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SORTING OUT OWNERSHIP INTERESTS IN A BULK: GIFTS, SALES AND TRUSTS

Sarah Worthington[*]

We routinely expect that simple problems will have simple solutions. The simple problem in this case is to define when an individual obtains an equitable ownership interest in part of a bulk. The bulk might comprise tangible property (such as wheat) or intangible property (such as shares).[1] Purported transfer of the ownership interest might occur by gift, by sale, or by declaration of trust. It seems almost inconceivable that a problem which can be so simply stated should still lack a generally accepted solution, yet that is clearly the current position. This uncertainty is all the more surprising given the commonplace nature of the dealings in issue.[2]

There are few relevant authorities, and their impact is hotly debated. *Re Wait*,[3] *Re London Wine Company (Shippers) Ltd*[4] and *Re Goldcorp Exchange Ltd (in rec)*[5] (all of which pre-date the introduction of section 20A into the Sale of Goods Act 1979) are commonly regarded as proof that the purchaser of goods which form part of a bulk

[*] I would like to thank Dr Michael Bryan and Dr Charles Mitchell for stimulating discussions of various issues raised in this article.

[1] Two unrelated points need to made here. First, the problem of bulks is said to be confined to dispositions of the form ‘20 shares out of an identified parcel of 100 shares’, and not to apply to dispositions of the form ‘20% interest in an identified parcel of 100 shares’. Secondly, and despite some assumptions to the contrary, it should be recognised that a debt is not a bulk: a bulk must, by nature, be comprised of fungibles (see Section 3, below). This says nothing of the transferability of part of a debt. Although part of a debt cannot be transferred at law, it can be transferred, even voluntarily, in equity: see Law of Property Act 1925 s 136; *Re Steel Wing Company* [1921] 1 Ch 349; *Williams v Atlantic Assurance Company* [1933] 1 KB 81; *Walter & Sullivan Ltd v Murphy & Sons Ltd* [1955] 2 QB 584; *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1, 16, 20, 30-1; *Shepherd v FCT* (1965) 113 CLR 385 (Aust HCt); Meagher, Gummow and Lehane, *Equity Doctrines and Remedies* (3rd edn, 1992) Butterworths, Sydney, (‘MGL’), para 635. The same is not the case with bulks: arguably part of a fungible bulk cannot be transferred by gift (ie voluntarily), even in equity, until the particular part to be given has been specifically identified: see Section 5, below; on the other hand, an voluntary declaration of trust may be effective: see Section 7, below.
[2] Both goods and shares are routinely traded ‘ex-bulk’: note, eg, the mode of operation of Cedel and Euro-clear’s fungible securities accounts for internationally traded securities. Also see R Goode, ‘Ownership and Obligation in Commercial Transactions’ (1987) 103, LQR 433, 451-2.
[3] [1927] 1 Ch 606.
[4] [1986] PCC 121.
[5] [1995] 1 AC 74.

cannot, in the absence of explicit arrangements, obtain an equitable interest in the goods concerned. The purchaser must wait until transfer of legal title is effected.[6] In the face of these authorities, *Hunter v Moss*[7] somewhat controversially suggests that the position is otherwise if the transaction is a declaration of trust of part of a bulk comprising intangibles (shares, in this case). Taking a superficial view, this different result might be rationalised on the basis that the earlier cases were concerned with sales rather than with declarations of trust or, alternatively, that they were concerned with goods rather than with shares. The recent decision of Mr Justice Neuberger in *Re Harvard Securities Ltd (in liq)*[8] suggests that it is the subject matter (goods cf shares) which provides the essential distinction.

This most recent case highlights the commercial and practical importance of the debate over interests in bulks as well as the need to reach some rational and defensible resolution of the problem. The central issue in *Re Harvard Securities Ltd* was whether the beneficial interest in certain blocks of Australian and US company shares was owned by Harvard (as the initial purchaser, albeit via a nominee company) or by Harvard's former clients (as sub-purchasers of smaller parcels of these shares, the legal title to which remained in a nominee throughout[9]). In 1988, when the decision to wind up the company was taken, Harvard had sufficient Australian and US company shares to account to all of its former clients in respect of their beneficial interests (if any) in such shares. Mr Justice Neuberger decided that Harvard's clients had obtained equitable ownership of the US shares (under English law[10]) but not of

[6] See, eg, *Re Stapylton Fletcher Ltd* [1994] 1 WLR 1181, which also pre-dates the Sale of Goods Act 1979 s 20A (although in *Re Harvard Securities Ltd (in liq)* [1997] 2 BCLC 369, 378, Mr Justice Neuberger seemed to think the outcome in this case was based on finding an equitable interest). With sales of goods from a defined bulk, this is no longer the problem it once was for purchasers: unless there is agreement to the contrary, the Sale of Goods Act 1979 s 20A ensures that legal title to part of the defined bulk passes to the purchaser on payment of the price.

[7] [1994] 1 WLR 452.

[8] [1997] 2 BCLC 369.

[9] This was to minimize transaction costs. The share certificates for blocks of shares would remain in the name and physical possession of a nominee of Harvard, and Harvard would simply record the sale of individual parcels to clients by way of book entry. Detailed evidence of Harvard's communications with its clients was scant, but it was assumed by Mr Justice Neuberger that all clients were issued with contract notes confirming the client's purchase of the small parcel of shares and indicating that the shares were held by nominees 'on [the client's] behalf' or 'to [the client's] order'. The contract note indicated the number of shares purchased, the purchase price, and the total consideration. Harvard's own records in respect of each large block of shares included entries showing the names of the client purchasers, the dates of the sales, and the numbers of shares purchased. (*Ibid* 371-3).

[10] Following *Hunter v Moss* [1994] 1 WLR 452.

the Australian shares (under Australian law[11]). The case is plainly a difficult one. Nevertheless, the reasoning which led to these results is open to some debate. Even ignoring the initial difficulties associated with the shares being held by a nominee,[12] there are problems with the basis upon which *Hunter v Moss*[13] was distinguished from other English authorities. More importantly, however, the adopted analysis appears to pay insufficient attention to three matters which are critical to any underlying analysis of ownership interests in a bulk: first, the practical problem of identifying some relevant bulk; secondly, the relevance of the form of the transaction (here, a sale and purchase); and, finally, the nature of the property comprising the bulk (here, shares in listed Australian and US companies). Arguably any one of these maters might have suggested that Harvard's clients did not and could not obtain an equitable interest in the shares. If debate is to lead to some sensible and acceptable approach to ownership interests in bulks, then each of these issues merits attention.

1. Identification of the relevant bulk

The problem at issue is narrowly defined: it is concerned only with the possibility of acquiring ownership interests in identified bulks.[14] If there is no identified bulk, either because property is completely unspecified or because it is fully and specifically identified, then the difficulties do not arise.

The last sentence merits amplification. The bulk is identified, in the necessary sense, only if the transferor is obliged (either at law or in equity) to derive the asset from that bulk. If the transferor is free to choose—or not—to select the relevant property from any source, then the transferee cannot possibly acquire an ownership interest in any particular bulk. The situation is simply one of an intended transfer of property which is completely unidentified until the transferor makes the necessary choice. Until such

[11] Accepting the expert opinion of a firm of Australian lawyers to the effect that, since *Hunter v Moss, ibid*, was not binding in Australia, Australian courts would be likely to find that there was insufficient identification of the shares comprising the client's parcel to enable a client to acquire an equitable interest. It followed that clients who had purchased Australian shares acquired no equitable interest in the relevant securities, and would have to rely on their contractual rights against Harvard. This view represented a slight extension of the principles accepted, albeit reluctantly, in MGL: see [1997] 2 BCLC 369, 384-5.
[12] See Section 4, below.
[13] [1994] 1 WLR 452.

identification, it is impossible for the transferee to obtain a property interest. This absence of an identified bulk is the most common stumbling block in assertions by plaintiffs that they have an equitable ownership interest. There was no identified bulk in this sense in the intended sale transactions in *Re London Wine Company (Shippers) Ltd*[15] or in *Re Goldcorp Exchange Ltd (in rec)*,[16] nor in the intended building retention trust in *MacJordan Construction Ltd v Brookmount Erostin Ltd (in rec)*.[17] In none of these cases, therefore, could the plaintiff hope to establish an equitable proprietary interest. Moreover, even in those cases where there is an identified bulk, it does not necessarily follow that the transferee has any property interest in the bulk. As outlined below, that depends critically upon the form (and sometimes the subject matter) of the transaction in issue. But at least the pre-condition of an identified bulk must be met.

Arguably this pre-condition was not met in *Re Harvard*. Because of this, it ought to follow that none of the clients could have had a proprietary interest in the shares. In *Re Harvard*, the *obligation* to appropriate shares for a particular client from an identified bulk could arise in only two ways (neither of which would necessarily give the client an immediate property interest in the bulk[18]): either Harvard was contractually bound to do this, or Harvard voluntarily declared itself to be a trustee of part of its interest in a specified bulk. A voluntary (and therefore revocable) decision by Harvard to satisfy its non-specific contractual obligations out of an existing and identified bulk will not do. The facts are scant, but certainly it appears that the clients themselves did not specifically contract to purchase part of a larger identified parcel. They do not even appear to have been told that their allocation was intended to come from a specifically identified holding.[19] Alternatively, nor do the facts suggest that

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[14] This involves two issues: identification of the bulk (discussed here) and the composition of the bulk (discussed next). To pre-empt that discussion, the bulk must be comprised of fungibles, otherwise it is not a bulk but an assortment of individual assets.

[15] [1986] PCC 121, 152 *per* Oliver J. Even in *Re Wait* [1927] 1 Ch 606, where the facts would seem to indicate a sale from an identified bulk, Atkin LJ at pp 627, 635 appears to suggest otherwise.

[16] [1995] 1 AC 74, 89-90 *per* Lord Mustill. Despite this, Mr Justice Neuberger described all three of these cases as being concerned with subject mater which was ‘an unascertained part of a mass of goods’: [1997] 2 BCLC 369, 383.

[17] [1992] BCLC 350. Also see *Hemmens v Wilson Browne (a firm)* [1995] Ch 223.

[18] Whether or not it would depends upon resolution of the further issues discussed below.

[19] The mere fact that Harvard’s own internal records made notional allocations to specified clients from identified share parcels is not sufficient. Nor is the fact that Harvard purchased blocks of shares more or less contemporaneously with the receipt of payments from clients in respect of particular purchases.

Harvard intended to make itself a trustee of the share holdings. The intention required is not simply to benefit the client, but to benefit the client by means of a trust. Reference to the shares as the client's is therefore not conclusive.[20] On this ground alone—ie absence of an identified bulk—the clients in *Re Harvard* might reasonably have been denied an equitable interest in Harvard's shares.

2. Specifying the part of the bulk

Critics of the notion of an equitable interest in part of a bulk take pains to distinguish between parts of a bulk defined as a *proportional* interest in the entire bulk and parts defined as an *absolute numerical quantity* to be extracted from the identified bulk. Only the latter is seen as problematic, whether the contemplated transaction is a sale or a trust. This seems doubtful, whether looked at from the point of view of the intention of the parties or the capacity of equity to respond to that intention.

For example, a contract to sell 20% of an identified parcel of 1000 shares is seen as practically and theoretically different from a contract to sell 200 shares from the same parcel. Whether any practical difference is actually intended by the parties is often doubtful.[21] The intending purchaser in both cases will almost invariably want independent ownership of 200 shares—with the degree of corporate control that entails—*not* a 20% interest in every one of the 1000 shares. In a very practical sense, the same is even more likely to be true of a contract for the sale of 20% of a stock of 1000 bottles of identically labelled wine.[22]

At the theoretical level, it is suggested that equity can deal with a trust[23] of a 20% interest in each of 1000 shares, but not a trust of 200 shares in a parcel of 1000.[24]

Finally, nor is the fact that, at the date of winding up, Harvard had sufficient shares to meet the claims of its clients.

[20] *Paul v Constance* [1977] 1 WLR 527. Furthermore, an intended but ineffectively executed alternative transaction cannot be saved by construing it as an effective trust.

[21] This might explain the apparent unwillingness of the Court of Appeal in *Hunter v Moss* [1994] 1 WLR 452 to find any significance in the issue of whether the declaration of trust related to 5% of the settlor's holding (see p 456) or to 50 shares out of that holding. Of course, the facts of a particular case may suggest that the parties *do* want percentage interests in each individual item comprising the bulk, but arguably this is the less common interpretation to be placed on their words.

[22] See below for comments on whether this ought to be regarded as the sale of part of a bulk. In *Re Stapylton Fletcher* [1994] 1 WLR 1181, 1198, such bottles of wine were treated as fungibles.

[23] Whether the trust is expressly declared or is one imposed by operation of law in the context of a specifically enforceable sale transaction.

This underestimates the capacity of equity. This issue is critical, and is dealt with in detail in the discussion below.[25]

3. Property comprising the bulk must be fungible

It follows from what has already been said that the identified bulk must be comprised of fungibles. Only if this is the case can equity *objectively* determine what ought to be done and then treat it as done. For example, an obligation to transfer £1,000 out of an identified fund of £10,000 or 1,000 shares out of an identified parcel of 10,000 can be objectively assessed and specifically enforced in equity with the effect that (on the arguments advanced here) the transferee obtains a proprietary interest in the bulk. Arguably a specifically enforceable obligation to transfer 1,000 bottles of wine out of an identified bulk of 10,000 identically labelled bottles should also give rise to a proprietary interest. Although it is true that some of the bottles may be corked—or differ in other ways from the rest of the bulk—this is not a feature which can be discovered by any party at the time of transfer. It follows that, whether the selection is effected by the vendor, the purchaser or a court officer, neither transacting party can be knowingly preferred. Accordingly, the bulk ought to be regarded as fungible. The same practical problems might equally well arise with other fungibles.[26]

On the other hand, the sale of one puppy out of an identified litter of five is not the sale of part of a bulk. The litter is not comprised of fungibles. The purchaser's interests are dependent upon how the selection process is effected. Although such a sale contract may be specifically enforceable, the contract of sale cannot give the purchaser an equitable interest in any puppy in advance of the transfer of legal title (or identification of the specific subject matter of the sale).[27]

4. Equitable ownership interests: general principles

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[24] D Hayton, 'Uncertainty of Subject-Matter of Trusts' (1994) 110 LQR 335, 339.
[25] See Section 7.
[26] For example, individual grains of wheat may be either contaminated or sterile; individual shares may be subject to defects of title. The bulk still remains one comprised of fungibles.
[27] Of course, context is important: it is conceivable, for example, that a sale in Australia of 20,000 sheep out of an identified flock of 100,000 might be regarded by both parties as the sale of part of a fungible bulk: *Scott v Scott* (1963) 109 CLR 649, 661.

Logic suggests that the general rules governing transfer of equitable ownership must be the starting point in determining equitable ownership interests in bulks. Equitable ownership interests can arise in two ways. They can arise in accordance with the explicit intentions of the parties, as with express declarations of trust or with transfers of existing equitable interests by gift or by sale.[28] They can also arise by operation of law, pursuant to rules which deem some intended but incompletely executed sales or gifts of legal[29] property to give rise to equitable ownership interests in advance of the transfer of legal title.[30]

In the context of bulks, it follows that the transactions which potentially give rise to equitable interests are incompletely executed gifts or sales (where any equitable interest will arise by operation of law), or declarations of trust of part of an identified bulk (where any equitable interest will arise in accordance with the intention of the party). Each needs separate consideration.

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[28] Both gifts and sales of subsisting equitable interests must be in writing: Law of Property Act 1925, s 53(1)(c). Although see *Neville v Wilson* [1996] 3 WLR 460, and the note below.

[29] The relevance of these principles when the subject matter is a subsisting *equitable* interest in property is unsettled: see S Worthington, *Proprietary Interests in Commercial Transactions* (Clarendon Press, 1996) p 195, n 39 and the references cited therein; but to the contrary see *Neville v Wilson* [1996] 3 WLR 460, the correctness of which is doubted. The issue ought to have been relevant in *Re Harvard*, since Harvard only had an equitable interest in the parcels of US and Australian shares (the shares being legally owned by a nominee). Arguably *if* the contract of sale between Harvard and its clients was for a specific part of an identified block of shares (of which Harvard was the equitable owner), *and if* Harvard's intention was to effect an immediate transfer of its equitable interest to the client (both of which are doubted), *then*, since the contract was apparently in writing (as required by the Law of Property Act 1925 s 53(1)(c)), presumably the transfer was immediately effective, and would have been so even if the transfer had been by way of gift. However, if only the first of these two conditions was met (and even this is doubted), but not the second, then it becomes necessary to consider whether the rules discussed in the text also apply in the context of transfers of subsisting equitable interests. *If* they do, then it is necessary to determine whether Harvard's agreement to transfer an equitable interest in the shares at some time in the future is specifically enforceable, thereby giving rise to a constructive trust in favour of a purchaser who has paid the price. In *Re Harvard*, since damages would apparently have been an adequate remedy, it is arguable that the contract would not have been specifically enforceable and no equitable interest would have arisen. The relevance of this issue was disguised by the fact that the nominee companies had agreed to be bound by any order made by the court ([1997] 2 BCLC 369, 372). This seemed to result in the judge determining the case on the basis that Harvard was the legal owner.

[30] These are constructive trusts. The facts, in the context of bulks, will rarely support the allegation of a resulting trust, although plaintiffs in recent cases have often argued (unsuccessfully) for the imposition of a purchase money resulting trust. Such a trust would solve all the problems of ownership interests in bulks without the need for any of the analysis being advanced in this article. What is needed to give rise to a purchase money resulting trust is a voluntary (ie gratuitous) contribution to the purchase price of an identified asset where the (presumed) intention is not to make a gift of that asset to the party who acquires legal title. Given these necessary pre-requisites, such rules are unlikely to apply in the context of purchases from a bulk. Payment of the purchase price pursuant to a contract of sale cannot sensibly be regarded as a gratuitous contribution to the purchase of an asset, even in those

5. Gifts of part of a bulk

The starting point is the general rule. If a donor intends a *gift* of specifically identified legal property, the most favourable view of equity's intervention to assist the donee will only view the donee as obtaining an equitable interest in advance of the transfer of legal title once the donor has done all that the donor is required to do, notwithstanding that there are other matters which are outstanding in order to complete the legal transfer, as long as those matters can be completed by some third party without the assistance of the transferor: *Re Rose*.[31] It follows that equity will never assist with the gift of part of an identified bulk belonging to the transferor: the transferor's intervention, either personally or via an agent, will always be necessary to physically segregate the portion to be given away.[32]

6. Sale of part of a bulk

Again it is helpful to start with the general rule governing acquisition of equitable interests. Where the intended transaction is not a gift but a *sale* of specifically identified property, the general rule is that the purchaser will acquire equitable ownership of the property in advance of the transfer of legal title only if the contract is unconditional[33] and specifically enforceable.[34] Only when these conditions are met can it be said that the sale property *ought* to be transferred. Only when the sale property *ought* to be transferred will equity, treating as done that which ought to be done, regard it as *already* transferred.

The requirement that the contract be specifically enforceable can have unexpected consequences, so it merits some comment. With many contracts of sale, specific

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rare instances where the specific funds supplied by the purchaser are used by the vendor to purchase the asset in question.

[31] [1952] Ch 499. Also see *Milroy v Lord* (1862) 4 De G F & J 264, 45 ER 1185; S Lowrie and P Todd, '*Re Rose* Revisited' [1998] CLJ 46.

[32] Contrast the questionable obiter views of Dillon LJ in *Hunter v Moss* [1994] 1 WLR 452, 458, apparently suggesting that an attempted *gift* of part of a bulk would create an enforceable *trust*. *Re Harvard Securities* [1997] 2 BCLC 369, 380 also seems to accept this as correct. This seems to ignore both *Paul v Constance* [1977] 1 WLR 527 and *Re Rose* [1952] Ch 499.

[33] This means, amongst other things, that the purchaser must have paid the price.

[34] For a detailed discussion supporting this assertion, see S Worthington, *Proprietary Interests in Commercial Transactions* (Clarendon Press, 1996) pp 194-215. Also see *Holroyd v Marshall* (1862) 10 HLC 191, 11 ER 999; *Tailby v Official Receiver* (1888) 13 App Cas 523; *Re Wait* [1927] 1 Ch

enforcement is not available: damages provide an adequate remedy. With contracts for the sale of goods, the availability of specific enforcement is even more restricted:[35] the orthodox view is that specific enforcement is only possible to the extent allowed by the Sale of Goods Act 1979 and, according to section 52, that is limited to contracts 'to deliver specific or ascertained goods'.[36] The net effect of this is that specific performance is not available in the context of sales of goods which form part of a bulk (and, accordingly, are not 'specific or ascertained' goods). It follows that contracts for such sales can never give rise to equitable interests by operation of law (at least in advance of segregation of goods from the bulk), since the pre-requisite of a specifically enforceable contract is absent. Had the facts been different in *Re London Wine Company (Shippers) Ltd*[37] or in *Re Goldcorp Exchange Ltd (in rec)*,[38] so that the contracts of sale could be described as contracts for the sale of goods from an identified bulk, this general rule denying specific enforceability would still have deprived the intending purchasers of an equitable interest in advance of transfer of the legal title to the goods in question.[39]

The matter is simpler with contracts for the sale of personalty other than goods.[40] Then the general equitable rules apply without statutory modification. Consider, for example, a contract for the sale of a specifically identified block of shares. If the shares are in a listed company, then the contract is unlikely to be specifically enforceable; damages will provide an adequate remedy.[41] Describing the contract as not specifically enforceable is another way of saying that the vendor is not compelled, in equity, to transfer the shares. Since equity only treats as done that which it sees ought to be done, it follows from the absence of specific enforceability that the

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606, 634-5 *per* Atkin LJ, suggesting that *absence* of specific enforceability on the facts before him defeated any supposed equitable assignment.

[35] According to the accepted view of Atkin LJ in *Re Wait* [1927] 1 Ch 606, 635-6.

[36] Although the injunction granted in *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 WLR 576 effectively ensured the specific performance of a contract for the sale of completely unascertained goods.

[37] [1986] PCC 121.

[38] [1995] 1 AC 74.

[39] Arguably such contracts are not even specifically enforceable under general equitable principles: since the subject matter is readily available on the market, damages would provide an adequate remedy. The Sale of Goods Act 1979 s 20A now solves both of these problems by providing that legal title to part of the bulk passes on payment of the price, unless the parties agree otherwise. This legislative change means that the absence of equitable intervention is irrelevant.

[40] Contrast R Goode (1987) 103 LQR 433, 449, 459, accepting that *Re London Wine* requires appropriation equally for tangibles and intangibles. Similarly, D Hayton (1994) 110 LQR 335, 337.

intending purchaser will *not* acquire an equitable interest in the shares in advance of the transfer of legal title. On the other hand, if the shares are in a private company, then the contract of sale is likely to be specifically enforceable. If that is the case, equity will treat the vendor's obligation to transfer as already effected, and the intending purchaser will acquire equitable ownership of the shares once the purchase price is paid.[42] This requirement that the contract of sale be specifically enforceable operates to ensure that very few intending purchasers acquire equitable interests in advance of the legal transfer, no matter how well identified the sale property.[43]

Surely if the purchaser of an entire block of specifically identified shares in a listed company cannot obtain equitable title to those shares in advance of the transfer of legal title, then the purchaser of part only of the block will be at least equally restricted in obtaining the assistance of equity in advance of the transfer of legal title to the smaller parcel of shares. This impediment was not even adverted to in *Re Harvard*. It is another basis upon which Harvard's clients ought to have been denied an equitable interest in the shares. If, on the other hand, and for the sake of argument, the clients in *Re Harvard* had agreed to purchase small parcels from identified larger blocks of shares in *private* companies, the analysis would necessarily have been more complicated. It would have raised squarely the problem of equitable interests in bulks and whether the subject matter of such a sale is sufficiently well identified.

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[41] *Duncuft v Albrecht* (1841) 12 Sim 189, 59 ER 1104.

[42] Assuming the contract is otherwise unconditional. See HAJ Ford and RP Austin, *Ford's Principles of Corporations Law* (6th edn, Butterworths, Sydney, 1992) para 1119; ICF Spry, *The Principles of Equitable Remedies* (4th edn, Law Book Co Ltd, Sydney, 1990) p 648. This discrimination in the treatment of different purchasers simply reflects the English view of the availability of specific performance. Where shares are readily available on the market, damages are deemed an adequate remedy. In practice, if the vendor is insolvent, the purchaser under a specifically enforceable contract is in a far better position that one whose contract is not specifically enforceable.

[43] Contrast this with the views of counsel, accepted by Mr Justice Neuberger in *Re Harvard Securities* [1997] 2 BCLC 369, 384, that if the shares had been specifically identified by certificate number then the client purchasers would certainly have acquired an equitable interest in them. On the views advanced here, they would not, since the contract for the sale of shares in a public company would not have been specifically enforceable. Admittedly, such purchasers might have received all the protection they desired in the ensuing insolvency, because they would (arguably) have the protection of a purchaser's lien on the sale property to ensure transfer of that property or return of the sale price: see S Worthington, *Proprietary Interests in Commercial Transactions* (1996) ch 9, especially pp 226-9. Although the practical effect is similar, the doctrinal analysis rests upon fundamentally distinct foundations.

On these imagined facts, the contract of sale would have been specifically enforceable. Indeed, if the purchaser were to seek a court order for specific performance, the vendor would be obliged to 'segregate' the required number of shares and transfer the legal title to the purchaser (by completing the necessary formalities and notifying the company in which the shares were held). The purchaser is thus assured of obtaining eventual legal ownership of the shares. But, *before* legal title is transferred, will the purchaser be regarded as the owner in equity of the parcel of shares? This is the nub of the problem concerning equitable ownership interests in bulks, and is where analytical effort needs to be focused. None of the existing English authorities is definitive; none is concerned with a specifically enforceable contract for the sale of part of an identified bulk.[44] This means that the answer is open to legitimate debate. However, there are sound arguments to suggest that a purchaser in these circumstances ought to be regarded as having an equitable interest in the identified bulk.

The particular arguments in favour of purchasers acquiring such equitable interests have already been presented in detail elsewhere.[45] Here it is sufficient to outline that reasoning and then to answer some of the more obvious criticisms that this suggestion faces. As already noted, equitable interests which arise by operation of law in advance of the agreed transfer of legal title are premised on the notion that equity regards as done that which ought to be done: if specific property ought to be transferred—because the sale contract is specifically enforceable and unconditional—then equity will regard the property as *already transferred* and the intending purchaser will be the owner in equity, although not yet the owner at law. If part of an identified bulk ought to be transferred—again because the sale contract is specifically enforceable and unconditional—then what, if anything, will equity regard as done? Clearly what the vendor ought to do (and what specific performance will compel) is segregate the sale property from the bulk and transfer it to the purchaser. Given this, will equity, considering as done that which ought to be done, assume that the vendor *has segregated* as well as assuming that the vendor *has transferred*? Since

[44] See the principal authorities noted earlier: in each case, either the transaction is not a sale, or it is not a sale from an identified bulk, or the sale is not specifically enforceable.
[45] See S Worthington, *Proprietary Interests in Commercial Transactions* (Clarendon Press, 1996) pp 217-220.

equity routinely does this in the context of trusts[46] and tracing exercises[47]—where, in both cases, the principal difference is that the equitable obligation to segregate and to transfer is derived from some source other than a specifically enforceable contract of sale[48]—there would seem to be no practical or theoretical impediment to adopting the same approach with sales. In fact, consistency might be seen as demanding this.

Nevertheless, several arguments are commonly raised to counter this suggestion that a purchaser might acquire an equitable interest in part of a bulk. The first is that such interests—at least in the context of sales of goods—would embarrass the ordinary operations of buying and selling.[49] This argument can no longer stand in the face of recent legislative reforms which deliver *legal* interests to such purchasers precisely because the ordinary operations of buying and selling *demand*, rather than deny, that such interests exist.[50] These recent legislative amendments also give the lie to the suggestion that it is 'the very nature of things' (because specific property has not been identified) that such interests cannot possibly exist.[51]

Other arguments are more substantial. They focus on the allegedly unacceptable practical and commercial consequences of finding that the purchaser has an equitable interest in a defined bulk. An example illustrates the imagined difficulties. Suppose that A agrees to sell to B 50 shares out of an identified parcel of 1,000 shares. Suppose, too, that the conditions are such that B is thereby considered to have an

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[46] See Section 7, below.

[47] See the discussion in S Worthington, *Proprietary Interests in Commercial Transactions* (Clarendon Press, 1996) pp 219-220.

[48] This is true even in tracing exercises, where the rationale is that *because* the defendant was not authorized either to convert or to mix the plaintiff's property, the defendant *ought* to segregate and return to the plaintiff an appropriate proportion of the newly acquired property. Equity regards this as done, and the bulk is held on trust by the defendant for the defendant and the plaintiff in appropriate shares. The essence of the tracing exercise is that certain presumptions apply in determining both whether it was the plaintiff's property which was converted or mixed without authority, and what proportion it is appropriate for the defendant to return.

[49] *Re Wait* [1927] 1 Ch 606, 630 *per* Atkin LJ.

[50] Sale of Goods (Amendment) Act 1995 inserting s 20A into the Sale of Goods Act 1979. The relevant sale contract simply has to be for the sale of part of a defined bulk. The contract does not have to meet the usual tests for specific enforceability (ie that damages would provide an inadequate remedy). Admittedly these statutory interests are legal, not equitable, but the practical arguments adverted to in *Re Wait* [1927] 1 Ch 606, 630, do not depend on the distinction.

[51] These words are taken—out of context—from *Re Goldcorp Exchange Ltd (in rec)* [1995] 1 AC 74, 90, where Lord Mustill was in fact describing why a plaintiff claiming legal or equitable title to the gold bullion would be defeated by 'the very nature of things' because the sale was of *generic* (ie completely unascertained) goods.

equitable interest in 50 of the shares in the parcel. Suppose, further, that A then sells (and legally transfers) 50 shares out of the parcel to another purchaser, C. It is suggested that it would be impossible to determine whether it was A's or B's shares which had been sold to C. This would create all sorts of accounting problems, both between A and B and between either party and the Revenue (in assessing capital gains tax, for example).[52] In particular, if the sale (and any subsequent investment) is advantageous or disadvantageous, is it A or B who will be entitled to or required to take the benefits or burdens? Alternatively, if there is no such problem, then can it really be said that B has any specific proprietary interest which is capable of assignment?[53] Professor Hayton argues not.[54]

This hypothetical problem demands a considered answer. Assume, for the sake of argument, that the purchaser *does* acquire an ownership interest in the bulk. The constructive trust which arises to recognise this interest does not automatically make the vendor a fiduciary, subject to the full rigour of fiduciary duties of self-denial, much less a trustee with powers of investment and duties to maximise the trust property.[55] We readily recognise that fiduciary obligations can exist independently of legal/equitable property splits; conversely, legal/equitable property splits can exist independently of fiduciary obligations (at least when that term is used, as it should be, to suggest obligations of self-denial).[56] The problem is to determine precisely what (non-fiduciary) obligations are imposed on the vendor in these circumstances.

It is important to recognise that even if the obligations imposed on the vendor *were* fiduciary, the beneficiary could only pursue the proceeds or profits derived from dealings with the trust property if those dealings were in breach of the trust. This means that if, for example, the trust required the trustee to sell 100 shares out of the

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[52] See D Hayton, 'Uncertainty of Subject-Matter of Trusts' (1994) 110 LQR 335, 336, discussing the analogous problem which would arise in the context of a declaration of trust of part of an identified bulk.
[53] *Ibid.*
[54] *Ibid.*
[55] The vendor of land, as a constructive trustee, is in a similar 'non-fiduciary' position: MGL para 609.
[56] Lord Browne-Wilkinson's judgment in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 recognises this, although his judgment adds to the confusion in terminology because he refuses to concede that there can be a trust without associated trustee (ie fiduciary) obligations. His conclusion depends upon an unacceptable conflation of the attributes of

parcel and pay out the proceeds to a particular beneficiary, then the other beneficiaries could not possibly make any claims based upon some purported equitable interest in the shares sold: they would be insulated from both the advantages and the disadvantages of the transaction.

In the context of an enforceable contract of sale, the purchaser with a property interest in the bulk has no possible right to pursue proceeds from dealings with that bulk unless the vendor is in breach of the vendor's obligations. This is notwithstanding the purchaser's proprietary interest in the bulk. If the vendor sells 50 of the 1,000 shares, then the vendor still has 50 shares within the nominated bulk with which to satisfy the contract of sale. This is all that the vendor is obliged to do. This is all the purchaser can demand.[57] It follows that the purchaser cannot lay claim to the proceeds of a sale of any of the other shares to a third party. As with express trusts, the purchaser is insulated from the financial advantages and disadvantages of such a sale.

On the other hand, if the *whole* parcel of shares is sold to a third party, then the vendor has clearly breached the contract of sale with the purchaser: the contract was for a sale out of a defined bulk, not a sale from any source.[58] This breach gives the purchaser a choice: either to pursue a personal claim for damages for breach of contract or to pursue a proprietary claim for a lien on the proceeds derived from the sale of the bulk,[59] always assuming those proceeds can be identified. The proprietary remedy is clearly preferable if the vendor is insolvent.

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express, resulting and constructive trusts. See Rt Hon Sir Peter Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399.

[57] This is also in line with the views expressed by Lord Browne-Wilkinson in *Target Holdings v Redferns* [1996] 1 AC 421, 436.

[58] See *Re Wait* [1927] 1 Ch 606, 641-2 *per* Sargant LJ (dissenting).

[59] The purchaser's interest in the proceeds is a lien for the value of the shares. In this context there is no practical difference between this and a *pari passu* ownership interest in the fund constituting the proceeds. However, a lien more accurately reflects the fact that the vendor is not a fiduciary, prohibited from making a profit, but is merely subject to the purchaser's proprietary claim to trace the *value* of the purchaser's shares into other identifiable assets. The distinction is important. If, for example, the sale proceeds are themselves used to purchase a wining lottery ticket, then the purchaser will have a lien on the winnings for the value of the shares, not a *pari passu* ownership interest in the winnings fund. This follows *because* the vendor is not a fiduciary, and so is not subject to obligations of self-denial, but is simply a legal owner obliged in equity to recognise the proprietary interests of another (although, to the contrary, see the purchase money resulting trust argument advanced by R Chambers, *Resulting Trusts* (Clarendon, 1997) p 21 and *passim*). All of this assumes that the second sale effectively transfers legal title to a bona fide purchaser. If this is not the case, then the original purchaser has a further alternative, to assert an equitable interest in the shares against the second purchaser. The second purchaser would then be left with a damages claim against the vendor.

In short, the analysis is premissed on the recognition that the purchaser can only ever claim against the vendor if the vendor is in breach of the obligations assumed. Those obligations are defined solely by the contract of sale. The fact that, on breach, there are personal and proprietary remedial alternatives flows directly from deciding that the particular contract involves a specifically enforceable obligation to transfer sufficiently identified property, not from any super-added fiduciary or trustee duties.

This analysis of the incidence of proprietary interests in bulks in the context of contracts of *sale* is consistent with the accepted analysis of proprietary interests which arise when the contract is for the sale of specifically identified property. In both cases equity's intervention is premissed on the fact that equity treats as done that which ought to be done. This means that the purchaser only acquires a proprietary interest if the vendor's obligation to transfer is unconditional and specifically enforceable: this defines what ought to be done. Moreover, equity can only treat the property 'as transferred' if the subject matter of the sale can be objectively identified: this means that the sale property must be specifically identified, or it must be part of a fungible bulk.[60] The limitations imposed by these conditions are such that very few purchasers of part of an identified bulk can expect to have an equitable proprietary interest in the bulk in advance of the transfer of legal title.

7. Declaration of a trust of part of a bulk

The problem of whether it is possible to have a valid voluntary[61] declaration of trust of part of a bulk requires a separate and more difficult analysis. This is

[60] See Section 3, above.

[61] Exactly the same analysis may suggest that a declaration made for a consideration is immediately effective to constitute a valid trust (with the presence of consideration adding nothing to the analysis). If the trust is not judged valid on this basis, then further analysis is necessary to fully identify the parties' rights. Perhaps the contract to create the trust is specifically enforceable (as it would have been in *MacJordan Construction Ltd v Brookmount Erostin Ltd (in rec)* [1992] BCLC 350, were it not for the onset of insolvency). However, this remedy is often of only limited value: in *MacJordan*, for example, since no specific property was identified as the subject matter of the contract, even specific enforceability would not have given the intended beneficiary a proprietary interest until the funds were actually allocated to the trust. Alternatively, perhaps the parties' contract is sufficient to create a valid trust of a promise. This possibility is admittedly unlikely, especially in a commercial context, since the intention necessary to create such a trust is usually lacking (but see *Fletcher v Fletcher* (1844) 4 Hare 67).

notwithstanding the contrary suggestions in *Hunter v Moss*.[62] Again, the analysis relies on basic and general principles, this time the familiar ones governing the creation of trusts.

A voluntary declaration of trust is either immediately effective as a valid (and irrevocable) trust or it is not effective at all. In particular, it is inappropriate to draw any analogies between voluntary declarations of trust and revocable mandates to make gifts.[63] To be immediately effective, the declaration of trust must satisfy three certainties (of intention, subject matter and objects); it must also comply with any necessary formalities.[64] This means that, given proof of the necessary intention, trusts of personalty can deliver equitable interests to the beneficiary far more easily than gift or sale arrangements. An oral declaration of trust of an identified parcel of shares, for example, can deliver the equitable interest in those shares to the nominated beneficiary, notwithstanding that the beneficiary has provided no consideration, that the shares are those of a public company, or that the title deeds remain within the control of the settlor/trustee. If the same end were to be achieved by gift or sale, much more would need to be done by one or both parties.[65] It follows that analogies with other transactional forms must be treated cautiously.

So, too, must reliance on the equitable maxims. In particular, the maxim that 'equity will not assist a volunteer' is irrelevant in determining whether a voluntary declaration of trust is effective.[66] A trust is either valid or not. If it is valid, it will deliver a proprietary interest to the nominated beneficiary, whether that beneficiary is a volunteer or not; if it is not valid, it delivers no interest, even to a beneficiary who has provided consideration.[67]

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[62] [1994] 1 WLR 452.
[63] But to the contrary, it seems, see D Hayton, 'Uncertainty of Subject-Matter of Trusts' (1994) 110 LQR 335, 339.
[64] Since the focus here is on fungible bulks, the formalities associated with trusts of land are not relevant (ie Law of Property Act 1925 s 53(1)(b)). With trusts of personalty, there are no formal requirements; an oral declaration suffices (although then there may be practical problems of proof of the necessary intention).
[65] See the earlier discussion.
[66] But see D Hayton, 'Uncertainty of Subject-Matter of Trusts' (1994) 110 LQR 335, 336.
[67] Although such a beneficiary may have contractual remedies.

In the context of identified bulks, the issue is whether identification of the bulk out of which the specific trust property is to come constitutes sufficient certainty of subject matter to merit classification as a validly created trust.[68] Clearly the question cannot be answered, as it can with gifts which are effective in equity, by saying that the trustee has put the matter beyond his or her control by making it possible for third parties to achieve transfer of legal title independently of the donor. Nor can it be said, as it can with certain contracts of sale, that the trustee is obliged to segregate and transfer the property, and so holds it on trust. The trustee is not obliged to hold the property on trust unless and until there is a validly created trust. In other words, analogies with other transactional forms are not helpful. *Hunter v Moss*[69] aside, there are no cases directly on point. This case has been the subject of so much criticism that a return to first principles is warranted. The most convincing arguments must be derived directly from trust law rather than by analogy with other areas of the law.

Certainty of subject matter is needed so that the trustee's obligations can be defined precisely. This is necessary not only because the consequences of breach are so onerous, but also because the court must be able to execute the trust. Even so, the demanded certainty is frequently achieved by making certain routine assumptions about how property subject to a trust is held. These assumptions suggest that it *is* possible to create a valid trust of part of an identified bulk. If this is true, then it follows that the Court of Appeal in *Hunter v Moss*[70] reached the correct result, whatever criticisms might be levelled at the reasoning.

As already noted, the critics of *Hunter v Moss*[71] find no difficulties with trusts of a *proportionate* interest in part of an identified bulk. A trust of 20% of a parcel of 1,000 shares is seen as unproblematic, whereas a trust of 200 shares out of the same parcel is seen as impossible. The practical difficulties with this distinction have already been noted.[72]

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[68] Certainty of intention and object are also necessary, of course, but neither adds to the theoretical problems involved in analysing trusts of part of a bulk.
[69] [1994] 1 WLR 452, criticised in [1993] *Conv* 466; [1994] CLJ 448; [1994] All ER Rev 250; (1995) 9 TLI 43; (1995) 110 LQR 335. Approved of in [1996] *Conv* 223.
[70] [1994] 1 WLR 452.
[71] [1994] 1 WLR 452.
[72] In the former case, the words are taken to mean a 20% interest in each of the 1000 shares. Whether in fact this is what the parties intend is often debatable: see Section 3, above.

However, even if the shares are specified by number rather than proportion, the following analyses seem correct, although perhaps controversial:

(i) A transfers 1,000 shares to T with instructions to T to hold the shares on trust, 800 shares for A and 200 shares for B. The trust will be a valid express trust.[73] It is irrelevant that A is both the settlor and a beneficiary. Moreover, A can, if *sui juris*, demand transfer of legal title to 800 shares. This is true even if B is not similarly minded (or able).[74]

(ii) A transfers 1,000 shares on trust to T with instructions to T to hold 200 shares for B. That instruction will suffice to ensure that T holds the 1,000 shares on trust, 200 for B and 800 for A (because of an automatic resulting trust in favour of A).[75] The consequences for A will then be the same as in the previous example.

(iii) A declares herself to be trustee of a specifically identified parcel of 1,000 shares, with 800 shares to be held for A and 200 for B. The trust will be a

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[73] See *Grey v IRC* [1960] AC 1; *Re Vandervell's Trusts (No 2)* [1974] Ch 269; and especially *Brady v Stapleton* (1952) 88 CLR 322, 338-9 *per* Dixon CJ and Fullagar J, 345 *per* McTiernan J. Importantly, it is irrelevant that the trust specifies the number of shares for each beneficiary, rather than giving the beneficiaries a percentage interest in each share in the parcel.

[74] This need not have been the course of legal development, given the narrow ratio of *Saunders v Vautier* (1841) 4 Beav 115, aff'd Cr & Ph 240; *Re Brockbank* [1948] Ch 206. However, the broader view has prevailed and seems not to depend upon whether the initial trust was expressed to give A a 20% interest or an interest in 200 shares: see *Re Marshall* [1914] 1 Ch 192, 199 *per* Cozens-Hardy MR (CA) (right of beneficiary who is entitled indefeasibly in possession to aliquot share, to have that share transferred to him). With personalty, the rule is often applied even though this may result in the undistributed shares losing value. However, sometimes beneficiary cannot insist on this where it would unduly prejudice other beneficiaries: see, eg, *Lloyds Bank plc v Duker* [1987] 1 WLR 1324, [1987] 3 All ER 193 (where the beneficiary with a majority share interest was refused transfer of the aliquot because he would thereby get a greater money value that 46/80 of estate. All shares were therefore sold as a block on the open market and beneficiary took 46/80 of proceeds). Also see *Stephenson v Barclays Bank Trust Co Ltd* [1975] 1 All ER 625, 627 *per* Walton J suggesting that the ability to divide the fund (ie its fungibility) was the critical issue, and that division was not problematic where the fund was comprised of cash, money in a bank account or stock exchange securities; division of land, on the other hand, would always be problematic, and division of shares in a private company could, in certain very special circumstances, be problematic (citing *Re Weiner's Will Trusts* [1956] 2 All ER 482). To the same effect, also see *Manfred v Maddrell* (1950) 51 SR(NSW) 95 (SCt NSW), suggesting that the question of the entitlement of a beneficiary to, eg, a third of the entire income of a fund or to the income of a third of the fund is determined by *practical* considerations of convenience of division and risk of prejudice to the other beneficiaries. In particular, fungibles (eg shares) generally presented no problems in division. Also see *Re Sandeman's WT* [1937] 1 All ER 368; *Crowe v Appleby* [1975] 1 WLR 1539, 1543. All this lends weight to the assertions advanced here, notwithstanding the doubt injected by RP Meagher and WMC Gummow, *Jacobs' Law of Trusts in Australia* (5th edn, Butterworths, 1986) ('*Jacobs*') para [2312], suggesting that these rules are dependent upon the pre-condition that all the beneficiaries are ascertained, *sui juris*, and consent.

[75] *Vandervell v IRC* [1967] 2 AC 291.

valid express trust.[76] It is immaterial that A is both the trustee and a beneficiary.

(iv) A declares herself to be trustee of a specifically identified parcel of 1,000 shares, with 200 shares to be held for B but with an ineffective indication of the allocation of the remaining 800 shares. Arguably—but more tentatively—the trust will again be a valid express trust of the 1,000 shares, with 200 shares being held for B and 800 for A.[77]

Each of these results follows because there is a clear intention to create a trust and sufficient indication of who is to be beneficially interested in the identified trust property. Moreover, in each of these cases it is possible to describe the consequences for both the trustee and the beneficiary of proper and improper dealings with the parcel of 1,000 shares. Can it seriously be suggested that the result should be any different if A simply declares that, out of a specifically identified parcel of 1,000 shares, she intends to hold 200 shares on trust for B? The effect of such a declaration, surely, is that the parcel of 1,000 shares is held on trust by A, 200 shares for B and 800 shares for A. This was the conclusion reached in *Hunter v Moss*,[78] although not on this reasoning.[79]

[76] *Paul v Constance* [1977] 1 WLR 527; *Brady v Stapleton* (1952) 88 CLR 322, especially pp 338-9, 345. But D Hayton, 'Uncertainty of Subject-Matter of Trusts' (1994) 110 LQR 335, 339, assumes the opposite to be true. This assertion is admittedly less secure than the earlier assertions, and there does not seem to be a case where issue was directly argued. Nevertheless, the tenor of the various cases already cited seem to support the view advanced here that both the trust property and the interests of each beneficiary are sufficiently identified for either the trustee or the court to be able to administer the trust. Also see J Martin (ed), *Hanbury & Martin's Modern Equity* (15th ed, Sweet & Maxwell, 1997) pp 96-7.

[77] But D Hayton, 'Uncertainty of Subject-Matter of Trusts' (1994) 110 LQR 335, 339, suggests that A might validly declare herself a trustee of 200 shares for B and 800 shares for X (but *not* 800 for A). However, if the trust for X were to fail (because X is dead, for example), then surely equity would not deny the efficacy of the whole trust; it seems sensible to suggest that the 800 shares would simply be held on resulting trust for A (notwithstanding the denial of this possibility in *Re Vandervell's Trust (No 2)* [1974] Ch 269, 288-93, *per* Megarry J, who said that there must be a transfer from A to a trustee of some kind before either a presumed or automatic resulting trust can arise). The footnotes immediately above lend further support.

[78] [1994] 1 WLR 452.

[79] The reasoning was in fact based on a questionable analogy between trusts and bequests (or gifts): see, eg, [1994] 1 WLR 452, 457-8 *per* Dillon LJ, criticised in Underhill and Hayton, *Law of Trusts and Trustees* (5th edn) p 61, and MGL, paras 679-82. In *Re Harvard Securities* [1997] 2 BCLC 369, too, trusts were treated as analogous to gifts and bequests (p 384), and to sales (p 382), and distinctions were instead based on the questionable differences between tangibles and intangibles (p pp 382-4).

All of this presupposes that it is A's intention to create a trust. The simple desire to benefit B is not enough. What is needed, regardless of the form of words chosen, is a desire to benefit B by embracing the duties and obligations imposed on trustees. This intention ought to be found only on the clearest evidence.[80] The consequences of such a finding are far more onerous for the settlor/trustee than a finding of intended gift or contract. Nevertheless, with clear evidence of such an intention, there seems no reason to deny the effectiveness of an intended trust of part of an identified bulk. The rules relating to automatic resulting trusts suggest that the subject matter and the respective interests of the parties are defined with sufficient particularity.

Of course, with trusts as with sales, this analysis can only be applied when the bulk is comprised of fungibles. A collection of individual assets (even if only marginally dissimilar) is not a bulk.[81] No one would suggest that a selection of two paintings out of an identified collection of 100 was a selection from a bulk.[82] Similarly, if A were to declare herself trustee for B of 2 sheep out of an identified flock of 100, this would probably not be sufficient to create a valid trust.[83] Both A and B may find selection of the particular sheep critical. In this context, equity cannot make the leap from A's intention to benefit B by trust to an identification of the specific benefit to be conferred. This is not the case with fungibles. A trust of 2 tons of wheat from an identified bulk of 100 tons does not pose the same problem.

Critics suggest that the possibility of a trust of part of an identified bulk would lead to unacceptable uncertainties. For example, if A subsequently sells 200 shares out of the identified parcel of 1,000 shares, is it A or B who is chargeable with capital gains tax? And if the proceeds of such a sale are profitably (or detrimentally) reinvested, does the new investment belong in equity to A or to B?[84] The allegation is that there is no

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[80] This evidence did not exist in *Re Harvard*, despite the inference, at [1997] 2 BCLC 369, 372, that it was sufficient that Harvard held the shares for the clients 'on your behalf' and 'being your shares'.
[81] But see Section 3 for the limits of this statement.
[82] But to the contrary with 2 prints from a collection of 100 identified and identical (ie un-numbered) prints.
[83] See *Re London Wine (Shippers) Ltd* [1986] PCC 121, 137 *per* Oliver J, using this example to illustrate the difficulties. From his comments it is not clear whether he saw the difficulty as one of lack of *any* defined bulk (as was the situation with the case at issue) or as one of the identified class of assets not being comprised of fungibles. As noted earlier, even with sheep, the context may indicate otherwise and there may then be a valid and certain trust: see *Scott v Scott* (1963) 109 CLR 649, 661.
[84] See D Hayton, 'Uncertainty of Subject-Matter of Trusts' (1994) 110 LQR 335, 336.

rational solution to these problems. This is not so. Traditional trust principles provide ready and acceptable solutions.[85]

Before indicating how traditional trust principles can resolve the problems, some preliminary matters require resolution. Trustees are often subject to an express or implied obligation to manage the trust fund in the interests of the beneficiaries. The usual inference is that sale and (perhaps restricted) re-investment is permitted, and that the original trust assets and their derivatives cannot be removed from the ambit of the trust and mixed with the trustee's own assets.[86] But this is not invariably the case. In *Hunter v Moss*,[87] for example, the inference is that the settlor/trustee is not to deal with the beneficiary's shares; the obligation is simply to hold he asset on a bare trust for the benefit of the nominated beneficiary. Recognising these different obligations is crucial in resolving the hypothetical problems posed earlier. In short, it seems necessary to distinguish bare trusts from those where A has powers of management.

If A's sale of 200 shares from the parcel of 1,000 is *not* in breach of trust (as is likely to be the case if A has powers of management), but A does not indicate whether the shares are being sold on A's or B's account, then the two beneficiaries will share *pari passu* in the sale proceeds (and the associated tax liability) and in their subsequent re-investment product, assuming this too is authorized.[88] This follows from the fact that A is not liable for any breach of trust and so is not penalised in any way. Any uncertainty is therefore resolved by treating both A and B as innocent beneficiaries, rateably entitled to share in the advantages of legitimate trust fund investments but also rateably liable to bear any losses.

On the other hand, if A's sale of the 200 shares constitutes a breach of trust, then the analysis must be more careful. A sale by A can only be in breach of trust if the

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[85] See J Martin (ed), *Hanbury & Martin's Modern Equity* (15th ed, Sweet & Maxwell, 1997) pp 96-7.
[86] Of course, assets can be removed from the trust if the trust is validly terminated: *Saunders v Vautier* (1841) 4 Beav 115, aff'd Cr & Ph 240.
[87] [1994] 1 WLR 452.
[88] If it is not, then A, as defaulting trustee, will be personally liable for any losses thereby caused to the trust fund, and A's beneficial interest will be charged with that liability. If, on the other hand, the unauthorised investment is profitable, the beneficiaries can elect to adopt the investment. Whether in these circumstances B can claim the *entire* profits of the unauthorised investment (rather than sharing them rateably with A) is still unsettled: see *Scott v Scott* (1962) 109 CLR 649, 657, raising the issue but not discussing it.

interest disposed of belongs to B and is disposed of in breach of trust (as would be the case if the trust was a bare trust). This is because, if the interest belongs to A, then A can be assumed to have known of and consented to the disposition: this disposition is then not an actionable breach of trust. Given this, if A sells 200 shares from the parcel, the most sensible analysis is to assume that the interest disposed of *is* A's, and that the interest remaining includes all of B's entitlement. This rationalization preserves B's rights (including the right not to have the shares disposed of) and ensures that A is not unnecessarily presumed liable for breach of trust.[89]

This analysis remains appropriate even if the sale and re-investment turns out to be more profitable than continued investment in the original shares. At first sight this might seem inappropriate, but the analysis is premissed on the assumption that it would be a breach of trust for A to dispose of B's interest. The tracing cases which allow a complaining beneficiary to elect to pursue the most profitable alternative (whether that is the remaining fund or the new investment) are premissed on the assumption that the trustee is unarguably in breach of trust by taking the trust property and mixing it with the trustee's own property so that identification by the beneficiary is impossible. *Because* the trustee is in breach of trust, the presumptions relating to identification of the beneficiary's property apply to the advantage of the beneficiary. In the case of a trust of an entire identified fund, there was no breach involved in the initial inability to distinguish shares in which A has an interest from those in which B has an interest, and arguably A is not in breach of trust in dealing only with those shares in which A has an interest.

Of course, this presumption of A's innocence will not always work. If A sells more than 800 of the shares, then at least some of the shares sold must necessarily have belonged in equity to B. In these circumstances, B can sue A for breach of trust. A

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[89] This conclusion seems to be reinforced by the fact that A could elect to segregate the 200 shares either at the time of declaring the trust or any time thereafter (in fact, J Martin (ed), *Hanbury & Martin's Modern Equity* (15th ed, Sweet & Maxwell, 1997) p 96, suggests that there is an obligation imposed on A to segregate. No authority is cited and, with respect, this seems to confuse *duty* imposed on the trustee with an evidential *presumption* which applies if a segregated trust fund is mixed without authority, making identification impossible). If this is the case, then it seems legitimate to regard any dealing with the 800 shares as preceded by a notional segregation. This accords with the policy underpinning the tracing rules described in *Re Hallett's Estate* (1879) 13 ChD 696, 717 *per* Sir George Jessel, and seems preferable to the suggestion in Martin, p 96, that the mixed asset tracing rules should apply.

will be personally liable to reinstate the trust fund (at least to the extent of B's share of it) and will also be subject to tracing claims, with all the identification presumptions operating against A (as defaulting trustee) and in favour of B. Rigorous application of the rules which apply to defaulting trustees would suggest that in these circumstances B could elect to treat any remaining shares as belonging to B *or not*, and could thus take the full traceable benefit of A's unauthorised investment should it turn out to be profitable. On this approach, the defaulting trustee would be precluded from asserting that the proven default is only limited, and that A's intention was to deal with all of A's interest but part only of B's.[90] This follows equity's traditional hard-line approach to defaulting trustees.[91]

In short, there seems to be no practical or theoretical reason to deny the possibility of a trust of part of an identified bulk provided the identity of the bulk and the size of the part (whether designated absolutely or as a proportion) are clear.

Conclusion

The common law does not treat dealings with bulks in the same way as dealings with unascertained property. For example, when a sale is from a defined bulk, destruction of the bulk frustrates the contract; in addition, the vendor is not entitled to dispose of all the bulk to a third party and then satisfy the primary contract from another source; finally, if the defined bulk is depleted, the purchaser's property may become ascertained by exhaustion, a process which is impossible if no bulk has been appropriated to the contract. This means that even the common law recognises that the property is at least partially identified.

Equity is similarly discriminating. Both at common law and in equity, dealings with such quasi-specific property (where the bulk is identified and so is the quantum to be

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[90] Although see the much-criticised case of *Re Tilley's WT* [1967] Ch 1179.

[91] A more lenient view, and one that is arguably consistent with the earlier analysis, would see A as being in breach only so far as the shares sold must unquestionably comprise B's interest in the trust fund. For example, if A sells 900 shares out of the parcel of 1,000, the assumption is arguably that 800 of the shares sold belonged to A and 100 to B; the 100 unsold shares remaining are thus B's. This result does not follow from an application of the somewhat questionable decision in *Re Tilley's WT*[1967] Ch 1179, but simply from the fact that A, as trust beneficiary, is entitled to consent to any dealings with A's interest in the trust fund. This remains true notwithstanding that A cannot deal with B's interest without B's consent. Perhaps the approach adopted in *Target Holdings v Redferns* [1996] 1 AC 421 offers some support for this alternative.

extracted) have consequences which are more akin to those found in dealings with specific property than to those found in dealings with completely unascertained property. This ought not to be surprising.

In the context of bulks, application of the general principles which govern the incidence of equitable interests suggests the following rules. A gift of part of a bulk will *never* be effective in equity in advance of physical segregation of the relevant part. An agreement for sale is different. It may sometimes confer on the purchaser an equitable interest: this is so if the contract of sale is specifically enforceable[92] and unconditional, and the bulk and quantum to be sold are identified. The combined effect of all these conditions is that few purchasers ever find themselves in such a favoured position. Most will have to wait until the agreed transfer of legal title is effected. This means that transfer of equitable ownership interests in bulks by operation of law is relatively uncommon. The most successful means of delivering such interests to third parties is not via operation of law (with incomplete gifts and sales) but by express declarations of trust. Proof of the necessary intention to do this is likely to create some difficulties, especially in a commercial context. But, given the necessary intention and a clearly identified beneficiary, a valid trust depends only upon identification of the relevant bulk and the quantum of the beneficiary's interest which is to come from that bulk.

The starting point in distinguishing *Hunter v Moss*[93] from the other English authorities ought to be that it concerns a voluntary declaration of trust, and not a sale or outright gift.[94] From that initial distinction, analysis ought to proceed in accordance with either the familiar and accepted general rules which govern the creation of express trusts or those which govern the incidence of interests which arise by operation of law. Care must be taken to apply the principles, rather than the results, from the relevant precedents in order to arrive at the correct practical conclusion. These latest cases on interests in bulks highlight the need to reason from

[92] See section 6, above, noting that this condition will never be satisfied if the bulk is comprised of goods: Sale of Goods Act 1979 s 52 as construed in *Re Wait* [1927] 1 Ch 606.
[93] [1994] 1 WLR 452.
[94] Although, because the shares were in a private company and the bulk was specifically identified, even an agreement for sale would, on payment of the price, have conferred an equitable interest on the

established principles to sustainable conclusions, avoiding the traps of unsound analogies based on seemingly similar facts.

purchaser. The same would not have been true, even with an identified bulk, in *Re London Wine* or in *Re Goldcorp*, since those contracts of sale were not specifically enforceable.