Can arbiters resolve conceptual uncertainty regarding trust beneficiaries?

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The need for certainty of trust objects

In *Knight v Knight*,[1] Lord Langdale MR included in his celebrated list of the 'three certainties' required to declare an express private trust that, 'the objects or persons intended to have the benefit of the recommendation or wish [must] be … certain'. That is, the settlor must indicate with certainty the objects of the trust – the identity of the beneficiary or beneficiaries.[2]

The law on certainty of trust beneficiaries will be surveyed here. It will be proposed that (adopting the terminology of the courts) 'conceptual uncertainty' in the description of a class of beneficiaries can sometimes be remedied by 'evidential certainty' – which in turn implies a framework for answering the disputed question whether a settlor can appoint a party to rule on conceptual uncertainty.

The justification for requiring certainty

It has been called paradoxical for 'discretionary' equity to insist on trust certainty.[3] However, the courts say they only insist on the *minimum certainty needed to enable them to enforce the trust*.[4] They have cautioned judges to invalidate trusts for uncertainty only when completely unavoidable:[5]

> '[T]he modern doctrine is not to hold a will void for uncertainty unless it is utterly impossible to put a meaning upon it. The duty of the Court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty.'

And our highest court has exhorted judges:[6]

> 'It is … the duty of the court by the exercise of its judicial knowledge and experience in the relevant matter, innate common sense and desire to make sense of the settlors or parties' expressed intentions, however obscure and ambiguous the language that may have been used, to give a reasonable meaning to that language if it can do so without doing complete violence to it. The fact that the court has to see whether the clause is

[1] (1840) 3 Beav 148, 49 ER 58, 173 (affd as *Knight v Boughton* (1844) 11 Cl & Fin 513, 8 ER 1195).

[2] The objects of a trust can instead be *purposes*, rather than beneficiaries. But charitable – 'public' – purpose trusts are exempt from the certainty of objects requirement; and the law only rarely allows non-charitable – 'private' – purpose trusts. So, as is usual, trusts for *purposes* will be left for treatment elsewhere: the only objects considered here will be beneficiaries. And as is conventional, 'beneficiaries' will be used to include objects of discretionary trusts, although strictly they are merely *potentially* beneficiaries: becoming a beneficiary only if the trustee makes a discretionary decision in their favour.

[3] Alastair Hudson, *Great Debates in Equity and Trusts* (Palgrave 2014), 72.

[4] *McPhail v Doulton* [1971] AC 424 (HL), 451.

[5] *Re Roberts* (1881) 19 Ch D 520 (CA), 529 (Sir George Jessel MR).

[6] *Re Gulbenkian's Settlement* [1970] AC 508 (HL) (reported as *Wishaw v Stephens*), 522 (Lord Upjohn). (L McKay, '*Re Baden* and the Criterion of Validity' (1973) 7 Victoria U Wellington L Rev 258, discusses (262-68) how far courts can go to impose sense on a settlor's words.)

> "certain" for a particular purpose does not disentitle the court from doing otherwise than, in the first place, try to make sense of it.'

Nevertheless, the public interest requires suitably robust certainty rules; to prevent unnecessary litigation.[7]

Certainty of beneficiaries

The general rule is that the identity of beneficiaries must be certain or ascertainable.[8] But the beneficiaries of a trust and their interests can be designated in various ways; and, correspondingly, differing tests of certainty are applied depending on how this has been done.

Specified beneficiaries – the 'identification (on a balance of probabilities)' rule

Where a beneficiary is specified, by name and/or description, but *ambiguously*, the test of certainty is that there must be admissible evidence by which they can be identified.[9] The usual civil standard of proof presumably applies: the trust will be valid if the person intended is proven *on a balance of probabilities*.[10] So, somewhat confusingly, we must think in terms of an identification that is 'probably' correct and therefore sufficiently 'certain'.

Gift subject to a condition precedent – the 'on any reasonable test' rule

A trust may impose a condition to be satisfied before a gift can be received: for example, '£10,000 provided she is a UK resident at that date'. This is a gift subject to a condition precedent – that is, a condition that precedes receipt. Or, it may give a series of gifts, each subject to a condition precedent: for example, '£1,000 to each of my friends'. This is a set of individual gifts: each subject to satisfying the condition of being a 'friend'.

The courts have decided that a gift subject to a condition precedent will be valid even if the description of the condition is unclear; but only those who satisfy the description on 'any reasonable test' will be entitled to the gift, not those who only debatably satisfy the description.[11]

So, the law is saving what it can: requiring full certainty would invalidate all gifts using unclear conditions. But the rule has been criticised for delivering inadequate legal control of the trust.[12]

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[7] Jeffrey Hackney, *Understanding Equity and Trusts* (Fontana 1987), 58-59.

[8] *Re Endacott* [1960] Ch 232 (CA), 246. Doubts whether a beneficiary is alive, or locatable, are a separate issue and do not make a trust uncertain: *McPhail v Doulton* [1971] AC 424 (HL), 457. (Several devices exist for resolving such problems: in particular, paying a trust share into court; a *Benjamin* order – *Re Benjamin* [1902] 1 Ch 723 (Ch) – with missing-beneficiary insurance; use of the Presumption of Death Act 2013, including s 13 insurance; advertising under the Trustee Act 1925, s 27.)

[9] *Re Gulbenkian's Settlement* [1970] AC 508 (HL), 523.

[10] *Gold v Hill* [1991] 1 FLR 54 (Ch) seems to support this. 'Carol and the kids' was held proven to mean the settlor's mistress and their children together – not his other children.

[11] *Re Barlow's Will Trusts* [1979] 1 WLR 278 (Ch). The court accepted that 'friends' is an unclear description: however a gift to each 'friend' was held valid; but only for those who were *definitely* friends – on any reasonable test.

[12] Lindsay McKay, '*Re Barlow* and the Certainty of Objects Rule' [1980] Conv 263 argued the rule is too lax: with an unclear condition, in practice most claimants will fall into a 'borderline', where the chance of wrong trustee decisions is high, but the confidence to challenge them is low.

Gift subject to a condition subsequent – the 'full certainty' rule

A trust may impose a condition under which a gift is lost: for example, 'to receive the income; unless he marries outside the Jewish faith'. This is a gift subject to a condition subsequent – that is, a condition that can subsequently take it away.

The courts have decided that the description of a condition subsequent must be fully certain; otherwise the gift remains valid but the condition is void.[13]

So, the law has a generous test for upholding receipt of gifts (conditions precedent), but a stricter one for taking them away (conditions subsequent).

Fixed division between a class – the 'complete list (on a balance of probabilities)' test

A trust to divide property in fixed shares between a class – for example 'equally between my children' – is valid only if the definition of the class is clear enough to allow every member to be listed: only then can share sizes be calculated (for example, if the list comes to 10 people, equal division is one-tenth shares).[14] On the usual civil standard of proof, the test is whether trustees can *probably* identify all members of the class for their list.[15] For example, 'all my grandchildren', probably yes; but 'everyone I ever employed', after a lifetime as a leading industrialist, probably no.[16]

An objection to the 'complete list' test is that the whole trust fails if there is just one person we are unsure about. For example, 'equally between the members of my club', when it has 19 full members and one honorary member: if the court professes itself unsure about the honorary member, the entire trust fails. Arguably, a 'maximum list' test should be enough instead.[17] In our example, this club has 19 definite members, and one that is not clear: a maximum of 20. So, arguably we should divide the fund into shares of one-twentieth: the 19 definite members should receive a share each, the minimum they are entitled to; and only the final share should fail, because it lacks certainty (that is, it is uncertain whether it belongs to the unclear candidate; or does not and so should have been divided between the other 19). There was high authority against a 'maximum list' approach, but this appears now to be out of date.[18]

Discretionary division between a class – the 'is or is not' test (with 'evidential certainty')

In a discretionary trust for division between a class, it would be helpful to have a complete list of all the beneficiaries: so that trustees could survey the list when determining how to exercise their discretion over the distribution of the property. And, at one time, a complete listing was

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[13] *Re Tepper's Will Trusts* [1987] Ch 358 (Ch).

[14] *IRC v Broadway Cottages Trust* [1955] Ch 20 (CA), 29. *OT Computers Ltd v First National Tricity Finance Ltd* [2003] EWHC 1010 (Ch), (2003) 6 ITELR 117 confirms this test still applies to fixed division trusts (despite being abandoned for discretionary trusts – see below).

[15] *Re Saxone Shoe Co Ltd's Trust Deed* [1962] 1 WLR 943 (Ch), 953-55 (decided when the complete list test was believed to apply to discretionary trusts).

[16] Jill Martin, 'Certainty of Objects – What is Heresy?' [1984] Conv 304, 306-7.

[17] CT Emery, 'The Most Hallowed Principle – Certainty of Beneficiaries of Trusts and Powers of Appointment' (1982) 98 LQR 551, 565.

[18] In *Re Gulbenkian's Settlement* [1970] AC 508 (HL), 524, Lord Upjohn, delivering the leading judgment, said obiter: '[T]here is no authority in the trustees or the court to make any distribution among a smaller class than that pointed out by the donor.' *But*, this is part of a passage (523-24) applying the same reasoning to discretionary trusts: an area where the reasoning has since been effectively *rejected* by the House of Lords, when they overturned the need for a 'complete list' there – see below.

understood to be legally required.[19] But, in more modern times, if the law required a complete list, that could invalidate useful trusts for large masses of people, like the discretionary trust for the current and past staff of a substantial company, plus their relatives and dependants, encountered in *McPhail v Doulton*.[20] The class would constantly shift through changes of employment, birth, death, marriage, divorce, separation, incapacitation, etc, making compiling a complete list impossible. So, in *McPhail v Doulton* the House of Lords decided in a discretionary trust it does not need to be possible to compile a full list of members of the class of beneficiaries. They reasoned *the trustees* would not need to fully list a large class: they would identify categories to benefit, and then find the individuals within them.[21] And *the court* would not need a full list either: if the court was required to execute the trust, equity does not require equal division; that may be suitable in small trusts, but not large ones.[22] Instead of a full list, the House of Lords said the test is: the description of the class must be clear enough to make it certain whether any given person considered is or is not a member of the class.[23] For example, if the class is 'my employees', it is possible to establish whether anyone under consideration is an employee of the settlor; but with 'my deserving employees', it is unclear what 'deserving' means. They adopted this 'is or is not' test from an earlier case about discretionary powers of appointment, *Re Gulbenkian's Settlement*;[24] saying because discretionary trusts and powers are so similar they should have the same test.

This is a test of practical certainty – not absolute certainty

In *Re Gulbenkian*, the House of Lords had emphasised the courts should try to uphold gifts: using a test of practical certainty, not absolute certainty.[25] So, documents that are unclear if read literally should be given a sensible interpretation instead; when possible. And there will be enough certainty despite borderline questions; if they are questions the courts can resolve. So, in effect, the test is whether the class is *basically clear*, with the court willing to resolve borderlines; or it is *so unclear* the court will give up on it. *Re Baden's Deed Trusts (No 2)*[26] demonstrates this is a test of *practical certainty*: the Court of Appeal holding both 'relatives' and 'dependants' to be sufficiently certain in an employee benefit fund; despite possible borderline issues over both words.

Conceptual and evidential uncertainty

The *Re Baden (No 2)* case considered a distinction between 'conceptual' (or 'semantic' or 'linguistic') certainty and 'evidential' certainty. *McPhail v Doulton* had said the 'is or is not' test requires conceptual certainty: the description of the class must be a clear concept (for practical purposes, at least).[27] *Re Baden (No 2)* discussed whether the law also requires evidential certainty: evidence available to apply that concept. There might sometimes be a clear concept, *but a lack of evidence*. For example, 'relatives of employees and ex-employees' was held in the case to be a clear concept: but suppose all the employment records have been

[19] *IRC v Broadway Cottages Trust* [1955] Ch 20 (CA).
[20] [1971] AC 424 (HL).
[21] ibid 449.
[22] ibid 451.
[23] ibid 456. This 'is or is not' test is also sometimes called the 'any given postulant test'.
[24] [1970] AC 508 (HL).
[25] ibid 522-23.
[26] [1973] Ch 9 (CA). (This was a re-consideration of the trust in *McPhail v Doulton*).
[27] [1971] AC 424 (HL), 457. However, the case said this subject to a qualification. Lord Wilberforce, delivering the leading judgment said, 'linguistic or semantic uncertainty … *if unresolved by the court*, renders the gift void' (emphasis added). Crucially to the argument made here, he said nothing about *how* conceptual uncertainty can be 'resolved by the court'. It is argued below that, in rare cases, conceptual uncertainty can be remedied by evidential certainty.

destroyed and so there is a lack of evidence to identify these people. In *Re Baden (No 2)* three judges in the Court of Appeal said three different things about evidential certainty.[28] Overall, *at most*, the case says there only needs to be evidential certainty about 'a substantial number' of potential beneficiaries; and only those it can be proven are in the class can benefit.

Suggestions of a possible lack of evidential certainty will only rarely arise in practice; and this 'substantial number' test should usually be easy to satisfy where it does: in general, settlors do not declare trusts where there is no adequate evidence to identify the beneficiaries. So, it appears that conceptual certainty can, *very occasionally*, be undermined by a lack of sufficient evidential certainty, rendering a discretionary trust invalid.

Each word describing a class must be tested

Public Trustee v Butler[29] holds that every word describing a class must be certain. 'Deserving relatives' was held uncertain: rejecting an argument that the class was *all* relatives (which was certain), with '*deserving*' (the uncertain word) just being a criterion to select by within that certain class.

Certain objects mixed with uncertain

Where there is a discretionary trust for a list of objects, some of which are sufficiently certain, and some of which are not, the current law is that the whole trust fails; the good cannot be severed from the bad.[30] For example, 'relatives and friends' – certain and uncertain – would be wholly invalid.

The law has been called 'unfortunate'.[31] There has been a judicial suggestion that courts should have the power to sever an item causing invalidity, if that would cause no injustice; but that legislation would be required.[32] And academic suggestion that judges themselves should adopt a power to sever; but only where it advances the settlor's intentions – for example, not where the saved class was clearly only meant to receive minor benefits, rather than all the property.[33]

Overview of certainty of beneficiaries

Having reviewed the law on various types of trust, it is now apparent that none of the major tests requires *absolute* certainty of beneficiaries: just *sufficient* certainty. Specified beneficiaries only need *probable* identification. Fixed division between a class needs only a *probably* complete list. And even the discretionary trust's 'is or is not' test requires only *basic clarity, with any borderlines being ones the court feels able resolve*.

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[28] Sachs LJ ([1973] Ch 9, 20) recognised no requirement of evidential certainty: *no minimum amount of evidence identifying potential beneficiaries needs to be available for a trust to be valid*. However, he said, someone can only be regarded as within the class of potential beneficiaries if there happens to be evidence available to prove they are within it. Megaw LJ ([1973] Ch 9, 24) recognised a *limited* requirement of evidential certainty: *there is only a valid trust if there is sufficient evidence available to identify a 'substantial number' of the potential beneficiaries*. Stamp LJ appeared to require full evidential certainty: *there is only a valid trust if there is sufficient evidence available to identify all potential beneficiaries.*

[29] [2012] EWHC 858 (Ch).

[30] *Re Wright's Will Trusts* (1999) 3 TLI 48 (CA; decided 1982).

[31] *Hanbury and Martin Modern Equity* (eds Jamie Glister and James Lee, 21st edn, Sweet & Maxwell 2018), para 4-019.

[32] *Re Leek* [1969] 1 Ch 563 (CA), 586 (Sachs LJ, obiter).

[33] Graham Virgo, *The Principles of Equity and Trusts* (3rd edn, OUP 2018), para 4.4.6(iii); Paul S Davies and Graham Virgo, *Equity and Trusts: Text, Cases and Materials* (3rd edn, OUP 2019), 110-11.

Consequences if beneficiaries are not certain

If the beneficiary or beneficiaries are uncertain there is no trust: the settlor remains owner. Or, if the property was transferred to a trustee, there is a resulting trust for the settlor; or, if dead, their estate. If the settlor is alive, this gives the opportunity to re-declare with certainty. If property was given away, with an invalid trust added, just the initial gift takes effect.[34]

Date for testing certainty

Re Hain's Settlement[35] decided the certainty test is applied to the situation existing when the trust is first declared – which, for a will, is of course the date of death – and later changes in circumstances cannot invalidate a trust. A discretionary trust was upheld despite a claim that evidential certainty had later been lost.

Curing conceptual uncertainty

'Evidential certainty' remedying 'conceptual uncertainty'

We saw that, in the context of discretionary trusts, the courts have drawn a distinction between 'conceptual certainty' and 'evidential certainty' in the description of a class of beneficiaries. The value of this analytical classification does not seem to be limited to discretionary trusts: it could equally be applied to other issues of certainty of trusts – in particular, the 'complete list' test in trusts for fixed division. The judges said that conceptual certainty can, *very occasionally*, be undermined by a lack of sufficient evidential certainty, rendering a trust invalid. Might the converse also be true – that conceptual uncertainty can, *very occasionally*, be remedied by having full evidential certainty, rendering a trust valid? This does appear possible.

For example, it is generally agreed that a trust – discretionary or fixed – for 'my friends' would fail because 'friend' is conceptually uncertain. But suppose the settlor was an eccentric testator, who kept an *Official List of Friends* on his living room wall (delighting in telling people what an honour it was to be added and in telling them they had been deleted following slights). It would seem reasonable for a court to accept this as proof of who the settlor intended: that is, as evidential certainty.[36] Note that we still do not have conceptual certainty. We still do not have a clear understanding of the word 'friend' in general, nor do we know clearly what this particular settlor meant by it: what criteria he applied in drawing up this list – nor whether he even had a coherent notion of friendship that he applied, rather than acting according to the whims and foibles eccentrics are prone to. In other words, we know *who* he meant; but we still do not know *what* he meant.[37]

If we look at the two leading modern authorities (both obiter) for the proposition that 'friends' is a conceptually uncertain description of a class of trust beneficiaries, both accept that admissible evidence can overcome the uncertainty. Lord Upjohn, delivering the leading

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[34] The rule that an apparent gift, with an invalid trust mentioned afterwards, takes effect as an outright gift is usually called 'the rule in *Lassence v Tierney*' (1849) 1 Mac & G 551, 41 ER 1379; or sometimes called 'the rule in *Hancock v Watson*' [1902] AC 14 (HL), 22, where Lord Davey's leading judgment contains a clear statement of it.

[35] [1961] 1 WLR 440 (CA).

[36] This appears to be admissible evidence within the Administration of Justice Act 1982, s 21.

[37] The only way to claim conceptual certainty would be to significantly rewrite the will, changing 'my friends' to 'my friends *according to my Official List of Friends*'. There is certainly not enough in the will's original wording to satisfy the doctrine of incorporation by reference, making the list part of the will (regardless of the additional problem for application of the doctrine that the list could change after the date of the will): see *Parry & Kerridge The Law of Succession* (by Roger Kerridge, 13th edn, Sweet & Maxwell 2016), paras 4.39-4.43.

judgment in *Re Gulbenkian*, spoke only in terms of evidence *that renders the prima facie uncertain concept certain* – that is, which gives us conceptual certainty:[38]

> '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.'

But, with reference to this example, Browne Wilkinson J in *Re Barlow's Will Trusts* spoke in apparently wider terms about evidence *identifying the intended beneficiaries*, saying merely that the 'persons intended to benefit by the donor must be ascertained if any effect is to be given to the gift'.[39] Seemingly, on this view, it is enough if we have evidential certainty; if we know *who* the settlor meant, although not necessarily *what* the settlor meant, by 'friends'. In principle, this wider view is preferable: it will be recalled that the courts have stressed they require only the minimum certainty necessary to carry out the trust. And in the leading case laying down the requirement of conceptual certainty, *McPhail v Doulton*, Lord Wilberforce, delivering the main judgment, said conceptual uncertainty can be 'resolved' by the court; but said nothing to limit *how* it may be resolved.[40]

The list of friends scenario is far-fetched, of course. But the point seems sound: that conceptual uncertainty can be cured by evidential certainty. And if that is accepted, it may have a significant practical application. It may provide a framework for answering a regularly debated question: whether a settlor can appoint a party to rule on conceptual uncertainty.

The settlor nominating a party to rule on conceptual uncertainty

Can a settlor eliminate a potential problem of conceptual uncertainty within a trust by appointing, in the declaration, a party to rule on any issue of uncertainty – whether a third party or the trustee?[41]

It is sometimes suggested in this regard that there is a difference between (1) appointing someone to rule on conceptual uncertainty arising from the description of a class (for example, 'those I owe a moral debt to; any uncertainty identifying them to be resolved by X'); and (2) purportedly preventing any conceptual uncertainty from arising by making that person's opinion *part of the description of the class* (for example, 'those who, in the opinion of X, I owe a moral debt'). But the better view is that such a distinction would reflect no credit on the law. Webb and Akkouh comment:[42]

> '[O]ne can argue that this distinction, between cases in which the third party is called on to resolve conceptual uncertainty in a definition and cases in which the third party's opinion forms part of that definition so as to preclude this uncertainty, is overly fine. It is unlikely that most settlors would appreciate any difference between the two, on both occasions intending the third party to tidy up loose ends. Moreover, it will often be difficult to tell from the language used by the settlor whether this is a case of the former

[38] [1970] AC 508 (HL), 524.
[39] [1979] 1 WLR 278 (Ch), 281.
[40] Supra n 27.
[41] Students should perhaps note that the typical wording of a discretionary trust does *not* purport to empower trustees to rule on uncertainty. Eg, 'to be divided between my friends as my trustees in their discretion decide' confers a discretion how to divide the property; but *not* to determine who is a friend. A purported appointment to rule on such uncertainty would need to be clearly stated.
[42] Charlie Webb and Tim Akkouh, *Trusts Law* (5th edn, Palgrave 2017), 64.

type or the latter. As such it may be questioned whether the validity of the trust should turn on this distinction.'

The conventional view is a settlor cannot cure conceptual uncertainty by appointing someone to rule on it: a conceptually uncertain trust will still fail. Cases against the settlor would be, in particular: *Re Coxen*,[43] *Re Jones*,[44] and *Re Wright's Will Trusts*.[45]

But other cases point in the opposite direction, in particular: *Re Coates*, [46] *Re Leek*,[47] and most importantly *Re Tuck's Settlement Trusts*.[48] In *Re Tuck*, a trust appointed a Chief Rabbi to rule if someone was of 'Jewish blood and faith'. The trust was held sufficiently certain even without this appointment. But, obiter, Lord Denning MR argued a settlor *should* be able to appoint a third party, or the trustees, to rule on conceptual uncertainty, saving a trust. He said this will not oust the court's jurisdiction, even if the person's decision is called 'conclusive'; because the court can answer legal questions and intervene if a decision is in bad faith or wholly unreasonable. He said: [49]

> 'If two contracting parties can by agreement leave a doubt or difficulty to be decided by a third person, I see no reason why a testator or settlor should not leave the decision to his trustees or to a third party. He does not thereby oust the jurisdiction of the court. If the appointed person should find difficulty in the actual wording of the will or settlement, the executors or trustees can always apply to the court for directions so as to assist in the interpretation of it. But if the appointed person is ready and willing to resolve the doubt or difficulty, I see no reason why he should not do so. So long as he does not misconduct himself or come to a decision which is wholly unreasonable, I think his decision should stand. After all, that was plainly the intention of the testator or settlor. He or his advisers knew that only too often in the past a testator's intentions have been defeated by various rules of construction adopted by the courts: and that the solution of them has in any case been attended by much delay and expense in having them decided by the courts … Who better to decide these questions of "Jewish blood" and "Jewish faith" than a Chief Rabbi?'

In other words, Lord Denning MR believed giving power to decide should be upheld; and any indication the decision is unchallengeable should be treated as of limited effect.[50]

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[43] [1948] Ch 747 (Ch). Jenkins J said, obiter (761-62): '[The settlor] would not I think have saved [the provision in the trust] from invalidity on the ground of uncertainty merely by making [the trustees'] opinion the criterion, although the declaration by the trustees of this or that opinion would be an event about which in itself there could be no uncertainty.'

[44] [1953] Ch 125 (Ch). Under a condition subsequent a beneficiary was to lose income if she 'in the uncontrolled opinion of the [the trustee company] have social or other relationship with [a specified person]'. The condition was held void for uncertainty, applying the statement of principle from *Re Coxen*, above.

[45] (1999) 3 TLI 48 (CA; decided 1982). A testatrix left her residuary estate on a discretionary trust for 'such people and institutions as [the trustees] think have helped me or my late husband …' It was held, without contrary argument, that this was an uncertain and invalid class.

[46] [1955] Ch 495 (Ch). A power a testator gave his widow to appoint in favour of friends she felt were forgotten in his will was upheld. It is not clear whether reference to the widow's opinion regarding who was a friend saved a power that, in its particular context, would otherwise have failed for uncertainty.

[47] [1969] 1 Ch 563 (CA). Harman LJ said obiter (579) that a discretionary trust for 'those with a moral claim against X' would be uncertain, but one for 'those the trustee consider to have' such a claim would be certain.

[48] [1978] Ch 49 (CA).

[49] ibid 61-62.

[50] Lord Russell (65) wished to express no opinion on the Chief Rabbi clause. Eveleigh LJ (66) doubted a provision like the Chief Rabbi clause could be used save a trust from uncertainty; but said it could help indirectly to establish certainty: by indicating the settlor had a similar understanding of Jewish blood and faith to the Chief Rabbi's understanding, so helping the court give a certain meaning to the settlor's words. But JE Penner, *The Law of Trusts*

Third parties

If we accept the principle that 'evidential certainty' *can* remedy 'conceptual uncertainty', appointing a *third party* to rule on any issues of uncertainty might be seen as a mechanism for providing a form of evidential certainty: meaning, arguably, such trusts *should* be upheld. Again, we have proof of the settlor's desired outcome, although the concept remains unclear. That proof is furnished through the settlor's delegation of a power to resolve borderline issues; but there is no rule against delegation.[51] More precisely, this would be a form of evidential *ascertainability*: a potential difficulty being that ascertainment would depend on the availability and willingness of the nominated party to act. There is an old decision, in a different context, holding a trust that can only be rendered certain by the independent act of a third party is not sufficiently certain.[52] But the case seems no longer to be a reliable authority, so there might not be an objection on this score.[53] And it is worth emphasising that the settlor specifically commended this source of evidence as to what the trust was intended to achieve.

The trustees

It looks more strained to see nomination of *the trustees* to rule on any conceptual uncertainty as providing evidential certainty or ascertainability: this appears to involve saying the trustees are providing evidential certainty *to themselves, by their own decision*. It is perhaps noteworthy that all of the three leading cases cited above standing against a settlor's ability to appoint a party to rule on conceptual uncertainty were speaking in the context of appointing *the trustees*. So, perhaps we should draw the conclusion that a *third party* can be effectually appointed to rule on conceptual uncertainty, but not *the trustees*?

However, the better view would be that it is only *the court*, in its supervisory jurisdiction over trusts, that needs to have evidential certainty available to resolve the conceptual uncertainty. The trustees would be empowered by the settlor to rule on any borderline issues: so the trustees are not the party that the law says needs evidential certainty. And the trustees would, by their decisions, be supplying the evidential certainty the law says *the court* needs.[54]

If that is not accepted, deciding that *third parties* can effectually be appointed to rule on conceptual uncertainty in a trust, but not *the trustees*, would potentially raise this anomaly: the uncertainty may be one a third party is no better placed to resolve than the trustees. For example, what qualities make a potential beneficiary a 'deserving' relative. This may in turn suggest – to avoid the anomaly – that, if only *third parties* can be appointed to rule on uncertainty, their appointments should be effective only where they have some special expertise.

(11th edn, OUP 2019), para 7.62, questions whether this is substantially any different from Lord Denning MR's view: 'In practice does this not amount to letting the Chief Rabbi determine the meaning of the settlor's words?'

[51] A supposed rule against delegation of testamentary power (that is, against leaving someone else to make your will for you) was rejected by *Re Beatty* [1990] 1 WLR 1503 (Ch). In any case, the situation under discussion here would not involve the *sort* of delegation that a rule against delegation of will-making power would be aimed at – that is the 'evasion of the Wills Act … A does not express his own will at all; he leaves that to B': DM Gordon, 'Delegation of Will-Making Power' (1953) 69 LQR 334, 335.

[52] *Re Wood* [1949] Ch 498 (Ch). Harman J held a (non-charitable) testamentary trust for payments to whichever organisations the BBC made 'The Week's Good Cause' was invalid for uncertainty because the beneficiaries (502) 'can be only made certain by the decision of some third party'.

[53] *Lewin on Trusts* (eds Lynton Tucker, Nicholas le Poidevin and James Brightwell, 19th edn, Sweet & Maxwell 2015), para 4-043, n 153, says: '[*Re Wood*, above] would probably now be decided differently in the light of *Re Beatty* [above] …' which rejected any rule against delegation of testamentary power.

[54] See supra n 27 on the resolution of conceptual uncertainty at court level.

Expertise

Appointment of *experts* to rule on conceptual uncertainty in trusts has the strongest claim to be upheld by the law: such as the Chief Rabbi clause in *Re Tuck*. In such situations, it has been suggested the courts should 'welcome the help'.[55] And from the trust's point of view there would be benefits: a potential saving to the trust in legal costs from not having to litigate whether a concept is certain or not; and, even if the difficult concept is sufficiently certain, from not feeling the need to seek directions about how to apply it.[56]

However, there are different kinds of expertise. The expertise of the Chief Rabbi could perhaps be called 'conceptual expertise' – a learned understanding of Jewishness. But contrast the expertise involved in a trust for 'my friends; and X may decide who my friends were' – where X has a detailed, intimate knowledge of the settlor's life, for example as a spouse. Here, X has no greater understanding of the concept of a 'friend' than anyone else: but has an expert knowledge of the settlor's relationships, so as to be able to apply that somewhat vague concept better than others. We might perhaps call this 'evidential expertise'.

Framing a rule that *only* experts may be appointed to rule on conceptual uncertainty in trusts, therefore, runs into the difficulty of defining what 'expert' means. It would be ironic indeed for the courts to formulate a rule – only experts – using a word they might find too vague if used by a settlor: would a discretionary trust to benefit 'experts' in some non-charitable field be held conceptually certain? And deciding that *expert third parties* can be appointed to rule on conceptual uncertainty in a trust, but not *the trustees*, potentially risks raising another anomaly: a trustee appointed may be an expert. This might suggest the law should accept – to avoid this anomaly – the appointment of *a trustee* to rule on uncertainty *while acting in another capacity they also hold, as expert*: for example, the 'Chief Rabbi' appointment in *Re Tuck* should be effective even if the Chief Rabbi happens to be one of the trustees – or, indeed, the sole trustee. But this does not fully deal with the anomaly. For example, it may be very artificial to say that a trustee appointed with only 'evidential expertise' – for example, a friend, sibling, or cohabitee of the settlor – has a distinct capacity in which to act as an expert.

Conclusion

It has been suggested that in relation to the requirement of certainty of trust beneficiaries, 'conceptual uncertainty' in describing a class of beneficiaries can, very occasionally, be remedied by 'evidential certainty'. This implies, in particular, that there is a powerful case for accepting a settlor can validly appoint someone to rule on such uncertainty. And given the difficulties and anomalies arising from attempting to distinguish between appointment of third parties and trustees, and/or between experts and others, a simple rule is preferable: the settlor should be free to appoint *anyone*.

This would be consistent with the law's guiding principle of upholding the intention of settlors where possible and insisting only on the minimum degree of certainty necessary for the court to enforce a trust. If the rule were established, it would not be an invitation to litigation, which is the principal mischief rules on certainty are designed to prevent. Indeed, it would be liable to tend in the opposite direction. It would not involve a legally improper delegation of the settlor's powers. And it would not involve an ouster of the court's jurisdiction. The ruling could be subject to the sort of challenge recognised by Lord Denning MR in *Re Tuck*. That is, if a decision involved an error of law or was in bad faith or wholly unreasonable. Therefore, any borderline rulings would be only prima facie proof of a party being within, or outside, the class of beneficiaries. But this prima facie proof should provide an adequate level of evidential certainty, acceptable to the courts, to resolve conceptual uncertainty. Finally, the proposed rule

[55] JE Penner, *The Law of Trusts* (11th edn, OUP 2019), para 7.64.
[56] JG Riddall, *The Law of Trusts* (6th edn, Butterworths 2002), 43.

would lead to a degree of court oversight broadly equivalent to that found acceptable elsewhere.[57]

However, it must be conceded that the framework suggested here of evidential certainty remedying conceptual uncertainty may not be acceptable to the courts. The conflicting judicial pronouncements may indicate that the law will not give a single, simple answer to whether a settlor can appoint a party to rule on conceptual uncertainty: it may be a matter of overall balance in each case – considering the degree of uncertainty; expertise of the person; etc.[58]
So, settlors who wish to overcome a potential problem of conceptual uncertainty *might* take the risk of appointing a party to rule on the uncertainty: in the hope that this is valid – and, of course, taking all practical precautions (designating the appointee with sufficient certainty, ensuring they are willing to act, nominating a substitute, etc). But such settlors are probably better advised, in line with current practice, to utilise a device common in modern trusts: giving the trustees a power to add new beneficiaries. A trust class can be stated narrowly, with certainty; but with a power given to add others in, individually, later. And the settlor can, of course – separately, outside the trust – express wishes about exercise of this power in terms that are not subject to any test of legal certainty.

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[57] See above, gifts subject to a condition precedent, where the 'on any reasonable test' rule means that only clearly correct payments of a gift to a 'friend' are permissible. Allowing appointees to rule on conceptual uncertainty would mean only clearly incorrect payments to a 'friend' are impermissible – those involving an error of law or in bad faith or wholly unreasonable.

[58] J Hackney, 'Trusts' [1976] ASCL 412, 427-28: 'The courts will permit some control to be exercised, but the [appointed party] must not be an *alter ego*. The exercise appears on the part of the court to be one of balancing. Issues of fact seem easier left than issues of law; small issues rather than large issues; issues with only penumbral uncertainty rather than those hopelessly vague; issues which the trustees or referees are well suited to answer rather than those at which the judge would be better qualified. One might also hazard a guess that clauses expressly ousting the jurisdiction of the court do not much advance the [settlor's] cause.'