

‘FAULT LINES’ IN CERTAINTY OF OBJECT FOR PRIVATE TRUSTS: ‘NONE THE WORSE FOR IT’?

ABSTRACT

It is well established that the validity of trusts is grounded in, amongst other things, certainty of object. Courts have developed rules, which function in a binary fashion as ‘fault lines’, directed to distinguishing objects that are certain from those that are not. At the same time, instances arise that test the boundaries of these lines. This article probes such instances, on the way to revealing that the concept of certainty of object may be more fluid, and indeed less precise, than may have been imagined. And it ultimately raises the question whether the law should be any the worse for this.

I SETTING THE SCENE

It has become fashionable, particularly in the equity sphere, to speak of ‘fault lines’.¹ The phrase is intended to invoke a more generic concept than some form of terrestrial fracture caused by the shifting of tectonic plates. It targets any form of division or rift that is prone to triggering confrontation. But it can be conceived more broadly again, to encompass the line dividing two inconsistent outcomes, and specifically where that line is to be drawn, and why. In many ways, the latter represents the ultimate focus of the law. As Oliver Wendell Holmes Jr famously wrote, ‘where to draw the line ... [is] pretty much everything worth arguing in the law’,² having some two decades earlier characterised ‘[m]ost distinctions’ as ones of degree and ‘none the worse for it’.³ In the legal environment the notion of fault lines is, in this sense, nothing revolutionary, reflecting the Biblical adage that there is nothing new under the sun.⁴

* Faculty of Law, University of Tasmania. This article represents an edited version of a paper delivered as the Christopher Legoe Lecture at the Trusts Symposium 2019 (under the joint auspices of the Law Society of South Australia and Society of Trust and Estate Practitioners) in Adelaide on 8 March 2019. I am most grateful to two anonymous reviewers for their valuable comments on the paper. Errors remain my own responsibility.

¹ Indeed, a book has been published with this focus: see James Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012).

² *Irwin, Former Collector of Internal Revenue v Gavit*, 268 US 161, 168 (1925).

³ *Haddock v Haddock*, 201 US 562, 631 (1906).

⁴ Ecclesiastes 1:19.

This article probes a 'fault line' in the trusts context. Merely because trusts emanated from the broader equitable jurisdiction, which originally marked itself by its flexibility and discretion as compared to the common law, hardly obviated the need for rules to distinguish one outcome from another. While there were (and arguably remain) instances where equity jurisdiction rests upon the length of the Chancellor's foot, most of the law surrounding express trusts, in particular, is characterised by well-defined rules.

As 'rules' of law serve to draw a (fault) line — so that the outcome differs depending on which side of the line a scenario is declared to fall — they are accordingly inherently binary in nature. Their application dictates either one outcome or another, which by definition differ. And this is notwithstanding that, as Holmes noted above, questions of degree are frequently involved.

For the purposes of this article, the focus is on one of the core rules underscoring the validity of an express trust: certainty of object. Given the prevalence of rules espoused by the general law of trusts, it is certainly not exhaustive of where fault lines emerge. For instance, in inquiring into an intention to create a trust, there is no scope for a court to conclude that a person *partly* intended to create a trust; instead, the law determines whether a trust was intended, or was not. The same applies to the second of the so-called 'three certainties' underscoring the creation of an express trust: certainty of subject matter. Again, either the subject matter of a trust is certain, or it is not. There is no legal concept or validity inhering in *partially* certain trust subject matter. Hence the binary concept mentioned above.

Parallel observations stem from inquiry into the third certainty, namely certainty of object as elaborated in this article. The general law ostensibly acknowledges no such thing as *partial* certainty of object; again, an object is either certain, or it is not. The need for rules to set the fault lines when addressing the three certainties is heightened because, if one of the certainties is lacking, no express trust enters into being; any supposed trust in this instance is said to 'fail'. To this end, 'certainty' assumes value because it aims to define what is, and is not, a trust.

(Un)certainty of intention to create a trust reflects the legal (and social) policy underscoring persons' freedom to dispose of their property on the terms they deem fit. Yet a person can express an intention to declare a trust over property (thus fulfilling certainty of intention) but at the same time fail to identify that property with the requisite certainty. In this event, the intended trust fails for certainty of subject matter. It is similarly conceivable that a person intending to create a trust, and specifies its subject matter with the requisite certainty, may nonetheless be thwarted in that intention by uncertainty of object.

The second and third certainties target the basal aspects of the trust, namely the holding of property (subject matter) for the benefit of another (object). This in turn explains why intention to create a trust is a necessary, *but not sufficient*, element of the trust equation. It ultimately acknowledges, in line with the remarks in the preceding paragraph, that the law does not always give effect to a person's intention when it comes to disposing of their property. In trusts law, the reasons for this are

evident, and focus in the first instance on the obligations of the putative trustee. They must be able to identify, with certainty, the property the subject of the trust, because the way they can (and sometimes must) deal with that property differs vis-à-vis property they hold beneficially. As the property is held (indeed managed) for the benefit of other persons, the trustee must also know, again with certainty, to whom they owe obligations (in equity).

II DOVETAILING INTO CERTAINTY OF OBJECT

When targeting certainty of object, the foregoing gives effect to assumptions of self-interest inherent in human nature. It presupposes that those with a financial interest in the trust property are motivated, for ‘selfish’ reasons if nothing else, to ensure that the trustee acts in their interests. By virtue of holding legal title, the trustee can (at common law) transact with trust property as they wish. The curb on trustee ‘selfishness’ here is the obligation, imposed by equity, to manage the trust property not for their own benefit, but for the benefit of those who (whether individually or collectively) hold the beneficial (equitable) entitlements thereto. The very fact that, as part of these obligations, fiduciary law proscribes even the prospect of conflict between duty and interest speaks to a concern that self-interest can manifest itself by way of temptation.

Certainty of object nonetheless has a broader remit than reflecting an incident of human nature. Its upshot, commonly termed the beneficiary principle, is driven by the concern espoused by Sir William Grant MR’s classic statement in *Morice v Bishop of Durham*:

There can be no trust, over the exercise of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership, and not trust. If there be a clear trust, but for uncertain objects, the property, that is the subject of the trust, is undisposed of, and the benefit of such trust must result to those, to whom the law gives the ownership in default of disposition by the former owner ... Every ... trust must have a definite object. There must be somebody, in whose favour the court can decree performance.⁵

Reflecting the courts’ longstanding inherent supervisory jurisdiction over trusts — no doubt driven in large part by the relative vulnerability of beneficiaries (objects) to the ‘strong’ position of trustees⁶ — his Lordship’s statement contains two main elements: the court must assume control over trusts; and every trust must have a definite object (beneficiary) who can enforce the trust. The two are related: as the court does not take the initiative in the control and enforcement of trusts, there must be a person (with an interest) to bring the matter to the court’s attention. On appeal, Lord Eldon LC explained that the notions of control and enforceability are based

⁵ (1804) 9 Ves 399, 404–5; 32 ER 656, 658.

⁶ See *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226, 234 [9] (The Court) (*‘Chief Commissioner of Stamp Duties’*).

on the possibility that the court might, under the umbrella of inherent jurisdiction, be called upon to step in and administer the trust, or to direct distribution of trust income or capital to a beneficiary.⁷

There are accordingly two aspects of the 'beneficiary principle'. There is the one immediately above evincing the concern that trustees must be held accountable, by the court if need be. Beneficiaries therefore have standing to 'enforce' the trust — in this context reflecting an exception to the equitable maxim that 'equity will not assist a volunteer', a category within which most trust beneficiaries inhabit — again by reference to the court if the trustees resist. By itself, however, this may not fully explain why the law demands 'certainty' of object, in the sense of ascertained or ascertainable beneficiaries. After all, not every beneficiary need be a party to a curial application to enforce the trust. Status as *a* beneficiary, not collective action by the beneficiaries, suffices for standing to this end.

At the same time, certainty plays a role here precisely because standing rests upon status as a beneficiary (and the 'interest' attaching to this status); hence a need to be able to discriminate persons who are beneficiaries from those who are not. There is no middle category in this regard where, assuming certainty of intention and subject matter, a trust may *partially* fulfil certainty of object.

This can in turn present challenges for the courts, given that drawing the (fault) line can, as Holmes acknowledged, involve matters of degree (or, expressed another way, inquiry along a continuum). With this backdrop, this article elaborates three scenarios where the ostensibly strict application of certainty of object has been relaxed by courts: certainty of object for fixed trusts, for discretionary trusts, and in distinguishing purpose from individual trusts. And while these have eschewed an intermediate category of partial certainty, their upshot in shifting what may be perceived as potentially uncertain into the 'certain' side of the (fault) line may belie the suggestion that they have not, at least in some way, loosened the dictates of certainty. These scenarios, which represent the substance of the article, may trigger a (re)consideration of what is meant by 'certainty' of object.

III FIXED TRUSTS

A *The Certainty Rule*

It is well established that certainty of object for fixed trusts is governed by the 'list certainty' test. What marks a fixed trust is that its beneficiaries have an (equitable) fixed entitlement to the capital and/or income of the trust, which courts have characterised in (equitable) proprietary terms. Beneficiaries can accordingly call for, and enforce the distribution of, that entitlement. It stands to reason that, to fulfil the certainty of object requirement, the trustee must be able to ascertain (that is, list) all of the beneficiaries at least when it comes to the time of distribution. If the

⁷ *Morice v Bishop of Durham* (1805) 10 Ves 522, 539–40; 32 ER 947, 954.

trustee can only ascertain some of the beneficiaries at that time, part of the equitable interest in the capital and/or income at that time remains unallocated. This would in turn conflict with the law's policy against gaps in (beneficial/equitable) ownership of property, and threaten oversight vis-à-vis the unallocated income/capital. The latter, in line with earlier observations, misaligns with the prospect of the matter being brought to the court's attention for control and enforcement.

Commonly cited as a leading case in support of the 'list certainty' approach, *Inland Revenue Commissioners v Broadway Cottages Trust* actually involved what was, for all intents and purposes, a discretionary trust.⁸ It retains its relevance in this context because, at the time, the same test for certainty of object applied whether the trust was fixed or discretionary in nature. For discretionary trusts, this subsequently changed, a point elaborated later in the article. The case involved a trust to apply income for the benefit of all or any of a class of beneficiaries specified in the Schedule to the trust deed 'in such shares proportions and manner as the trustees in their discretion from time to time think fit'. The Schedule referred, inter alia, to the following persons by way of clauses 1 and 2:

1. All persons (other than the settlor and any wife of his and any infant child of his) who have been in the past or (as the case may be) at the date of these presents or subsequently thereto at any time during the period ending on December 31, 1980, or during the appointed period whichever shall be the shorter employed by:— (a) the settlor; (b) the wife of the settlor; (c) William Timpson deceased (father of the settlor and who died on January 20, 1929); (d) Katherine Chapman Timpson deceased (mother of the settlor and who died on December 16, 1940); (e) William Timpson Limited or by any other limited company which may succeed to the business of William Timpson Limited; (f) any other limited company of which the settlor is a director at the date of these presents.
2. The wives and widows of any such persons as is specified in cl 1 of this schedule.⁹

Given the wide scope of clauses 1 and 2 above, it was conceded that the persons who constituted 'the beneficiaries' comprised an aggregate of objects incapable of ascertainment, in the sense that it would be impossible at any given time to achieve a complete and exhaustive enumeration of those who qualified as 'beneficiaries'. At the same time, it was similarly conceded that the qualifications for inclusion in the beneficiary class were sufficiently precise to make it possible to determine with certainty whether or not any particular individual was a member of the class.

Lord Justice Jenkins, who delivered the reasons of the English Court of Appeal, expressed 'some sympathy' for the argument that the latter should suffice to substantiate certainty of object in the circumstances. His Lordship's sympathy emanated

⁸ [1955] Ch 20 ('*Broadway Cottages*').

⁹ *Ibid* 23–4.

from what he perceived as ‘an attractive air of common sense’ underscoring that argument.¹⁰ Yet his concern was that, by reason of an inability to make a complete list of beneficiaries, the trust was not one that the court could control or execute, even if curial assistance ever becoming necessary was improbable.¹¹

While the same would not have been the outcome had the case been decided after *McPhail v Doulton*¹² — which as discussed below obviated the list certainty test for discretionary trusts, instead aligning the relevant inquiry with that applicable to mere powers¹³ — the latter did not purport to alter the list certainty approach in its application to fixed trusts. Hence, the following statement by Jenkins LJ in *Broadway Cottages* remains extant:

a trust to divide the income of the trust fund during the appointed period amongst a class consisting of the settlor’s wife and all the beneficiaries for the time being living or in existence, and if more than one in equal shares, would ... have been void for uncertainty.¹⁴

B *The Rule Relaxed?*

In Australian law, the list certainty test espoused in *Broadway Cottages* may prove less strict in its application to fixed trusts than may appear at first sight, at least if Young J’s decision in *West v Weston* is any indicator of its possible trajectory.¹⁵ The case involved a testamentary gift ‘[t]o divide the balance then remaining equally (per capita) amongst such of the issue living at my death of my four grandparents ... as attain the age of twenty-one (21) years’.¹⁶ Difficulties arose because it was practically impossible to make a complete list of these persons as at the time of the testator’s death. Yet the testamentary language — in its use of the phrase ‘divide ... equally’ — mandated that each beneficiary take an equal share. Genealogical inquiries had, at the time of the hearing, identified some 1,675 beneficiaries who could take a share of the balance. His Honour conceded that ‘[a]lthough the law of diminishing returns will now apply, it is possible that more claimants will come to light even though the executrix and the genealogist have now been searching for some two years’.¹⁷

This in turn suggested a lengthy and potentially expensive process of identifying (further) beneficiaries. Against this backdrop, Young J considered that the strict ‘list certainty’ approach should be modified, opining that ‘a court of equity must always

¹⁰ Ibid 35.

¹¹ Ibid.

¹² [1971] AC 424 (*McPhail*).

¹³ Cf *Broadway Cottages* (n 8) 36 (Jenkins LJ). His Lordship spoke against ‘a valid power [being] spelt out of an invalid trust’.

¹⁴ Ibid 29.

¹⁵ (1998) 44 NSWLR 657 (*West*).

¹⁶ Ibid 658.

¹⁷ Ibid 659.

be on the *qui vive* to realise that community circumstances have changed.’¹⁸ The changes his Honour had in mind included the following:

these days, being married is not a necessary prerequisite to having children. Even married persons may give the child a surname other than the father’s surname. Unmarried persons who produce a child often call the child by the mother’s surname. In remote areas and some Aboriginal communities births are not always registered. All these factors produce greater uncertainties than would have been the case when the rules as to certainty were laid down.¹⁹

In other words, evidential difficulties — which the House of Lords had a quarter of a century earlier viewed as not undermining certainty of object²⁰ — could translate from the procedural to the substantive when it comes to the validity of trusts.²¹ In view of these difficulties, Young J perceived a justification in ‘slightly modifying’ the operation of the ‘list certainty’ rule ‘for Australian conditions of the present day’ to read as follows:

The rule will be satisfied if, within a reasonable time after the gift comes into effect, the court can be satisfied on the balance of probabilities that the substantial majority of the beneficiaries have been ascertained and that no reasonable inquiries could be made which would improve the situation.²²

This represented ‘good equity and good sense’, his Honour surmised, as ‘[e]quity does not make a rule just for the sheer fun of making a test, but it must have a purpose’.²³ He saw the purpose of the list certainty rule as, in modern conditions, just as well catered for by the above modification as in its original form. Indeed, Young J remarked, it was ‘better accommodated’ because, on the facts before the Court,

instead of the testator’s intention being completely frustrated and the money passing as *bona vacantia*, at least 1,675 people who can be ascertained and do fit

¹⁸ Ibid 663.

¹⁹ Ibid 664.

²⁰ ‘[I]f the class is sufficiently defined by the donor the fact that it may be difficult to ascertain the whereabouts or continued existence of some of its members at the relevant time matters not. The trustees can apply to the court for directions or pay a share into court’: see *Re Gulbenkian’s Settlements* [1970] AC 508, 524 (Lord Upjohn) (*Re Gulbenkian’s Settlements*). See also *Lempens v Reid* (2009) 2 ASTLR 373, 377–8 [21] (Gray J) (*Lempens*).

²¹ Cf RP Austin, ‘Discretionary Trusts: Conceptual Uncertainty and Practical Sense’ (1980) 9(1) *Sydney Law Review* 58. Austin maintains a confluence between semantic and evidential uncertainty issues.

²² *West* (n 15) 664.

²³ Ibid.

within the description will benefit as the testator intended notwithstanding that it might not be possible to make a complete list with certainty.²⁴

In view of the extensive genealogical inquiries made to date, his Honour envisaged that the risk of other beneficiaries ‘coming out of the woodwork’ could be addressed by publishing advertisements in a national newspaper and the executrix taking out insurance against missing beneficiaries (if insurance of this kind remained available).²⁵ Although his Honour made no specific reference to this point, it may be noted that, if 1,675 persons could be identified as beneficiaries, each would have been entitled to less than \$300 (the net estate totalling around \$500,000), not a substantial sum by any means. One may ponder whether Young J would have pursued the same solution had the sums in question been much more substantial.

Justice Young in *West* did not seek to create a new category of partial uncertainty straddling (list) certainty and uncertainty, which itself would have been productive of uncertainty. Instead, while conceding in the above quote that ‘it might not be possible to make a complete list with certainty’, he purported to mitigate the strictures surrounding the list certainty test so as to locate what would otherwise have been punctuated by uncertainty within the (list) certainty fold. In so doing, he adopted essentially utilitarian reasoning, by contrasting the utility in giving effect to testamentary intention (that would benefit at least 1,675 persons) with that of frustrating it (wherein every such person would be denied a claim). In other words, his Honour evinced marked discomfort with an outcome where, contrary to the testator’s intention, members of an extensive class of beneficiaries would miss out entirely merely because of (potential) minimal remnants of uncertainty as to their class. Not only would they miss out, their share would, given the lack of next-of-kin, likely accrue to the Crown as ownerless goods, an outcome the law is generally loathe to countenance. After all, few testators or donors would, absent specific direction to this effect, wish their estate to be devoted to the Crown.

Clearly, there would have been no need for Young J to modify the certainty test had some element of discretion vested in the trustees of the estate in question. In that event, the sympathy espoused by Jenkins LJ in *Broadway Cottages* mentioned earlier, which as discussed below witnessed fruition in *McPhail*, may have come to the fore. At the same time, it cannot be denied that *West* involved unusual facts, sufficiently so to have generated little curial need to probe the parameters of the modified test in the ensuing two decades or so.²⁶ Unusual facts, moreover, are not

²⁴ Ibid 664–5.

²⁵ Ibid 665–6.

²⁶ *West* was applied, without analysis, by Ross J in *Re Estate of Meyerstein* (2009) 4 ASTLR 180. Some other cases have cited *West*, but by reference to Young J’s mention (at 662) of the traditional English practice surrounding inquiry into next-of-kin, involving an order for an advertisement to be published calling for potential claimants, specifying that those who do not come forward and substantiate their claim will be excluded from the benefit of any subsequent order of the court: see, eg, *Re Application by NSW Trustee and Guardian* [2012] NSWSC 1532, [11] (Hallen J); *Re NSW Trustee*

always prone to making good law. This has in turn prompted a commentator to query the legitimacy (and ultimate applicability) of the test espoused in *West*, in particular the scope for difficulty in objectively measuring ‘the substantial majority’ of the beneficiaries.²⁷ After all, as ‘substantial’ is something upon which reasonable minds may disagree — invoking as it does inquiries of degree — the spectre of uncertainty is raised. And there is the attendant concern that it can undermine the very nature of a fixed trust, and require the court when approached to essentially authorise trustee behaviour inconsistent with its terms.

Moreover, although Young J sought to justify ‘slightly modifying’ the list certainty rule to take into account ‘Australian conditions of the present day’, it may be queried whether those conditions are truly unique or endemic to modern Australia. It should not be assumed that inaccurate registration of births, or use of different surnames, is a phenomenon confined to modern Australia, or even modern times. If anything, it can be logically surmised that the accuracy of birth records has improved in time, in Australia as in most comparable nations. And earlier times certainly saw (especially illegitimate) children being named other than according to their father’s, or even mother’s, surname.²⁸ Again, this is no new phenomenon.

Be that as it may, *West* reveals a judicial acknowledgement that the element of ‘certainty’ underscoring the list certainty test has the capacity for at least some flexibility. It also reveals a judicial sensitivity to giving effect, to the extent possible, to evident testamentary intention, and in so doing not allowing ostensibly strict rules of certainty to frustrate that intention.

and Guardian [2015] NSWSC 1529, [5]–[6] (Hallen J). In the latter case, as well as in *Application by NSW Trustee and Guardian* [2019] NSWSC 340, [11]–[14] (Henry J), the respective judges viewed the *West* approach as applicable to a ‘Benjamin order’ (named after the order made by Joyce J in *Re Benjamin; Neville v Benjamin* [1902] 1 Ch 723 (*Benjamin*)) — namely an order for the distribution of the estate to persons known to be entitled but without prejudice to the entitlement of any other eligible persons, who later might be located or identified, to then make a claim and be entitled to trace the funds that had been distributed — although Young J made no explicit reference to *Benjamin* in his judgment. In another case where *West* saw mention, *Prosper v Wojtowicz* [2005] QSC 177, [33]–[35] (Wilson J), it was held inapplicable in the face of evidential difficulties in ascertaining the identity of beneficiaries, which do not by themselves undermine the validity of a trust.

²⁷ See Peter Creighton, ‘Certainty of Objects of Trusts and Powers: The Impact of *McPhail v Doulton* in Australia’ (2000) 22(1) *Sydney Law Review* 93, 96–9.

²⁸ Although it may be conceded that historically illegitimate children did not take under ‘child’, ‘issue’ or ‘next-of-kin’ testamentary descriptors absent a clear(er) indication to this effect: *Hill v Crook* (1873) LR 6 HL 265; *Dorin v Dorin* (1875) LR 7 HL 568.

IV DISCRETIONARY TRUSTS

A *The Certainty Rule*

The term ‘discretionary trust’, the High Court has remarked, is ‘used to describe particular features of certain express trusts’.²⁹ The main such features are that its trustees commonly enjoy discretion to select who in the designated class of potential beneficiaries is to receive any benefit, and to decide the amount of any benefit to be paid. This impacts on both the entitlement of the trust’s beneficiaries and the obligations of its trustees, making it unsurprising that it should translate to how the law couches the relevant test for certainty of object.

That beneficiaries of discretionary trusts, like their fixed trust counterparts, clearly possess standing to enforce the trustees’ obligations under the trust pursuant to the ‘beneficiary principle’ — were it otherwise, the trustees could deal with the trust property in their own interests (‘selfishly’) — is not to confer upon them any individual proprietary interest in the trust income or capital.³⁰ They accordingly cannot demand a trust distribution in their favour, which rests upon an exercise of the trustees’ discretion, conferred by the trust deed. The beneficiaries, as a result, have no more than a hope or expectation that the trustees will exercise the discretion in their favour.

This in turn explains why there is no need for the trustees of a discretionary trust to make a complete list of (potential) beneficiaries when it comes to the proper exercise of discretion to distribute (sometimes termed ‘appoint’). All that trustees must do is exercise the discretion in good faith, with a real and genuine consideration, and for the purposes for which it was conferred.³¹ A discretion is qualitatively distinct from a compulsion, which applies in the fixed trust scenario, namely a compulsion to make a distribution according to the fixed entitlements of the beneficiaries.

The above distinctions between trustee obligation (versus discretion) and beneficiary entitlement (versus hope or expectation) were primary motivators for a majority of the House of Lords in *McPhail* to shelve the list certainty test when it came to discretionary trusts.³² The trust deed there established a fund, the income from which was to be applied ‘in making at [the trustees’] absolute discretion grants to or for the benefit of any of the officers and employees or ex-officers or ex-employees of the

²⁹ *Chief Commissioner of Stamp Duties* (n 6) 234 [8] (The Court).

³⁰ *Gartside v Inland Revenue Commissioners* [1968] AC 553, 607 (Lord Reid), 615 (Lord Wilberforce).

³¹ *Karger v Paul* [1984] VR 161, 164 (McGarvie J).

³² *McPhail* (n 12) 456 (Lord Wilberforce). They were not, however, the only drivers to this end. Their Lordships’ determination was facilitated by adopting a more flexible approach to applying the equitable maxim ‘equality is equity’: at 451–3 (Lord Wilberforce). Preceding *McPhail*, the basis for requiring list certainty for trust powers was that, should the donee/trustee not appoint the property, the court would do so in their stead. Application of the above maxim dictated that the court equally divided the

company or to any relatives or dependants of any such persons ...' (cl 9(a)). Another sub-clause provided that the trustees were not 'bound to exhaust the income of any year or other period in making such grants ...' (cl 9(b)) and, to reiterate the effect of cl 9(a), under cl 10 '[a]ll benefits being at the absolute discretion of the trustees, no person shall have any right title or interest in the fund otherwise than pursuant to the exercise of such discretion ...'.³³ It was accepted that the class of beneficiaries in cl 9(a) was incapable of reduction to a list, meaning that, if the *Broadway Cottages* approach applied, the trust would fail for lack of certainty of object.

In reaching the conclusion that the list certainty test did not govern a discretionary trust, a majority of the House of Lords compared the discretion as to appointment under a discretionary trust to that under what the law recognises as a 'mere power'. The latter, which need not be confined to the holder of property to which the power attaches, vests in its donee a complete discretion as to whether *or not* to exercise the power. When referring to a discretionary trust (sometimes termed a 'trust power'), while there is likewise a discretion (in a trustee), the relevant language 'imposes a clear duty ... to distribute the fund amongst some at least of the specified class of potential beneficiaries, the discretion conferred ... extending merely to selection and not to deciding whether or not to select'.³⁴ This in turn translates to what Lord Upjohn in *Re Gulbenkian's Settlements*, the leading 'modern' mere powers case, explained as the 'basic difference' between a mere power and a trust power, namely

that in the [mere power scenario] 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 [trust power scenario] the trustees must exercise the power and in default the court will.³⁵

To this end, both the beneficiaries of a discretionary trust and the objects of a mere power have no more than a hope or expectancy of a distribution in their favour. Neither can compel the trustee or donee to exercise the discretion or power in their favour. The difference comes down to whether or not the discretion must be exercised. Critically, the law had before *Re Gulbenkian's Settlements* accepted that certainty of object for mere powers rested on fulfilling 'criterion certainty', namely that the donor specified a criterion capable of certain application by the donee in exercising the power.³⁶ In effect, this was the test (unsuccessfully) pressed upon the English Court of Appeal in *Broadway Cottages* vis-à-vis the discretionary trust in that case.

property between the class of objects, thus requiring knowledge of the identity of each such object (ie list certainty). *McPhail* veered from the equal division approach in curial appointment, thereby obviating the need for list certainty.

³³ Ibid 447.

³⁴ *Re Leek (deceased)* [1967] Ch 1061, 1073 (Buckley J).

³⁵ *Re Gulbenkian's Settlements* (n 20) 525.

³⁶ It may be noted, however, that this did not appear to be settled from early times. In *Re Gulbenkian's Settlements*, Lord Upjohn saw it as '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

Lord Wilberforce, with whom Lord Reid and Viscount Dilhorne concurred, delivered the majority judgment in *McPhail*. Setting the scene for the outcome were his Lordship’s initial observations as to it being ‘striking how narrow and in a sense artificial is the distinction, in cases such as the present, between trusts or as the particular type of trust is called, trust powers, and powers’, such that ‘[a] layman and, I suspect, also a logician would find it hard to understand what difference there is’.³⁷ This prompted the observation that ‘[i]t does not seem satisfactory that the entire validity of a disposition should depend on such delicate shading’,³⁸ before adding that the distinction ‘appears even less significant’ in considering ‘how in practice reasonable and competent trustees would act, and ought to act, in the two cases’.³⁹ His Lordship illustrated the latter point as follows:

A trustee of an employees’ benefit fund, whether given a power or a trust power, is still a trustee and he would surely consider in either case that he has a fiduciary duty: he is most likely to have been selected as a suitable person to administer it from his knowledge and experience, and would consider he has a responsibility to do so according to its purpose. It would be a complete misdescription of his position to say that, if what he has is a power unaccompanied by an imperative trust to distribute, he cannot be controlled by the court unless he exercised it capriciously, or outside the field permitted by the trust ... Any trustee would surely make it his duty to know what is 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 other possible claimants, a particular grant was appropriate.⁴⁰

While Lord Wilberforce did not in so doing purport to equate trust powers and mere powers — he countenanced that a distinction ‘would seem to lie in the extent of the survey which the trustee is required to carry out: if he has to distribute the whole of a fund’s income, he must necessarily make a wider and more systematic survey than if his duty is expressed in terms of a power to make grants’⁴¹ — but to emphasise that

ascertainment’: *ibid* 521. His Lordship found authority to this effect in the decision of Clauson J in *Re Park* [1932] 1 Ch 580. See also *Re Gestetner Settlement* [1953] Ch 672, 684 (Harman J). Justice Harman remarked that in the case of a mere power — there described as ‘a power collateral, or a power appurtenant, or any of those powers which do not impose a trust upon the conscience of the donee’ — ‘I do not think that it can be the law that it is necessary to know of all the objects in order to appoint to one of them. If that were so, many appointments which are made every day would be bad.’

³⁷ *McPhail* (n 12) 448.

³⁸ *Ibid* 449.

³⁹ *Ibid*.

⁴⁰ *Ibid*.

⁴¹ *Ibid*. In a concluding and ostensibly obiter observation, Lord Wilberforce also envisaged that what he termed ‘administrative uncertainty’ could prejudice trust powers but not mere powers: at 457. His Lordship’s remarks here were expressed tentatively, namely that ‘[t]here *may* be a third case where the meaning of the words used is clear but the definition of beneficiaries is so hopelessly wide as not to form

any differences were insufficient in substance to apply discrete tests of certainty of object. This prompted his Lordship to express the following opinion:

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 upon the courts by [*Broadway Cottages*] 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 *In re Gulbenkian's Settlements* 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.⁴²

In *Re Gulbenkian's Settlements* Lord Reid, in this vein, had expressed the test in terms that '[i]f 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'.⁴³ Having determined the appropriate test to apply, the House of Lords in *McPhail* then remitted the case to the Chancery Division for determination whether, on the basis of the test so prescribed, cl 9(a) was valid.⁴⁴ On appeal from the Chancery Division, the English Court of Appeal in *Re Baden's Deed Trusts [No 2]*⁴⁵ upheld the validity of the clause. Even though the judgments had their differences, broadly speaking its upshot was that the criteria prescribed thereunder — 'officers', 'employees', 'ex-officers', 'ex-employees' or 'relatives' or 'dependants' of such persons — fulfilled the criterion certainty test. In other words, it was possible for the trustees (and thus the Court) to determine with certainty whether or not a person was an 'officer', 'employee', 'ex-officer' or 'ex-employee' of the company in question, and also whether or not they were a 'relative' or 'dependant' thereof. Records of

"anything like a class" so that the trust is administratively unworkable' (emphasis added). This tentativeness translated to a hesitation to give examples 'for they may prejudice future cases', although he added that 'perhaps "all the residents of Greater London" will serve'. His Lordship proceeded to disclaim any notion that a discretionary trust for 'relatives' of a living person falls within this category. There is little that is genuinely probative in the subsequent case law to give administrative uncertainty any greater precision, and indeed occasions where some confusion surfaces as to its role as distinct from semantic uncertainty: see, eg, *Crawford v Phillips* [2018] 3 NZLR 247, 257–8 [37]–[42] (Asher J for the Court), as well as the discussion in Geraint Thomas, *Thomas on Powers* (Oxford University Press, 2nd ed, 2012) 492–8. There is, in any event, no suggestion in Lord Wilberforce's tentative reference to 'administrative uncertainty' that sought to upset the binary inquiry underscoring *semantic* uncertainty.

⁴² *McPhail* (n 12) 456 (citations omitted).

⁴³ *Re Gulbenkian's Settlements* (n 20) 518. See also Lord Upjohn, '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': at 521.

⁴⁴ *McPhail* (n 12) 450.

⁴⁵ [1973] Ch 9 ('*Re Baden's Deed Trusts [No 2]*').

company officers and employees existed, from which the identity of potential beneficiaries could be gleaned, to be distinguished from persons outside that class.

The Court had little difficulty in interpreting ‘relatives’ as ‘blood relations’, again capable of being differentiated from persons who were not ‘relatives’.⁴⁶ After all, a longstanding line of case authority involving wills interpreted the term in this fashion.⁴⁷ As ‘dependants’ was ‘a word used over several generations in comparable trust deeds’, Sachs LJ opined that ‘the suggestion that it is uncertain seems no longer arguable’.⁴⁸ His Lordship referred, moreover, to the use of that term in statute, which courts have been able to define with the certainty needed for its statutory application. Implicit in this observation is that a term capable of definition with certainty in a statutory context should not be viewed as uncertain in a private disposition of property. (Indeed, it may be argued that the certainty threshold for statute should exceed that in trusts and wills).

Hence the discretionary trust in *McPhail* was ultimately held to fulfil the criterion certainty test (and thus exhibit ‘semantic’ or ‘linguistic’ certainty in the words of Lord Wilberforce), in that the criteria specified could be the subject of certain application. A dividing line could be drawn between those who came within the criteria, and those who fell outside it. Terms such as ‘officer’, ‘employee’, ‘relative’ and ‘dependant’ meet the certainty threshold precisely because they are amenable to setting objectively clear dividing lines and in so doing avoiding matters of degree.

It is curious that, even though *McPhail* is approaching its 50th anniversary, the High Court of Australia has yet to explicitly rule on the application of the criterion certainty test in relation to trust powers.⁴⁹ Having said that, as multiple lower court judgments endorse its correctness in Australian law,⁵⁰ and a contrary conclusion would threaten the validity of literally thousands of trusts that have been created and operate upon

⁴⁶ Ibid 21–2 (Sachs LJ), 22–3 (Megaw LJ), 29–30 (Stamp LJ).

⁴⁷ See, eg, *Re Lanyon* [1927] 2 Ch 264, 267 (Russell J); *A-G (Vic) v Commonwealth* (1962) 107 CLR 529, 545 (Dixon CJ). The same may be said, incidentally, of terms such as ‘child(ren)’, ‘issue’, ‘next-of-kin’, ‘descendants’, ‘heirs’, ‘nephews/nieces’ or even ‘family’, which likewise have attracted prima facie meanings in testamentary instruments: see generally Gino E Dal Pont, *Interpretation of Testamentary Documents* (LexisNexis Butterworths, 2019) ch 7.

⁴⁸ *Re Baden’s Deed Trusts [No 2]* (n 45) 21. See also at 30 (Stamp LJ).

⁴⁹ The best that can be said is that in *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145, three members of the High Court referred to *McPhail* with apparent approval, although not strictly in relation to the test for certainty: at 183.

⁵⁰ See, eg, *Horan v James* [1982] 2 NSWLR 376, 382 (Glass JA), 383–4 (Mahoney JA); *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271, 277 (Gummow J); *McCracken v A-G (Vic)* [1995] 1 VR 67, 71 (Phillips J) (*McCracken*); *Re Blyth* [1997] 2 Qd R 567, 576 (Thomas J); *Commissioner of State Revenue v Viewbank Properties Pty Ltd* (2004) 55 ATR 501, 509 [20] (Nettle J). See further Creighton (n 27) 99–103.

its foundation, it would be most unlikely for the High Court to rule to the contrary.⁵¹ The upshot of *McPhail*, after all, was to animate the modern discretionary trust, freeing it from the strictures of the list certainty test underscoring fixed trusts.

B *The Rule Relaxed?*

While *McPhail* may, by loosening the certainty requirement, have broadened the scope for operation of discretionary trusts, it clearly did not upset the need for certainty of object. That the classes of beneficiaries involved in the case were found to have fulfilled the criterion certainty test did not, on the face of Lord Wilberforce's speech, herald an 'open door' policy to *any* criterion. Implicit in his Lordship's speech (and in its factual application in *Re Baden's Deed Trusts*) is that not all criteria necessarily fulfil the criterion certainty test, but only those amenable to a definition capable of clearly dividing objects coming within the criterion from those that fall outside it.

On this basis, therefore, it could rationally be surmised that a criterion such as 'friends' — or, for that matter, 'mates', 'colleagues', 'associates', 'comrades', 'supporters' or 'companions' — is unlikely to fulfil the criterion certainty test (that is, it will be semantically uncertain) unless the terms of the relevant disposition adopt language capable of giving this descriptor scope for objectivity in its application. Here reference may be made to the famous words of Lord Upjohn in *Re Gulbenkian's Settlements*:

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.⁵²

Although *Re Gulbenkian's Settlements* involved a mere power, the above dictum by itself does not compel a conclusion that the term 'friends' lacks semantic certainty. At the same time, his Lordship's reference to the fund being 'divided equally' between

⁵¹ It has been suggested that the High Court may have implicitly accepted *McPhail* in *Chief Commissioner of Stamp Duties* (n 6) by treating a disposition there in favour of such charities as the trustees might select, in the absence of a prior appointment in favour of other beneficiaries, as a valid trust power: Harold Ford et al, Thomson Reuters, *The Law of Trusts* (at 3 August 2012) [5.9010].

⁵² *Re Gulbenkian's Settlements* (n 20) 524.

‘my old friends’ (or ‘friends’, for that matter) contemplates that each ‘old friend’ receive an equal proportion of the fund. Far from being a power, even of the trust variety, it involves a fixed entitlement in each ‘old friend’, the validity of which is, by definition, premised upon a complete list being made of ‘old friends’.⁵³ Of course, that the criterion ‘old friend’ appears *prima facie* incapable of certain application challenges the trustee’s (and court’s) ability to make such a list, and thereby functions to infect the disposition with uncertainty of object.

Yet at least in the context of *mere powers*, the foregoing must be viewed against the backdrop of case law upholding dispositions in favour of a donor’s ‘friends’ (or the like). A leading case is *Re Coates (deceased)*, where after making provision for his wife and bequeathing a number of pecuniary legacies, the testator directed, *inter alia*, that

[i]f my wife feels that I have forgotten any friend I direct my executors to pay to such friend or friends as are nominated by my wife a sum not exceeding £25 per friend with a maximum aggregate payment of £250 so that such friends may buy a small memento of our friendship.⁵⁴

Justice Roxburgh was careful to stress that he was ‘not deciding whether or not a power to appoint in favour of a testator’s friends without qualification would be valid’,⁵⁵ but instead ‘whether there is such a degree of uncertainty about the word “friends” in the context in which I find it, and in the circumstances of the case, as would justify me in coming to the conclusion that the gift was bad’.⁵⁶ Though conceding that ‘friendship’ ‘draws a picture particularly blurred in outline’, his Lordship held that its context, and the circumstances of the case — in particular that the power was vested in the testator’s widow — ‘may well fill in what would otherwise be vague’.⁵⁷ What this dictated, Roxburgh J surmised, was that the gift contemplated ‘a degree of intimacy sufficiently close to make its detection quite easy’,⁵⁸ so that ‘it is only friends of a considerable degree of intimacy who are to be included in this gift’.⁵⁹

A little over 12 years later a similar issue confronted Plowman J in *Re Gibbard’s Will Trusts*.⁶⁰ The testator conferred a mere power in the survivor of two trust beneficiaries, by way of her will, to

⁵³ See, eg, *Re Connor* (1970) 10 DLR (3rd) 5 (Alberta Supreme Court). This case involved a gift of residue to be ‘divided among my close friends in such a way and at such time as my trustee in her discretion should determine’. The gift was held void for uncertainty because it was not possible to ascertain the entire class of ‘close friends’.

⁵⁴ [1955] Ch 495, 495.

⁵⁵ *Ibid* 497.

⁵⁶ *Ibid* 499.

⁵⁷ *Ibid*.

⁵⁸ *Ibid*.

⁵⁹ *Ibid* 500.

⁶⁰ [1967] 1 WLR 42.

appoint my residuary trust funds in such a manner and at such times and under such terms and conditions as she may think fit to charities or charitable institutions and amongst any old employees of mine or their descendants any of my old friends and their descendants and any nephews or nieces of mine and any of their descendants ...⁶¹

As the law defines the term ‘charity’ (and thus ‘charities’ and ‘charitable’),⁶² there was no problem with certainty in that part of the disposition. Nor did the terms ‘employees’, ‘descendants’, ‘nephews’ or ‘nieces’ present difficulties with certainty of object, for the reasons elaborated in *Re Baden’s Deed Trusts* discussed earlier. More challenging on the certainty front, and thus the subject of argument before Plowman J, was the reference to ‘my old friends’. Yet, following *Re Coates (deceased)*, his Lordship viewed that phrase as ‘a sufficiently precise test in the sense that there is no difficulty in envisaging cases where claimants might come along and establish beyond question that they would be eligible to use that expression’.⁶³ Seemingly influential was the following example offered by counsel for the appointee (that is, object) of the power, Mr Browne-Wilkinson, which Plowman J cited as follows:

suppose that the testator had been at preparatory school with X and had gone on from prep. school to public school with X, and then to University with X; each had become god-father to one of the other’s children, perhaps lived in the same neighbourhood, perhaps belonged to the same club, perhaps played golf together, perhaps dined in each other’s houses and had been doing that for 50 years. Could X, coming along and stating that that was the relationship between the testator and himself, fail to satisfy the description ‘any of my old friends’? I should have thought that the answer was no.⁶⁴

The (mere) power of appointment was accordingly valid. There was no requirement that the objects of the power be capable of exhaustive listing, nor any requirement that the donee be capable *in every instance* of determining with certainty whether or not a person fell within the object class. *Re Gibbard’s Will Trusts* was a weaker case, in the latter regard, than *Re Coates (deceased)*, given that, inter alia, the donee of the power was ostensibly not in as close a relationship to the testator as the donee in *Re Coates (deceased)* (the testator’s wife).

Each of these decisions preceded the House of Lords’ determination in *McPhail*, which in aligning the test of certainty of object concerning mere powers to trust powers obviated the list certainty requirement in the latter context. As noted earlier, the very nature of the ‘certainty’ underscoring the test espoused in *McPhail* rests on a binary inquiry: is an object ‘in’ the class, or ‘out’ of the class? A criterion that introduces matters of degree challenges this approach. What influenced the judges in both *Re Coates (deceased)* and *Re Gibbard’s Will Trusts* were scenarios that

⁶¹ Ibid 42.

⁶² See GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2nd ed, 2017) ch 2.

⁶³ *Re Gibbard’s Will Trusts* [1967] 1 WLR 42, 49.

⁶⁴ Ibid.

were amenable to inhabiting the ‘in’ side of the line, the former by reference to the testator’s wife and the latter by reference to an obvious factual illustration. Neither case probed more difficult circumstances, namely where the degree of friendship could not be substantiated with the same level of certainty.

It may be that while the House of Lords in *McPhail* opened the door to a wider class of objects than was previously allowable, its approach to the criterion certainty test, which it purported to align with the approach applicable to mere powers, could frustrate the validity of powers such as those in *Re Coates (deceased)* and *Re Gibbard’s Will Trusts*. Or it may be that the alternative is the case, namely that cases such as *Re Coates (deceased)* and *Re Gibbard’s Will Trusts* remain persuasive in setting the parameters of certainty of object when it comes to discretionary trusts, which if so may well dilute the concept of ‘certainty’ in that context.

There may be a third alternative: that a further difference remains between mere powers and trust powers when it comes to applying the certainty of object test. It will be recalled that Lord Wilberforce in *McPhail*, in phrasing the criterion certainty test, spoke in terms of its being ‘similar’ to that accepted in *Re Gulbenkian’s Settlements* for mere powers.⁶⁵ That his Lordship spoke in terms of similarity as opposed to identity may leave some wiggle room here. It may dictate that trust powers are subject to a more rigorous criterion certainty test than mere powers; that is, the certainty threshold could be higher for trust powers.

Support for this proposition may derive from the fact that their Lordships in *Re Gulbenkian’s Settlements* did not mention *Re Gibbard’s Will Trusts* (although it was cited in argument). Instead, their Lordships merely cited *Re Coates (deceased)* without elaboration in support, together with other cases, of the criterion certainty test for mere powers. Nor were these two cases cited, even in argument, in *McPhail*. It stands to reason that neither court considered them wrongly decided, a point with especial force in view of Lord Upjohn’s ‘my old friends’ illustration in *Re Gulbenkian’s Settlements*, noted earlier. Perhaps this proceeded on the assumption that, as the donee of a mere power has no obligation to make an appointment under the power, the need for a strict approach to certainty is less compelling.

At the same time, there may be a reason in principle capable of unsettling the above proposition. This derives from a common hallmark of a mere power, namely provision for a gift over in default of appointment; that is, provision for the destination of the fund in question should the donee not exercise the power to appoint within a class of objects. The presence of such a gift, it has been judicially observed, ‘demonstrates that the donor did not intend to impose a duty on the donee to make a selection in any event but contemplated that he might not elect to do so’.⁶⁶ The power in *Re Gulbenkian’s Settlements*, for instance, made provision to this effect. The persons who take in default of appointment are commonly termed ‘default beneficiaries’ (or ‘default objects’), which (subject to the terms of the relevant instrument) the law

⁶⁵ *McPhail* (n 12) 456.

⁶⁶ *Re Leek (deceased)* [1967] Ch 1061, 1074 (Buckley J).

acknowledges as possessing a *vested* interest typically in the income of the fund, but one liable to be *divested* by the donee exercising the power to distribute that income among the specified class of objects.⁶⁷

As there is a ‘backup’ in the event of the donee not exercising the power, and so no gap in beneficial ownership pertaining to the income (or fund) in question, there may be logic in being *stricter* when it comes to certainty of object in this context than where trustees are compelled to exercise their discretion in favour of a class (trust power). After all, as was envisaged in *Re Gulbenkian’s Settlements*, in so far as the (mere) power there was not exercised by the trustees *or was void for uncertainty*,⁶⁸ the income fell to be held upon the trusts declared under the gift over in default provision. The latter provision, in expressing the testator’s intention, serves to overcome the prospect that uncertainty of object, even where some potential objects are identifiable, could frustrate that intention. That, in turn, may be the consequence in the case of a trust power, unsupported by any gift over in default provision. In that context, a stricter approach to certainty has the prospect of fostering the failure of the disposition entirely, and with this frustrating the settlor’s intention.

Whatever may be the correct position, even for mere powers courts acknowledge that certainty plays more than a nominal role. This was apparent, for instance, from the remarks of Lord Reid in *Re Gulbenkian’s Settlements*. His Lordship noted that it was not disputed that if the description of the class is too uncertain, ‘the whole provision fails even although the other potential beneficiaries are easily ascertainable’.⁶⁹ Hence, merely because it is possible for the donee to identify persons who can take under the criterion specified does not by itself dictate that the criterion is one capable of certain application.

In view of the foregoing, one may hope to be instructed by investigating the curial approach to (un)certainly of object for mere powers post-*McPhail*. But there is not a great deal of case law to assist when it comes to drawing the certainty line. An indication that *McPhail* has not functioned to upset mere powers aligned with the criterion of friendship is found in *Re Barlow’s Will Trusts*.⁷⁰ The judgment was delivered by Browne-Wilkinson J, whom it may be recalled acted as counsel for the appointee (that is, object) of the power in *Re Gibbard’s Will Trusts*. Consistent with

⁶⁷ *Commissioner of Succession Duties (SA) v Isbister* (1941) 64 CLR 375, 380 (Williams J); *Commissioner of Stamp Duties (NSW) v Sprague* (1960) 101 CLR 184, 194 (Dixon CJ).

⁶⁸ This was so even though the gift over in default provision made no specific reference to failure due to uncertainty; it simply referred to holding ‘the said income or so much thereof as shall not be paid or applied under such discretionary trust or power’ upon certain trusts: *Re Gulbenkian’s Settlements* (n 20) 520 (Lord Upjohn). Evidently, their Lordships interpreted this clause as encompassing not merely a failure to appoint but a failure of the mere power in its entirety, including for reasons of uncertainty of object.

⁶⁹ *Re Gulbenkian’s Settlements* (n 20) 517.

⁷⁰ [1979] 1 WLR 278.

his submission in that case, his Lordship was willing to uphold the validity of a bequest of valuable artwork on a trust for sale, subject to the executor

allow[ing] any member of my family and any friends of mine who may wish to do so to purchase any of such pictures at the prices shown in [a] catalogue or at the values placed upon them by valuation for probate purposes at the date of my death, whichever shall be the lower.⁷¹

The argument was presented that the term 'friends' was semantically uncertain because of the many different degrees of friendship, it being impossible to say which degree the testatrix had in mind.⁷² Justice Browne-Wilkinson accepted that if the nature of the gift made it legally necessary to draw a complete list of the testatrix's 'friends', or to be able to say of any person that 'he is not a friend', the entire gift 'would probably fail even as to those who, by any conceivable test, were friends'.⁷³ But this was not so on the facts, according to his Lordship, who explained the point as follows:

But in the case of a gift of a kind which does not require one to establish all the members of the class (eg 'a gift of £10 to each of my friends'), it may be possible to say of some people that on any test, they qualify. Thus ... the example of a gift to X 'if he is a tall man'; a man 6 ft 6 ins tall could be said on any reasonable basis to satisfy the test, although it might be impossible to say whether a man, say, 5 ft 10 ins high satisfied the requirement.

So in this case, in my judgment, there are acquaintances of a kind so close that, on any reasonable basis, anyone would treat them as being 'friends'. Therefore, by allowing the disposition to take effect in their favour, one would certainly be giving effect to part of the testatrix's intention even though as to others it is impossible to say whether or not they satisfy the test.⁷⁴

Re Barlow's Will Trusts adds another wrinkle to the certainty of object scenario. It must be conceded that it does not engage the standard 'mere power' scenario, instead being better described in terms of a testamentary option. Accordingly, any exercise of 'discretion' in this context lies in the optionee, not in the donee (or trustee) of any power.⁷⁵ At the same time, though, standing to exercise the option rested upon

⁷¹ Ibid 280.

⁷² Ibid. His Lordship also addressed the criterion of 'family', noting that '[i]t is not suggested that this class is too uncertain', and that '[i]n the absence of issue, the prima facie meaning of "family" means "relations," that is to say those related by blood': at 283.

⁷³ Ibid 281.

⁷⁴ Ibid.

⁷⁵ It may be observed, as an aside, that the position of an optionee vis-à-vis the relevant property is 'stronger' than that of a beneficiary of a discretionary trust vis-à-vis the trust property. After all, the optionee can select property within the terms of the option, whereas the beneficiary of a discretionary trust cannot call for distribution. It

being a member of a class specified by the criterion ‘friends’, and so in order to fulfil its obligations the trustee could only accede to applications by persons within that criterion.

As appears from the foregoing, Browne-Wilkinson J approached this inquiry from the perspective of eligibility rather than ineligibility. After all, he targeted ‘acquaintances of a kind so close that, on any reasonable basis, anyone would treat them as being “friends”’. And, as noted above, he had earlier branded as uncertain a requirement that involved the trustee being able to say of any person that ‘he is not a friend’. This in turn bespeaks a rather diluted concept of certainty, which may be satisfied provided that some persons can clearly substantiate their status as a ‘friend’, notwithstanding that there are others whose status as a friend may be less compelling, and others again who on no reasonable basis could be described as friends. Driven to give (maximum) effect to testamentary intention, the decision seems quite divorced from the criterion certainty approach espoused in *McPhail*.

The only Australian case to address the ‘friends’ aspect of *Re Barlow’s Will Trusts* is *Lempens v Reid*,⁷⁶ a 2009 decision of the Supreme Court of South Australia. However, Gray J in that case did not need to squarely address the certainty threshold in a case such as *Re Barlow’s Will Trusts* (or indeed *Re Coates (deceased)* or *Re Gibbard’s Will Trusts*), as the disposition in question was not phrased in discretionary terms. The relevant testamentary clause purported to bequeath one-half of the estate to ‘such of them my friends who resided with me from overseas’. His Honour found this clause semantically uncertain, although at the same time cast no aspersions on the correctness of *Re Barlow’s Will Trusts* (or of *Re Coates (deceased)* and *Re Gibbard’s Will Trusts*), thus leaving the issue of certainty somewhat suspended.

In view of the preceding discussion, there are reasons to believe that the concept of ‘certainty’ when it comes to exercises of trustee discretion may be less precise than appears at first glance. Not every scenario, it seems, is amenable to judges applying the binary ‘in’ and ‘out’ approach espoused in *McPhail*. And it goes to show that certainty is not always premised upon the ability to clearly distinguish between two disparate classifications. As illustrated below, moreover, the challenges in this regard are (perhaps unsurprisingly) not confined to fixed and discretionary (‘individual’) trusts but are capable of emerging when making the distinction, again in the realm of certainty of object, between individual and purpose trusts.

may be argued, then, that the more ‘concrete’ nature of the optionee’s interest should spawn a stricter test of certainty than that which applies in the discretionary trust environment.

⁷⁶ *Lempens* (n 20).

V PRIVATE PURPOSE TRUSTS

A *The Certainty Rule*

When speaking of purpose trusts, the charitable trust looms large because it is arguably the only purpose trust that can, in Australian law, categorically and without exception be characterised as valid. As has long been understood, equity treated charity with tenderness, broadly speaking because it encouraged financial support for objects accruing for the public benefit. As a charitable trust is by its very nature a purpose trust (despite the fact that individuals ultimately benefit therefrom, given that the benefit must accrue to the *human* public),⁷⁷ the beneficiary principle requires modification in the charitable environment. The law has done so by essentially treating the ‘purpose’ as the beneficiary, in circumstances where it falls within the legal (as opposed to dictionary) definition of ‘charity’.

However, a ‘purpose’, unlike an individual beneficiary, cannot enforce a trustee’s obligation; it does not have an ‘interest’ in the proper management of the trust property, and so is not positioned to raise any issue before a court. This could manifest itself in little or no control over the trustee’s use (and abuse) of the trust property unless the law were to provide some avenue to this end. In the context of charitable trusts, the law has done so via its longstanding conferral upon the relevant Attorney-General, representing the public (which is to benefit), of standing to enforce such trusts. It may be observed that, as Attorneys-General do not maintain a list of charitable trusts, do not conduct trustee compliance audits, and do not receive trust financial (and other) statements,⁷⁸ the notion of enforcement here rests upon an individual with an ‘interest’ alerting the Attorney-General to potential trustee infelicities.

Otherwise, certainty of object when dealing with charitable trusts shares a core similarity with that pertaining to individual trusts. In each case the trust either fulfils certainty of object — for individual trusts, as noted earlier, by reference to the certainty surrounding beneficiaries or beneficiary classes; for purpose trusts, by certainty manifested by coming under the ‘charitable’ umbrella as defined by the law — or it fails. There are, again, only two outcomes, with no intermediate ‘partial certainty’ category; the exercise is ‘all or nothing’. That a legal meaning attaches to the concept of ‘charity’ does not, however, mean that its parameters are always

⁷⁷ Which explains why objects directed to, say, benefiting animals per se are not charitable whereas those directed at the protection and preservation of animals, from which some benefit to humans can ensue, are charitable: see the discussion in *Murdoch v A-G (Tas)* (1992) 1 Tas R 117.

⁷⁸ The situation has changed with the operation of the Australian Charities and Not-For-Profits Commission, which registers charities, performs a monitoring role, and receives statements from registered charities: see *Australian Charities and Not-For-Profits Commission Act 2012* (Cth) chs 2 (registration), 3 (record-keeping and reporting), 4 (information gathering, monitoring and enforcement powers). This initiative does not, however, supplant the enforcement of charitable trusts by the relevant Attorney-General.

precise.⁷⁹ Questions of degree sometimes emerge, which challenge the parameters of ‘certainty’.

The foregoing explains not only frequent litigation in this regard, but outcomes (especially in the context of allegedly charitable associations) that are difficult to view as precedential, given minute distinctions between influential facts.⁸⁰ And it has engaged the courts in semantic (and, from a testator’s perspective, questionable) distinctions between ‘charity’ and prima facie similar terms such as ‘benevolent’ or ‘philanthropic’.⁸¹ Unlike in the individual trust scenario, however, the charity environment in each Australian state has witnessed statute expand certainty of object to encompass what may prove no more than ‘partially charitable’ and thus only ‘partially certain’. Colloquially known as ‘saving legislation’,⁸² it functions to bring within the charity fold objects that fall outside the legal concept of ‘charity’ if the court is satisfied of a ‘distinct or sufficient indication’ of an intention to benefit charity, albeit not exclusively.⁸³

As this article targets private trusts, mention of charitable (public) trusts is made primarily for context. But it serves to highlight why purpose trusts that are not ‘charitable’ at law (and cannot be ‘saved’ by statute) confront traditionally insurmountable hurdles to certainty of object. Trusts of this kind, as foreshadowed above, contravene the beneficiary principle precisely because they lack a beneficiary with standing to enforce the trustees’ obligations thereunder. Accordingly, aside from a longstanding but anomalous exception surrounding the maintenance of a testator’s tomb or animals,⁸⁴ non-charitable purpose trusts are treated as prima facie void, even if there are individuals who have an interest in their enforcement.

⁷⁹ While the law usually attributes legal meanings to terms to give them greater precision than dictionary meanings, the converse is ostensibly the case when it comes to the legal meaning of ‘charity’, which in most respects is broader and more amorphous than its dictionary equivalent: see GE Dal Pont, ‘Charity Law: “No Magic in Words”?’ in Matthew Harding, Ann O’Connell and Miranda Stewart (eds), *Not-For-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 87.

⁸⁰ Compare, for example, *Chamber of Commerce and Industry of Western Australia (Inc) v Commissioner of State Revenue (WA)* (2012) 89 ATR 797 with *South Australian Employers’ Chamber of Commerce & Industry Inc v Commissioner of State Taxation (SA)* (2017) 106 ATR 305.

⁸¹ See, eg, *Chichester Diocesan Fund and Board of Finance (Incorporated) v Simpson* [1944] AC 341 where a trust for ‘charitable or benevolent’ purposes was held void as an admixture of charitable and non-charitable objects.

⁸² See *Charitable Trusts Act 1993* (NSW) s 23; *Trusts Act 1973* (Qld) s 104; *Trustee Act 1936* (SA) s 69A; *Variation of Trusts Act 1994* (Tas) ss 4(2)–(3); *Charities Act 1978* (Vic) s 7M; *Trustees Act 1962* (WA) s 102.

⁸³ *McCracken* (n 50) 81 (Phillips J).

⁸⁴ Its ‘troublesome, anomalous and aberrant’ nature (*Re Endacott (deceased)* [1960] Ch 232, 251 (Harman LJ)) explains why further discussion of this exception is omitted from this article. On this topic see James Brown, ‘What Are We to Do With Testamentary Trusts of Imperfect Obligation?’ (2007) 71 (March/April) *Conveyancer and Property Lawyer* 148.

This has in turn prompted arguments that what appear to be purpose trusts are instead trusts for individuals, and the case law evinces occasions where courts have acceded to such arguments,⁸⁵ as well as rejected them.⁸⁶ It has equally driven submissions that the legal concept of ‘charity’ ought to be extended to encompass the purpose(s) in question, which again have sometimes succeeded,⁸⁷ but other times failed.⁸⁸

B *The Rule Relaxed?*

There is nonetheless a line of authority treading what can, at least in one sense, be viewed as a middle ground. It emanated from the decision of Goff J in *Re Denley’s Trust Deed*, involving a trust of land to

be maintained and used as and for the purpose of a recreation or sports ground primarily for the benefit of the employees of [a specified] company and secondarily for the benefit of such other person or persons (if any) as the trustees may allow to use the same ...⁸⁹

The employees were, under the terms of the trust, entitled (subject to rules and regulations made by the trustees) to use and enjoy the land. Having characterised this as a purpose trust — in line with the language of the said clause — but not a charitable trust (by reason of its sporting and recreational nature),⁹⁰ trusts orthodoxy should have led Goff J to declare the trust void. Yet its validity was upheld, following a distinction his Lordship espoused. The void side of the (fault) line was conceptualised in the following terms:

I think there may be a purpose or object trust, the carrying out of which would benefit an individual or individuals, where that benefit is so indirect or intangible or which is otherwise so framed as not to give those persons any *locus standi* to apply to the court to enforce the trust, in which case the beneficiary principle would, as it seems to me, apply to invalidate the trust ... [T]he beneficiary principle ... is confined to purpose or object trusts which are abstract or impersonal. The objection is not that the trust is for a purpose or object per se, but that there is no beneficiary or cestui que trust ...⁹¹

⁸⁵ See, eg, *Re Segelman (deceased)* [1996] Ch 171.

⁸⁶ See, eg, *Strathalbyn Show Jumping Club Inc v Mayes* (2001) 79 SASR 54 (*‘Strathalbyn Show Jumping Club’*).

⁸⁷ See, eg, *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation* (2005) 142 FCR 371.

⁸⁸ See, eg, *Re Shaw (deceased)* [1957] 1 WLR 729.

⁸⁹ [1969] 1 Ch 373, 375.

⁹⁰ On sporting and recreational trusts falling outside the charity net see Dal Pont, *Law of Charity* (n 62) 268–76 [12.2]–[12.12].

⁹¹ *Re Denley’s Trust Deed* [1969] 1 Ch 373, 382–3.

This was distinct from occasions where ‘the trust, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals’, which Goff J located as ‘in general outside the mischief of the beneficiary principle’.⁹² His Lordship, being concerned with scope for the enforcement of the trust, clearly perceived company employees to have a sufficient ‘interest’ in enforcing the trust (being ‘capable of ascertainment at any given time’ in line with the then governing test in *Broadway Cottages*), and thus to bring to the court’s attention any trustee behaviour inconsistent with its terms.⁹³ In his Lordship’s opinion, the court could then

execute the trust both negatively by restraining any improper disposition or use of the land, and positively by ordering the trustees to allow the employees and such other persons (if any) as they may admit to use the land for the purpose of a recreation or sports ground.⁹⁴

There is no Australian authority to date endorsing this approach (although it has been followed in England).⁹⁵ Instead, dicta in two first instance decisions cast doubt over its legitimacy. Yet the first obviated any need to probe the point because the judge found the case did not involve a purpose trust,⁹⁶ whereas the second did not, on the test proposed by Goff J in *Re Denley’s Trust Deed*, involve the alleged beneficiaries being ascertainable at a given time.⁹⁷

The decision has also been subject to academic criticism for supposedly introducing a new category of non-charitable purpose trust.⁹⁸ While the trust in *Re Denley’s Trust Deed* was expressed for a purpose, and was so acknowledged by Goff J, whether it indeed heralded an intermediate category between valid individual trusts and invalid purpose trusts is not quite as clear. That his Lordship located the question of the trust’s enforcement, and with this the incidents of certainty of object, squarely in the hands of the company employees appears to treat the employees as individual beneficiaries thereof. His expression of the trust as ‘directly or indirectly for the benefit of an individual or individuals’⁹⁹ speaks to this, as does his application, mentioned above, of the *Broadway Cottages* test of certainty of object. In passing, it should be

⁹² Ibid 383–4.

⁹³ Ibid 386.

⁹⁴ Ibid 388.

⁹⁵ See *Re Lipinski’s Will Trusts* [1976] Ch 235, 247–8 (Oliver J).

⁹⁶ *Tidex v Trustees Executors & Agency Co Ltd* [1971] 2 NSWLR 453, 465 (Street J). Cf *Radmanovich v Nedeljkovic* (2001) 52 NSWLR 641, 664–5 [127]–[129] (Young CJ in Eq) (who made brief passing mention of *Re Denley’s Trust Deed*, but similarly considered it factually inapplicable on the facts in question).

⁹⁷ *Strathalbyn Show Jumping Club* (n 86) 65 [50]–[51] (Bleby J).

⁹⁸ See, eg, JM Evans, ‘Purpose Trusts — Further Refinements’ (1969) 32(1) *Modern Law Review* 96.

⁹⁹ *Re Denley’s Trust Deed* [1969] 1 Ch 373, 383.

noted that in some jurisdictions the issue has been addressed by way of statute to validate certain purpose trusts¹⁰⁰ or to vest standing in an ‘enforcer’ or ‘protector’.¹⁰¹

VI WHERE DOES THIS TAKE (OR LEAVE) US?

This article commenced with the observation that the law is continually engaged in drawing (fault) lines designed to dictate one outcome or another in a given factual scenario. Inquiries into certainty of object for private trusts simply present one illustration of this exercise. That certainty of object goes to the *validity* of private (as well as charitable) trusts may function to bolster the proposition that the line between certainty and uncertainty in this context should be marked by an objectively determinable inquiry.

So it proves, at least *prima facie*. For fixed trusts, certainty of object is governed by the list certainty test, which simply asks whether it is possible to make a complete list of the beneficiaries at the distribution date. For discretionary trusts, the same inquiry rests upon proof of ‘criterion certainty’, namely whether from a ‘definitional’ (or ‘semantic’) perspective a person falls within or outside the beneficiary class so defined. And courts have long proven able to distinguish individual from purpose trusts, and sided with one or the other, depending on the language of the relevant disposition, notwithstanding occasions where indicators potentially led both ways.

Yet as catalogued in this article, there are instances where the certainty inquiry has not proven entirely amenable to such an objective determination. Justice Young in *West* envisaged that certainty for fixed trusts need not always require the capacity to draw a complete list of beneficiaries, but that ascertaining a ‘substantial majority of the beneficiaries’ where ‘no reasonable inquiries could be made which would improve the situation’ could suffice.¹⁰² Case law involving discretions as to appointment, moreover, has revealed that a criterion upon which reasonable minds may differ — ‘friendship’ — may not necessarily infringe the criterion certainty test. And in *Re Denley’s Trust Deed* what appeared to be a (non-charitable) purpose trust was upheld because, rather than being ‘abstract and impersonal’, it enured ‘directly or indirectly for the benefit of an individual or individuals’.¹⁰³

Each of these instances challenges the ‘certainty’ of object inquiry in a similar way, by inviting inquiry into a matter of degree. What is a ‘substantial majority’? What are the parameters of ‘friendship’? Where is the line drawn between the ‘impersonal’ and the ‘individual’? This is not to say that matters of degree are inconsistent with certainty in outcomes — after all, many determinations in the legal sphere require

¹⁰⁰ See, eg, *Perpetuities Act*, RSO 1990, c P.9, s 16(1) which is Canadian legislation that treats trusts for non-charitable purposes as valid powers.

¹⁰¹ See, for instance, the discussion in Tsun Hang Tey, ‘The Duties of a Trust Enforcer’ (2010) 22(2) *Singapore Academy of Law Journal* 363.

¹⁰² *West* (n 15) 664.

¹⁰³ [1969] 1 Ch 373, 383.

drawing a line based on degree — but that the precision traditionally understood as underscoring certainty of object in private trusts may be more fluid than first envisioned. It reveals that while tests directed to making a clear division between two potential outcomes are valuable — and especially so where those outcomes are polar opposites, with distinct proprietary consequences — circumstances may arise that are capable of justifying a mitigation of their strictness and apparent objectivity.

If so, the ‘certainty’ underscoring certainty of object for private trusts may not necessarily be certainty as we have always imagined it, and the question centres on whether the law should be any the worse for it. In addressing that question, it is notable that on each occasion where judges have been inclined to broaden (or loosen) the certainty envelope, they have been minded to preserve the rationale for the certainty requirement. As foreshadowed at the outset of the article, certainty of object is designed to curb the spectre of uncontrolled (legal) power in the trustee and thereby ensure that the beneficiaries enforce their (equitable) entitlements under the trust. The focus in each case upon beneficiaries (or objects) with standing to enforce the relevant obligations speaks to this.

Assuming that the mischief to which certainty of object is directed can be adequately addressed in these instances, a powerful policy reason supports the validity of these dispositions, namely giving effect to the donor’s intention. This was implicit in *Re Coates (deceased)*, *Re Gibbard’s Will Trusts* and *Re Denley’s Trust Deed*, and explicitly acknowledged in *West* and *Re Barlow’s Will Trusts*. In a society and legal system premised upon private ownership of property, with the attendant freedom to dispose of property as its owner deems fit, it would be odd for the law to frustrate the formal expression of that freedom without a compelling justification. It may be queried, to this end, whether an inability to precisely ascertain or distinguish every beneficiary should necessarily constitute such a justification.

It should not be overlooked, moreover, that in the testamentary context, where much of the case law on certainty of object has emanated, courts have long acknowledged the force of a rule of construction informed by the Latin phrase *ut res magis valeat quam pereat*, translated as ‘that the thing may rather have effect than be destroyed’.¹⁰⁴ In construing testamentary dispositions, the law has also long recognised and applied a presumption against intestacy, prompting the adoption, where possible, of a construction that avoids property devolving under the intestacy rules rather than according to the testator’s intention.¹⁰⁵ It may be recalled that *West* and the ‘friendship’ cases each involved testamentary dispositions; and although *Re Denley’s Trust Deed* did not, the outcome would presumably have been bolstered had it inhabited the testamentary environment.

¹⁰⁴ This has witnessed repeated acknowledgement and application by the High Court: see, eg, *Carroll v Perpetual Trustee Co Ltd* (1916) 22 CLR 423; *Fell v Fell* (1922) 31 CLR 268; *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1.

¹⁰⁵ See Dal Pont, *Interpretation of Testamentary Documents* (n 47) 57–60 [3.3]–[3.5].

In view of the foregoing, some loosening of the test of certainty of object for private trusts, where it does not threaten the mischief underscoring the beneficiary principle and gives effect to dispositive intention, may not unduly prejudice the binary exercise involved in drawing the 'fault lines' inherent in the concept of 'certainty'. In the words of Oliver Wendell Holmes Jr, the law may prove 'none the worse for it'.