

# Certainty of Object

- The beneficiary principle means that a trust must be in favour of definite beneficiaries that's are ascertained or capable of ascertainment, or for a recognised charitable purpose (*Morice v Bishop of Durham*)
- Degree of certainty of beneficiary depends on the type of trust being considered

## 1. Is it a fixed interest trust, discretionary trust or mere power?

### Fixed interest trust

- ❖ In a fixed interest trust the trustee has no discretion to distribute the trust property among the beneficiaries.
- A fixed interest trust requires list certainty - The trustee must be able to make 'a list' of the names of the beneficiaries so that the trustee can distribute the property to them *Kinsela v Caldwell*
- It is not essential that the objects be ascertained at the commencement of the trust, as long as they are described with sufficient certainty for an exhaustive list to be made at the date at which the beneficiary is entitled to the estate/distribution (*Kinsela v Caldwell*)
- Contrast *West v Weston*, Just a substantial majority had to be listed. This approach has been criticised.

### Discretionary trust

- ❖ In a discretionary trust, the trustee has some discretion in how the trust property is distributed.
- ❖ Requires that the court be able to determine whether or not an individual is within the class of potential objects – known as '**criteria certainty**' *McPhail v Doulton*
- ❖ Discretionary trusts can be further divided into two categories depending on whether the trustee is actually obliged to distribute the trust.
- ❖ Whether a trust power or mere power is a question of intention

### Mere/bare power

- In the case of a mere power the Trustee is not obliged to carry out the trust – only required to consider
- Trustee is given a discretion to select among the beneficiaries as to what they will ultimately receive
- Eg "I give my trustee power to appoint \$1,000,000 to whichever of my 4 sons he shall select, and in default of appointment, it is to be held for my oldest son."
- If there is a gift over in default of appointment – indicates there is a mere power (contemplated the donor might not make the gift)
- Where a person is given a mere/bare power, it is not really a trust at all - therefore, the person given the power is called a 'donee' rather than a trustee.
- No one has sufficient standing, and indeed a court can't compel a donee to distribute.

### Trust power

- ❖ Where the trustee is obliged to distribute, it is named a 'trust power'.

## 2. What type of Certainty is required?

- ❖ **Fixed trust requires; a) Semantic certainty b) evidential certainty c) no need for administrative**
- ❖ **Mere power requires: a) Semantic Certainty; b) No need for Evidential Certainty c) no need for administrative workability**
- ❖ **Trust power requires: a) semantic certainty b) no evidential c) may require administrative certainty**
- ❖ **Evidential uncertainty will not invalidate trust**

### Semantic uncertainty

- A class is semantically certain if it can be said with certainty that a possible object is or is not a member of the particular class
- "my old friends" is semantically uncertain unless it can be shown that the donor has a special meaning for the term (*Re Gulbenkians Settlements*)
- to the "dependents" or "relatives" of specified persons is semantically certain as even on the widest meaning the trustees could determine whether a candidate came within the class (*Re Baden's Deed Trusts*)
- A will allowing the trustee to distribute "among such Organisations as in the Public Trustee's opinion are working for the elimination of war" will satisfy the certainty requirement yet "among such Organisations as in the Public Trustee's opinion are formed for the purpose of raising the standard of life throughout the world" is not semantically certain not (*Re Blythe*) – impossible to say what is formed for the purpose of raising the standard of life
- "the deserving among my relatives" semantically uncertain (*Public Trustee v Butler*)

### Evidential Uncertainty

- Evidential uncertainty results when there is not sufficient evidence to prove that a person comes within the particular class
- A trust deed giving trustees power to give out in their absolute discretion 'to or for the benefit of 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' was semantically certain yet question of fact to be determined on evidence as to who fell within it (*Re Baden*)
- Evidential uncertainty (will not invalidate discretionary trusts and mere powers).

### Administrative Uncertainty

- The definition of beneficiaries must not be so wide that the trust is administratively unworkable: *McPhail v Doulton*
- Eg a trust for 'all the residents of greater London' as suggested in *McPhail v Doulton*