Administrative unworkability - a reassessment of an abiding problem

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*Conv. 24 **1. INTRODUCTION**

It is received wisdom that the objects of a trust must be defined with sufficient certainty or it will fail. What continues to prove elusive is the logical and juridical bases for Lord Wilberforce's suggestion that a trust may also fail if the class of beneficiaries is clearly described, but so "hopelessly wide" as to render the trust administratively unworkable.[1] Despite academic doubts[2] as to the justification for what may be termed the "workability criterion," the courts have been prepared to strike down a trust for precisely this reason.[3] In this paper, the writer sets out to review the arguments advanced for and against the workability criterion, as well as to examine some of the peripheral issues raised thereby. The exercise demonstrates that the concept is one of considerable utility, even if its theoretical underpinnings are somewhat dubious.

2. AN ASPECT OF CERTAINTY OR PRACTICABILITY?

It is unclear from Lord Wilberforce's formulation whether administrative unworkability is a source of definitional uncertainty or a ground of invalidity in its own right. Grbich has taken the view that questions of administrability are indistinguishable from questions of certainty. [4] Fradley, on the other hand, considers that "wide" in this context actually means "vague," and that a definition can be simply too "wide" to be usable, whatever the numerical size of the object group. It is submitted that the workability criterion refers to impossibility of execution, and not to definitional uncertainty. A consideration of the precision of a given description is a linguistic exercise which must precede the application of that description to the facts. [5] If *Conv. 25 "width" did connote vagueness, it would surely be indistinguishable from conceptual uncertainty. A conceptually uncertain definition can be discarded as meaningless from the outset, [6] relieving one of the need to consider administrability at all.

3. WHY DO WE NEED ANOTHER GROUND OF INVALIDITY?

According to Wynn-Parry J. in *Re Eden,* [7] the fact that a large part of a trust fund may be dissipated in a hopeless quest to locate enormous numbers of eligible beneficiaries is not in itself a reason why the task should not be undertaken. The obvious futility of consuming the trust fund in the course of ascertaining its intended recipients means that such an outcome is to be avoided if at all possible. It is surely preferable to abandon such cases as unworkable from the outset, and the workability criterion is an implicit acknowledgement of that fact. What is lacking, however, is a set of indicia which enables the onlooker to determine when the logistical obstacles are insuperable and when they are not.

(1) *Width of the Class*

Lord Wilberforce's suggestion that a trust in favour of "all the residents of Greater London" would be unworkable, as a consequence of the width of the class, [8] lends some support to this being the principal basis for condemning certain trusts as unworkable. A declaration of trust by the West Yorkshire Metropolitan County Council in favour of "any or all or some of the inhabitants" of West Yorkshire has been held to be inoperable, apparently because the class of objects (some two-and-a-half million persons) was too wide. [9] Width is also analogous to "uncertain enumerative range," which, according to Sachs L.J. in *Re Baden (No. 2),* [10] is "relevant" to the workability criterion. Yet why should the width of the class itself be critical? Trustees of a discretionary trust are not required to ascertain each and every beneficiary, merely to survey the range of objects; "range" is a fluid concept [11] which allows the trustees to adjust their sights according to the *Conv. 26 type of class to be considered. Certainly, no objection has been taken in earlier cases to a trust extending to innumerable objects, nor to a class capable of continuous expansion. [12] Indeed such classes are effectively self-limiting. Those on the margins of eligibility will encounter great difficulty in proving membership, and "that factor automatically narrows the field within which the trustees select." [13] It is submitted that width of the class cannot of itself be decisive. It is just one parameter, albeit, probably, the most significant one, to be taken into account in assessing the prospects of execution.

(2) *The Extent of the Trustees' Duties*

In *Re Hay's S.T.,* [14] Megarry V.-C. stated that he would, if necessary, be prepared to hold that an intermediate trust (*i.e.* one in favour of everyone except a few specified individuals) was administratively unworkable, on the ground that the duties of a trustee in relation to a discretionary trust are more stringent than those attendant upon the exercise of a power of appointment. This greater stringency stems from the fact that, as the trustees of the former are under a positive obligation to distribute, they must perforce carry out a wider and more systematic survey than the donees of a mere power, who only have to consider exercising it from time to time. [15] It could indeed be the case that the duty to conduct a thorough survey of a particularly wide and amorphous class of beneficiaries renders "meaningless any notion of discretionary distribution." [16] In *Re Baden (No. 2),* Stamp L.J. declined to follow the majority in upholding a discretionary trust for the "relations" of employees and ex-employees because he was unable to discern where a survey thereof would begin or end, or even the principles which would guide him. [17] It should only be in the most extreme cases, however, that such factors will prove fatal. The trustees should be able to regulate their survey according to the size of the trust fund and the resources at their disposal, excluding from consideration those candidates whom it would be disproportionately expensive to trace. [18] Having done their best, the trustees can then distribute on the "footing that a complete list of beneficiaries has *Conv. 27 been compiled." [19] "Doing one's best" may consist of no more

than the application of suitable selection criteria to a sufficiently substantial [20] number of beneficiaries, whithout necessarily having to journey to the "hinterland" of the class. Rarely can virtually no one be left out of account (as in *Re Hay's*).

(3) *Universal Locus Standi* 在Megarry V.-C.看來，宣佈中間信託不可行的另一個原因是，受益人擁有權力物件不具備的執行權。

A further reason for declaring an intermediate trust to be unworkable, in the opinion of Megarry V.-C., is the fact that the beneficiaries have rights of enforcement which the objects of a power do not possess. [21] The basis of such reasoning is that should a class of beneficiaries prove to be of immeasurable width, the number of people with *locus standi* to enforce the trust would be similarly limitless, making it impossible to detect frivolous or vexatious applications. [22] Another problem arises from the conferment of rights of enforcement on beneficiaries of a discretionary trust. The rationale for the applicability of the so-called rule in *Saunders* v. *Vautier* [23] is the fact that the trustees have no choice but to distribute the trust property to one or more members of the class of objects, so that together the totality of the latter's interests must be absolute. [24] Such reasoning is said to be untenable if all the prospectant beneficiaries are not discoverable. Is there any need, however, to go this far? One need only be cognisant with the natural boundaries of the class, and the approximate number of potential claimants. In *Re Baden (No. 1),* Lord Wilberforce expressly excluded a trust for the relatives of a living person from the category of unworkable trusts, [25] notwithstanding the fact that even attempting to gauge the full extent of the beneficial entitlement would be impossible. If administrability did depend upon an ability to apply the incidents of the rule in *Saunders* v. *Vautier,* all such trusts would have to be abandoned. As for the courts of the land being besieged by legions of undeserving but theoretically genuine claimants, the prospect is a remote one. Realistically, most people will never get to hear of the trust's existence, and there are ample procedural devices available to wheedle out unmeritorious claims. [26]

Conv. 28 **5. SOME INTERIM CONCLUSIONS**

Each of the suggested determinants of workability, taken in isolation from the others, affords insufficient justification for striking down a trust as unworkable. This may suggest, of course, that it will only be a combination of factors which will infringe the workability criterion. Much may well depend on the amount of information and the resources that the trustees have at their disposal. Lord Reid, in fact, recognised this when he said:

"I could understand it being held that if the classes of potential beneficiaries were so numerous that it would cost quite disproportionate inquiries and expense to find them all and discover their needs and deserts, then that provision will fail. But that will not be a ground of uncertainty as that term is generally understood." [27]

It could be that one should take a pragmatic view, and look upon the workability criterion as a reference to the feasibility of the trustees being able to perform their duties in a meaningful fashion, or perhaps to the feasibility of the court being able to render assistance on a summons for directions.

(1) *The Trustees*

A prerequisite of the performance of a trustee's duties is the ability to carry out a satisfactory survey of those beneficially entitled. [28] The trustee has to scrutinise the composition of the field, assess needs and qualifications, and select worthy recipients in the light of the information gleaned. [29] Crucial to the process, according to one commentator, [30] is the presence of suitable "appointment criteria." [31] This is ostensibly far more significant than the issue of whether a group of beneficiaries can meaningfully be called a class. [32] Very often, though, the settlor combines a very wide class of objects with a virtually unfettered discretion on the part of the trustees. In such circumstances, the general criterion of benefit should be enough for the trustees to go on. [33] The selection of one type of benefit from amongst many is con ***Conv. 29*** ceivably just what the settlor had in mind, and in so selecting, the trustees can have regard to precisely the same considerations which actuated the settlor to demonstrate his munificence in the first place. [34]

It could be, furthermore, that a "sliding scale" of duties exists. That is, the larger or more disjunctive the class happens to be, the less onerous the trustees' duties become. [35] This corresponding reduction in the rigor of the trustees' duties is said to be consistent with the settlor's realistic expectations. [36] Admittedly, one can voice reservations as to whether the extent of fiduciary duties (apart from the duty to survey the field) ought to vary with something as fortuitous as the size of the class, but the sliding

scale argument, if accepted, does tend to militate against the notion that the trustees cannot ever execute a trust in favour of a huge and fluctuating body of persons.

(2) ***The Court***

A trust must be one which the courts can control. [37] Where judicial execution has been undertaken, there have normally been "metes and bounds" [38] within which the trusts have been defined; parameters that act as "pointers or guides" [39] to enable the court to substitute its own discretion for that of the trustees. In the course of so doing, the paramount objective of the court has been to execute the trust in a practical way; one best calculated to realise the settlor's intentions. [40] The court has several options at its disposal, [41] and the problem lies in determining when barriers to judicial execution are such that all such options are otiose. The principal arguments are two-fold:

(a) A trust is unworkable if it affords insufficient guidance on the settlor's intentions. [42]

 (b) An unambiguous but unduly wide disposition makes it impossible to judge whether a breach has been committed. [43]

Each will be examined in turn.

(a) Insufficient guidance on the settlor's intentions

It may be that some indication of what the settlor contemplated is essential, especially if the court is proposing to plump for a non-equal allocation. [44] In all cases where uneven distribution took place, some benchmark of the settlor's intentions was present. Yet the argument is predicated on the assumption that a general intention is always too vague to be effectuated. The writer has already sought to demonstrate that there is no reason why this should be so. There is a whole panoply of considerations that the trustees can take into account in giving practical expression to a general intention to benefit the class; *a fortiori* this is true of the court, with its greater arsenal of judicial weaponry.

(b) Impossibility of monitoring performance, or of judging whether a breach has been committed

According to this contention, the incertitude stemming from immeasurably wide classes makes a nonsence of judicial supervision of the trustees' duties, since who is to say that a given selection of a beneficiary is wrong, and according to what criteria? The argument has, though, been repudiated in the context of powers. [45] If width alone ought not to prevent a trustee from considering when and how to exercise a power, nor the court from assessing whether a breach has been committed, there would likewise seem to be no reason why a huge number of potential objects should stop the court from determining the reasonableness of a trustee's actions with regard to individual claimants.

The above discourse supports the conclusion that it will seldom be the case that the trustees, or the court in their stead, will be unable to administer the trust. Perhaps the workability criterion should only be employed where the trustees are unable to devise even a preliminary strategy, and where the court is similarly "none the wiser." [46] Such cases have been, and are likely to continue to be, extremely rare.

(1) ***Does the Workability Criterion Apply to Fixed Trusts?***

Emery opines that the workability criterion is pertinent only in respect of discretionary trusts, and then only where there is a dearth of suitable determinants upon which to base selection decisions. He points out that, in the context of fixed trusts, no question of selection arises. [47] With respect, this cannot be right. The administrability of a fixed trust consists in the capacity to distribute to each and every member of the designated class. If this is so vast as to render that objective impossible of attainment, the trust is unworkable. [48]

(2) ***Does the Workability Criterion Apply to Mere Powers?***

A mere power cannot, without more, be struck down for width of the class of objects. Numbers *per se* should not inhibit trustees from considering whether or not to exercise the power, as opposed to deciding in whose favour to exercise it. [49] But what if

factors conspire to prevent the trustees from even considering who are to be fitting recipients? Whilst trustees administering a mere power of appointment do not actually have to carry it out, only to consider doing so, there must surely have to be a realistic prospect of successful execution should the trustees wish it? [50] In *Re Hay's,* [51] Megarry V.-C. admitted that the court may be compelled to hold that a power posing "real problems of administration or execution" is void, although his lordship declined to elaborate on the possible nature of such problems.

Before the trustees can even meaningfully consider exercising a mere power, they must conduct some sort of survey. If such a survey is not feasible, owing to a lack of express or implied boundaries delimiting the field of consideration, then the power may be condemned as unworkable. In *Blausten* v. *I.R.C.,* [52] Buckley L.J. felt able to uphold a mere power only on the footing that the trustees' power to include any person in the world was subject to the settlor's consent, which had the effect of placing "metes and bounds" around what would otherwise have been a limitless class. Megarry V.-C. doubted this view, as he failed to see how the settlor's approval would have the effect of narrowing the class, or make it possible to treat "anyone in the world save X" as constituting a class in the accepted sense of ***Conv. 32*** the word. [53] This surely misses the point. According to Lord Justice Buckley's dictum, the validity of the power stood or fell, not on the size of the class of objects, but on the presence or absence of suitable selection-criteria. Normally, the trustees have only their own judgment (and perhaps some clues derivable from the trust instrument itself, and external evidence) to guide them in their deliberations. In this instance, they had a definitive indication of the settlor's true intentions--straight from the "horse's mouth." In the absence of that fact, the decision would have been different. Thus, it is submitted that Megarry's interpretation of *Blausten* is erroneous. The essence of workability in the sense it was used there is not the size of the class to be benefitted, but the plausibility of actually conferring the benefit in a way which fulfils the settlor's intentions. It has, of course, been argued more than once that the general requirement of "benefit" may often be enough to enable the trustees to do just that, but *on the assumption* that something more is called for, the dictum of Buckley L.J. is supportable.

(3) ***Is the Workability Criterion the Same Thing as "Capriciousness?"***

Another ground for judicial intervention is where a power is "capricious"; that is, where the settlor's class designation fails to reveal any settled purpose, being little more than an incidental assemblage of individuals, affording no guidance on how eligible objects are to be hived off from the mass. [54] This category of invalidity can, according to Templeman J., be distinguished from administrative unworkability in that the latter refers to discretionary trusts which may require execution by the court, and not to powers, where the adjudicative function is more circumscribed. [55] Unfortunately, his lordship's linkage of capriciousness to the trustees' methods of selection, or of placing limits on numbers, is to couch the fault underlying capricious powers in essentially administrative terms. If Emery is to be believed, the co-essence of both notions is the resultant impossibility of execution. [56] Jill Martin assumes that the two concepts are distinct, on the ground that size of the class--the key attribute of the workability criterion, in her opinion--has no necessary connection with capriciousness. [57] The writer would venture the opinion that both notions are alternative vitiating factors; a settlor is permitted to earmark whomsoever he pleases to be the objects of his benefaction, but, as a matter of policy, the court will not aid the settlor in all his ***Conv. 33*** eccentricities. If the disposition is devoid of any sensible purpose, then it will be avoided as capricious. Conversely, the sheer size of the problem of converting an otherwise sensible intention into actuality may make the endeavour implausible, and the disposition may then be abandoned as unworkable. [58] As Jill Martin succinctly puts it: "The objects must either be unlimited, in which case the trustees can perform their obligations sensibly, or limited to a "sensible' class." [59]

8. CONCLUSIONS

The juridical basis for the workability criterion remains nebulous. That fact, however, need not trouble us unduly; the concept is still in its infancy, and should not be hedged around with theoretical strictures. The writer considers it best to treat the notion as a logical extension of evidential certainty. The court will not normally permit difficulties of ascertainability to frustrate execution, but there must be a juncture at which performance becomes an exercise in futility. It is suggested that such will be the case when a potentially innumerable class of beneficiaries is coupled with a total lack of provable definitional criteria. The concept of workability is not then, as some seem to think, [60] an unwarranted threat to freedom of alienation; rather it is a useful means of curbing its more extreme manifestations. Many settlements fulfil important socio-welfare functions, and it is vital that the court be left to devote its scarce resources thereto without being sidetracked by the whimsical and the unworkable.

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Footnotes

1 *Re Baden's Trust Deed* [1971] A.C. 424 at p. 456, *per* Lord Wilberforce.
2 See L. McKay (1974) 38 Conv.(N.S) 269.
3 *R. v. District Auditor, ex p. West Yorkshire Metropolitan County Council* [1986] R.V.R. 24; *Re Hay's S.T.* [1982] 1 W.L.R. 202 at pp. 213-214, *per* Megarry V.-C.
4 See generally (1974) 37 M.L.R. 643; *cf.* Emery (1982) 98 L.Q.R. 551, at pp. 552-553.
5 See *Re Gulbenkian* [1970] A.C. 508, 518, where Lord Reid talks of instances where to attempt to *apply* an otherwise certain definition would lead to insurmountable administrative difficulties.
6 "Conceptual uncertainty arises where a testator or settlor has used words which are too indistinct for a court to apply." (*Re Tuck's S.T.* [1978] 1 Ch. 49 at p. 59, *per* Lord Denning M.R.)
7 [1957] 2 All E.R. 433 at p. 435.
8 *Re Baden (No. 1)* [1971] A.C. 424 at p. 457.
9 *R.* v. *District Auditor, ex p. West Yorkshire C.C.* (1986) 26 R.V.R. 24.
10 *Re Baden's Trust (No. 2)* [1973] 1 Ch. 9, 22.
11 *Per* Sachs L.J., *ibid.* at p. 20.
12 See *Re Scarisbrick* [1951] Ch. 622 at p. 632, *per* Lord Evershed M.R.
13 *Re Baden (No. 2), per* Sachs L.J. at p. 22.
14 [1982] 1 W.L.R. 202, 213.
15 *Re Baden (No. 1), per* Lord Wilberforce at p. 449.
16 Emery, *op. cit.* at p. 558.
17 At p. 27.
18 *Re Baden (No. 1), per* Lord Wilberforce at p. 449. This was an implicit acceptance of a contention of Vinelott Q.C., counsel for the appellants. It is submitted that the remarks of Wynn-Parry J. in *Re Eden* (*supra*) should no longer be treated as good law.
19 *Re Baden (No. 2), per* Stamp L.J. at p. 27.
20 *Per* Megaw L.J., *ibid.* at p. 24.
21 See *Re Hay's S.J.* [1982] 1 W.L.R. 202 at p. 213, where his lordship proclaimed the question of enforceability to be "of the essence" of the distinction between a trust and a power for this purpose.
22 See A. Grubb [1982] Conv. 432, 441.
23 (1841) 4 Beav. 115; affirmed Cr. & Ph. 240.
24 See Matthews [1984] Conv. 22, 23; *Re Smith* [1928] Ch. 915, 920, *per* Romer J.
25 *Re Baden (No. 1)* at p. 457; see also *Re Baden (No. 2)* at p. 23, *per* Megaw L.J.
26 See, *e.g.* Supreme Court Act 1981, s.24; R.S.C. Ord. 18, r. 19.
27 *Re Gulbenkian* [1970] A.C. 508 at p. 519. This extract from his lordship's judgment also seems to confirm the view that the workability criterion relates to the plausibility of executing a given trust and not to definitional uncertainty.
28 McKay, *op. cit.,* p. 273.
29 *Re Baden (No. 1)* 424, at p. 449, *per* Lord Wilberforce.
30 Grubb [1982] Conv. 432 at pp. 435-436.
31 *e.g.* (1) the terms of the trust; (2) the terms of the instrument as a whole; (3) the knowledge of the trustees themselves, acquired or handed down; (4) the express wishes of the settlor, such as a stipulation that consent be obtained. See *Re Manisty* [1974] 1 Ch. 17, 26; Grubb (*supra*) at p. 435.
32 Emery (1982) 98 L.Q.R. 551 at p. 558.
33 McKay, *op. cit.,* p. 281.
34 Provided, of course, that the trustees are apprised of such considerations, or that admissible evidence exists: *Re Manisty,* p. 24, *per* Templeman J. His Lordship's remarks were made with reference to powers, but would seem no less apt in relation to trusts.
35 Grubb, *op. cit.,* p. 440.

36 See *Re Gestetner* [1959] 1 Ch. 672 at p. 688, *per* Harman J.
37 *Morice* v. *Bishop of Durham* (1805) 10 Ves. Jr. 552 at pp. 539-540, *per* Lord Eldon *I.R.C.* v. *Broadway Cottages* [1955] Ch. 20; in *Re Manisty* [1974] Ch. 17 at p. 29, Templeman J. considered that, in positing the workability criterion, Lord Wilberforce appeared to be adverting to trusts, "which have to be executed and administered by the court, and not to powers, where the court has a very much more limited function."
38 *Re Park* [1932] 1 Ch. 580 at p. 583, *per* Clauson J.
39 *Re Baden (No. 1),* pp. 442-43, *per* Lord Hodson.
40 *Re Baden (No. 2),* p. 19, *per* Sachs L.J.; *Re Sayer* [1957] Ch. 423, 436, *per* Upjohn J.
41 Such as (1) appointing new trustees; (2) directing representatives of the class of objects to devise a scheme of distribution; (3) authorising the trustees to distribute in accordance with the proper basis of distribution, should this be self-evident (see *Re Baden (No. 1),* p. 457, *per* Lord Wilberforce).
42 See McKay's arguments on the "general principle of judicial execution" (1974) Conv.(N.S.) 269 at p. 280. See also D. J. Hayton, *The Law of Trusts* (1989), p. 67: "The court cannot resort to guesswork, for this is to fulfil a non-justiciable function."
43 *Blausten* v. *I.R.C.* [1972] Ch. 256 at p. 272, *per* Buckley L.J.
44 McKay, *supra,* p. 281.
45 *Re Manisty,* p. 23, *per* Templeman J.
46 See Hayton, *op. cit.,* pp. 67-68.
47 Emery, *op. cit.,* p. 569.
48 See J. G. Riddall, *The Law of Trusts* (3rd ed. 1987), p. 24.
49 *Re Manisty* (*supra*); *Re Hay's S.T.* (*supra*) p. 211, *per* Megarry V.-C. *Contra Blausten* v. *I.R.C.* [1972] 1 Ch. 256 at p. 273 (*per* Buckley L.J.), p. 275 (*per* Salmon L.J.).
50 *cf.* Grubb (*supra*), p. 434.
51 At p. 212.
52 [1972] Ch. 256, 272.
53 *Re Hay's S.T.,* p. 211.
54 See *Re Manisty* (*supra*), p. 29, *per* Templeman J.
55 *Ibid.* p. 29; see also *R.* v. *District Auditor, ex p. W. Yorks C.C.* (*supra*).
56 Emery, p. 584.
57 Hanbury and Maudsley's *Modern Equity* (13th ed., 1989), by Jill Martin, p. 105.
58 As Jill Martin points out, the trust in *R.* v. *District Auditor, ex p. West Yorkshire Metropolitan C.C.* was held to be void for unworkability. Capriciousness did not enter into the equation because "the local authority (the settlor) had every reason to wish to benefit the inhabitants in the ways specified." (Hanbury and Maudsley, p. 105.)
59 *Ibid.*
60 McKay, p. 284.

