Trusts & Equity – Law 463
Fall Term 2024

Lecture Notes No. 7

IV. THE CREATION OF AN EXPRESS TRUST: 'THE THREE CERTAINTIES'

(c) Certainty Of Objects

McPhail v Doulton; Re Baden (No 1)
[1970] 2 All ER 228 (H.L.); cb, p.220

The settlor settled a trust that would provide benefits to employees of a company which he owned. It was argued that the trust was invalid in part for uncertainty of objects. The objection arise for the fact that the jurisprudence established that a test requiring all members of a class must be comprehensively identified for a class of objects to be valid. Here the House of Lords held that the old test was impractical, and that all that was required was that the trustee identify a particular person as being a member of the class both for the validity of mere powers and trusts.

The trust provided:

> **9. (a) The trustees shall apply the net income of the fund in making at their absolute discretion grants to or for the benefit of any of the officers and employees or ex-officers or ex-employees of the company or to any relatives or dependants of any such persons in such amounts at such times and on such conditions (if any) as they think fit.**
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> (b) The trustees shall not be bound to exhaust the income of any year or other period in making such grants . . . and any income not so applied shall be ... [placed in a bank or invested].
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> (c) The trustees may realise any investments representing accumulations of income and apply the proceeds as though the same were income of the fund and may also ... at any time prior to the liquidation of the fund realise any other part of the capital of the fund ... in order to provide benefits for which the current income of the fund is insufficient.

Most of the case report deals with the reluctance of the House of Lords to overturn the decision in *Inland Revenue Comrs v Broadway Cottages Trust, Inland Revenue Comrs v Sunnyland Trust* [1954] 3 All ER 120 (C.A.) requiring "list

certainty". Beyond that reluctance, it is clear that the case rests on pragmatism and the need that allows a trustee to appoint property without the need for extravagant efforts to detail all members of a class.

Lord Wilberforce:

> So I come to *Inland Revenue Comrs v Broadway Cottages Trust*. This was certainly a case of trust, and it proceeded on the basis of an admission, in the words of the judgment, 'that the class of "beneficiaries" is incapable of ascertainment'. In addition to the discretionary trust of income, there was a trust of capital for all the beneficiaries living or existing at the terminal date. This necessarily involved equal division and it seems to have been accepted that it was void for uncertainty since there cannot be equal division among a class unless all the members of the class are known. The Court of Appeal applied this proposition to the discretionary trust of income, on the basis that execution by the court was only possible on the same basis of equal division. They rejected the argument that the trust could be executed by changing the trusteeship, and found the relations cases of no assistance as being in a class by themselves. The court could not create an arbitrarily restricted trust to take effect in default of distribution by the trustees. Finally they rejected the submission that the trust could take effect as a power; a valid power could not be spelt out of an invalid trust.
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> My Lords, it will have become apparent that there is much in this which I find out of line with principle and authority but, before I come to a conclusion on it, I must examine the decision of this House in *Re Gulbenkian's Settlement Trusts* on which the appellants placed much reliance as amounting to an endorsement of the *Broadway Cottages* case. But is this really so? That case was concerned with a power of appointment coupled with a gift over in default of appointment. The possible objects of the power were numerous and were defined in such wide terms that it could certainly be said that the class was unascertainable. The decision of this House was that the power was valid if it could be said with certainty whether any given individual was or was not a member of the class and did not fail simply because it was impossible to ascertain every member of the class. In so deciding, their Lordships rejected an alternative submission, to which countenance had been given in the Court of Appeal ([1967] 3 All ER 15, [1968] Ch 126) that it was enough that one person should certainly be within the class. So, as a matter of decision, the question now before us did not arise or nearly arise. However the opinions given were relied on, and strongly, as amounting to an endorsement of the 'complete ascertainment' test as laid down in the *Broadway Cottages* case.

My Lords, I comment on this submission with diffidence, because three of those who were party to the decision are present here today, and will express their own views. But with their assistance, and with respect for their views, I must endeavour to appraise the appellants' argument. My noble and learned friend Lord Reid's opinion can hardly be read as an endorsement of the Broadway Cottages case. It is really the opinion of my noble and learned friend Lord Upjohn which has to be considered. Undoubtedly the main part of that opinion, as one would expect, was concerned to deal with the clause in question, which required careful construction, and with the law as to powers of appointment among a numerous and widely defined class. But having dealt with these matters the opinion continues with some general observations. I have considered these with great care and interest; I have also had the advantage of considering a detailed report of the argument of counsel on both sides who were eminent in this field. I do not find that it was contended on either side that the *Broadway Cottages* case was open to criticism—neither had any need to do so. The only direct reliance on it appears to have been to the extent of the fifth proposition (See [1954] 3 All ER at 125, [1955] Ch at 31), which was relevant as referring to powers, but does not touch this case. It is consequently not surprising that my noble and learned friend Lord Upjohn nowhere expresses his approval of this decision and indeed only cites it, in the earlier portion, insofar as it supports a proposition as to powers. Whatever dicta therefore the opinion were found to contain, I could not, in a case where a direct and fully argued attack has been made on the *Broadway Cottages* case, regard them as an endorsement of it and I am sure that my noble and learned friend, had he been present here, would have regarded the case as at any rate open to review. In fact I doubt very much whether anything his Lordship said was really directed to the present problem. I read his remarks as dealing with the suggestion that trust powers ought to be entirely assimilated to conditions precedent and powers collateral. The key passage is where he said ([1968] 3 All ER at 793, 794, [1968] 3 WLR at 1139):

> 'Again the basic difference between a mere power and a trust power is that in the first case trustees owe no duty to exercise it and the relevant fund or income falls to be dealt with in accordance with the trusts in default of its exercise, whereas in the second case the trustees must exercise the power and in default the court will. It is briefly summarised in 30 HALSBURY'S LAWS (3rd Edn.), p. 241, para 445: "… the court will not … compel trustees to exercise a purely discretionary power given to them; but will restrain the trustees from exercising the power improperly, and if it is coupled with a duty … can compel the trustees to perform

> their duty." It is a matter of construction whether the power is a mere power or a trust power and the use of inappropriate language is not decisive (*Wilson v. Turner* ((1883) 22 Ch D 521 at 525)).
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> 'So, with all respect to the contrary view, I cannot myself see how, consistently with principle, it is possible to apply to the execution of a trust power the principles applicable to the permissible exercise by the donees, even if trustees of mere powers; that would defeat the intention of donors completely.
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> 'But with respect to mere powers, while the court cannot compel the trustees to exercise their powers, yet those entitled to the fund in default must clearly be entitled to restrain the trustees from exercising it save among those within the power. So the trustees, or the court, must be able to say with certainty who is within and who is without the power. It is for this reason that I find myself unable to accept the broader proposition advanced by LORD DENNING, M.R. ([1967] 3 All ER at 18, 19, [1968] Ch at 133, 134), and Winn LJ ([1967] 3 All ER at 21, [1968] Ch at 138), mentioned earlier, and agree with the proposition as enunciated in Re Gestetner and the later cases.'

The reference to defeating 'the intention of donors completely' shows that what he is concerned with is to point to the contrast between powers and trusts which lies in the facultative nature of the one and the mandatory nature of the other, the conclusion being the rejection of the 'broader' proposition as to powers accepted by two members of the Court of Appeal. With this in mind it becomes clear that the sentence so must relied on by the appellants will not sustain the weight they put on it. This is ([1968] 3 All ER at 793, [1968] 3 WLR at 1138):

> '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.'

What this does say, and I respectfully agree, is that, in the case of a trust, the trustees must select from the class. What it does not say, as I read it, or imply, is that in order to carry out their duty of selection they must have before them, or be able to get, a complete list of all possible objects.

So I think that we are free to review the *Broadway Cottages* case. The conclusion which I would reach, implicit in the previous discussion, is that the wide distinction between the validity test for powers and that for trust powers, is unfortunate and wrong, that the rule recently fastened on the courts by the Broadway Cottages case ought to be discarded, and that the test for the validity of trust powers ought to be similar to that accepted by this House in Re Gulbenkian's Settlement Trusts for powers, namely that the trust is valid if it can be said with certainty that any given individual is or is not a member of the class.

I am interested, and encouraged, to find that the conclusion I had reached by the end of the argument is supported by distinguished American authority. Professor Scott in his well-known book on Trusts discusses the suggested distinction as regards validity between trusts and powers and expresses the opinion that this would be 'highly technical'. Later in the *Second Restatement of Trusts* (which Restatement aims at stating the better modern view and which annotates the *Broadway Cottages* case) a common test of invalidity is taken, whether trustees are 'authorised' or 'directed'; this is that the class must not be so indefinite that it cannot be ascertained whether any person falls within it. The reporter is Professor Austin Scott. In his Abridgement, Professor Scott maintains the same position:

> 'It would seem … that if a power of appointment among the members of an indefinite class is valid, the mere fact that the testator intended not merely to confer a power but to impose a duty to make such an appointment should not preclude the making of such an appointment. It would seem to be the height of technicality … '

Assimilation of the validity test does not involve the complete assimilation of trust powers with powers. As to powers, I agree with my noble and learned friend Lord Upjohn in *Re Gulbenkian's Settlement* that although the trustees may, and normally will, be under a fiduciary duty to consider whether or in what way they should exercise their power, the court will not normally compel its exercise. It will intervene if the trustees exceed their powers, and possibly if they are proved to have exercised it capriciously. But in the case of a trust power, if the trustees do not exercise it, the court will; I respectfully adopt as to this the statement in Lord Upjohn's opinion ([1968] 3 All ER at 793, [1968] 3 WLR at 1139). I would venture to amplify this by saying that the court, if called on to execute the trust power, will do so in the manner best calculated to give effect to the settlor's or testator's intentions. It may do so by appointing new trustees, or by authorising or directing representative persons of the

> classes of beneficiaries to prepare a scheme of distribution, or even, should the proper basis for distribution appear, by itself directing the trustees so to distribute. The books give many instances where this has been done and I see no reason in principle why they should not do so in the modern field of discretionary trusts (see Brunsden v Woolredge, Supple v Lowson, Liley v Hey and Lewin on Trustsh). Then, as to the trustees' duty of enquiry or ascertainment, in each case the trustees ought to make such a survey of the range of objects or possible beneficiaries as well enable them to carry out their fiduciary duty (cf Liley v Hey). A wider and more comprehensive range of enquiry is called for in the case of trust powers than in the case of powers.

Ultimately, then, the control on trustee conduct is the manner in which the decision to appoint to a member of a class is made with reference to the fiduciary principle, and not the class itself.

Re Baden's Deed Trusts (No.2)
[1973] Ch 9 (C.A.); cb, p.231

The class as specified must be conceptually certain, thus *dependants* is permissible, but *relatives* somewhat suspect

SUMMARY RE CERTAINTY OF OBJECTS

Fixed Trusts

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

- 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.**
- The class as specified must be conceptually certain; ***Re Baden's Deed Trusts (No.2)*** **[1973] Ch 9**.
- **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 trustees of a discretionary power may not act capriciously or irrationally**,

(d) Constitution of Trusts

The trust is generally constituted by:

1. the settlor declaring himself or herself to be trustee in respect of property; or

2. the settlor transfers the property to the trustee directly; or

3. the settlor transfers the property to the trustee indirectly.

In general, a court will not enforce an incompletely constituted trust based on the maxims ***Equity will Not Assist a Volunteer*** and ***Equity Will Not Perfect an Imperfect Gift***. The rationale is the preservation of the proprietary interest of the settlor in the trust property; that is, the law will not disturb ownership without a compelling reason.

Sometimes a court will assist and order the trust be constituted. For example, there was a promise that is enforceable (and, like contract, we look for consideration to bring the beneficiary outside the category of a 'volunteer'). At other times, the court may hold it would be unconscionable not to assist, principally when the settlor has done everything he or she can and something outside his or her control prevents the trust being constituted.

(a) Self-Declaration of Trust

The settlor must clearly intend to become a trustee of the property, as a matter of fact.

(a) Richards v Delbridge (1874) LR 18 Eq 11 (S endorsed a lease on premises 'this deed and all thereto belonging I give to Edward Bennetto Richards from this time forth with all stock in trade' and dies. Held: no trust).

(b) Jones v Lock (1865) LR 1 Ch App 25 (S produced a cheque for £900 payable to himself, and said 'look you here, I give this to baby; it is for himself, and I am going to put it away for him, and will give him a great deal more along with it.' Held: no trust).

(c) **Paul v Constance [1977] 1 WLR 54; cb., p.254**: S and B lived together. S opened a bank account in his name alone, with his common law spouse having a right to withdraw or deposit such that their joint bingo winnings were paid in and their joint Christmas expenses were withdrawn, there is a trust where S said to B 'the money is as much yours as mine' - these were simple people who the court found intended a trust obligation.

Carson v Wilson
[1961] OR 113 (CA; cb, p.246

In this case deeds of conveyance were executed by the testator during his lifetime and the deeds were lodged with his solicitor pending the testator's death. As inter vivos gifts, the deeds failed for want of delivery. As testamentary gifts, they failed for non-compliance with formalities of the wills legislation. As trusts, they failed as the testator had not intended that he be obligated as a trustee by virtue of his execution of the deeds.

Per Schroeder JA:

> I refer also to *Richards v. Delbridge* (1874), L.R. 18 Eq. 11. There the owner of leasehold business premises and stock in trade shortly before his death purported to make a voluntary gift in favour of his grandson, who was an infant and who had assisted in the operation of the business, by the following memorandum signed and endorsed on the lease: "This deed and all thereto belonging I give to E. from this time forth, with all the stock-in-trade." The lease was then delivered to the mother of E on his behalf. Holding that there had been no valid declaration of trust of the property in favour of the grandson, Sir G. Jessel, M.R., stated at p. 14:
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> **The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning.**

<u>Direct Transfer and Imperfect Gifts:</u>

> ***Equity will not perfect an imperfect gift:***
> The court will not order a trust constituted as a curative measure to save a failed trust.

***Equity will not assist a volunteer*:**
As a general rule, the court will not order equitable remedies to cure an otherwise failed trust indirectly.

In ***Milroy v Lord* (1862), 45 ER 1185 (Eng. C.A.)**, the settlor (Medley) owned shares in a bank (The Louisiana Bank) which he purported to transfer to Lord, who was to hold them on trust for Milroy. Lord was the settlor's agent under a Power of Attorney; he never made the transfer during the settlor's lifetime and paid the dividends to Milroy. When the settlor died, the share certificates were given to the settlor's executor. Milroy argued that Lord held under a valid trust for him; the executor argued that the trust never arose because the shares were never actually transferred to Lord – the company registry never showed a change of ownership of the shares from the settlor to Lord and such a change in registration was necessary for any assignment to be valid in law.

Turner LJ described **the basic rule:** there is no equity to perfect an imperfect gift, and there is also no equity for the court to order complete constitution of a trust in a mode other than that contemplated by S – the settlor must do everything that he can to constitute the trust. **"If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be effectual by being converted into a perfect trust."**

Re Rose
[1952] Ch 499; cb., p.259

The court modified the rigidity of the rule in *Milroy v Lord* such that where the transfer is not yet complete but where S has done everything that he or she can, S holds for B pending completion. This softened a rigid approach at the time based on dicta in *Milroy v Lord* itself and hence the two cases sit well together.

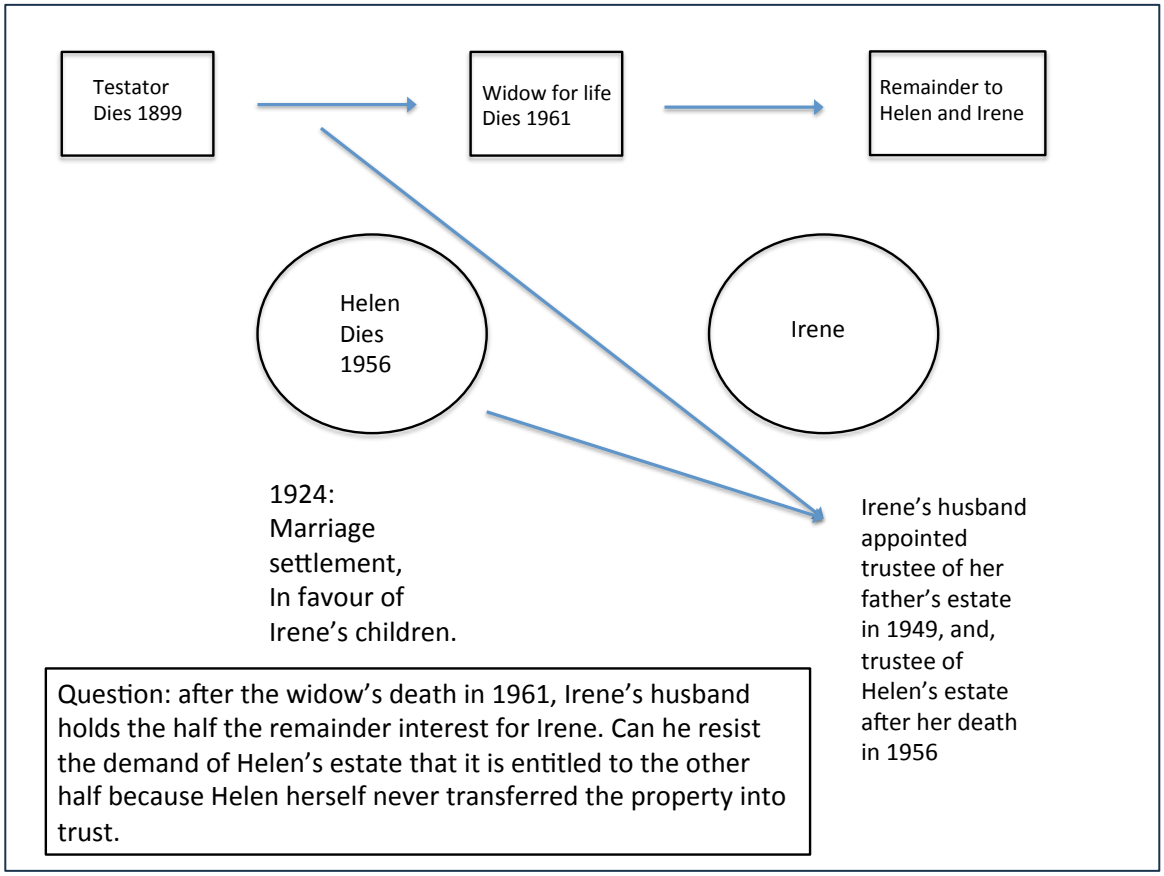
Here the settlor held two blocks of shares and transferred them to a trustee under a deed of settlement of a trust. The transfer met the company's regulations for change in share ownership. The date of the transfer of ownership was made by the company 3 months later. The settlor died 5 years later. A tax was payable on voluntary disposition of property made within 5 years of death. The date of the transfer on the company's registry feel within that 5 year period. Was the transfer effective on the date of the delivery of the share assignment form to the company (and thus outside the tax window) or on the date of the change on the registry (and thus tax was payable). Held: No tax liability as the transfer was effective on the date on which the settlor did all that he could to give effect to the trust.

Gany v. Khan
[2018] UKPC 21 (P.C.)

Where there is a transfer to a trustee of a pre-existing trust, a trust obligation arises upon the intention of the settlor/transferee and the Court should avid using presumptions in place of evidence.

Indirect Transfer – Third Parties

Re Ralli's Will Trusts
[1964] Ch 288; cb., p.271



Here the testator left his residuary estate to his wife for life, remainder to his two daughters (Helen and Irene). Helen made a 'marriage settlement' under which she promised to settle property that she held and would obtain in future for Irene's children.

1892: Testator's Will executed.
1899: Testator dies – to wife for life, remainder to two daughters absolutely.
1924: Helen's marriage settlement in favour of Irene's children.
1946: Irene's husband appointed trustee of marriage settlement, and, trustee of testator's estate.
1956: Helen died.
1961: Testator's widow died.

In 1961, then, the trustee of the testator's estate was Irene's husband. He held the title to the trust property. Helen was now dead. **Helen's estate claimed a half-share of the remainder of the testator's estate arguing that the marriage settlement had failed given that she had never herself transferred property to the trustee of her marriage settlement, and thus her share ought to revert to her estate**.

It was held that once the trustee has the property – under either trust – the obligations from both trusts could be enforced. Equity here was not needed to vest the trust property in the trustee, however equity will enforce the trust however as it is fully constituted – if there was improper conduct in constitution, the result may be different. In any case, that is not the case here and the terms of the marriage settlement were binding on the trustee.

Buckley J:

> In my judgment **the circumstance that the plaintiff holds the fund because he was appointed a trustee of the will is irrelevant. He is at law the owner of the fund, and the means by which he became so have no effect upon the quality of his legal ownership. The question is: For whom, if anyone, does he hold the fund in equity?** In other words, who can successfully assert an equity against him disentitling him to stand upon his legal right? It seems to me to be indisputable that Helen, if she were alive, could not do so, for she has solemnly covenanted under seal to assign the fund to the plaintiff, and the defendants can stand in no better position. It is, of course, true that the object of the covenant was not that the plaintiff should retain the property for his own benefit, but that he should hold it on the trusts of the settlement. It is also true that, if it were necessary to enforce performance of the covenant, equity would not assist the beneficiaries under the settlement, because they are mere volunteers; and that for the same reason the plaintiff, as trustee of the settlement, would not be bound to enforce the covenant and would not be constrained by the court to do so, and indeed, it seems, might be constrained by the court not to do so. As matters stand, however, **there is no occasion to invoke the assistance of equity to enforce the performance of the covenant. It is for the defendants to invoke the assistance of equity to make good their claim to the fund. To**

do so successfully they must show that the plaintiff cannot conscientiously withhold it from them. When they seek to do this, he can point to the covenant which, in my judgment, relieves him from any fiduciary obligation he would otherwise owe to the defendants as Helen's representatives. In so doing the plaintiff is not seeking to enforce an equitable remedy against the defendants on behalf of persons who could not enforce such a remedy themselves: he is relying upon the combined effect of his legal ownership of the fund and his rights under the covenant. That an action on the covenant might be statute-barred is irrelevant, for there is no occasion for such an action.