This essay was Chapter 29 *in the second edition of Equity & Trusts published in 2001. It is a unique inclusion within the trusts law canon and considers entities which are, strictly speaking, bodies corporate and not private trusts. The purpose behind their inclusion was an attempt to broaden the notion of what constitutes a "trust", given that all of these bodies corporate are called "trusts" (although that is principally an attempt to make them sound reliable, etc.). However, given the corporatisation of trusts in modern trusts law practice – see, for example, my discussions of the contractarian development of trusts (Ch 21 of Equity & Trusts) and the distinct regulation of pension fund trusts and unit trusts from private trusts (see the appropriate chapters in Thomas and Hudson, The Law of Trusts (OUP), 2004): in effect we are left with the notion that commercial trusts are becoming ever closer to corporate entities and therefore if the envelope of what constitutes a trust can be extended in that dimension, then why not consider the extension of the envelope of trusts in the public sphere. There is also a discussion in this essay of the fiduciary liabilities of officers in public bodies.*

PUBLIC INTEREST TRUSTS

29.1 INTRODUCTORY

This chapter is a consideration of the possibility of creating a new form of quasi-trust structure which operates in the expanded public sector. By 'expanded public sector' is meant the developing range of quasi-public institutions which provide services to citizens. Examples of this phenomenon are numerous: in contrast to the straightforward provision of social housing by government agency such housing is provided by housing associations and housing action trusts;[1] healthcare services formerly provided by local health authorities are now provided by NHS trusts;[2] and there are also many instances of government ministries being replaced in their day-to-day activities by the Next Step Agencies.[3] The legal means by which public services are provided by private persons like NHS trusts is principally through contract, and public expenditure on capital projects frequently by the private finance initiative (PFI). This phenomenon has been dubbed by the commentators as 'government-through-contract'.[4] Significantly, this is a combination of public law concepts (that is, the public law treatment of the services provided these agencies) and the principles of contract law which govern the operation of these schemes.

What remains open for debate is the manner in which fiduciary obligations will be activated in these contexts. In private law contexts of partnership the partners owe fiduciary duties one to another. In relation to private sector trusts and companies, the trustees and directors owe fiduciary duties to the beneficiaries and the companies (or potentially the shareholders) respectively. This chapter will consider potential futures for the obligations over the dispersal of public sector finance and over bodies corporate like NHS trusts and housing action trusts. What confuses matters is the frequent use of the word 'trust' in these contexts as a rhetorical device aimed at mollifying the citizenry into believing that the bodies corporate are indeed 'trustworthy'. However, most of these entities are bodies corporate which own their own property and which do not have any vested beneficiaries for whom any property could be held on a *trust*, properly so-called. At the time of writing all that can be said is that in the decades to come it is likely that such structures will continue to be used and that their proper legal analysis will remain opaque.

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1 Originally introduced by Housing Act 1988, s 62.

2 National Health Service and Community Care Act 1990.

3 Freedland, 1998.

4 *Ibid*.

29.2 PUBLIC INTEREST TRUSTS

29.2.1 Public interest trusts as trusts in the 'higher sense'

The purpose of this section is to consider the role of 'public interest trusts', as defined in this chapter, as trusts properly so-called. There is already in the jurisprudence a division between ordinary private trusts and also those trusts of a 'higher' nature. In *Kinloch v Secretary of State for India*[5] Lord O'Hagan advanced a division between two forms of trust:

> … the term 'trust' is one which may properly be used to describe not only relationships which are enforceable by the courts in their equitable jurisdiction but also other relationships such as the discharge under the direction of the Crown of the duties or functions belonging to the prerogative and the authority of the Crown. Trusts of the former kind are described … as being 'trusts in the lower sense' trusts of the latter kind … 'trusts in the higher sense'.[6]

Therefore, the division is made between ordinary private trusts (that is, trusts of the lower kind) and trusts in which some person in entrusted in a general sense with the use of some public or other similar property (trust in the higher sense). For the purposes of this chapter it will be suggested that fiduciary responsibility may attach to those who control entities providing given categories of public service as trustees in this higher sense. It is accepted that this division does not form a commonplace of trusts law analysis and is a question which has not troubled the authors of the great trusts law texts. As outlined above, it is suggested that this will come to constitute an important form of fiduciary responsibility with the creation of a particularly significant new sector of our social life: the quasi-public sector.

This division of categories of trust resembles Cotterrell's analysis of the unique nature of trust as understood by lawyers.[7] Cotterrell deals with this janus-faced concept of trust. Its vernacular meaning identifies the person who is being trusted ('the trustee') as being the person in a position of power, whereas the person who places reliance on the trustee is vulnerable because she relies on the trustee not breaching that trust. It is equity which posits the alternative definition in which the trustee is a person encumbered by legal obligations as to the management of property and so forth. The person who trusts the trustee is known as a 'beneficiary' and is impressed with a range of entitlements. The idea of 'trust in the higher sense' is more closely comparable to Cotterrell's explanation of the ordinary meaning of 'trust'.

The person entrusted with the management of property, particularly public property, does not necessarily suffer the ordinary burdens of the law of trusts accordingly in Lord O'Hagan's analysis.[8] It may be that such a person is impressed only with a moral obligation as to the management of that property and that its legal context is limited to the law of employment if she is incompetent, or failure to get re-elected if she is an elected official. The alternative approach would be that if such a person is responsible for property which is held for the public good she should be similarly liable for the misuse of that property as someone in the private sector would be – the only difference being that the beneficiary of such an action would not be a vested private beneficiary but rather some person acting for the public good.[9]

But, is Lord O'Hagan's analysis a satisfactorily complete division of the possible types of trust? In my view it is not a complete definition. Rather, there should be a division between private trusts, public charitable trusts, public interest trusts, and trusts implied by law. Private trusts are trusts as ordinarily understood in chapter 2 of this book. Public trusts divide into two kinds. The first is the charitable trust. Even though this form of entity need not be organised as a trust, the law of trusts has long accepted a species of trusts law rules dealing with charities in particular. The second is the 'higher form of trust' considered above in which a person is entrusted with stewardship and deployment of public property – this form of trust is considered immediately below. The final form of trust is that imposed by general principles of equity to police or regulate the conscience of the legal owner of property.[10] It is suggested that this form of trust can be imposed on any person regardless of their relationship to any claimant if the circumstances comply with those general principles. The possibility of such an ordering of trusts is considered in greater detail in chapter 36.

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5 (1882) 7 App Cas 619.

6 *Ibid*, 625–26, 630.

7 Cotterell, 1993, 75–95.

8 See also the support lent to this analysis in *Tito v Waddell (No 2)* [1977] Ch 211, 216, *per* Megarry V-C.

9 *Attorney-General v Blake* [2000] 4 All ER 385.

10 *Westdeutsche Landesbank v Islington* [1996] AC 669.

29.2.2 Principles of the 'public interest trust'

It is suggested that the proliferation of legislation creating bodies under the rubric 'trust' (for example NHS trusts and Housing Action trusts) which incorporate some of the usual features of trusteeship require that there be some understanding on the particular principles on which those entities are to be understood. It is my contention that they be conceived of as a form of 'trust' imposing fiduciary duties on their officers. The categorisation of an NHS trust as being a trust at all is somewhat problematic, as considered at para 29.3 below. What is particularly awkward is the definition of the 'beneficiary' in this context.

In relation to charitable trusts the absence of a beneficiary does not pose an obstacle to those entities being considered as being trusts in some situations. A number of commentators have complained of the continued need to include charities within the scope of the law of trusts even though there are few similarities between private trusts and the regulated charitable trusts sector. Perhaps some of this complaint focuses on the lack of direct proprietary right in any assets held by the charity – a feature generally associated with trusts. The central locus of the trust itself differs in a subtle way between commentators: some focusing straightforwardly on the conscience of the legal owner of property while others centre the core of the trust relationship on the rights of the beneficiary in the trust fund.[11]

Therefore, it is possible to establish public interest trusts as being another form of public trust in parallel to the charitable trust similarly without needing to satisfy the beneficiary principle. It should also be possible to understand the rights of users of health services within the catchment area of the NHS trust as being quasi-proprietary rights. The deficiency in this contention would be that the users do not have even direct democratic control over the NHS trust. Rather that NHS trust exists as a public body accountable vertically to the Secretary of State rather than straightforwardly democratically to the local populace. The rights of local people using the trust's services arise in the form of complaints brought through the mechanisms considered earlier in this chapter or as tortious claims either in negligence or for breach of statutory duty. As such the potential users of services do not have control over the use of assets by the NHS trust but rather a right to complain if they consider services actually delivered to have been deficient in some way.

Evidently, this form of trust does not correlate closely with private trusts because there is no straightforward means of identifying a beneficiary who can control the trustee by means of personal obligations owed between those two persons. This form of control is a feature which some commentators advance as being part of the core, irreducible content of trusteeship.[12] However, that has never interfered with charities being able to identify themselves as being a form of trust. Given this book's determined argument to recognise a need for legal models which facilitate social interaction, the potential for a public interest trust, with its own fiduciary principles, is to support social welfare initiatives like housing action trusts and NHS trusts both to enable them to operate effectively and also to enable users of their services to effect some control over them. In this way, law becomes a means of democratic control – lending a voice to ordinary citizens. After all, such a separate stream of principles for charities has enabled the charitable sector to grow into the force it is in the modern economy.

29.2.3 The 'public interest' as a means of effective control

It was accepted in *Bromley v GLC*[13] that a local authority owes fiduciary duties to its council taxpayers – although it was also held that the terms of a manifesto could not, of themselves, constitute grounds for a suit for breach of duty. Accepting that there are fiduciary duties owed by local authorities, the issue is then as to the content of those fiduciary duties. In particular the 'Fares' Fair' litigation in *Bromley LBC v GLC* required that the authority take into account the interests of ratepayers and also that the authority balance fairly the interests of council taxpayers[14] with the users of the transport services at issue who might not be council taxpayers but rather commuters.[15] What is interesting is that a duty is owed in two forms: to those who fund the service through local taxation and also to those who use the service without necessarily funding it through local taxation.

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11 Hayton, 1996, 47.

12 Hayton, 1996.

13 [1983] AC 768.

14 *Ibid*, 829, *per* Lord Diplock.

15 *Ibid*, 815, *per* Lord Wilberforce.

Therefore, in the context of the health service the duties of the service-provider would be owed to those who fund it and to those who use it. The difference is that there is no clear link between a taxpayer and the NHS trust. This is one of the great political arguments against this structure: the democratic link between citizen and service-provider is replaced by a quasi-commercial link between the service-provider and the agency which controls their budget. Therefore, it is difficult to establish a link between local people and the NHS trust on the basis of funding. Instead, the sole possibility would be between the user of that service (or, patient) and the NHS trust once a service is sought or provided. At that time the legal focus is on tortious liabilities or on breaches of statutory duty connected with the treatment of that person. That legal context is therefore reduced to private law and moved away from public law liability. The use of agencies like NHS trusts therefore weakens the public law possibility of control between the citizen and the organ of the state providing public services.

29.3 THE LEGAL NATURE OF NHS TRUSTS

29.3.1 Introductory

The National Health Act 1946 introduced publicly-funded, universal healthcare. That system survived substantially intact until the passage of the National Health Service and Community Care Act 1990 which introduced an internal market to the National Health Service (NHS) and created NHS trusts to administer healthcare services for their allocated geographic regions. It will emerge from the following discussion that NHS trusts are not trusts as ordinarily understood but are bodies corporate understood as quasi-public corporations.

There is a political determination to create public bodies which borrow the positive connotations of the word 'trust'.[16] That little is to be made by lawyers of the use of the word 'trust' is demonstrable by the variety of names through which this entity went before governmental policy settled on the term 'trust': 'self-governing hospital' in *Working for Patients*,[17] and 'NHS Hospital Trust' in *Working for Patients – Self-governing Hospital Working Paper*.[18] Politicians fasten on the word 'trust' because it carries with it connotations of wholesome policy and mellow fruitfulness. Among its recent borrowers are Blair,[19] Giddens,[20] and Fukuyama.[21] It would be possible to ignore the political, lay use of a word which coincidentally has a technical, legal meaning and apply a corporate analysis, were it not for the use in the legislation of particular circumstances in which the NHS trust will act as a 'trustee' in the formal, legal sense.

29.3.2 The legal nature of NHS trusts

NHS trusts are not properly 'trusts' at all – although there are limited contexts in which the NHS trust will act as a trustee.

The NHS as a body corporate

NHS trusts were created by s 5 of the National Health Service and Community Care Act (NHSA) 1990. Individual NHS trusts are created by order of the Secretary of State for Health in response to applications. Section 5(5) NHSA provides that:

> Every NHS trust (a) shall be a body corporate having a board of directors consisting of a chairman appointed by the Secretary of State and … executive and non-executive directors ...

That much would appear to be decisive of the nature of a NHS trust apart from s 11 NHSA, considered immediately below, which suggests that there will be situations in which the NHS trust, or its officers, will act as a trustee in relation to identified property. The question then is the extent to which the NHS trust itself or its officers are to subject to fiduciary duties which may or may not compare to trusts.

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16 Bartlett, 1996, 186.

17 HMSO, London, 1989.

18 *Ibid*.

19 Blair, 1998.

20 Giddens, 1998.

21 Fukuyama, 1995.

The occasional role as trustee

There are contexts in which the trustees of an NHS trust will be appointed to act as trustees under particular express trusts. Section 11 NHSA provides as follows:

> The Secretary of State may by order made by statutory instrument provide for the appointment of trustees for an NHS trust; and any trustees so appointed shall have power to accept, hold and administer any property on trust for the general or any specific purposes of the NHS trust (including the purposes of any specific hospital or other establishment or facility which is owned and managed by the trust) or for all or any purposes relating to the health service.

This does not make the NHS trust itself a 'trust' in the proper sense of the term, nor would it make the officers of an NHS trust 'trustees' in all circumstances in which they carry out their duties for the NHS trust. Rather, the apparent purpose of this provision is to permit the officers of that NHS trust to act as trustees in relation to existing trusts created for charitable or benevolent purposes in relation to the provision of medical services within the context of the National Health Service.[22] It is frequently the case that property is left for charitable, medical purposes and it is then for the applicable NHS health authority or, latterly, hospital trust to administer that fund. It is not always entirely clear whether NHS trustees can make declaration of trust over donations where the wishes of the original donors are impossible to ascertain clearly: although general principles of the law of charities favouring validating trusts can generally be expected to be effected.[23] A number of large bequests (outwith the perpetuities rules due to their charitable status) were made some considerable time ago before health and hospital services were reorganised into the NHS in 1946. Therefore, it is necessary when effecting any reorganisation of the NHS to ensure that trusteeship in relation to these funds is assumed by the successor entity and/or its officers. Consequently, trustees will have to be appointed under s 11 NHSA to hold property which is donated to the NHS for the specifically identified medical purposes of the NHS trust or more general health service activities. As such the officers of the NHS trust can be empowered to act as trustees in particular situations.

29.3.3 The purposes of NHS trusts

NHS trusts assume all the responsibilities of the pre-existing health authorities which they replace. NHSA, s 5 provides that NHS trusts are to assume the rights and responsibilities of the pre-existing Regional, District and Special Health Authorities in respect of particular hospitals and attendant services.[24] Their obligations are 'to provide and manage hospitals or other establishment or facilities'.[25] The reference to other establishment and facilities extends the obligations of an NHS trust beyond merely hospital management into areas such as the provision of ambulance services.[26]

While the statute is silent on the question it is suggested that these obligations are owed to the Secretary of State as the person both empowered to enforce the powers set out in the legislation and to authorise the constitution of the NHS trust. This raises a question as to the possibility of individual citizens acquiring rights against the NHS trust in relation *inter alia* to negligent service and judicial review of decisions made in relation to allocation of services.

29.3.4 The fiduciary context of officers in NHS trusts

The further question arising from that provision relates to the duties imposed on both the NHS trust itself (as a body corporate) and on the trust's officers. Under s 11, the officers of the NHS trust may bear fiduciary office in the public law sense of that term.[27] Section 11 provides that 'trustees ... have the power to accept, hold and administer property on trust for the general or any specific purposes of the NHS trust ...'. This provision implies a fiduciary obligation in relation to certain provisions of property but there is no extant obligation that other property is always to be held on trust.

As a result, it is difficult to discern whether these trustees in relation to NHS trusts ought properly to be considered to be trustees in the proper legal sense of that term, and thus subject to all of the ordinary fiduciary obligations of trustees, or whether some other regime of public law principles ought to apply. It is suggested that in relation to their stewardship of property left on express trust and passing to the NHS trust there is no good reason to apply anything other than ordinary trustee principles in this context.

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22 NHSA 1977, s 90.

23 *Attorney-General v Mathieson* [1907] 2 Ch 383, CA; noted by Riches, 1997, 5.

24 NHSA 1990, s 5(1)(a).

25 *Ibid*, s 5(1)(b).

26 NHSA 1977, s 128(1).

27 *Bromley LBC v Greater London Council* [1983] 1 AC 768.

In relation to the ordinary business of the trust, the board of directors ought to be considered as fiduciaries bearing liabilities closely analogous to those of directors of ordinary companies in relation to rules against making secret profits or permitting conflicts of interest.[28] At this level, the officers of an NHS trust owe fiduciary duties either to the person from whom their power is delegated or they owe duties in the public interest more generally. The principal authority dealing with this point is that of *Attorney-General for Hong Kong v Reid*[29] in which the former Attorney-General had received bribes not to prosecute particular criminals. It was held by Lord Templeman (giving the leading opinion in the Privy Council) that the Attorney-General was to be treated as having held those bribes on constructive trust from the moment at which he received them. No distinction was drawn here between any public and private law context for the imposition of this fiduciary liability. Therefore, it is suggested that there is a general context in which fiduciary responsibilities will apply.

There may, however, be some contexts in which there might need to be a distinction between private fiduciary contexts and public fiduciary contexts. The principal ground for distinction is in relation to the constitution of the NHS trust is that part of the fiduciary's activities which relate specifically to the individual decisions executed in relation to a body discharging public functions. On the authorities it would appear that there are further fiduciary duties necessitated by this public status, as considered in *Bromley LBC v GLC*.[30] In that instance, the House of Lords found that the fiduciary obligations of the then Greater London Council in relation to use of local taxpayers' money created obligations to act fairly between council taxpayers *and* service users who were not such taxpayers. Therefore, the extent of persons to whom the obligations were owed extended beyond simply those who had given value and to whom obligations would be owed on democratic principles, but also to those who had not given value but who could reasonably be expected to use the council's services. In relation to NHS trusts, it can be seen that fiduciary obligations may be owed to a broad category of persons who may use the trust's services, albeit the content of the duties owed to persons falling within the net might be very similar to private law duties (as indicated by *Reid* above). The issues surrounding these 'public fiduciary duties' are considered in greater detail below.

It is generally assumed that in relation to corporate governance issues in NHS trusts, and with particular reference to the personal liability of the directors and officers of NHS trusts, that the Nolan Committee's Second Report on standards in public life would apply to directors and officers of NHS trusts and extent to which insurance and statutory and contractual indemnities provide protection.[31] What remains unclear however, is the material difference this makes for any individual fiduciary beyond a requirement of general probity. It is suggested that the private law of fiduciaries would necessarily have a part to play in legal liabilities and enforceable penalties against any abuse of position. The issue of the personal liability of NHS directors (as compared to directors of private companies) is complicated by the statutory indemnity created by s 265 of the Public Health Act 1875.

One proposal for improved corporate governance procedures in NHS trusts is the introduction of two-tier boards of management. It is suggested that a distinction between a supervisory board and an executive board of management carrying out day-to-day management decisions would facilitate more efficient control of the activities of the board of management than is possible. It is suggested that this proposal has great merit. Given the sensitive and important work done by NHS trusts in relation to public welfare services, a direct form of democratic control over strategic policy decisions (through a supervisory board) would enhance public confidence in the management of the trust's work. This development would also permit a balance to be struck between managerial efficiency and effective public service.

29.3.5 The management obligations in the NHS trust

The financial management obligations imposed on NHS trusts are generally to break even, rather than to show a surplus. In accordance with the practice of public sector bodies this would require spending its allocated budget, or available funds, but not exceeding that budget. Section 10 of NHSA provides that:

> (1) Every NHS trust shall ensure that its revenue is not less than sufficient, taking one financial year with another, to meet outgoings properly chargeable to revenue account.

The statutory exception to this general principle of financial prudence occurs in circumstances in which the NHS trust agrees another spending plan with the Secretary of State. Section 10 NHSA further provides that:

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28 *Boardman v Phipps* [1967] 2 AC 46.

29 [1994] 1 AC 324.

30 [1983] 1 AC 768.

31 *Burgoine v Waltham Forest LBC* (1996) *The Times*, 7 November, Ch D.

(2) It shall be the duty of every NHS trust to achieve such financial objectives as may from time to time be set by the Secretary of State with the consent of the Treasury and as are applicable to it; and any such objectives may be made applicable to NHS trusts generally, or to a particular NHS trust or to NHS trusts of a particular description.

This duty falls within the competence of the board of directors, as considered below. Therefore, the investment obligations of the NHS trust would be established by agreement with the Secretary of State and frequently within the scope of the PFI scheme.

29.3.6 The rights of NHS trusts to property

The foregoing discussion has considered the capacity of NHS trusts to act as trustees in relation to property settled on charitable trust connected to the services which such NHS trusts provide. There is the further issue of the ability of NHS trusts to take title in property and assets used in the fulfilment of their statutory functions. Section 8(1) of NHSA provides as follows:

> The Secretary of State may by order transfer or provide for the transfer to an NHS trust … of such of the property, rights and liabilities of a health authority … as … need to be transferred to the trust for the purpose of enabling it to carry out its functions.

Therefore, with the creation of NHS trusts by statute all property held by the predecessor body to the NHS trust becomes vested in the NHS trust by means of an order of the Secretary of State. As a body corporate, title in that property will vest in the NHS trust.

The necessity of taking property to carry out healthcare and ancillary functions has developed as a key feature of the property rights available to the NHS trusts. The issue is then whether NHS trusts ought to be considered bound by private property rights (such as restrictive covenants) or whether those rightholders ought to be entitled only to compensation.[32] In *Cadogan v Royal Brompton Hospital National Health Trust*[33] the issue of covenants restricting use of land were held to have been unenforceable against NHS Trust as being inconsistent with the carrying out of its statutory functions. The rationale was the primacy of the public interest over private property rights. Therefore, a restrictive covenant which conferred a benefit on a private person is not a suitable reason for preventing an NHS trust from carrying on its statutory healthcare functions on land given over for charitable or benevolent purposes.

This rule of public policy indicates that the public interest, identified typically by reference to the statutory functions of a public body, can overrule the expressed wishes of a settlor or, in general terms, can interfere with the private property rights of a landowner.[34] In such a situation, the loss caused to the person taking the benefit of the covenant would be remediable only by statutory compensation.[35] It would only be in circumstances in which observance of the covenant would not interfere with the performance of the trust's statutory objectives that the covenant would be enforced.[36] By some it is argued that the funding of healthcare services has been advanced by the interaction of NHS trusts and the PFI and that NHS trusts have benefited from the disposal of surplus property assets: others identify a democratic deficit in such arrangements as profits are put before people.[37]

29.4 COMMENTARY ON TRUSTS USED FOR WELFARE PURPOSES

This Part 8, *Welfare Uses of Trusts*, has been concerned to consider the ways in which trusts – necessarily not public sector bodies traditionally – have come to be used for very significant forms of welfare provision. At the outset of this Part it was said that this use of the trust concept constituted a challenge to many forms of social scientific division between forms of welfare provision. The material in this Part divide into two halves: private trusts for personal welfare and public trusts for social welfare.

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32 *Brown v Heathlands Mental Health NHS Trust* [1996] 1 All ER 133, QBD.

33 (1996) 37 EG 142.

34 *Metropolitan Asylum District v Hill* (1881) 6 App Cas 193.

35 *Brown v Heathlands Mental Health National Health Service Trust* [1995] 1 All ER 133; noted at Rutherford, 1996, 260.

36 *Stourcliffe Estates Co Ltd v Bournemouth Corporation* [1910] 2 Ch 12; *Cadogan v Royal Brompton Hospital NHS Trust* [1996] 2 EGLR 115.

37 Chomsky, 1999; Monbiot, 2000.

29.4.1 Private trusts for personal welfare

First, the private trusts used for welfare purposes. It was said that trusts have of course always been used for welfare purposes: the earliest marriage settlements were concerned entirely to legislate for the management of the wealth of landed families down the generations when couples married. However, this Part has considered occupational pension funds and also co-operatives as two forms of structure based on a combination of contract and property rules which provide for the welfare of individuals as part of a group. So, in occupational pension funds there is the contract of employment which underwrites the obligations of employer and employee to contribute to the fund and the rights which each is entitled to take afterwards. It was also considered whether this constituted deferred pay for the employee or a form of proprietary right. As to co-operatives, parallels were drawn with the earliest commercial trusts and the use of a contract between the members of an association to allocate proprietary rights and personal rights to money between them. With co-operatives in particular there is a requirement that the co-operative have some benevolent purpose amongst its objects which give the membership rights to benefit *from* the good works of their association but no rights to benefit *in* the property held by the association in the manner which a trusts lawyer would understand that term.

The conceptual distinctions between these two forms of welfare structure – aside from their different statutory regulation – are the fact that the co-operative is entirely benevolent whereas the pension fund guards and garners wealth for the individual pensioner personally. The role of the private pension fund is to replace the role of state pensions, whereas co-operatives provide a potentially broader range of benefits including financial services in the form of credit unions for those too socially excluded to acquire those services on the high street.

They both constitute a form of personal welfare provision as part of a market economy. In each case the individual contributes to a mutual fund with an eye to her own personal welfare. And yet, the precise benefit which each will be able to provide will be dependent on the performance of any investment which the mutual fund makes or, even if no investments are made, dependent on the performance of markets in relation to the value of the property held by the fund as against the movement in financial markets. Importantly, while these structures are private trusts they are also founded on a form of social solidarity constituted by the contract between the membership – which is stronger in the benevolent co-operative where the members have rights *inter se* as opposed to the pension fund where there are usually only rights between employer and employee – and on the anticipated performance of the mutual fund through its size as a collective endeavour than as a purely personal investment by each individual member.

29.4.2 Public trusts for social welfare

Still operating outwith the welfare state, charities and 'public interest trusts' provide social welfare services. The NHS trusts and housing action trusts provide for healthcare and housing services respectively: thus replacing many of the services provided exclusively by the state in the wake of the 1939–45 war in the United Kingdom. As discussed above, these trusts are not 'trusts' in the sense of private express trusts discussed in Part 2 of this book because there are no trustees or beneficiaries with rights in identified property. Rather, they are dubbed 'trusts' by the legislation which created them and do impose fiduciary duties on their managers to observe the rights of those who use their services. As such, the notion of trusteeship in play is that of trust in a higher sense in relation to the provision of public welfare services such as public healthcare and social housing.

While these structures are not trusts, and therefore some might say ought not to be considered in this book at all, they are no less trusts than the charities which similarly have no trustee-beneficiary relationship as recognised in chapter 4 of this book under the 'beneficiary principle' or the principle in *Saunders v Vautier*. Charities are discussed in the books on trusts primarily because the ecclesiastical jurisdiction gave way to the Chancery jurisdiction in relation to charitable purposes and therefore the two distinct concepts acquired common features: products of their environment rather than nature, one might say. And yet it is useful to think of them as involving fiduciary responsibilities in a higher sense too. The higher sense refers to the services which are provided to the public by fiduciaries who owe their duties not on the basis of some entitlement orientated around specifically identifiable property but rather on the basis of a notion of public service. The augmented role of the charity with the withdrawal of the welfare state in many contexts has erected the twin towers of government services provided through contract with agencies like NHS trusts and also through the activities of charities.

29.4.3 Common purpose in welfare provision; categorisation differences in law

While these structures occupy legally distinct categories – due to their various histories and the different statutes giving birth to them – their roles in society are aimed in ever more similar directions. Each will be called upon to bear ever greater weight as the welfare state is withdrawn and individuals are required to rely on their own resources (through pensions or local, co-operative action) or to call on people other than the state for succour (through quasi-autonomous non-governmental agencies running health, housing and transport services, and charities). The theoretical dissection of public policy in this context is a formidable field of endeavour which cannot be addressed adequately here. What this Part 8 has sought to do is to introduce a new form of category to the greying law of trusts. That is, a category which will continue to grow in significance in the future.