The subject matter of the trust must be clearly identifiable.

→ 'Bulk of my estate' – too vague and subjective to identify a clear portion of the estate held on trust ***(Palmer)***

***Mussoorie Bank* – no trust**
FACTS: Testator left property to widow – 'feeling confident that she will act justly to our children in dividing the same when no longer required by her'.
HELD: There was no trust created for the children. The language was precatory. Uncertainty of subject matter as court could not determine what would be a 'just share'. Widow took the property absolutely entitled.

***Sprange* – no trust**
FACTS: Wife gave property to husband for 'his sole use' provided that at 'his death the remaining part of what is left, that he does not want for his own wants and use, be divided between' her brother and sisters.
HELD: No trust as subject matter was too vague because it left the legatee to decide the amount (if any) of the property to be held on trust.

CERTAINTY OF OBJECT

The beneficiaries or objects of a [non-charitable] trust must be certain ***(Morice)***.

****IF THERE ARE TWO PARTS TO THE CLAUSE (i.e. DEFAULT/GOING TO ANOTHER PERSON), YOU MUST ANALYSE BOTH PARTS SEPARATELY****

→ Beneficiary principle: A trust must be in favour of identifiable beneficiaries or a valid charitable purpose.

Summary	**Obligation to distribute**	**Discretion to select objects**			**Test for certainty**
		General	**Hybrid**	**Special**	
Fixed Interest Trust	Yes	No discretion permitted			List certainty
Discretionary Trust Power	Yes	No	No	Yes	Criterion certainty
Discretionary Mere Power	No	Yes	Yes	Yes	Criterion certainty

STEP ONE – IDENTIFY THE POWER

a. FIXED INTEREST TRUST

WRITE: The trust is a fixed interest trust, evident **[how]**. **[Trustee]** has no discretion, and must distribute the property to the beneficiary, **[beneficiary]**, who has a full, vested equitable indefeasible proprietary interest in the trust property.

→ List certainty test for certainty of object

b. DISCRETIONARY TRUST

WRITE: The trust is a:

1. non-exhaustive discretionary trust **(bare power)**
2. exhaustive discretionary trust **(trust power)**

as **[why]**. The **[clause?]** is a **[general/hybrid/special]** power as **[why]**. **[Who]** are objects under the trust, and they do not have equitable property rights in the trust assets.

→ Trust power: The objects have a right to consideration and a right to due administration ***(Kennon)***.

i) IDENTIFY THE POWER OF APPOINTMENT

WRITE: **[Trustee's]** power is a **[bare/trust power]** as **[how]**.

'I leave my property to my trustee Tom. My wife may appoint the property to anyone except my brother Fred' = legal title goes to Tom, but power of appointment goes to the wife. Discretionary trust with bare hybrid power. Wife is not the trustee, so not a fiduciary.

BARE/MERE POWER *(non-exhaustive discretionary trust)*:

The trustee has no obligation to distribute the trust property.

Permissive language – 'may, can'

→ The certainty of object test is criterion certainty.

If there is a default clause, it will be a bare power.

TRUST POWER *(exhaustive discretionary trust)*:

The trustee must distribute the property because there is an obligation under the power to distribute the trust property.

Mandatory language – 'shall, must, is to be'

→ The certainty of object test is criterion certainty and administrative workability.

BUT – The presence of a default clause (gift over in default) transforms a trust power into a bare power. A default clause is determinative.

ii) IDENTIFY THE BREADTH/WIDTH OF THE CLASS OF OBJECTS

WRITE: **[Trustee's bare/trust]** power is a **[general/hybrid/intermediate]** power as **[why]**.

Summary	**Obligation to distribute**	**Discretion to select objects**			**Test for certainty**
		General	**Hybrid**	**Special**	
Discretionary Trust Power	Yes	No	No	Yes	Criterion certainty + Admin Workability
Discretionary Bare Power	No	Yes	Yes	Yes	Criterion certainty

GENERAL POWER:

Power to appoint to anyone in the world (including donee of power).

*Note re donee – is the power then in the hands of a fiduciary or no?

'To whomever they select'

HYBRID POWER:

Power to appoint to anyone in the world except certain people.

'To whomever they select except XYZ'

SPECIAL POWER:

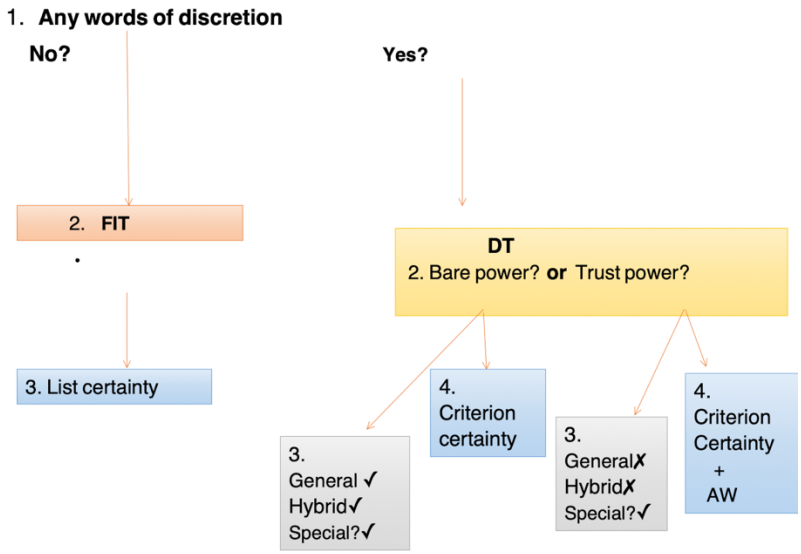
Power to appoint to persons in a specified 'class'.

'To whomever of XYZ they select'

***Residue clause = property settlor not aware of or anything that fails. Common in a will and trust. It will be valid as a fixed interest trust.**

STEP TWO – APPLY THE RELEVANT CERTAINTY OF OBJECT TEST

TRUST TYPE	CERTAINTY TEST
Fixed Interest Trust	List certainty
Non-exhaustive Discretionary Trust (bare power)	Criterion certainty
Exhaustive Discretionary Trust (trust power)	Criterion certainty AND administrative workability



a. FIXED INTEREST TRUST – LIST CERTAINTY

WRITE: A fixed interest trust requires list certainty at the date of distribution ***(McPhail; Gulbenkian)***.

→ Are we able to ascertain who is holding the identified beneficial interest? Can a list of the beneficiaries actually be made?
→ Do not need to be able to make a list at the date of creation, only date of distribution.

b. DISCRETIONARY TRUSTS

i. *BARE POWERS (NON-EXHAUSTIVE DISCRETIONARY TRUST)*

WRITE: A non-exhaustive discretionary trust (bare power) requires criterion certainty ***(Gulbenkian)***. A bare power of appointment among a class is valid if you can with certainty say whether any given individual, is or is not, a member of the class; not every member of the class has to be ascertained ***(Upjohn, Reid LLJ* in *Gulbenkian)***.

Subheading each:

1. Semantic certainty – FATAL TO VALIDITY

WRITE: The class of objects will be semantically certain if the terms used have precise, objective and clear boundaries of meaning.

→ It will be semantically uncertain if it cannot be said whether a claimant is a member of a class or not – 'my old friends', 'most worthy recipient', 'my lovely teachers'.

→ IF IMPRECISE, THE TRUST FAILS

CERTAIN	UNCERTAIN
Distribution to 'relatives' certain ***(McPhail)***	'A trust for my old friends' – conceptually uncertain unless more details provided ***(Gulbenkian)***
Employees, officers, former employees, former officers ***(McPhail)***	

McPhail v Doulton
CLAUSE: The Trustees shall apply the net income of the Fund in making at their absolute discretion grants to or for benefit of any of the *officers and employees* or *ex-officers or ex-employees* of the Company or to *any relatives or dependents* of any such persons in such amounts at such times and on such conditions (if any) as they think fit
HELD: No doubt who was an employee, officer, former employee, former officer. The term 'relative' was also sufficiently certain – 'next of kin'/blood relative.

2. Evidential certainty – NOT FATAL TO VALIDITY

WRITE: Evidential certainty is not fatal to validity. While it is uncertain whether **[X]** is in the class of **[what]**, the court can give directors for evidence needed to ascertain this.

→ Factually, is X within the class?
→ Matter of evidentiary proof
→ E.g. 'to all my 2023 trusts students' – is X actually a 2023 trusts student?

EFFECT OF FINDING A BARE POWER

General power – power to appoint to anyone in the world