

1. Are the differences between a trust and a power theoretical or real?

Suggested Answer

See 3.1 to 3.4. It is worth explaining that there are different types of trusts and powers. Mere (bare) powers are exercised by appointors, who are often beneficiaries themselves. Fiduciary powers are exercised by trustees, who, because they are trustees, must choose more carefully. Fixed trusts involve clearly defined and specified beneficiaries, whereas discretionary trusts require trustees to choose among a class of beneficiaries. A comparison is often made between fiduciary powers and discretionary trusts. In both the trustees must choose amongst the class. Beneficiaries do not have specific equitable interests, just a hope (*spes*) that they are chosen by the trustees. In both fiduciary powers and discretionary trusts the beneficiaries have a right to have the trust properly run and their claims considered properly. It is thought that the trustees must consider more thoroughly in a discretionary trust: *Re Hay* [1982] 1 WLR 202, and that the beneficiaries can ultimately claim the trust property: *Re Smith* [1928] Ch 915. This difference may be more apparent than real: *McPhail v Doulton* [1971] AC 424. It must also be borne in mind that there are many sub-categorisations of the different types of trusts and powers, such as exhaustive and non-exhaustive discretionary trusts and academic writers have different views on how trusts and powers should be classified and distinguished one from another.

FURTHER READING: [1982] Conv 432 A Grubb, 'Powers, trusts and classes of objects—*Re Hay's Settlements*'.

2. Do the cases on certainty of objects indicate a consistent approach by the courts?

Suggested Answer

See 3.8 and 3.10. The requirement of the three certainties is a basic requirement of trust law dating back to older cases such as *Wright v Atkyns* (1823) Turn & R 143 and *Morice v Bishop of Durham* (1805) 9 Ves Jun 401. Lord Eldon gave no test to decide whether any of the three certainties was present. He explained that certainty of objects is necessary, because there must be somebody to go to court and enforce the trust, if the trustees do not carry out their trust obligations. Therefore courts, and that means individual judges, have to decide whether certainty of objects is present, looking at the words used in the trust and the context surrounding the declaration of trust. The English language is complex with many words having several different meanings, so it is not surprising that individual judges come to different interpretations. This is well explained at 3.8.7 in *Re Gulbenkian's Settlements* [1970] AC 508: the courts do try to make sense of the words used in a trust. They do not want to find the trust invalid, unless there is no alternative. The first two certainties have no particular test, but certainty of objects does. It is complicated by the fact that there are different tests for different types of disposition. For a fixed trust, the number and identity of all the beneficiaries must be known. This is sometimes known as the rule of exhaustive enumeration or complete ascertainment. It must be possible to list all the beneficiaries, because the trust property belongs to them and, if the trust fails, it must be possible to divide it up among them: *IRC v Broadway Cottage Trust* [1955] Ch 20.

Fiduciary powers adopted a different certainty of objects test in *Re Gestetner* [1953] Ch 672. In a power, the trust property does not belong to the beneficiaries, the property will never be divided between them and so it is not necessary to identify every one of them. The test for certainty of objects is whether it can be said with certainty whether any given individual is or is not a member of the class. The idea is that the class must be so clearly defined that if any possible person claimed to be a member of the class, it would be possible to give a simple yes or no answer. The same test was adopted for discretionary trusts in *McPhail v Doulton* [1971] AC 424. The test has proved difficult to apply, as explained in question 3. The difficulty has been compounded, because conditional gifts have yet another version of the certainty of objects test. See 3.10. There the court must be satisfied that at least one person could satisfy the definition of the class: *In Re Barlow's Will Trusts* [1979] 1 WLR 1 WLR 278.

FURTHER READING: CT Emery 'The Most Hallowed Principle-Certainty of Beneficiaries in Trusts and Powers of Appointment' (1982) 98 LQR 551

3. Is the *McPhail v Doulton* test for certainty of objects workable?

Suggested Answer

See 3.8. The *McPhail* test came about because of the difficulty of deciding certainty of objects for fiduciary powers and discretionary trusts. It is worth considering previous attempts to put forward tests for certainty of objects in cases such as *Re Gulbenkian* [1970] AC 508 and *IRC v Broadway Cottages* [1955] Ch. 20. The test put forward in *McPhail v Doulton* [1971] AC 424 seems straightforward enough, but has proved difficult to apply. Three judges reached the same conclusion, that 'relatives' passed the certainty of objects test, but for different reasons in *Re Baden No.2* [1973] Ch. 9.

One way of ensuring that the class of objects in a fiduciary power or discretionary trust passes the certainty test is to draft it very widely, as in *In Re Manisty's Settlement* [1974] Ch. 17, so there also needs to be an additional test of administrative workability. See 3.9

FURTHER READING: (1974) 37 MLR 642 Y. Grbich "Baden: awakening the conceptually moribund trust."

4. How do beneficiaries enforce the duties of the trustees in a fiduciary power or discretionary trust?

Suggested Answer

See 3.3 and 3.4. Here the beneficiaries are more commonly called objects. Unlike in fixed trusts they do not have specific individual equitable interests that they can enforce. Instead, the trustees have a duty to consider and the objects can force the trustees to consider properly: *Re Hay's Settlement Trusts* [1982] 1 WLR 202. A complete failure to consider would be actionable by the beneficiaries, but such situations would be rare, as trustees would be more likely to consider, but consider

badly: *Turner v Turner* [1984] Ch 100. On the other hand, the trustees have no duty to explain their decisions to the beneficiaries, which makes it harder for the objects to challenge the decisions of the trustees in court: *Re Beloved Wilkes Charity* (1851) 3 Mac. & G. 440. In theory, at least, the objects of a discretionary trust can use the rule in *Saunders v Vautier* (1841) 4 Beav. 115 and end the trust.

FURTHER READING: As above.