

Equity and Trusts Concentrate: Law Revision and Study Guide (8th edn)
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3. The three certainties

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Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter discusses the certainties that must be satisfied by trusts: intention, subject matter, and objects. Trustees must know what their obligations are under the trust, and satisfying these certainties ensures that, if necessary, the court itself will be able to administer the trust. Certainty of intention is a question of fact and the courts will consider the whole context of the case. Certainty of subject matter requires certainty as to what property is held on trust and the beneficial interests involved. Certainty of objects relates to who are the beneficiaries of a trust. Every trust—with the exception of charitable trusts—must satisfy the certainty of objects requirement.

Keywords: trusts, certainty, intention, subject matter, objects, beneficiaries, trustees

Key facts

- All trusts must satisfy the three certainties (but charitable trusts do not need to satisfy the certainty of objects requirement).
- Certainty of intention is a question of fact and the courts will consider the whole context of the case.
- Certainty of subject matter requires certainty as to what property is held on trust and the beneficial interests involved.
- Complicated issues arise concerning trusts of part of a bulk of unascertained goods—the approach taken by the courts depends on whether the property is tangible or intangible.
- A fixed trust will be certain as to its objects if a complete list of beneficiaries can be compiled.

- A discretionary trust will be certain as to its objects if it can be said with certainty that any given individual is or is not a member of the class.

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Introduction

Every trust (except for charitable trusts, see chapter 6) must satisfy the three certainties of intention, subject matter, and objects: *Knight v Knight (1840)* (see Figure 3.1).

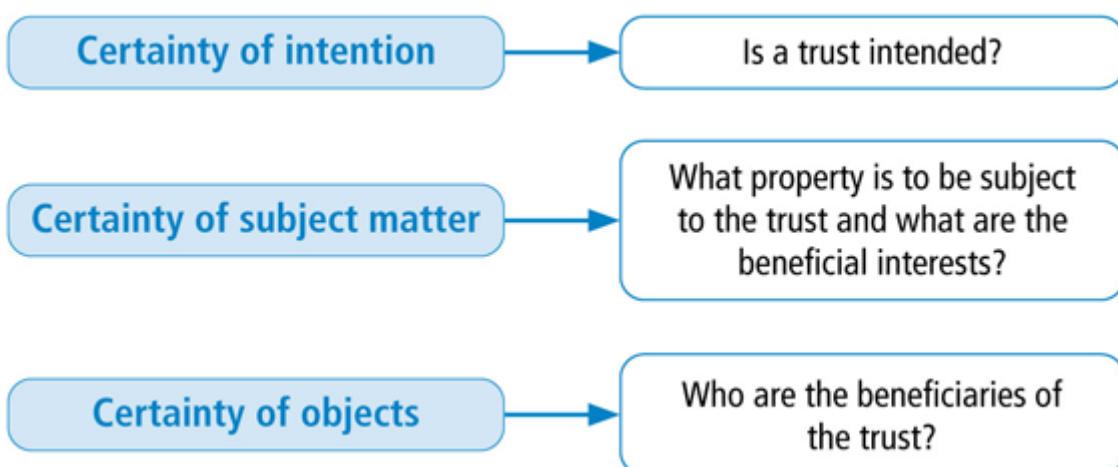


Figure 3.1 The three certainties

It is important that a trust satisfies the three certainties for two reasons:

- Trustees must know what their obligations are under the trust—remember that trustees will be liable for breach of trust if they fail to carry out their obligations correctly. The three certainties therefore provide a trustee with a degree of protection by ensuring that their obligations are clear.
- Satisfying the three certainties ensures that, if necessary, the court itself will be able to administer the trust.

Revision tip

Trusts can be declared orally or in writing. While the three certainties apply to all but charitable trusts, you should remember that every trust will also have to satisfy the formality requirements in respect of the type of property involved. So, for example, a trust of land may satisfy the three certainties. However, if the trust does not comply with s 53(1)(b) **Law of Property Act 1925** by being written or evidenced in writing, it will still be unenforceable.

Certainty of intention

Intention is established by considering *all* the circumstances of the case—*equity looks to intent rather than form*. In working out what was intended, there are a number of indicators of intention that you should look out for.

Imperative or precatory language?

Since the case of *Lambe v Eames (1871)*, the courts have generally made a distinction between the use of precatory and imperative words.

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- Precatory words express a hope, a wish, or a moral obligation. The use of precatory words typically indicates that a gift is intended (see Table 3.1).
- Imperative words express a command—a duty to do something. The use of imperative words indicates that a trust (or power) is intended.

Table 3.1 Case examples of precatory wording

CASE	PRECATORY WORDING
<i>Lambe v Eames (1871)</i>	'to be at her disposal in any way <i>she may think best</i> , for the benefit of herself and her family'
<i>Re Adams and Kensington Vestry (1884)</i>	'in full confidence that she would do what is right'
<i>Re Diggles [1888]</i>	'it is my desire that [my daughter] allows Anne an annuity of £25 during her life'

While the courts will be guided by the language used, remember that just as there is no magic in the use of the word 'trust' (*Kinloch v Secretary of State for India (1882)*), the presence of precatory words will not necessarily prevent the court from finding that a trust exists, as long as it is satisfied that this was the intention of the donor:

Comiskey v Bowring-Hanbury [1905] AC 84

The testator left his wife the whole of his estate 'in full confidence that she will make such use of it as I should have made myself and that at her death she will devise it to such one or more of my nieces as she may think fit ...'. These words sound precatory and would suggest a gift. However, the will continued, '... in default of any disposition by her thereof by her will or testament I hereby direct that

all my estate ... shall at her death be equally divided among the surviving said nieces'. When read as a whole, the court concluded that the testator had intended a trust, under which the wife held a life interest.

- The court may also take into account surrounding evidence which sheds light on the intentions of the parties. In *Staden v Jones [2008]*, the Court of Appeal used a solicitor's covering letter to conclude that an arrangement by which a divorcing wife waived her interest in the family home, on the basis that their daughter would ultimately be entitled to her share, amounted to a constructive trust. Similarly, in *Hilton v Cosnier [2018]*, a man promised his former partner that she could remain in a property for the rest of her life but that the property was to go to his grandchildren on her death. It was held that there was no intention to declare a trust in favour of the grandchildren, only an intention to clarify that he was not giving the house to his former partner outright. This conclusion was supported by the fact that he did not discuss the existence of a trust with anyone and acted inconsistently with such an intention by transferring the property to his daughter some years later. In a more commercial context, in *North v Wilkinson [2018]*, an investor argued that a 'Contract of Agreement' drawn up between himself and an inventor demonstrated an intention to create a trust which would have entitled him to a share of damages the inventor had subsequently received from another business which had adopted his inventions without his permission. However, the agreement had been drawn up without legal advice and the Court of Appeal concluded that it lacked any evidence of such an intention, not least because it did not set out how such an arrangement would practically operate.

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Conduct

An intention to create a trust can also be inferred from the conduct of the donor.

Paul v Constance [1977] 1 WLR 527

When Mr Constance died, a dispute arose regarding whether his wife (from whom he was separated but not divorced) or his new partner, Mrs Paul, was entitled to money held in a bank account in his sole name. During their relationship, Mr Constance had made arrangements for Mrs Paul to be able to withdraw money with his written permission. Only Mr Constance withdrew money, which was split evenly between himself and Mrs Paul, and he often told Mrs Paul that the money was 'as much yours as mine'. In addition, they had also paid some joint winnings from bingo into the account. It was held that these actions were sufficient to infer that Mr Constance had made a declaration of trust of the money in the bank account and Mrs Constance was entitled to his half of the account under intestacy.

A similar approach has been taken in some commercial contexts. For example, in *Re Kayford Ltd (in liquidation)* [1975], the separation of customers' money in a different bank account was deemed sufficient to demonstrate an intention to create a trust.

However, not all conduct can lead to the inference to create a trust: see, for example, *Jones v Lock* (1865).

The effect of lack of certainty of intention

If there is no intention to create a trust (or power), the donee will take the property absolutely, as a gift (*Lassence v Tierney* (1849)).

Certainty of subject matter

There are two elements to certainty of subject matter:

- it must be clear what property is held on trust; and
- the beneficial interests must be clear.

The property held on trust must be certain

Vague or general descriptions of the trust property

It must be clear what property is to be held on trust or the trust will be void as the trustees, beneficiaries, and, ultimately, the court will be unable to determine what is held on trust (see Table 3.2).

Table 3.2 Case examples of uncertain descriptions of property

CASE	UNCERTAIN DESCRIPTION OF PROPERTY TO BE HELD ON TRUST
<i>Palmer v Simmonds</i> (1854)	'the bulk' of the testatrix's estate
<i>Peck v Halsey</i> (1720)	'some of my best linen'
<i>Jubber v Jubber</i> (1839)	'a handsome gratuity'
<i>Re Kol b's WT</i> [1961]	An instruction to purchase 'blue chip' investments

p. 29 **Trusts of part of property**

This situation arises where there is an attempt to create a trust over part of a bulk of **tangible property**, for example the furniture in a home or a warehouse filled with desktop computers. Where there is a trust of *part of a bulk of tangible property*, the trust property will only be certain if it has been separated from the rest.

Re London Wine Co [1986] PCC 121

LWC stored cases of wine in various warehouses. When wine was purchased by customers, they received a certificate of title which indicated that the wine would be held on trust for them until dispatched. When LWC went into liquidation, the question arose whether the wine was held on trust for the customers or was to be considered part of LWC's general assets available to creditors. It was held that there was no trust as the wine ordered by customers had not been separated from the general stock and therefore the subject matter of each trust could not be identified.

Note: under **s 20A Sale of Goods Act 1979**, purchasers of an unsegregated part of a larger bulk of property will be considered tenants in common of the whole property as soon as they have paid. This has the effect of protecting their purchases from creditors in the event of liquidation or receivership.

However, where there is a trust of part of some **intangible property**, such as shares, there is no need to identify the specific shares to be held on trust.

Hunter v Moss [1994] 1 WLR 452

Moss owned 950 shares in a company and was found to have declared himself trustee of 50 of those shares for Hunter. However, Moss sold all his shares and kept the proceeds for himself. When Hunter sought a share of the proceeds, Moss argued that the trust was void because he had not separated or identified the specific shares to be held on trust for Hunter.

Dillon LJ distinguished *Re London Wine Co* on the basis that, unlike cases of wine or other tangible property, these shares were indistinguishable from one another. Therefore, no segregation was required as holding any 50 of the 950 shares on trust would achieve the same thing.

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Revision tip

Remember that this case applies to trusts of a part of a *homogeneous* larger whole. When approaching a problem question, pay close attention to the facts. If, for example, the question relates to a portion of shares where the shares are of different types or relate to shares in different companies, the rule in *Hunter v Moss* will not apply and the trust will be void if there is no further identification of the relevant property (*Re Harvard Securities Ltd (in liquidation) [1998]*).

Looking for extra marks?

Despite the fact that *Hunter v Moss (1994)* was followed in *Re Harvard Securities Ltd (in liquidation) [1998]*, and more recently in respect of complex financial securities in *Pearson v Lehman Brothers Finance SA [2010]*, there have been many criticisms of the law in this area. Hayton, in (1994) 110 LQR 335, raises a number of significant criticisms of which you should be aware:

- Is Dillon LJ's argument that there is no difference between a testator giving 50 shares to a legatee in his will and a settlor declaring himself trustee of 50 of his shares correct?
- Difficult questions may arise if that the 'trustee' sells part of his holding—for example, has he sold his own shares or the beneficiary's, or, if the transaction is taxable, who is liable—the seller or the beneficiary? Consider this argument in light of Worthington's argument in 'Sorting Out Ownership Interests in a Bulk: Gifts, Sales and Trusts' [1999] JBL 1, that such issues could be resolved through the rules of tracing (see chapter 12).
- Is the broad distinction in the cases between trusts of parts of unascertained bulks of tangible and intangible property convincing?

The beneficial interests under the trust must be certain

The beneficial interests under the trust must also be clear. Two cases illustrate the problems that may arise in this context.

Boyce v Boyce (1849) 16 Sim 476

A testator established a trust of four houses for his daughters, Maria and Charlotte. Maria was to choose which house she wanted, and the other houses would be held on trust for Charlotte. However, Maria died before making her choice. The trust failed as it was no longer possible to say which houses would be held on trust for Charlotte.

The property had been clearly identified but the beneficial interest had not. The trust would have succeeded if the trustees had been given the power to choose the house, but in the absence of this power, neither the trustees nor the court could determine the beneficial interest.

In the following case, the question was whether the instructions given to the trustees were certain enough to allow them to carry out the terms of the trust.

Re Golay's WT [1965] 2 All ER 660

A trust was set up whereby the beneficiary was to ‘receive a reasonable income’ from the testator’s properties. The court held that this was a valid trust as the phrase ‘reasonable income’ allowed the trustees (and the court, if need be) to make an *objective* assessment of what that might be, based on the beneficiary’s circumstances. Therefore, the trust was sufficiently certain because, while the income might vary over the years, the trustees would always have an objective yardstick by which to act. On the other hand, the trust would have failed if the properties were to be sold in order to provide a reasonable one-off sum of money for the beneficiary. This is because the trustees would have no way of determining what a ‘reasonable’ payment would amount to. Arguably, the wording of the trust suggests that the beneficiary would not receive all the money, but then what portion of the proceeds would be reasonable?

Note: the legal issues surrounding the certainty of beneficial interests will not apply in respect of discretionary trusts. This is because the class to benefit merely holds a *spes* (hope) of benefiting; the extent to which they can benefit, if at all, is at the absolute discretion of the trustees.

A link between certainty of intention and certainty of subject matter

If there is a lack of certainty as to the subject matter of the trust, this will cast doubt on whether the settlor truly intended to create a trust (*Mussoorie Bank Ltd v Raynor (1882)*).

The effect of lack of certainty of subject matter

If there is a lack of certainty as to the subject matter the trust fails, and the property will return to the settlor or estate on resulting trust.

Certainty of objects (beneficiaries)

Certainty of objects relates to the question of who the beneficiaries of a trust are. Every trust—with the exception of charitable trusts—must satisfy the certainty of objects requirement. The certainty of objects test is different for fixed trusts and discretionary trusts.

- *Fixed trust*—the beneficial interests are fixed, for example a trust to benefit Razia and Shahana in equal shares.
- *Discretionary trust*—this is a type of trust in which the trustees are given the power to appoint people as beneficiaries of the trust. Members of the class of potential beneficiaries do not hold any beneficial interest until trustees exercise their discretion to appoint in the beneficiaries’ favour. The amount the beneficiaries receive is at the discretion of the trustees.

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Fixed trusts

In order to satisfy the certainty of objects requirement, a full list of the beneficiaries must be able to be created (*IRC v Broadway Cottages Trust [1955]*), ie all the beneficiaries must be able to be identified. (See chapter 11 for a discussion of the trustees' options if the whereabouts or continued existence of a beneficiary cannot be ascertained.) In *OT Computers Ltd (In Administration) v First National Tricity Finance Ltd & Others [2003]*, an attempt to set up a trust to protect monies owed to 'urgent suppliers' of a struggling company failed because the meaning to be given to the adjective 'urgent' was not made clear, making it impossible to draw up a full list of beneficiaries.

Discretionary trusts

A different approach was taken in respect of discretionary trusts in the key decision of *McPhail v Doulton*:

McPhail v Doulton (Re Baden's Trusts (No 1)) [1971] AC 424

The settlor set up a fund for the benefit of employees of Matthew Hall & Co Ltd and their relatives and dependants at the 'absolute discretion' of the trustees. The House of Lords had to decide: (i) whether this was a trust or a power; and (ii) the appropriate test for the certainty of objects requirement. While all the judges agreed that this was a discretionary trust rather than a power, they were split regarding the appropriate test. On a three to two majority, Lord Wilberforce, who delivered the leading judgment of the majority, held as follows:

1. The complete list approach adopted in *IRC v Broadway Cottages [1955]* was overruled in respect of discretionary trusts.
2. The test for certainty of objects in discretionary trusts is the same as the test for fiduciary powers in *Re Gulbenkian's Settlement [1970]*, namely *whether it could be said with certainty that any given individual is or is not a member of the class*.

Applying the test in *McPhail v Doulton: Re Baden's Trusts (No 2)*

Having decided on the test for certainty of objects for discretionary trusts, the case was returned to the court of first instance for the test to be applied. Despite the court deciding that it satisfied the new test, the executors of Baden's will relentlessly contested its validity, and the case came before the Court of Appeal for the second time.

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Re Baden's Trusts (No 2) [1973] Ch 9

The trust set up by Baden was to benefit 'employees of Matthew Hall & Co Ltd and their relatives and dependants'. The issue in this appeal was whether the groups 'relatives' and 'dependants' satisfied the new test → set out in *McPhail v Doulton*—ie could it be said with certainty that any given individual was or was not a member of these classes?

The Court of Appeal held that *only if a class of beneficiaries is conceptually certain* will it be possible to satisfy the test of whether it can be said with certainty that any given individual is or is not a member of the class.

What is conceptual certainty?

Conceptual certainty has been described as 'linguistic or semantic certainty'—in other words, a class of beneficiaries will be conceptually certain when the description enables the group to be defined clearly. Consider the following examples:

EXAMPLE 1

1. A discretionary trust of £100,000 for members of the British Army who served in the Gulf War.
2. A discretionary trust of £50,000 for morally upstanding residents of Gloucester.

The first trust can be said to be conceptually certain as the group to benefit can be clearly understood. However, it is unlikely that the second trust would be valid as it is extremely difficult to define what exactly would be meant by 'morally upstanding'. For example, X may attend church regularly but may also cheat at poker. Y might give regularly to charity but cheat on their husband. If Z is in favour of same-sex marriage, does this mean they are morally upstanding or not? Where would the line be drawn?

Gifts subject to a condition precedent

Gifts subject to a condition precedent do not require the same degree of conceptual certainty as discretionary trusts.

Terminology tip

A gift made subject to a condition precedent is one to which the donee will not be entitled unless he or she satisfies the condition, for example ‘£10,000 to each of my children who graduate from university’.

Re Barlow's WT [1979] 1 WLR 278

A testatrix provided that a number of her paintings could be sold at a reduced price to ‘any members of my family and any friends of mine’. The gift in question here was the difference in price between the market value of the paintings and their reduced price. The central issue was whether the condition precedent—ie that they be family members or friends—rendered the gift void for uncertainty. The court upheld the gift. Whereas the objects of a discretionary trust must be conceptually certain, a condition precedent will be valid if *at least one person can be said to satisfy the condition*.

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- ↳ In a gift to a class, as the objects are only entitled to a *share* of the property, it is vital to be able to say whether any given individual is or is not a member of the class. However, in this case, the ‘family and friends’ were each given an *individual opportunity* to purchase the paintings. Therefore, a greater degree of uncertainty as to who satisfied this condition did not affect the opportunity they received.

Revision tip

While a gift to ‘friends’ may be valid as a gift subject to a condition precedent, a discretionary trust for ‘friends’ will be void for uncertainty, as it is impossible to define friends so that it could be said that *any individual is or is not* within the class.

Distinguishing conceptual uncertainty from evidential uncertainty

It is important to distinguish ‘conceptual uncertainty’ from ‘evidential uncertainty’. Conceptual certainty relates to the certainty of the *class*; evidential certainty relates to the issue of whether or not an *individual* can be found or proven to be a member of the class. If a class is conceptually uncertain, the trust will be void, but evidential uncertainty will not defeat a trust.

Having discussed the meaning of conceptual certainty in general terms, it is important to return to *Re Baden's Trusts (No 2)*. The Court of Appeal was asked if the groups 'dependants' and 'relatives' were conceptually certain. All the judges agreed that the group 'dependants' was conceptually certain. However, while they also agreed that the group 'relatives' was conceptually certain, the three judges each reached this conclusion by different reasoning!

Sachs LJ: the liberal approach

Sachs LJ started by defining 'relatives' to mean 'descendants of a common ancestor'. He argued that this was conceptually certain as its meaning was clearly understandable. He then stated that trustees have a fiduciary obligation to survey the range of possible beneficiaries. This involves the trustees gaining a sense of the general width of the class—it does not require an exhaustive list. Beyond that survey, anyone who can prove that they are a member of the class can be included.

Sachs LJ's approach clearly separates the question of evidential uncertainty by stressing that an exhaustive list is not required. Moreover, in response to the problem that a potentially limitless number of people can be included within the definition 'descendants of a common ancestor', he makes three points:

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1. The trustees should exercise their discretion in a sensible way, thus making it more likely that they would choose close relatives in the general course of events.
2. Proof of one's relationship to another soon becomes very difficult, providing a natural limit on who could establish their membership of the class.
3. Most importantly, these issues are evidential and the fact that it will not always be possible to prove that any given individual is not a member of the class will not render the trust void.

This approach is arguably the purest interpretation of conceptual certainty. The only drawback is that Sachs LJ's reasoning provides no simple way for the trustees to work out whether the class to benefit under the trust is conceptually certain. Simple common sense may be a dangerous path for trustees, who could be liable if they distribute the money wrongly.

Megaw LJ: the middle ground

Megaw LJ also defined 'relatives' as 'descendants of a common ancestor'. However, he argued that a class would be conceptually certain if it could be said with certainty that *a substantial number of objects fell within the class*, even if there were a substantial number of others that could not definitely be said to be within or without the class.

- Megaw LJ's approach offers trustees more guidance in that the conceptual certainty of the group can be tested by seeking a substantial number of individuals who definitely come within the class.
- However, what exactly is meant by 'a substantial number'? Megaw LJ suggests that this is a question of common sense, but wary trustees will still find themselves questioning whether they have done enough, especially should the situation arise where there is definitely a substantial number of individuals and the trustees *cannot say with clarity* that they are within the class.

- Despite it being said that evidential certainty will not defeat a discretionary trust, Megaw LJ's approach rests on being able to provide *evidence* that a sufficient number come within the class.

Stamp LJ: the strict approach

Stamp LJ takes a literal approach to the test set out in *McPhail v Doulton* that to be conceptually certain it must be possible to say of *any given individual* that they are or *are not* within the class. On this basis, Stamp LJ rejected the idea that 'descendants of a common ancestor' could be conceptually certain and argued that the discretionary trust could only be valid if 'relatives' was defined as **next-of-kin**.

- Stamp LJ's reasoning seems determined to undermine the liberal implications of the decision in *McPhail v Doulton*. Applying his approach, there would be no real difference between the new test adopted in *McPhail v Doulton* and the previous complete list approach of *IRC v Broadway Cottages Trust [1955]* as every individual's membership of the class would have to be capable of being established.
- It is questionable whether this approach would be followed in the future, particularly as Lord Wilberforce's full expression of the test states that a trust 'does not fail simply because it is impossible to ascertain every member of the class'.

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Looking for extra marks?

The issue of certainty of objects for discretionary trusts is complex. If you want to do well in this area, there is no substitute for reading *McPhail v Doulton* and *Re Baden's Trusts (No 2)* and taking your own detailed notes. You should particularly focus on how well the Court of Appeal in *Re Baden's Trusts (No 2)* uses 'conceptual certainty' in its judgments. Once you have done this, you can deepen your understanding of some of the problems in this area by reading Emery's discussion of this issue at (1982) 98 LQR 551.

Can conceptual uncertainty be cured?

There is some debate over whether conceptual uncertainty can be cured by reference to the decision or opinion of the trustees or a third party.

Re Tuck's ST [1978] Ch 49

A trust was established to benefit future baronets on the condition that they were of the Jewish faith and married to a wife of 'Jewish blood', as determined by the Chief Rabbi. The court upheld the trust: any conceptual uncertainty regarding the conditions was cured by the power given to the Chief Rabbi.

While Denning LJ simply argued that reference to the trustees' or a third party's opinion may cure conceptual uncertainty, Eveleigh LJ's reasoning rested on the narrower ground that there was no conceptual uncertainty because the settlor was 'in effect saying that his definition of "Jewish faith" is *the same as the Chief Rabbi's definition*' (emphasis added) (a conceptually certain class).

Note: *Re Tuck's ST* addresses the validity of *conditions precedent*. It remains unclear whether:

1. the same approach would be adopted in respect of a *discretionary trust* with conceptually uncertain objects; and
2. whether the courts would adopt the broad approach of Denning LJ or the more restrictive approach of Eveleigh LJ.

Both approaches remain problematic. Whereas Denning LJ's approach would ensure the validity of many more discretionary trusts, it would also seem to empower individuals named by the settlor to cure conceptual uncertainty in circumstances where the court would otherwise declare the trust void. On the other hand,

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Eveleigh LJ's approach maintains the need for conceptual certainty but rests on a very fine factual distinction that many settlors will not appreciate (see Webb and Akkouh, *Trusts Law*, 5th edn (2017), 3.17). Compare the following examples.

EXAMPLE 2

1. Bradley leaves £10,000 in his will to be held on discretionary trust for 'the men and women who have given me pleasure over my long and happy life'. He adds, 'in the event of any doubt, my wife can choose who qualifies'.
2. Bradley leaves £10,000 in his will to be held on discretionary trust for 'those men and women whom my wife considers have given me pleasure over my long and happy life'.

In (1), the group is conceptually uncertain. Giving someone the ability to decide who comes within the class will not cure this uncertainty as there is no objective way to determine what Bradley meant.

However, in (2) there is no conceptual uncertainty as the class in question is not 'those who have given me pleasure' but 'those whom my wife considers have given me pleasure'. As membership is to be decided by Bradley's wife, there is no difficulty in understanding how the class is to be determined.

Administrative unworkability

A trust may be void if the class to benefit is so wide that the trust would be administratively unworkable, for instance Lord Wilberforce's example of a trust for all the residents of Greater London in *McPhail v Doulton*.

In *R v District Auditor, ex parte West Yorkshire Metropolitan County Council* (1986), a trust 'for the benefit of any or all or some of the inhabitants of the County of West Yorkshire' (some 2.5 million potential beneficiaries) was held to be void for administrative unworkability.

Note: administrative unworkability will also render a fiduciary power void because the fiduciary obligations of the holder require that the power is capable of being exercised in a responsible manner and that the selection of one person over another can be meaningfully justified. However, administrative unworkability will not affect the validity of a mere power (ie a power given to a non-fiduciary) (*Re Hay's Settlement Trusts [1982]*).

The effect of lack of certainty of objects

A trust which lacks certainty of objects will be void and return on resulting trust to the settlor or his or her estate.

Comparing discretionary trusts and fiduciary powers

As you have seen, following *McPhail v Doulton*, the test for certainty of objects for discretionary trusts and fiduciary powers is now the same. However, it is important to remember that there are still important differences.

p. 38 **The duties under the discretionary trust/fiduciary power**

Discretionary trusts

McPhail v Doulton establishes that trustees have the following duties:

- to survey the field to identify the width of the class; and
- to distribute the income from the trust.

Note: watch out for *non-exhaustive discretionary trusts* which expressly allow the trustees to accumulate the income. In such trusts, the trustees may delay distributing for some time but must still ultimately distribute at some point.

Fiduciary powers

The donee of a fiduciary power is *not* under a duty to distribute the property. However, under *Re Hay's ST* fiduciaries have the following duties:

- to consider periodically whether to exercise the power;
- to consider the range of possible objects (beneficiaries); and
- to consider the appropriateness of appointments made—ie they cannot pick at random or without reason.

Revision tip

If an arrangement refers to a ‘gift over in default of appointment’ or a direction that remaining money is to return to the settlor’s estate, this will be a fiduciary power, as the wording demonstrates that there is not a duty to distribute.

EXAMPLE 3

- Discretionary trust: ‘I leave £100,000 to my wife to be held on trust at her absolute and unfettered discretion for the employees of Brillington Engineering Co Ltd.’
- Fiduciary power: ‘To my trustees I leave £50,000 to share amongst those of my relatives who are most in need. In the event that all the money is not used up, any remainder will pass to my gardener, Ted.’

As there is a duty to distribute in a discretionary trust, there are no directions about what should be done with any remaining money. Compare this with the fiduciary power, where a beneficiary in default of appointment is indicated.

The rights of members of the class

Discretionary trusts

Members of the class are not beneficiaries until they are appointed to the trust—until that time they merely hold a *spes* (hope) of benefiting. This means that members of the class may challenge the decisions of the trustees but they *cannot* claim that they are entitled to be appointed, as this is at the absolute discretion of the trustees.

Decisions may be challenged on the basis that the trustees have:

- appointed outside the class;
- failed to consider their reasons for appointment; or
- acted in bad faith in making an appointment (eg appointing only to close friends within the class).

Note: if all the beneficiaries are *sui juris*, they may act together to wind up the trust under the rule in *Saunders v Vautier (1841)*, as they own the entire beneficial interest (see chapter 10).

Fiduciary powers

As with discretionary trusts, members of a class under a fiduciary power cannot claim to be entitled to be appointed. However, decisions may be challenged on the basis that the fiduciaries have:

- appointed outside the class;
- failed to carry out their fiduciary obligations under *Re Hay's ST*.

Unlike discretionary trusts, the court will not intervene to compel the fiduciaries to exercise their power. Furthermore, the objects of a fiduciary power cannot take advantage of the rule in *Saunders v Vautier (1841)* as the beneficial interest lies with the person entitled to the gift over *in default of appointment*.

Key cases

CASES	FACTS	PRINCIPLE
Hunter v Moss [1994] 1 WLR 452	An attempt to create a trust of 50 of the 950 shares owned by the trustee was upheld.	Trusts of part of an unascertained bulk of intangible property do not require segregation or specific identification to satisfy the certainty of subject matter requirement.
Knight v Knight (1840) 3 Beav 148	Concerned a will which included the statement 'I trust to the liberality of my successors to reward any others of my old servants and tenants according to their deserts'. The successor took the deceased's property absolutely.	Originating case for the three certainties requirement of intention, subject matter, and objects.
Lambe v Eames (1871) 6 Ch App 597	Concerned money left to a wife 'to be at her disposal in any way she may think best, for the benefit of herself and her family'. The wife took the property as a gift.	Emphasizes the difference between imperative words (which suggest that a trust is intended) and precatory words (which suggest a mere moral obligation).
p. 40 ↵ McPhail v Doulton [1971] AC 424	Concerned the validity of a discretionary trust established for employees, relatives, and dependants.	The certainty of objects requirement for discretionary trusts is whether it can be said with certainty that any given individual is or is not a member of the class.
Palmer v Simmonds (1854) 2 Drew 221	A gift of the 'bulk' of the testatrix's estate failed.	The vagueness of the wording meant that there was no certainty of subject matter.
Re Baden's Trusts (No 2) [1973] Ch 9	Concerned whether the groups 'relatives' and 'dependants' satisfied the certainty of objects test for discretionary trusts.	In order to satisfy the test set out in <i>McPhail v Doulton</i> , the groups to benefit must be conceptually certain. 'Conceptual certainty' refers to whether the group can be meaningfully defined (as opposed to meaning that all the beneficiaries can be identified).

3. The three certainties

CASES	FACTS	PRINCIPLE
Re London Wine Co [1986] PCC 121	An attempt to create a trust of part of an unascertained bulk of tangible property (cases of wine) failed.	Trusts of part of an unascertained bulk of tangible property must be segregated or specifically identified to satisfy the certainty of subject matter requirement.

Key debates

Topic	How defensible is the current approach to trusts of part of an unascertained bulk of intangible property?
Academic/author	Hayton/Worthington
Viewpoint	The current approach in <i>Hunter v Moss</i> raises problems in respect of legal principles and remedies in the event of a breach of trust.
Source	Compare Hayton (1994) 110 LQR 335 and Worthington (1999) JBL 1.
Topic	How can the complicated decisions on certainty of objects be unravelled?
Academic/author	Emery
Viewpoint	The reasoning of the different judges in <i>Re Baden's Trusts (No 2)</i> demonstrates that there is still some confusion around the meaning of conceptual certainty and evidential certainty.
Source	Emery (1982) 98 LQR 551.

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Exam questions

Problem question

Anna was the managing director of a multinational company. She died in 2012 and her will contains the following bequests:

1. £50,000 to my sister, Ruth, whom I trust will use the money to continue supporting her daughter, Joanna.
2. £150,000 to Alistair and Fraser, to be held on trust for any of my trusted work colleagues in any amount at their absolute and unfettered discretion.

3. My favourite jewels are to be held on trust for my beloved granddaughter, Lucy, until her twenty-first birthday.

Discuss the validity of these bequests.

See the Outline answers section in the end matter for help with this question.

Essay question

The current approach to certainty of objects in discretionary trusts creates more uncertainty than it resolves.

Discuss.

Online resources

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer <https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-3-outline-answers-to-essay-questions?options=showName> to the essay question
- Further reading <https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-3-further-reading?options=showName>
- Interactive key cases <https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-3-interactive-key-cases?options=showName>
- Looking for extra marks quiz <https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-3-looking-for-extra-marks?options=showName>
- Multiple choice questions <https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-3-multiple-choice-questions?options=showName>

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