Chapter Two

The nature of a power

The general point is that a power is a non-enforceable obligation but a trust creates an enforceable obligation. However, it may be difficult to tell the difference between the two. You will see in the test for certainty of objects (Chapter Three) that there are different tests for fixed and discretionary trusts. It was noted by Lord Wilberforce in *McPhail v Doulton* that a discretionary trust had more in common with a power than it did with a fixed trusts. The idea that should the trustee not fulfil their obligations to distribute the fund would be divided equally between the class of beneficiary may not be what the settlor ever intended.

It may be difficult to tell the difference between a discretionary trust and a power. For example:

a) £100,000 to my trustee on trust for such of my relatives as my trustee shall choose and if he does not select any then to my friend Luke.

b) £100,000 on trust for such of my relatives as my trustee shall choose.

c) £100,000 to Katie in the hope that she will share it with her cousins.

All of these settlements have some power of choice but there is a difference. In a) there is a power by the trustee to make an appointment (give a share) to the relatives of the settlor and if this is not done then there is a gift over in default for Luke. Luke will have an interest if the money is not used for the relatives, and has no claim on the money if all the money is used by the donee of the power (note the language) for the benefit of the relatives). Any money not used for this power will go to Luke.

Whilst in b) there is a discretionary trust for the relatives. In c) this is a mere power.

Sometimes it is the language that may confuse, with trust powers, powers of appointment, fiduciary powers etc. The following is a brief attempt to try and clarify some issues and help you identify them. Hopefully this will help you identify the types of settlements/bequests and the language the courts use.

**Discretionary Trust**

In b) above there is a discretionary trust. This means that the relatives of the settlor can compel the trustee to appoint, make a selection from them as to who will get the money. The potential beneficiaries have a proprietary interest in the money. So the trustee has a duty to appoint but has a discretion as to the size of share which the appointee may receive and to which of the class will receive. This is important in
deciding the correct test for certainty of objects (see chapter 3). It may be worth noting that a discretionary trust for a small family trust in *Burrough v Philcox* (1840) 5 My & Cr 72, was considered to fulfil the same test as a fixed trust because in default of appointment the money was assumed to be required to be divided equally (on the true intention of the settlor). **Powers**

Both a) and c) create powers but they are different. In a) this is a power which is given to a trustee and creates a fiduciary power. It appears in a) that there is a discretionary trust, a common mistake for students is to see that the word trust is used, and that there is a trustee, but they need to be clear about the interests created. There will be a trust for Luke, which would be fixed as no discretion is attached to that. But the trustee has the power to distribute, all, some or none of the money to relatives. If he does give it all to the relatives, the trustee cannot be sued by Luke as they have acted within their power, if the trustee gives none they cannot sued by the relatives as he has not duty to distribute to them.

**Fiduciary Powers** - The trustee has a discretion similar to that in b) but they cannot be compelled by the relatives to select, neither do the relatives have any proprietary interest until there has been an appointment. The only duty that the trustee does have is to consider the exercise of the power and not to act capriciously in the performance of their power; *Re Hays* [1981] 3 All ER 786.

**Mere powers** – have no requirement to act or consider acting. So in c) Katie can just keep the money and has no need to explain to the cousins why she has done this; *Adams & Kensington Vestry* (1884) 27 ChD 394. It would be a gift to Katie with a mere power (a moral obligation and no more).

**Special Powers** – can be part of a mere power or fiduciary power and is there the potential beneficiaries are restricted, as in a) to the relatives.

**Intermediate/hybrid powers** – are similar to special powers but are negative in defining their class; so everyone except… In *Re Parks*[1932] 1 Ch 580 – ‘except the settlor, wife and relatives’. *Re Byron’s Settlement* [1891] 3 Ch 475 ‘except her husband or any friend or relatives of his’. So you can see from this broad class that the problem of administrative unworkability is not a problem for powers.

**Quistclose Trusts**

The power can also include a purpose (see Chapter Seven). The debate concerning the nature of a *Quistclose Trust (Barclays Bank Ltd v Quistclose Investments Ltd* [1968] UKHL 4) has generated much academic debate and there is no attempt here to summarise the many debates. This is a popular essay area and this is brief attempt to look at the issues involved.
The main facts – money was lent to RR by Q for a particular purpose (paying dividends to shareholders). RR went in liquidation before the purpose could be carried out. BB claimed the money in the bank was theirs, to meet debts owed to it by RR.

The Issues

A loan agreement is a contractual arrangement, and if not repaid then the remedy is personal. This would place Q as an unsecured creditor of RR. If however they could prove that the money lent was theirs they had a proprietary claim, which would that property from any claim be creditors.

Lord Wilberforce in the leading judgment said that the fact that there was a loan agreement did not mean that there could not be a trust. The liability to pay interest would arise when the money was used to pay dividends (the purpose) and the relationship would be only contractual, but if there was a failure then it was a resulting trust (see Chapter Nine) for the lender. He talked of two trusts, one for the paying of dividends (the primary trust) and a second, in suspense, until the purpose fails.

As a matter of trusts you could use your knowledge to criticise this reasoning. All trusts need the three certainties;

The subject matter of the trust is the money lent for the purpose, which is usually not an issue. Although it was difficult to identify in Farepak Foods & Gifts Limited [2006] EWHC 3272.

The intention to create a trust was not evident on the facts. Although there is no need to use the word trust it is not clear on what facts there could be one found, as there was in Paul v Constance (see Chapter Five). One way that later cases have considered the intention to be evident is the separation of the money into a separate account (see Re Kayford [1975] 1 All ER 604).

The issue of intention in a Quistclose trust has been considered by many academics (see the on-line materials for chapters 7 and 9). In looking at the nature of the Quistclose Trust Lord Millett in Twinsectra Ltd v Yardley and Others [2002] UKHL 12, considered that there was a loan, with the benefit held on resulting trust (although this is not certain) for the lender, with the borrower having a power to use (apply) for a particular purpose. This may show you that later in the course you will see that the simplified identification of trusts and powers we begin our studies with it more complicated as we progress.
The objects of the trust are also problematic if we take Lord Wilberforce’s view. If there is a (primary) trust for the payment of dividends, then it would appear that the shareholders are the beneficiaries; if so, when the dividends are not paid they should have a remedy. However, it was considered that the failure to pay the dividends then engaged the ‘secondary’ trust for the lender. This would perhaps be fine in *Quistclose* itself but if the money was lent to buy materials or land the beneficiary of the ‘primary’ trust are not human but for a purpose, and therefore offends the beneficiary principles. You will see in chapters 6 and 7 that the courts do not generally enforce purpose trusts). However, if we take the explanation advanced in *Twinsectra* this is overcome, as there is a power, which can be a purpose, and a trust for the lender.

From this brief summary of the issues in one case you can see how the issues in the later chapters of this book interact and form the parts of a fascinating jigsaw; a puzzle that is worth completing.

**Protective Trusts**

Protective trusts are trusts aimed at preventing an irresponsible beneficiary from wasting trust property. Section 33 Trustee Act 1925 simplifies the method by which the beneficiary is given a life interest which is determinable (can be forfeited) on given events, for example bankruptcy or sale. At this point the protective trust ends and the property is then held on a discretionary trust for the beneficiary, their spouse, and children, or those who would inherit had the beneficiary died.