

CERTAINTY OF OBJECTS

	General Power	Hybrid Power	Special power
Fixed Interest Trust: Beneficiaries denoted and usually their shares. Must be exercised: LIST CERTAINTY APPLIES <i>(Kinsela; Doulton as per Lord Wilberforce)</i>	N/A	N/A	N/A
Trust power: discretion to select who but there is a duty to exercise	INVALID: class too wide Inconsistent with fiduciary obligations Will fail on administrative unworkability	INVALID: class too wide Will fail on administrative unworkability because rest of world is too big a class per <i>(Re Hays)</i>	VALID Apply criteria certainty and administrative unworkability
Mere power: discretion of whether to select at all, can also benefit themselves (general MP) ** DEFAULT CLAUSE, 1st = MP **	VALID Apply criteria certainty: will not fail because everyone is in class	VALID Apply criteria certainty	VALID Apply criteria certainty and capriciousness

FIXED INTEREST TRUST

- Trustee is **OBLIGED** to distribute
- **NO DISCRETION** given to trustee to decide on beneficiaries
- Beneficiary has a proprietary interest
- **LIST CERTAINTY** is required – trustee must be able to compile a **definitive list of beneficiaries at date of distribution (end date)** *(Kinsela; Doulton as per Lord Wilberforce)*

Kinsela v Caldwell:

- Date of distribution not date of drafting trust, must be able to name each and every beneficiary with certainty that fits such description in trust deed when required
- **TEST:** make a list of each and every beneficiary at date of distribution – fixed interest you need to know how many shares to divide the property between etc

TRUST POWER/DISCRETIONARY TRUST

- Trustee has **DUTY TO CONSIDER** *(Re Gulbenkian)* and **OBLIGED** to distribute property by termination date
- Power to choose (**DISCRETION**) amongst objects who will receive distribution (and become a beneficiary)
- Objects do not have a proprietary interest but a **MERE EXPECTANCY** *(Kennon v Spry)* and rights to due consideration and administration of the trust *(McPhail; Kennon)*
- Trustee = FDuty to survey range of objects (more comprehensive duty than a mere power)

General class: Fail for uncertainty as class too wide

Hybrid class: Fail, class too wide

- Also fail on administrative unworkability as world too big a class

Special class → VALID

- Criteria certainty
- Administrative workability also applies

BARE/MERE POWER CERTAINTY

- Trustee **NOT OBLIGED** to distribute (court cannot compel exercise) (*Re Gulbenkian*)
 - Court will only interfere if **exercising powers outside ambit/capriciously** e.g. distributes assets to individuals outside the settlor's intended class (*McPhail*)
- If exercise power, **DISCRETION** who to distribute (within specified class)
- If power not exercised → **gift over/ taker in default/residuary clause** - 'and in default of T's exercise of discretion, to C'
 - If no residue clause, intestacy or fall back onto estate? If inter vivos, RT for settlor.

Certainty depends on class of power

- GENERAL power** is sufficiently certain because **anyone is within the class**
- HYBRID power** is certain if the **excluded class is sufficiently certain**
 - Need to be able to say of any given person if they are in the excluded class
- SPECIAL class** will be certain only if you can say, **of any given person**, if they are within the class or outside the class

+ Capriciousness (*Re Manisty; Re Hays*)

- Need a discernible link to the settlor or institution

(1) CRITERION CERTAINTY

Semantic uncertainty – where terms are inherently subjective and have imprecise boundaries of meaning

- Must be able to know, **of any given person**, if they are within the class or not – not enough that someone can be identified within class

UNCERTAIN	CERTAIN
<ul style="list-style-type: none"> 'old friend' (<i>Re Gulbenkian</i>) 'friends' (<i>Re Gulbenkian</i>) 'John Smith' – need to identify which one (<i>Re Gulbenkian</i>) 	<ul style="list-style-type: none"> Employee, officer, former employee, former officer (<i>McPhail</i>) Relative (<i>McPhail</i>) Dependent (<i>McPhail</i>) Inhabitants (<i>R v District Auditor</i>) 'person residing' with X... (<i>Re Gulbenkian, Lord Upjohn</i>)

Evidentiary uncertainty – when court can give directions to clarify uncertainty

- Difficulty ascertaining the existence or physical whereabouts of members of the class – a matter the court can deal with on application for directions
- Court give discretions re evidentiary uncertainty eg advertise in newspaper for relatives (*McPhail*)
- Does not invalidate the clause (*McPhail*)
 - Eg relatives, dependants (*McPhail*) – who in fact are they?

Trustee w BARE power	<ul style="list-style-type: none"> Duty of consideration whether someone ought to have a distribution when comparing to other claimants Consider whether to exercise power and consider if someone falls within class
Trustee with a TRUST power	<ul style="list-style-type: none"> Must exercise power but similar to bare power Expect trustee to examine the field by class and category – decide on priorities and select individuals Trust power requires a higher level of examination – more systematic survey Semantic uncertainty will render the gift void <ul style="list-style-type: none"> If you have difficulty ascertaining the whereabouts of the class Evidential uncertainty <ul style="list-style-type: none"> Does NOT make the trust invalid

(2) ADMINISTRATIVELY UNWORKABILITY

1. Class so broad that trustee has **no objective criteria** to make the decision between objects

- Trust for residence of greater London – no objective criteria to choose?

2. Too many people would have *locus standii* (right to bring action) to complain of trustee's actions.

- Greater London = too many people
- In an area but so diverse and different in so many other circumstances, not really still connected as a group except for one element
- × Eg 'any of all or some of the inhabitants of the County of West Yorkshire' 2.5m = AU (*R v District Auditor*)

3. Task is practically impossible for the trustee, given the size of the trust fund (*District Auditor West*)

<i>R v District Auditor West Yorkshire Metropolitan County Council</i>	
Facts:	Attempt to set up a trust for all or some inhabitants in district of West Yorkshire County. Looked to be set up as a charitable trust too relieve assistance of unemployment, assistance for ethnic groups, provide info to inhabitants about consequences of abolition of Council. As a charitable trust, failed. Cannot have a political purpose as a charitable purpose trust. Trust power to benefit some or all of inhabitants in WYC – 2.5 mill inhabitants
Issue:	Can this trust power be executed?
Held:	Without explaining term of inhabitants, still criterion certain – able to state who inhabits County area BUT is administratively unworkable <ul style="list-style-type: none">- Trust for 2.5mill people is too large for a trust power – trustee simply unable to carry out the task- Potentially trusts in 1000s (like Doulton) not immediately AU BUT trust for millions of people are unworkable NB: Look at ratio between trust value and people – if 10,000 people but only \$100, is that also AU?

(3) CAPRICIOUSNESS → BARE POWER ONLY

Capricious – irrational, perverse or irrelevant to any sensible intention on part of settlor (*Re Manisty*)

- Accidental conglomeration of person with no discernible link with settlor or any institution – contrary to presumed intentions of settlor
- Need ascertainable link

Discussed in *Re Hays*

- A power in favour of residents of London probably wouldn't be capricious if settlor was a former mayor etc. → connection between settlor and the group
- Sitting as a precedent that **a very wide special class could be capricious, but no case law of these being struck down**

Special bare power only? SBP may be invalid where its exercise would be capricious (*Lord Templeton in Re Manisty's*)

- No cases where SBP has been invalidated on capriciousness and such grounds for invalidation is inconsistent with equity's recognition of general and hybrid powers ('GAHP') i.e. shouldn't all GAHP be invalidated on basis of capriciousness?). **Thus, unlikely SBPs will be, and as a matter of policy should not be, invalidated on this basis**

TRUSTEES' DUTIES

3 sources of Trustee duties:

- (1) **Trust deed:** Excludes or modifies standard rules in the statute and equitable principles
- (2) **Equitable principles:** Profits and conflicts rule
- (3) **Legislation:** *Trustee Act 1958 (Vic)*

Trustees vs. other fiduciaries: standard for a trustee goes beyond that of which most fiduciaries are subject to, due to the fact that they manage trust property, and it is easier for them to misappropriate

Duties on commencement	Fiduciary duties	Duties relating to conduct	Investment duties
Comply with deed Get in' the trust assets Distribute/exercise discretion	No profits rule No conflict rule Fair dealing rule Self dealing rule	Act gratuitously Act personally Act in best interests of ben Not to mix trust assets	Act with reasonable prudence – duty to invest <ul style="list-style-type: none"> • Not speculate • Review • Take advice Act impartially Keep accounts and inform

6.2 DUTIES ON COMMENCEMENT

(1) DUTY TO COMPLY WITH DEED

- Obeying the trust deed is the **most important** duty, *Green v Wilden*
 - 'It is the duty of a trustee to adhere to the terms of the relevant trust deed. Other equitable rules are to be applied subject to any provisions contained in the trust instrument itself'
 - 'Where the trustee deviates from the terms of the trust deed, he acts at the peril of failing to satisfy the Court that the deviation was necessary or beneficial'
 - If trustee has deviated, they **must show either**:
 - It was necessary (i.e. can be excused), OR
 - It was beneficial (i.e. didn't cause any loss)

Examples:

- A is entitled to a life interest in Capital Asset A. The life tenancy of A will only be able to dispose of some of the capital asset (for their life interest), if it is **allowed** by the trust deed.
- When a trustee is investing funds, both statute and the deed must be complied with.
- When distributing funds, compliance with the deed is of utmost importance

(2) DUTY TO 'GET IN' THE TRUST ASSETS

T must take control of the assets held in the trust including recovering them from breaches of prior Ts (*Permanent Trustees v Perpetual Trustee*)

- T must get control of the trust by following through and obtaining legal title
- Submit transfer form to ensure trust is fully constituted and that they hold legal title
- T must take control of the trust instrument and familiarise themselves with any terms of the trust, they must work out their obligations

Incoming trustee:

- Has an obligation if there were any previous breaches of trust
- Sue previous trustee (if necessary) to get compensation for the fund
 - i.e. positive duty to make sure the previous person did not fk up
 - If the new T fails to identify and rectify those breaches, s/he will be liable for the breach of trust
- Trustee not only party to take action for breach of duty – beneficiaries may sue if incoming trustee refused to do so
- Ben and T may both sue for breach of duty

Note: in this case, where a 'unit trust' was created, issue with units being traded. Money recovered was distributed to current beneficiaries, even though it was misappropriated when some beneficiaries (who have now sold at loss) had ownership of unit(s) (old Bs)

(13) DUTY TO ACT IMPARTIALLY BETWEEN DIFFERENT CLASSES OF BENEFICIARIES

Trustee Act s 7(2)(c)

(2) Without limiting the generality of sub-section (1), a duty imposed by any rules and principles of law or equity includes--
(c) a **duty to act impartially towards beneficiaries** and between **different classes of beneficiaries**

(1) T has duty to act impartially towards (s7(2)(c), Nestle; Re Mulligan; VBN v APRA)

- different classes of beneficiaries
- individual beneficiaries (i.e. allowing 1 to purchase property)

(2) Query investment strategy AND actual investments

(3) Balancing competing interests between different Bs and different classes of Bs – make fair investment apportionments (Nestle)

- Life tenants = income generating assets cf capital increase
- Remainderman = capital growth cf income
- Preserving real value of capital, a strict requirement where remaindermen are young and well-off **c.f.** life tenant of the testator's widow who has fallen upon tough times is inappropriate

Examples:

- × *Re Mulligan* - clear breach as invested **purely in income producing assets to protect Mrs M** (fixed interest investments e.g. mortgages, bonds, debentures, loans to co's, gov authorities) which favoured LT at expense of remainderman – **post 1960, needed diversification to protect capital value of fund**. Not about weighing scales, entitled to consider individual circumstances of beneficiaries – look at age of bens, financial circumstances, need for funds
- ✓ *cf Nestle* – attempt to balance needs of two classes, investment in share market and in fixed interest securities – based on time investing in mkt, choices still fair

(4) [T] will argue HOLLISTIC APPROACH - 1 class may still be allowed to do better than other (VBN)

- **Not a mechanistic process** - not dollar for dollar (*Nestle*)
- Test: having regard to interests of estate as a whole, part of ordinary duty to properly consider interests and needs of Bs and different classes; to balance interests as whole (VBN)

(5) [T] will argue only in extreme cases will courts find breach, as courts prefer to allow T's to exercise their discretion without fetter, provided exercised in accordance with its purpose, in good faith, and on genuine consideration (VBN)

(6) Where LT closely related to testator – court sympathetic to trustee who ensures wife/ siblings (LT) looked after (testator wouldn't have wanted them to fall below poverty line)

Trustee's duties; Duty to act impartially between Bs & classes of Bs	
<i>Nestle v National Westminster Bank [1993]</i>	
Issue:	Did T breach duty to act impartially?
Held:	<ul style="list-style-type: none">• T is to act fairly in making investment decisions that have different consequences to difference classes of Bs. Prefer <u>the fairness/impartiality test to the traditional 'holding of the scales equally between life tenant and remaindermen'</u>.• Additionally, scales suggest weighing of known/ ascertainable quantities whereas investment decisions concern future/unknown prediction.• T needs some flexibility to consider the circumstances of individual Bs and between classes of Bs.• Preserving the real value of capital is a strict requirement where remaindermen are young and well off, c.f. life tenant of the testator's widow who has fallen upon tough times. On the facts – the bank acted conscientiously, fairly and carefully throughout the administration of the trust and the actions must therefore be dismissed.