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CERTAINTY OF OBJECT

Per the beneficiary principle, a trust must be in favour of definite beneficiaries, ascertainable or capable of ascertainment, or of a recognised charitable purpose. A trust for a non-charitable purpose will always be invalid, even if defined with precision.

FIXED PRIVATE TRUSTS

A fixed trust is one in which the share or interest of each beneficiary is specified in the instrument, leaving the trustee no discretion. Objects of fixed private trusts must satisfy the list certainty rule.

- The amount which each beneficiary will take is known at the outset
  - this can be because the trust instrument itself specifies shares
  - alternatively the share taken is known because the share to be taken is necessarily implied (equal shares are implied)

LIST CERTAINTY

A list of all possible objects of trust must be able to be compiled or must be capable of compilation at the time of distribution.

- It is essential that they be able to be identified exactly
- it is said that the trustee must be able to make a ‘list’ of their names, so that the trustee can distribute the property to them
- if such a list cannot be made, the trust will fail
- the list does not need to be compiled at the commencement of the trust
- instead, the beneficiaries must be able to be described sufficiently so that a list can be compiled at the time of distribution
- therefore, unborn children can be beneficiaries

DISCRETIONARY PRIVATE TRUSTS

Discretionary trusts are where trustees have the discretion to select who within a designated class is to receive any benefit and decide the amount of benefit to be paid. Objects of discretionary private trusts must satisfy the criterion certainty rule. This means that it must be possible to determine with certainty whether any particular claimant is or is not within the class of objects.

CRITERION CERTAINTY

Criterion certainty will be satisfied where trustee can determine whether a person is within a class of objects described in the provision or not (McPhail). Although this matter has not arisen before the HCA, lower courts have regularly applied McPhail. Criterion certainty includes linguistic/semantic uncertainty, evidential uncertainty and the additional test of administrative unworkability. Criterion certainty can be invalidated on grounds of linguistic uncertainty and administrative unworkability, but not evidential uncertainty.

- Criterion certainty encompasses two possible types of uncertainty; these are uncertainty in the semantic sense, and uncertainty for lack of evidence
**Beneficiary Principle**

A trust must be in favour of **definite beneficiaries**, ascertainable or capable of ascertainment, or of a recognised **charitable purpose**.

- A trust for unborn children is allowed, as long as its ascertained at the time a property is apportioned
- A trust for a **non-charitable purpose**, rather than for persons, is **invalid** even if the purpose is defined with precision.

> Why does this principle exist?
- The courts must be able to assume control over trusts – the court might be called upon to step in and administer trust or direct distribution to some person.
- As court does not take initiative in enforcing trusts, every trust must have definite objects who can enforce trust.
- But courts will exercise control over charitable trusts.

### Types of Uncertainty (**McPhail v Doulton**)

#### Semantic Uncertainty

- Reference to **precision/accuracy of language used to define class**
- if it cannot be said with **certainty** of any possible claimant that **is or is not a member of the class** (ie. ‘my old friends’), then the **disposition is void** and the trustee holds property subject to resulting trust
- when words used are **inherently subjective** in meaning
- the term ‘relative’ is frequently interpreted as meaning ‘blood relative’ and is sufficiently certain (**Baden No 2**)
- a class that is ‘**semantically uncertain**’ would also be **administratively unworkable** (**Thomas J in Re Blyth**)

#### Evidential Uncertainty

- Extent to which **evidence available enables specific person to be identified** as class members
- discretion in favour of wide class- may be difficult to ascertain whereabouts/existence of some members
- evidential uncertainty does not invalidate a trust
  - even though it may be difficult to establish who all the members of the class are, the provision is not invalidated because it is not necessary for the trustee to be able to list all the members of the class
  - the trustee can choose the recipient from anyone in the class

#### Administrative Unworkability

- where the meaning of words used is clear but the definition of beneficiaries is so hopelessly wide as not to form ‘anything like a class (**Lord Wilberforce in R v District Auditor No 3 Audit District of West Yorkshire**)
- fatal to validity of trust
- only applies to **special trust powers** (NOT mere powers)
- **Hybrid powers would always be administratively unworkable**, but they can be valid as **mere powers** because the test of administrative unworkability does **NOT apply** to mere powers

### Administrative Uncertainty / ‘Capriciousness’ (**Re Manisty’s Settlement**).
**Donees must not** exercise power ‘capriciously’.
  - capriciousness = **irrational and perverse** to the reasonable expectation of the settlor

reasonable trustees will **endeavour to give effect to the intentions of the settlor**, and will derive this from the **terms** itself, the **circumstances** under which it was made and their **own individual knowledge**

- could be argued that it should not matter who the trustee is, but practically the above is what takes place

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**Can trustees be trusted to exercise very broad powers sensibly?**

- trustees should not exercise fiduciary powers in capricious ways; **clauses that provide no guidance** to the trustees at all **force the trustees to act capriciously**
  - clauses that are **so unbounded and unguided**
  - capriciousness may be a criterion for finding a clause to be invalid - but there isn’t consistent authority on this
  - this is handled by administrative unworkability in relation to **trust powers**

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**Potentially conflicting authorities:**

- Lord Templeman in *Re Manisty’s* – A widely defined special power is inherently capricious but a hybrid power is not
- **Megarry J in Re Hay’s** – No reason to think differently about a hybrid power and a widely defined special power. In practice, capriciousness is unlikely to invalidate a MP because, if a hybrid can be valid, it is difficult to imagine how a special MP can be invalid for capriciousness.
  - Although *Re Hay’s* indicates that capriciousness is unlikely to invalidate a MP, **Megarry J still suggests that MP might be invalid if there was a real problem concerning its administration or execution; however, he indicates that courts should be slow to invalidate MPs on this basis**
  - **Megarry J’s approach may be preferred because it does not require a distinction between capriciousness and administrative unworkability**
### MERE POWERS

<table>
<thead>
<tr>
<th>WHICH TEST APPLIES？</th>
<th>GENERAL MP</th>
<th>HYBRID MP</th>
<th>SPECIAL MP</th>
</tr>
</thead>
<tbody>
<tr>
<td>CRITERION CERTAINTY</td>
<td>A general power will always pass this test as there is no criteria because there is full discretion given</td>
<td>CRITERION CERTAINTY</td>
<td>CRITERION CERTAINTY &amp; CAPRICIOUSNESS</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>It is only capricious if there is no further explanation in the settlor’s life or the trust documents as to why they would leave the property to such a class</td>
</tr>
</tbody>
</table>

### TRUST POWERS

<table>
<thead>
<tr>
<th>WHICH TEST APPLIES？</th>
<th>FIXED INTEREST TP</th>
<th>GENERAL TP</th>
<th>HYBRID TP</th>
<th>SPECIAL TP</th>
</tr>
</thead>
<tbody>
<tr>
<td>LIST CERTAINTY</td>
<td>✓ VALID</td>
<td>✗ INVALID</td>
<td>✗ INVALID</td>
<td>✓ VALID</td>
</tr>
<tr>
<td>A list of all possible objects of trust is compiled or is capable of compilation at the time of distribution per IRC; McPhail</td>
<td></td>
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</tr>
<tr>
<td>CRITERION CERTAINTY</td>
<td>To treat property as one's own is inconsistent with a trustee's fiduciary obligation</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>ADMINISTRATIVE UNWORKABILITY</td>
<td>Definition is so hopelessly wide as not to form 'anything like a class' per Lord Wilberforce in McPhail</td>
<td></td>
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</tr>
<tr>
<td>CRITERION CERTAINTY &amp; ADMINISTRATIVE WORKABILITY</td>
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</table>
The beneficiary is the equitable owner of the trust property. Most of the beneficiary’s rights are attributable to this aspect of the nature of the trust, and are sourced in the general law.

However, the trust deed can expand or restrict beneficiaries’ rights.

**RIGHT TO CALL FOR THE TRUST PROPERTY**

A beneficiary who is sui juris who has an absolute, vested and indefeasible interest in the trust may at any time require the transfer of the trust property to him and terminate the trust (Saunders v Vautier). This is a power of the beneficiary (Beck v Henley).

**WHEN THERE ARE MULTIPLE BENEFICIARIES**

**FIXED TRUST**
- They must all consent, be sui juris and act together to call for the trust property (Stephenson v Barclays Bank Trust Co).

**DISCRETIONARY TRUST**
- The class as a whole holds the proprietary interest in the beneficial entitlements; so they must all act together – this would only apply to a trust power with a special class (Sir Moses Montefiore Jewish Home v Howell).

**LINE TENANT AND REMAINDERMEN**
- Do not have a divisible interest separately but together they have the whole interest so if they agree they can call for the trust property and then divide it.

**ONLY SOME SUI JURIS/ ENTITLED/ WANT TO EXERCISE THE RIGHT**
- Those fully entitled can extract their share of the trust property, provided it is conveniently divisible and will not prejudice other beneficiaries
  - i.e. shares that are plainly severable (Beck v Henley)
- Only in ‘special circumstances’ will this rule not apply (Beck v Henley)
- In the absence of actual prejudice, the mere fact that there is a loss of measure of control does not prevent the exercise of the rule in this way (Beck v Henley).

**TRUSTEES’ R.O.I**

This right is subject to the trustees’ right of indemnity. Before the ROI is exercised the beneficiaries cannot know how much they are entitled to. The beneficiaries aren't indefeasible entitled to the property when there is an outstanding ROI (Beck v Henley, CPT v Custodian).

**LIMITS TO THE RIGHT TO CALL FOR TRUST PROPERTY / AVOIDING THE RULE IN Saunders v Vautier**

1. **CREATING A DISCRETIONARY TRUST**
   - This only forms a limit if all of the objects cannot agree to terminate the trust; which is likely if there are a lot of them.

2. **INSERTING A CHARITABLE PURPOSE**
- If discretionary trust, include a charitable purpose in objects
- The AG cannot give up their rights under a discretionary trust **(Sir Moses Montefiore)**

### 3. PREVENTING BENEFICIARIES FROM HAVING AN ABSOLUTE INDEFEASIBLE INTEREST

- The creation of a *contingent gift* or a trust subject to a prior discretionary trust will defeat the rule / *gift over in default*
  - eg. Income for A until they turn 25 when they receive the capital and income absolutely
  - eg. The property to be held on trust to distribute income for 10 years amongst the appointment class then absolutely to my daughter

### 4. COURT DIRECTED TRUSTS

- Where a trust is *created by a court order, the rule cannot apply.*
- The trust *can only be terminated by application to the court* **(*Perpetual v Nasri*)**