

One cannot, in law, speak of property being owned by an unincorporated association. The property must instead be owned by its members or... by some persons holding title to the property on their behalf.

G Moffat *Trust Law* (5th edn, Cambridge: Cambridge University Press, 2009) at 887.

Consider the accuracy of the above statement.

Suggested answer

The first part of the question highlights the main problem in this area of law. An unincorporated association cannot own property, because it has no legal existence. Unlike a corporation, e.g. a company, it has no separate legal personality: see for example *Re L* [2009] 1 All ER 786. The founders or members of most unincorporated associations would be amazed to be told that their Cricket Club or Debating Society, which is very real to them, does not exist in a legal sense. However, this legal peculiarity is unlikely to be a problem, unless the unincorporated association holds property, especially land or inherits or is given property. Then the problem arises of to whom this property belongs.

The courts once thought that an unincorporated association would involve a private trust for the members. The committee or officers of the society or club would often be called “trustees” and could be regarded as holding the club property on trust for the club members as beneficiaries. See, for example *In Re Drummond* [1914] 2 Ch. 90 and *In Re Printers and Transferrers Amalgamated Trades Protection Society* [1899] 2 Ch 184.

This comfortable theory was damaged by the celebrated *Leahy v Attorney General for New South Wales* [1959] AC 457, which involved a seemingly uncontroversial gift to an order of nuns. As the nuns were a contemplative order, they did not enjoy charitable status and the Privy Council thought that a private trust for the nuns would infringe the perpetuity rule. Nuns could join the order in the future leading to a problem of perpetual duration for the trust and the membership could also fluctuate, infringing the certainty of objects rule. If the bequest was interpreted as a gift to the nuns collectively, there was nothing to stop a nun taking their individual share of the property and leaving. There would be no way of holding the unincorporated association together

The solution would seem to be to develop the idea of individual gifts to the nuns and find some way of tying them together into an unincorporated association. This was suggested in the subsequent *Neville Estates v Madden* [1962] Ch. 832: the rules of the association were a contract binding the members together and restricting them from removing their share of the property. This theory seems to lift unincorporated associations right out of the law of trusts and its problems.

The idea of a multilateral contract between the members of the unincorporated association is not without its own difficulties however. An association may have no written rules or rules they just do not cover legal issues like severing shares. This was seen in *Conservative and Unionist Central Office v Burrell* [1982] 1 WLR 522.

The contract analysis has proved useful when dissolving an unincorporated association. The court may even be able to solve the problem if the rules of the association are silent on a key issue e.g. how the property should be divided. The judge may imply contractual terms to come to a fair and flexible solution. In *Cunnack v Edwards* [1896] 2 Ch 679, the purpose of the contract had been achieved, so the society property was ownerless and went to the Crown. In *In Re Buckinghamshire Constabulary* [1979] 1 WLR 936, the property that remained was split equally between the surviving members, but in *Hanchett-Stamford v Attorney-General* [2009] Ch 173, as there was only one surviving member, the remaining property went to her.

The contractual theory does not solve all problems. There is probably still a need to identify trustees to hold the association's property. If it is land there can be no more than four of them, according to section 34 Trustee Act 1925. So we are back where we started, with trustees holding trust property for the members of the unincorporated association.

In appropriate cases, the Court has been able to go back to the trust analysis. *In re Denley's Trust Deed* [1969] 1 Ch. 373 had identifiable beneficiaries, who were employees of the company and the trust had been limited to a perpetuity period. With the reform of the perpetuity rule in the Perpetuities and Accumulations Act 2009, it will be even easier to establish an unincorporated association as a trust.

We might ask the question of why a trust has to have beneficiaries anyway. It is an old and basic principle of trust law, going back to Lord Eldon in *Morice v Bishop of Durham* (1804) 9 Ves Jr 399, that, unless a trust is a charity, it must have identifiable beneficiaries who can enforce it. This rule does not seem open to reconsideration: *In Re Astor's Settlement Trust* [1952] Ch. 534. Although limited exceptions have been allowed to this rule, such as trusts to maintain a grave or a pet animal, the courts have set their face against extending these exceptions, at least in the trust jurisdiction of England: see *In Re Endacott, Deceased* [1960] Ch. 232.

So it seems that we are stuck with a slightly messy contractual solution as explained in *In Re Recher's Will Trusts* [1972] Ch 526: this is some sort of collective joint tenancy held together by a contract. To most unincorporated associations, none of this is of any concern, because most exist quite happily without ever going to court.