THE RULES AGAINST PERPETUITY

This additional chapter discusses the final requirement to declare a valid trust. All trusts must comply with rules which seek to prevent trust property being tied up within the same trust for a lengthy period of time. These are known as the rules against perpetuity.

Note:

The rules against perpetuity are an intricate area of trusts law which have developed over the last five centuries. This chapter explains their history and detail. The rules are, however, comparatively rarely part of modern trusts law teaching at university. Before you read this chapter, you are advised to check your syllabus to ascertain if a detailed study of all (or any) of these rules is required.
As You Read

As you read this chapter, look out for the following key issues:

- The rules against perpetuity:
  (a) how there are three key rules which are relevant to trusts today;
  (b) how they can be defined; and
  (c) how they arose and the different situations in which they apply today.

- How the rules have recently been subject to reform by the Perpetuity and Accumulations Act 2009.

THE RULES AGAINST PERPETUITY

Context

Before the rules against perpetuities can be considered in detail, their context must first be examined.

To declare a trust expressly, the following four requirements must be met:

(i) rules concerning formality and the capacity of the settlor and the trustee(s);¹

(ii) the beneficiary principle;²

(iii) rules concerning the three certainties – of intention to create a trust, of the subject matter (property) of the trust and of object (who may benefit from the trust);³ and

(iv) rules against perpetuity.

¹ See Chapter 4.

² See Chapter 6.

³ See Chapter 5.
In addition, the trust must also be properly constituted if it is to be formed correctly.4

The subject ‘rules against perpetuity’ in fact refers to three separate rules which have
developed separately, from entirely different sources and for differing reasons. These three
rules are:

(i) the rule against remoteness of vesting. This refers to when a beneficiary must
have their interest in the trust property vested in them. This is arguably the
most complex of the three rules against perpetuity;

(ii) the rule against excessive accumulations. This concerns the extent to which
income generated by the trust property can be re-invested in the capital of it;
and

(iii) the rule against inalienability. This concerns the ability of the settlor to be able
to ensure that the trust property should always remain in the hands of the
same beneficiaries. This is closely related to the concept of a purpose trust
(considered in Chapter 6) and ensures that a trust should not be capable of
lasting forever.

The rules against perpetuity collectively try to prevent property from being tied up in trusts for
too long a period of time. From this point onwards they will be considered separately.

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4 See Chapter 7.
THE RULE AGAINST REMOTENESS OF VESTING –

BACKGROUND

The rule against remoteness of vesting was developed by the common law and, until the Law of Property Act 1925, was entirely untouched by statute.

To understand the rule, you must understand a little of the historical developments of trusts. As we have seen in Chapter 2, the trust was developed primarily as a device to save paying tax. By the seventeenth century, the trust had become firmly established in English law but then landowners wanted to make use of the trust for a secondary purpose. A lot of land was owned by comparatively few landowners. Those landowners wanted to keep the land within their families when they died. They did not want what they saw as ‘their’ land to be available on the open market. Trusts began to be used as a device to achieve this wish. A landowner might, say, declare a trust in which his land was to be held on trust for his son and then on trust for his son and so on, thus keeping the property within the same family.

If a trust was to be so used, that would mean that every son who benefitted from the land could only use it for his lifetime and then, whether he liked it or not, the land would pass to his own son. Such an approach did indeed ensure that land was kept within the same family but also meant that each beneficial owner had restrictions placed upon their ownership of the land – namely, they could use it only for their lifetime and not sell it. There is a certain irony in a settlor using the freedom of equity to set up a trust which had the effect of curtailing each successive owner’s own freedom of use and sale of the land.

There was also perceived to be a wider problem with using a trust to keep land within the same family. The trust could be used as a means of undermining the market economy as the land would never be available to be bought and sold freely. Clearly, if all land in the country
could be tied up in this way, the logical conclusion to such an approach would be that little (if any) land would be available in the future to be bought and sold. Using the trust in this manner could, therefore, have had adverse economic consequences, albeit these have never been definitively proven.

By the seventeenth and eighteenth centuries, case law had therefore developed the rule against remoteness of vesting. The rule seeks to prohibit trusts being used to tie up any type of property within families for long periods of time. The rule comes from Lord Nottingham LC’s decision in *The Duke of Norfolk’s Case.*

The facts concerned a trust declared by Henry Frederick Howard, Earl of Arundel, in 1647, of the Grostock and the Burgh baronies (these are the lands owned by a Baron). He declared a trust of these baronies which purported to last for 200 years. After declaring a life interest for both himself and his wife, the remainder interest was to be held for his sons. Henry Frederick had three sons: his eldest Thomas, the second eldest, Henry and the youngest, Charles. The trust provided that the property should pass to Thomas and any male heirs he had. If, however, Thomas did not have any male heirs, effectively the trust was to be split: the Earl of Arundel title and its lands would go to Henry and his sons, but the Grostock barony would go to Charles and his male heirs.

The trust had been established because Thomas may have been insane and Henry Frederick Howard wanted to stop Thomas from inheriting the lands and then disposing of them. The trust was the device which would be able to achieve this since, as it was set up, it simply gave each of the sons a life interest in the lands.

Henry Frederick Howard died in 1652. Thomas then succeeded to the Earldom but he died, without issue (descendants), in 1677. Shortly before Thomas’ death, Henry had ensured that

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5 *The Duke of Norfolk’s Case* (1681–1698) 3 Chan Cas 2; 22 ER 931.
further documentation had been executed which supported his claim to the Grostock barony.

On Thomas’ death, Henry became the next Earl, but Charles brought the action in the Court of Chancery, seeking to enforce the original trust declared by his father, Henry Frederick Howard.

The first instance decision in the Court of Chancery was that Henry was entitled to the whole of the Grostock barony but Lord Nottingham’s decision was that the part of the trust in Charles’ favour was valid. It was Lord Nottingham’s views that were later affirmed by the House of Lords.

The case is known, however, for Lord Nottingham’s views on the doctrine of perpetuities.

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**Did you know?**

(i) *The Duke of Norfolk’s Case* is not only known for Lord Nottingham’s famous views on perpetuities in the law of trusts but is one of the very few cases from that era that is actually reported in full. Most reports of cases in the seventeenth century and beforehand are little more than notes of the case taken by a barrister in court.

(ii) The case is not without its own scandal. It seems that second son Henry went with his brother Thomas to Padua, Italy, where he left him ‘kept in cruel slavery’.6 This occurred shortly after Thomas succeeded to the Earldom. Thomas later died in Padua, nearly 25 years after arriving there.

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Lord Nottingham recognised that trusts which infringed perpetuities were void:

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If it tends to a perpetuity there needs no more to be said, for the law has so long laboured against perpetuities, that it is an undeniable reason against any settlement, if it can be found to tend to a perpetuity.  

He went on to explain what a perpetuity is and set out the reason for the law being against perpetuities:

A perpetuity is the settlement of an estate … with such remainders expectant upon it, as are in no sort in the power of the tenant in tail in possession, to dock by any recovery or assignment, but such remainders must continue as perpetual clogs upon the estate; such do fight against God, for they pretend to such a stability in human affairs as the nature of them admits not of, and they are against the reason and the policy of the law, and therefore not to be endured.

In essence, Lord Nottingham was making the following points:

- a perpetuity was the creation of a device by which property was to be left to a series of people, as an inheritance, under which none of them would be able to stop their successor inheriting the property after them;
- by its very nature, such a device prevented each owner of the property from dealing freely with it;
- such lack of freedom to deal with the property amounted to a ‘perpetual’ clog upon the property; and
- this inability of each successive owner to deal with the property meant that such devices could not be permitted as they were a restriction on a property owner’s ability

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7 The Duke of Norfolk's Case (1681–1698) 3 Chan Cas 2 at 31.

8 Ibid.
to deal with their own property whilst they masqueraded as bringing stability in families.

On the other hand, Lord Nottingham said that certain devices were permitted:

future interests … remainder that are to emerge and arise upon contingencies, are quite out of the rules and reasons of perpetuities … especially, if they be not of remote or long consideration: but such as by a natural and easy interpretation will speedily wear out, and so things come to their right channel again.⁹

This meant that a settlor could create a trust which imposed a contingency – or condition – that a beneficiary had to meet before he would become entitled to enjoy the trust property. Such a contingent interest was permitted provided that the contingency would not arise in too long a period of time and therefore be seen to be a perpetual clog on the trust property. That begs the question: What is too long a period of time?

Lord Nottingham’s view was:

But what time? And where are the bounds of that contingency? You may limit, it seems upon a contingency to happen in a life; what if it be limited if such a one die without issue within 21 years or 100 years, or while Westminster Hall stands? Where will you stop if you do not stop here? I will tell you where I will stop; I will stop wherever any visible inconvenience doth appear… . ¹⁰

The difficulty is, of course, that Lord Nottingham did not set out any definitive time period that the contingency must be fulfilled within, in order for the trust to be valid.

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⁹ Ibid.

¹⁰ Ibid at 49.
Summary of Lord Nottingham’s views

The rule against remoteness of vesting, as set out by Lord Nottingham, was that trust property had to vest in the beneficiary within a certain period of time of the trust being created by the settlor. If the trust property did not vest in the beneficiary, the trust would be perpetual and thus void. If the settlor imposed a contingency that a beneficiary had to fulfil before the trust property vested in him, that contingency also had to be met before ‘any visible inconvenience’ appeared due to the contingency being present in the trust.

By the nineteenth century at the latest, the courts had set out a time limit by which any contingency had to be met. The focus was on 21 years, which at the time was the age of majority. The decision in Taylor v Biddal had held that a period of 21 years should be the appropriate long-stop time period in which the beneficial interest had to vest. The theory was that there might be a child who had just been born who would have to wait until the age of his majority before he could enjoy his inheritance. The 21-year time period now runs from the death of the life in being chosen by the settlor in the trust instrument.

MODERN DEFINITION OF THE COMMON LAW RULE AGAINST REMOTENESS OF VESTING

A modern definition of the rule against remoteness of vesting was given by Sir Denys Buckley in the leading judgment of the Court of Appeal in Re Drummond:

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11 And possibly as early as the 1677 case of Taylor v Biddal (1677) 2 Mod 289.

12 As confirmed by the House of Lords in Cadell v Palmer (1833) 1 Cl & F 372; 6 ER 956.

13 Taylor v Biddal (1677) 2 Mod 289.

14 See p. 13 of this additional chapter.

15 Re Drummond [1988] 1 WLR 234.
every limitation of property … must, to be valid, be such that the estate or interest so limited must vest, if at all, within a life or lives in being at the date of its creation and 21 years thereafter.\textsuperscript{16}

What this shows is:

- The rule against remoteness of vesting applies to the \textit{vesting} of the interest in a beneficiary. It does not, therefore, seek to state that a trust must only last for a certain particular period of time. Rather, it controls the extent of time the trust should last for by ensuring that the property must vest in the beneficiary by a particular point.

- The rule only controls contingent interests. Those are conditions which the settlor has said that the beneficiary must meet before the trust property may vest in them. Only when the contingency has been fulfilled can the trust property vest in the beneficiary.

- The long-stop date for the trust property to vest in the beneficiary is 21 years from the death of the life in being chosen by the settlor. At the end of that 21-year period, the trust property must have vested in the beneficiary, otherwise the beneficiary will not be able to enjoy the trust property at all. This is known as the ‘perpetuity period’. If the contingency does not occur in the perpetuity period, the trust property will be held on a resulting trust for the settlor’s estate.

**The common law’s first requirement: it must be absolutely certain that the property will vest in the perpetuity period**

It must be absolutely clear that the interest will vest within the perpetuity period. Where there is the merest hint or possibility that the interest may not vest within this time period, the common law’s attitude was that the interest would be void.

\textsuperscript{16} Ibid at 237 (emphasis added).
This principle was illustrated in the facts and decision of *Re Dawson*.\(^{17}\)

Major Dawson declared a trust in his will in which he left part of his property on trust for his daughter, Mary Johnston, for life, with remainder to Mary’s children who attained 21 years of age. If any of Mary’s sons had died, then on the death of a particular son, his children would take his share.

When Major Dawson died, Mary was just over 60 years old. She had one son and five daughters, all of whom had reached 21 years of age. She also had a number of grandchildren. Mary brought the action, claiming that the trust declared by Major Dawson was void for perpetuity. She wanted the absolute interest in the property for herself only.

The beneficiaries of the trust were made up of one class – relatives of Major Dawson – but it was a class of two generations: Mary’s children and Mary’s grandchildren. The difficulty was this. For the trust to be valid, it had to be shown that every member of the class would meet the contingency before the end of the time period of the death of a ‘life in being’ plus 21 years. Major Dawson was the life in being. That meant that each contingency had to occur within 21 years of his death.

Chitty J held that the trust in favour of those in the first generation was valid: each of her own children would be able to reach 21 by 21 years from the death of Major Dawson. Indeed, since they were all already alive, they had to be able to fulfil that contingency. The problem concerned the second generation in the class, the grandchildren.

The trust in favour of that second generation was void. It was possible that Mary might have another son after Major Dawson’s death. Such a son would not be able to attain 21 years of age within 21 years of Major Dawson’s death. In turn, that son might himself have had a child. The whole class (of children and grandchildren) could not fulfil the contingency within the perpetuity period of 21 years from Major Dawson’s death, so the entire trust was void.

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\(^{17}\) *Re Dawson* (1888) LR 39 ChD 155.
Of course, it may be argued that it is extremely unlikely that Mary Johnston, being 60 years old, would have given birth at that point in her life. That point was argued in front of Chitty J, but he did not feel he could accept the argument. He considered himself bound by the earlier decision in *Jee v Audley*\(^\text{18}\) that such evidence was not admissible. Lord Kenyon had decided in *Jee* that evidence as to whether a 70-year-old woman could have further children was inadmissible. That case seems to have been decided largely on practicalities: if such evidence was admitted as to whether an elderly woman could have children, similar medical evidence would have to be admitted in other cases where impossibility of childbirth was alleged. Such an approach would take up an unreasonable amount of court time.

### Analysing the Law

*Re Dawson* is, in some respects, a strange decision which seems to fly in the face of biological understanding of the human body. With advances of medical science, it is nowadays possible that women can have children comparatively late on in life, but this certainly would not have been possible in the nineteenth century. The decision illustrates the harshness and inflexibility of the rule against perpetuities. It had to be absolutely certain that each interest would vest within the perpetuity period. If there was even the merest hint of a chance that each beneficiary would not fulfil the contingency drafted within the perpetuity period, the trust would be declared void.

The decision in *Re Dawson* was effectively overturned by the enactment of section 2 of the Perpetuity & Accumulations Act 1964. Section 2(1)(a) provides that it is presumed that a woman can only have a child between the ages of 12 and 55. In addition, section 2(1)(b) provides that in the case of living persons, specific evidence can be led showing that he or

\(^{18}\)*Jee v Audley* (1787) 1 Cox Eq Cas 324; 29 ER 1186.
she will or will not be able to have a child at a particular time. If *Re Dawson* were decided now, the presumption would be that Mary would not be able to give birth to a child at her age. As all of her children had reached the contingency age within the perpetuity period, the trust would have been valid.

**The common law’s second requirement: a ‘life in being’ …**

The perpetuity period is 21 years after the death of the final life in being.\(^{19}\) It is by this time that the interests under the trust must vest in the beneficiary.

A ‘life in being’ is a person who is alive when the trust is declared. For a trust declared by the settlor in his lifetime (inter vivos) then the life in being is someone alive at that date. For a trust declared by the settlor in his will, a life in being is a person alive at the date the will applies (i.e. the date of death). A person who is not yet born, but who has been conceived, also qualifies as a life in being.

It may, therefore, be considered usual for the settlor to specify a particular person as constituting the life in being when they declare their trust. The settlor may, for example, nominate themselves as the life in being. There is no requirement that the life in being must be the settlor or anyone else directly connected to the trust.

There is a relationship here between the rule against perpetuity and the requirement of certainty. It must be possible to be said with certainty when the person chosen to be the life in being died so that it is possible to ascertain when the time period for the vesting of the trust property runs out.

*Re Moore*\(^{20}\) illustrates this principle. In this case, Martha Moore purported to create a trust of money in her will, instructing the trustees to use the income raised from the money to keep her brother’s grave in Zambesi, Africa, in good repair. This was to happen:

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\(^{19}\) *Cadell v Palmer* (1833) 1 Cl & F 372; 6 ER 956.
for the longest period allowed by law, that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death.

The issue for the High Court was whether the gift was void for breaching the rule against perpetuity.

Joyce J found it unnecessary to decide that point but, in perhaps one of the shortest judgments in the last century, held the trust to be void for uncertainty. As he said, ‘[i]t is impossible to ascertain when the last life will be extinguished, and it is, therefore, impossible to say when the period of twenty-one years will commence’.21

Provided, however, it is possible to say when the person chosen to be the life in being died, so that one can establish when the perpetuity period ends, the rule against perpetuity will not be breached.

For this reason, often settlors will choose a well-known person to be their life in being in the trust instrument, so that it can easily be ascertained when that person died. In the past, settlors have often based their perpetuity period on members of the English royal family. Such clauses drafted in trust documents are known as ‘royal lives clauses’. Often, however, basing the perpetuity period on the death of a member of the royal family will not make it easy to ascertain when the perpetuity period ends.

20 Re Moore [1901] 1 Ch 936.

21 Ibid at 938.
Applying the Law

A perpetuity period based on royal lives was recognised as valid in *Re Villar*\(^2\) where the period was expressed to be:

the period ending at the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of Her Late Majesty Queen Victoria who shall be living at the time of my death.

In attempting to find out when this perpetuity period expired, one would have to consider all of those relatives descended from Queen Victoria who were alive on the day of the testator’s death and then ascertain which of them was the last to die. The 20-year period in the clause would then start from that date.

The evidence given to the Court of Appeal in the case was that, as at the date of the testator’s death, there were approximately 120–130 such descendants of Queen Victoria who were still alive. To ascertain if the trust was valid, the trustees would need to work out if the gift vested in the beneficiaries within the time period of 20 years following the death of the final one of that large number of descendants to die.

The Court of Appeal held that the perpetuity clause was valid because all 120–130 descendants could be ascertained. Some of those descendants lived in Europe and were hard to trace, but this was no reason for ruling that the perpetuity period was invalid. It might well have taken the trustees a considerable period of time to work out when the perpetuity period ended, as it might be difficult to trace all of the relatives in future and work out which one of them was the last to die. But these potential difficulties could not be taken into account by the Court as, in they were not, in Lord Hanworth MR’s phrase, ‘insurmountable’.\(^2\)

As can be seen, the common law rule against remoteness of vesting had more to do with certainty of the trust being created than with sympathy for the trustees over how they were to administer the trust.
Sometimes the settlor will not expressly choose a life in being when declaring a trust. In such situations, regard must be had to what may be implied from the trust to ascertain the relevant life in being.
Explaining the Law

Scott declares an *inter vivos* trust of £10,000 to his first grandchild to attain 21 years of age. Scott dies the following day.

The rule against remoteness of vesting clearly applies as this is a contingent gift: the grandchild can only have access to the money if they reach 21.

From when does the perpetuity period commence? Scott has not expressly stated a life in being. Consequently, one must look to see which lives are implied into the perpetuity period.

The lives implied into the perpetuity period are Scott’s, his children and his grandchildren. The first grandchild to reach 21 is entitled to the money. Note that, although Scott’s children are not expressly mentioned in the trust, they are by implication since they are obviously the parents of Scott’s grandchildren.

In this example, the trust would be void at common law as it would infringe the rule against remoteness of vesting. This is because the gift *may* not vest within 21 years of the death of Scott’s youngest grandchild.

To understand this, consider the following hypothetical facts. Suppose nine months after declaring the trust, Scott’s wife gives birth to another child, Thomas. Thomas may then have a child (Ulrika), who would be one of Scott’s grandchildren. Assume that every one of Scott’s children and other grandchildren then die. Ulrika may reach the age of 21 more than 21 years after the death of Scott, all his children and every other one of his grandchildren.

The facts involving Scott, Thomas and Ulrika are perhaps unlikely to happen in fact. But the common law does not care about the likelihood of these facts occurring. All the common law is concerned about is the slightest chance of this remote possibility occurring. As long as there is the slightest chance of these facts occurring, that will be enough to ensure that the rule against perpetuity is infringed and the trust void.
If no life in being is selected expressly by the settlor or can be implied, then the perpetuity period is simply 21 years, according to Re Hooper. In this case, Harry Hooper left £1,000 on trust to be invested so that the income from it could be used for the upkeep of graves and monuments of certain members of his family. The perpetuity period was set out to be ‘to the intent that so far as they [the trustees] can legally do so’. Maugham J held that the perpetuity period was the maximum duration of time for which the trust could be valid at common law, which was 21 years from Mr Hooper’s death. The trust took effect upon Mr Hooper’s death and the gift had to vest within 21 years from that date.

**STATUTORY REFORM OF THE RULE AGAINST REMOTENESS OF VESTING**

As has been shown, the rule against remoteness of vesting at common law has difficulties:

- It was not always easy to ascertain when the perpetuity period set out in each trust instrument would, in fact, come to an end, especially if the perpetuity period was referenced to lives of the English royal family; and

- It had to be absolutely certain that the property would vest within the perpetuity period otherwise the trust would be void. Even if there was the merest theoretical possibility that the property would not vest within the perpetuity period, the trust would be declared void. Theoretical possibilities were therefore allowed to override reality, as in Re Dawson.

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24 Re Hooper [1932] 1 Ch 38.

25 Re Dawson (1888) LR 39 ChD 155.
It was with the intention of trying to resolve these difficulties that Parliament intervened on two occasions – first with the Perpetuities and Accumulations Act 1964 (‘the 1964 Act’) and more recently with the Perpetuities and Accumulations Act 2009 (‘the 2009 Act’).

**A fixed perpetuity period**

Section 1 of the 1964 Act introduced a fixed perpetuity period for the first time. Under section 1(1) a settlor could choose a fixed number of years as the duration of their perpetuity period, up to a maximum of 80 years. In practice, the ability to define a perpetuity period of up to 80 years from the date of the effect of the trust instrument was widely used and clauses setting out perpetuity periods became easier to draft. There were two limits on this fixed perpetuity period:

(i) There was no compulsion on a settlor to use a fixed time limit of up to 80 years. That meant a settlor could alternatively still make use of the common law period of a life in being plus 21 years. And, as has been seen, the life in being needs to have no connection with the settlor, as the development of perpetuity periods with reference to the English royal family show. Some settlors still made use of the common law period for defining when their gifts had to vest, thus making section 1 redundant; and

(ii) As Acts of Parliament generally do not have retrospective effect, the ability to choose a fixed perpetuity period of up to 80 years applied only to new trusts created from the commencement of the Act, which was 16 July 1964. Trusts taking effect before this date, of which there remain many still in operation, must adhere to the common law rule concerning the perpetuity period.

Section 5 of the 2009 Act has made additional changes to the fixed perpetuity period:

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26 Perpetuity and Accumulations Act 1964, s 15(5).
The perpetuity period is 125 years (and no other period); and

Subsection (1) applies whether or not the trust instrument specifies a perpetuity period; and a specification of a perpetuity period in that instrument is ineffective.

These two sub-sections mean that for trusts coming into effect from 6 April 2010 onwards, it is now compulsory for the perpetuity period to be a fixed period of time of 125 years. Unlike the 1964 Act, no other number of years may be chosen. Under section 5(2), the trust document need not specifically set out a perpetuity period at all, as section 5(1) will apply regardless. Any other perpetuity period set out in the trust document will be disregarded.

The 2009 Act came about following a Report by the Law Commission27 into the law against perpetuities and excessive accumulations. The Law Commission believed that it was wrong that a settlor could expressly choose a life in being with no connection either to himself or the trust simply to give the longest possible time for the gift to vest in the beneficiaries. It was also felt that the law should be simplified. The fixed period of 125 years was thought to be a long enough date by which the property in the majority of trusts would be vested in a beneficiary.

Section 6 of the 2009 Act confirms that the perpetuity period commences when the trust instrument takes effect. If it is a trust declared in the settlor’s lifetime, the time period runs from the date the document is dated. If it is a trust in the settlor’s will, the perpetuity period will commence from the date of the settlor’s death as that is when the will takes effect.28 As with the 1964 Act, the 2009 Act is not retrospective. Under section 15, the 125-year perpetuity period will only apply for trust instruments entered into on or after 6 April 2010.

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28 Provided that the will was executed on or after 6 April 2010. If the will was executed before 6 April 2010, the new 125-year fixed perpetuity period does not apply and the common law or 1964 Act perpetuity periods may instead be chosen to apply (s 15(1)(a)).
‘Wait and see’

The common law adopted the position that if there was any remote possibility of an event occurring which would mean that the gift would not vest within the perpetuity period, the trust would be void for breaching the rule against perpetuities.

The 1964 Act adopted a more realistic position. Section 3(1) adopted what became known as the ‘wait and see’ provision. This provided that if the trust would otherwise be void because it might have infringed the rule against remoteness of the interest vesting, the trust would continue in full effect until it was clear that the interest would actually vest after the perpetuity period had ended. Only if it became absolutely clear that the interest would vest after the perpetuity period had expired would the rule against remoteness of vesting be infringed and the trust seen to be void.

The effect of section 3 of the 1964 Act was, therefore, to turn the common law on its head. No longer were trusts to be declared void simply because they might potentially infringe the rule against remoteness of vesting. Instead, a contrary presumption would apply: the trust would be valid unless it was proven that the interest definitely would vest in the beneficiary after the perpetuity period had expired. This new approach brought a great deal of common sense with it. It brought a sense of reality to trusts in place of the common law’s focus on vague possibilities.

This begs the question as to the length of time that the principle of ‘wait and see’ was to last in relation to each trust instrument. This depended on whether a settlor had made use of the fixed perpetuity period of up to 80 years:

(i) if the settlor had declared a fixed perpetuity period of up to 80 years in their trust, then the time of waiting and seeing whether the contingency occurred –

29 The ‘wait and see’ principle is preserved by the Perpetuities and Accumulations Act 2009, s 7.
and, therefore, whether the interest did actually vest in the beneficiary during the fixed time set out in the trust – was during that time period.

### Explaining the Law

Suppose the facts are broadly the same as in the earlier example:

Suppose Scott declares an *inter vivos* trust of £10,000 to his first grandchild to attain 21 years of age, but this time includes a fixed perpetuity period of the maximum time allowed (80 years) under the 1964 Act. Scott dies the following day. Nine months after declaring the trust, Scott’s wife gives birth to another child, Thomas. Thomas then has a child (Ulrika), who is one of Scott’s grandchildren. Every one of Scott’s children and other grandchildren then die. Ulrika does reach the age of 21 more than 21 years after the death of Scott, all his children and every other one of his grandchildren.

Under the 1964 Act, it would not now be the case that the trust would be declared void automatically at the start of the trust. Instead, the law would wait and see whether Ulrika attains 21 within the fixed perpetuity period of 80 years. In fact she does, with plenty of time to spare. This trust would therefore be valid under the 1964 Act.

(ii) If the settlor did not make use of a fixed perpetuity period under the Act, then the position as to how long the law should wait and see whether the trust was valid was a little more complicated. The Act based this perpetuity period on the common law’s concepts of lives in being. Section 3(4) of the 1964 Act provides that the wait and see period should be 21 years after the death of any person who is ‘in being and ascertainable’ at the time the perpetuity period becomes effective and who is listed in section 3(5).
Section 3(5) created a statutory list of ‘lives in being’. It includes the settlor, any member of a class if the trust is in favour of a class of beneficiaries and an individual beneficiary who has to meet the contingency before their interest will vest. If, however, there are numerous examples of a particular type of person under section 3(5), they will be disregarded from the list of relevant lives in being if it is ‘impracticable to ascertain the date of death of the survivor’.  

The statutory list of lives in being tries to create the longest possible duration of time that can be used for the ‘wait and see’ period.

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**Explaining the Law**

Again, assume the facts are broadly the same as in the first example:

Suppose Scott declares an *inter vivos* trust of £10,000 to his first grandchild to attain 21 years of age. Scott dies the following day. No fixed perpetuity period is set out in the trust. Nine months after declaring the trust, Scott's wife gives birth to another child, Thomas. Thomas then has a child (Ulrika), who is one of Scott’s grandchildren. Every one of Scott’s children and other grandchildren then die. Ulrika does reach the age of 21 more than 21 years after the death of Scott, all his children and every other one of his grandchildren.

The statutory lives in being under section 3(5) can be Scott and Ulrika. The trust in her favour will be valid under the 1964 Act because she can be the relevant life in being for the perpetuity period and, of course, provided she lives to be 21 years old, she will have reached that age before 21 years of her own death.

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30 Perpetuities and Accumulations Act 1964 s 3(4)(a).
The statutory lives in being are not necessarily the same as the common law lives in being. The settlor can choose any life in being at common law hence the use of royal lives clauses. Yet such royal lives are not mentioned in section 3(5). Where lives chosen by the settlor are not listed under section 3(5), section 3(4)(b) provides that the perpetuity period shall be a simple 21 years.

Section 7 of the 2009 Act preserves the ‘wait and see’ principle, albeit with arguably a clearer and more contemporary form of drafting:

(1) Subsection (2) applies if (apart from this section and section 8) an estate or interest would be void on the ground that it might not become vested until too remote a time.

(2) In such a case –

(a) until such time (if any) as it becomes established that the vesting must occur (if at all) after the end of the perpetuity period, the estate or interest must be treated as if it were not subject to the rule against perpetuities, and

(b) if it becomes so established, that does not affect the validity of anything previously done (whether by way of advancement, application of intermediate income or otherwise) in relation to the estate or interest.

Section 7 applies if it appears that the beneficiary’s interest will vest after the perpetuity period has expired. In such a case, the legal fiction (introduced in section 3 of the 1964 Act) continues in section 7(2)(a) which provides that it will be assumed that the trust is not subject to the rule against remoteness of vesting at all. The rule is, therefore, suspended from operation over the trust on a temporary basis. Only when it becomes entirely clear that the
beneficial interest must vest after the perpetuity period has come to an end will the rule against remoteness apply and declare the trust void.

If, during this period of time when the rule against remoteness is suspended under section 7(2)(a), the trustees act upon the terms of the trust by, for example, advancing capital to a beneficiary, then section 7(2)(b) provides protection to the trustees. Their acts will continue to be valid, even though the trust is subsequently void as infringing the rule against remoteness.

The significance of section 7 of the 2009 Act is this. By the Act providing that only one fixed perpetuity period of 125 years can apply to trusts created on or after 6 April 2010, the ‘wait and see’ period in section 7 can only refer to that 125-year period. Trustees must only have regard to that fixed period of time when they are to wait and see whether the gift will vest in the beneficiary. For trusts created on or after 6 April 2010, the 2009 Act introduced a much simpler ‘wait and see’ period than that created by the 1964 Act. Gone are the statutory lives in being from new trusts for the simple reason that all trusts created now must have the fixed 125-year perpetuity period.

Whilst this reform is to be welcomed, knowledge of the pre-2010 law is still essential. How the ‘wait and see’ principle applies to trusts created over the years is summarised in the table set out in Figure A1 below.

**Figure A1: Summary of how ‘wait and see’ principles apply to trusts created over time**

<p>| Trusts created pre-16 July 1964 | No ‘wait and see’. The trust stands or falls on common law principles as to whether the gift vests in the perpetuity period. If there is the slightest chance the gift will not vest in the |</p>
<table>
<thead>
<tr>
<th>Trusts created <em>inter vivos</em> between 16 July 1964 and 5 April 2010 (and those in all wills created between 16 July 1964 and 6 April 2010)</th>
<th>The 1964 Act’s ‘wait and see’ principle applies.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trusts created or or after 6 April 2010</td>
<td>125-year fixed perpetuity period applies. ‘Wait and see’ applies only to that time period.</td>
</tr>
</tbody>
</table>

### CLASS GIFTS

Class gifts are subject to additional requirements in terms of perpetuity. A class gift occurs when a settlor leaves property to be divided between members of a particular group of people. It was defined by Lord Selborne LC in *Pearks v Moseley*[^31] as property which is left to:

\[
\text{all those who shall come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares.} \quad 32
\]

The issue is whether the gift vests in each of its recipients within the perpetuity period.

The common law took a similarly harsh line to class gifts as it did to trusts benefitting an individual. The original view of the common law was that everyone who was to benefit from the trust had to benefit within the perpetuity period. If, once again, there was even the slightest possibility that one person may not benefit during the perpetuity period, the trust would be void.

[^31]: *Pearks v Moseley* (1880) 5 App Cas 714.
[^32]: Ibid at 723.
would be declared void as infringing the rules against perpetuity. As Lord Selbourne LC said in *Pearks v Moseley*, ‘the vice of remoteness affects the class as a whole ...’.

**Explaining the Law**

Suppose Scott this time wishes to benefit a class of people. He declares an *inter vivos* trust of £10,000 to be divided between any of his grandchildren who attain 21 years of age. Scott dies the following day. No fixed perpetuity period is set out in the trust. Nine months after declaring the trust, Scott’s wife gives birth to another child, Thomas. Thomas has a child (Ulrika), who is one of Scott’s grandchildren. Ulrika does reach the age of 21 more than 21 years after the death of Scott, all his children and every other one of his grandchildren.

Scott is the life in being in the trust. Since Ulrika has turned 21 years old more than 21 years after Scott’s death, she cannot benefit from the trust as she has not reached the contingency within the perpetuity period.

Yet the common law’s original view was that the trust as a whole would be void as infringing the rule against remoteness. The trust could not be partly sound and partly bad. It had to be entirely sound or entirely bad. As one beneficiary was not able to fulfil the contingency within the perpetuity period, the trust must be fail in its entirety.

Fortunately, the common law was able to ameliorate this rather harsh result of declaring a trust completely invalid. The ability to ameliorate this part of the common law is known as the rule in *Andrews v Partington*. This rule developed arguably as a method of assisting

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33 Ibid.

34 *Andrews v Partington* (1791) 3 Bro CC 401; 29 ER 610.
trustees in distributing the beneficial interests under a trust, as opposed strictly to being concerned with perpetuities.

In the case, Robert Andrews made a will leaving £3,000 to his daughter, Diana. There was a contingency attached to the gift: she had to marry before she was entitled to the money. If she did not marry, the will provided that the majority of the money was to be divided equally between the children of Robert’s son, also called Robert, who attained 21 years of age (or who, if Robert Jr’s daughters, married under that age).

Diana never married. Robert Jr had 12 living children. His eldest child, Elizabeth, brought an action claiming her share of the money. When she brought her action, half of Robert’s children had attained 21 but half were under that age, with the youngest only 12 years old.

The problem that Elizabeth faced was that it was possible that her father might have had more children who might fall within the class defined in her grandfather’s will. The difficulty would be splitting the gift between the present class without taking those potential future grandchildren into account.

Nonetheless, the Lord Chancellor held that the gift had to be divided between those children who were alive at the time the eldest child attained 21.

The case is authority for the principle of ‘class closing’. At common law, the class to which the gift is made will close when the first member of the class fulfils the contingency. So when Elizabeth reached 21 years old, the class of grandchildren who could benefit from Robert’s gift closed. It closed to all those who fell within the class who were alive at that moment in time. If Robert had any further grandchildren, they would not be entitled to benefit from a share in the gift.

As should be apparent, the class closing rule from Andrews v Partington is a rule of great convenience when compared to the prior common law rule of the gift had to be good in its entirety. The ratio of the case brought some pragmatism to this area of law.
This practical decision had wider application. It impacted on the rule as to remoteness by providing that as soon as the first beneficiary fulfilled the contingency, the class closed. This prevented any later-born grandchildren from benefitting from the gift in the case itself and also, incidentally, assisted the whole gift in complying with the rule against remoteness.

**Class gifts and statutory reforms**

The 1964 Act sought to address the issue of class gifts. It may assist class gifts being valid through one of three mechanisms:

(i) the ‘wait and see’ doctrine;

(ii) reducing a contingency age; or

(iii) the severance doctrine.

**Wait and see**

The ‘wait and see’ provisions already considered apply just as much to class gifts as to individual gifts.
(ii) Reducing the age of a contingency

Reducing the age of a contingency was another new development in the 1964 Act.
Section 4(1) provides that for trusts under which a beneficiary must fulfil a contingency which requires meeting an age exceeding 21 years old, then the age is to be reduced to an age which will prevent the trust from infringing the rule against remoteness.

### Explaining the Law

Suppose Scott still wishes to benefit a class of people. He declares an *inter vivos* trust of £10,000 to be divided between any of his grandchildren who attain 25 years of age. Scott dies the following day. No fixed perpetuity period is set out in the trust. Nine months after declaring the trust, Scott’s wife gives birth to another child, Thomas. Thomas has a child (Ulrika), who is one of Scott’s grandchildren, along with Vikas and Wendy. Thomas, Vikas and Wendy then all die the following year. Ulrika is 22 years old after the end of the perpetuity period (i.e. 21 years after the death of the last to die of Thomas, Vikas and Wendy).

First, the trustees would wait and see if Ulrika reaches 25 during the lifetime plus 21 years of the last life in being alive at the date Scott declared the trust to die. Ulrika has, in fact, not reached 25 within this time period. Section 4(1) would then apply to save the trust by reducing the contingency age that Ulrika must reach to 22 by the time the perpetuity period expired. The trust would therefore be valid for Ulrika.

### (iii) The severance doctrine

Section 4 of the 1964 Act abolishes the common law concept that a gift had to be entirely sound or entirely bad. Sections 4(3) and 4(4) operate to remove people who might qualify to be members of the class.

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35 As set out in *Pearks v Moseley* (1880) 5 App Cas 714.
Section 4(3) applies to anyone who might be a member of the class or, alternatively, future living children who, when born, might themselves become members of the class. If either of these two categories of people prevent the age reduction provisions in section 4(1) from operating to save the overall class gift from vesting within the perpetuity period, the age reducing provisions will take precedence by excluding anyone from benefitting who might be a future member of the class gift. In effect, therefore, the legislation prioritises the reduction of age to a beneficiary such as Ulrika in the above example at the expense of anyone in the future who might become a member of the class. Those latter people are simply excluded from benefitting.

Section 4(4) provides that if it becomes clear during the ‘wait and see’ period that not all potential beneficiaries of the class gift can actually benefit from it during the perpetuity period, they will be excluded from the class entirely. This provision has been replicated in section 8 of the 2009 Act.

The effect of section 8 is to remove those people from the class if including them would render the trust void as infringing the rule against remoteness of vesting. The section thus further bolsters the ability to save gifts which might otherwise be void.

Statutory reforms of the rules as to remoteness of vesting have shown that the law has moved a long way from the original common law theoretical possibilities of gifts not vesting within 21 years from the last life in being to die. Nowadays the emphasis is on saving gifts as opposed to seeking out highly unlikely possibilities to illustrate that gifts may not vest during the perpetuity period.

**THE RULE AGAINST EXCESSIVE ACCUMULATIONS**

The rule against remoteness of vesting concerned when the beneficiary would eventually enjoy their entitlement to the absolute interest in the trust property. As has been shown, that rule was a rather crude device used originally to prevent trust property from being tied up in
a family’s hands by ensuring that the trust property had to go to the beneficiary, sooner rather than later, so that the beneficiary might use the property not only for their personal benefit but also for the benefit of the wider economy.

The rule against excessive accumulations always had a different concern. It tries to deal with an aspect of the management of the trust property. One of a trustee’s duties is to manage the trust property in the best manner they are able to do, providing the best return on that property for the beneficiaries. The trustee will often, therefore, seek to invest the property to produce a return. Under section 3(1) of the Trustee Act 2000, the trustee may make any type of investment that an absolute owner of the property could. The trustee may then ‘roll up’ the return on that investment into the capital amount of the trust property. That is accumulating the income.

**Key Learning Point**

The rule against excessive accumulations seeks to prevent the money raised on investments from being re-invested in the capital of the trust property for a substantially long period of time.

The danger with accumulating the income made from investments into the capital of the trust fund is that, potentially, those beneficiaries entitled to the income from the trust are deprived of their full entitlement. Those entitled to the capital have something of a bonus, as the capital sum is increased by the accumulation of the investment returns.
Explaining the Law

Suppose Scott declares a trust of £1 million in favour of Thomas for life, remainder to Ulrika. As life tenant, Thomas will enjoy the income from the £1 million. As remainderman, Ulrika will enjoy the actual capital sum of £1 million after Thomas’ death.

The trustees decide to invest the entire sum of £1 million in an investment scheme that produces a high rate of return on the money. Suppose that the £1 million produces £50,000 per year in interest. The trustees wish to accumulate that income. This means that the interest earned is added to the £1 million. Each year, the amount capable of being invested grows by £50,000.

The danger with accumulating the income is that Thomas will never be able to enjoy his income as the money has all been added to the capital sum and re-invested. Of course, this is a benefit for Ulrika, but it is at Thomas’ expense. The rule against excessive accumulations seeks to control the trustees’ ability to re-invest income into the capital sum for a long period of time.

Harman LJ defined accumulation and the explained the danger with it in *Re Berkeley (Earl of), Dec’d.*[^36]

> [a]ccumulation to my mind involves the addition of income to capital, thus increasing the estate in favour of those entitled to capital and against the interests of those entitled to income.[^37]

[^36]: *Re Berkeley (Earl of), Dec’d* [1968] Ch 744.

[^37]: Ibid at 772.
Development of the rule against excessive accumulations

The rule was politically motivated and developed as a result of the decision in *Thellusson v Woodford*.38

Before the decision in that case came about, income could be accumulated into capital in a trust, provided such accumulation did not occur for longer than the perpetuity period. There was no separate rule about accumulations of income and the rule against remoteness of vesting operated to prevent accumulations from carrying on for a significant period of time. The decision in *Thellusson v Woodford* was to change that.

The facts of the case concerned Peter Thellusson’s will. A wealthy man, Mr Thellusson owned real property in both the Caribbean and England and considerable personal property estimated to be worth over £600,000. He devised a complicated will, in which after bequests to his immediate family were taken into account, his property was to be held on trust. The trustees were directed to invest the property in land for the lives of his sons, grandsons and great-grandsons who were living when Mr Thellusson died. The investment returns were to be accumulated with the capital sums of the investments. This had the effect that Mr Thellusson’s sons, grandsons and great-grandsons would not be able to benefit from any share of the investments. The property would by-pass them completely. Following the death of the final one of that group, the property was to be split into three equal shares and given to the eldest male descendant of each of Mr Thellusson’s three sons.

After Mr Thellusson’s death, his widow and children brought an action in the Court of Chancery claiming that the trusts were void. If their claim was successful, the real property would go to Mr Thellusson’s eldest son and the considerable personal property would be divided between the rest of the family according to the law then applicable.

The basis of the family’s claim was explained forcefully by their counsel:

38 *Thellusson v Woodford* (1799) 4 Ves 227.
The dispositions made by this will are without example, unnatural and absurd. The object is the accumulation of immense masses of landed property in the hands of a few individuals; an object impolitic and pernicious. To effect that purpose the testator withdraws from enjoyment for a long series of years a very considerable portion of property.³⁹

Counsel then went on to explain the ironic relationship with the rule against remoteness of vesting in this case:

Most attempts to create perpetuities are made with a view to continue the enjoyment of property for a long series of years in the families of the testators. But this testator contrives, how long it is possible to keep any of his descendants from the enjoyment of his property. No one, who had ever breathed the same air with him, could inherit.⁴⁰

The report of the case states that even at the most conservative estimate, the property left by Mr Thellusson would, if invested for the period of time instructed by him, be worth over £19 million. Whilst that would ensure that those three who were to inherit the property eventually would enjoy a vast fortune, it was questionable whether it was a sound objective to remove the property from the open market for such a long period of time by preventing the more immediate beneficiaries from enjoying it.

Despite the family’s arguments, the trust was held valid in both the Court of Chancery and the House of Lords.⁴¹ There was no rule of law or equity to prevent accumulation. Lord Eldon LC did not believe accumulation would have a general adverse economic effect:

the rents and profits are not to be locked up, and made no use of, for the individuals, or the public. The effect is only to invest them from time to time in land: so that the

³⁹ Ibid at 238.

⁴⁰ Ibid.

⁴¹ Thellusson v Woodford (1805) 11 Ves 112; 33 ER 273.
fund is, not only in a constant course of accumulation, but also in a constant source of circulation. To that application what possible objection can there be in law?

The decision in the case therefore affirmed the trust that Mr Thellusson had created. Accumulating income for a lengthy period of time was consequently permitted.

Parliament was, however, swift to intervene, enacting the Accumulations Act 1800 even before the case had reached the House of Lords. The Act was known informally as the Thellusson Act. Its entire purpose was to prevent accumulations from being carried on for an excessive lengthy time.

The effect of the Accumulations Act 1800 was re-enacted in section 164 of the Law of Property Act 1925. Section 164 provided:

(1) No person may be any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than one of the following, namely:-

(a) the life of the grantor or settlor; or

(b) a term of twenty-one years from the death of the grantor, settlor or testator; or

(c) the duration of the minority or respective minorities of any person or persons living or en ventre sa mere at the death of the grantor, settlor or testator; or

(d) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated.
Two further periods of time which a settlor or testator might choose for accumulation were added to section 164 by section 13 of the Perpetuity and Accumulations Act 1964:

(a) a term of twenty-one years from the date of making the disposition; and

(b) the duration of the minority or respective minorities of any person or persons in being at that date.

Section 164 went on to provide that any direction to accumulate outside of one of these periods would be void if the period drafted exceeded the ones permitted. Any income that was generated in an unlawful extended accumulation period was to be paid to the recipient who would have benefitted from the trust property being invested if there had been no direction to accumulate the income.

Section 164 remains good law on accumulations of income in trusts entered into before 6 April 2010. Accumulations of income remain void unless the settlor or testator chooses one of the six permitted time periods during which income can be accumulated.

**The rule against excessive accumulations today**

The Perpetuities and Accumulations Act 2009 turned the clock back to Mr Thellusson’s time. By section 13 of the 2009 Act, section 164 of the Law of Property Act 1964 was repealed. The effect of the 2009 Act is that directions to accumulate income are now valid, subject to their compliance with the rules against remoteness of vesting.

The change brought about by the 2009 Act was as a direct result of the Law Commission’s Report.\(^{42}\) Its earlier Consultation Paper\(^{43}\) had identified weaknesses in the law of excessive accumulations.

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accumulations. These included that the relevant law was ‘unnecessarily complicated’\(^{44}\) due to having the choice of six alternative accumulation periods and the meaning of ‘accumulation’ being difficult to discern and the law being inconsistent, as it applied only to trusts established by individuals and not companies. In addition, a number of common law jurisdictions around the world had either never enacted a rule against excessive accumulations,\(^{45}\) or had subsequently abolished their equivalent of the rule.\(^{46}\) The Law Commission therefore recommended that the rule on excessive accumulations be abolished in England and Wales.\(^{47}\) The only exception would be for charitable trusts.

Section 14 of the 2009 Act provides a simplified system for the accumulation of income for charities. Section 14(3) provides that a charity may only accumulate income for the maximum period of time allowed by the statute. Under section 14(4), this is 21 years from when the income may or must first be accumulated.

The rationale for the preservation of the rule against excessive accumulations for charitable trusts was to prevent such charities from building up great reserves of wealth in order to fulfil a charitable purpose that may not come about for many years into the future. The Law Commission believed that there would be no public benefit achieved in allowing a charity to do this. Indeed, there would be an adverse consequence as the charity would be allowed to generate the income whilst not having to pay income tax on it.

Section 14 does not, however, leave charities destitute. A charity is still able to build up reserves of money by keeping them as income over which the Charity Commission has

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\(^{44}\) Law Commission, *The Rules Against Perpetuities and Excessive Accumulations* (Law Com No. 251, 1998), at [10.5]

\(^{45}\) For example, Jersey and some states in the United States of America.

\(^{46}\) For example, in Australia, states including Victoria, New South Wales and Tasmania had all abolished their rules against excessive accumulations.

scrutiny. Such reserves would still enable the charity to function, through maintaining its administrative capabilities or fulfilling its charitable purposes.

The effect of section 14 of the 2009 Act is now to allow income to be accumulated for trusts entered into on or after 6 April 2010. In this sense, the law goes back to the decision in Thellusson v Woodford. Yet, as in Thellusson, the income of the trust can only be accumulated with the capital sum for the duration of a valid perpetuity period. Nowadays, following the enactment of section 5(1) of the 2009 Act, the only allowable perpetuity period is that of a fixed time of 125 years. For trusts declared currently, the only caveat on accumulating income is that the accumulation must cease before that perpetuity period expires.

Lifetime beneficiaries are not disadvantaged as trustees are under a duty to balance their interests with those of the remaindermen.

**THE RULE AGAINST INALIENABILITY**

The final rule related to perpetuity is the rule against inalienability. This is the concept that a trust cannot be perpetual in nature or last forever. The rule is closely related to the concept of a purpose trust, discussed in Chapter 6. As Roxburgh J explained in *Re Astor’s Settlement Trusts*,48 English law objects to a non-charitable trust for a purpose largely because there is no beneficiary to enforce the trust against the trustees if the trustees fail to administer the trust correctly. But there is a secondary reason why English law dislikes purpose trusts: it is because they may last forever. Retaining potentially large sums of money for a non-charitable purpose that might last forever is seen not to be a good thing.

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48 *Re Astor’s Settlement Trusts* [1952] Ch 534.
This is what the rule against inalienability seeks to prevent as it declares void non-charitable purpose trusts which may last forever.\textsuperscript{49}

The rule against inalienability can be illustrated by \textit{Thomson v Shakespear}.\textsuperscript{50} The facts concerned the famous playwright, William Shakespeare. In 1848, the Shakespeare’s Birthplace Committee bought the house in Stratford-upon-Avon which was the birthplace of William Shakespeare. Mr Thomson left £2,500 in his will to the committee to form a museum at the house. In addition, he made provision for an annual sum of £60 to be paid to the committee for the provision of a guardian at the house, to attend to the visitors to the property.

Whilst the Lord Chancellor thought that ‘[a]ll must be delighted at anything that can be done to do honour to the memory of such a remarkable man as Shakespeare’,\textsuperscript{51} he held that the trust declared by Mr Thomson was void. The problem was the ongoing nature of the trust. By providing that the annual payment of £60 was to be paid for the provision of a guardian, Mr Thomson had expressed an intention that the trust should carry on forever. As the Lord Chancellor explained:

\begin{quote}
\textit{it is quite clear that was to be perpetual; and if you look to the intention of the testator … then his intention was that this should be laid out upon a building that was to stand and be perpetual in memory of Shakespeare. That is a perpetuity, and not being a charity, it is void.}\textsuperscript{52}
\end{quote}

As can be seen from the case, however, the trust created by Mr Thomson was essentially that for a purpose. As it was not charitable, it could not stand given that there was no-one to

\textsuperscript{49} This rule is untouched by the Perpetuities and Accumulations Act 2009 (s 18).

\textsuperscript{50} \textit{Thomson v Shakespear} (1860) 1 De G F & J 399; 45 ER 413.

\textsuperscript{51} Ibid at 405.

\textsuperscript{52} Ibid at 406.
enforce the trust had the committee not decided to administer it according to Mr Thomson’s wishes. The two concepts of purpose trusts and perpetual trusts are strongly linked to each other. Purpose trusts can continue forever and this is one of the reasons they are not generally permitted.

Some categories of purpose trust are allowed in English law. These are explained in greater detail in Chapter 6, but include trusts of imperfect obligation and trusts which appear initially to be for a purpose but which nonetheless have ascertainable beneficiaries who may benefit from them. These purpose trusts, if they are permitted, however, must still comply with the rule against remoteness of vesting.

In *Re Denley’s Trust Deed*, Charles Denley left a piece of land in Gloucestershire on trust for the purpose of a sports or recreation ground. Whilst the trust appeared initially to be for a purpose, the High Court held that it was valid, as there were ascertainable beneficiaries who did have the ability to enforce the trust. These were probably the company employees whom were given the ability to enjoy the land. But to be valid, the trust also had to comply with the rule against remoteness of vesting. Fortunately, the trust did as it was drafted that:

> until the expiration of the period of 21 years from the death of the last survivor of such of the following persons as were living on and born before March 1, 1936, namely…

By ensuring that any valid, non-charitable purpose trusts do have to comply with the rule against remoteness of vesting, equity still manages to ensure that such trusts cannot last forever.

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53 *Re Denley’s Trust Deed* [1969] 1 Ch 373.
Analysing the Law

The largest category of non-charitable purpose trust in existence is almost certainly the unincorporated association. Given that the categories of non-charitable purpose trusts permitted to exist are fairly robustly controlled by the courts and such non-charitable purpose trusts have to comply with the rule against remoteness of vesting in any event, do you think that the rule against inalienability really adds anything to English law? If so, what?

POINTS TO REVIEW

You have seen:

- what the rules against remoteness of vesting, excessive accumulations and inalienability are: how they may be defined and how they operate;

- how the rule against remoteness of vesting is the dominant part of the perpetuity doctrine. It is a complex rule, based on a history of possibilities, not probabilities or certainties. The Perpetuity and Accumulations Act 1964 introduced some much-needed pragmatism to the rule, with its ‘wait and see’ doctrine, together with the ability for a settlor to choose a fixed perpetuity period;

- how the rule against remoteness of vesting has been simplified as a result of the Perpetuities and Accumulations Act 2009. The new, fixed perpetuity period of 125 years should provide both simplification and clarification to a complicated area of law in the future but, of course, the Act does not have retrospective effect. This means that a knowledge of all of the history of the rule against remoteness of vesting remains essential in order to ascertain whether trusts, no matter when they were declared, are valid; and
how the rule against excessive accumulations has, finally, after 210 years, been abolished. Accumulations will in future be subjected only to the fixed perpetuity period used in the rule against remoteness of vesting.

**Making connections**

This additional chapter considered another piece of the jigsaw in trust formation, but the final piece of the jigsaw in terms of the requirements to declare a trust.

Due to the connection between the rule against inalienability and equity's distaste for a non-charitable purpose trust, you may wish to refresh your memory of the latter in Chapter 6.

The next logical step is to consider the last piece of the jigsaw of trust formation: constitution of the trust. That topic is addressed in Chapter 7.

**USEFUL THINGS TO READ**

Cases themselves can be found electronically on legal search engines such as Westlaw or Lexis Library. Alternatively, for those who prefer a paper copy of cases, you should look in your local law library for the relevant law reports.

Extracts from most of the cases listed below can also be found in *Text, Cases and Materials on Equity and Trusts* (Routledge-Cavendish, 2008) by Mohammed Ramjohn.

**Primary sources**

*Andrews v Partington* (1791) 3 Bro CC 401; 29 ER 610.

*Re Dawson* (1888) LR 39 ChD 155.

*Re Denley’s Trust Deed* [1969] 1 Ch 373.
Thellusson v Woodford (1805) 11 Ves 112; 33 ER 273.

Thomson v Shakespear (1860) 1 De G F & J 399; 45 ER 413.

Perpetuities and Accumulations Act 1964 ss 1, 2, 3 and 4.

Perpetuities and Accumulations Act 2009 ss 1–8, 12–15 and Sch 1.

**Secondary sources**

