Why is there no doctrine of frustration in the law of trusts?

Article

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Introduction

Lord Millett, delivering one of the leading judgments in the House of Lords, said in *Twinsectra Ltd v Yardley*:[1]

> 'A trust does not fail merely because the settlor's purpose in creating it has been frustrated: the trust must become illegal or impossible to perform. The settlor's motives must not be confused with the purpose of the trust; the frustration of the former does not by itself cause the failure of the latter.'

This seems to be a generally accepted statement of the law.[2] Assuming it to be correct, the question then arises, 'Why is there no doctrine of frustration in the law of trusts as there is in the law of contract?' This short article will seek to explore the issue. Such a question doubtless sounds doomed to be merely an exercise in idle academic curiosity. And perhaps it is. But the hesitant and speculative suggestion here is that there *is* possible scope for recognising a doctrine of frustration in the law of trusts.

Meaning of 'frustration'

Lord Simon gave a widely cited description of the meaning of 'frustration' within the law of contract, in the leading case of *National Carriers Ltd v Panalpina (Northern) Ltd*:[3]

> 'Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.'

Various bases have been suggested for the doctrine of frustration (reviewed in the case itself). But absence of consent – *non haec in foedera veni* 'it was not this that I promised to do' – appears the most convincing.[4]

Both agreeing a contract and settling a trust involve a transaction that is entered into *by choice*. Each is based on *consent*. Is the law being consistent then – treating like cases alike – if it says that, for one transaction (a contract) consent runs out at a certain point, but for the other transaction (a trust) it does not run out at an equivalent point?

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[1] [2002] UKHL 12, [2002] 2 AC 164, [98].
[2] For example, the passage is quoted with approval by JE Penner, *The Law of Trusts* (12th edn, OUP 2022), para 11.61.
[3] [1981] AC 675 (HL), 700.
[4] See for example, Mindy Chen-Wishart, *Contract Law* (7th edn, OUP 2022), ch 7.

Illegality, impossibility, and frustration of purpose

Much of the doctrine of frustration, as found in the contract textbooks, does have an equivalent in the law of trusts – just not under the name 'frustration'. Much case law about the frustration of contracts concerns contracts that became illegal or impossible to perform; while in the case of trusts that become illegal or impossible, we would talk about a consequent resulting trust (or possible cy-près application in the case of a charitable trust). However, in contract law, a contract can also be frustrated, as Lord Simon's description above encompasses, where the parties' fundamental underlying purpose behind the contract has been thwarted – even though the contract remains lawful and could still be performed in a literal sense.[5] The question being posed here, therefore, is really limited to why this *part* of the doctrine of contractual frustration – sometimes called 'frustration of purpose'[6] – does not appear to have an equivalent in the law of trusts.

Potential application of frustration of purpose in the context of trusts

Could the contractual doctrine of frustration of purpose be transposed into the law of trusts? The first question might be whether there are any doctrinal or technical objections.

The (partial) similarity between trusts and contracts – but also between trusts and gifts

Trusts can be thought of as *sometimes and in some respects* analogous to contracts. Langbein famously sought to highlight the contractual quality of (express private) trusts:[7] '[T]he deal between settlor and trustee is functionally indistinguishable from the modern third-party-beneficiary contract. Trusts are contracts.' Although he recognised that this analysis could not cover a self-declaration of trust, where the settlor acts as trustee.[8] And, despite highlighting this contractual quality, he nevertheless acknowledged that trusts are fundamentally gifts:[9]

> 'Trusts are gifts. Most gifts are so simple that the donor has no reason to use a trust. The donor just delivers the asset, conveys realty, registers securities in the donee's name, or executes a deed of gift.
> The simple gift is a two-party transfer, from transferor (donor) to transferee (donee). The ordinary trust, by contrast, entails a three-party relationship, in which the donor (settlor) arranges with the trustee to divide the donee's interest between trustee and beneficiary. In the time-honored formulation, the trustee takes legal title to the property for the benefit of the beneficiary. "[T]he normal private trust is essentially a gift, projected on the plane of time and so subjected to a management regime."[10]
> Inserting a trustee between the beneficiary and the donative interest is manifestly clumsy and costly. The donor who structures a gift in this way expects compensating advantages. The advantages and the uses of the trust have undergone fundamental

[5] The classic contractual example is *Krell v Henry* [1903] 2 KB 740 (CA). The plaintiff licensed the use of a flat to the defendant for two set days, and a deposit was paid. The understanding of both parties (although not expressed in the written contact) was that the flat was hired for the purpose of viewing a coronation procession. The procession was cancelled. It was held the plaintiff could not recover the balance of the hire fee because the contract was frustrated.

[6] Edwin Peel (ed), Treitel's *Frustration and Force Majeure* (4th edn, Sweet & Maxwell, 2021), ch 7.

[7] John H Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 Yale LJ 625, quote from 627.

[8] Langbein above n 7, esp 672-75. Testamentary trusts could also be seen as problematic for the analysis: Graham Virgo, *The Principles of Equity and Trusts* (5th edn, OUP 2023) sect 3.2. But Langbein above n 7, 636-37, does not agree.

[9] Langbein above n 7, 632 (notes omitted).

[10] Quoting Bernard Rudden (1981) 44 MLR 610, 610 (book review).

> change from the origins of the trust as a conveyancing device in the fourteenth and fifteenth centuries to its modern role as an institution for managing financial assets.'

Accordingly, if the notion of frustration of purpose were to be copied across from contracts to trusts, it would not be the purpose of both parties – settlor and trustee – that would be in issue as it is in contract law, but only the purpose of one party – the settlor. As Langbein put it:[11]

> 'Although the trust deal originates in a contract between settlor and trustee … [t]he trustee is normally indifferent to the distributive provisions … Fundamental terms that define the purposes of the trust, such as the choice of beneficiaries and the allocation of shares, have no effect on the interests of the trustee. Accordingly, only the settlor's intention governs.'

In deciding any point of trusts law, there is a tension as to which of these two dimensions, gift or contract – or indeed any other facets of the institution of the trust – should be given precedence.[12] We would not consider the frustration of a gift: it is a completed transaction. (Although there are circumstances where the law intervenes to re-open gifts, of course; for example – and most related to the issues discussed here – on the grounds of mistake, as distinct from misprediction).[13] But a trust, as an on-going, contract-adjacent relationship, could be subject to frustration.

Frustration of proprietary interests within trusts

That trust relationship will often have involved the creation of proprietary interests in beneficiaries, such as a life interest for A, remainder to B. Would it be legitimate to see these as 'frustrated'? In the *National Carriers v Panalpina* case, above, the House of Lords decided that, in rare cases, the doctrine of contractual frustration can be applied to a lease, even though, beyond being simply a contract, it confers a proprietary interest on the tenant. By parity of reasoning, it should not be an objection to recognising the frustration of trusts that the trust has conferred proprietary interests on beneficiaries.[14] Although, again by parity of reasoning, only in rare cases could frustration of trusts be established.

Consequences for the parties of frustration of a trust

If the contractual doctrine of frustration of purpose were transposed into the law of trusts, there would be a difference in *outcomes* for the relevant parties. The key effect of contractual frustration, as described by Lord Simon in *National Carriers v Panalpina* above, is that 'the law declares both parties to be discharged from further performance'. In the case of trusts, the key effect would be returning the trust property to the settlor (or their estate if dead) under a resulting trust (or possible cy-près application in the case of a charitable trust). Where the settlor has made a self-declaration of trust, so that the settlor is also the trustee, it would be true to say that the effect of frustration of the trust would be that the settlor/trustee is 'discharged from further performance'. But in the more standard case of settlors appointing others as trustees, the settlor (or their estate if dead) would simply be potentially getting their property back rather than being discharged from performance. It could be said that their trustee(s) would be so discharged – from a trust, we could say, so altered that (in effect) they did not agree to it. However, as indicated above, the reality is that the trustee(s) would usually be uninterested in the settlor's purpose behind a trust; and it is likely they would therefore be equally uninterested

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[11] Langbein above n 7, 651-52.
[12] For a discussion, see Charlie Webb and Tim Akkouh, *Trusts Law* (5th edn, Palgrave 2017), sect 2.6.2.
[13] See *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108; and Weeliem Seah, 'Mispredictions, Mistakes and the Law of Unjust Enrichment' (2007) 15 RLR 93.
[14] cf Kelvin FK Low 'Certainty of Terms and Leases: Curiouser and Curiouser' (2012) 75 MLR 401, 410.

in being discharged from an altered performance. From the perspective of the trustee(s), frustration would likely amount to nothing more than the unexpected and perhaps unwelcome loss of a paid office they hold.

The Law Reform (Frustrated Contracts) Act 1943, intended to make the consequences for the parties that follow on from the frustration of a contract more just, only applies to contracts. It would therefore not apply if frustration of purpose in trusts were to be recognised. However, nor, necessarily, would the common law approach to contracts the Act was designed to modify. Frustration of purpose in trusts would be an equitable jurisdiction, to be rarely exercised, and could be understood to give the court a discretion to make such orders as were fair in all the circumstances.[15]

Conclusions on potential application of frustration to trusts

There does not seem to be, from this review, any *compelling* reason why a doctrine of frustration of purpose could not be adopted into the law of trusts. But is there any positive reason to import it – is there any lacuna in the law to be remedied?

The case for a doctrine of frustration of purpose in the context of trusts

Trusts, of course, come in a wide variety of forms. For present purposes, it is perhaps helpful to think of them on a spectrum, from the most extensively-prepared trusts to the most casually-created trusts.

An extensively-prepared trust will involve a professionally drafted trust instrument, typically derived from a collection of very detailed precedents, based on many years of past practice and experience, and the trust will often contain wide discretions and powers that give huge flexibility as to how it will operate in the future. The prevalence of this kind of trust probably helps to explain, in large part, why there has been no apparent call for a doctrine of frustration of purpose in the law of trusts. In such a trust, even the most unforeseen turn of events can be accommodated within the trust's operation, in a way that will align with the settlor's wishes or at least what the settlor would have wanted, according to the best estimation of the trustees.

On the other hand, the settlor of a casually-created trust may not even be aware they are creating one. For example, a donor to a non-charitable unincorporated association is usually oblivious to the fact that the donation will be held on trust, although this is what the law presumes. *Re Recher's Will Trusts*[16] and *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No 2)*[17] show that, unless some other trust has been declared, property-holding officers of a typical non-charitable unincorporated association receive and hold its property on trust for its current members, as beneficiaries; whether the association exists to benefit its members or for other reasons. And the members' equitable interests are subject to a contract between the members formed by the association's rules, governing how the property is to be used. The cases added it is open to the current members to depart from their contract and decide to divide the property between themselves for personal use: either by varying the contract within the rules, for example by majority vote; or otherwise unanimously, by agreeing to abandon the contract. And it is irrelevant that a donor might not foresee this.

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[15] That is, the resulting trust following on from frustration of purpose in the law of trusts could be in the nature of the 'remedial resulting trust' described by Jeffrey Hackney, *Understanding Equity and Trusts* (Fontana 1987), 157-59. (Hackney was writing in the context of non-charitable unincorporated associations, considered below as a possible situation where frustration of purpose might make sense in trusts law.) But questioning the usefulness of 'remedial' language, see Charlie Webb, 'The Myth of the Remedial Constructive Trust' (2016) 69 CLP 353.

[16] [1972] Ch 526 (Ch).

[17] [1979] 1 WLR 936 (Ch).

Does the existence of such casually-created trusts – lacking the inbuilt flexibility to respond to future events in line with the settlor's wishes that is to be found in extensively-prepared trusts – raise a case for recognising a doctrine of frustration of purpose in the law of trusts?[18] As an example, suppose a lottery winner presents a cheque for £1m to their beloved 'UFO Society', a non-charitable unincorporated association. The society's constitution says it is dedicated to the search for evidence of extraterrestrial life visiting Earth. But a month after the gift, extraterrestrials openly land and give a detailed account to the world of themselves and their regular visits. It is still technically possible to continue with the trust – the society could still continue looking for further evidence of alien life visiting Earth; and at the very least the trust could continue to give effect to the proprietary interests of the members. However, let us assume that, if we had a doctrine of frustration of purpose in the law of trusts, a court would find this extraterrestrial landing to have frustrated the donor's purpose behind their trust gift – because the search for evidence is no longer meaningful; the mystery has been comprehensively resolved. Does the justice of the situation demand that we recognise a doctrine of frustration of purpose in the law of trusts, so that the donor's trust gift has been frustrated and the donor will get back what remains of the gift under a resulting trust? Or, instead, are we content not to recognise a doctrine of frustration of purpose in the law of trusts, with the association winding up and its members taking the gift as a windfall?

Suppose now, the majority of members want to continue the association, despite the landing of extraterrestrials, by refocusing its mission. But one member relies on the arrival of extraterrestrials as frustrating the contract constituted by the rules of the association, leaving the member free to claim their share of the association assets held on trust, regardless of the wishes of the majority. Again, if we assume this was a frustrating event, is it really the law that the association member *can* claim the contract formed by the rules of the association was frustrated, to take their windfall; but the donor to the association *cannot* claim that the intimately related trust on which the association assets were held was frustrated, so as to recover the remains of the gift instead?[19]

Suppose now that – disappointingly – extraterrestrials do not land a month after the donation. But instead, a majority of association members vote to terminate the association and distribute its assets between the members: having realised they would rather have a substantial payday, following the donation, than carry on with their alien hunting. Again, assume this vote would be seen as a frustrating event, if we had a doctrine of frustration of purpose in the law of trusts. Do we wish to have that doctrine in place, to prevent this cynical asset-stripping of the association at the expense of the donor's intentions, returning what remains of the gift on resulting trust to the donor? Or are we instead content to follow the lead set in the *Re Recher* and *Re Bucks (No 2)* cases above, which suggest it is immaterial that a donor to a non-charitable unincorporated association does not foresee a division by the members of its assets, leaving the members free to take their windfall? The judges suggesting this did not have before them a case of brazen asset-stripping. *Moffat's Trusts Law* comments:[20]

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[18] In the case posited of an unincorporated association, the association typically does have considerable flexibility to deal with donated property as *its members* wish, but they are free to act *regardless of the apparent wishes of the donor*.

[19] Goff J (in the absence of argument) mentioned possible 'frustration' of the contract of membership with an unincorporated association in *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts* [1971] Ch 1 (Ch), 10. (Compare the contract constituted by the rules of an association being played out under the concept of 'loss of substratum' as explained by Brightman J in *Re William Denby & Sons Ltd Sick and Benevolent Fund* [1971] 1 WLR 973 (Ch), 978-79; or Sir Robert Megarry V-C preferred 'spontaneous dissolution' as a name for it in *Re GKN Bolts & Nuts Ltd (Automotive Division) Birmingham Works Sports and Social Club* [1982] 1 WLR 774 (Ch), 780-81.)

[20] Jonathan Garton, Rebecca Probert, and Gerry Bean (eds) *Moffat's Trusts Law: Text and Materials* (7th edn, CUP 2020), 823-24.

> '[C]onsider the perhaps improbable instance of an association receiving a large gift or bequest to further its purposes whereupon the members accede to temptation and purport to dissolve the association and share out the proceeds … There is no evidence that the situation has arisen in modern times, but, were it ever to occur, might not the courts be receptive to any tenable argument that would prevent the members sharing the proceeds even where permitted by the rules of the association? … [T]he courts may baulk at … unconscionability.'

A doctrine of frustration in the law of trusts would be one mechanism that could prevent this injustice.[21]

In the specific context of non-charitable unincorporated associations, the adoption of a doctrine of frustration of purpose into the law of trusts in this way could be seen as a middle ground between (1) the law's current understanding of such donations as held subject to a beneficiary trust, which leaves the beneficiaries free to do as they (collectively) wish, and (2) the recognition some would like to see that donations to non-charitable unincorporated associations are held subject to a purpose trust – a possibility presently ruled out, of course, by the law's insistence that (usually) there cannot be non-charitable purpose trusts.[22]

Inconveniently, in some trusts where pursuit of a specific purpose on behalf of beneficiaries would be of particular importance to donors, rather than a desire to benefit those beneficiaries unconditionally,[23] any resulting trust would be fragmented between a body of donors that included numerous very modest contributors, such as with crowdfunded trusts. However, the same is already true if such a trust becomes impossible or illegal, rather than merely suffering a frustration of purpose. That is, unless some specific provision is made in the terms of the trust to provide for non-pursuit of the purpose, which will often be the case for well-organised fundraising.[24]

It is suggested, accordingly, there is *some scope* for arguing that recognising a doctrine of frustration of purpose in the law of trusts might, occasionally, have some value.

Case-law foundation for a doctrine of frustration of purpose in the context of trusts

Is there a basis in case law for recognising a doctrine of frustration of purpose within the law of trusts? The best candidate to serve as a foundation for building on seems to be *Re Ames' Settlement*.[25] As explained in later cases, this decision appears – on the face of it – to show

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[21] The widespread idea that it is an inherent quality of a valid donation to a non-charitable unincorporated association that the members *must* have an unrestricted right to divide the property between themselves – based on the problematic decision in *Re Grant's Will Trusts* [1980] 1 WLR 360 (Ch) – appears to be simply wrong: see David Wilde, 'The Rule Against Perpetual Trusts: Part 2 – Property Holding Within Non-Charitable Unincorporated Associations' (2022) 35 TLI 223, esp 234-238; and David Wilde, 'Gifts to Unincorporated Associations: the Significance of Members Being Free to Divide their Assets' [2022] PCB 41.

[22] *Re Endacott* [1960] Ch 232 (CA). A prohibition recently restated by the Supreme Court in *Nuffield Health v Merton London Borough Council* [2023] UKSC 18, [2023] 3 WLR 13, [48]. (The only established exception is a minor one: see David Wilde, 'Trusts of Imperfect Obligation' (2022) 28 T&T 298. Some add that there is another *major* exception, where non-charitable purpose trusts can be valid, capable of explaining the operation of at least some non-charitable unincorporated associations, 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.)

[23] For discussion of such trusts, see David Wilde, 'Trusts and Purposes – Settlors Assigning Purposes to Beneficiary Trusts' (2023) 36 TLI 141.

[24] See for example David Wilde, 'Trusts of Crowdfunded Litigation Costs – Purpose Trusts or Beneficiary Trusts?' (2024) 30 T&T 94.

[25] [1946] Ch 217 (Ch). Similarly, *Essery v Cowlard* (1884) 26 Ch D 191 (Ch).

merely that if a settlor's declaration of trust states a particular fundamental purpose behind it, the viability of that purpose can be understood to be a precondition to the validity of the trust: if the settlor's purpose fails from the outset, the trust correspondingly fails and the property is held on a resulting trust for the settlor or the settlor's estate. So, in outline, when a trust was established stated to be a marriage gift, and there was no marriage, a resulting trust arose. But the case arguably has hidden depths.

Looking at the facts in more detail, in *Re Ames* a settlor covenanted in 1908 'in consideration of the … intended marriage' of his son to pay a sum to trustees within one year from the solemnization of the marriage, on a typical marriage settlement. The marriage ceremony took place; the money was paid to the trustees; and the couple lived together for many years. In 1927 the wife obtained a decree of nullity – which, at the time, retrospectively invalidated a marriage from the outset[26] – and she released any interest under the settlement. The husband continued to receive the income until his death in 1945. On the husband's death the trustees were directed by Vaisey J to pay the fund back to settlor's estate rather than those entitled on default of issue under the settlement. The judge said:[27]

> 'It seems to me that the claim of the executors of the settlor in this case must succeed. I think that the case is, having regard to the wording of the settlement, a simple case of money paid on a consideration which failed.'

Lord Browne-Wilkinson, speaking obiter, but delivering the leading judgment in the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington LBC*,[28] preferred the language of a 'condition precedent to the operation of the trust' to that of 'total failure of consideration'.[29] He said about *Re Ames*:[30]

> 'The judgment is very confused. It is not clear whether the judge was holding (as I think correctly) that in any event the ultimate trust failed because it was only expressed to take effect in the event of the failure of the issue of a non-existent marriage (an impossible condition precedent) or whether he held that all the trusts of the settlement failed because the beneficial interests were conferred in consideration of the intended marriage and that there had been a total failure of consideration … On either view, the fund was vested in trustees on trusts which had failed. Therefore the moneys were held on a resulting trust of type (B) above. [That is, (B) Where A transfers property to B *on express trusts*, but the trusts declared do not exhaust the whole beneficial interest].'

So, the most authoritative explanation of the *Re Ames* case today is that it involved an unfulfilled condition precedent, applicable to the specific trust interests in issue in the case.

However, examined more closely, *Re Ames* looks strikingly like a case of frustration of purpose within the law of trusts. What is interesting for the purposes of the present analysis is that Vaisey J, supported by authority, recognised that there was a valid and effective trust *until the decree of nullity* – that is, for a long period *before* the trust interests in dispute potentially arose under the terms of the settlement:[31]

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[26] This retrospective operation was removed by the Nullity of Marriage Act 1971, s 5; now the Matrimonial Causes Act 1973, s 16 – where there is a power to make property adjustment orders in s 24.
[27] [1946] Ch 217 (Ch), 223.
[28] [1996] AC 669 (HL).
[29] There having been a tortuous debate amongst restitution scholars about exactly what this latter expression can comprehend.
[30] [1996] AC 669 (HL), 715, cross-referring to 708.
[31] [1946] Ch 217 (Ch), 221-22.

> '[W]hen the marriage has been annulled the settlement as a marriage settlement must be considered, for some purposes at any rate, to be no longer in existence … Let me say at once that [the proposition that "what has been done during the continuance of the de facto marriage cannot be undone – cannot be overturned by the operation of law"] seems to me to be completely sound provided that there is a proper understanding of what is meant by "what has been done during the continuance of the de facto marriage" and provided that it is not supposed that that includes things which are not done during the continuance of the marriage but which might flow from things which were done during the continuance of the marriage … This is no question of undoing anything which has been done.'

In other words, the marriage settlement was fully effective for many years, during the period from the marriage until the annulment. The trust then appears to have been, in effect, 'frustrated' through the annulment thwarting its fundamental purpose, retrospectively.[32] In particular, the judge clearly – and it is submitted correctly – viewed the on-going life interest of the husband to the 'marriage' as terminated by the annulment, in the course of deciding that the settlor had not affirmed the settlement after the annulment, by permitting continued payment under the life interest to the husband, despite that interest having become invalid by that point:[33]

> 'The [settlor] father, it is true, did not make any claim [following the annulment] to the [sum he paid into the settlement] during his lifetime, as he might well have done; nor did his representatives make any such claim during the life of [his son, the husband of the 'marriage'] John Ames. But it may well have been his own intention, so far as the life interest in the sum was concerned, that John Ames should have the benefit of it. However that may be, I do not think there is anything … in the course of dealing by the father, or his refraining from asserting his rights at an earlier stage, that can operate to defeat the rights which are now asserted by his personal representatives.'

Conventional 'condition precedent' reasoning cannot explain the termination, part way through its course, of the husband's entitlement under his subsisting life interest. Nor should we necessarily be put off from viewing *Re Ames* as a frustration case simply because of later condition precedent reasoning, explaining the central decision in the case, regarding the gift in default of issue. After all *Taylor v Caldwell*,[34] usually seen as the foundation of contractual frustration law, *was similarly reasoned on the basis of an implied term*. The more general doctrine of frustration was then drawn from these beginnings later.

Further elaboration on *Re Ames* is found, again obiter, in the Court of Appeal in *Burgess v Rawnsley*.[35] There Browne LJ succinctly summarised the rule:[36] 'As I understand it, the basis for this sort of resulting trust is that the purpose for which the trust was created has wholly failed.' Sir John Pennycuick added – and this was also implicit in the other two judgments in the Court of Appeal – that a settlor's purpose being a precondition to the validity of the trust may equally be an *inference* of the settlor's intention, from admissible evidence of the

[32] It was still *literally* possible to execute what remained of the settlement – a gift in default of marriage issue. If seen as a frustration case, therefore, the decision in favour of a resulting trust makes the case look like it involved frustration of purpose rather than frustration through impossibility.
[33] [1946] Ch 217, 223.
[34] (1863) 3 B & S 826, 122 ER 309.
[35] [1975] Ch 429 (CA). Only Lord Denning MR would have made the point a ground for his decision (438).
[36] [1975] Ch 429 (CA), 441.

circumstances in which a trust was created, rather than being anything expressly indicated in the declaration of trust. He said:[37]

> 'Where a person makes a disposition in contemplation of an intended marriage, then, even if the disposition is not expressed to be conditional upon the marriage taking place, if the marriage does not in fact take place, there is no doubt that he is entitled to have the settlement set aside upon the ground that the purpose of the disposition has failed. That is plain common sense and it is not necessary to go into the technicalities of marriage as a consideration.'

The language of a condition precedent limits the scope of the decision in *Re Ames* to failures of purpose from the outset of a trust – or at least from the outset of a specific interest within a trust. Whereas the language of frustration gives scope for the law to recognise similarly frustrating events *later in the life of a trust or interest* – the reality of what happened in the case, if we consider what was said about the interests under the settlement overall. (This is not to imply that a marriage settlement such as that in *Re Ames* would be frustrated by subsequent divorce, death, or any other of the ordinary, foreseeable vagaries of married life. Annulment, with retrospective effect, differed: entailing that there never was a marriage.)

The language of frustration is also one that is readily understood by lawyers. Perhaps the underlying principle of the case can be reinterpreted in that way?

Case law potentially pointing against a doctrine of frustration of purpose in the context of trusts: the rule in *Saunders v Vautier*

One strand of case law might seem particularly inimical to the recognition of a doctrine of frustration of purpose in the law of trusts: the rule in in *Saunders v Vautier*.[38] That case held that where a beneficiary is sui juris – adult and of sound mind – and is entitled to the whole beneficial interest, they can terminate a trust and take the property out, even though this violates the terms of the trust. A trust said the beneficiary should receive property at 25; he was held able to take it out as soon as he was adult. It follows that several beneficiaries can do this: if they are all sui juris, between them entitled to the whole beneficial interest, and unanimously agreed. And it follows that beneficiaries can use this power to simply vary the terms of a trust, rather than terminating it. Beneficiaries can equally exercise the power over some severable *part* of a trust's assets, if they hold the whole beneficial interest in that part – provided this will not unduly prejudice the remainder of the trust. The rule was extended by the Variation of Trusts Act 1958, which enables the court to approve an exercise of the power on behalf of those not able to exercise it themselves, because not sui juris – for example, children – or not ascertained.

In *Saunders v Vautier*, we could say the settlor's purpose was the holding of the trust property as an enforced-savings investment fund until the beneficiary was 25. But the beneficiary was able to defeat – or 'frustrate' – the settlor's purpose and take the trust property freed from it, given they were sui juris and entitled to the whole beneficial interest.

It is clear, therefore, that a beneficiary exercising the *Saunders v Vautier* power to override a settlor's stipulated terms – and in a sense 'frustrate' the purpose behind those terms – could not itself be seen as a frustrating event: beneficiaries have a recognised right to do this. Which might be taken to imply that there cannot be a doctrine of frustration of purpose within the law of trusts. However, arguably the existence of this *Saunders v Vautier* power is not inconsistent with recognising a doctrine of frustration of purpose in the law of trusts. We have

[37] [1975] Ch 429 (CA), 445.
[38] (1841) 4 Beav 115, 49 ER 282.

previously acknowledged that frustration of purpose in trusts would be only for wholly exceptional situations. Where the rule in *Saunders v Vautier* operates, the fundamental purpose of the settlor – to benefit their beneficiary – is still being carried out, even after exercise of the *Saunders v Vautier* power: the beneficiary simply chooses their own means of benefit rather than being forced to abide by the settlor's intended means. So, it is suggested, there has been no frustration of the settlor's purpose in the *fundamental sense* required by a doctrine of frustration. Basically, the philosophy of the *Saunders v Vautier* rule is that a settlor cannot give a gift to a sui juris beneficiary and say, 'You shall enjoy your gift as I dictate, not as you prefer'. And it is possible to say that proposition is quite consistent with a doctrine of frustration of purpose within the law of trusts, where a more *fundamental* form of frustration of the settlor's purpose is required to bring the doctrine into operation.[39]

Can an exercise of the *Saunders v Vautier* power be distinguished from the situations suggested here as possible scenarios for the application of a doctrine of frustration of purpose in trusts? With regard to *Re Ames*, above, it can be said that the settlor there only intended to provide for the beneficiaries *because they represented the union in marriage of two families* – which did not happen. As for the case of a non-charitable unincorporated association (the examples given were an association quickly losing its core mission, or an association whose members quickly voted to asset-strip the association) it can be said that a donor's intention to make the members of an unincorporated association trust beneficiaries *is a somewhat artificial construct of the law to begin with, manoeuvring around the rule that non-charitable purpose trusts are not permitted*.[40] So arguably material distinctions can be drawn. And any *difficulty* in drawing these distinctions merely reflects the inherent and seemingly inescapable difficulty in identifying cases of frustration, which is already notorious within contract law.

Charitable trusts

In the case of public, charitable trusts, equity originally said that a trust only failed where it was illegal or impossible to carry it out. Only then could the issue of a cy-près application arise; or of a resulting trust, in the case of an initial failure where the settlor had no general charitable intent. However, we now have the modern statutory expansion of the cy-près jurisdiction found in (what is now) Charities Act 2011, s 62. This appears to make redundant any resort to a doctrine of frustration of purpose in charitable trusts, in general at least. Arguably, a doctrine of frustration of purpose could be invoked in the case of an alleged initial failure of purpose, where the settlor had no general charitable intent to justify cy-près application.[41] Despite this apparent general redundancy, the statutory expansion of the cy-près jurisdiction could be understood as implying that a doctrine of frustration of purpose might have been able to make a useful contribution to the law in this area, had its desirability not been overtaken by the new statutory scheme.

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[39] The better view of the law is that, in extreme cases, the rule in *Saunders v Vautier* is itself qualified by a discretion to refuse what the beneficiaries want: David Wilde, 'The Nature of *Saunders v Vautier* Applications: Does the Court have a Discretion to Refuse?' (2023) 37 TLI 67.

[40] The artifice is perhaps most clearly exposed by the decision in *Hanchett-Stamford v A-G* [2008] EWHC 330 (Ch), [2009] Ch 173, that the sole surviving member of a non-charitable unincorporated association campaigning for a ban on performing animals was entitled to land and investments of the association worth over £2m, contributed towards that cause, since she was the sole surviving 'beneficiary' of the trust on which its assets were held when the association ceased to exist. (She had expressed the wish to donate the property to an animal welfare charity.)

[41] Although such a frustration of purpose might well already be brought within the 'broad description of impossibility' operated in charity law: *Re Dominion Students' Hall Trust* [1947] Ch 183 (Ch), 186.

Conclusion

Drawing on the doctrine of frustration in contract law, a modest argument could be made for recognising a doctrine of frustration of purpose in the case of express private trusts, leading to a resulting trust – although with a potential discretion in the court as to its precise orders, to achieve overall justice. However, such a doctrine would seem generally redundant in the case of charitable trusts, given the extent of the modern statutory cy-près jurisdiction.

Frustration of purpose could only operate in rare, very exceptional cases in the law of trusts for several reasons. (1) Because professionally drafted trusts are common, involving wide discretions and powers that anticipate unforeseeable eventualities and allow them to be dealt with within the framework of the trust. Also (2) because a parallel would need to be drawn with what has been said in the law of contract about how exceptional the frustration of leases will be, given their conferral of a proprietary interest; since trusts often confer similar proprietary interests. And (3) because the rule in *Saunders v Vautier* makes clear that a significant degree of what might be called 'frustration' of a settlor's purposes is tolerated and accepted within the law of trusts.

Correspondingly for a rare phenomenon, there is doubtless only a slender basis in reported precedent that could be relied upon to support any doctrine of frustration of purpose in the law of trusts (just as, it should be added, there is only minimal case law on frustration *of purpose* within contract law).