Trusts & Equity
Fall Term 2022

Lecture Notes – No. 5

(b) Certainty Of Subject-Matter

The general rule is that the declaration of trust must relate to **specific property**, and that property must be **ascertainable** else the trust is void for uncertainty. Moreover, the beneficial interests in that property must themselves be certain.

Ascertainability and quantification:
The trust will be void where the trust property is divided by quantity and there are no specifics provided about which identifiable property is to go to a certain B.

> **There is no problem where the subject-matter of the trust is to be divided in some specific proportions between different beneficiaries but there is an uncertainty problem where the division is made in reference to a *specific quantity of assets*.** Thus, where the settlor declares a trust in relation to 20 out of 80 cases of wine, there can be no certainty of subject-matter as the transfer of title is prevented by the unascertainability of the goods in particular; ***Re London Wine Company*** **[1986] Palmer's CC 123; cb., p.202.**
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> But, conversely, a declaration of trust in relation to 50 of 950 shares was held to be valid in ***Hunter v Moss*** **[1994] 3 All ER 215; cb, p.203.**
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> [*Re London Wine Company* was preferred in ***Re Goldcorp*** **[1995] AC 74; cb, p.202,** by the Privy Council. It was held that the problem with *Hunter v Moss* is that the court equated *inter vivos* and testamentary gifts. However, whilst one might be able to Will 50 of 950 shares and all shares pass to the executor in any case for distribution, the settlor still retains equitable ownership of the remaining 900 shares in the *inter vivos* case and thus *Hunter v Moss* seems to have wrongly distinguished *Re London Wine Company*.]

'Anything Left':
Re Walker
(1925), 56 OLR 517 (CA); cb, p.211

Conventionally, one can either gift (with or without conditions) or trust – but not both. Thus, a gift with a gift-over clause is one or the other. Here, it was a gift – thus the trust seemingly intended over that part of the funds given but not yet used at the death of the widow is void. [The better way to produce such a result would have been for a gift to the wife for life (i.e. life-limited interest over income) with an absolute power to encroach on the capital, and a remainder interest to the remainderman.

Beneficiary's Entitlement:

Re Golay's Will Trusts
[1965] 1 WLR 969 (Ch.); cb, p.213

Is there sufficient certainty where S settled a trust to pay "a reasonable income" to B?

The objection taken to the settlement was that S failed to provide guidance as to how the reasonableness of the income was to be determined. Thus, if this was simply a discretionary determination by the trustees, there would be no problem. The question faced by the Court was whether it could determine reasonableness on some articulable standard that would allow it to supervise the trust satisfactorily.

Per Ungoed-Thomas J:

> … the yardstick indicated by the testator is not what he or some other specified person subjectively considers to be reasonable but what he identifies objectively as "reasonable income." **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 my view the testator intended by "reasonable income" the yardstick which the court could and would apply in quantifying the amount so that the direction in the will is not in my view defeated by uncertainty.**

Thus, a concept such as reasonableness may be elastic, but it lends itself to supervision of the court when construed objectively.

C. Certainty Of Objects

Re Gulbenkian's Settlement Trusts
[1970] AC 508 (HL)

At issue was a power given to the trustees as set out in a rather complex trust settlement:

> ... at their absolute discretion pay all or any part of the income of the property hereby settled and the investments for the time being representing the same (hereinafter called the trust fund) to or apply the same for the maintenance and personal support or benefit of all or any one or more to the exclusion of the other or others of the following persons.

Among those persons were

> ... any person or persons in whose house or apartments or in whose company or under whose care or control or by or with whom the said Nubar Sarkis Gulbenkian [the beneficiary] may from time to time be employed or residing.

The House of Lords maintained the difference between an obligation and a mere power; the former must be satisfied, the latter carries no obligation. In defining the class of objects of a

power, the trustee or donee need only be able to say whether a particular individual is within the class of objects. However, when a trustee is exercising a power, he or she must take care not to act capriciously.

Lord Reid:

> The sole question in this appeal is whether this class of potential beneficiaries is so uncertain that these provisions cannot be operated by the trustees. It is not disputed that if the description of the class which I have quoted is too uncertain then the whole provision fails even although the other potential beneficiaries are easily ascertainable.
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> This clause does not make sense as it stands... [b]ut the client must not be penalised for his lawyer's slovenly drafting. Under modern conditions it may be necessary to relax older and stricter standards. If I adopt methods of construction appropriate for commercial documents and documents inter rusticos I must consider whether underlying the words used any reasonably clear intention can be discerned...
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> One argument, as I understand it, is that because this is admitted to be a mere power, it really imposes no duties on them at all. I find that difficult to understand. **It is a power given not to the individuals who happen also to be trustees but to the trustees as such** so that new trustees duly assumed or appointed can exercise it. In my view it must follow that the trustees are to act in their fiduciary capacity. They are given an absolute discretion. So if they decide in good faith at appropriate times to give none of the income to any of the beneficiaries the court cannot pronounce their reasons to be bad. And similarly if they decide to give some or all of the income to a particular beneficiary the court will not review their decision... But **their "absolute discretion" must, I think, be subject to two conditions.** It may be true that when a mere power is given to an individual he is under no duty to exercise it or even to consider whether he should exercise it. **But when a power is given to trustees as such, it appears to me that the situation must be different. A settlor or testator who entrusts a power to his trustees must be relying on them in their fiduciary capacity so they cannot simply push aside the power and refuse to consider whether it ought in their judgment to be exercised. And they cannot give money to a person who is not within the classes of persons designated by the settlor: the construction of the power is for the court.**
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> **If the classes of beneficiaries are not defined with sufficient particularity to enable the court to determine whether a particular person is or is not, on the facts at a particular time, within one of the classes of beneficiaries, then the power must be bad for uncertainty. If the donee of the power (whether or not he has any duty) desires to exercise it in favour of a particular person it must be possible to determine whether that particular person is or is not within the class of objects of the power.** And it must be possible to determine the validity of the power immediately it comes into operation. It cannot be valid if the person whom the donee happens to choose is clearly within the objects but void if it is doubtful whether that is so. So if one can reasonably envisage cases where the court could not determine the question the power must be bad for uncertainty. But it is not bad merely because such determination may be difficult in a particular case. The respondents have inserted in their case at the request of the trustees a statement that in the view of the trustees "it must be unlikely that they would in practice be able

to exercise the said power or discretion except after obtaining a decision of the court whether any particular suggested object thereof did or did not fall within the said description." That in itself is not sufficient to warrant a decision that the power fails for uncertainty. **It may be that there is a class of case where, although the description of a class of beneficiaries is clear enough, any attempt to apply it to the facts would lead to such administrative difficulties that it would for that reason be held to be invalid.**

Lord Upjohn:

It is curious that there is no long line of decided cases as to what is the proper test to apply when considering the validity of a mere power when the class of possible appointees is or may be incapable of ascertainment, but there is a body of recent authority to the effect that the rule is, that provided there is a valid gift over or trust in default of appointment... a mere or bare power of appointment among a class is valid if you can with certainty say whether any given individual is or is not a member of the class; you do not have to be able to ascertain every member of the class.

... So I propose to make some general observations upon this matter.

If a donor (be he a settlor or testator) directs trustees to make some specified provision for "John Smith," then to give legal effect to that provision it must be possible to identify "John Smith." If the donor knows three John Smiths then by the most elementary principles of law neither the trustees nor the court in their place can give effect to that provision; neither the trustees nor the court can guess at it. It must fail for uncertainty unless of course admissible evidence is available to point to a particular John Smith as the object of the donor's bounty.

Then, taking it one stage further, suppose the donor directs that a fund or the income of a fund should be equally divided between members of a class. That class must be as defined as the individual; the court cannot guess at it. Suppose the donor directs that a fund be divided equally between "my old friends," then unless there is some admissible evidence that the donor has given some special "dictionary" meaning to that phrase which enables the trustees to identify the class with sufficient certainty, it is plainly bad as being too uncertain. Suppose that there appeared before the trustees (or the court) two or three individuals who plainly satisfied the test of being among "my old friends," the trustees could not consistently with the donor's intentions accept them as claiming the whole or any defined part of the fund. They cannot claim the whole fund for they can show no title to it unless they prove they are the only members of the class, which of course they cannot do, and so, too, by parity of reasoning they cannot claim any defined part of the fund and there is no authority in the trustees or the court to make any distribution among a smaller class than that pointed out by the donor. The principle is, in my opinion, that the donor must make his intentions sufficiently plain as to the objects of his trust and the court cannot give effect to it by misinterpreting his intentions by dividing the fund merely among those present. **Secondly, and perhaps it is the more hallowed principle, the Court of Chancery, which acts in default of trustees, must know with sufficient certainty the objects of the beneficence of the donor so as to execute the trust.** Then, suppose the donor does not direct an equal division of his property among the class but gives a power of selection to his trustees among the class; exactly the same principles must apply. The trustees have a duty to select the

donees of the donor's bounty from among the class designated by the donor; he has not entrusted them with any power to select the donees merely from among known claimants who are within the class, for that is constituting a narrower class and the donor has given them no power to do this.

But when mere or bare powers are conferred upon donees of the power (whether trustees or others) the matter is quite different. As I have already pointed out, the trustees have no duty to exercise it in the sense that they cannot be controlled in any way. If they fail to exercise it then those entitled in default of its exercise are entitled to the fund. Perhaps the contrast may be put forcibly in this way: in the first case it is a mere power to distribute with a gift over in default; in the second case it is a trust todistribute among the class defined by the donor with merely a power of selection within that class. The result is in the first case even if the class of appointee among whom the donees of the power may appoint is clear and ascertained and they are all of full age and sui juris, nevertheless they cannot compel the donees of the power to exercise it in their collective favour. If, however, it is a trust power, then those entitled are entitled (if they are all of full age and sui juris) to compel the trustees to pay the fund over to them, unless the fund is income and the trustees have power to accumulate for the future.

Re Hay's Settlement Trusts
[1982] 1 W.L.R. 202 (Ch)

Megarry J:

…. Clause 2 reads as follows:

> 'PENDING the execution of an effective and irrevocable appointment of the whole of the capital and income of the Trust Fund and so far as any appointment thereof shall not for the time being and from time to time extend the trustees shall hold the Trust Fund upon trust until the lastest [sic] date for the vesting of the trust funds under the last preceding Clause hereof to pay the income of so much of the Trust Fund as is for the time being unappointed to or for the benefit of any person or persons whatsoever (save as hereinafter provided) whether or not related to Lady Isobel Rose Hay or to any Charity in such manner and in such shares and proportions as the trustees shall think fit.'

There are only two other clauses in the deed of appointment. Clause 3 prohibits any 'appointment under any power' in the deed, or 'under any other power exercisable by the trustees in relation to the Trust Fund', to be made in favour of the settlor, any husband of hers or any existing or former trustee of the settlement. In view of the words 'save as hereinafter provided' in cl 2, I think that the words 'any other power' in cl 3 must be read as including any discretion under any trust, and so as applying to cl 2.

Clause 4 reads as follows:

> 'SUBJECT as aforesaid and from and after the date for vesting provided by Clause 2 hereof the trustees shall stand possessed of the capital of the Trust Fund upon the trusts in default of appointment declared in Clause 4 of the Settlement but subject to the proviso for hotchpot therein contained.'
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> …

The starting point must be to consider whether the power created by the first limb of cl 4 of the settlement is valid. The rival arguments were presented by counsel for the defendants in his primary contention, and by counsel for the Attorney General, in favour of validity, and by counsel for the defendants, in his alternative contention, against validity. The essential point is whether a power for trustees to appoint to anyone in the world except a handful of specified persons is valid. Such a power will be perfectly valid if given to a person who is not in a fiduciary position: the difficulty arises when it is given to trustees, for they are under certain fiduciary duties in relation to the power, and to a limited degree they are subject to the control of the courts. At the centre of the dispute there are *Re Manisty's Settlement Trusts* [1973] 2 All ER 1203, [1974] Ch 17 (in which Templeman J differed from part of what was said in the Court of Appeal in *Blausten v Inland Revenue Comrs* [1972] 1 All ER 41, [1972] Ch 256); *McPhail v Doulton* [1970] 2 All ER 228, [1971] AC 424 (which I shall call *Re Baden (No 1))*; and *Re Baden's Deed Trusts (No 2)* [1972] 2 All ER 1304, [1973] Ch 9, which I shall call *Re Baden (No 2)*. Counsel for the defendants, I may say, strongly contended that *Re Manisty's Settlement* was wrongly decided.

In *Re Manisty's Settlement* a settlement gave trustees a discretionary power to apply the trust fund for the benefit of a small class of the settlor's near relations, save that any member of a smaller 'excepted class' was to be excluded from the class of beneficiaries. The trustees were also given power at their absolute discretion to declare that any person, corporation or charity (except a member of the excepted class or a trustee) should be included in the class of beneficiaries. Templeman J held that this power to extend the class of beneficiaries was valid. In *Blausten v Inland Revenue Comrs* which had been decided some eighteen months earlier, the settlement created a discretionary trust of income for members of a 'specified class' and a power to pay or apply capital to or for the benefit of members of that class, or to appoint capital to be held on trust for them. The settlement also gave the trustees power 'with the previous consent in writing of the settlor' to appoint any other person or persons (except the settlor) to be included in the 'specified class'. The Court of Appeal decided the case on a point of construction; but Buckley LJ ([1972] 1 All ER 41 at 49, [1972] Ch 256 at 271) also considered a contention that the trustees' power to add to the 'specified class' was so wide that it was bad for uncertainty, since the power would enable anyone in the world save the settlor to be included. He rejected this contention on the ground that the settlor's prior written consent was requisite to any addition to the 'specified class'; but for this, it seems plain that he would have held the power void for uncertainty. Orr LJ simply concurred, but Salmon LJ expressly confined himself to the point of construction, and said nothing about the power to add to the 'specified class'. In *Re Manisty's Settlement* [1973] 2 All ER 1203 at 1213, [1974] Ch 17 at 29, Templeman J rejected the view of Buckley LJ on this point on the ground that *Re Gestetner (deceased)* [1953] 1 All ER 1150, [1953] Ch 672, *Re Gulbenkian's Settlement Trusts* [1968] 3 All ER 785, [1970] AC 508 and the two *Baden* cases did not appear to have been fully explored in the *Blausten* case,

and the case did not involve any final pronouncement on the point. In general, I respectfully agree with Templeman J.

I propose to approach the matter by stages. First, it is plain that if a power of appointment is given to a person who is not in a fiduciary position, there is nothing in the width of the power which invalidates it per se. The power may be a special power with a large class of persons as objects; the power may be what is called a 'hybrid' power, or an 'intermediate' power, authorising appointment to anyone save a specified number or class of persons; or the power may be a general power. Whichever it is, there is nothing in the number of persons to whom an appointment may be made which will invalidate it. The difficulty comes when the power is given to trustees as such, in that the number of objects may interact with the fiduciary duties of the trustees and their control by the court. The argument of counsel for the defendants carried him to the extent of asserting that no valid intermediate or general power could be vested in trustees.

That brings me to the second point, namely, the extent of the fiduciary obligaitons of trustees who have a mere power vested in them, and how far the court exercises control over them in relation to that power. In the case of a trust, of course, the trustee is bound to execute it, and if he does not, the court will see to its execution. A mere power is very different. Normally the trustee is not bound to exercise it, and the court will not compel him to do so. That, however, does not mean that he can simply fold his hands and ignore it, for normally he must from time to time consider whether or not to exercise the power, and the court may direct him to do this.

When the does exercise the power, he must, of course (as in the case of all trusts and powers) confine himself to what is authorised, and not go beyond it. But that is not the only restriction. Whereas a person who is not in a fiduciary position is free to exercise the power in any way that he wishes, unhampered by any fiduciary duties, a trustee to whom, as such, a power is given is bound by the duties of his office in exercising that power to do so in a responsible manner according to its purpose. It is not enough for him to refrain from acting capriciously; he must do more. He must 'make such a survey of the range of objects or possible beneficiaries' as will enable him to carry out his fiduciary duty. He must find out 'the permissible area of selection and then consider responsibly, in individual cases, whether a contemplated beneficiary was within the power and whether, in relation to the possible claimants, a particular grant was appropriate': per Lord Wilberforce in *Re Baden (No 1)* [1970] 2 All ER 228 at 240, 247, [1971] AC 424 at 449, 457.

I pause there. The summary of the law that I have set out above is taken from a variety of sources, principally *Re Gestetner (deceased)* [1953] 1 All ER 1150, [1953] Ch 672, *Re Gulbenkian's Settlement* [1968] 3 All ER 785 at 787, 592-594, [1970] AC 508 at 518, 524-525 and *Re Baden (No 1)* [1970] 2 All ER 228 at 246, [1971] AC 424 at 456. The last proposition, relating to the survey and consideration, at first sight gives rise to some difficulty. It is now well settled that no mere power is invalidated by it being impossible to ascertain every object of the power; provided the language is clear enough to make it possible to say whether any given individual is an object of the power, it need not be possible to compile a complete list of every

object: see *Re Gestetner (deceased)* [1953] 1 All ER 1150 at 1155, [1953] Ch 672 at 688; *Re Gulbenkian's Settlement* [1968] 3 All ER 785, [1970] AC 508; *Re Baden (No 1)* [1970] 2 All ER 228, [1971] AC 424. As Harman J said in *Re Gestetner (deceased)* [1953] 1 All ER 1150 at 1056, [1953] Ch 672 at 688, the trustees need not 'worry their heads to survey the world from China to Peru, when there are perfectly good objects of the class in England'.

That brings me to the third point. How is the duty of making a responsible survey and selection to be carried out in the absence of any complete list of objects? This queston was considered by the Court of Appeal in *Re Baden (No 2)*. That case was concerned with what, after some divergences of judicial opinion, was held to be a discretionary trust and not a mere power; but plainly the requirements for a mere power cannot be more stringent than those for a discretionary trust. The duty, I think, may be expressed along the following lines: I venture a modest degree of amplification and exegesis of what was said in *Re Baden (No 2)* [1972] 2 All ER 1304 at 1310, 1315, [1973] Ch 9 at 20, 27. The trustee must not simply proceed to exercise the power in favour of such of the objects as happen to be at hand or claim his attention. He must first consider what persons or classes of persons are objects of the power within the definition in the settlement or will. In doing this, there is no need to compile a complete list of the objects, or even to make an accurate assessment of the number of them: what is needed is an appreciation of the width of the field, and thus whether a selection is to be made merely from a dozen or, instead, from thousands or millions. (Incidentally, in order to avoid the relevant passage in the judgment of Sachs LJ being self-contradictory I think a comma needs deletion: the words 'it refers to something quite different, to a need to provide ... ' should read 'it refers to something quite different to a need to provide ... ', or, preferably, 'it refers to something quite different from a need to provide ... ': see [1972] 2 All ER 1304 at 1310, [1973] Ch 9 at 20). Only when the trustee has applied his mind to 'the size of the problem' should he then consider in individual cases whether, in relation to other possible claimants, a particular grant is appropriate. In doing this, no doubt he should not prefer the undeserving to the deserving; but he is not required to make an exact calculation whether, as between deserving claimants, A is more deserving than B: see *Re Gestetner (deceased)* [1953] 1 All ER 1150 at 1155, [1953] Ch 672 at 688, approved in *Re Baden (No 1)* [1970] 2 All ER 228 at 243-244, [1971] AC 424 at 453.

If I am right in these views, the duties of a trustee which are specific to a mere power seem to be threefold. Apart from the obvious duty of obeying the trust instrument, and in particular of making no appointment that is not authorised by it, the trustee must, first, consider periodically whether or not he should exercise the power; second, consider the range of objects of the power; and third, consider the appropriateness of individual appointments. I do not assert that this list is exhaustive; but as the authorities stand it seems to me to include the essentials, so far as relevant to the case before me.

…

The second ground of invalidity if there is no requirement for the settlor's consent seems to be that the power is so wide that it would be impossible for the trustees to

consider in any sensible manner how to exercise it, and also impossible for the court to say whether or not they were properly exercising it. With respect, I do not see how that follows. If I have correctly stated the extent of the duties of trustees in whom a mere power is vested, I do not see what there is to prevent the trustees from performing these duties. It must be remembered that Buckley LJ, though speaking after *Re Gulbenkian's Settlement* and *Re Baden (No 1)* had been decided, lacked the advantage of considering *Re Baden (No 2)*, which was not decided until some five months later. He thus did not have before him the explanation in that case of how the trustees should make a survey and consider individual appointments in cases where no complete list of objects could be compiled. I also have in mind that the settlor in the present case is still alive, though I do not rest my decision on that.

From what I have said it will be seen that I cannot see any ground on which the power in question can be said to be void. Certainly it is not void for linguistic or semantic uncertainty; there is no room for doubt in the definition of those who are or are not objects of the power. Nor can I see that the power is administratively unworkable. The words of Lord Wilberforce in *Re Baden (No 1)* [1970] 2 All ER 228 at 247, [1971] AC 424 at 457 are directed to discretionary trusts, not powers. Nor do I think that the power is void as being capricious. **In *Re Manisty's Settlement* [1973] 2 All ER 1203 at 1211, [1974] Ch 17 at 27 Templeman J appears to be suggesting that a power to benefit 'residents in Greater London' is void as being capricious 'because the terms of the power negative any sensible intention on the part of the settlor'. In saying that, I do not think that the judge had in mind a case in which the settlor was, for instance, a former chairman of the Greater London Council, as subsequent words of his on that page indicate. In any case, as he pointed out earlier, this consideration does not apply to intermediate powers, where no class which could be regarded as capricious has been laid down. Nor do I see how the power in the present case could be invalidated as being too vague, a possible ground of invalidity considered in *Re Manisty's Settlement* [1973] 2 All ER 1203 at 1208, [1974] Ch 17 at 24. Of course, if there is some real vice in a power, and there are real problems of administration or execution, the court may have to hold the power invalid: but I think that the court should be slow to do this. Dispositions ought if possible to be upheld, and the court ought not to be astute to find grounds on which a power can be invalidated. Naturally, if it is shown that a power offends against some rule of law or equity, then it will be held to be void: but a power should not be held void on a peradventure. In my judgment, the power conferred by cl 4 of the settlement is valid.**

SUMMARY RE CERTAINTY OF OBJECTS

Fixed Trusts

1) Where there is uncertainty as to objects (Bs), a resulting trust arises.

   This is not the same as the 'beneficiary principle' (every non-charitable trust must have a human beneficiary) described in *Re Astor's Settlements* [1952] Ch 534, though the policy rationale is the same. Similarly, *Leahy v AG for NSW* [1959] AC 457 (where the trust has certain objects, the court can enforce it. Where the trust is charitable, the AG can enforce it. Where the object is not charitable and the B not human, no one can enforce it including the court).

2) Where the trust is a fixed trust, all beneficiaries must be ascertainable or can be ascertainable when the time comes for distribution of the property or income.

Discretionary Trusts

1) For a discretionary trust, the test for ascertainability is the same test as is applied for discretionary trusts; ***McPhail v Doulton*** **[(Re Baden's Deed Trusts (No 1)] [1971] AC 424.**

2) The class as specified must be conceptually certain, thus *dependants* is permissible, but *relatives* somewhat suspect; ***Re Baden's Deed Trusts (No.2)*** **[1973] Ch 9**. The court can look to outside opinion as provided for in the instrument, i.e. the Chief Rabbi delegated to decide who is Jewish under the terms of the trust; *Re Tuck* [1978] Ch 49.

3) **There is some authority that the class must be administratively workable**; see *McPhail v Doulton* ("all the residents of London" as an example of one that would not be OK). The trustee is under no obligation to ascertain the class to list certainty, but cannot merely choose whomever comes to hand first - "what is required is an appreciation of the width of the field, whether a selection is to be made from a dozen, or instead, from thousands or millions…"; *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (re mere power to appoint anyone in the world except a small class). However, and notwithstanding the modern approach not to interfere with S's wishes and a well drafted discretionary trust, in *R v District Auditor, ex parte west Yorkshire MCC* [1986] RVR 24 ("all or some of the inhabitants or West Yorkshire"), the trust was void as the court could not frame an order that would fit within the terms of the trust (the trust was also void as a pure purpose trust).

4) **The trustees of a discretionary power may not act capriciously or irrationally**, for example exercising the power based on the fact that the object was tall or a resident of Toronto. Thus, the power itself cannot be capricious in the sense that an exercise within the terms of the power would necessarily be capricious by definition - "a capricious power negatives a sensible consideration by the trustees of the exercise of the power" per Lord Templeman in *Re Manisty's Settlement* [1974] Ch. 17.

THE BENEFICIARY PRINCIPLE AND PRIVATE PURPOSE TRUSTS

A general formulation of the 'beneficiary principle' is as follows:

> **For there to be a valid trust there must be beneficiary (corporate or human) in whose favour performance of the trust may be decreed unless the trust falls within a group of exceptional anomalous cases when it is valid but unenforceable so that the trustee may perform it if they wish.**

Morice v Bishop of Durham (1804) 9 Ves 399, 405 is commonly cited as authority for the proposition: '… [e]very other [than charitable] trust must have a definite object. There must be somebody in whose favour the court can decree performance.'

Non-compliance with the beneficiary principle will generally invalidate a trust obligation. **However, in Ontario, the court enjoys a statutory jurisdiction to recognize the failed trust as a power (and thus the trustee may utilize the power free from fear of liability for breach of trust) where the disposition is conceptually certain and specific enough to fall within the statute.**

Illustrations:

Re Astor's Settlement Trusts
[1952] Ch 534

Here the settlor settled shares in the company which publishes The Observer newspaper, income to be used for protection of newspapers from combine control, preservation of journalistic integrity, etc. The trust failed as it was neither charitable nor did it have human beneficiaries. It was for general purposes, not people, and thus uncontrollable by the court as too nebulous.

Per Roxburgh J:

> Let me, then, sum up the position so far. On the one side, there are LORD PARKER'S two propositions with which I began. These were not new, but merely re-echoed what SIR WILLIAM GRANT, M.R., had said in Morice v. Bishop of Durham as long ago as 1804: "There must be somebody, in whose favour the court can decree performance". The position was recently re-stated by HARMAN, J., in Re Wood where he said ([1949] 1 All ER 1101): "a gift on trust must have a cestui que trust", and this seems to be in accord with principle. On the other side is a group of cases relating to horses and dogs, graves and monuments—matters arising under wills and intimately connected with the deceased—in which the courts have found means of escape from these general propositions, and also Re Thompson and Re Price which I have endeavoured to explain. Re Price belongs to another field. The rest may, I think, properly be regarded as anomalous and exceptional and in no way destructive of the proposition which traces descent from or through SIR WILLIAM GRANT, M.R., through LORD PARKER OF WADDINGTON, to HARMAN, J. Perhaps the late SIR ARTHUR UNDERHILL was right in suggesting that they may be concessions to human weakness or sentiment: see UNDERHILL'S LAW OF TRUSTS AND TRUSTEES, 8th ed., p. 79. **They cannot, in my judgment, of**

> **themselves (and no other justification has been suggested to me) justify the conclusion that a court of equity will recognise as an equitable obligation affecting the income of large funds in the hands of trustees a direction to apply it in furtherance of enumerated non-charitable purposes in a manner which no court or department can control or enforce. I hold that the trusts here in question are void** on the first of the grounds submitted by counsel for the trustees of the settlement of 1951 and counsel for the Attorney-General.

Re Shaw
[1957] 1 WLR 729

[This case illustrates well the defining difference between invalid *private purpose trusts* and valid *public purpose trusts* (or more conventionally, *charitable trusts*): public benefit.]

George Bernard Shaw's will gave funds in trust "(i) to ascertain by inquiry how much time could be saved by persons who speak and write the English language, by the substitution for the present English alphabet of a proposed British alphabet containing at least forty letters; to show the extent of the time and labour wasted by the use of the present alphabet; and, if possible, to show the loss of time in terms of loss of money; (ii) to transliterate one of the testator's plays into the proposed British alphabet; to advertise and publish the transliteration with the original lettering opposite the transliteration, page by page; and to present copies thereof to public libraries, so as to persuade the government or the public to adopt the proposed alphabet."

It was held that the trust was invalid as charitable and not an exception to the beneficiary rule - the trusts were not within the category of charitable trusts for other purposes beneficial to the community, because the object of the research set out by the testator was to convince the public that the new alphabet would be beneficial, and, analogously to the cases of trusts for political purposes advocating a change in the law of the land, the court was not in a position to judge whether the adoption of the new alphabet in fact would be beneficial.

Re Endacott
[1960] Ch 232

A testator gave by will his residuary estate "to North Tawton Devon Parish Council for the purpose of providing some useful memorial to myself."

It was held that the gift was not a good charitable gift and failed for uncertainty on the following grounds: (i) the words "for the purpose of providing some useful memorial to myself" were not merely expository, but were intended to impose an obligation in the nature of a trust, so that the gift was not an out and out gift to the council; (ii) though the purpose of the intended trust was to create a memorial to the testator himself, yet it was to be one that was useful and would serve a public purpose of some kind; but, as the purpose of utility so expressed was not synonymous with the gift's being simply for the benefit of the inhabitants of the parish, it was not within the line of authority by which gifts for such benefit had been held to be charitable; (iii) the gift was of too wide and uncertain

a nature to fall within the anomalous class of cases in which trusts, although not charitable, were upheld as being of a public character.

Some anomalous exceptions creating allowable powers:

- Re Dean (1889) 41 Ch D 552: a trust for the maintenance of the horses and hounds of T is valid.

- Re Hooper [1932] 1 Ch 38: a trust for the maintenance of funeral monuments is valid.

Courts will not add to these unprincipled categories.

'Apparent Purpose Trusts'

Sometimes the beneficial class is set out in the instrument in a manner that seems an invalid purpose trust, but can be construed in a manner so as to reveal a certain class of beneficiaries.

Re Denley
[1969] 1 Ch 373

Here land was to be maintained and used for the purposes of a recreation or sports ground primarily for the benefit of "the employees of the company" and, secondarily, for the benefit of "such other person or persons, if any, as the trustees may allow to use the same"; and if at any time the number of employees subscribing should be "less than seventy-five per cent of the total number of employees at any given time" or if the land should at any time cease to be required or to be used by the employees as a sports ground, it was to be conveyed to the general hospital at Cheltenham.

It was held, distinguishing *Astor*, that this was not an invalid purpose trust but a valid trust - where a trust, though expressed as a trust for a purpose that was not in law a charitable purpose, was directly or indirectly for the benefit of individuals, it was not invalid for the absence of certainty of objects where the class of beneficiaries ("the employees of the company") was sufficiently ascertainable. The trustees held a trust obligation together with a valid power to extend the beneficial class (persons other than "the employees of the company").

Statutory Conversion of Specific Purpose Trusts into Simple Powers

Under provincial legislation many of the problems are avoided by converting a specific purpose trust into a simple power, which then would be applied by the donee of the power in accordance with the standard rules respecting certainty of objects.

The Perpetuities Act, RSO 1990, c.P.9
s.16(1)

> Specific non-charitable trusts
> 16.--(1) A trust **for a specific non-charitable purpose** that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital, as the case may be, and, unless the trust is created for an illegal purpose or a purpose contrary to public policy, the trust is valid so long as and to the extent that it is exercised either by the original trustee or the trustee's successor, within a period of twenty-one years, despite the fact that the limitation creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period, but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the limitation to be void if the court is of opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.

Re Russell Estate
[1977] 6 WWR 273 (Alta. SCTD)

Per Stevenson J.:

> It is interesting to note that in Re Shaw, [1957] 1 All E.R. 745, Harman, J., faced with a purpose trust, which was within the perpetuity, expressed the wish that he could treat George Bernard Shaw's trust for the creation of a new alphabet as a power citing the Restatement of Trusts. Indeed, in that case, by a compromise this result was achieved with the concurrence of all parties (In Re Shaw, [1958] 1 All E.R. 245).
>
> **The legislation appears to me to equate "specific purpose trusts" with other recognized anomalous purpose trusts which have been permitted to operate as powers.**
>
> Does this gift come within the remedial section? An obvious difficulty is in the use of the term "specific". Two choices appear to be open; to define the term as being the opposite of "general" or to define it as "precise or certain". While the former interpretation may be applicable, there is nothing in the section which does away with the recognized requirement that the objects of a power must be certain. **A gift in order to be protected by the section must be certain. In the case of a charitable trust the Court is able to supply certainty by its scheme making power. No authority was suggested to me which would enable the Court to settle a scheme for a power. I am also mindful of the fact that the term "specific" is ordinarily to be found defined as "made definite" or "precise"; see, e.g., 39A Words and Phrases 398. I note in discussing**

purpose trusts that Scott sees a requirement that it be definite. (2 Scott on Trusts, Third Edition, p. 937).

Here the purposes of the power were held insufficiently specific given the various goals of the Society. It seems a rather harsh application of the test which muddies specificity of intent with conceptual certainty of a class of objects.

Angus v The Corporation of the Municipality of Port Hope
2016 ONSC 4343 (S.C.J.)

Here a trust failed based on perpetuities but was converted into a power based on s.16 of the Perpetuities Act. J.R. McCarthy J. held:

> [107] In Ontario, s. 16 or the Perpetuities Act both affirms the legality of specific non-charitable purpose trusts and provides a mechanism by which that variety of trust can be made to comply with the rule against perpetuities. The section directs that such a trust be construed as a power to appoint the income or the capital within the period of twenty-one years. By virtue of s. 16(2) of the Perpetuities Act, the unexpended income and capital of a non-charitable purpose trust devolves to "the person or persons, or the person or person's successors, who would have been entitled to the property comprised in the trust if the trust had been invalid from the time of its creation". In my view, this indicates that the Legislature contemplated that a specific non-charitable purpose trust could be validated, but validated in a limited way so that the specific purpose of the trust may be respected but only during a time period beyond which the rule against perpetuities would be offended.
>
> [108] The power to appoint income or capital, as conferred by s. 16, does not empower a trustee to act as he or she wishes in appointing the income. First, by virtue of s. 11 of the Perpetuities Act, a power of appointment shall be treated as a special power unless the two criteria set out in that section apply, which they do not. Whereas a general power of appointment authorizes the donee to give the donor's property to any person with no restrictions on the power whatsoever, a special appointment restricts the class by listing those who are potential appointees by describing their traits (Gillese, The Law of Trusts, at pp. 24-26). Schedule 8 clearly describes the traits of the appointees of the trust property.
>
> [109] Second, there is nothing in s. 16 of the Perpetuities Act which serves to relieve a trustee from adhering to the document under which he or she holds the trust property. The non-charitable purpose trust is to be "construed" as a power to appoint. The word "construe" means to be interpreted in a particular way. I do not read the section to mean that there should be any derogation from the principles of trust law.
>
> [110] Third, I note that ss. 16(1) and (2) refer to the specific non-charitable trust as a "trust" immediately following and in spite of the direction to construe such an arrangement as a "power to appoint". In the present case, had the Respondent Municipality been uncertain about its role under such an arrangement or about the manner in which it was to appoint the income, it

would have been entirely justified in applying to the court for directions on the subject in the manner of any similarly placed trustee.

[111] I find that the trust is saved by s. 16(1) of the Perpetuities Act. The powers within it have been exercised by the trustee within twenty-one years of its constitution. I interpret the term “exercise” to mean that it has been acted upon: that some aspect of the trust has been carried out or followed. As well, the trust was not created for an illegal purpose; its purpose is not contrary to public policy.