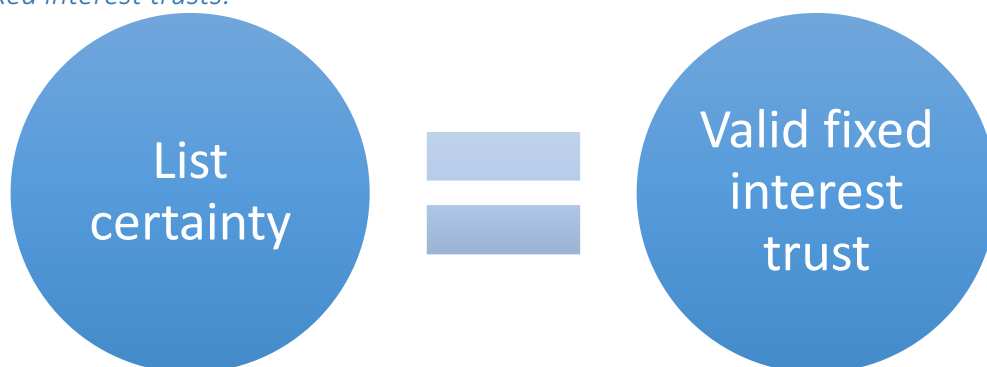


## Certainty of objects

*For fixed interest trusts:*



- **Test: List certainty:** Must be capable of listing out all objects (*Gulbenkian*; *IRC v Broadway*)
- Fixed trust would be valid as long as the court can be satisfied on the balance of probabilities **that a substantial majority of the beneficiaries have been ascertained** and that no reasonable inquiries could be made which would improve the situation (*West*)
- The amount which each beneficiary will take is known as the outset. This can be because the trust instrument itself specifies shares. If no shares are specified the requisite amounts can be necessarily implied.
- A gift to ‘such of them my friends who resided with me from overseas’ failed as the deceased had not provided any information as to who these people were and all attempts at finding them had failed in *Lempens v Reid*
- Ordinarily, the question of certainty is timed at the date the trust instrument becomes effective, meaning that list certainty needs to be satisfied at the time of the trust or will comes into force.
- Problems can occur when the list of possible beneficiaries is extremely long and the job of discerning the identity of the beneficiaries cannot be completed at the time the trust comes into effect.

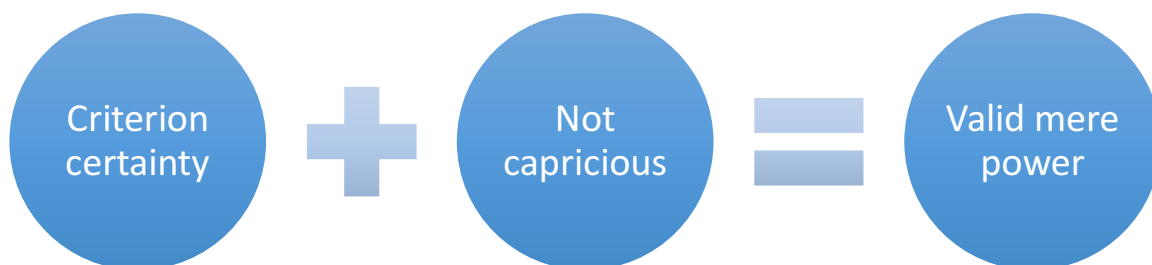
*For discretionary trusts:*



- **Test: Criterion certainty:** Must be able to define the objects (*McPhail*)
- This test has 2 facets:
  1. Semantic certainty: Can you define the class (*Gulbenkian*)
  2. Evidentiary certainty: Can you prove who is in the class
- If the objects are not semantically certain then the trust fails. However, a lack of evidentiary certainty is not fatal. (*Gulbenkian*)

- **Administrative workability:**
  - A trust power will also be invalid if the class is so hopelessly wide as to render it nothing like a class at all. (*Gulbenkian per Upjohn LJ*; *R v District Auditor*)
  - What exactly did Lord Wilberforce mean when he discussed administrative workability? Three explanations offered:
    1. Class so broad that trustee has no objective criteria to make the decision between objects.
    2. Too many people would have locus standii to complain of trustee's actions.
    3. Task is practically impossible for the trustee, given the size of the trust fund.
  - Explanation three is probably the best explanation
  - **Use examples on exam:**
    - “All the residents of Greater London” (2 million people at the time) (*McPhail, per Lord Wilberforce*) → this would be unworkable!
    - The trust for in *McPail* for the employees, relatives and dependents was not unworkable and that was a trust for thousands of people.
    - Trust in *District Auditor* for residents of West Yorkshire (2.5 million people) was unworkable.
  - Rationale:
    - The courts must have some idea as to who has standing to enforce the power.
    - The trustee must be able to undertake an adequate survey of the class in order for the power to be exercised properly.

For mere powers:



- The test for validity of mere powers is also ‘criterion certainty’.
  - Semantic Certainty (E.g *Re Gulbenkian’s Settlement Trusts* [1970] AC 508)
  - Evidential Certainty
- The test of administrative unworkability is thought not to invalidate mere powers.
- *Re Manisty’s Settlement per Templeman LJ*: A mere power will not be enforced if to do so would be capricious, in the sense that it would benefit an accidental conglomeration of persons with no discernible link to the settlor, contrary to the presumed intentions of the settlor.
- *Re Hays per Megarry LJ*: The issue of capriciousness would only arise if there was a real problem in the administration of the trust, such as where a small amount of property was to be appointed to a large number of objects.
- The test of capriciousness appears to be a narrow doctrine and *Bryan and Vann* state that it has never been applied to invalidate a bare power.

***Re Gulbenkian’s Settlement* [1968] 1 Ch. 126**

**Facts:**

- Calouste Gulbenkian, a wealthy Ottoman oil businessman and co-founder of the Iraq Petroleum Company set up a settlement that stated the “Trustees shall at their absolute discretion, during the life of my son, pay the income of my trust fund to the following beneficiaries: Any person in whose house, apartments or in whose company, care or control, or with whom the said son may be employed or reside with.”
- This was the object of the trust.
- Counsel argued the following terms were uncertain:
  - meaning of ‘residing’
  - persons ‘with whom’ he was residing
  - persons in ‘whose company’ he was residing
  - persons ‘under whose care or control’ he was residing.

**Issue:** What type of power is this? Was it valid?

**Judgment:**

- The court held that this was a mere power despite the inclusion of the word ‘shall’ because the trustees were given discretion as to distribution.
- The House of Lords held for powers of appointment, objects were sufficiently certain if any given individual could be said to be in, or not in, the class. (So this was more relaxed than list certainty, which requires everyone to be said to be in the class.)
- **Lord Reid** said 'It is often difficult in a particular case to determine whether a temporary sojourn amounts to "residence".' But he held that it was certain enough to succeed.

#### ***McPhail v Doulton* [1970] UKHL 1**

**Facts:**

- Baden established a discretionary pension fund for the employees of Matthew Hall & Co Ltd.
- His executors challenged the validity of the trust (if it was invalid the property would form part of the estate).
- The clause described the potential beneficiaries as ‘any of the officers and employees or ex-officers or ex-employees of the company or ... any relatives or dependants of such persons’.

**Issue:** What type of power is this? Was it valid?

**Judgment:**

- The House of Lords held that the trust power would be valid if the objects satisfied the criterion certainty test.
- **Lord Wilberforce** stated that if the trustee is required to distribute the whole of a fund’s income ‘he must necessarily make a wider and more systematic survey than if the duty is expressed in terms of a power to make grants.’
- **Lord Wilberforce** said the test for validity ought to be whether ‘it can be said with certainty that any given individual is or is not a member of the class...’
- **Lord Wilberforce** stated that within criterion certainty if there was linguistic/semantic uncertainty that would render the trust void and evidentiary uncertainty which would not invalidate a trust.
- **Lord Wilberforce** also stated that a trust may be invalid if the definition of beneficiaries was ‘so hopeless wide’ that it would be administratively unworkable. His lordship gave the example of ‘all the residents of Greater London’.

- **Lord Reid and Viscount Dilhorne** agreed with **Lord Wilberforce**

#### ***West v Weston (1998) 44 NSWLR 657***

##### **Facts:**

- Testator had no children, his parents had died, he had no brothers or sisters or uncles or aunts.
- Will provided for residuary estate to be divided equally among those descended from the testator's four grandparents. 1,225 people qualified as beneficiaries on Castles side of family, 450 on Coghlan side of family.
- Executrix and genealogist had been searching for 2 years, expected to unearth more beneficiaries.
- This was a fixed trust, not a discretionary trust.

**Issue:** Was it fatal that there was not "list certainty"?

##### **Judgment:**

- **Young J** noted that circumstances in Australia have changed since list certainty was introduced. His honour also noted that the authority for list certainty could only be found in older UK cases.
- Therefore adds gloss to list certainty rule: fixed trust would be valid as long as the court can be satisfied on the balance of probabilities **that a substantial majority of the beneficiaries have been ascertained** and that no reasonable inquiries could be made which would improve the situation.

#### ***Re Baden's Deed Trusts (No 2) [1972] EWCA Civ 10***

##### **Facts:**

- After the decision in *McPhail v Douulton* the matter was remitted back to trial where, on appeal, it was argued that the use of the words 'relatives' and 'dependants' were semantically uncertain.

**Issue:** Were the terms semantically uncertain?

##### **Judgment:**

- **Sachs LJ:** distinguished between conceptual uncertainty and evidential uncertainty. "Relative" can be given a clear meaning ie, descent from a common ancestor. Therefore sufficiently certain.
- **Megaw LJ:** should be possible to say of a substantial number of objects that they fall within the trust.
- **Stamp LJ:** should be possible to say that any person did or did not fall within the class, and should be possible for trustees to conduct a survey of the possible beneficiaries. Relative = "nearest blood relations" or "next of kin". Therefore sufficiently certain.
  - This definition would be difficult to apply in modern times given adoption, step-siblings, etc
- **Stamp LJ** said relatives was sufficiently certain but dependents was semantically uncertain

***R v District Auditor No 3 Audit District of West Yorkshire MCC, ex parte West Yorkshire MCC [1986] RVR 24***

**Facts:**

- The council wished to create a discretionary trust of £400,000 to be applied for a list of purposes 'for the benefit of any or all or some of the inhabitants of the county of West Yorkshire.'

**Issue:** Was this trust valid?

**Judgment:**

- **Taylor J** held that the trust was invalid, because it was administratively unworkable to distribute such small amounts to all people, notwithstanding the fact it satisfied criterion certainty. The trust was not, however, 'capricious', but merely too difficult and costly for a court to enforce.
- His honour stated that 'A trust with as many as 2 ½ million potential beneficiaries is, in my judgment, quite simply unworkable. The class is far too large ... It seems to me that the present trust comes within the third case to which **Lord Wilberforce** refers. I hope I am not guilty of being prejudiced by the example which he gave. But it could hardly be more apt, or fit the facts of the present case more precisely.'

***Re Manisty's Settlement [1974] Ch 17***

**Facts:**

- Mere power conferred on the trustees to appoint the property to the children of the settlor, the brother of the settlor, or any person, corporation, charity or object other than the settlor, his wife or anyone settling property on trust.
- In this case, there was no problem of semantic or evidentiary certainty.

**Issue:** Was the power wide to properly administer?

**Judgment:**

- Court held it did not matter how wide the class was because administrative workability was not part of the test. This is partly because person with mere power does not have to exercise the power.
- **Templeman LJ** stated that the trust was valid, notwithstanding that the class of potential objects was defined by exclusion. This is because administrative unworkability does NOT apply to mere powers. Since a mere power does not have to be exercised, a broadly defined class is not inconsistent with the performance of that power. The only situation in which the court would intervene was if the trustees acted 'capriciously', that is to say, act for reasons which could be said to be irrational, perverse or irrelevant to any sensible expectation of the settlor.