

## Certainty of Objects

- “The principle is, in my opinion, that the donor must make his intentions sufficiently plain as to the objects of his trust and the court cannot give effect to it by misinterpreting his intentions by dividing the fund merely among those present. Secondly, and perhaps it is the more hallowed principle, the Court of Chancery, which acts in default of trustees, must know with sufficient certainty the objects of the beneficence of the donor so as to execute the trust.” - *Re Gulbenkian's Settlements* [1970]
- The possible persons who may be **beneficiaries** of the trust must be identified with sufficient certainty
  - “There can be no trust, over the exercise of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership, and not trust. [A] trust must have a definite object. There must be somebody, in whose favour the Court can decree performance.” *Morice v Bishop of Durham*
- The beneficiaries must be people, not abstract purposes (exceptions; charities)
- *Morice*: trust created in will which was for benevolent and charitable purposes. Issue around “benevolent” purposes, does not fall under charity hence no-one can enforce benevolent purposes and the trust must fail.
- Testamentary trust returns to persons whom deceased has specified any property should go to or according to intestacy rules
- If decided there is a clear intention to create the trust but do not have certainty of object – the beneficial ownership returns. The property is undisposed of and the benefit of such a trust must result [go back] to those whom the law gives ownership in default of the disposition
- Generally cannot set up a trust for a purpose, exception are charities
- Court has to be able to decree performance and only human beneficiaries can enforce the trust so trustees live up to their obligations. For charitable purposes, would be AG or Charities Commission.

### *Clayton v Clayton*

- Normally easy to get certainty of subjects and objects, nominate certain people eg. can specify by name or well-defined concepts eg. issue of any final beneficiary/descendants
- In practice easy to avoid problems with certainty of objects i.e. specify by name and role eg. wife, Hilary
- Could have uncertainty eg. issue – does it include adopted children or if do not know person existed and a general definition, whether have intention to give property to that person.

## **Kinds of uncertainty**

- Conceptual uncertainty:
  - “...on trust for the interesting members of the VUW Law Faculty...”
  - Evidential uncertainty:
    - “...on trust for my former faculty colleagues ...”
- ‘Whereabouts’ uncertainty
  - Cannot find a particular beneficiary
  - “Hopelessly wide” class: administrative unworkability
- There are different tests of certainty of object for different types of trust and power
  - Fixed trusts (including bare trusts)
  - Discretionary trusts [‘trust powers’]
  - Powers held as a fiduciary
  - Personal powers
- One trust instrument might contain a combination of these trusts and powers
- If there is insufficient certainty of objects, the trust or power will be void
- Problem arises not when set up a trust with people who you want to be the object or beneficiary eg. family. Easy to identify without names who can take trust property
- Problem arises when set up a trust to help a certain class of people eg. old friends which are not easily defined individuals.

## **McPhail v Doulton**

- Bertram Baden created Matthew Halls Star Trust for “any of the officers and employees or ex-officers or ex-employees of the company or to any relatives or dependants of any such persons”.
- Family receive Baden’s money on resulting trust if it fails.
- For discretionary trust where beneficiary of objects do not have a fixed interest i.e. certain amount must be paid every year - re Baden trust deed, beneficiaries only have the right to be considered.
- Trustees can pay to the beneficiaries in such amounts and conditions if any as they think fit, and the trustees do not have to make a payment to any particular beneficiary.
- Trustees have to make a payment under a discretionary trust but no beneficiary has any particular entitlement to any payment.

### *Issues:*

- 1) whether certainty of object matter according to is or is not test
- 2) whether that test should apply
- Fixed trust requires a complete list of all beneficiaries – issue arises from employee’s descendants or relatives – would not have enough evidence to draw up a complete list
- Changed test for certainty of objects for discretionary trusts where no specific person has specified entitlement and trustee chooses amongst class of who gets what. A complete list is irrelevant, the trustees only have to choose from the relevant class.
- Liberalises ability of settlors to create discretionary trusts which are limited to specified individuals or defined classes – focus on whether a person is in or outside a class.

- Lord Wilberforce: can still enforce a trust and ensure if trustees are required to make a distribution among discretionary beneficiaries that the distribution does not need to be to all the discretionary beneficiaries equally, which would require a complete list
- Trust deed: trustees have to pay the net income to the employees or to the employee's relative or dependents
- Assimilate test for discretionary trusts and fiduciary powers
- Fiduciary power or discretionary trust is crucial if going to have different tests
- Clause 9a not a discretionary trust: could be a fiduciary power as no duty to make an allocation as under clause 9b. Do not have to spend all the income and in clause 9a, "apply the net income of the fund in making... in such amounts at such times and on such conditions (if any) as they think fit." Allows trustees not to apply the income
- Lower court held to be a fiduciary power and Lord Wilberforce applies realist analysis as prior to McPhail if this was a discretionary trust need to draw up a complete list.
- Lower court wants to uphold Bertrand's trust is to stipulate that there was a fiduciary power so apply more lenient test of certainty of object: whether any given person is or is not someone the property can be given to. Do not need a complete list
- HL: Artificial distinction between trust powers and fiduciary powers.
- "what to one mind may appear as a power of distribution coupled with a trust to dispose of the undistributed surplus, by accumulation or otherwise, may to another appear as a trust for distribution... A layman and, I suspect, also a logician, would find it hard to understand what difference there is."
- Trustee of a discretionary trust with a duty to distribute has essentially the same obligation as if they held fiduciary power.
- Replaced distinction in tests between fiduciary powers and discretionary trusts, use is or is not test.

<b>Reasons for higher level of certainty for discretionary trusts pre-<i>McPhail v Doulton</i></b> <b>• <i>IRC v Broadway Cottages (1955)</i></b>	<b>Reasons for the lower level of certainty for discretionary trusts in <i>McPhail v Doulton</i></b>
<p>In default of trustees complying with their duties, need complete list of objects so the court can make an equal distribution and enforce the trust; it could not exercise the dispositive discretion</p> <p>Court could not insert other trustees to give effect to obligation to distribute property</p>	<p>Court can appoint new trustees or itself give effect to the settlor's intention</p> <p>Can enforce a discretionary trust apart from giving an equal share of property to each discretionary beneficiary</p>
<p>The trustee must make a distribution after considering all members of the class, not a smaller subset.</p>	<p>The trustee need only make a general survey of the field, distinguishing between classes and categories and particular individuals. Trustees fulfil obligations by distributing to individuals within the category</p> <p>Too onerous an obligation to require trustees to identify all the beneficiaries of the trust before making a distribution</p>
<p>Similarly, the court cannot impose an arbitrary limitation on the class by creating a smaller certain class where the settlor has not.</p> <p>Courts also unwilling to distribute to a smaller class and decide which beneficiary receives property.</p>	<p>Beneficiaries and the court can ensure that the trustees do not dispose of property to non-objects</p> <p>Trustees cannot distribute property to people outside the class. Can apply an 'is or is not' test – have to know who falls within the class for certainty of object so courts can enforce the trust by controlling discretionary trustee actions and ensure they distribute to persons within the class</p>
<p>Basic principle underlying court's reasoning is court has to be able to enforce the trust</p>	

<b>Fixed Trust</b>	<b>Fiduciary Powers</b>	<b>(Discretionary) Trust Powers</b>
no discretion/power is conferred upon the trustee or any other party to vary the class of the beneficiaries or the quantum of their interests. Eg. Divide \$100k equally between [class of persons]	A power given to “appoint” property to (vest property in) one or more persons, where the donee of the power is under <u>no obligation</u> to appoint the property.	A power to distribute which the donee must exercise
<p>“[T]here cannot be equal division among a class unless all the members of the class are known.” - “Complete list”</p> <p>This requires conceptual + evidential certainty Cf \$1000 to each of my good friends <i>McPhail v Doulton</i>:</p>	<p>“[A] mere or bare power of appointment among a class is valid if you can with certainty say whether any given individual is or is not a member of the class; you do not have to ascertain every member of the class.” <i>Re Gulbenkian</i></p> <p>McPhail borrowed test and applied to DT</p>	<p>“The power is valid if it can be said with certainty whether any given individual <u>is or is not</u> a member of the class and does not fail simply because it is impossible to ascertain every member of the class.” <i>McPhail v Doulton</i> [1971]</p>
Trustees have no discretion as to who gets what and are told to give property to this person	Trustee is given a power to distribute but is not required to distribute. No duty to allocate income to certain objects	Trustees have to be able to determine whether any person is or is not within the class. Duty to allocate income to certain objects
Need closed, complete list of all beneficiaries i.e. distribute income equally to children, need to know no. of children which determines the proportion of property people get.	Is or is not within a class.	Is or is not within a class.

<p><i>Re Baden's Trust No 2</i></p> <ul style="list-style-type: none"> <li>• Case remitted to the Chancery Division of the High Court, and then on appeal to the CA. <b>Q: how did the judges apply the 'is or is not' test?</b></li> <li>• Defined class i.e. employees and dependents and relatives</li> </ul>	
Megaw LJ	Sachs LJ
Such a trust will be valid if a substantial number of people can be identified as satisfying the terms of the trust	Once the conceptual uncertainty hurdle has been overcome, then the court (if called on) needs enough evidence to be convinced that X is within the class. If not enough evidence of membership, they are not within the class
Test: can we identify sufficient no. of people who are clearly within the class.	Test: can it be said with conceptual certainty that any given individual is or is not a member of the class?
Once identified sufficient number of objects or discretionary beneficiaries fall within the class, does not matter if cannot say for every person whether they are or are not within the class.	Once class is conceptually certain, does not matter if there is a lack of evidence as to whether any given person is within the class or not. Becomes a question of fact.
Do not need clear is or is not test and clear conceptual certainty.	<p>Application:</p> <p>Concept of dependents or relatives is conceptually certain.</p> <p><b>Relative:</b> descendent from a common ancestor. Notes class capable of infinite expansion to include everyone, but Court can choose particular common ancestors and smaller group of kinsmen.</p> <p>But Stamp LJ: next of kin. MB: not conceptually certain</p> <p><b>Dependent:</b> "probably means dependent for the ordinary necessities of life for a person of that class and position in life"</p> <p><b>MB:</b> not legitimate to draw on definition from another case. Different view: could be person who depends on another for basic sustenance or food.</p> <p>"any one wholly or partly dependent" – unclear how long one has to remain a dependent for – suggests conceptual uncertainty.</p>
Does not matter if class is somewhat uncertain provided some clearly fall within it eg. friends. Trust should not be otherwise invalid or return on resulting trust to the settlor.	<p>Conceptually uncertain classes:</p> <ul style="list-style-type: none"> <li>• distributions to someone who trustee is morally obliged to (grey area)</li> <li>• friend</li> </ul>
<b>Stamp LJ:</b> Need both conceptual and evidential certainty to show that any given person is or is not within the class	

- If read it or is not test strictly, then need enough conceptual certainty and evidence to draw up a complete list of all people to show whether they are or are not within the class. Unless draw up a complete list, then cannot say for certain that any given person whether they are or are not within the class.
- Trustee or court can define who a relative is but in doing so are making a decision the settlor did not make.
- Often court says not for them to impose definition on an uncertain class but courts seem to be doing it in this case.
- Is or is not conceptual certainty. If have full evidence of information about a person and know whether particular person fell within a class or not, then conceptually certain and the class would be a valid class within certainty of objects.

*Re Beckbessinger*

- “Residue to be held on trust by X and Y to be applied “to benefit the interests which [deceased] has particularly in Christchurch...”\*  
- no class
- Will created a discretionary trust:
  - No choice but to exercise the power
- Where there is a choice as to beneficiaries, the “complete list” test (for fixed trusts) does not apply.
- Followed *McPhail v Doulton*
- Expression “interests which [deceased] had in Christchurch “is so conceptually uncertain as to be void for uncertainty.”
- Power and a distribution had to be exercised – ‘is or is not’ test cannot be applied to an unclear class of persons
- Re Baden: need conceptual certainty, evidential uncertainty does not matter