

## (1) Introduction

- **Trust:** owner of asset **nominates another person** to hold the asset for the **benefit of a third party** (*Jacobs*)
  - **Settlor:** settlor creates the trust inter vivos + gives away the property to the trustee
  - **Trustee:** trustee holds legal title to property but for benefit of beneficiary
  - **Beneficiary:** beneficiary has an equitable interest in the trust property
    - **Trust created by a transfer:** Lucas (settlor) appoints Pablo (trustee) to hold his house in Caulfield and \$500,000 on trust for Pauline (beneficiary), Lucas must transfer the property to Pablo.
    - **Trust created by declaration:** Maria (settlor) appoints herself (trustee) to hold her farm in Gippsland and \$100,000 on trust for Leo (beneficiary), Maria does not need to transfer the property.
- **Types of trusts:**
  - **Express:** a trust formed by the clear intention of someone to create a trust (**need 3 certainties**)
  - **Constructive:** a trust imposed by the Courts to rectify dispute/matter/unconscionable conduct
  - **Resulting:** a trust that exists through the operation of law
- **Trust for whom/what:**
  - **For persons:** trust has been set up for a **particular individual**/group of individuals who are the beneficiary
  - **For purposes:** trust has been set up for a **particular purpose**
    - **Prima facie:** invalid (UNLESS 'Charitable Trust' (Pemsel) / a 'Quistclose Trust' (Quistclose))
- **Creation of the trust:**
  - **Inter-vivos:** while the person was/is still alive
    - **By transfer:** give property/asset/title to another person to hold for another person
    - **By declaration:** declare themselves to hold property/asset/title for another (settlor + trustee same person)
  - **Testamentary:** when the person has passed away
    - **By will:** appointing another party to hold an asset for another
- **Questions 'to ask' each trust?**
  - Is it a 'Fixed Interest Trust' or a 'Discretionary Trust'?
  - If it is a 'Discretionary Trust' is it an 'Exhaustive Trust' (subject to a 'Trust Power') or a 'Non-exhaustive Trust' (subject to a 'Mere Power')?
  - Are the powers 'General Powers', 'Hybrid Powers', or 'Special Powers'?
- **Consequences of creation:**
  - Trust is treated as an irrevocable disposition of property (*Mallott; Re McGowan*)
  - A trust cannot be revoked once it has been created (subject to a right of revocation) (*Mallott; Re McGowan*)
  - Even where it is unclear who Trustee is, a trust will not fail for want of a Trustee (*Mallott; Re McGowan*)

Determining whether a clause is a trust power or a mere power:

1. Look to see if there's mandatory language (e.g., 'shall') vs. permissive language (e.g., 'may'). (But this isn't always determinative). It can be interpreted in two ways:
  - a) As imperative, where the word shall relates to the obligation to exercise the power (*McPhail*)
  - b) As a mere power, where the word shall related to the trustee's discretion to select or not (*Gulbenkain*)
2. The existence of a default clause is **always** dispositive: if there is a default clause, then the power above it is always a mere power, not a trust power. Must also deal with the gift over clause (most likely trust power).
3. Compare the clause's language with that of other clauses in the trust instrument.
4. **Time limit** indicates that it is imperative that the trustee acts, therefore more likely a trust power (discretionary trust)

## (2) Creation of an Express Trust

- **Introduction:** (A) must prove **three certainties exist** for a valid & subsisting express trust (intend to create trust) - (a) certainty of intention; (b) certainty of subject matter; and (c) certainty of object (*Lord Langdale MR in Knight [96]*)
- Certainty of Intention**
- **Introduction:** (A - beneficiary) must prove (B – settlor) manifested an irrevocable and immediate intention to depart with their beneficial interest in trust property (*Harpur; Mallott; Hyphonie*) Intention is generally to be determined objectively (*Byrnes*) & this intention will not be readily inferred where it does not exist (*Korda*)
  - **Test:** whether a reasonable person in all circumstances would consider (B) intended to create a trust (*Waddell*). OTF
    - **Explicit writing:** (A) argues (B) created a doc with language (“upon trust” - *Byrnes*, on the understanding that - *Hayes*) –unambiguous & explicit declaration of a trust – reasonable person find (B’s) words amount to unequivocal manifestation of their intention to create a trust (*French CJ in Byrnes; Owens overruled*)
      - **‘Trust’ NOT used:** (B) counterargues word “trust” is not used so no intention
        - ✓ **Argue:** (A) argues not necessary to use word “trust” – imprecise words create trust if intention is clear
      - **Didn’t intend:** (B) counterargues meant to say (“...”) – rather than what was written in the deed
        - ✓ **Argue:** (A) argues intention is determined objectively not subjectively so courts look at what was expressed in deed **THAN** privately intended (*Gummow & Hayne JJ in Byrnes*). *Byrnes* - “trust” in a deed created in favour of a spouse, demonstrated intention to create a trust, despite no subjective intent
      - **Precatory words:** (B) counterargues words are merely precatory & do not amount to an intention to create a trust. This is like language of “in the fullest confidence” (*Re Williams*) & “trusting to her” (*Cole*)
    - **Inexplicit writing/orally:** (A) argues (B) (created doc with lang of ... **OR** created trust orally) – **ambiguous** - court analyse if (A) manifested intention to create trust thru reference to surrounding factual matrix (*Byrnes; Harpur*)
      - **Intention:** (A) argues considering context, (B) intended for (prop) to be held for the benefit of (A) as (...)
        - ✓ **Phrases:** (B) say (...). *Re Armstrong* - “investment was for them”, *Paul* - “money is as much yours as mine”
        - ✓ **Other docs:** Docs like (...) - unambiguous lang – unequivocal direction of what prop used for (*Chang*)
        - ✓ **Distant relo:** (A) & (B) are (coworkers) – distant relo so settlor wouldn’t rely on person informally & more likely intend to impose legal obligation via a trust (*Chang* - strained father/son relo & specific directions in letter – father couldn’t rely on son to informally pass funds to mistress after mum death -
          - **Argue:** (B) NOT know trust relo - no intent. (A) counter settlor **NOT** have to know (*Re Armstrong*)
        - ✓ **Joint bank acc:** (A) & (B) have a joint bank account with minimal withdrawals & kept separate from personal funds, even though it is registered in just one person’s name - intention (*Paul*)
        - ✓ **Parties’ names:** (B) referred to (A’s) name – intent. *Re Armstrong* - father opens bank account to get income interest then leaves capital remainder to sons. Receipts mention son’s names - intent to benefit
        - ✓ **Sophisticated character:** (B) is (solicitor/accountant) – lang of (“trust created”) will evince intention (*Paul*) & expected for someone with background to use lang when creating a deed than layman (*Dean*)
          - **Argue:** Courts not imply trusts merely for “commercial necessity” or if provide better protection
        - ✓ **Use of “trust”:** (B) used word (“trust”) – evidential presumption trust intend (*Re Armstrong*). Court will attempt to construe lang of instrument using ordinary definition in the context as a whole (*Byrnes*)
          - **Argue:** (B) argues the use of formal or technical words / trust language is not required (*Paul*)
          - **Argue:** (B) argues using the word “trust” is NOT determinative of creating trust (*Re Armstrong*)
      - **NO intention:** (B) counterargues (...)
        - ✓ **Precatory words:** (B) argues used precatory words of (“fullest confidence, condition that she, trusting she will, I hope...”) – express hope, confidence & moral obligation **THAN** imperative language like (“I intend..”) – merely gift **NOT** trust & **against** requisite intention being formed (*Re Hayes*). *Re Williams* - property was left “in fullest confidence” the wife would carry out wishes – precatory lang - no trust
        - ✓ **Close relo:** (A) & (B) are (friends/siblings) – close relationship – suggest settlor trusted (B) informally. Like *Re Williams* – husband & wife, *Paul* - clear intention wife has beneficial ownership
          - **Argue:** (B) counters courts reluctant to impose trust in close relo (*Re Williams*); may infer informal gift/moral obligation. If no express trust - court infer diff legal obligation (CT) (like in *Cobcroft*)
        - ✓ **Not sophisticated character:** (B) is (art dealer) - NOT from a sophisticated background, thus it cannot be expected for them to use legal terminology (Paul) as a solicitor would use (*Dean*)
        - ✓ **Use “trust” elsewhere:** (B) argues use word (“trust”) elsewhere **BUT** not here –using trust lang in some parts & not others shows know how to use & so here no intent to create trust (*Re Williams*)
    - **Contract:** If contracts are at play in a trust relationship, must have regard to the contractual terms in construing the relationship (*Korda*). Subjective intention is not relevant in contractual arrangements, and the objective test will be applied according to both parties’ understanding of the transaction (*Shortall v White*)

- **Intention:** (A) argues contract states (“...”) – thus trusts and fiduciary obligations must apply consistently with the terms of the contract (Gageler J in Korda affirming Hospital Products) - trust created
- **No intention:** (B) counters existence of express trust determined by examining intention behind it (Korda)
  - ✓ If the interactions between the parties indicate contractual obligations instead of an intention to create a trust, a trust will not be enforced merely as a commercial necessity.
- **Can the intention be rebutted:** (B) counterargues that (...)
  - **Sham:** (B) argue the trust is a sham as it was never intended to create genuine trust obligations, but instead to (mislead TP’s - creditors, tax authorities/achieve purpose – get money) (*Hyhonie; Sharrment*). Thus, parties did not intend to be bound by terms of the trust & objective intention vitiated by (A’s) subjective intention (*Lewis; Byrnes*). *Wyatt* - trust documents were executed solely to defeat creditors & no beneficial interest genuinely conferred & *Hyhonie* - trust deed signed but never acted upon — a “pretence being put up” (*Hodgson JA*).
  - **Counterargue:** (A) argues this is a high threshold so while the creation of the trust may have been for an improper motive, this did not mean that (A) did not still intend to set up a trust (*Lewis*). Subsequently, the trust would not be construed as a sham, meaning (A’s) motive is not sufficient to vitiate intention (*Lewis*).
  - **Equitable challenge:** (B) argues (unconscionable conduct, mistake, duress, misrepresentation) by (A) – void trust
  - **Non est factum:** (B) argues did not understand nature of doc of (...) signed so trust is void
  - **Illegal purpose:** (B) argues trust created to conceal or enable illegal conduct of (tax evasion, bankruptcy fraud)
- **Is the intention immediate:** Declaration of intention to create trust be **immediate** (*Neave & Redlich JJA in Harpur*)
  - **Immediate intention:** OTF, (B) (wrote/said/used) present tense as (“I now declare myself trustee”, “I hold this property on trust”) - appears to be an immediate intention to create a trust. Diff from *Harpur* where “as from the commencement day” indicated future promise NOT immediate trust
  - **Future intention:** OTF, (B) (wrote/said/used) future tense as (“I will create a trust, “as from date X”, no present change in beneficial ownership) - appears to be a future intention to create a trust. Like *Harpur* where “as from the commencement day” indicated future promise NOT immediate trust
    - **Consideration given:** (A) gave (B) consideration of (...) – (B) will hold (A’s) conscious bound & trust created
    - **Consideration NOT given:** (A) NOT give (B) consideration – (B) NOT hold (A’s) conscious bound & NO trust
- **Alternates:** If NO trust – gift subject to (precatory words, legal condition, equitable condition, equitable charge)
  - **Mere moral obligation:** Precatory words = mere hope/desire, not binding (*Re Williams; Re Hayes*)
    - **Satisfied:** (A) argues (B) used (“in fullest confidence...” ) - moral obligation only → no enforceable trust
    - **Argue:** (B) argues context shows imperative language, more consistent with trust/condition (*Re Gardiner*)
  - **Legal condition:** Strong imperative wording = legal condition; breach = forfeiture (*Re Gardiner*)
    - **Satisfied:** (A) said (B) used (“subject to X paying Y within Z time”) - condition precedent - forfeiture if unmet
    - **Argue:** (B) argues obligation vague/disproportionate, may reclassify as equitable condition (*Cobcroft; Gill*)
  - **Equitable condition:** Where legal condition too harsh/vague, equity construes as personal oblig (*Cobcroft; Gill*)
    - **Satisfied:** (A) argues (B) used (“hope X will support Y”) - obligation too vague/disproportionate for forfeiture → equitable obligation enforceable (SP/compensation) (*Cobcroft; Gill*).
    - **Argue:** (B) argue lang precise/imperative (fixed timeframe, “subject to”)- better legal condition(*Re Gardiner*)
  - **Equitable charge:** Gift subject to obligation benefiting 3rd party can be charge (Gill).
    - **Satisfied:** (A) argues (B) said (“provided X pays annuity to Z”) → charge attaches to property → beneficiary can enforce (SP/comp)
    - **Argue:** (B) argues if no clear obligation to 3rd party - more consistent with precatory words or equitable condition (*Re Williams; Cobcroft*).
- **Conclusion:**
  - **Trust:** On BoP, court likely finds there has been an objective manifestation of an immediate intention with obligatory words- thus certainty of intention has been satisfied.
  - **No trust:** On BoP, court likely finds clause is invalid for certainty of intention – (prop) held on RT for (B’s) estate

## Certainty of Subject Matter

- **Introduction:** (A) must prove subject of trust is sufficiently certain present (*Hunter; Norman; Shepherd*)
- **Is there present property:** Trust property **MUST** be presently existing property which (B) has rights over
  - **Present property:** OTF, the property is (...)
    - **Land/Chattels/Debts/Life Insurance Policy:** land (*James*), furniture (*Re Montagu's Settlement Trusts*), intellectual property like secret recipes (*Green*), debts (*Citibank NA*), partnership interests
    - **Shares:** shares (*White*), equitable interest in share (*Grey*), beneficial interest in fixed trust (*J W Broomhead*)
    - **Dividends:** declared dividends is assignable present property (diff to *Shepherd*)
    - **Contractual right to future income:** (B) says ("I declare trust over 20% of contractual right to royalties.") – contractual right to future income – assignable as present chose in action (*Shepherd*). Like fruit & tree analogy in *Shepherd*, (prop) is 'right' to present chose in action - certain to accrue as contractual period
      - ✓ **No income:** Even if right **NOT** result in income – still presently assignable right (*Shepherd*)
      - ✓ **Unilateral contract:** unilaterally terminable contract - no presently assignable right (Norman)
    - **Contingent property:** (B) says ("I give my property to my daughter **provided** she completed her uni studies") – thus clause appears to deal with contingent property as depends on whether (...) - constitutes assignable property (*Re Armstrong*). Like *Re Armstrong* where assignor said ("I hold the funds in my term deposit on trust for my sons to be transferred to them on its maturity provided I die before then")
  - **Not present property:**
    - **Mere expectancy:** (B) assign (interest in the will of a living person - *Re Rules Settlement*) **OR** (right of a person as an object under a discretionary trust where trustee has absolute discretion as to who they distribute to - *Kennon*) – unassignable mere expectancy - cannot be declared under a trust (*Kennon*)
    - **Future property:** (B) assign (DOWN...) - future property - unassignable (*Kennon*) **SEE IF CONSIDERATION**
      - ✓ **Purported assignments of unearned income:** (B) assign (money from trust income, unearned income) yet to accrue - fail (*Williams, Norman*). Utilising fruit & tree analogy from *Shepherd* - comparable to a right for fruit that is yet to be grown, rather than present 'tree' & arguable (income cannot accrue..) - (prop) could not be the subject of a trust. This is like money from trust income in *Williams*
      - ✓ **Right to loan interest where debtor free to repay anytime:** (B) assign right to interest of part of loan repayable any time – future property right as contingent on loan continuing owed (*Norman*)
        - **Fixed term loan:** (A) counters a right to interest under a fixed term loan is presently existing, even if the interest itself is not (Windeyer J's dissent in *Norman*)
        - **Payable on a loan in year:** (A) counters there is assignment of right to the interest payable on a loan each year, where the loan is of a fixed duration – okay (obiter in *Norman*)
      - ✓ **Undeclared dividends:** (B) assigns undeclared dividend, which may never accrue due to companies discretion in declaring them (Norman) – future property
        - **Contractual right to undeclared dividends:** (A) argues these are 'rights' to dividends – distinguished from *Norman*. Utilising tree & fruit analogy from *Shepherd*, [X] may assert that these 'rights' to dividends can be seen as the tree, rather than the fruit of the tree, as the right is presently existing. However, this is a weak argument
      - ✓ **No consideration:** (A) not paying consideration to (B) - trust only be created over present property (*Kennon*). Equity not assign volunteer - creation of trust over future property ineffective (*Williams*)
        - **Consideration given:** (A) has provided consideration to (A) in the form of (\$50) – (B) will be treated as the equitable owner of the property once the property becomes identifiable in [S]'s hands (Tailby; Harpur), as equity deems done that which ought to be done.
  - **Is the property assignable:** (B) must have rights over the property to deal with it (*Kennon*)
    - **Have rights:** (B) has rights over (prop) – satisfied (*Kennon*)
    - **NO rights:** (B) has (beneficial interest under discretionary trust) - NO rights over (prop) - NOT satisfied (*Kennon*)
  - **Is the property certain:** The trust property must be distinctly identified, ascertainable, and defined with adequate precision; otherwise, the court cannot determine which property to manage for the trust (Raynor).
    - **Identifiable VS not identifiable property:** OTF, the property is (...)
      - **Identifiable:**
        - ✓ Shares where the company and class are specified (*Hunter*)
        - ✓ "Allow enjoyment of my flats during her lifetime & receive reasonable income" - obj measured (*Re Golay's Will Trust*)
        - ✓ My blue car (if only one owned)



- ✓ "My dog Buddy"
- ✓ "The rest and residue of my estate"
- **NOT identifiable:**
  - ✓ "Two books from my collection"
  - ✓ "the bulk of my estate" (Palmer)
  - ✓ Give to children "when no longer required by her" (Mussoorie) - wife had discretion to decide when no longer need & wished to pass to kids
  - ✓ Five sheep from my paddock
- **Distinguishable/identical intangible property:** If intangible & identical fungible property, certainty of subject matter will be satisfied without needing specify which exact asserts are held on trust (Hunter; Shortall)
  - **Identical:** OTF, the (shares) are homogenous as [e.g. they are shares of the same class rights in the same company]. Thus, analogous to Hunter and Shortall, they are fungible, meaning the subject matter is taken as certain without a need to [segregate / specify] shares.
  - **Not identical:** OTF, the (shares) are not homogenous, as [e.g. although all shares are for the same company, they are comprised of different classes]. Thus, distinguishable from Hunter and Shortall, they are not fungible, meaning there is no certainty of subject matter due to lack of specific identification.

SUFFICIENTLY CERTAIN	NOT SUFFICIENTLY CERTAIN
Reference to a % holding of shares of the same class ( <i>Hunter</i> ) <ul style="list-style-type: none"> <li>Don't need to have segregation of the shares for there to be certainty of subject matter when the shares are all in one company → all identical; same classes; not numbered</li> <li>E.g. 50 of 950 shares in the same pool of shares (<i>Hunter; Shortall</i>)               <ul style="list-style-type: none"> <li>Can determine portion by reference of shares (i.e. resulting trust for a 222k of 1.5M) (<i>Shortall</i>)</li> </ul> </li> </ul>	A bundle of shares will be uncertain where they are not homogenous ( <i>White v Shortall</i> ) <ul style="list-style-type: none"> <li>E.g. one of my horses (when there is 3 horses) is not sufficient as each horse is different</li> <li>Most of my paintings = too vague. Could say 25% however could be difficult</li> </ul> <p><b>Uncertain owner:</b> Where it is not certain from which person property comes from, the trust will not be sufficiently certain (<i>Herdigan</i>)</p>
<i>Hunter v Moss</i>	'Agreed H would get 5% shareholding, but couldn't identify which 50 of the 1000 shares were H's.' <ul style="list-style-type: none"> <li>Trust can be just over the portion of identical property</li> <li>shares interchangeable → need to be in the same company/type: can declare over a percentage of shares, do not need to specify the ones</li> </ul>
<i>Shortfall v White</i>	'Male owned 1.5m shares. Agreed he held 220k on trust for the female partner.' <ul style="list-style-type: none"> <li>Sufficiently certain: all shares in same company &amp; identical</li> <li>Can determine portion by reference of shares (i.e. resulting trust for a 222k of 1.5M) (<i>Shortall</i>)               <ul style="list-style-type: none"> <li><i>Cf. Hunter</i> – Effect of holding all shares on trust: 220k for her, &amp; remaining balance on trust for himself.</li> <li>Imposes a minimum bar requirement, cannot spent the final 222K</li> </ul> </li> </ul>
<i>Herdigan</i>	Husband and wife owned shares individually and purported to declare trusts for others. <ul style="list-style-type: none"> <li>It was unclear where the shares assigned for the trust were to come from (him or her), therefore trust failed.</li> </ul>

- **Conclusion:**

## Certainty of Objects

- **Introduction:** (A) must prove (B) established the trust in favour of definite beneficiaries (*Morice, McPhail*)
- **Characterise the trust:** OTF, (clause X) states (...) which establishes a (...)
  - **Fixed interest trust:** A fixed interest trust along with a trust power, as [trustee] is obligated to distribute and has no discretion regarding the beneficiaries or the shares they will receive.
  - **Discretionary trust:** A discretionary trust combined with a trust power, as [trustee] is required to distribute **BUT** has discretion in how the distribution occurs.
  - **Mere power:** A mere authority as there is no obligation on (trustee) to distribute the property
- **State width of power:** OTF
  - **General:** (Clause X) notes ("I gift my card collection to Jack with a power to appoint to whomever he selects, including himself") – thus (prop) can be given to anyone in the world – general width of power
  - **Hybrid:** (Clause X) notes ("I give Lucy my house with power to appoint to whomever she selects apart from myself, Bob or Tom") – thus (prop) can be given to anyone in the world except for ascertained individuals or a specified criteria – hybrid width of power
  - **Special:** (Clause X) notes ("I leave my house to my wife for life, with the remainder to such of our children, in such shares as she shall select during her lifetime") – thus (prop) **ONLY** give to an ascertainable class, defined by inclusion and exclusion – special width of power
    - NB: has to be special for discretionary trusts)
- **Relevant test:**
  - **Fixed interest trust:** As the beneficiaries and their interests are specified, [Clause X] appears to be a fixed interest trust in favour of [beneficiaries], who are taken to have equitable property rights for [objects under the trust], meaning they can insist the trust is distributed according to their proportionate interests (cf. Kennon).
    - **List certainty:** [T] must be the ability to compile a list of all beneficiaries at the time of distribution (McPhail per Lord Wilberforce; Kinsela). OTF...
    - NB: the fact the people are not known before distribution is irrelevant (don't have to make a list at the date of trust creation) → BUT must say at outset if list is likely to be possible.
    - Broadway Cottages: FIT for "current and future employees" failed as impossible to make a list of future employees at the time of distribution
    - 'Mates/friends': no possibility of listing this unless special instructions given by S to T (Lord Upjohn in Gulbenkian)
    - Shares to be taken may be specified on trust deed or necessarily implied ○ If this can't occur, the trust will fail
  - **Discretionary Trust:** Here, [Clause X] is a discretionary trust power, as while [X] has an obligation to distribute the fund, [he/she] has discretion as to the proportion any object shall receive (if any). Thus, the pertinent tests are criterion certainty and administrative workability (McPhail, reversing IRC). This allows for the valid creation of modern large-scale non-exhaustive discretionary trusts.
    - **Criterion certainty test** (McPhail; Re Gulbenkian): For the beneficiaries to be certain, it must be possible to clearly determine whether any given individual falls within or outside the class for distribution. This includes both semantic certainty and evidentiary certainty
      - ✓ **Semantic certainty:** Class must be described in a way that is not vague. OTF, the words used to describe the class are (...) – words are (clear, unclear) – so (are/are NOT semantically certain).

Certain	Uncertain
Employers (Gulbenkian)	'My old friends' (Gulbenkian) → 'Mates/friends' (can't list unless given criteria to identify) (L Upjohn in Gulbenkian; Lempens)
Former & current employees / officers (McPhail)	Deserving journalists (Fairfax)
Residents or inhabitants (District Auditor)	Future employees (Broadway Cottages)
Relative (blood relative) (McPhail)	Members in good standing
Dependents (rely financially) (McPhail)	Organisations to raise the standard of living
Organisations for the elimination of war (Blyth)	Christian Societies or Organisations' (McCracken)
Anyone in the world (Re Hays)	"According to financial need" – not uncertain, as trustees can effectively decide which children have more financial need than others).
'Any person, in whose house, company or care' (Gulbenkian)	
Any person with whom my son resided (Gulbenkian)	

- ✓ **Evidentiary certainty:** Must be practically feasible for the trustee to ascertain who is / is not in the class based on the available evidence (McPhail)
  - **Satisfied:** OTF, this requirement will be met, as [insert relevant facts]. Therefore, criterion certainty is satisfied.
  - **Not satisfied:** OTF, (clause X) states (residing, under whose care) – practically challenging for the trustee to determine who is a member of the class. **HOWEVER**, this does not invalidate the clause (McPhail). The trustee may seek assistance from the court through a Re Benjamin order.

- **Administrative Workability:** If the class is so broad that trustee has no objective criteria to make a decision between objects, it is administrative unworkable (R v District)

- ✓ **Factors indicating administrative workability:**
  - Number of potential beneficiaries is manageable (i.e. not *millions*).
  - The class is **numerically/geographically limited**, or clearly defined (Creighton; *District Auditor*).
  - A clear **objective criterion** exists for selecting between beneficiaries (e.g., need-based).
  - The fund size is **proportionate** to the class size (see *District Auditor*).
- ✓ **Factors indicating unworkability:**
  - Class size so large it “cannot form anything like a class” (McPhail).
  - No objective basis to distinguish between members of the class (Gulbenkian; *District Auditor*).
  - Capricious or arbitrary decisions likely (i.e. who receives what and why?).
  - Large number of potential people with standing to litigate (Creighton).
  - Trustees required to “distribute money among millions with limited funds” (*District Auditor*: £400,000 across 2.5 million).

- **Mere powers:** The applicable test is criterion certainty (Re Gulbenkian). According to McPhail, the administrative workability test is relevant only to trust powers, so it will not apply here. However, the trustee may struggle to fulfill their fiduciary duties effectively if the terms of the power are capricious (Re Manisty)

- **Criterion certainty test:** For the beneficiaries to be certain, it must be possible to clearly determine whether any given individual falls within or outside the class for distribution. This includes both semantic certainty and evidentiary certainty

- ✓ **Semantic certainty:** Class must be described in a way that is not vague. OTF, the words used to describe the class are (...) – words are (clear, unclear) – so (are/are NOT semantically certain). Similar to (...)

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Employers (Gulbenkian)	‘My old friends’ (Gulbenkian) → ‘Mates/friends’ (can’t list unless given criteria to identify) (L Upjohn in Gulbenkian; Lempens)
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- ✓ **Evidentiary certainty:** Must be practically feasible for the trustee to ascertain who is / is not in the class based on the available evidence (McPhail)
  - **Satisfied:** OTF, this requirement will be met, as [insert relevant facts]. Therefore, criterion certainty is satisfied.
  - **Not satisfied:** Here, it will be practically challenging for the trustee to determine who is a member of the class, as [insert relevant facts]. **HOWEVER**, this does not invalidate the clause (McPhail). The trustee may seek assistance from the court through a Re Benjamin order.
- **Capriciousness:** A mere power may still be invalid if **capricious** — i.e. the terms of the power are **irrational, perverse, or irrelevant to any sensible expectation of the settlor** (Templeman LJ in *Re Manisty’s*).
  - ✓ Satisfied: (A) argues the power is not capricious, as it relates to (individuals/entities that B had a logical connection to. In *Re Hay’s*, even a tenuous connection sufficed. Therefore, the court is unlikely to intervene.

- ✓ Not satisfied: A) may argue the terms are capricious because they form an arbitrary group with no link to the settlor, akin to *Re Manisty's*, where “residents of Greater London” were too broad and disconnected.

- **If object is uncertain, can it be saved:**

- Two-part clauses: As courts intend to give effect to the settlor's intention, where there is a two-part/default of distribution clause and first part is invalid, the court would likely sever the clause (most likely giving to default party)
- Third party resolution: Can also get over uncertainty where the trust provides that a third party can resolve a dispute (Tucks)

- **Effect of Object Uncertainty:**

- Trusts by declaration: Where a trust by declaration fails due to lack of intention, [settlor] will continue to hold their property in their own right, not subject to any trust.
- Trusts by transfer: Where property has already been successfully transferred to [trustee], and the trust then fails for another reason (e.g. certainty of object), [trustee] will hold the property on resulting trust for the settlor.
  - In the case of a testamentary trust such as a will (rather than *inter vivos* trust), then property reverts to the estate.

- **Conclusion:**

- INTENTION ESTABLISHED (failure for another reason e.g. certainty of object): As certainty of intention is satisfied, it is clear [settlor] did not intend [trustee] to receive the property as a gift. Accordingly, [trustee] will hold the property on resulting trust for [settlor], pending the later direction.
- FAILURE FOR INTENTION: The property reverts back to the settlor and trustee held to hold the property on constructive trust for the settlor.

- **OVERALL conclusion:**

- Express trust found: On BoP, court finds that there is certainty of intention, subject matter & object so express trust valid. Thus, binding trust relationships are created with lasting consequences that courts will enforce (*Valentini Trusts*) & the trust is irrevocable (*Mallott*)