**TOPIC 3A: CERTAINTY OF OBJECT**

Pursuant to the beneficiary principle, a trust must be for the benefit of identifiable persons or objects *(Morice)*. However, the test for certainty depends upon the type of trust created.

<table>
<thead>
<tr>
<th>Summary</th>
<th>Obligation to Distribute</th>
<th>Discretion to Select Objects</th>
<th>Test for Certainty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fixed Interest Trust</td>
<td>Yes</td>
<td>No discretion permitted</td>
<td>List Certainty</td>
</tr>
<tr>
<td>Discretionary Trust</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Mere Power</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
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### 1. Type of Trust

**A. OBLIGATION TO DISTRIBUTE?**

- **ASK:** Does the wording of the clause indicate that trustee is obliged to distribute property?
  - **If YES,** then clause imposes a *trust power*
  - **If NO,** then clause imposes a *mere power*

**I. TRUST POWER**

- Look at whether there is time limit e.g. T must appoint to B within X years → this indicates obligation
- Generally, will not have a gift over in default (although not conclusive) *(Hays)*
- Clear and express language e.g. “must”, “on trust” – compare to other sections
- To distribute to anyone except T ← also indicates that cannot keep it for themselves

**II. MERE/BARE POWER**

- Weak language compared to other sections will likely indicate a mere power
- A gift over in default clause is conclusive evidence of a mere power *(Hays)*

**B. TYPES OF CLASS OF OBJECTS**

- Here [CLAUSE #] grants [D] a [GENERAL/HYBRID/SPECIAL] power of appointment, to select to whom property is distribute from [CLASS OF OBJECTS].

  1. General Power
     - Power to appoint anyone in the world including the donee
  2. Hybrid Power
     - Power to appoint anybody in the world EXCEPT a specified class of individuals
  3. Special Power
     - Power to appoint to anyone WITHIN a specified class of individuals

**C. DISCRETION TO SELECT OBJECTS?**

**I. FIXED INTEREST TRUST**

- This is where the beneficiaries and their interests are specified (i.e. no POI)
- This creates equitable property rights to [B] in [TRUST PROPERTY] as they can insist the trust is distributed according to their proportionate interests
- Where fixed interest beneficiaries are specified but no proportions stated – presume equal shares
- The test for certainty of object is *list certainty* and [T] must be able to identify all beneficiaries at the time of distribution *(McPhail)*
II. EXHAUSTIVE DISCRETIONARY TRUST

- Where there is a general or hybrid class of objects with an obligation to distribute the property, it will fail → the class is simply too wide to allow the trust to be enforced (*Re Carville*) (*Hays*)
- Where certainty fails due to above, a resulting trust will be established in favour of estate

- As [D] is under an obligation to distribute the assets s/he has an exhaustive discretionary power and the test is **criterion certainty**.

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III. MERE DISCRETIONARY POWER

- As [D] has a mere POI the test for certainty of objects is **criterion certainty** (*McPhail*)

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2. Test for Certainty

- **Fixed interest trusts** = List Certainty
- **Discretionary trusts** = Criterion Certainty

A. LIST CERTAINTY

- **TEST:** T must be able to make a list of all the beneficiaries, if this can’t occur, the trust will fail
- List is made at the time of distribution
- Shares to be taken may be specified on trust deed or necessarily implied

B. CRITERION CERTAINTY

- **TEST:** T must be able to determine whether or not a person is within the class of objects

1. **Semantic certainty**
   - First must show, whether or not the description of the class is semantically certain
     - ✓ Employers (*Gulbenkian*)
     - ✓ Employee or officer (*McPhail*)
     - ✓ Inhabitants
     - ✓ Relative (blood relative) (*Badens*)
     - ✓ Dependents (rely financially) (*Badens*)
     - ✓ Organisations for the elim of war (*Blyth*)
     - ✓ Anyone in the world (*Re Hays*)
     - ❌ Friends (need criteria to identify) (*Lempens*)
     - ❌ Any person with whom my son resided (*Gul*)
     - ❌ Future employees
     - ❌ Members in good standing
     - ❌ Organisations to raise the standard of living

2. **Evidentiary certainty**
   - X may argue the objects of the trust are NOT ascertainable by way of evidence (*McPhail*)
   - HOWEVER, evidentiary uncertainty is something the court can rule upon and WILL NOT invalidate the clause (*Re Gulbenkian*)
   - Being difficult to establish does not equate to evidential uncertainty
3. **Administrative unworkability**
   - X will argue that even though the objects are semantically certain, the class is so wide that it is administratively unworkable (*Lord Wilberforce in McPhail*)
   - **ASK:** is the class so hopelessly wide that no sensible decision can be made? (*Gulbenkian*)
     - E.g. Greater London (*McPhail*) or the inhabitants of county of West Yorkshire (*District Auditor*)
     - E.g. in McCracken, ‘such Christian organisations and societies’ may have been AU per Phillips J

4. **Capriciousness**
   - Administrative unworkability does not apply to mere powers because it never has to be performed, but settlor can’t be acting capriciously (*Templeman LJ in Re Manisty’s*)
   - Can’t use terms that are “irrational, perverse or irrelevant” – e.g. skin colour
   - Where the objects are an “accidental conglomeration” with no discernable link to S (*Templeman J*)

**N.B.** where there is a two-part/default of distribution clause and first part is invalid → whole clause will be treated as invalid (provision severance is outside the bounds of our course)
   - Can also get over uncertainty where the trust provides that a third party can resolve a dispute (*Tucks*)