

# *Trusts of crowdfunded litigation costs — purpose trusts or beneficiary trusts?*

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Published Version

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Wilde, D. (2024) Trusts of crowdfunded litigation costs — purpose trusts or beneficiary trusts? *Trusts & Trustees*, 30 (2). pp. 94-98. ISSN 1752-2110 doi:  
<https://doi.org/10.1093/tandt/ttad092> Available at  
<https://centaur.reading.ac.uk/114328/>

It is advisable to refer to the publisher's version if you intend to cite from the work. See [Guidance on citing](#).

To link to this article DOI: <http://dx.doi.org/10.1093/tandt/ttad092>

Publisher: Oxford Academic

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# Article

## Trusts of crowd-funded litigation costs—purpose trusts or beneficiary trusts?

David Wilde\*

### Abstract

This article examines the relatively new phenomenon of ‘crowdfunding’ litigation costs. It suggests that funds raised must sometimes be held on trust and attempts to elucidate the nature of the trust.

### Introduction

Over recent years, it appears that a new type of trust has emerged, which will be of interest to lawyers for more than one reason. Money raised from crowdfunding to cover litigation costs seems—at least sometimes—to be held on trust. The focus here will be the technical nature of any trust involved: arising at the contested borderline between trusts for purposes and trusts for beneficiaries.

### The CrowdJustice model

Our starting point should be the CrowdJustice website, setting the most common model for this type of fundraising<sup>1</sup>:

As the only bespoke crowdfunding site established specifically for litigation, CrowdJustice has proven by far

the most popular site for litigation crowdfunding in the UK since its inception in 2014.

Basically, a litigant sets up a page on the website to solicit donations towards their litigation costs, in the hope of public sympathy towards their cause (and, of course, with the web platform deducting fees). The site’s ‘Terms of Use’ apply.<sup>2</sup> The fundraiser agrees to ‘use all Funds raised in a Successful Campaign to pay directly and solely for fees and/or costs associated with the Case as described on the Case Page’. Donations are processed by a collection agent and typically paid directly to the litigant’s solicitor:

Funds raised in a Successful Campaign will be transferred to the Case Owner’s solicitor or legal representative, save for where the Case Owner is an organisation, charity or NGO, or where the Case (as determined by CrowdJustice in its sole discretion) is a general legal project that does not require or involve legal representation, in which circumstances funds will be transferred to the Case Owner directly (in each case, the ‘Recipient’).

There is an obligation to ‘inform CrowdJustice of and return any Unused Funds . . . to the site in accordance with these CrowdJustice Terms’.<sup>3</sup> There is a long section

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1. Sam Guy, ‘Mobilising the Market: an empirical analysis of crowdfunding for judicial review litigation’ (2023) 86 MLR 331, 332–33.

2. <https://www.crowdjustice.com/terms-and-conditions/> (accessed as version ‘last updated 4 July 2023’).

3. Although the word ‘return’ is used here, note that the money is not really being ‘returned’ to CrowdJustice, because CrowdJustice has not at any prior point held title to the money: donations via its website were processed by a collection agent and transferred directly to the litigant’s solicitor.

on ‘Unused Funds’, which, in outline, ensures such funds are used for similar causes. Importantly, for present purposes, unused funds in the hands of a solicitor cannot be beneficially paid to the litigant or returned to the donors.<sup>4</sup>

### How the litigant’s solicitor receives the funds

As mentioned, the donations are typically paid directly into the hands of the fundraising litigant’s solicitor. Money that solicitors hold on behalf of clients in a client account is usually held on trust for the client as equitable beneficial owner.<sup>5</sup> But solicitors receiving money raised through CrowdJustice will have notice of the terms on which it was donated: that it is to be used solely to pay the client’s litigation costs, and any surplus is to go to similar causes.<sup>6</sup> So, the trust on which the solicitor holds the money here cannot simply be for the client as an outright equitable beneficial owner. What sort of trust, therefore, is this?

To some, this will look suspiciously like a non-charitable purpose trust: a trust for the purpose of paying litigation costs.<sup>7</sup> The problem such a view poses, of course, is that non-charitable purpose trusts are generally said to be invalid<sup>8</sup> (subject to the exceptional ‘trusts of imperfect obligation’).<sup>9</sup> Nor is it possible to analyse

the situation instead as a ‘*Quistclose* trust’—as explained in later case law—which sometimes rescues what may *look like* a problematic non-charitable purpose trust, by identifying an underlying beneficiary trust for the party advancing the money involved.<sup>10</sup> The terms on which CrowdJustice donations are contributed make clear that the donors cannot receive their money back under any circumstances, so it appears not to be an option to say that the solicitor ultimately holds the money on an underlying beneficiary trust for the donors (or, perhaps more elegantly, the solicitor holds on trust for their client, who then holds on a sub-trust for the donors).

It is submitted this is *not* a non-charitable purpose trust, and there is *no* problem of invalidity here. Instead, it is suggested that this trust is merely a new example falling within a well-established category of trust. That is, beneficiary trusts where a particular purpose is assigned by the trust terms as the exclusive means of benefiting the beneficiary. Here the beneficiary is the litigant and the assigned exclusive method of benefiting them is payment of their litigation costs. That is, a payment for the beneficiary to receive future services or to receive the discharge of an existing liability. This deviates from the *usual* form of beneficiary trust, where a trust serves to *confer equitable beneficial ownership* of the

4. There is, however, this statement of a temporary technical trust in favour of donors once unused funds have been paid to CrowdJustice, to cover the possibility of its insolvency: ‘Any Unused Funds held from time to time by CrowdJustice shall be held net of fees on trust for the Backers. If CrowdJustice is subject to any winding-up, liquidation, receivership, administration or analogous insolvency event whether provisionally or finally and whether compulsorily or voluntarily (“Insolvency Event”), the Backers as beneficial owners of the Unused Funds and by entering into these CrowdJustice Terms instruct CrowdJustice to transfer any Unused Funds to The Access to Justice Foundation. Backers agree that we shall assume no duties of trusteeship other than the duty to retain and apply any such Unused Funds in accordance with these CrowdJustice Terms. At no point shall CrowdJustice have any rights of ownership or entitlement in respect of any Unused Funds.’

5. *Brown v IRC* [1965] AC 244 (HL;S). For the nature of these trusts, see JE Penner, *The Law of Trusts* (12th edn, OUP 2022), paras 11.7–11.34. (See further the Solicitors Regulation Authority *SRA Accounts Rules*—<https://www.sra.org.uk/solicitors/standards-regulations/accounts-rules/>.)

6. The author was unable to obtain from CrowdJustice a copy of any standard form of communication sent to solicitors, to see whether it might purport to add anything beyond the publicly available CrowdJustice ‘Terms of Use’. What is written here, therefore, *assumes* that nothing is added to those terms.

7. *Incorporated Council of Law Reporting for England and Wales v A-G* [1972] Ch 73 (CA) shows that charitable trusts can exist for the purpose of advancing the administration of the law (within the ‘other purposes’ provision of Charities Act 2011, s 3(1)(m)). And this can seemingly include the paying of court costs: *Re Vallance* (1876) *Seton’s Judgments*, 7th edn, vol 2, 1304 (a trust to promote prosecutions for cruelty to animals upheld by Hall V-C). But a trust for the payment of a specific litigant’s costs seems—at least in an ordinary case—to be of private benefit in a way that is inconsistent with the ‘public benefit’ requirement for a charitable trust under Charities Act 2011, s 2. *Latimer v Commissioner of Inland Revenue* [2004] UKPC 13, [2004] 1 WLR 1466, esp [32]–[36], explained that under the public benefit test, any private benefits conferred on individuals must be just an *incidental consequence* of benefiting the public, rather than, instead, a *purpose*.

8. *Re Endacott* [1960] Ch 232 (CA). (A rule recently restated by the Supreme Court: *Nuffield Health v Merton London Borough Council* [2023] UKSC 18, [2023] 3 WLR 13, [48].)

9. For these, see David Wilde, ‘Trusts of Imperfect Obligation’ (2022) 28 *Trusts & Trustees* 298. Some add that there is another major exception, where non-charitable purpose trusts can be valid, established by *Re Denley’s Trust Deed* [1969] 1 Ch 373 (Ch). But this seems not to be the best view of the law: see David Wilde, ‘*Re Denley*: Re-evaluating its Significance for Non-Charitable Purpose Trusts’ (2023) 139 *LQR* 243.

10. In *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL), a loan, to be used by the borrower only in paying debts owed to their creditors, was found to be held by the borrower on trust: first to pay the creditors; and second, if that did not happen, to repay the lender. It was subsequently suggested by some that the first trust, for payment of the creditors, was a purpose trust. But the *Quistclose* trust has now been explained differently, as only one single beneficiary trust, in *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164. The borrower held the money on trust for the lender from the outset; the borrower had only a power to pay the creditors; otherwise, the money had to be returned to the beneficiary lender. And if the borrower had a duty to exercise the power, and pay the creditors, this came from a separate contract or mandate between lender and borrower—it was not part of the trust arrangement.

trust assets on the beneficiary<sup>11</sup>—rather than merely conferring a right to have that property expended by the trustee in some manner that benefits the beneficiary. Some suggest that the *usual* form of beneficiary trust is the *only* possible form of beneficiary trust: that a beneficiary trust *definitionally means* one that confers equitable beneficial ownership of the trust assets on the beneficiary. But, to the contrary, the present writer has recently examined the issues and authorities involved at length elsewhere, concluding that there can indeed be *beneficiary trusts* where, rather than conferring equitable beneficial ownership on the beneficiary, another exclusive means of benefiting them is instead validly assigned as a purpose within the trust. A conclusion is summarized in this way<sup>12</sup>:

Where a trust has a beneficiary, but the settlor assigns a purpose to the trust, the trust should nevertheless be classified as a ‘beneficiary trust’ not a ‘purpose trust’. The classification ‘beneficiary trust’ should be applied to *every trust that has a beneficiary*. But it is important to be clear that a person can be a ‘beneficiary’ even if the terms of the trust do not confer a beneficial proprietary interest on them. In other words, not every beneficiary trust involves giving property to the beneficiary. All that is required to qualify a person as a ‘beneficiary’ is that the settlor designed the trust (primarily) to benefit them, through the trustees applying the trust property in some way beneficial to them: which is not limited to conferring ownership on them, but can include instead, for example, providing a licence, purchasing services, discharging a liability. The law then affords such a person the familiar rights we recognise beneficiaries to have: to be informed of the trust, to obtain an account, to enforce the trust, to sue for its breach, etc . . . The classification ‘purpose trust’ should only be used for *trusts without a beneficiary*: trusts for the carrying out of a

specified purpose or purposes, not serving any specific, identifiable beneficiary or beneficiaries, although carrying out the purposes may benefit some people in general. This understanding of ‘beneficiary trusts’ and ‘purpose trusts’ should be adopted because it follows logically from the key reason we must distinguish between them: the rule that a non-charitable purpose trust is invalid *because it has no beneficiary to enforce it*. This rule presupposes that by ‘purpose trust’ the law means one without a beneficiary. Accordingly, it is unhelpful and confusing ever to label a trust with a beneficiary a ‘purpose trust’, even if the settlor stipulates a purpose for the trust. This approach to classification is also consistent the rules governing charitable trusts.

Specifically, our trust of crowdfunded litigation costs would be within a class of trust, identified in the analysis there, which provides its beneficiary is to be benefited by expenditure on the stipulated purpose—meeting litigation costs—of only the *part* of the trust fund that proves to be required for the purpose; with the beneficiary having no further right to the trust fund. The leading authority showing this to be a valid type of beneficiary trust is *Re Sanderson’s Trust*.<sup>13</sup> A testator left property on trust, during the life of his mentally disabled brother, to apply the whole or any part of the income for his maintenance, attendance, and comfort. At the disabled brother’s death, it was held there was a resulting trust of the lifetime income not used for his maintenance, for the testator’s estate; it did not belong to the disabled brother’s estate. The disabled brother had a right only to expenditure on suitable maintenance; not to all the income. Page Wood V-C said<sup>14</sup>:

I do not think [the trust] confers on him an absolute right to have the whole income applied, except in the

11. That is, basically, a right to receive a distribution of income or capital from the trust; although this right might be discretionary, postponed, contingent, or defeasible; and the beneficiary might often enjoy their interest by using the trust assets in specie rather than taking receipts—for example, occupying land rather than receiving rents from it.

12. David Wilde, ‘Trusts and Purposes—Settlers Assigning Purposes to Beneficiary Trusts’ (2023) 36 TLI 141, 165–66. (As explained there (159) there is a *sense* in which a beneficiary can always be called ‘equitable owner’ of trust assets: that is, they have the right to exclude others in general from the benefit of the trust assets. But here we are focusing on the beneficiary’s *beneficial* entitlement—what benefit they are to receive from the trust assets by the terms of the trust—which, as stated, need not always be ‘ownership’.)

13. (1857) 3 K&J 497, 69 ER 1206.

14. (1857) 3 K&J 497, 69 ER 1206, 507–8.

event of a case being made, that the whole was wanted for the specific purposes directed by the will. It is not the whole income that is given. It is ‘the whole or any part’; . . . I do not think, therefore, that the present case is within the class of cases where an entire fund is given, and a purpose is assigned as the motive of the gift . . .

But, of course, in our situation, the prima facie resulting trust for the donors of any surplus crowdfunded money, after litigation costs are met, would be ousted by the terms on which donations were made, stipulating that any surplus was to be used for similar causes.

### **Non-availability of the *Saunders v Vautier* power**

As explained, the litigant-beneficiary of our trust for payment of their legal costs is not the equitable beneficial owner of any of the trust assets: their only beneficial right is that the trustee spends the money for their benefit on covering those costs. But there is, of course, a rule that trust beneficiaries can sometimes use to *obtain* outright ownership of trust assets. The rule in *Saunders v Vautier*<sup>15</sup> (basically) empowers beneficiaries of full capacity, who are wholly entitled to the benefit of trust assets, to collapse the trust and take its property in disregard of the trust’s terms.

The trust we have posited is a trust to pay the litigant-beneficiary’s legal costs; but with any surplus going to similar causes. The litigant-beneficiary is therefore, under the terms of the trusts, not solely entitled to the benefit of the entire trust fund, and so cannot exercise the *Saunders v Vautier* power over the whole of it—at least not alone, without the cooperation of those potentially entitled to the surplus, who will often not yet be ascertained. But, in trusts where the beneficiary’s sole entitlement is to expenditure the *part* of a trust fund required to benefit them in a particular way, a beneficiary can usually exercise the *Saunders v Vautier* power

to demand any part of the trust fund demonstrably required for that purpose. For example, in *Stokes v Cheek*,<sup>16</sup> the settlor’s will directed trustees to use money to buy annuities for beneficiaries—specifically adding that the beneficiaries were not to be allowed to take out the money instead of receiving the annuities. Sir John Romilly MR, nevertheless, held that the beneficiaries could collapse the trust and take out the money, rather than accept the purchase of annuities stipulated under the terms of the trust<sup>17</sup>: ‘The annuitants are entitled to such a sum as would be required to purchase their annuities’. So, on first impression, our litigant-beneficiary might appear able to exercise the *Saunders v Vautier* power over any part of the fund demonstrably needed for their litigation costs—if they felt there was any benefit to be derived from exercising the power—or to join with those potentially entitled to the surplus to demand the whole fund.

But the better view is there would be no scope at all for exercising the *Saunders v Vautier* power. *Stokes v Cheek* (above) is generally cited as authority that a settlor cannot—at least unilaterally—exclude the rule in *Saunders v Vautier*.<sup>18</sup> But as *Lewin on Trusts* suggests<sup>19</sup>: ‘[I]t seems that the beneficiaries, or a beneficiary, may effectively contract not to exercise the right to call for the trust property.’ In our scenario, the fundraising litigant when soliciting donations will, under the CrowdJustice terms, have undertaken that funds raised would be used solely to cover their litigation costs (with express provision for any surplus), and donors will have contributed on that basis. This seems sufficient to constitute a contract between the litigant-beneficiary and the settlor-donors (as well as between the litigant-beneficiary and CrowdJustice itself), whereby the litigant-beneficiary has effectively promised not to collapse the trust and demand funds from the solicitor-trustee. Presumably, a court would not facilitate the litigant-beneficiary breaching their contractual undertakings, by upholding an exercise of the *Saunders v*

15. (1841) 4 Beav 115, 49 ER 282.

16. (1860) 28 Beav 620, 54 ER 504.

17. (1860) 28 Beav 620, 54 ER 504, 621.

18. cf Joseph Jaconelli, ‘Premature Trust Termination’ [2020] Conv 29, 39–42.

19. Lynton Tucker, Nicholas le Poidevin, and James Brightwell (eds), *Lewin on Trusts* (20th edn, Sweet & Maxwell 2020), para 22.016 (note omitted).

*Vautier* power by them. The better view of the law is that the *Saunders v Vautier* power is *not*—as often suggested—the exercise of proprietary right; and the court always has a discretion to refuse a *Saunders v Vautier* application for good reason.<sup>20</sup>

So, it seems that the *Saunders v Vautier* power would simply not be available to our litigant-beneficiary—regardless of any other defences the solicitor-trustee might rely on to withhold demanded trust funds already due for payment to the solicitor-trustee.

### Receipt of CrowdJustice funds by others

Sometimes funds donated to a litigant through the CrowdJustice website are not paid directly to their solicitor but to another party instead.<sup>21</sup> But it seems that—in the absence of any other arrangements being effectually specified—such funds would be held on a trust materially the same as that identified above where funds are paid to a solicitor.

### Use of other crowdfunding sites such as GoFundMe

Alternatively, a litigant may seek to crowdfund money to cover their litigation costs, with the money instead to be received directly into their own hands, using other websites, of which the best known is GoFundMe.<sup>22</sup> A person cannot be both sole trustee and sole beneficiary of a trust,<sup>23</sup> so whatever civil redress or criminal sanctions there may be for a failure by such a fundraiser to

apply the money as represented, exclusively for litigation costs, this situation cannot involve a trust.

However, in some circumstances, a trust may arise from arrangements made through such websites on normal principles: involving a beneficiary trust to cover litigation costs similar to that identified above. For example, a fundraiser can use such sites to solicit and receive funds, *for the benefit of another party, to cover that other party's litigation costs*. Or a litigant may fundraise through the site to cover their own litigation costs, *but nominate another party to receive the funds*. Or a litigant may fundraise through the site to cover their own litigation costs *but undertake to donors that any surplus will, for example, be given to a named charity, so that the fundraiser is no longer the sole possible beneficiary of donations*.

### Conclusion

The new phenomenon of crowdfunding litigation costs has helped to exemplify once again that valid and perfectly functional beneficiary trusts can be created where the beneficiary—instead of being made the equitable beneficial owner of the trust assets—is only entitled to the benefit of expenditure (or other use of the trust assets) by the trustee on some purpose benefiting the beneficiary: here the payment of their litigation costs—a payment for the beneficiary to receive services or for the discharge of an existing liability. In other words, we witness again that not all beneficiary trusts involve giving the trust property *to* the beneficiary.

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20. David Wilde, 'The Nature of *Saunders v Vautier* Applications: Does the Court have a Discretion to Refuse?' (2023) 37 TLI 67.

21. For example, <https://www.crowdjustice.com/case/almut-gadow-academic-freedom/> (accessed 29 October 2023)—'[F]unds raised will be transferred to the Free Speech Union which will hold the money in trust for the payment of fees as they arise. Any unused funds will be returned to CrowdJustice in accordance with its terms'.

22. CrowdJustice does allow direct receipt in some situations: as quoted more fully above, for 'an organisation, charity or NGO'.

23. *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL), 706.