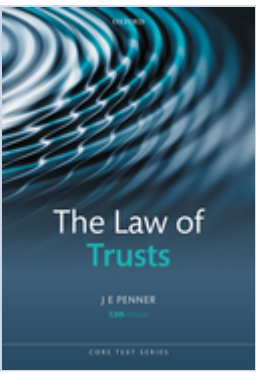

The Law of Trusts (12th edn)
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5. Certainty

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Abstract

Titles in the Core Text series take the reader straight to the heart of the subject, providing focused, concise, and reliable guides for students at all levels. This chapter focuses on the three certainties—certainty of intention, certainty of subject matter, and certainty of objects—and adjacent issues including administrative unworkability. The three certainties are considered first in the context of traditional family trusts, then in the context of modern discretionary trusts, and finally in the commercial context.

Keywords: certainties, intention, subject matter, objects, family trusts, modern discretionary trusts, trusts of goods, prepayment trusts, floating trusts

Summary

5.1 The terms of a trust must be 'certain', that is, precise enough for the trustees to know what they must do. If the terms are uncertain then the intended trust fails.

The three certainties

5.2 The traditional elements of this requirement are known as the 'three certainties', following *Knight v Knight* (1840): certainty of intention; certainty of subject matter; and certainty of objects. The first concerns the question whether what the putative settlor did or said amounts to a declaration of a fixed trust, a discretionary trust, or the conferral of a mere power (**Chapter 3**). The second requires that the assets in respect of which those trusts or powers are to operate are sufficiently defined. The third, which we have already discussed in some detail (**4.13** et seq), requires that the intended objects of the trusts or powers are
p. 107 identifiable. The rules regarding the three certainties were developed in the context of traditional family trusts, like the Examples 1 to 4 that we looked at in **Chapter 3**. But their application has to be considered afresh in the contexts of modern discretionary trusts, or MDTs (**Chapter 4**), and commercial trusts, so we shall start with the first, and then move on to consider the other two.

The special place of the certainty of intention

5.3 One should distinguish the certainty of intention from the other two. Certainty of intention is like the 'intention to create legal relations' in contract law; it concerns the question whether the putative settlor really meant to create a trust at all. When we deal with the second and third certainties, we are past that point. We know what the person intended, whether a fixed trust, a discretionary trust, or a power of appointment: these secondary certainties concern the efficacy of the settlor's expression, or the workability of his intentions—does he provide an instruction that can be carried out? Or is it too vague, or too difficult, or even impossible to implement? A severe difficulty in identifying the subject matter or objects may indicate that no trust was intended: uncertainty of subject matter (*Mussoorie Bank Ltd v Raynor* (1882), or objects (*Lambe v Eames* (1871), has a 'reflex action' that indicates an uncertainty of intention to create a trust or power.

The family gift context—traditional trusts

Certainty of intention

5.4 The maxim 'Equity looks to intent, not form', which we shall look at later (**9.7**), applies to declarations of trust. No particular formula is necessary, not even the use of the word 'trust'. Neither is it necessary for the settlor to know that, technically, that is what he is doing. In *Paul v Constance* (1977) Mr Constance and Mrs Paul lived together as man and wife although not legally married. He opened a bank account in his own name with money received as compensation for an injury at work. Because of their dealings with the account—they both drew upon it to play bingo and deposited their winnings in it—and because on several occasions Mr Constance declared to Mrs Paul, 'the money is as much yours as mine', the court held him to have declared a trust of the property in equal shares for himself and Mrs Paul. Thus, very informal declarations of trust are possible.

5.5 *Paul v Constance* was followed in *Rowe v Prance* (1999), where the owner of a boat repeatedly said that the boat was 'our boat' and 'ours', meaning himself and his extramarital partner. One point to note about both cases: a person can only declare an express trust once; in these cases it seemed unnecessary to identify which statement counted as *the* declaration, but analytically any prior or subsequent statement can only count as evidence of the settlor's sincerity, ie that he really meant it.

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Whose intention?

5.6 Many trusts are testamentary, so finding a trust will often depend on construing wills to determine the testator's intention, which is why certainty of intention has sometimes been called 'certainty of words'. For example, in *Re Foord* (1922) the testator, in an informal will he wrote without legal advice, left shares 'absolutely' to his sister 'on trust' to pay his wife an annuity; the shares were worth considerably more than required for the annuity, and the question arose on what basis the sister held the surplus. 'Absolutely' suggests that the gift was an outright gift to his sister, with a condition that she pay the wife an annuity. But 'on trust' suggests that she took the property as a trustee, and trustees are not entitled to any interest in the trust property unless also made a beneficiary, in which case the surplus would be held on resulting trust (**2.14**). Sargant J found the case a difficult one, but decided that the surplus was held by the sister for her own benefit. In testamentary cases, then, the only relevant intentions are those expressed by the testator in his will. (See also *Cook v Hutchinson* (1836).) But the matter is more subtle in the case of *inter vivos* trusts (**2.13**).

5.7 It is typically said that the relevant intention is the same: it is only the settlor's intention that counts. This view was recently expressed in *High Comr for Pakistan v Prince Muffakham Jah* (2019), per Marcus Smith J, [244], as follows:

> *There must be certainty of intention to create a trust on the part of the settlor. [It was] suggested that there needed to be a common intention by the transferor and the transferee. I do not accept that that is a requirement for an express trust. It is the intention of the settlor that counts, and the intention of the trustee in accepting the trust is irrelevant. The trustee can, of course, refuse to accept the role of trustee, but that is not a point that goes to the necessary intention to create a trust.*

This thought must be approached with some caution. A settlor cannot simply impose a trust upon her trustees. In other words, the settlor must indicate with sufficient clarity what the terms of the trust are so the trustees understand what they are undertaking. The settlor cannot, therefore, harbour private, unexpressed intentions—it is the *declaration* of trust, what the settlor expresses, that is relevant (see also later, **5.10**). So while it is true that it is the settlor's intentions alone that 'counts', it is those intentions as would be reasonably construed by a trustee or, where there is some ambiguity or uncertainty, by the court.

5.8 Occasionally it is difficult to tell whether someone intended to declare a trust or merely stated an intention to make a future gift. In *Jones v Lock* (1865) a man on return from a business trip responded to his infant child's nurse's statement that he had 'not brought baby anything' by pressing a cheque made out to him for £900 into the wee child's hand and said, 'Look you here, I give this to baby'. He later contacted his solicitor, expressing the intention to invest the £900 (and more) for the benefit of the child, as well as to alter his will in the child's favour. Before doing so he died. Although sympathetic, the court was unwilling to find the father's
p. 109 actions a declaration of trust. He intended to deal with the property in the cheque for the benefit of the son, no doubt, but not as a trustee, but as the full owner until such time as he had made his intended arrangements with his solicitor. The court regarded his 'declaration' as merely a declaration that he was now able to provide for his son and intended to do so.

Trust or power of appointment?

5.9 Trust instruments are to be interpreted or construed by applying the normal rules for the construction of documents (*Millar v Millar* (2018), [17]–[18]), although historically courts have applied some particular rules of construction with respect to trust instruments. Consider: '£100,000 to my trustees for distribution to such of my relations as my trustees shall in their absolute discretion think fit': it would seem to be unclear whether 'for distribution' means 'to be distributed', an imperative direction imposing an obligation upon them to distribute, or is rather to be interpreted as 'available for distribution', thus creating no obligation but giving the trustees a power that they may exercise if they so choose.

5.10 Several rules of construction may determine whether a trust or a power of appointment is intended:

(1) If there is an explicit 'gift over' in default of appointment, such as 'my shares in X company to my trustees, with power to appoint to my children in such portions as my trustees shall in their absolute discretion decide, and in default of appointment to the National University of Singapore', there is a power of appointment, because if the settlor provides for the case where the trustees do not appoint, clearly they are under no duty to do so.

(2) The second rule is a specification of the first. In order to find a power on the basis of a gift over, the gift over must specifically arise on default of appointment. For example, a residuary gift (**2.83**) is not a gift over for this purpose. Residuary clauses deal with failures of all kinds; nothing, therefore, can be inferred about any specific gift just because the will contains a residuary clause.

(3) Finally, if there is no gift over in default of appointment, one must determine the true intentions of the testator by construing the will or settlement as a whole. For example, if the testator uses words that clearly indicate his intention to create a trust with respect to some of his gifts, but does not in the gift under consideration, the court is apt to conclude that there is no trust—the testator knew what words

to use to create a trust, and in respect of this gift did not (see *Re Weekes' Settlement* (1897)). The settlor's use of the word 'power' is not determinative, but words such as 'shall' or 'to be', as in 'shall distribute' or 'to be divided amongst' seem quite clearly to be imperative, strongly indicating the imposition of a duty, and thus a trust. Finally, where a trust is intended but fails for a reason that would not invalidate a similarly framed power, the court will not save the gift by treating it as a power (*IRC v Broadway Cottages Trust* (1955); *Re Shaw* (1957)).

p. 110 **5.11** Settlors may create a power of appointment 'coupled' with an implied trust in default of appointment. It is perfectly possible to give someone a power to appoint certain property, in default of which appointment the property goes to the objects of the power itself, rather than to another class of objects (**3.10**). In cases where there is a gift over in default to the same people who are the objects of the power of appointment, then the power is, in essence, nothing more than a power to vary the shares that the objects would otherwise receive under the gift over.

5.12 In *Re Weekes' Settlement* (1897), a testatrix left property to her husband with a 'power to dispose of all such property by will amongst our children in accordance with the power granted to him as regards the other property which I have under my marriage settlements'. There was no gift over, so that did not decide the issue. The husband died intestate. The children argued that the testatrix's words indicated a general intention that the husband should leave the property in question to all the children in equal shares if he did not appoint particular shares to them, in other words, that he was given a power coupled with an implied trust in default of appointment. Their argument failed. The court did not find it possible to construe from the document that the property should be held on trust for all the children jointly if he did not appoint.

5.13 In *Burrough v Philcox* (1840) (at 300), the pertinent instruction in the will was as follows:

> *but in case my son and daughter should both of them die without leaving lawful issue, then for the said estates to be disposed of as shall be hereinafter mentioned, that is to say, the longest liver of my two children shall have the power, by a will, properly attested, in writing, to dispose of all my real and personal estates amongst my nephews and nieces or their children, either all to one of them, or to as many of them as my surviving child shall think proper.*

Here the court found a general intention that the class of nieces and nephews and their children should benefit. Lord Cottenham LC said (at 306):

> *[W]hen there appears a general intention in favour of a class, and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails, from that selection not being made, the Court will carry into effect the general intention in favour of the class … and in such case, the Court will not permit the objects of the power to suffer by the negligence of the donee [of the power], but fastens upon the property a trust for their benefit.*

Thus the property was held for the nieces and nephews and their children in equal shares.

Precatory words

5.14 'Precatory words' are words of prayer or request, for example, this testator's direction from Mussoorie Bank Ltd v Raynor (1882) (at 325): 'I give to my dearly beloved wife … the whole of my property … feeling
p. 111 confident that she will act justly to our children in dividing the same when no longer required by her.' Clearly the testator had in mind that his wife would, following her use of the property, pass it on to his children, but did he intend her to hold the property on trust—for her own use for life, say, and then for their children after her death?

5.15 A run of cases leading up to the middle of the nineteenth century provided authority for a 'doctrine of precatory trusts', essentially a rule of construction by which such expressions were held sufficient to create trust obligations (see *Palmer v Simmonds* (1854)). In *Lambe v Eames* (1871), however, the CA refused to find that a testator's gift of his estate to his widow 'to be at her disposal in any way she may think best, for the benefit of herself and her family' was a trust.

5.16 In *Mussoorie Bank*, the same attitude was adopted by the HL, and the 'doctrine' of precatory trusts was effectively abolished. Nevertheless in the proper context words that on their face look merely precatory may establish a trust. In *Comiskey v Bowring-Hanbury* (1905) the words 'in full confidence that … at her death [my wife] will devise it to such one or more of my nieces' were taken to establish a trust for the persuasive reason that immediately following this direction was a statement to the effect that in the event that the wife failed to devise the property to one or more of the nieces herself, it should be divided equally amongst them. It therefore seemed clear that the testator intended his nieces to take following her death, so the wife really held the property on trust for herself for life, and then for the nieces, with a power to vary the nieces' particular shares by her will (**5.9**).

Sham trusts

5.17 'Sham' trusts purport to divest the settlor of his interest in the trust property but in reality do not, because he had no intention to create a trust of the kind that the written terms represent. As Lewin states (2020, 5-020): 'Properly understood … there is no such thing as a "sham trust", but merely a document purporting to create a trust which does not in fact exist'. A genuine sham involves an intent to deceive third parties, in particular as to the extent of one's assets (see *Midland Bank v Wyatt* (1995)), and the 'shamming' intention may relate only to the terms of the trust, which are meant to deceive, but not to whether a trust was established at all, and a trust is not a sham just because it is created with an improper motive (*Lewis v Condon* (2013)).

5.18 Regarding the settlor's and the trustees' intentions (**5.7**), Rimer J had this to say in *Shalson v Russo* (1990, [190], emphasis added):

> *When a settlor creates a settlement he purports to divest himself of assets in favour of the trustee, and the trustee accepts them on the basis of the trusts of the settlement. The settlor may have an unspoken intention that the assets are in fact to be treated as his own and that the trustee will accede to his every request on demand.* But unless that intention is from the outset shared by the trustee (or later becomes so shared), *I fail to see how the settlement can be regarded as a sham. Once the assets are vested in the* ↵ *trustee, they will be held on the declared trusts, and he is entitled to regard them as so held and to ignore any demands from the settlor as to how to deal with them.*

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Certainty of subject matter and objects: common issues

5.19 Modifying Emery's classification (1982), we can divide up the common sources of uncertainty of subject matter and objects into three categories:

- conceptual uncertainty;
- evidential uncertainty; and
- whereabouts uncertainty.

5.20 Conceptual uncertainty concerns the problem of vagueness in the language used by the testator. For example, if a testator gives 'a lot' of his estate to 'my shorter employees' in equal shares, we appear to be faced with a problem. How much is 'a lot', and who, of all his employees, count as the 'shorter' ones?

5.21 Evidential uncertainty may arise because, while the language used to identify the property or persons is precise enough, it seems unlikely or impossible to find the evidence that will allow the trustees to carry out a settlor's, in particular a testator's, instructions. Consider 'the fishing rod that I used to catch a prize salmon on 7 September 1988, I give to the woman I had dinner with that night in celebration'. This bequest is conceptually certain both in subject matter and object—he caught the fish with only one rod, and only one woman dined with him. But determining which of the fishing rods the testator owned at his death is the prizewinning one, and who the lucky woman is, may be impossible simply because there is no reliable evidence.

5.22 Finally, the whereabouts problem; consider this bequest: 'The photograph of me with Winston Churchill I give to my nephew Paul.' On its face, there appears no problem at all. There is no conceptual or evidential uncertainty making it difficult to determine which photo is the right one and who Paul is. But what if it turns out that the testator kept the photo hidden somewhere in his 60-room mansion, Grandacre, and, secondly, that Paul emigrated somewhere (no one remembers precisely where) in 1973? It may be just impossible to locate either the photograph or Paul.

Whereabouts uncertainty

5.23 We can start with the whereabouts problem, because it is essentially no problem at all (see *Brown v Gould* (1972), per Megarry VC). No trust ever fails because the whereabouts of the property or the object is presently unknown. The trustees would not be required to pull down Grandacre in order to eliminate every possible hiding place for the photo. The gift is valid, and Paul may be put in possession if and when the photograph

ever turns up. In a roughly similar fashion, trustees are required to hold a gift to a person whose whereabouts
p. 113 are presently unknown, and give it to him if and when he ever turns up. In *Re Gulbenkian* (1970) Lord Upjohn stated (at 524) that, in the case of a beneficiary of a class gift whose whereabouts were uncertain, the trustees could apply to the court for a direction to pay his share into court. In short, the problem is correctly thought of as one confronting the trustees when faced with their duty to distribute the trust property, not as a problem concerning the very existence of the trust (see also **13.88**).

Evidential uncertainty

5.24 Evidential uncertainty of either subject matter or objects defeats an outright gift, a trust for a specified individual, or a fixed trust. The reasoning is straightforward: if the settlor expresses his gift in such a way that evidence must be adduced to identify the property or the person and that evidence is not available, then the gift or trust simply cannot be executed according to its terms. This does not mean that any requirement of evidence defeats an intended gift. There are rules that govern how evidence can be adduced to give effect to a testator's wishes expressed in his will, the general point of which is to ensure that such evidence only gives effect to the testator's declared wishes but does not serve to change or make ambiguous what the testator put in his will, and similar rules should govern the admission of evidence in the case of trusts generally.

Conceptual uncertainty

5.25 Conceptual uncertainty arises from the settlor's use of imprecise or vague language to express his intentions. Vagueness is an ineliminable aspect of language. Vagueness can be understood as the problem of the uncertain boundaries that arise when we try to apply our words to things in the world. For example, the word 'tall' appears to have very uncertain boundaries: 'tall' is not a synonym for '5 foot 10 inches or over'; it is not that precise. People may disagree whether Jim is tall, and an individual may be in a quandary himself as to whether Jim is tall or not. Jim may be 'on the borderline' for 'tall'. Vague terms will certainly apply in some cases—Paul, who is 7 foot 8 inches, is certainly tall (heavens, he's very tall)—and certainly not apply in others —to Stephen who is 4 foot 10 inches—but there will be a range of cases for which the application of the term is indeterminate, or uncertain. We can make a rough-and-ready distinction between two kinds of vagueness. 'Degree' vagueness covers words such as 'tall': 'tall' clearly refers to a scale—height—along which we can place individuals. The second kind of vagueness is 'category' vagueness. An example is 'furniture': 'furniture' is a term that applies to certain household objects. A sofa is certainly furniture, and a dinner plate is certainly not. But what about a carpet? Or a refrigerator?

5.26 In everyday communication, vagueness is not a problem because, in context, we can draw boundaries that are sufficiently workable to understand what we are up to. When greater precision is wanted, we can stipulate a meaning for a term that provides a more precise boundary for its application. For example, we can stipulate that, for our purposes, 'tall' means '5 foot 10 inches or over', or if we run a department store, we can stipulate that furniture includes carpets if carpets are sold in the 'furniture' department. While these
p. 114 stipulations are arbitrary, that does not mean they are unreasonable: '5 foot 10 inches or over' is a reasonable stipulation for tall, although reasonable people might choose different measures, but '4 foot 10 inches' is not, since that boundary does not reflect anything like the normal borderline area where 'tall' is thought to be vague.

5.27 In some cases, courts are willing to determine a boundary for a vague term, in other cases, not. In *Palmer v Simmonds* (1854) the words 'the bulk of my said residuary estate' were held to indicate too uncertain a proportion of the residuary estate to establish a trust. The judge did assume that 'the bulk' meant more than half but that was still too imprecise to establish the subject matter of the trust. By contrast, in *Re Golay* (1965), the gift of a 'reasonable income', to go along with a life interest in a flat, did not fail for uncertainty. Ungoed-Thomas J said (at 662):

> *The court is constantly involved in making such objective assessments of what is reasonable and it is not to be deterred from doing so because subjective influences can never be wholly excluded.*

In other words, the court was willing to stipulate a meaning for 'reasonable income'. Vague words are not useless, even at the borderline. Their vagueness at the borderline just requires us to do some work, that is stipulate criteria for a term's application to give a working definition that is precise enough for the task at hand. Did the court have better reason to do this in *Re Golay* than in *Palmer*?

5.28 The same problem arises for certainty of objects. Not surprisingly, in *Re Wright's Will Trusts* (1982), CA, a trust for 'such people and institutions as [my trustees] think have helped me or my late husband' failed for uncertainty, Blackett-Ord VC at first instance observing that helping the testatrix 'could mean anything from helping the testatrix across the road to saving her from death, dishonour, or bankruptcy'.

5.29 The career of the expression 'my old friends'/'my friends' is particularly interesting. 'My old friends' and 'my friends' were held to be conceptually certain in *Re Gibbard* (1966) but in doing so the court was applying a test for certainty that was later rejected by higher courts (*Re Gulbenkian* (1970)). Lord Upjohn used 'old friend' as a paradigm example of conceptual uncertainty in *Re Gulbenkian* (1970) (at 524), as did Megarry VC in *Brown v Gould* (1972) (at 57D–E):

> *If there is a trust for 'my old friends,' all concerned are faced with uncertainty as to the concept or idea enshrined in these words. It may not be difficult to resolve that 'old' means not 'aged' but 'of long standing'; but then there is the question how long is 'long'. Friendship, too, is a concept with almost infinite shades of meaning.*

5.30 In *Re Barlow's Will Trusts*, by contrast, Browne-Wilkinson held the opposite. The case concerned a provision in a will construed as a gift subject to a condition precedent (**3.20**) where, apparently, a lower standard for certainty is required. To remind you, one might give Blackacre to Stella conditional upon her obtaining a 2:1 degree. Notice that the condition does nothing to identify the donee. Here we are concerned with conditions precedent that do. In *Re Barlow*, the testatrix directed her executor to allow any of her friends
p. 115 to buy paintings from her collection at below market value. Thus, the condition precedent—friendship—defined a class of potential donees and so the standard of certainty required here makes a useful point of comparison with that for certainty of objects of a trust. Browne-Wilkinson J held that the executor was not required to determine a class of donees defined by the term 'friends', but rather that the direction should be construed as a series of individual gifts to such persons who could satisfy the criteria for 'friendship'.

5.31 Denying that the meaning of 'friends' was 'too vague to be given legal effect', Browne-Wilkinson J stipulated (at 300) criteria for its application:

> *Without seeking to lay down any exhaustive definition ... it may be helpful if I indicate certain minimum requirements: (a) the relationship must have been a long-standing one; (b) the relationship must have been a social relationship as opposed to a business or professional relationship; (c) although there may have been long periods when circumstances prevented the testatrix and the applicant from meeting, when circumstances did permit they must have met frequently.*

Resolution of uncertainty by a trustee's or other's opinion

5.32 Should a settlor be able to express his directions as precisely as he can, but provide that if there is a possible uncertainty over their meaning or application, recourse may be had to the trustees or someone else to resolve the issue? *Re Wynn* (1952) stands for the proposition that a settlor cannot oust the jurisdiction of the court by inserting a provision allowing the trustees' opinion to resolve any matter of doubt concerning their compliance with the trust terms. But narrower provisions may be effective.

5.33 In *Re Coxen* (1948), the settlor made a gift of a residence to his widow, which was however to end 'if in the opinion of my trustees she shall have ceased permanently to reside therein'. Jenkins J held (at 761–762):

> *If the testator had insufficiently defined the state of affairs on which the trustees were to form their opinion, he would not I think have saved the condition from invalidity on the ground of uncertainty merely by making their opinion the criterion ... in my view the testator by making the trustees' opinion the criterion has removed the difficulties [in deciding whether the determining event has occurred, which] may necessarily be a matter of inference involving nice questions of fact and degree.*

Re Coxen thus stands for the proposition that an opinion clause cannot cure conceptual uncertainty, but may allow trustees or another person to determine matters of fact as to whether the provision applies in any particular case.

5.34 In *Re Leek* (1969), the objects of a trust were 'such other persons as the company [acting as trustee] may consider to have a moral claim upon' the settlor. Harman LJ said (at 579) [original emphasis]:

> *It was argued that ... the trust was too vague ... If the trust were for such persons as have moral claims, I would agree with this view, but this is not the trust. The trustees are made the arbiters and the objects are such persons as they may* consider *to have a* ↵ *moral claim; and I do not see why they should not be able on this footing to make up their minds and arrive at a decision.*

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Compare this finding with that concerning persons or institutions that the trustees 'thought' had helped the testatrix in *Re Wright* (1982) (**5.28**). *Re Leek* should be treated with caution. If the term is conceptually too vague for a court to apply it, it is not clear that trustees, who must act within the law, that is, carry out the valid legal trust terms, are in any position to do any better than the court.

5.35 *Re Jones* (1972) is a contrasting case. The case concerned a condition subsequent (**3.20**), which requires a high standard of certainty or the condition will fail. In this case, the recipient of the gift, the testator's daughter, would lose half her interest if in 'the uncontrolled opinion' of the trustees she had a 'social or other relationship' with a certain named person. Danckwerts J held the condition uncertain, stating (at 128):

> *[It] seems to me that it may include all kinds of things: for instance, such things as being members of the same congregation, members of the same bus queue, citizens of the same State ...*

As regards the trustees 'uncontrolled opinion' in determining whether the condition was met, Dankwerts J held (at 128–130) that the uncertainty was not one which the trustees' opinion could cure.

5.36 In *Re Tuck's Settlement Trusts* (1978), the CA considered a condition on the inheritance of a baronetcy, that the wife of any heir must be of 'Jewish blood' and worship 'according to the Jewish faith'; in the case of doubt the decision of the Chief Rabbi in London was to be conclusive. Lord Denning MR said (at 61–62):

> *I see no reason why a testator or settlor should not provide that any dispute or doubt should be resolved by his executors or trustees, or even by a third person ... if there is any conceptual uncertainty in the provision of this settlement, it is cured by the Chief Rabbi clause.*

5.37 Lord Denning's view does not, however, represent the law, because although all of the judges upheld the settlement, Lord Russell and Eveleigh LJ did so on a different basis. Lord Russell did not consider the Chief Rabbi clause since he did not find the condition to be uncertain. Eveleigh LJ said (at 66) that the settlor:

> *is in effect saying that his definition of Jewish faith is the same as the Chief Rabbi's definition. Different people may have different views or be doubtful as to what is 'Jewish faith', but the Chief Rabbi knows and can say what meaning he attaches to the words ... I therefore do not regard the settlor as leaving it to the Chief Rabbi to discover what the settlor meant or to provide a meaning for the expression used by the settlor when the meaning is in doubt ... The fact is that the Chief Rabbi knows what he means by 'Jewish faith' and the testator has said that he means the same thing.*

Thus in Eveleigh LJ's view the Chief Rabbi's opinion is regarded not as determining the meaning of the settlor's words by providing workable criteria for them; the Chief Rabbi's opinion is merely evidence of the settlor's opinion.

p. 117 **5.38** In *Re Tepper's Will Trusts* (1987), gifts were subject to the condition that the recipients 'shall remain within the Jewish faith and shall not marry outside the Jewish faith'. Scott J, following Eveleigh LJ, held that Re *Tuck* established the admissibility of evidence to elucidate the meaning of terms such as 'the Jewish faith'.

5.39 In general, courts try not to invalidate trusts if a reasonable construction can be placed on the words that will make them valid (*IRC v McMullen* (1980) per Lord Hailsham), but individual judges vary in their willingness to find a 'benignant' construction. As a result, settlors are faced with uncertainty about the extent to which a court will allow the determination of a possibly vague term. Where an opinion clause empowers the trustees or a third party to establish criteria for applying the settlor's words (as in *Re Coxen*), that does not

mean they can choose any criteria at all. As Browne-Wilkinson J's decision in *Re Barlow* shows, the provision of criteria, while necessarily arbitrary, can be more or less reasonable, and the courts could act if the criteria chosen were irrational or perverse; they need not, therefore, be worried that reference to opinion clauses ousts the jurisdiction of the court to determine whether a provision is conceptually certain. Of course the courts must remain the ultimate arbiters of which clauses are just so vague that any determination of criteria for them would, in effect, be writing the will or the settlement for the settlor.

5.40 One final point: as we have seen, in *Re Tuck* the Chief Rabbi clause allowed a non-trustee to provide evidence of what 'Jewish faith' meant to the settlor. Presumably such a provision naming the trustees would not have worked, because trustees are not in any better position than the court to determine what the settlor meant by 'Jewish faith'—trustees are not required to have any particular knowledge of the settlor or beneficiaries in order to carry out a trust. Remember that any trustee or trust company trust officer can die or otherwise be no longer able to serve—a trusteeship is a kind of 'office', which anyone *sui juris* can in principle fill. So, powers to apply a provision which turns on special knowledge are prima facie powers '*nominatum*' (**3.33**), given to individuals. A clear example of this kind is *Re Coates* (1955), where the testator's wife was given a power to nominate friends of the testator to receive gifts if in her opinion the testator had forgotten to nominate them himself. Such a power given to a specific trustee with particular knowledge of the settlor (eg the trustee nominated by the settlor in his will) may well be valid as in substance a power *nominatum*, which would last so long as that particular trustee remained in office.

Certainty of subject matter: particular issues

The 'whatever is left' trust

5.41 In *Sprange v Barnard* (1789), a testatrix left £300 in securities to her husband 'for his sole use; and at his death, the remaining part of what is left, that he does not want for his own wants and use', was to be divided equally amongst three others. The court held that the husband was entitled absolutely, for a trust of what property remained after the husband's use would be impossible to be executed; similar negative attitudes to this kind of 'whatever is left' trust are found in *Lambe v Eames* (1871) and *Mussoorie Bank Ltd v Raynor* (1882).

p. 118 **5.42** In *Ottaway v Norman* (1972), however, the Australian (*Birmingham v Renfrew* (1936)) 'floating' or 'suspended' trust analysis was applied. The son and daughter-in-law of the deceased claimed that he had left his house, its contents, and his money to his housekeeper to her for her use so long as she lived, but on trust to leave the property to them on her death. Brightman J opined that there was a valid trust of the house and contents (the latter being subject to normal wastage and wear and tear), which he was content to assume was 'in suspense' during the housekeeper's lifetime, attaching to the property only upon her death. It is not clear from this 'floating trust' analysis whether the 'floating trustee' has any obligations to preserve the property during his life. May he spend as much as he wants? Could the housekeeper in *Ottaway* have sold the house and spent the proceeds living on the Costa del Sol? In Birmingham, the court said that gifts 'calculated to defeat' the trust could not be made, but such an obligation seems so nebulous as to be unenforceable. In *Ottaway*, the trust did not extend to the money the housekeeper received under the will. Such a trust would be 'meaningless and unworkable' unless the money was given with the obligation that it be kept separate from

her own money, and there was none. What is most odd about trying to 'develop' a new device of the 'floating trust', which arguably is inconsistent with both resulting trust principles (**2.14**) and the beneficiary principle (**Chapter 7**) is that the result can perfectly well be achieved on perfectly traditional trust principles. So, for example, if you want to create a 'floating trust' in favour of Betty during her life, with whatever is left to go to Bertram, do the following: transfer the property to Betty on trust for her life, remainder to Bertram, granting a personal power (**3.36**) to Betty to appoint capital, up to the entirety of the trust funds, to herself during her lifetime. In this way Betty can have more than a mere income interest by making use of the power, yet anything left will go to Bertram, as he has the capital interest. If the settlor wants to ensure Bertram receives a certain amount, he can restrict Betty's power to appoint capital accordingly.

The identification of specific property out of a larger amount

5.43 In *Boyce v Boyce* (1849), a testator left three houses to his widow, instructing her to give to his daughter Maria whichever one Maria chose and to give the other two houses to his daughter Charlotte. Maria died before choosing any house, and the court held that the gift to Charlotte failed for uncertainty, reasoning that the gift to Charlotte was of the other houses that remained following Maria's choice. Since she made none, the ascertainment of such other houses became impossible, and so the gift failed.

Trusts of residue

5.44 One last point on certainty of subject matter, which I stress because students regularly get this wrong in exams, is that a testamentary gift or trust of the residue under a will is *not uncertain*. In the course of executing the will, the executors will determine to the very penny the residue of the estate. 'That is certain which can readily be made certain', the saying goes, or '*id certum est quod potest reddi certum*', if you prefer Latin.

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Certainty of objects: particular issues

Outright gifts, fixed trusts, and Burrough v Philcox *trusts*

5.45 In these cases, the object or each member of a class of objects must be known with certainty, or the gift or trust will fail. Thus, a trust of the income of 1,000 shares of ABC plc for Jim will fail if it is uncertain who Jim is. Similarly, in the case of a gift to or fixed trust for a class, the trust fails unless the entire class can be ascertained with certainty. For example, '£100,000 on trust to pay the income to my children in equal shares' will fail unless each of the settlor's children can be ascertained. Thus, the test of certainty in these cases is the 'complete list' test (recall **4.14**). The same test applies to a '*Burrough v Philcox*'-type discretionary trust (**5.13**), because each individual in the class will take an equal share should, for some reason, the trustee fail to appoint the trust property, just as the objects of a fixed trust for a class do.

5.46 A settlor may create a trust for a class the members of which may be unborn, as in a trust for his grandchildren. Until they are born, of course, these objects are not ascertained, but that does not invalidate the trust for uncertainty of objects. These objects will be identified with certainty over the course of the trust.

McPhail v Doulton

5.47 Previously (**4.12** et seq) we examined why the 'is or is not' test for certainty of objects was held to apply both to powers and to *McPhail*-type trusts. The *McPhail* case was remitted to the High Court for determination whether the trust was valid under the 'is or is not' test. Thence, it went up to the CA as *Re Baden's Deed Trusts (No 2)* (1973). The trust was for, amongst others, employees and their 'dependants' and 'relatives'. 'Dependants' was not regarded as uncertain at all; it had been used in many other deeds and by Parliament to describe individuals financially dependent upon others for their support. 'Relatives', however, led to a difference of opinion. 'Relative' or 'relation' means a descendant from a common ancestor, and so everyone has an indefinite, although undoubtedly large, number of distant relatives about whom they have never heard; if such persons were to be included in the class, then it would be a very large class indeed. There is nothing conceptually uncertain about 'descendant from a common ancestor'. The problem turns entirely on proving the connection on the available evidence.

5.48 Sachs LJ made a clear distinction between conceptual and evidential certainty; the 'is or is not' test applies to the former, and 'the court is never defeated by evidential uncertainty' (at 20). It is a question of fact whether 'any individual postulant has on inquiry been proved to be within [the class]; if he is not so proved then he is not in it' (at 20). Thus it was perfectly all right that 'relative' means a descendant from a common ancestor. Someone offering sufficient proof of that 'is' within the class; someone unable to do so 'is not'. Sachs LJ did not say who has the onus of proof, although presumably if any postulant must be proved to be within it to take, then the trustees would have to be satisfied so that their decision would stand in the face of a
p. 120 challenge by another beneficiary. Thus, although Sachs LJ would not allow evidential uncertainty to defeat the trust, he did rely upon the existence of evidence to define the boundaries of the class.

5.49 Megaw LJ introduced a factor of substantial numbers into the 'is or is not' test: if it could be said with certainty that a substantial number of beneficiaries fell within the class, the class was certain. With respect, this does not seem in the spirit of Lord Wilberforce's judgment, having nothing really to do with his holding that the 'is or is not' test applied to discretionary trusts. 'Substantial' numbers seems nothing to do with that.

5.50 Stamp LJ disagreed with Sachs J that resorting to the availability of evidence could cure the problems caused by a conceptually certain term: if 'relatives' means descendants of a common ancestor, one either glosses the word or the trust is void for uncertainty; the 'is or is not' test is a test of a class defined by the concepts the settlor used. It cannot be watered down to a test that depends upon a burden of proof, because that makes the test one of evidential certainty, not conceptual certainty, and raises the problem that only one or a few possible objects bring forward the suitable proof. Echoing in some respects one of the reasons given against applying the 'is or is not test' to discretionary trusts in the first place he said (at 27):

> *[I]t is not enough that trustees should do nothing but distribute the fund among those objects of the trust who happen to be at hand or present themselves ... [I]t would in my judgment follow that, treating the word relatives as meaning descendants of a common ancestor, a trust for distribution such as is here in question would not be valid. Any 'survey of the range of the objects or possible beneficiaries' would certainly be incomplete, and I am able to discern no principle on which such a survey could be conducted or where it should start or finish.*

However, Stamp LJ found authority for interpreting 'relatives' to mean next of kin, and on that basis found the trust valid.

5.51 Stamp LJ's and Sachs LJ's opinions differ in particular about the character of the trustees' duties. Sachs LJ seems concerned only that the trustees are able, with certainty, to distribute the money only to valid recipients, and therefore he focuses the 'is or is not' test on the status of 'any given postulant'. Stamp LJ emphasises the trustees' duty to survey the class, and from this perspective he is surely right that no sensible survey could be made of the employees and all those who have descended from a common ancestor, because that would be like surveying the world. Almost certainly the trustees will think of 'relatives', when 'surveying the field', as the employees' near relatives. This difference reflects different senses in which a large, discretionary trust is a trust. For Stamp LJ, the whole class of objects really do have the right to be considered, and therefore the trustees must have a sensible picture of them as a whole; there appears a fairly traditional right–duty relationship between the class of beneficiaries and the trustees. For Sachs LJ, the objects are much less like a class, appearing rather as applicants or postulants to a fund for which they might qualify for a distribution, and the trustees are like power holders who may benefit particular individuals; their only duty is
p. 121 to make sure they get on with the job and distribute the funds, and so they need a solid test of whether or not any individual distribution is legitimate.

5.52 Together Sachs and Megaw LJ found that 'relative' meaning 'descendant of a common ancestor' was not an invalidating term on the 'is or is not' test, although it remains so on the 'complete list' test. Thus, a trust for one's 'relatives' in equal shares fails unless 'relatives' is read as next of kin.

Administrative unworkability

5.53 Not knowing when to stop is a mistake anyone can make, even judges. Just before concluding his judgment in *McPhail*, Lord Wilberforce said this (at 457):

> *There may be a … case where the meaning of the words used is clear but the definition of beneficiaries is so hopelessly wide as not to form 'anything like a class' so that the trust is administratively unworkable or in Lord Eldon LC's words one that cannot be executed … I hesitate to give examples for they may prejudice future cases, but perhaps 'all the residents of Greater London' will serve. I do not think that a discretionary trust for 'relatives' even of a living person falls within this category.*

Here we will try to give some kind of sensible meaning to this added condition on the validity of trusts, but it may be a hopeless enterprise.

5.54 In the first place, there is some ambiguity in respect of 'so hopelessly wide': does this refer specifically to the size of the class, so that any discretionary trust for 9 million or so people (roughly the population of London) would necessarily fail? Would that make sense given the court's willingness to validate the *McPhail* trust, where on Sachs's reading of 'relative'—descendant of a common ancestor—the class was surely huge, certainly in the millions? Why should mere size render the trust administratively unworkable anyway? If the problem is the survey the trustees must undertake, the difficulty of doing that surely has more to do with whether the class or various sub-classes within it are defined in such a way that the trustees can determine

the settlor's intentions regarding how they are to distribute within it, than with absolute numbers, a point we shall return to (**5.57**, **5.64**). Or does 'hopelessly wide' refer, not to the size of the class, but to the class definition? That is what the grammar of Lord Wilberforce's statement suggests. But what is it for a definition to be 'hopelessly wide'? Hopelessly vague? 'All the residents of Greater London' is not vague at all.

5.55 Failure on the basis of administrative unworkability has only arisen in one reported case. (In *Re Harding* (2007) ([15]) it was conceded by all parties that a private trust for a class consisting of all the members of the black community in four London Boroughs would be administratively unworkable because the class was too numerous.) In *R v District Auditor, ex p West Yorkshire Metropolitan County Council* (1986), the council was about
p. 122 to be abolished, and it proposed to transfer its remaining funds, £400,000, on trust for 'any or all or some of the inhabitants of the County of West Yorkshire' in order to benefit them in various ways, which included informing all interested and influential persons of the consequences of its abolition. Lloyd LJ decided:

> *A trust with as many as two and a half million potential beneficiaries is, in my judgement, quite simply unworkable. The class is far too large ... It seems to me that the present trust comes within the ... 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.*

Lloyd LJ dismissed the idea that anything but the size of the class was at work to invalidate the trust, in particular 'capriciousness', ie that the class was 'an accidental conglomeration of persons who had no discernible link with the settlor':

> *[T]hat objection could not apply here. The council had every reason for wishing to benefit the inhabitants of West Yorkshire.*

Yet significantly, he stated:

> *What we have here, in a nutshell, is a non-charitable purpose trust.*

As we have seen (**3.77**) such trusts are normally invalid. Therefore, administrative unworkability may mean that the class of beneficiaries is 'hopelessly wide' because the trust is not really for a class of individuals at all; it is really a trust to carry out a purpose that is masquerading as a valid trust by the inclusion of a bogus class of beneficiaries.

5.56 The issue of administrative workability also arose in three cases dealing not with discretionary trusts, but with intermediate powers: *Blausten v IRC* (1972); *Re Manisty's Settlement* (1974); and *Re Hay's Settlement Trusts* (1981). In *Blausten* Buckley J suggested *obiter* that such a power might be invalid on the ground of administrative unworkability, but both Templeman J in *Re Manisty* and Megarry J in *Re Hay's* held that intermediate powers were valid.

5.57 Templeman J considered in particular whether trustees are given any guidance in the exercise of such a power. Templeman J was not perturbed because, in his view, the expectations of the settlor are often not difficult to discern (at 25A); although 'all the beneficiaries are equal some are more equal than others' (at 24H);

while the terms of the power itself may not guide the trustees, that does not mean that they may not sensibly exercise it, which is presumably why the settlor gave them absolute discretion to do so. And it appears that the trustees' duty to survey the entire class of objects is not onerous (at 25C–E):

> *If a settlor creates a power exercisable in favour of his issue, his relations, and the employees of his company, the trustees may in practice for many years hold regular meetings, study the terms of the power and the other provisions of the settlement, examine the accounts and either decide not to exercise the power or to*
> p. 123 *exercise it only in favour, ↵ for example, of the children of the settlor. During that period the existence of the power may not be disclosed to any relation or employee and the trustees may not seek or receive any information concerning the circumstances of any relation or employee. In my judgment it cannot be said that the trustees in those circumstances have committed a breach of trust and that they ought to have advertised the power or looked beyond the persons who are most likely to be the objects of the bounty of the settlor.*

5.58 Significantly, Templeman J directly related the concept of administrative unworkability to the idea of capriciousness by reference to Lord Wilberforce's example (at 27B–D):

> *The objection to the capricious exercise of a power may well extend to the creation of a capricious power. A power to benefit 'residents of Greater London' is capricious because the terms of the power negative any sensible intention on the part of the settlor. If the settlor intended and expected the trustees would have regard to persons with some claim on his bounty or some interest in an institution favoured by the settlor, or if the settlor had any other sensible intention or expectation, he would not have required the trustees to consider only an accidental conglomeration of persons who have no discernible link with the settlor or any institution. A capricious power negatives a sensible consideration by the trustees of the exercise of the power.*

5.59 It is doubtful that there is any real standard for capriciousness that will *defeat a trust*, as opposed to justifying the court's intervention when a power *is exercised capriciously* (**3.53**). It is worthwhile remembering (**3.84**) that the one case cited as authority for the court's power to strike down capricious trusts, *Brown v Burdett* (1882), concerned a private purpose trust, to block up the rooms of a house for 20 years.

5.60 In *Re Hay's* Megarry VC specifically rejected Buckley J's view *Blausten* that an intermediate would be invalid as creating a class so wide as not to form a true class (at 211D):

> *I do not see how mere numbers can inhibit the trustees from considering whether or not to exercise the power.*

With regard to administrative unworkability, he simply pointed out that Lord Wilberforce's words concerning administrative unworkability were directed to discretionary trusts, not powers (at 212A). With regard to capriciousness, he doubted Templeman J's analysis of a power to benefit 'residents of Greater London' (at 212B):

> *In saying that, I do not think the judge had in mind a case in which the settlor was, for instance, a former chairman of the Greater London Council …*

5.61 Unfortunately Megarry VC went on to say this (at 212C):

> *Of course, if there is a real vice in a power, and there are real problems of execution or administration, the court may have to hold the power invalid.*

A real vice in a power? Real problems of execution or administration? It is hardly helpful of Megarry VC to
p. 124 conclude a discussion of what makes a power bad or administratively ↵ unworkable by throwing out a couple of novel criteria for invalidity, which he leaves unexplained.

5.62 Megarry VC did, however, say this regarding discretionary trusts, although the statement is clearly obiter (at 213H):

> *I consider that the duties of trustees under a discretionary trust are more stringent than those of trustees under a power of appointment, … and as at present advised I think that I would, if necessary, hold that an intermediate trust [ie a trust by which the trustees could appoint to anyone save a specified class] is void as being administratively unworkable.*

But why? The mere presence of a duty to distribute neither clarifies nor muddies the trustee's task—it just means the trustee must distribute the property. If the task cannot be carried out, it would seem as impossible to carry it out for both powers and trusts, and conversely, if it can be carried out for one, it can be carried out for the other. It seems an inadequate reason to hold an 'intermediate' trust void.

5.63 McKay (1974) considers five possible interpretations of 'administrative unworkability': (1) the beneficiaries of a valid class have no common attributes; (2) the class is too large; (3) the trustees will be unable to perform their administrative duties; (4) the court will be unable to execute the settlor's directions; and (5) the trust is capricious. In view of the past cases in which trusts or powers have been held by the court to be valid, McKay argues that not only is there no discernible flaw in the trust for 'residents of Greater London' that should render it invalid, but also that:

> *None of the possible bases upon which [administrative unworkability] could or has been said to rest satisfactorily provides a substantive base for it … this is principally due to the disruptive influence acceptance of any of those grounds would have on both the decided cases and the presumed spirit and intention of McPhail v Doulton itself.*

5.64 Swadling (2000) suggests that the test of administrative workability requires there to be a 'core class' of objects within the larger class to which the trustees may primarily devote their survey of objects, such as the employees, not their relatives, in *McPhail*. While this is a useful suggestion, it has not been endorsed by any decision (although Templeman J's statement in *Re Manisty* that some beneficiaries are more equal than others (**5.57**) may lend support), and it does not follow in any obvious way from Lord Wilberforce's actual words. To

the extent, however, that the idea of core class gives a sense of what sort of appointment would be 'irrational, perverse, or irrelevant to any sensible expectation of the settlor', it might draw upon the same kind of reasoning employed by Templeman J in *Re Manisty*.

5.65 Here's a final suggestion drawn from Lord Reid's opinion in *Re Gulbenkian* (1970), where he said (at 519F):

> *I could understand it being held that if the classes of potential beneficiaries were so numerous that it would cost quite disproportionate enquiries and expense to find them all and discover their needs or deserts, then the provision would fail.*

p. 125 ↵ Consider the following discretionary trust: '£1,000 on trust to be distributed in such amounts as my trustees shall in their absolute discretion see fit amongst those persons who have given up their seat on a bus to the settlor.' The problem here seems to be that in order to determine which persons are eligible, the trustees will have, at a minimum, to advertise, and will probably have to conduct some investigations of those coming forward to determine the validity of any payments; thus in order to carry out any survey of the objects the trustees will have to deal with evidential difficulties, and £1,000 will not be enough to enable them to do so if the recipients are going to receive any worthwhile amounts. Thus, in line with Lord Wilberforce's view that the equal division of the trust fund amongst all the beneficiaries of the *McPhail* trust would benefit no one (**4.27**), the costs of administering this trust would probably result in no payments being made at all; thus to carry out the trust would result in its defeat in practice. On that basis, one might well say that the trust is administratively unworkable. And interpreting administrative unworkability in this way might explain why administrative unworkability only applies to invalidate trusts and not powers: regarding this example, we might allow a power to stand, because if anyone who gave up their seat on the bus to the settlor showed up and proved that he had done so, he could be paid by the trustees. The extent of the power holder's survey would be simply to take the claims of postulants seriously, rather than to make some effort to hunt them down. Conversely, the trustee of a discretionary trust must carry out some sort of search simply because the trustee must distribute the fund and therefore must find someone who can be paid and, *ex hypothesi*, that search would exhaust the trust fund.

Effects of uncertainty

5.66 At the risk of stating the obvious: where property is given to a named individual, if there is uncertainty of intention in that it is uncertain as to whether a trust obligation has been imposed, then that individual takes the gift absolutely, free of any trust obligations. If property is given to a trustee *virtute officii*, ie as a trustee, it is assumed the intention was to create a trust, but if the objects or subject matter are uncertain, the trustee will hold the property on resulting trust (**2.14**) in the case an *inter vivos* trust or, if a testamentary trust, the subject matter of the trust will fall into residue. If there is certainty of intention but uncertainty of subject matter, then there can be no disposition of property to found the trust, and thus the intended trust fails. If there is certainty of intention and subject matter but uncertainty of objects, the property is held on resulting trust if an *inter vivos* trust, or falls into residue if the trust is testamentary.

The family gift context—modern discretionary trusts

5.67 All of the preceding principles apply in theory to MDTs, but given their structure, many simply don't apply in practice. Look again at Example 5 (**4.2**) to refresh your memory. There is generally no issue with the
p. 126 certainty of subject matter—the subject matter will just be those assets transferred to the trustees under the trust. Similarly, at least on the face of the document, there is no difficulty with the certainty of objects. As regards the capital interest, this may go to a named charity, or could be a discretionary trust for such charities as the trustees choose. But 'charity' is a well-defined term in law, so the class from which the trustees choose is also well-defined. As regards the objects of the trust of income and the overriding powers, these are simply the persons in the class of 'beneficiaries' at any one time—this satisfies not only the 'is or is not' test but also the more stringent 'complete list' test. And the intermediate power in clause 1(ii) satisfies the 'is or is not'—if you are not one of those excluded, and these persons are well-defined, then you're in.

5.68 Yet, as we have seen (**4.60** et seq), MDTs clearly raise a host of what might be called 'certainty' issues regarding the identification of the 'true, intended beneficiaries' of the trust. There is no need to repeat that discussion here, but only to note that the courts seem not to deal with this issue applying the traditional certainty rules. But there are some particular developments regarding MDTs which can be productively discussed under the heading of certainty.

Certainty of intention

Letters of wishes

5.69 A letter of wishes is invariably expressed as not legally binding on the trustee, but even if so expressed what the settlor's intentions genuinely are is a matter of construction of the letter and the trust instrument to which it relates (**4.6**). In *Chen v Ling* (2000) the letter of wishes was in such clearly imperative terms that the court had no difficulty in finding that the settlor intended the letter to bind the trustees; hence, the real trust of the assets transferred to the trustee on trust was found to be what was said in the letter of wishes, not what the so-called 'trust document' stated. Similarly, in *Taulbut v Davey* (2018), the court held that a letter of wishes was incorporated into a testatrix's will in view of the way that the will directed her trustees to comply with the letter of wishes.

Trusts where the settlor's intentions are not reflected in the terms of the trust instrument

5.70 Express trusts can be divided into bare trusts and special trusts. Under a bare trust, a trustee holds property for a beneficiary on no specific trust terms; the trustee's only obligation is to transfer the property to the beneficiary or to a third party as the beneficiary directs. For this reason, it is said that the trustee holds the trust assets 'to the order' of the beneficiary. Bare trusts are common in commercial contexts, as we shall explore in detail in **Chapter 11**. In contrast, a special trust is with specific terms; the standard example is the typical family trust, in which the trustee has various duties, to invest the trust property, to pay the income to

X, and so on. The distinction is relevant here because in certain cases it may be that though the trust instrument purports to create a special trust, the fact of the matter is that the trustee holds the assets on bare trust for the settlor.

p. 127 **5.71** This situation typically arises where a rich individual is 'sold' an offshore trust as an investment vehicle offering various advantages. Under a valid trust the trust assets are no longer beneficially the settlor's, so no one having any claims against him or his estate when he dies (ie his creditors, a divorced spouse, or his heirs if the settlor comes from a jurisdiction where heirs or dependants have legal claims against his estate that cannot be defeated by his will) will be able (generally speaking) to claim any share of the property in the trust. This is regarded by some settlors as one of the *inter vivos* trust's chief advantages. But what if the 'settlor' of such a trust is told that it is equivalent to a 'living will', in which he can order the trustees to deal with the property as he orders, during his life and after his death? In that case, whatever the actual terms of the trust say, the settlor's intention was not to create a trust by which he gave up the beneficial interest in the property, but instead to create a trust in which he has the full control and beneficial ownership of the property.

5.72 The leading example is the Jersey case *Rahman v Chase Bank (CI) Trust Co Ltd* (1991), which sent shock-waves around the trusts law world when it was decided. The court found that the settlor effectively controlled the assets as is if they remained his. He sometimes directed the trust investments and drew upon the trust bank accounts only telling the trustee later. The trustee in effect didn't act like a trustee in charge of the trust assets; the settlor did. The court held that in reality the trust assets were held on bare trust for the settlor; the result was that the trust assets formed part of his estate on death.

5.73 Cases of this kind, then, raise the issue of certainty of intention in this way: does the settlor intend, by entering into a transaction, to lose his hold over the trust assets, or does he believe, especially in consequence of the sales pitch made to him, that he will remain in reality the beneficial owner of them? (See Willoughby (1999).) Recall the website characterisation of letters of wishes (**4.81**), in particular the words: 'Letters of wishes are not legally binding but they do hold strong moral weight and your trustees should have good reason to depart from their guidance.' A settlor might well interpret such a statement to mean that his trustees are obliged to follow the letter of wishes unless they have strong reasons not to. On that basis, the letter might be understood by the settlor to create *vested* beneficial interests (**3.21**) in the trust property as she directs, interests which are *defeasible* (**3.20**–**3.22**) by the trustees if unforeseen circumstances arise which, in the trustee's judgement, would make complying with the letter of wishes significantly problematic. If that was the settlor's understanding then arguably the letter is legally binding at least prima facie, and only in those unforeseen circumstances could the trustees depart from it.

Illusory trusts

5.74 Recall (**4.35**) what Millett LJ said in *Armitage v Nurse* (1998): 'If the beneficiaries have no rights enforceable against the trustees, there are no trusts.' The term 'illusory' applies to trusts which, although appearing to be for the benefit of a class of beneficiaries, under its terms the trustee or settlor (in particular where the trustee is the settlor) has such control over the trust property in virtue of the trust provisions, he is

basically able to do with the property what he likes (distributing it all to himself for instance (see eg *Clayton v*
p. 128 *Clayton* (2013), [78]–[91])), such that the beneficiaries (or the other beneficiaries where the settlor or trustee is also a beneficiary) have no genuine rights enforceable against the trustee.

5.75 In the Bermuda case *Re the AQ Revocable Trust* (2010) the settlor/trustee had extensive powers to deal with the trust assets during his lifetime, and the trust instrument included the following term, where 'donor' means settlor:

> *Article VII H The written approval by the Donor of any trust transaction during his lifetime shall be a complete release of the Trustee (including the Donor) of any liability or responsibility of the Trustee to any person with respect to this transaction.*

The court held that ([29]):

> *the concatenation of rights and powers in the settlor, when coupled with the fact that he was the sole trustee at the time of the constitution of the trusts, rendered this trust illusory during his lifetime. … the cumulative effect of the trust documents, when taken with the de facto situation, means that the settlor as trustee could not effectively be called to account during his lifetime. Crucial to this conclusion is art VIII H, which allows the settlor to absolve himself as trustee from any and all breaches of trust.*

Note the phrase 'illusory during his lifetime'. If I settle assets on trust, which on its true construction the trustees hold the assets 'to my order' during my lifetime, ie I can direct the trustees what to do with both the interest and capital, but there is also a provision requiring the trustee to distribute the trust assets to my children in equal shares, then this 'trust' for my children is in fact a *testamentary* disposition, a will. So, this provision for the children may be valid, so long as the trust instrument meets the formality required for a valid will (**9.70** et seq).

5.76 In *Clayton v Clayton* (2016) the NZSC distinguished illusory trusts from sham trusts (**5.17**–**5.18**). The finding of an illusory trust does not require the trust to be a mere pretence, intended to deceive others. The NZSC opined that the term 'illusory trust' (at least as used by the High Court and the Court of Appeal) was unhelpful, indicating nothing more than that no trust, or rather, no trust except for a trust in favour of the settlor was created. (See also Bennett (2017); Ho (2018).) The court did not need to determine whether the trust in this case was one solely for the benefit of the settlor, but did find that he held such significant powers over the trust assets that they would be regarded under the relevant legislation as his assets for the purposes of matrimonial property division.

5.77 In JSC *Mezhdunarodniy Promyshlenniy Bank v Pugachev* (2017) Birss J held that the settlor, in taking the role of the first protector (**4.7**) during his lifetime, had such extensive powers, in particular a personal (**3.28**) power to dismiss and replace trustees 'without cause', he had effective control over the assets such that he could direct how they should be used as he liked.

5.78 The leading case is now *Webb v Webb* (2020), a PC appeal from the Cook Islands. In *Webb* the settlor
p. 129 appointed himself trustee and 'consultant' (comparable to a protector) with wide powers to distribute the trust assets, and to vary all the provisions of the trust. As settlor, he was given the power to nominate and replace beneficiaries, and as trustee he was entitled to act notwithstanding any conflict of interest (**3.29**–**3.30**). Drawing upon the doctrine that a general power of appointment is equivalent to ownership ([77]) (recall **3.12**) Lord Kitchin held ([89]):

> *... the powers reserved to Mr Webb under the trust deeds may be analysed in two different ways. One is to consider whether those powers were so extensive that Mr Webb can be said never to have disposed of any of the property purportedly settled on or acquired by the trusts. In this connection one might also ask whether the trusts lacked the irreducible core of obligations owed by trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. The other is to ask whether the powers reserved to Mr Webb were so extensive that in equity he can be regarded as having had rights which were tantamount to ownership ... I will ... confine myself to the substantive question whether Mr Webb's powers under each of the trust deeds were such that, in equity and in all of the circumstances of this case, he can be regarded as having had rights in the trust assets which were indistinguishable from ownership. In my view he plainly can. Mr Webb had the power at any time to secure the benefit of all of the trust property to himself and to do so regardless of the interests of the other beneficiaries. ... The bundle of rights which he retained is indistinguishable from ownership.*

Regarding the 'two different ways' the trust deed may be analysed, if there is a difference, it is a subtle one. An example of the first analysis might be the case where the beneficiaries' interests are so cut down that they have no enforceable rights against the trustee; for example, a provision as in *Re Wynn* (**5.32**) which purports to oust the jurisdiction of the court, or Article VII H in *AQ Revocable Trust*. On the second analysis, which was applied in the case, the trust is valid yet the settlor, via the exercise of personal powers granted under the trust terms, can basically make the assets his own at any time.

Certainty of subject matter

Accounting trusts

5.79 It is generally understood that, as part of the trustee's liability to account to his beneficiaries, the trustee must keep the trust property separate from his own (**2.21**). Nevertheless, the terms of the trust may indicate otherwise in this sense—the trust terms may provide that the trustee transform an obligation with respect to the title to the trust assets into a merely personal obligation. This was the case *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* (1986), decided by the UKPC on appeal from the Bahamas. Under the terms of the trust, the trustee bank was entitled to receive the trust moneys as its own; it was on this basis that the trust funds would be invested.

5.80 The result of this arrangement is that the trustee is obliged to distribute any money showing in the
p. 130 trust's investment account according to the terms of the trust, but the trustee merely has a personal obligation to do so, using its own assets. Take a simple example. Assume the settlor transfers £10,000 to the

trustee on trust for A for life, and then to B on A's death. The bank trustee then credits the trust investment account, and then, based on its investment programme, credits the trust investment account with 100 shares of ABC plc. The trustee doesn't actually have to buy any shares of ABC plc, but the investment will be recorded as if the shares were purchased based on the market value of the shares on the date of the 'purchase'. If a dividend of £10 per share is declared, the account will be credited with £1,000, and then to discharge its trust obligation, the trustee must pay £1,000 to A. Similarly, on A's death the trustee bank can only discharge its trust obligation by paying the market value of the shares of the account to B. So despite the label 'accounting trust' this is not really a trust at all. It is merely a debt arrangement under which the proper disposition of its own money by the trustee to meet its obligations mirrors the dispositive provisions in the trust instrument. The obvious risk of this sort of arrangement, a risk that materialised in *Space Investments*, is that the trustee might become insolvent—the trust beneficiaries merely have a personal right to be paid by the trustee, and so they must prove in the insolvency this 'trust debt' just like any other creditor of the trustee.

The commercial context

Certainty of intention

Whose intentions count?

5.81 The obligation to hold property on trust in commercial cases is invariably a term of a contract between the parties. For that reason determining whether one party had an obligation to hold some property on trust for the other party must be determined by the general principles of contract construction. In particular these are relevant where one party asks the court to imply a term requiring the other party to hold some asset on trust for it. The basic principles were set out by Lord Hoffman in *AG Belize v Belize Telecom Ltd* (2009) [21]:

> *... in every case in which it is said that some provision B ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. ... this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must 'go without saying', it must be 'necessary to give business efficacy to the contract', and so on. But these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?*

Bearing these principles in mind, we can look at some examples where trusts can arise in commercial
p. 131 contexts. We have already seen one such example, *Trident Holdings Ltd v* ↵ *Danand Investments Ltd* (1998), where land was held on trust for the joint venturers who were developing it (**2.33**).

Trusts of goods, in particular raw materials and the retention of title

5.82 When A sells goods to B 'on credit', that is A will pass the goods to B and B will only pay later, A will often protect itself from the consequences of B's becoming insolvent before it pays this debt. Especially in the context of the sale of raw materials, A may employ what is called a reservation of title or 'Romalpa' clause (*Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* (1976); *Clough Mill Ltd v Martin* (1984)), under which the legal title to the materials remains with A, B merely taking possession of them. A's title will be extinguished if (1) the materials lose their identity by being incorporated in B's products—if you paint a car, the paint 'accedes' to the car, so there is no longer any distinct property right in the paint; or (2) if they are sold by B, whereupon the title to them passes to the purchaser under the 'buyer in possession' rule of the Sale of Goods Act 1979, s 25; or (3) B has paid off his outstanding debt to A, whereupon the title passes to B itself. If B becomes insolvent, A can reclaim the materials B has on hand. There is no trust here; the legal title to the goods simply remains with A until either (1), (2), or (3) occurs.

5.83 Alternatively, the legal title to the raw materials may pass to B under the contract, but under the contract A may possess an equitable charge (**2.9**) over the materials, which will make him a secured creditor. If B goes insolvent, A will have the right to re-possess the materials and sell them to recover the money it is owed. If B is a company, however, which for obvious reasons is often the case, the equitable charge must be registered or it is void against B's general creditors or his liquidator (Companies Act 2006, s 859(H)3). Thus even if A is able to establish, through the interpretation of the contract, that he has an equitable charge over company B's property, this is unlikely to help in company B's insolvency for it is unlikely that A will have registered the charge if its creation was not clearly set out in a term of their contract.

5.84 Finally, in theory the contract terms may provide that B holds the materials on trust for A until such time as B pays for them. However, following *Re Bond Worth Ltd* (1980), it now appears to be orthodoxy that while legal retention of title clauses with respect to transferred goods are effective, those clauses that purport to grant A equitable title will be treated as charges, but the reasoning is questionable (see Worthington (1996), 15–24). There is a sound policy reason for this position though: the registration requirement for charges against companies means these interests will be publicly ascertainable by prospective creditors.

Prepayment trusts

5.85 In *Re Kayford Ltd* (1975) a mail order company unilaterally decided to place all of the money it received as prepayments from customers for goods in a special bank account—'unilaterally' because there was no term in the contract with its customers requiring it to do so. It then only drew upon the account when it filled a
p. 132 customer's order. It was held that, upon the company's insolvency, the money in the account was held on trust for the customers even though they were unaware of the arrangement. While there is nothing particularly difficult about inferring or finding such a unilateral intention to create a trust by the company, under insolvency law such a declaration appears to be an illegitimate preference of the company favouring some creditors over others (Insolvency Act 1986, s 239), so the case should be treated with caution. Indeed, in *Re Farepak Food and Gifts Ltd (In liquidation)* Mann J refused ([52]) to allow administrators of the insolvent company to distribute customer money it received on the basis of a unilateral express declaration that it held

the money on trust for its customers, for the very reason that under the company–customer contractual relationship, the money was received by the company beneficially—to give effect to the trust would give effect to an unlawful preference, favouring some of its creditors over others.

Collecting agents

5.86 Agents often collect money which they must 'account for' to their principals. Airline ticketing agents are a good example. The ticketing agent sells the airline tickets on behalf of the airline, and receives payment from the customer. Under the terms of the contract, there are two possibilities in terms of the way the agent receives the money. Under the first, the agent receives the money as its own and can use it in its business as it chooses. But of course it must pay the ticket prices received, minus its commission, to the airline on a periodic basis, say at the end of every month. Under this contract, the agent is merely a debtor to the airline for this amount. The second alternative is that under the contract the agent holds the ticket money on trust for the principal and itself to the extent of its commission. This was the contract in *Royal Brunei Airlines v Tan* (1995), which we shall look at in more detail (**15.7** et seq).

5.87 Two cases involving retailers illustrate the problems that can arise. In *Re Lewis's of Leicester* a large department store licenced 'concessionaires' to display their own goods to the store's customers, but the sales of these goods occurred at the store's tills. Thus, the store was a collecting agent for the concessionaires and took a commission from each sale. The question was whether, as a matter of their contract with the concessionaire, the store held the money it received on trust for the concessionaire, and for itself to the extent of its commission, or whether the store merely owed a debt to the concessionaire in respect of its receipts from the sale of the concessionaire's goods, again minus its commission. The case arose at the time of the store's liquidation, and so determining what the contracts were was essential in determining the concessionaire's claims to funds held in the store's bank accounts. In *Re Lewis's* there were a number of different contracts with the concessionaires, and it was clear that for some, the relationship between them and the store was a creditor–debtor relationship. In respect of others the contract clearly stipulated that the receipts from the concessionaires were to be held on trust, and the store banked these receipts in a separate bank account. These concessionaires were clearly entitled to these moneys because it was held on trust for them. In respect of a third group, their contracts stipulated that the receipts should be held on trust, but the store did not segregate their money in any identifiable way, and so they were, despite the store's breach of contract in not holding the receipts on trust, mere creditors in the result. Finally, there was a group of concessionaires for whom the store had declared a trust along the lines of *Re Kayford*. Robert Walker J considered whether this trust constituted an unlawful preference, but decided on the particular facts of the case that it did not.

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5.88 In the Singapore case *Hinckley Singapore Trading Pte Ltd v Sogo Department Stores* (2001) the same issue concerning the terms of the contract between concessionaires and a department store arose. There was no express term of the contract requiring the store to segregate the receipts in a particular bank account, much less an express term requiring the store to hold the receipts on trust. The concessionaires contended that the court should imply such a term into the contract, but on basic principles of contractual construction the court declined to do so ([32]–[41]).

5.89 In *North v Wilkinson* (2018), documents under which a businessman offered shares of his business to providers of funds clearly contemplated that they would get shares in a company incorporated to run the business, and no such company was ever formed. Quite rightly the CA held that these documents could not be construed as declarations of trust.

Certainty of intention, subject matter, and the constitution of trusts

5.90 There are two basic ways in which a trust obligation can arise under a contract. The first, which we have already seen in the case of collecting agents, is an obligation to hold money the contracting party receives on trust from the moment he acquires it. The second is a contractual obligation to create a trust with the party's own money, or to transfer its own money to a trustee to hold on trust. The latter is typical of company pension funds. In the standard case, both the employee and the employer make pension contributions. For example, the employee might be required to contribute 5 per cent of his salary, and the company be required to contribute on top of that a further sum in the amount of 5 per cent of the employee's salary. But all of the contributions are those of the company's money. The employee's contribution comes from the company—it withholds 5 per cent of the employee's salary with an obligation to transfer the like amount to the pension fund trustees, and it has an obligation to transfer a further 5 per cent of its own money to the trustees. But there is no 'trust money' until the employer *actually complies with this obligation and transfers the money to the trustees*. If the employer, in breach of contract, fails to do so, then the employees can sue for damages for breach of contract, but there are no assets held on trust which represent the failed payments.

5.91 This brings us to the notion of the 'constitution' of trusts. As we shall see in **Chapter 6**, in order for a
p. 134 trust to exist is must be 'constituted', which means the trustee must acquire title to the assets that are meant to be held on trust. So if I want Jerry to hold £1,000 on trust for Alexis, the trust does not exist until I transfer £1,000 to him. That transfer constitutes the trust. In the case of a self-declaration of trust, things appear simpler. If I declare I hold my antique watch on trust for Alexis, then the trust is automatically constituted because I already have title to the watch. But what about this: I hereby declare that I hold £1,000 on trust for Alexis'? That trust is *not constituted*, for I have not indicated any *specific* asset of mine as the asset to be held on trust. I have merely indicated a monetary value. I may *intend* to go to the bank and draw £1,000 in case to hold on trust, or I may intend to open a new trust account with my bank and transfer £1,000 into it, but until I do either of those things the trust doesn't exist. It is just the same with the employer who fails to transfer money to a pension trustee.

5.92 Notice how the issues of intention, certainty of subject matter, and constitution intertwine in such cases. A trust cannot be constituted if there is uncertainty of subject matter, even if you can show the settlor intended to identify the subject matter and constitute the trust. Recall *Boyce* (**5.43**). The testator certainly intended that Maria should choose one of the houses, but because she failed to do so, the 'other two' houses he intended to go to Charlotte were not identified, so the trust for Charlotte was not constituted—the trust assets were not identified—and it failed.

5.93 *Boyce* is an unusual family example of a more general problem that arises more commonly in the commercial context, that of identifying which specific things, out of a larger class of things, are to be held as the subject matter of a trust or indeed a sale of goods. If I have 20 sheep and declare a trust of 'two of my

sheep' the trust is not constituted until I identify which two sheep are the trust assets; likewise, if I purport to sell you two of my 20 sheep, no title to any of my sheep can pass under the contract of sale until which two sheep are 'ascertained' or 'appropriated to the contract' as the subject matter of the contract.

5.94 In *Re London Wine Co (Shippers) Ltd* (1986) a company that dealt in wines went into receivership. Its customers had purchased wine but left it in the company's possession for storage, and naturally assumed that they could retrieve 'their' wine and that it was not part of the insolvent company's assets. Unfortunately, the customers did not become legal owners of any wine. Although the company contracted to sell them particular cases of wine and hold it for them, and even charged them storage fees, in breach of contract the company did not allocate any particular cases of wine to any particular customers and, in general, did not ensure that it had on hand sufficient quantities to meet all the customers' purchases should they all have demanded actual delivery of their purchases all at once. Wines were only allocated to any individual customer when she actually took delivery. In a thorough review of the case law, Oliver J decided, quite rightly, that the same reasoning must apply to the subject matter–constitution question regarding a trust: it could not be said which wines were the subject matter of a trust for any particular customer.

5.95 *Re London Wine* was approved by the UKPC in *Re Goldcorp Exchange Ltd* (1995), a case involving similar
p. 135 claims against a dealer in precious metals. While sympathising with the customers, Lord Mustill affirmed that a right in property, whether legal or equitable, cannot exist in the air, hovering over an undifferentiated mass of property; it can only exist in relation to property which is specifically identified.

5.96 This reasoning should not be taken to mean that a court cannot resolve some uncertainties; the court can, just as in family cases (eg *Re Golay* (**5.27**)). In *North v Wilkinson* the UKCA, affirming prior authority, held ([17]) that the 'business assets' of a sole trader could be held on trust:

> *The assets of a business will in the case of many assets be obvious. It is true that there may be difficult questions as to whether a particular asset falls for the purposes of a trust to be an asset of the business, but the courts have for many years had to resolve such issues.*

5.97 Unfortunately, before the decision in *Re Goldcorp* was given, the CA delivered its decision in *Hunter v Moss* (1994), which threw this area of law into some confusion. Mr Moss was the owner of 950 shares in a private company. In order to place his finance director, Mr Hunter, on the same footing as his managing director in respect of their interests in the company, he purported to declare (as the court found) a trust of 50 of those shares. He later sold the 950 shares when the company was taken over by a larger concern, keeping all the proceeds for himself. Hunter claimed a 1/19th proportionate share of the proceeds of that sale, ie the proportion that would be his in equity if the declaration of trust were valid. There was a problem, however, in that Moss had never done anything to segregate or identify any particular lot of 50 shares out of the whole 950 he was to hold on trust for Hunter. Although the case concerned 'intangible property', ie shares, not goods, there seems no good reason to distinguish the clear rule in *London Wine*, approved in *Goldcorp*, that a trust cannot exist unless and until the property to which it relates is specifically ascertained (although the CA appears to have distinguished *London Wine* on a goods/intangibles distinction without further reasoned

argument). In order to have specifically ascertained the property in this case Moss would have needed either to isolate share certificates to the specified amount or at least indicate the registration numbers of the shares to be held on trust. Nevertheless, Dillon LJ held that the trust was effectively declared.

5.98 His decision was based on an analogy, to wit: since a testator may validly bequeath 50 of his 950 shares of X Ltd without previously segregating them, Mr Moss should equally be able to create an *inter vivos* trust of 50 of his 950 shares of X Ltd without previously segregating them. But under a will, the legatee's proprietary interest in specific shares of property only arises when such property is actually identified for distribution. As Hayton (1994) points out, the *inter vivos* situation analogous to the testamentary bequest is the case where A properly transfers legal title of his 950 shares to B to hold on trust to 50 of them for C, the rest for others, which was not Moss's declaration in this case.

5.99 The decision leads to obvious problems. Assume such a trust. What happens when Moss deals with the
p. 136 950 shares? Say he sells 100 shares (properly transferring title) to Fred: whose shares are these? Hunter's or Moss's? If they are Hunter's, Moss has just committed a breach of trust; if they are not Hunter's, he has not. One does want to know whether a breach of trust has occurred. Martin (1997, 96) suggested that this worry is insubstantial, since the rules of tracing (**2.69**, **Chapter 12**) may be notionally employed: thus, we proceed as if Moss did segregate 50 shares out of the 950, but then immediately mixed them again with the other 900, so we have a mixture of 950 shares, just like the case where a trustee in breach of trust mixes £50 of trust money in his bank account, raising the balance to £950. Under the rules of tracing, Hunter will be able to trace his equitable interest into particular shares in the £950, which particular shares he traces into depending upon the circumstances. But this is a strange way to deal with a certainty problem, that is by assuming that in the very act of declaring a trust a person also makes himself a trustee in breach. The better view is that Moss has not properly created a trust at all, and while he might have been contractually obliged to do so (under a term of Hunter's employment contract with him), it is conceptually confused to deal with his failure to make himself a trustee by treating him as a trustee in breach.

5.100 The aftermath, however, has not been particularly exciting. Although the CA's reasoning in the case has been criticised, the case has generally been accepted on the basis that a self-declaration of trust of 50 shares out of 950 for A should be construed as a declaration of trust of a 1/19th share of the 950 shares for A, 18/19ths for the settlor (Goode 2003; *White v Shortall* (2006); *Re Lehman Brothers International (Europe)* (2010, 2011)).

'Floating trusts'

5.101 Following Stevens (2017), what I shall call a 'floating trust' is one which arose in *Lehman Brothers International (Europe) (in administration) v CRC Credit Fund Ltd* (2010, 2011). To state the facts very schematically, one company in a group of companies, the 'hub' company, held securities on trust for companies in the group, 'the affiliates'. At the beginning of each trading day, the affiliates would release their interests under the trusts to the hub company for a payment, and the hub company was thus entitled to trade the securities in the market earning whatever profit it could. At the end of the trading day, the hub company promised to hold equivalent securities for the affiliates as they had done at the beginning of the trading day. In the middle of the fateful trading day, the 'music stopped'—the hub company had to cease trading because it was insolvent.

The question was whether the assets it had on hand that were the traceable proceeds (**2.69**) of the affiliates' securities that had been released to them in the morning were held on trust for the affiliates. Under the applicable regulations (made under the Financial Services and Markets Act 2000) the UKCA said that the answer was 'yes'. The reason Stevens calls this a 'floating trust' is that the affiliates' trust interests only 'crystallised' when the event causing the hub company to stop trading occurred, in analogy to a 'floating charge', a security interest which only crystallises over a company's assets when the same thing happens. It is unclear whether the finding in the case should extend to cases outside the particular regulatory context in which it occurred.

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Further reading

Emery (1982)

Grubb (1982)

Hayton (1994)

Hopkins (1971)

McKay (1974)

Penner (2004)

Stevens (2017)

Must-read cases: *Re Baden (No 2)* (1973); *Re Tuck's ST* (1978); *Re Goldcorp Exchange* (1995); *Hunter v Moss* (1994); *Re Hay's ST* (1981); *Re Manisty's Settlement* (1974); *Chen v Ling* (2000)

Self-test questions

1. What is 'uncertainty of intention', and how does it relate to uncertainty of subject matter or objects?
2. What is 'conceptual uncertainty' and what may be done to resolve it?
3. What, if anything, is 'administrative unworkability'?
4. Consider the validity and the effect of the following testamentary gifts.
   (a) '£100,000 to Fred for his use in his remaining days, to leave what is left to Tom by will.'
   (b) '£200,000 on trust for distribution as the trustees shall in their absolute discretion see fit, to persons or dependants of persons who have had coalminers in the family for at least three generations.'
   (c) 'One of my vintage cars to each of my old friends.'
   (d) 'The residue of my estate to my trustees for distribution to such persons and in such proportions as they in their absolute discretion see fit, save that no distribution whatsoever shall be made to my wife or children.'

5. What is an ‘illusory’ trust? How does it differ from a ‘sham trust’?
6. What particular certainty issues arise with MDTs?
7. How does certainty of subject matter interact with the constitution of trusts?

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