

CERTAINTY OF SUBJECT MATTER

To be a valid trust, the property must be:

- (1) More than a **mere expectancy**;
- (2) **Presently** existing property; and
- (3) Certain (**ascertained** or **ascertainable**)

Note: any residue from a will **automatically** has certainty of subject matter

If the certainty of subject matter fails (because it is future property or unascertainable), the trust will not be valid (*Mussoorie Bank*)

STEP 1: MERE EXPECTANCY

Is the property a **mere expectancy**? If so, cannot assign:

- 1) A beneficiary named in **will of testator** who has not yet died only has a mere expectancy;
 - 2) A beneficiary with an interest in **subject matter of a discretionary trust** where a decision is yet to be made to distribute to that beneficiary only has a mere expectancy (*Kennon v Spry*);
 - 3) A **contingent interest**, which requires that a particular event occurs (such as attaining the age of 21), is still presently existing and therefore more than a mere expectancy
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STEP 2: FUTURE V PRESENT PROPERTY

- (1) **An interest** which may accrue is a *future* right which is **not** assignable (*Norman v FCT*)
 - In this case, interest from (unusual) loan was not necessarily going to accrue
- (2) **An interest** which will accrue is a *present* right to future income which **is** assignable (*Shepherd*)
 - That is, a present right to future income can be assigned (*Shepherd v FCT*)
 - It does not matter whether that right actually results in any income or not (*Shepherd*)
 - The majority distinguished from *Norman* on the facts: there was a transfer of a proportion of a contractual right to receive income (presently existing property) as distinct from the income itself, not yet received (future property)
- (3) **Money/debts** which are **not yet acquired** are a mere expectancy and cannot be assigned even if there is certainty around projected earnings (*Williams v CIR*)
- (4) **Dividends** on shares are future rights which are not assignable unless they are declared (*Norman v FCT*)
 - Even if there is a past course of action which is likely to occur again

Right to proportion a dollar amount (\$) = not assignable (*Williams*)

Right to proportion a percentage (%) = assignable (*Shepherd*)

STEP 3: CERTAIN SUBJECT MATTER

Having confirmed that the subject matter is presently existing, the next step is to ask:

TEST:

Is the property **ascertained** or **ascertainable**?

That is, is the property described in such a way that it can be **identified** or is **identifiable**?

Note: look for issues of timing – the later, the less certain

HUNTER v MOSS

FACTS:	<ul style="list-style-type: none">- M owned 950 shares in a company that had issued share capital of 1000- M orally declared himself trustee of 5% of issued share capital (e.g. 50 shares) for H- No further identification of the 50 shares to be held on trust
HELD:	<ul style="list-style-type: none">- In the case of shares, although the exact shares may not be specified, if shares are all of the same type and carry the same rights, then they will still be certain <p><i>“The defendant did not identify any particular 50 shares for the plaintiff because to do so was unnecessary and irrelevant. All 950 of his shares carried identical rights. It mattered neither to him nor to the plaintiff which particular 50 shares were to be regarded as held for the plaintiff. The shares were therefore in my judgment of such a nature that each of them could satisfy the trust just as well as any other of them.”</i></p>

WHITE V SHORTALL (affirming Hunter)

FACTS:	<ul style="list-style-type: none">- Parties in de facto relationship which was in difficulty. Ms S said she wanted security, Mr W agreed to give her some shares in public company and hold on trust for her- Mr W declared trust over 220,000 shares, out of pool of 1.5 million, and \$20,000 was paid in consideration by S- W gave a letter that he held 220,000 of his 1.5 million shares in co “on trust for S” which he would transfer on request made after 1/8/03- S called for transfer of shares— W refused—shares were held in escrow
HELD:	Shares were not numbered and indistinguishable from each other—upheld a trust of 220,000 shares In effect, declaration that W held 220,000 shares on trust for S & the rest on trust for himself

MUSSORRIE BANK

FACTS:	Testator left property to widow ‘feeling confident that she will act justly toward the children in dividing the same when the property is no longer needed by her’
HELD:	PC said that if there is uncertainty as to amount or nature of property, court cannot know on what property to lay its hands to execute trust . Prop was not certain – widow could consume some prop and no way of knowing how much left over – prop cannot be identified

CERTAINTY OF OBJECT

Every trust must have a **definite object**. There must be some person (or a valid charity), in whose favour the court can decree performance. That is, there must be certainty for object: the **beneficiaries must be identified with certain sufficiency** (*Morice v Bishop of Durham*)

DEFAULT IN APPOINTMENT CLAUSE

E.g. \$50,000 is to be distributed among my best friends, and in **default of appointment** the money is to be given to my cousin Jim Jones

Note: Prior to exercise of power, the taker in default has a **beneficial interest**. **After** exercise of (valid) power, the taker's interest **is divested**

If there is a default clause:

(1) Analyse the validity of the **first appointment**

- This is done by way of steps (1), (2) and (3) below
- Remember, default clause indicates that, for step (1), the **first appointment is a mere power**
- **If valid**, the donee has discretion whether to exercise appointment. If so, the taker in default's interest is divested
- **If invalid or donee does not exercise**, the default provision takes effect (if valid)

(2) Analyse the validity of the **default appointment**

- This is done by ways of steps (1), (2) and (3)
- Since default clause is very likely to be fixed interest, (2) may not apply
- **If valid** – distribute per the default appointment
- **If invalid:**
- In the case of a testamentary trust, property will fall into residue; or
- In the case of a living trust:
 - If a trust by transfer, property is held by the trustee of RT for settlor; or
 - If trust by declaration, settlor will hold the trust property

STEP 1: TYPE OF TRUST

The court will first look into the trust clause and what type of trust it creates. Look for the relevant characteristics as to obligation and discretion

(1) Fixed interest trust

- A fixed interest trust is one in which the beneficiaries and their shares in the trust property are **specified at the time of creation of the trust**.
- Trustee is obligated to distribute only to the beneficiary(ies) in the amounts as specified at the time of creation
- The only beneficiary who has a vested and assignable interest

✓ Obligation to distribute

✗ Discretion as to selection/amount of object

e.g. I hereby declare that I hold my flat in Richmond on trust for my 3 grandchildren

(2) Discretionary trust (aka trust power)

- Trustee has an obligation to exercise discretion as to who will take and in what amounts

✓ Obligation to distribute

✓ Discretion as to selection/amount of object

e.g. I hereby declare that I hold my flat in Richmond on trust for my 3 grandchildren as I, in my absolute discretion, select

(3) Mere power (aka bare power or power of appointment)

- Power of appointment is vested in donee of power to determine beneficial ownership and has power to select the beneficiary who will take it
- A person with mere power need not necessarily be trustee
- If there is a **default clause**, this is an indicator of a mere power as there is no obligation to exercise the choice

✗ Obligation to distribute

✓ Discretion to selection/amount of object

Now continue to step 2

STEP 2: CLASSIFICATION OF POWER

DO NOT APPLY FOR FIXED INTEREST TRUSTS

The court will ask what class of power of appointment exists:

(1) General power (only valid for mere power)

- A power to appoint anyone in the world, including the donee
- E.g. I give my card collection to Jack with a power to appoint to whomever he selects, including himself

(2) Hybrid power (only valid for mere power)

- A power to appoint to anyone, except a specific class of individuals/group
- E.g. I give Lucy my shares with a power to appoint the shares to whomever she selects apart from Bob, Tom or Alice

(3) Special power (valid for mere power or discretionary trust)

- A power to appoint anyone within a specified class of individuals
- The only power which can validate a discretionary trust
- E.g. I give my house to John with power to appoint to such of A, B and C as he selects (inclusive group)

**Now continue to step 3
or
if failed, see failed creation**

STEP 3: TEST FOR CERTAINTY

Finally, the court will query whether the object is sufficiently certain, so that the trustee can tend to their main duties to preserve trust property and account for it to the beneficiaries. This is done **depending on the type of trust**.

FIXED INTEREST TRUST:

The required certainty is 'list certainty' (*McPhail v Doulton*; *Gulbenkian*)

List certainty is required for fixed interest trusts because the **trustee must perform the obligation exactly by distributing to those entitled** (*McPhail*).

This means that:

- The beneficiaries must be ascertained or ascertainable (*McPhail*); and
- The amount in which each beneficiary will take is known at the outset

If a **list of all beneficiaries** can be (but not necessarily has been) made by the trustee, this test will likely pass

DISCRETIONARY TRUST OR MERE POWER:

The required certainty test is 'criterion certainty' (*Re Gulbenkians Settlement*)

The trustee must be able to determine whether the person is *inside* or *outside* the class

The court will **look at the wording** to determine if the class is **sufficiently certain** (two steps):

(1) Semantic/linguistic uncertainty (i.e. what do the words mean):

- The words must be **capable of objective definition** (without guidance from the settlor as to the meaning of the phrase)
- Examples of semantic uncertainty includes 'favourite' or 'closest'
- Failure to satisfy will **invalidate the clause**
- **Examples:**
- *Friends*
 - The term 'my old friends' was void in *Gulbenkian*, but 'friends' can be certain if it is narrowed or confined to a specific group of people like 'friends from overseas' (*Lempens*- but note it is South Australian so only persuasive).
- *Relatives*
 - The term 'relatives' refers to close blood relatives (*McPhail*) and can be certain (*Baden*).
- *Inhabitant*
 - The term 'inhabitant' is capable of an objective definition (*West Yorkshire*).

- Organisations working for elimination of war
 - Sufficiently certain (*Re Blyth*)
- Organisations for raising the standing of living
 - Not semantically certain. What does it mean to raise the standard of living? (*Re Blyth*)
- 'Deserving' / 'Members in good standing'
 - Uncertain unless documents sheds light on meaning (*Fairfax*)

(2) Evidential uncertainty (i.e. factually, is the beneficiary within the class)

- The court must be able to determine the objective meaning
- Factually, is X within that class?
- Difficulties of evidence will **not invalidate clause**, as **court can give directions** about appropriate evidence (though possible for evidentiary requirements to remain unsatisfied).

(3) Administrative workability (for discretionary trusts only)

- Discretionary trusts must also have **administrative workability** (*Re Manisty's Settlement*)
- A trust will be administratively unworkable if (discuss all three):
 1. The class is **so broad** that the trustee has no objective criteria to make the decision between objects; **or**
 2. Too many people would have **locus standii** to complain of the trustee's actions; or
 3. The task is **practically impossible** for the trustee, given the size of the trust fund (*West Yorkshire* – in this case class was 2.5 million people; *McPhail* – 'greater London' too wide)
- *Note*: can go to court and seek a declaration as to whether it is administratively workable

(4) Capriciousness

- Administrative unworkability is irrelevant to mere/bare powers because trustee doesn't have to exercise the power (*Re Manisty's*)
- But might be held to be invalid if capricious (*Re Manisty's*)
- Capricious = no sensible identifiable link to the settlor.
- Cannot use terms that are "irrational, perverse or irrelevant" in the wording of a trust clause. E.g. skin colour.
- **Note** – there has **never been a case** where a mere power has been ruled capricious. But it is possible

CONSIDER

COURT INTERVENTION

- The court will not intervene to force the exercise of a bare power, because it does not have to be exercised. However, a court will insist a fiduciary holder of a bare power consider whether to exercise.
- The court will intervene to force the exercise of a trust power, because it must be exercised.
- A fixed interest trust must be performed according to its terms, and court will ensure that it is.

PROPRIETARY CONSEQUENCES

- Beneficiaries under a fixed interest trust have equitable property rights in the subject matter of the trust
- Objects of a discretionary trust have no property rights until an appointment is made in their favour.

LOCUS STANDI

- Beneficiary of fixed interest trust has standing to insist trust is performed according to its terms.
- Objects of trust powers have standing to insist trustee exercise power, but cannot insist distribution be made in their favour.
- Object of a mere power: court will only get involved where there has been improper exercise of a power
 - Special mere power- no locus issues because class will be described, a defined class.