. The third of these is at issue here. In *Inland Revenue Commissioners* v *Broadway Cottages Trust* [194] the English Court of Appeal considered a discretionary trust over income.[195] Jenkins LJ held that the tremendous scope of terms describing 'the beneficiaries' made it "... impossible at any given time to achieve a complete and exhaustive enumeration of all the persons then qualified for inclusion"[196] in the class of objects. Because the court felt it could not exercise the discretion itself,[197] it must distribute the income equally among all objects. This required a complete list of all so entitled.

14 years later, *Re Gulbenkian's Settlement Trusts* [198] came before the House of Lords. It concerned a "mere power"[199] and argument again centred upon determining whether the class of beneficiaries was sufficiently ascertainable. Lord Upjohn said:[200]

> ... a mere or bare power of appointment among a class is valid if you can with certainty say whether any given individual is or is not a member of the class; you do not have to be able to ascertain every member of the class.

Gulbenkian was soon followed by *McPhail* v *Doulton* [201] which concerned a discretionary trust with mere powers of appointment and accumulation. The House of Lords overruled *Broadway Cottages* and the complete enumeration test. Lord Wilberforce held:[202]

> ... the wide distinction between the validity test for powers and that for trust powers[203] is unfortunate and wrong... the rule recently fastened on the courts by the *Broadway Cottages* case ought to be discarded, and... the test for the validity of trust powers ought to be similar to that accepted by this House in *Re Gulbenkian's*

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193 *Knight* v *Knight* (1840) 3 Beav 148, 173 per Lord Langdale.
194 [1955] 1 Ch 20.
195 Above n 194, 29.
196 Above n 194, 29.
197 Above n 194, 30.
198 [1968] 3 All ER 785.
199 A 'discretionary power' in US terminology.
200 Above n 198, 790.
201 [1970] 2 All ER 228.
202 Above n 201, 246.
203 Lord Wilberforce uses the term 'trust power' as a synonym for 'discretionary trust'. This is, however, quite incorrect. A trust power is essentially a trust in default of appointment. Chesterman, Dewar & Moffat give the following example: Suppose property is held by T1 & T2 on trust for W for life, and then for such of A, B & C as W in her absolute discretion may appoint. W dies without exercising her discretion. If a power, then A, B & C have no claim to the property which reverts to the settlor's estate. If a trust some distribution must occur and courts have occasionally resorted to the 'trust power' to authorise a distribution: M Chesterman, J Dewar, G Moffat *Trusts Law: text and materials* (Weidenfeld & Nicolson, London, 1988) 210.

Settlement Trusts for powers, namely that the trust is valid if it can be said with certainty that any given individual is or is not a member of the class.

The same 'any given individual' test for certainty of objects, therefore, applies to both discretionary trusts and mere powers.

(4) The challengers - applying McPhail *v* Doulton *to the Deed*

The Deed is not a fixed interest trust, because a fixed interest must be certain both in terms of quantum and beneficial destination. Neither is it clearly a discretionary trust, because once ascertained, the challenger is 'entitled' to a match. Rather, the Deed is a purpose trust -to establish a perpetual challenge cup- with factual beneficiaries. It was in contemplating this very situation that Lord Wilberforce endorsed the 'any given individual' test, and it is therefore applicable to the Deed despite not falling satisfactorily within either trust category.

Hancock J said: "[a] defender owes a duty as trustee to any yacht club which may file a challenge against it."[204] Upon one interpretation this means that only the single challenger at each periodic regatta is a beneficiary.[205] 'Beneficiary' is therefore synonymous with 'challenger'. However, Hancock J goes on to say that the trustee also owes a fiduciary duty "... to past defenders and trustees... those who have engaged in America's Cup competitions and to interested members of the international yacht racing community."[206] All, he says, have a legitimate interest in the Deed's avowed purpose as "... a perpetual Challenge Cup for friendly competition between foreign countries."[207]

If Hancock J means that these individuals are all beneficiaries then, with respect, the writer disagrees. That interpretation would certainly cause the trust to fail for "administrative unworkability".[208] The trustee may owe such 'interested members' fiduciary obligations, but they can not be beneficiaries. They appeared as "amici curiae"[209] in the *Mercury Bay III* proceedings and that, it is submitted, is their correct role.

Hancock J's statement that "[a] defender owes a duty as trustee to any yacht club which may file a challenge against it"[210] is susceptible to a second interpretation. Beneficiary rights accrue not through gaining the fleeting status of challenger, but through mere existence as "[a]ny Yacht Club of a foreign country."[211]

The former interpretation dictates an intervening period between periodic challenges where there is no beneficiary at all. Arguably, this is a natural part of the Deed.

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204 Above n 42, 864.

205 The multinational series to decide which nation may challenge the defender for the Cup is the Louis Vuitton Cup.

206 Above n 42, 864.

207 Above n 42, 864.

208 Above n 201, 247.

209 See above n 79.

210 See above n 204-205, and accompanying text.

211 See Appendix C.

Nevertheless it may cause the trust to fail. Under the latter interpretation, however, no such problem arises. It is a relatively simple task to apply and satisfy the certainty of objects test for ascertainable factual beneficiaries. One merely enquires whether, at any given time, 'any given' entity is or is not an:[212]

> ... organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, having for its annual regatta an ocean course on the sea, or on an arm of the sea....

A foreign country is simply one other than that to which the defending club belongs.

(5) Re Baden's Deed Trusts (No. 2) [213] - *the 'any given individual' test under siege?*

In *Re Baden*, the English Court of Appeal came to apply the 'any given individual' test propounded in *McPhail* v *Doulton*. The defendant/executors of Mr Baden's will alleged that the trust he set up "... for providing benefits for the staff of the Company and their relatives and dependants" was void. They submitted that:[214]

> [y]ou may with certainty say that a very large number of given individuals are relatives... but,... you will never be able to say with certainty of many individuals that they are not.

Stamp J responded that this argument is tantamount to returning to *Broadway Cottages* and its 'complete list of beneficiaries' test. Rejecting it is similarly tantamount to returning to the 'any *one* individual' test repudiated in *Gulbenkian* [215] in which ascertaining one qualifying factual beneficiary is enough. These are very real problems in Lord Wilberforce's test. However, the House of Lords has rejected both the 'complete list' and 'any one individual' tests as inappropriate.

Megaw LJ consequently saw the defendant/executor's argument as an exercise in semantics. The 'any given individual' test declares that "... you do not have to be able to ascertain every member of the class."[216] For the trustees to positively ascertain that an entity is *not* a yacht club with the relevant characteristics "... in substance and reality..."[217] requires ascertaining every member of the class. Megaw LJ concludes by saying *McPhail* v *Doulton* 's 'any given individual' test is satisfied if "... a substantial number of objects... can, with certainty , be described as falling within the trust."[218]

C *Perpetuity : The Final Frontier !*

Given that the Deed is not a charitable trust, does it fail as extending into perpetuity? After all, Schuyler called it a 'perpetual challenge cup.' The short answer is yes. There are good reasons, however, why the short answer is incorrect.

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212 Above n 211.
213 [1972] 2 All ER 1304.
214 Above n 213, 1315.
215 Above n 198, 792.
216 Above n 213, 1313.
217 Above n 213, 1313.
218 Above n 213, 1313.

The law's aversion to perpetual non-charitable purpose trusts is steeped in a fundamental desire for assets and wealth to remain in circulation as much as possible.[219] As pointed out in Part VI *B* (1) above, the law generally strikes down large funds not devoted to charitable purposes. There is, however, no large fund of money at stake under the Deed. Trust property consists merely of an old (and rather unattractive) silver cup. The real substance of the trust is the sailing competition - its rules, procedures, race conditions and courses. The rationale behind the perpetuity rule consequently has no relevance for Schuyler's Deed. This is also another reason why its 'charitable' status has never been challenged.

The mischief at which the perpetuity rule is directed simply does not arise under the Deed. It ought, therefore, be excluded from its effect.

D Conclusion

The Deed essentially establishes a trust for the promotion of yacht racing. *In re Nottage* declared such a purpose uncharitable. Even though the elitism inherent in yachting is not so strong as it once was, *Chester* declared that providing racing facilities and trophies is not within the 'spirit and intendment of the preamble' to the Statute. The financial spin-offs of Cup competition, judicial acquiescence and passage of time have colluded to colour the Cup in charitable shades for purposes of US trust law. In reality, however, its colours are quite different. A similar trust established today is unlikely to achieve charitable recognition.

In re Denley's Trust Deed recognised that a non-charitable purpose trust may have factual beneficiaries who can enforce it. This represented a revision of the 'beneficiary principle' which demanded a trust be for persons unless charitable or anomalous.[220] In *Gulbenkian*, Lord Upjohn enunciated the 'any given individual' test for 'mere powers' and the House of Lords adopted it in *McPhail* v *Doulton* as applicable to discretionary trusts as well. It is this test which determines whether a non-charitable purpose trust satisfies the requirement of certainty of objects.

It can, with certainty, be ascertained whether an entity is, or is not an incorporated, patented, or licensed yacht club of a foreign country. Such are factual beneficiaries who may then challenge for and sail a match for the Cup. Furthermore, the rule against perpetuity has no logical relevance where no appreciable asset is withheld from circulation. There is, therefore, no obstacle to the Deed existing in perpetuity as a non-charitable purpose trust.

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219 Commentators have articulated the rule against perpetuity as a proviso to a larger rule against rendering property inalienable for a period longer than lives in being and twenty-one years. See: L A Sheridan & G W Keeton *The Modern Law of Charities* (3ed, University College Cardiff Press, UK, 1983) 2; and G Jones *History of the Law of Charity 1532-1827* (Cambridge University Press, London, 1969) generally.

220 The anomalies being trusts for horses, dogs, graves and monuments: see above n 186 & 188.

VIII CONCLUSION

On July 17 1987, Mercury Bay presented San Diego with the opportunity to direct, choreograph and star in a spectacle of yachting magnificence. However, San Diego axed both the 'spectacle' and 'magnificence' before opening night by casting itself as a catamaran.

The Deed 'entitled' MBBC to a 'match' which Schuyler described as a competition 'upon equal terms'. He thereby excluded the type of farcical mismatch which SDYC staged on the waters of San Diego Bay. In 1887 catamarans were considered experimental, incapable of crossing oceans, and came nowhere near the minimum LWL length specified by the Deed. Further, their design features bear no relation to dimensions specified in the Deed. In no way, therefore, did Schuyler contemplate, or the Deed permit SDYC's *Stars & Stripes.*

Even if the Deed had *prima facie* permitted a catamaran defence, as trustees, SDYC were required to exercise 'the punctilio of an honour the most sensitive'. By sailing a catamaran, SDYC took an 'all's fair in love and war' approach which removed any element of realistic competition from the regatta. It consequently failed to satisfy its fiduciary obligation of acting in the utmost good faith toward MBBC and Schuyler's avowed intention of ensuring a fair match. SDYC breached the trust and forfeited the Cup to MBBC.

While its charitable status is long established, the Deed is more accurately described as a non-charitable purpose trust for factual beneficiaries. Applying the test in *McPhail* v *Doulton* , any foreign yacht club with the requisite qualities specified by the Deed is a factual beneficiary. The Deed evades the rule against perpetuity for the simple reason that there is no large fund withdrawn from circulation.

IX EPILOGUE

In October 1991, *Rinaldo* v *McGovern* [221] came before the New York Court of Appeals. Roberta Rinaldo sued in negligence for personal injuries sustained when the defendant miscued a golf shot, sending his ball onto a nearby road where it struck the plaintiff's car windscreen. The court held that the plaintiff had not shown the defendant had failed to exercise due care, for example, by aiming so inaccurately as to unreasonably increase the risk of harm.

Evidently, there are more golfers on the New York Court of Appeals' bench than there are sailors.

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221 (1991) 78 NY 2d 729.

APPENDIX A

DEED OF GIFT OF 1857

TO THE SECRETARY OF THE NEW YORK YACHT CLUB:-

Sir: The undersigned, members of the New York Yacht Club, and late owners of the schooner yacht *America*, beg leave through you to present to the Club the Cup won by the *America*, at the Regatta of the Royal Yacht Squadron at Cowes, England, August 22, 1851.

This Cup was offered as a prize to be sailed for by Yachts of all nations without regard to difference to tonnage, going round the Isle of Wight, the usual course for the Annual Regatta of the Royal Yacht Squadron, and was won by the *America*, beating eight cutters and seven schooner Yachts which started in the race.

The Cup is offered to the New York Yacht Club, subject to the following conditions :

Any organized Yacht Club of any foreign country shall always be entitled, through any one or more of its members, to claim the right of sailing a match for this Cup with any yacht or other vessel of not less than 30 or more than 300 tons, measured by the Custom House rule of the country to which the vessel belongs.

The parties desiring to sail for the Cup may make any match with the Yacht Club in possession of the same that may be determined upon by mutual consent; but in case of disagreement as to terms, the match shall be sailed over the usual course for the Annual Regatta of the Yacht Club in possession of the Cup, and subject to the Rules and Sailing Regulations the challenging party being bound to give six months' notice in writing, fixing the day on which they wish to start. This notice to embrace the length, Custom House measurement, rig, and name of the vessel.

It is to be distinctly understood that the Cup is to be the property of the Club, and not of the members thereof, or owners of the vessels winning it in a match; and that the condition of keeping it open to be sailed for by Yacht Clubs of all foreign countries, upon the terms above laid down, shall forever attach to it, thus making it a perpetual Challenge Cup for friendly competition between foreign countries.

J.C. Stevens
Edwin A. Stevens
Hamilton Wilkes
J. Beekman Finley
George Schuyler

APPENDIX B

DEED OF GIFT OF 1881

The America's Cup is again offered to the New York Yacht Club, subject to the following conditions:

Any organised Yacht Club of a foreign country, incorporated, patented or licensed by the Legislature, admiralty or other executive department, having for its annual regatta an ocean water course on the sea or on an arm of the sea (or one which combines both), practicable for vessels of 300 tons, shall always be entitled, through one or more of its members, to the right of sailing a match for this Cup, with a yacht or other vessel propelled by sails only, and constructed in the country to which the Challenging Club belongs, against any one yacht or vessel as aforesaid, constructed in the country of the club holding the Cup.

The yacht or vessel to be of not less than 30 nor more than 300 tons, measured by the Custom House rule in use by the country of the challenging party.

The challenging party shall give six months' notice in writing, naming the day for the proposed race, which day shall not be less than seven months from the date of notice.

The parties intending to sail for the Cup may, by mutual consent, make any arrangement satisfactory to both as to the date, course, time allowance, number of trials, rules and sailing regulations, and any and all other conditions of the match, in which case also the six months' notice may be waived.

In case the parties cannot mutually agree upon the terms of the match, then the challenging party shall have the right to contest for the Cup in one trial, sailed over the usual course of the Annual Regatta of the club holding the Cup, subject to its rules and sailing regulations, the challenged party not being required to name its representative until the time agreed upon for the start.

Accompanying the six months' notice, there must be a Custom House certificate of the measurement, and a statement of the dimensions, rig and name of the vessel.

No vessel which has been defeated in a match for this Cup can be again selected by any club for its representative until after a contest for it by some other vessel has intervened, or until after the expiration of two years from the time such contest has taken place.

Vessels intending to compete for this Cup must proceed under sail on their own bottoms to the port where the contest is to take place.

Should the club holding the Cup be for any cause dissolved, the Cup shall be handed over to any club of the same nationality it may select which comes under the foregoing rules.

It is to be distinctly understood that the Cup is to be the property of the club and not of the owners of the vessel winning it in a match, and that the condition of keeping it open to be sailed for by organized Yacht Clubs of all foreign countries, upon the terms above laid down, shall forever attach to it, thus making it perpetually a Challenge Cup for friendly competition between foreign countries.

George Schuyler

APPENDIX C

DEED OF GIFT OF 1887 (THE "DEED")

This Deed of Gift, made the twenty-fourth day of October, one thousand eight hundred and eighty-seven, between George L. Schuyler as sole surviving owner of the Cup won by the yacht AMERICA at Cowes, England, on the twenty-second day of August, one thousand eight hundred and fifty-one, of the first part, and the New York Yacht Club, of the second part, as amended by the orders of the Supreme Court of the State of New York dated December 17, 1986, and April 5, 1985.

WITNESSETH-

That the said party of the first part, for and in consideration of the premises and of the performance of the conditions and agreements hereinafter set forth by the party of the second part, has granted, bargained, sold, assigned, transferred, and set over,and by these presents does grant, bargain, sell, assign, transfer, and set over, unto said party of the second part, its successors and assigns, the Cup won by the schooner yacht AMERICA, at Cowes, England, upon the twenty-second day of August, 1851. To have and to hold the same to the said party of the second part, its successors and assigns, IN TRUST, NEVERTHELESS, for the following uses and purposes:

This Cup is donated upon the condition that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries.

Any organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both, shall always be entitled to the right of sailing a match for this Cup, with a yacht or vessel propelled by sails only and constructed in the country of the Club holding the Cup.

The competing yachts or vessels, if of one mast, shall be not less than forty-four feet nor more than ninety feet on the load water-line; if of more than one mast they shall not be less than eighty feet nor more than one hundred and fifteen feet on the load water-line.

The Challenging Club shall give ten months' notice, in writing, naming the days for the proposed races; but no race shall be sailed in the days intervening between November 1st and May 1st if the races are to be conducted in the Northern Hemisphere; and no race shall be sailed in the days intervening between May 1st and November 1st if the races are to be conducted in the Southern Hemisphere. Accompanying ten months' notice of challenge there must be sent the name of the owner and a certificate of the name, rig, and following dimensions of the challenging vessel, namely, length on load water-line; beam at load water-line and extreme beam; and draught of water; which dimensions shall not be exceeded; and a custom-house registry of the vessel must also be sent as soon as possible. Centre-board or sliding keel vessels shall always be allowed to compete in any race for this Cup, and no restriction nor limitation whatever shall be

placed upon the use of such centre-board or sliding keel, nor shall the centre-board or sliding keel be considered a part of the vessel for any purposes of measurement.

The Club challenging for the Cup and the Club holding the same may, by mutual consent, make any arrangement satisfactory as to both as to the dates, courses, number of trials, rules and sailing regulations, and any and all other conditions of the match, in which case also the ten months' notice may be waived.

In case the parties cannot mutually agree upon the terms of a match, then three races shall be sailed, and the winner of two of such races shall be entitled to the Cup. All races shall be ocean courses, free from headlands, as follows: The first race, twenty nautical miles to windward and return; the second race an equilateral triangular race of thirty-nine nautical miles, the first side of which shall be a beat to windward; the third race (if necessary) twenty nautical miles to windward and return; and one week day shall intervene between the conclusion of one race and the starting of the next race. These ocean courses shall be practicable in all parts for vessels of twenty-two feet draught of water, and shall be selected by the Club holding the Cup; and these races shall be sailed subject to its rules and sailing regulations so far as the same do not conflict with the provisions of this deed of gift, but without any time allowances whatever. The challenged Club shall not be required to name its representative vessel until at a time agreed upon for the start, but the vessel when named must compete in all the races, and each of such races must be completed within seven hours.

Should the Club holding the Cup be for any cause dissolved, the Cup shall be transferred to some Club of the same nationality, eligible to challenge under this deed of gift, in trust and subject to its provisions. In the event of the failure of such transfer within three months after such dissolution, said Cup shall revert to the preceding Club holding the same, and under the terms of this deed of gift. It is distinctly understood that the Cup is to be the property of the Club subject to the provisions of this deed, and not the property of the owner or owners of any vessel winning a match.

No vessel which has been defeated in a match for this Cup can be again selected by any Club as its representative until after a contest for it by some other vessel has intervened, or until after the expiration of two years from the time of such defeat. And when a challenge from a Club fulfilling all the conditions required by this instrument has been received, no other challenge can be considered until the pending event has been decided.

AND the said party of the second part hereby accepts the said Cup subject to the said trust, terms, and conditions, and hereby covenants and agrees to and with said party of the first part that it will faithfully and fully see that the foregoing conditions are fully observed and complied with by any contestant for the said Cup during the holding thereof by it; and that it will assign, transfer, and deliver the said Cup to the foreign Yacht Club whose representative yacht shall have won the same in accordance with the foregoing terms and conditions, provided the said foreign Club shall, by instrument in writing lawfully executed, enter with said party of the second part into the like covenants as are herein entered into by it, such instrument to contain a like provision for the successive assignees to enter into the same covenants with their respective

assignors, and to be executed in duplicate, one to be retained by each Club, and a copy thereof to be forwarded to the said party of the second part.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal, and the said party of the second part has caused its corporate seal to be affixed to these presents and the same to be signed by its Commodore and attested by its Secretary, the day and year first above written.

George L. Schuyler (L.S.)
The New York Yacht Club
by Elbridge T. Gerry, *Commodore*
John H. Bird, *Secretary*

In the presence of
H.D. Hamilton.
(Seal of the New York Yacht Club)

APPENDIX D

DIMENSIONS OF AMERICA'S CUP YACHTS 1870-1937

	DEFENDERS			CHALLENGERS		
1870	Magic			Cambria		
	LOA	90'		LOA	112'	11.5"
	LWL	81'		LWL	99'	7"
	BEAM	21'		BEAM	21'	2"
	DRAFT	6'	8.5"	DRAFT	12'	3"
1871	Columbia*			Livonia		
	LOA	112'		LOA	127'	
	LWL	98'	6"	LWL	108'	8"
	BEAM	25'	3"	BEAM	23'	
	DRAFT	5'	11"/22'	DRAFT	12'	10"
1876	Madeleine			Countess of Dufferin		
	LOA	106'		LOA	107'	
	LWL	95'	0.5"	LWL	95'	6.5"
	BEAM	24'	1.5"	BEAM	23'	9"
	DRAFT	6'	9"/16'6"	DRAFT	not available	
1881	Mischief			Atalanta		
	LOA	67'	6"	LOA	70'	2"
	LWL	61'		LWL	64'	
	BEAM	19'	8"	BEAM	18'	8"
	DRAFT	5'	4"	DRAFT	5'	4.5"
1885	Puritan			Genesta		
	LOA	94'		LOA	96'	8"
	LWL	81'	1.5"	LWL	81'	8"
	BEAM	22'	7"	BEAM	15'	
	DRAFT	8'	8"	DRAFT	13'	5"
1886	Mayflower			Galatea		
	LOA	100'3"		LOA	102'	7"
	LWL	85'	6"	LWL	86'	10"
	BEAM	23'	7"	BEAM	15'	
	DRAFT	9'	10"	DRAFT	13'	8"
1887	Volunteer			Thistle		
	LOA	108'		LOA	108'	5"
	LWL	85'	10.5"	LWL	86'	5.5"
	BEAM	23'	2.5"	BEAM	20'	4"
	DRAFT	10'		DRAFT	13'	8"

* Sailed three out of 5 races winning two.
Sappho sailed the other two races winning both.

	Sappho	
LOA	138'	
LWL	119'	4"
BEAM	27'	
DRAFT	12'	10"

1893	Vigilant			Valkyrie II		
	LOA	126'	4"	LOA	117'	7"
	LWL	85'		LWL	85'	6"
	BEAM	26'		BEAM	22'	4"
	DRAFT	13'		DRAFT	16'	6"
1895	Defender			Valkyrie III		
	LOA	123'		LOA	129'	
	LWL	89'	2"	LWL	87'	7"
	BEAM	23'	1"	BEAM	26'	
	DRAFT	19'	1"	DRAFT	19'	7.5"
1899	Columbia			Shamrock		
	LOA	131'	9"	LOA	127'	6"
	LWL	89'	5"	LWL	89'	
	BEAM	24'	3"	BEAM	24'	6"
	DRAFT	19'	7"	DRAFT	20'	2.5"
1901	Columbia			Shamrock II		
	LOA	131'	9"	LOA	134'	4.5"
	LWL	89'	5"	LWL	89'	6"
	BEAM	24'	3"	BEAM	24'	4"
	DRAFT	19'	7"	DRAFT	20'	9"
1903	Reliance			Shamrock III		
	LOA	143'	8.25"	LOA	134'	5.25"
	LWL	89'	8"	LWL	89'	10"
	BEAM	25'	10"	BEAM	24'	10.25"
	DRAFT	19'	7"	DRAFT	19'	10.5"
1920	Resolute			Shamrock IV		
	LOA	106'	8"	LOA	110'	4.5"
	LWL	75'	6"	LWL	75'	
	BEAM	21'	1"	BEAM	22'	8"
	DRAFT	13'	10"	DRAFT	13'	8"

1930	Enterprise			Shamrock V		
	LOA	120'	10"	LOA	119'	10"
	LWL	80'		LWL	81'	1"
	BEAM	22'	1.25"	BEAM	19'	8"
	DRAFT	14'	6"	DRAFT	14'	8"
1934	Rainbow			Endeavour		
	LOA	127'	8"	LOA	129'	10"
	LWL	82'		LWL	84'	
	BEAM	21'		BEAM	22'	
	DRAFT	14'	11.5"	DRAFT	15'	
1937	Ranger			Endeavour II		
	LOA	135'	1.8"	LOA	135'	9.5"
	LWL	87'		LWL	86'	6"
	BEAM	21'		BEAM	21'	6"
	DRAFT	15'		DRAFT	15'	

APPENDIX E

PREAMBLE TO THE STATUTE OF CHARITABLE USES 1601 (Eng)

Whereas Lands, Tenements, Rents, Annuities, Profits, Hereditaments, Goods, Chattels, Money and Stocks of Money, have been heretofore given, limited, appointed and assigned, as well by the Queen's most excellent Majesty, and her most noble Progenitors, as by sundry other well disposed Persons: some for Relief of aged, impotent and poor People, some for Maintenance of sick and maimed Soldiers and Mariners, Schools of Learning, Free Schools, and Scholars in Universities, some for repair of Bridges, Ports, Havens, Causeways, Churches, Sea-Banks and Highways, some for Education and Preferment of Orphans, some for or towards Relief, Stock or Maintenance for Houses of Correction, some for marriages of Poor Maids, some for Supportation, Aid and Help of young Tradesmen, Handicraftsmen and Persons decayed, and others for any poor Inhabitants concerning payments of Fifteens, setting out of Soldiers and other Taxes; which lands, Tenements, Rents, Annuities, Profits, Hereditaments, Goods, Chattels, Money, and Stocks of Money, nevertheless, have not been employed according to the charitable intent of the givers and Founders thereof, by reason of Frauds, Breaches of Trust, and Negligence in those that should pay, deliver and employ the same: For Redress and Remedy whereof, Be it enacted by Authority of this present Parliament etc.