Re Lipinski and Gifts to Unincorporated Associations

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Well known and long standing difficulties have faced persons wishing to establish the validity of gifts and bequests to unincorporated associations. A recent decision in the English High Court suggests, among other things, a revival in the purpose trust approach as a means of resolving those difficulties. In this article, the writer critically examines the approach adopted by the court in that case.

I. INTRODUCTION

Few areas of equitable doctrine display swings and shifts as dramatic as the rules governing gifts to unincorporated associations. The recent decision in *Re Lipinski's Will Trusts, Gosschalk* v. *Levy*[1] reveals how extraordinarily difficult it is to accommodate the conflicting judicial pronouncements that have resulted. At the same time, however, it suggests an approach to bequests of this character which appears to resolve some of the most acute difficulties which have plagued this subject for decades. The object of this note is to assess the propriety of that approach and the extent to which *Re Lipinski* may herald the restoration of a degree of order so manifestly lacking over the past three decades.

II. RE LIPINSKI AND THE AVAILABLE APPROACHES

In *Re Lipinski* the testator bequeathed one half of his residuary estate on trust to the Hull Judeans (Maccabi) Association, a non-charitable[2] unincorporated association. The bequest was expressed to be "in memory of my wife" and the instruction given that it was to be "used solely in the work of constructing the new buildings for the association and/or improvements to the said buildings".[3] The testator's executors sought a declaration as to the validity of the bequest.[4]

It is symptomatic of the prevailing confusion in this area of the law that the learned judge before whom the case came[5] could have adopted any one of three different approaches to the issue before him, each supported by high

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1. [1976] 3 W.L.R. 522.
2. Counsel for the Attorney-General argued, faintly, that the bequest was charitable. The argument was rejected: [1976] 3 W.L.R. 522, 530-531.
3. Ibid., 524.
4. The case also raised the issue of the validity of a second bequest in favour of a charitable body. The case is not noted on this point, which was disposed of shortly by Oliver J. ibid., 536.
5. Oliver J.

authority. Even more significant is the consideration that, also on the basis of authority, five independent and for the most part conflicting constructions of the bequest were reasonably open. A brief description of these is helpful at the outset.

First, there was the approach of the Privy Council in *Leahy* v. *Attorney-General for New South Wales*[6] and the High Court of Australia in *Bacon* v. *Pianta*.[7] That involved a prima facie construction of the gift as being to the present individual members of the association, followed by an analysis of the terms of the gift, the nature of the society and the subject matter of the gift to ascertain whether that prima facie — and validating — construction should be departed from in favour of a construction of a trust for purposes or a trust for future as well as existing members. Either of the latter interpretations was in the opinion of the Privy Council decisive of the invalidity of the gift: a purpose trust construction presumably[8] because it offended the emerging human beneficiary doctrine,[9] a trust for future members construction because it offended the perpetuity rule.[10] Explicit in the decision of the Privy Council then was the proposition that if the gift cannot be construed as one to the existing members beneficially, it must fail. Implicit in it — and this not withstanding the seemingly generous attitude indicated by a prima facie validating construction — was an apparent hostility to gifts of the class before it. This latter assertion emerges clearly from two aspects of the decision. First, in laying down the considerations to be taken into account in determining whether the prima facie construction should be departed from in favour of one that led to the gift being declared invalid, the Privy Council seemingly seized upon those very factors most likely to lead to the presumption being rebutted in the generality of cases.[11] Secondly, a point related to the first, the Privy Council rejected as legitimate constructions a number[12] of interpretations adopted in earlier cases which — although they did not commence from a presumption of validity — nevertheless in their practical operation favoured gifts such as those in *Leahy* itself. In conclusion then the *Leahy* approach was calculated to severely curtail effective gifts of the class in question.

The second line of authority open to Oliver J. was that culminating in the

6. [1959] A.C. 457.
7. (1966) 114 C.L.R. 634.
8. While the Privy Council repeatedly stressed the invalidity of a trust for the purposes of an unincorporated association, the basis of its reason for so doing is not entirely clear. At one point the court seems to have seen the vice in purpose trusts as being an "imperfect" exercise of testamentary power: ibid., 484. It would seem clear however that what has come to be termed the beneficiary doctrine lies at the heart of the invalidity: see Keeler, "Devises and Bequests to Unincorporated Bodies" (1966) 2 Adelaide L.R. 336, 341.
9. For a discussion of which, post p. 7 *et seq.*
10. [1959] A.C. 457, 478.
11. See generally Keeler, op. cit., 343-348; Hogg, "Testamentary Dispositions to Unincorporated Associations" (1971) 8 M.U.L.R. 2-5. Viewed broadly, all of these factors direct attention to the actual intention of the donor and to the question "Did the donor intend to benefit the existing members beneficially?" The answer to that query must be "No" in an overwhelming majority of cases: post, p. 3.
12. See in particular its disapproval of the House of Lords decision in *Re Macaulay* [1943] Ch. 435 (reported as a note to *Re Price* [1943] Ch. 422), and discussed briefly post, p. 4 and p. 7.

High Court decisions in *Re Recher*[13] and *Neville Estates Ltd.* v. *Madden.*[14] These cases, in part, offered the same alternative constructions as those discussed in the context of *Re Leahy* — that is, a gift to the existing members beneficially, a gift to the existing and future members and a gift for purposes. They did, however, differ from the Privy Council in three important respects. First, they did not formally approach the inquiry from the standpoint of a presumption in favour of the first of these interpretations but rather directed the analysis at the general[15] intention of the donor. Secondly, they offered a fourth possible construction of a gift to an unincorporated association which had not been explicitly forwarded in *Leahy.* And thirdly, there is an apparent desire in both cases to uphold the gift and a display of sympathy at the predicament of a donor of such a gift that is markedly absent in *Leahy.*

A word or two of elaboration is necessary. As to the first of these factors, it might prima facie seem that to take as the judicial starting point the query "which of these alternative constructions best describes the intention of the donor" is to doom the gift to failure in a way that the *Leahy* approach did not. That is because the actual intention in virtually every case in this area is to further the continuing group enterprise,[16] and the constructions which most closely reflect that intention — a trust for future members, or a trust for purposes — both invalidate the gift. In fact, however, the *Neville Estates* and *Re Recher* approach did not have that consequence. Intention, while the basis of it, was viewed on a far broader level, and in *Re Recher* at least the inquiry into it implicitly takes the form of the question "Did the donor intend this gift to fail?" That interrogative inevitably provoked the response "No" and prompted the sympathetic solution "Then let us construe the gift in such a way as to validate it, even though we will in the process be giving it a construction that the donor did not intend".[17] No donor would complain at that approach. Most, presumably, would be pleased to see the validity of their gift upheld, even if only on the basis of a construction to the existing members beneficially.[18] To the few who might be reluctant to countenance even the remote possibility of severance that this interpretation involved, *Recher* and *Neville Estates* went further. As we shall see, the fourth, non-*Leahy,* construction that they offered virtually[19] assured the preservation of the fund for the use of the ongoing group enterprise. No donor would regard that as frustrating his general intention.

What then was this additional, validating, construction? Cross J. defined it in *Neville Estates* as one[20]

> to the existing members not as joint tenants [i.e. the 'prima facie'

13. *Re Recher's Will Trusts* [1972] Ch. 526.
14. [1962] Ch. 832. See generally Ford, *Unincorporated Non-Profit Associations* (Oxford, 1959) 21.
15. In the very loose sense described in the next paragraph.
16. See Ford, op. cit., 3; *Re Recher,* supra, 539-540.
17. Though simplified, this does seem a fair description of the reasoning in, e.g., *Re Recher,* supra: see the judgment of Brightman J. at 539.
18. In most cases the donor would seemingly be prepared to trust to the integrity of the existing members to obviate the possibility of members insisting upon rights of severance: see the observations of Christian L.J. in *Stewart* v. *Green* (1871) 5 Ir. R. Eq. 470. See too *Re Wilkinson's Trusts* (1887) 19 L.R. Ir. 531 and, generally, Ford, op. cit., 14-18.
19. See the legal consequences of this construction, post, p. 4.
20. [1962] Ch. 832, 849.

> construction of *Leahy*], but subject to their respective contractual rights and liabilities towards one another as members of the association.

It is in the taking of the property by the existing members "subject to their contractual rights and liabilities" that both provides the difference between this interpretation and that accepted as the sole valid construction in *Leahy*[21] and also ensures that this construction promotes the prevailing donative intention in gifts of this class. As to the latter proposition, we have seen[22] that the usual intention motivating gifts to unincorporated associations is to assist in the promotion of the society's purposes in an ongoing way, and not to provide a personal windfall to those who happen to be members of the society at any given point of time. The *Recher* and *Neville Estates* construction, while *vesting* the donated fund in the existing members, ensures its preservation for those general purposes. Referring to the significance of the existing members taking subject to their contract *inter se*, one writer commented:[23]

> [U]nder the rules developed independently in cases concerned with the administration of the property of associations, those members cannot deal with the property in the manner open to non-associated joint tenants or tenants in common. They hold the title subject to an obligation to permit the property to be used for the objects of the association in the manner prescribed by the constitution and by-laws of the association.

Nor does death or retirement of an existing member effect a severance of his interest in the property: either event brings his interest to an end and it passes to the other — and new — members by assignment. In the absence of the dissolution of the entire association, then, perpetual succession is assured.[24]

The combined effect of the availability of this fourth construction and the liberal approach to donative intention which permits its adoption indicates a markedly different judicial policy to gifts of the class in question to that manifest in *Leahy*.

The third line of authority that might have been followed in *Lipinski* was that adopted by the House of Lords in *Macaulay* v. *O'Donnell*.[25] In that case Lord Buckmaster included among the class of validating constructions an interpretation expressed in this way:[26]

> [A gift to a society in its own name will be valid][27] if the Society is

21. I.e. to the existing members individually as joint tenants or tenants in common.
22. Supra, p. 3.
23. Ford, op. cit., 21.
24. Ibid., 22. See too Hogg, op. cit., 3-4 and the description of the incidents of this form of ownership in *Re Recher*, supra, 538-39.
25. [1943] Ch. 435, supra fn. 12.
26. Ibid., 436.
27. The actual language is "Nor again is there a perpetuity". The attribution in the text is however justified, for at the time of this decision the perpetuity objection was the principal obstacle to the validity of the gifts in question and to overcome it virtually guaranteed the validity of the gift. For the present position, which is somewhat different, see post, p. 7.

> at liberty in accordance with the terms of the gift, to spend both capital and income as they think fit.

This ground of validity is quite clearly put forward as a separate and independent basis by Lord Buckmaster, and earlier cases, among them *Re Drummond,*[28] *Re Turkington*[29] and, arguably[30] the important case of *Re Clarke,*[31] had treated it as such. Two points should be briefly made in relation to it. First, it conflicts with *Leahy* — and was disapproved of by the Privy Council in that case[32] — in that it is available even if the gift cannot be construed as being to individuals. Secondly, it was articulated as a response to a perpetuity argument and does not in itself meet the purpose trust ground of invalidity which was to surface in the 1950s, and in this respect differs from a construction to the existing members as joint tenants (the only ground of validity accepted in *Leahy*) and to the existing members subject to their contract *inter se* (*Madden* and *Recher*).[33]

These then were the differing constructions offered by earlier authority. All — given the state of conflict in the cases — seemed reasonably open in *Lipinski.* Let us turn to the decision in that case now.

III. THE DECISION IN RE LIPINSKI

The judgment of Oliver J. can be summarised quite shortly. After holding the gift to be non-charitable, Oliver J. commenced his analysis by adopting the decision of Cross J. in *Neville Estates,* including, of course, that portion of the latter judgment which suggested the *inter se* construction. He then went on to hold that the first of the interpretations discussed in *Neville Estates* — to the existing members beneficially as joint tenants — was inapplicable to the facts before him due to the designation of a particular purpose in the terms of the bequest itself. His somewhat summary dismissal of this option is not surprising. While most of the pre-*Leahy* cases had suggested that this alternative was open[34] more recent authorities, including *Re Recher,* had tended to abandon it, principally no doubt for its seeming inconsistency with the thrust of the Privy Council decision.

28. [1914] 2 Ch. 90.
29. [1937] 4 All E.R. 501, discussed in *Lipinski* at 533.
30. The exact basis upon which *Re Clarke* [1901] 2 Ch. 110 was decided is unclear. In *Leahy,* at p. 480, it was said to be consistent with the rule that a gift is only effective if capable of construction as being to the existing members as joint tenants. The language of Byrne J., however, is clearly wider than that for he implied that an alternative ground of validity arose from a negative response to the query "will the legacy when paid be subject to any trust which will prevent the existing members from spending it as they please?": *Re Clarke* [1901] 2 Ch. 110, 114.
31. [1907] 2 Ch. 110.
32. [1959] A.C. 457, 483.
33. A fuller discussion of the purpose trust issue appears post. It is sufficient to note at this point that neither the *Leahy* nor the *Neville Estates* construction calls the rule into question. In both cases the existing members held both the legal and beneficial interest, although in the case of the *Neville Estates,* alternative of course that beneficial interest is circumscribed by the terms of the contract *inter se.*
34. See e.g. *Re Clarke,* supra ("to the committee for the time being of the Corps of Commissionaires in London to aid in the purchase of their barracks"); *Re Wilkinson's Trusts,* supra ("for the purposes solely of the [Convent of Mercy]").

Oliver J. then turned to the possibility of construing the gift as being to the individual members subject to their contract *inter se*. At the outset, he saw an obstacle to this interpretation in these terms:[35]

> [T]here appears to be a difficulty in arguing that the gift is to the members of the association subject to their contractual rights inter se when there is a specific direction or limitation sought to be imposed upon those contractual rights as to the manner in which the subject matter of the gift is to be dealt with.

Upon analysis, however, the learned judge did not find this obstacle insuperable, since in his view the designation could, if necessary, be ignored by the membership: if it could be ignored, it could provide no reason for not construing the gift in accordance with the *inter se* construction. He reasoned:[36]

> Where the donee association is itself the beneficiary of the prescribed purpose, there seems to me to be the strongest argument in common sense for saying that the gift should be construed *as an absolute one within the second category* — the more so where . . . the members can by appropriate action vest the resulting property in themselves . . .

With respect, the reasoning of Oliver J. is decidedly suspect on this point. To suggest that the gift is an "absolute one within the second category" is, first, a contradiction in terms which suggests an underlying confusion of concept. If the settlor intends an absolute gift he surely gives it to the members beneficially, not to the association, and certainly not to the association subject to the condition that it be used "solely" for a single designated purpose. An inherent feature of "the second category" is that the subject matter of the gift is not held "absolutely" but in such a way that prevents severance.

There is however a more significant objection. Central to the suggestion of Oliver J. that the designation can be ignored is his holding that the trust was intended to be of benefit only to the existing members — "central" because that assertion is the only basis upon which the gift can be treated as "absolutely" in favour of the existing members. In support of that holding, Oliver J. seems to provide two arguments. First, he suggests the existing members have the power to make the capital their own; and secondly, the settlor intended the existing members to be his beneficiaries. Both arguments, it is submitted, are unpersuasive. The first is in essence not an argument in support of the conclusion but a restatement of the conclusion itself, for it is quite clear that the existing members have the power to vest the capital in themselves only if they are indeed the sole beneficiaries of the trust. The second seems in defiance of the only definition of intention that can reasonably be attributed to the settlor.[37]

Both of these points are analysed in more detail in the following discussion on the "purpose-trust" aspect of the decision. For present purposes it seems sufficient to suggest that prima facie the bequest in issue seemed to be precluded

35. [1976] 3 W.L.R. 522, 532.
36. Ibid., 533. Emphasis added. The "second category" refers back to the *inter se* construction as discussed in the judgment of Cross J. in *Neville Estates,* supra.
37. See the discussion post, pp. 9-11.

from receiving the *inter se* construction by virtue of the designation that accompanied it. That designation indicated that the fund was not to be at the unfettered disposal of the existing members but was to be held by that membership on trust for the existing and future members of the society. If that is so, the case falls squarely within the class of gifts held by Brightman J. in *Re Recher* not to be susceptible of the *inter se* construction.[38]

Having dealt quite shortly with these first alternatives, Oliver J. turned to the third, the construction of the gift as one for purposes. Counsel for the next of kin had argued that the adoption of this alternative automatically rendered the gift void since on the basis of authority a purpose trust breached both the perpetuity and human beneficiary doctrines. Oliver J. disagreed. In his view it was possible to construe the gift as one for purposes yet still comply with both perpetuity and beneficiary principles. As to the perpetuity point, he relied upon *Macaulay* v. *O'Donnell,*[39] to which reference has already been made, and in particular to the opinion of Lord Buckmaster to the effect "there is [no] perpetuity if the society is at liberty in accordance with the terms of the gift to spend both capital and income as they think fit". It is far from certain that there is any real conflict with *Leahy* in the approach of Oliver J. on this point. It is of course true that the Privy Council explicitly disapproved of this passage from the opinion of Lord Buckmaster: but it did so for the reason that it implied that the society, and not the existing members of the society, was the appropriate point of reference. If the statement were accordingly amended to read "there is no perpetuity if the existing members are at liberty to spend the fund as they think fit" it would be consistent with *Leahy.* Since, as we shall see, Oliver J. did go on to hold the existing members of the society to be the beneficiaries of the gift, it is likely that the Privy Council — although it would in all probability have disagreed with Oliver J. on the propriety of that second step in his reasoning[40] — would have agreed with his reliance on *Macaulay* for the perpetuity proposition.

To resolve the perpetuity question in this way however highlights rather than resolves the purpose trust aspect of the construction in question. Let us now turn to that, the most novel and potentially far reaching aspect of *Lipinski.*

IV. MEMBERS OF THE SOCIETY AND THE HUMAN BENEFICIARY RULE

For many years prior to cases such as *Re Astor,*[41] *Re Endacott*[42] and *Leahy,* the rule against perpetuities provided the greatest obstacle to the validity of a trust for an unincorporated association. Those cases, however, particularly *Leahy,*[43] established beyond doubt not only that the purpose trust doctrine did apply to gifts to such donees but also that a gift for the promotion of the objects of an unincorporated society was prima facie invalid on account of it. These cases and others in which their strict approach was followed also suggested that many

38. [1972] Ch. 526, 536. Brightman J. held that the *inter se* construction was not available in cases where the settlor sought to impose a trust upon the existing membership.
39. Supra, fn. 25.
40. Discussed and doubted post, pp. 8-10.
41. [1952] Ch. 534.
42. [1960] Ch. 232.
43. [1959] A.C. 457, 478.

earlier authorities, decided on the perpetuity ground alone, might no longer be good authority.[44] The prevailing view became that if the only permissible construction was that of a trust for the purposes of the association, then the gift must fail unless the association was a charity. This was the view accepted even in the more liberal decisions in *Re Recher* and *Neville Estates* v. *Madden*.[45]

How then could Oliver J. suggest that the *Lipinski* gifts could survive a purpose trust construction? The answer lies in his adoption of the judgment of Goff J. in *Re Denley*[46] and his incorporation of its holding into the unincorporated associations field. In *Denley* Goff J. had held that invalidity through failure to comply with the human beneficiary rule arose only where the purposes were "abstract and impersonal", for only in those cases would no individual have *locus standi* to apply to the court for the enforcement of the trust.[47] Where, on the other hand, the trust[48]

> 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.

Expressing the opinion that this qualification of the beneficiary rule accorded with both authority[49] and common sense, Oliver J. went on to hold that any purpose trust created by the testator did comply with the doctrine since the existing members of the association, on account of the benefit derived from the purpose, would have *locus standi* to enforce the trust.[50]

It is not appropriate in this note to question the validity of *Re Denley*.[51] Accepting the decision to be correctly decided, however, several things must be said about its adoption into the unincorporated association context by Oliver J.

First and most significantly it is difficult to accept the learned judge's suggestion that the existing members of the association were "the beneficiaries" for the purpose of the rule. The trust undoubtedly was intended, as were virtually all the trusts in the reported cases, to contribute to the association as an ongoing entity. Accordingly, it cannot be accurate to describe the existing members as "the beneficiaries": they are *some* of the beneficiaries.

If this qualification is correctly inserted, it is of paramount significance in determining the propriety of the approach of Oliver J. Its inclusion of course invites the question, who are the other beneficiaries? And if the answer to that is, as it must be, "presently unascertained persons who will subsequently join the

44. *Re Macaulay*, supra, and *Re Price*, supra, for example did not address themselves to the beneficiary rule and are dubious authority for that reason. See the observations of Oliver J. in *Lipinski*, supra, 532.
45. See *Neville Estates* v. *Madden* [1962] Ch. 832, 849; *Re Recher* [1972] Ch. 526, 535.
46. [1969] 1 Ch. 373.
47. Ibid., 382.
48. Ibid., 383-384.
49. This may be doubtful. Unless the employees in *Denley* were held to have licences to use the sports-field (akin to contractual licensees) it is difficult to see how they possessed sufficient *locus standi* to enforce the trust: see a paper by the present writer, McKay, "Trusts for Purposes — Another View" (1973) 37 Conv. (N.S.) 420. See too Nathan and Marshall, *Cases and Commentary on the Law of Trusts* (6th ed. London, 1975), 107-108.
50. [1976] 3 W.L.R. 522, 535.
51. But see the reservation, ante, fn. 49.

association and benefit from the fund", it is conceptually impossible to regard the existing members at the time of the gift as fulfilling the human beneficiary rule.

To elaborate. Notwithstanding his construction of the bequest as one for the carrying out of the purposes of the association, Oliver J. did not question that legal title to the bequest was held by the existing members.[52] If the assertions in the preceding paragraphs are well founded, the existing members hold their interests in trust, either for the purposes of the society or for the existing and future members of the society. As trustees, their control is of course the direct and principal concern of the human beneficiary rule,[53] and in order to determine whether that rule is satisfied the task becomes one of ascertaining persons with interests in the trust fund whose *locus standi* to protect those interests will give some guarantee that the trust will be respected. By definition, the future members of the association cannot fulfil that role; by authority neither the settlor[54] nor his next of kin, nor his residuary legatee[55] is in any better position. Who remains? Only the trustees themselves, the existing members, who on the basis of both *Astor*[56] and common sense cannot be relied upon to enforce the trust against themselves. The irresistible conclusion then, is that on the assumption of a trust for existing and future members, the *Lipinski* bequest necessarily breached the human beneficiary rule.

Several aspects of this argument will inevitably be questioned. First, it might be argued that the assertion that future, as yet unascertained, members were "beneficiaries" of the gift is unfounded. Oliver J. clearly would treat it as such, for he consistently — and necessarily, given his conclusion — treated the existing members and those alone as the beneficiaries. With respect, however, that cannot be so, for a number of reasons. First, it would be absurd to infer an intention to the donor to benefit only those persons. The donor imposed no obligation on his trustees to spend the gift at once, or within a year, or within any time period at all. Rather, he clearly contemplated that its utilisation would await a final decision of the executive of the association as to the form of the new premises, a question that had been before the Board for four years prior to his death.[57] He must inevitably have contemplated that the decision as to the destination of his bequest might be years in the future. It cannot be said in these circumstances that he intended to benefit the existing members at the time of his death and those alone. To suggest otherwise would involve the proposition that members admitted after his death were to be excluded from using premises provided with his fund, or that they would be admitted only at the pleasure of the original members. Such a suggestion is so contrary to the spirit of his bequest as to be untenable. Far more consistent with it is the more obvious inference that the donor intended to benefit both existing and future members.

Next, it might be suggested that the argument put forward ignores the

52. Indeed, it could not be held elsewhere. Significantly for the purposes of the analysis that follows, he at one point, p. 533, refers to the existing members holding legal title as "trustees".
53. See *Morice* v. *Bishop of Durham* (1804) 9 Ves. 399, per Grant M.R. at 404-405; see too Lord Eldon at (1805) 10 Ves. 522, 539. See too McKay, op. cit., 432-434.
54. *Re Astor,* [1952] Ch. 534, 542.
55. See Nathan and Marshall, op. cit., 107-108.
56. Supra.
57. [1976] 3 W.L.R. 522, 534.

possibility that the existing members in their capacity as beneficiaries might enforce the trust against each other. For example: A, B, C and D are both trustees and beneficiaries of the Z Trust. If A misapplies, or refuses to perform, B, C and D would presumably have standing to enforce the trust against him for the protection of their beneficial interests. Why should not the same principle apply in the context of an unincorporated association and accordingly permit the rule to be fulfilled by the existing members?

The weakness in this hypothetical counter-argument is illustrated if the example is amended to more closely equate with the actual *Lipinski* situation. A, B, C and D are trustees and beneficiaries. But there are other beneficiaries, who are not trustees. They are the potential future members, jointly termed E. If A misapplies, as in the previous example, it is probable that E's interests will be protected by an application to enforce the trust brought by B, C or D. But what if A, B, C and D all refuse to carry out the purpose trust, or all misapply the trust funds? The purpose cannot sue. E, with an interest in its performance, is unascertained. There is no one with standing to prevent the breach of trust, and the human beneficiary rule is not complied with. None of this is to say that the existing members do not have equitable interests in the trust fund as well as legal. It is, rather, to assert that they do not have the *entire* equitable interest and that the policy of the beneficiary principle would seem to require that the outstanding equitable interest — that referable to future members — be protected.

It might be argued that this conclusion is inconsistent with *Denley*[58] in that the existing employees in that case were, by implication, held to have standing to enforce the trust, notwithstanding that the purpose was clearly intended to benefit future employees as well. There is however no inconsistency. In *Denley* the trust property was held not by the existing members but by independent trustees. The trustees would therefore be readily controlled by the members for the time being and the entire beneficial interest of all members, existing and future, thereby secured. It is the dual status of the existing members in the unincorporated association context that renders that approach impossible in cases such as *Lipinski.*

By way of conclusion to this analysis of the purpose trust section of *Lipinski,* two further aspects of the decision are worthy of note. The first relates to "an additional factor" of "some significance"[59] relied upon by Oliver J. in support of his decision vis-à-vis the human beneficiary rule. As well as the existing members being able to fulfil the beneficiary requirement, he suggested, they could in any event "by appropriate action vest the . . . property [of the gift] in themselves". The significance of this suggestion is apparently to reinforce the notion that the beneficial entitlement to the fund rests in the existing membership and to support the case in favour of their standing to enforce the purpose trust by logical inference from their ability to divide the fund up among themselves in any event. This argument however seems to evidence the same flaw as that earlier noted. On first principles, funds impressed with a trust are not the beneficial property of the trustee. If the trust proceeds as intended, they become the property of the beneficiaries; if the trust fails, they either return to the settlor

58. Supra.
59. [1976] 3 W.L.R. 522, 535.

on resulting trust or, in occasional and infrequent cases, to the Crown as *bona vacantia.* In no event are they the beneficial property of the trustee. Accordingly, if the funds held by the existing members of an unincorporated association are indeed trust funds and those members do not possess the entire beneficial interest, it is not within their power to assert full beneficial ownership of the funds. And, as in the analysis in the preceding paragraphs, it cannot be doubted that in the context of a trust for purposes, that is precisely how the funds directed to that purpose must conceptually be held.

These points become clearer upon an analysis of *Re Bowles,*[60] which Oliver J. regarded as authority for the capacity of the existing members to terminate the trust for their own benefit. In that case the testator bequeathed £5,000 "to expend the same in planting trees for shelter on the W estate". The plaintiff, the life tenant of the estate, argued for the payment of the fund to him and to his eldest son, the remainderman. North J. summarised his argument in this way:[61]

> [T]here is nothing illegal in the gift itself; but the owners of the estate now say: 'It is a very disadvantageous way of spending this money; the money is to be spent for our benefit, and that of no one else; it was not intended for any purpose other than our benefit and that of the estate. There is no reason why it should be thrown away by doing what is not for our benefit, instead of being given to us, who want to have the enjoyment of it'.

North J. upheld this contention, and ordered payment of the fund to the life tenant and remainderman, thus overriding the purpose specified by the testator. Oliver J. said of the decision "I can see no reason why the same reasoning should not apply in the present case simply because the beneficiary is an unincorporated society".[62] With respect, that is to overlook a distinction of central significance between the bequest in *Bowles* and that in *Lipinski.* North J., as the above passage suggests, was able to uphold the contention of the plaintiff for the reason that the life tenant and the remainderman held the entitre beneficial interest in the advantaged property. Had there been additional beneficiaries who did not or could not consent to the course proposed, the order would not have been made and the purpose would have been enforced. *Lipinski* accordingly differs from *Bowles* on one of the most significant underpinnings of the latter decision. It is more akin to a case where a life tenant seeks the overriding of the purpose but the remainderman either does not or cannot. North J. would clearly have refused the order sought in such a case.[63]

The final aspect of the decision worthy of comment also relates to Oliver J.'s holding that the existing members were "the beneficiaries". Apparently by way of further support for that conclusion, he noted on several occasions that the existing members were free to spend the capital and income as they thought fit.[64]

60. [1896] 1 Ch. 507.
61. Ibid., 510.
62. [1976] 3 W.L.R. 522, 535.
63. See his comparison of the case before him with what was termed a "public trust" to plant trees in a park.
64. [1976] 3 W.L.R. 522, 536-537.

His suggestion seems to be that since the society could spend the entire fund immediately, then it is legitimate to assume that the beneficiaries of the purpose it is intended to promote are the existing members of the fund. Such a conclusion cannot, however, be supported. The sole significance of the power to expend the income and capital at once — apart from its perpetuity effect — is that the existing members may derive a benefit from the bequest which they would not receive if its utilisation was postponed. This is a far cry from saying that they are the *only* beneficiaries of the purpose, any more than it would be possible to say that if the club house was built in, say, ten years, the members as at that point would be the sole beneficiaries of the purpose. The time at which the society elects to utilise its power over the fund, in other words, seems irrelevant to the determination as a legal matter of its beneficiaries. The relevant considerations to that decision are no more than these: the society is given the power, exercisable immediately if it chooses, to promote a particular purpose; when carried out, that purpose will be of ongoing benefit to the members of the association. In such a case, it cannot be said that the existing members at any given point of time are "the beneficiaries"; the description only becomes accurate if the qualification "*some* of the beneficiaries" is added and once defined in that way the consequences previously noted must inevitably follow.

V. CONCLUSION

The principal argument presented in this note is that Oliver J. does not convince in his attempt to apply *Re Denley* to the unincorporated association context. If that argument is valid, *Lipinski* represents not the light at the end of the tunnel for unincorporated associations but a further darkening of the air within it. Might this writer add his voice to those who have pleaded for a legislative removal of the antiquated and antisocial obstacles which have created, and, through *Re Lipinski,* compounded such a quagmire of conflict and uncertainty?