

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.

<i>Summary</i>	Obligation to Distribute	Discretion to Select Objects			Test for Certainty
		General	Hybrid	Special	
Fixed Interest Trust	Yes	No discretion permitted			List Certainty
Discretionary Trust	Yes	No	No	Yes	Criterion Certainty
Mere Power	No	Yes	Yes	Yes	Criterion Certainty

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

Summary	Obligation to Distribute	Discretion to Select Objects			Test for Certainty
		General	Hybrid	Special	
Discretionary Trust	Yes	No	No	Yes	Criterion Certainty

- 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 **critierion certainty**.

Summary	Obligation to Distribute	Discretion to Select Objects			Test for Certainty
		General	Hybrid	Special	
Mere Power	No	Yes	Yes	Yes	Criterion Certainty

III. MERE DISCRETIONARY POWER

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

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*)