

6. Capriciousness

if condition is capricious, it may be disregarded

DISCRETIONARY TRUSTS

Mere Powers of appointment - The trustees have a power to transfer given amounts to the trust income to an identified class of beneficiaries. The trustees are not obliged to transfer money to any beneficiaries, rather they would have the ability to do so in defined circumstances if they consider it appropriate

The way to distinguish between a discretionary trust and a power of appointment is by examining the precise terms of the trust; whether or not the trustees are compelled to act or merely enabled to act - 'Shall'=discretionary where 'may' = merely a power

1. The essential test of certainty

The trustees are given discretion as to which objects are to be benefited by distribution of the trust property and in what proportion. Confusingly this type of trust is described as a 'trust power'. It is essential that the trustees know from the outset who the potential beneficiaries might be. If this is unclear, a trust will be void for uncertainty.

The trustees therefore have a discretion as to how they exercise their power but they have an obligation to exercise that discretion in favour of one of the objects of that trust.

Satisfying the complete list test creates more difficulties for discretionary trusts rather than fixed trusts because discretionary trusts involve many more objects.

Mc Phail v Doolittle [1971] AC 413

is or is not test

The test requires that, for a discretionary trust to be valid, it must be possible to say of any given claimant to the trust that that person either is or is not within the class of beneficiaries. In the event that any one person cannot be categorised as falling either within or without the class of beneficiaries, the trust fails.

The strict test will tend to invalidate many trusts where vague expressions as 'good friends' are used to define the class of the beneficiaries.

The settlor established a fund for the benefit of the employees and ex employees of a company, and their relatives and dependants. It was recognised that the settlor had purported to create a discretionary trust, but the validity of this trust turned on whether relatives and dependants were sufficiently certain objects

"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"

Lord Wilberforce : held that it was sufficient that it could be said with certainty what any given individual was or was not a member of the relevant class and it was not necessary to ascertain everybody who was in the class. This is sometimes known as the 'postulant test' It is important to stress that 'any' in 'any given person' does not mean that it is enough that one person satisfies the test , but instead refers to anybody at all who might be considered to be a potential object.

The HL rejected the fixed list test of certainty of objects for discretionary trusts. This is because if the trustees fail to exercise their discretion, the court will be willing to find a solution without resorting to the maxim that 'equality is Equity' . The general significance of this maxim was doubted by Lord Wilberforce in Mc Phail v Doulton especially because it would rarely accord with the intention of the settlor. Indeed as he recognized, in some trusts equal division among many will be beneficial to nobody, since the trust assets would be disbursed so thinly as to be essentially worthless.

The **is or is not test** is satisfied "if it can be said with certainty whether any given individual is or is not a member of the class and does not fail simply because it is impossible to ascertain every member of the class" (Lord Wilberforce in McPhail v Doulton)

The complete list test is not totally irrelevant to discretionary trusts, but will apply only where it appears that the settlors' intent is that if the trustee does not make a selection from the objects, there will be division among them all, whether equally or in different proportions. Such a construction of the settlor's intent would be available only where the list of potential objects is small.

Re Baden's Deed Trusts(no2)1979 - CA considered that the discretionary trust was valid by applying Lord Wilberforce's test

2. Conceptual Certainty

The test of certainty of objects will not be satisfied if it is not possible to define the description of the class with sufficient clarity.

Re Baden (no2) - CA recognised that both 'relatives' and 'dependants' were conceptually certain. 'Dependants' were defined as those who are wholly or partly financially depended on somebody else. 'Relatives' were defined by Sachs and Megaw LJ as descendants from a common ancestor.

Re Barlow's Will Trusts - the normal meaning of 'family' was considered to be those related by blood. Blood relation creates a much potential class than defining them by reference to a common ancestor.

Lord Brown Wilkinson J provided some guidance as to the meaning of 'friends' eg long-standing relationship, social rather than business, in which the parties met frequently when they had the opportunity

He held that it might be possible to validate a testamentary bequest if the testator's intention could be shown to be an intention to make gifts of individual items of property rather than to impose a trust over all of that property