TRUST-POWERS AND TRUSTS

In McPhail v. Doulton the House of Lords ruled that the same test for identifying a beneficiary under a trust power applied as in the case of a mere power; if it could be said with certainty whether any given individual was or was not a member of the class indicated by the settlor the trust was valid. This article considers the hybrid trust-power in this context; whether there is a duty to appoint and other aspects of this important tool of the conveyancer.

The modern discretionary trust is an important tool in the hands of the conveyancer and tax-planner. It is surprising, therefore, that, despite the spate of comment following the House of Lords decision in *McPhail* v. *Doulton*,[1] there is still a need for further discussion of the actual operation of trust-powers[2] and, in particular, their relationship with fixed trusts. It is hoped that this article will go some way towards fulfilling that need. Its form, while supported by some early precedents, is something of a departure from the accepted pattern. It has been adopted in the hope that the author's view may thereby be more easily seen along-side the statements commonly made in the accepted texts, many of which are refuted. The questioner is assumed to have read the relevant cases, particularly *McPhail* v. *Doulton*, and to be voicing doubts and questions raised by those cases and by the commentators. The answers are, in part, re-affirmations of previously accepted equitable doctrines which appear sometimes to have been lost sight of in the recent cases and, in part, an attempt to show the effects on the operation of trust-powers of the decision in *McPhail* v. *Doulton*.

Q. What are trust-powers and how do they differ from an ordinary equitable powers of appointment?

A. Before I can answer that question it is necessary to establish the nature of ordinary powers of appointment themselves.

Q. I understand that a power of appointment is an authority given to a person to dispose of property not his own.[3]

A. Your definition of a power suggests that it is a true power of

1. [1971] A.C. 424.
2. This expression is adopted throughout. The creature referred to is also called a power in trust, a power coupled with a duty, or a power in the nature of a trust.
3. See, for example, Hanbury's *Modern Equity* (9th Ed. 1969) 103.

disposition; as if on the creation of the power the settlor were separating the power of disposition from his total ownership and delegating it to the donee. This is not the way powers of appointment work. It is possible to conceive of a system of law in which the power to dispose of property could be separated from the property itself; the donee of the power being able to dispose of the property in a way consistent with any limitations set by the donor. Neither the common law nor equity is such a system.

Q. What are powers of appointment if not true powers of disposition?

A. When a settlor creates future interests the event or events upon which those interests are to vest, divest, or shift from one person to another are commonly events of external significance. The attainment of a certain age, the survival of one person by another, or marriage, are common examples. However, equity also allows the settlor to create his own "event" — the execution of a power of appointment. Instead of giving to such of his sons as marry, for example, a settlor can give to such of them as A, the donee of a power of appointment, may appoint. The creation of the power is merely the creation of a contingent event devised specifically for the purpose, and any appointment by A is merely the happening of that event.[4]

Q. When a power of appointment is exercised does the object take from the donor of the power or the donee?

A. It is a fundamental doctrine of the law of powers that an object in whose favour a power has been exercised takes his title from the donor of the power not the donee. The only juristic act, the only conveyance, is that of the donor. The donee's act of appointment is merely part of the machinery of the donor's conveyance.[5]

Q. What is the relationship between powers and trusts?

A. An equitable power of appointment is a special type of contingent event creating or shifting future equitable interests. It must exist *within* a valid trust. The appropriate distinction is not the commonly drawn one between a trust, on the one hand, and a power, on the other,[6] but rather that between a fixed trust, in which the settlor himself sets out who is to take and when, and a trust containing a power, in which he creates future interests through the exercise of another person's discretion.

4. One of the best discussions of the operation of powers of appointment is to be found in Simes & Smith, The Law of Future Interests (2nd ed. 1956) Ch. 28.
5. *Marlborough* v. *Godolphin* (1750) 2 Ves. Sen. 61; *Scrafton* v. *Quincey* (1752) 2 Ves. Sen. 413.
6. All the members of the House of Lords in *McPhail* v. *Doulton* drew the distinction between trusts and powers.

Q. Is it not in the so-called trust-power that trust and power meet? What is the relationship between trust-powers and trusts?

A. Although they provide tremendous flexibility in the creation of future interests, ordinary powers of appointment have one serious limitation: there may be no appointment.

There are two types of contingent event — those certain to occur and those which may never occur. If a father provides for an interest to vest in his son "upon his marriage", it is quite clear that he intends his son to take only if he should get married. If he has not specifically provided for the failure of that contingency, a resulting trust is the only possible solution. This is not inequitable because the father must be taken to have contemplated the possibility that his son might not marry. In the case of a power of appointment, however, it might be the wish of the settlor that only the time at which the objects take and the shares in which they take be determined by execution of the power, failure to appoint not being contemplated. The paradox is that, while the execution of a power of appointment is by its nature an uncertain event, it might be the desire, or even the assumption, of the settlor that it should occur. Equity was not slow to realise this and it was to prevent the frustration of settlor's intentions, where these depended upon there being an appointment, that the trust-power was developed.[7]

Q. Trust-powers are frequently described as powers coupled with a duty.[8] Does the donor of a trust-power impose an enforceable duty upon the donee to appoint?

A. It is true that equity's first formulations of the trust-power concept were put in terms of a duty on the donee to appoint.[9] This concept arose because, having decided in principle that the objects of certain powers should not be disappointed by a failure of the donee to appoint, equity found in the enforcement of fixed trusts a convenient analogy by which this principle might be put into effect. Trustees were under fiduciary duties to act for the benefit of those entitled in equity and beneficiaries of trusts had interests which could not be frustrated by default of the trustee. If the objects of a power could be placed in a position analogous to beneficiaries of fixed trusts, their hold on the trust property could be strengthened. It was said, therefore, that,

> . . . there are not only a mere trust and a mere power, but there is also known to the Court a power which the party

7. Particularly in the case of testamentary trusts, the failure of which would not leave the testator with another opportunity to benefit those whom he intended to benefit.
8. See for example Lord Hodson in *McPhail* v. *Doulton* [1971] A.C. 424, 441.
9. *Brown* v. *Higgs* (1801) 8 Ves. Jun. 561; *Harding* v. *Glyn* (1739) 1 Atk. 469; *Pierson* v. *Garnet* (1786) 2 Bro. C.C. 38.

> to whom it is given is intrusted and required to execute; and with regard to that species of power, the Court considers it as partaking so much of the nature and qualities of a trust, that if the person, who has that duty imposed upon him does not discharge it, the Court will to a certain extent discharge the duty in his room and place . . . The Court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it.[10]

Q. You say that the duty of a donee of a trust-power to appoint is only *analogous* to the duty of a trustee. But is not a trust-power one which is given to a trustee and which is consequently part of his trust and subject to his fiduciary duties?[11]

A. This is a common, but very distorted, view of trust-powers. The short answer is simply that a trust-power may be given to the trustee of the property affected or it may be given to a stranger to the trust. It will emerge later that the court's enforcement of trust-powers does not depend upon the donee being also trustee of the property affected. It is the nature of the power which is important — not the nature of the donee.

Q. You must concede that all the cases referred to by Lord Wilberforce in *McPhail* v. *Doulton* involved trustees.[12]

A. Yes, but it is not at all clear that this was a deliberate selection on his part. Certainly the cases themselves make no distinction based on the nature of the donee. The conclusions in *McPhail* v. *Doulton* about the nature of trust-powers and their enforcement apply with equal force to trust-powers given to donees who are not also trustees of the property affected. I emphasise again that the cases establishing the trust-power concept placed no significance on the nature of the donee. In many of those cases the donee of the trust-power was only life tenant of the property and when Lord St Leonards came to classify the cases he concluded that there was no distinction to be drawn between cases where the donee was trustee and cases where he was not.[13]

Q. If I concede that a trust-power may be given to a person who is not also trustee of the property affected, cannot it not still be argued that the power itself becomes the subject-matter of a trust,

---

10. *Brown* v. *Higgs* (1801) 8 Ves. Jun. 561, 570, 574. (Lord Eldon).
11. See the discussion in Simes & Smith, para. 1032.
12. *Mosely* v. *Mosely* (1673) Fin. 53; *Clarke* v. *Turner* (1694) Free. Ch. 198; *Warburton* v. *Warburton* (1702) 4 Bro. P.C. 1; *Richardson* v. *Chapman* (1760) 7 Bro. P.C. 318; *Kemp* v. *Kemp* (1801) 5 Ves. Jun. 849; *Brown* v. *Higgs* (1803) 8 Ves. Jun. 561 and *Harding* v. *Glyn* (1739) 1 Atk. 469.
13. A Practical Treatise on Powers (8th ed. 1861) 591. See also *Moore* v. *Ffolliot* 19 L.R. Ir. 499, 502.

even when given to a stranger? Trust-powers are said to be powers "in trust". Is not the donee a trustee of the power, even if he is not a trustee of the property subject to the power?

A. The answer to this is that a trust in the true sense can attach only to property and powers of appointment have never been regarded as property in the hands of the donee.[14] Any control which the Court exercises over the execution of powers of appointment can come about only through its control of the property involved.[15] To say that the donee of a trust-power is "trustee" of the power, whether or not he is also trustee of the property, does not and cannot, create a trust of the power. As I said at the beginning, it only suggests an analogy with trustees' duties in relation to trust property.

Q. What is wrong with this analogy?

A. It is just not a particularly fruitful one. Despite the continued adoption of the "duty" formulation of trust-powers, the actual experience of the courts denies the existence of such a duty.[16] It is one thing to say to a trustee: "You must hold the trust property for beneficiaries who are, or will be, ascertained" and quite another to say to the donee of a power: "You must appoint".

It is now no longer possible to explain the operation of trust-powers satisfactorily in terms of a duty on the donee to appoint. Although the Courts and the commentators still cling to this formulation, the concept of a duty to appoint is only another way of expressing the idea that the donor of the power intended that there should be an appointment; it does not reflect the way that intention is given effect to by the Court.

Q. If the duty approach to trust powers is rejected how else can they be explained?

A. This brings us to the next step in the development of the trust-power.

Recognising that it could not force the donee of the trust power to appoint, equity early adopted the view that, on default of appointment by the donee, the court itself would execute the

---

13A. This is the view taken in the Restatement of Trusts — see Simes & Smith para. 1032.

14. *Tremayne* v. *Rashleigh* [1908] 1 Ch. 681; *Townshend* v. *Harrowby* (1857) 27 L.J. (Ch) 553.

15. This is the point made by Gray in his article "Powers in Trust and Gifts Implied on Default of Appointment" (1911) 25 H.L. Rev. 1.

16. As Ames pointed out in "The Failure of the 'Tilden Trust'" (1892) 5 H.L. Rev. 389, 395, in practice the donee of a trust-power always had the option of appointing or not, since, although he ought to appoint, he can never be forced to do so by the Court.

power in his stead.[17] In some very early cases the court appointed to a narrow section within the class or even, on at least one occasion, to an individual.[18] In the course of time, however, it became clear that the Court would invariably execute the power by giving to the objects equally.[19] Eventually, in *Kemp* v. *Kemp*,[20] it was decided that the Court must always give equally as the only equitable way of distribution.

Q. Is this why trust-powers are sometimes explained in terms of an implied gift to the objects equally on default of appointment?

A. That was the next step in their development. At the time *Kemp* v. *Kemp* was decided it was thought that the objects of a trust-power took equally on default because the Court gave to them in that way. But the reason for the Court's intervention had always been the intention of the donor that the objects' expectations should not be defeated by default. It did not involve too great a shift of emphasis to explain the objects' taking, not in terms of the court's intervention, but in terms of an implied gift by the donor of the power.

According to this "implied gift" theory, the objects of a trust-power did not remain merely those to whom the donee ought to have appointed, nor merely those to whom the Court itself might appoint on default, but became donees of a gift in equal shares from the donor of the power. Moreover, the interests of the objects were not regarded as contingent upon default, but vested, subject to defeasance by an appointment.[21]

This remained the position up until the recent line of cases beginning with *Re Gestetner*.[22] The two principal characteristics of trust-powers were, firstly, that the objects took equally on default of appointment and, secondly, that the objects' interests vested on the creation of the power. These characteristics were conveniently and neatly explained by the implied gift theory and there appears to have been little disagreement with the position adopted by Gray in his leading article.[23] The fact that some of the cases continued to adopt the fiduciary duty approach meant that Gray's explanation could never be said to have been completely accepted by the courts, but it was probably generally thought that the implied gift theory offered the best solution.

17. See the early cases referred to in the majority opinion in *McPhail* v. *Doulton* [1971] A.C. 424.
18. *Richardson* v. *Chapman* (1760) 7 Bro. P.C. 1.
19. *Maddison* v. *Andrew* (1747) 1 Ves. Sen. 57; *Alexander* v. *Alexander* (1755) 2 Ves. Sen. 640; *Burrell* v. *Burrell* (1768) Amb. 660.
20. (1801) 5 Ves. Jun. 849.
21. *Burrough* v. *Philcox* (1840) 6 My. & Cr. 72; *Wilson* v. *Duguid* (1883) 24 Ch. D. 244; *Lambert* v. *Thwaites* (1886) 2 Eq. 151; *Re Scarisbrick* [1951] Ch. 622.
22. [1953] Ch. 672.
23. "Powers in Trust & Gifts Implied in Default of Appointment" (1911) 25 H.L. Rev. 1.

Q. You imply that the *McPhail* v. *Doulton* line of cases has thrown a new light on the nature of trust-powers.

A. Yes, especially *McPhail* v. *Doulton* itself. Before looking at that aspect of the cases, however, it might be better to first examine the actual issue involved in them; the appropriate certainty test to be applied to the objects of a trust-power.

Q. As I understand them, the line of cases *Gestetner*[24] to *Gulbenkian*[25] decided that the objects of a trust-power, unlike the objects of a mere power, must be capable of complete ascertainment at the time the power is created. The reason for this "trust - certainty" rule in relation to trust-powers was given by Lord Upjohn in *Gulbenkian*. He said that the donees of trust powers:

> . . . have a duty to select the donees of the donor's bounty from among the class designated by the donor; he has not entrusted them with any power to select the donees merely from among known claimants who are within the class, for that is constituting a narrower class and the donor has given them no power to do this.[26]

This argument does not appear to have been satisfactorily dealt with in *McPhail* v. *Doulton* although the House of Lords there rejected the trust-certainty rule in relation to trust-powers.[27]

A. In many of the early cases involving powers of appointment the objects of the power formed a class; all were known to the donee or could be ascertained by him. The donee could consider the claims of all the objects before appointing or before excluding any object. It was never suggested that knowledge of the whole range of objects was an essential prerequisite to the valid exercise of a mere power. The courts have upheld numerous cases involving friends, relatives and other classes of objects which could not be wholly ascertained and, for example, powers to appoint among issue were validly exercised even before all issue had become ascertainable. It was never suggested that an appointment to a child under the usual power to appoint among children or issue was bad because other children or issue might afterwards be born.[28]

It is surprising that the point was even raised in *Re Gestetner* but not at all surprising, in the light of the practice of a hundred

---

24. [1953] Ch. 672. The dictum in this case about the certainty test for trust-powers is the beginning of the line of cases, *I.R.C.* v. *Broadway Cottages Trust* [1955] Ch. 20; *Re Sayer* [1957] Ch. 423; *Re Saxone Shoe Co. Ltd.* [1962] 1 W.L.R. 943; *Re Leek* [1967] Ch. 1061.
25. [1970] A.C. 508.
26. Ibid., 524. This passage was adopted by Lord Hodson (dissenting) in *McPhail* v. *Doulton* [1971] A.C. 424, 443.
27. See Lord Wilberforce's treatment of Lord Upjohn's dictum [1971] A.C. 424, 455, 456.
28. See Farwell, *A Concise Treatise on Powers* (3rd ed. 1916) Chapter XIII.

years (to say nothing of cases such as *Re Park*[29]) that Harman J. decided that the donee of a mere power could validly exercise it among known objects, not necessarily being all the objects. However, *Gestetner* is remembered not for its ratio decidendi about certainty in relation to the objects of mere powers but for its dicta about certainty in relation to the execution of trust-powers. Largely as a way of distinguishing *Re Ogden*,[30] Harman J. said that whereas the donee of a mere power may appoint to one object without knowing all of them, this is not so in the case of a trust power where the donee "must be able to review the whole field in order to exercise his judgment properly".[31]

This approach was adopted by Lord Upjohn in *Re Gulbenkian*. His view seems to be based on the assumption that because the trustees have a duty to appoint they can only appoint from among all objects. Why? To say to the trustees: "You must appoint" and to say: "When you appoint you must have all the objects before you" are two quite different requirements. The reasoning in *Gestetner* in relation to mere powers was simply that if the donor creates a power to appoint to a wide class he can hardly have intended that the donee should survey the world from China to Peru before appointing. The same reasoning could have been applied in *Gulbenkian*, despite the duty there to appoint to someone. Where there is a wide class the donee of the power, whether it be a mere power or a trust-power, must be entrusted to select from the known claimants within the class.

Q. How did *McPhail* v. *Doulton* affect Lord Upjohn's argument?

A. Unfortunately *McPhail* v. *Doulton* did not dispose of it completely. In Lord Wilberforce's view the earlier cases such as *Gulbenkian* had "overstated" what the donee of a trust-power "requires to know or to inquire into before he can properly execute his trust."[32] However, even in *McPhail* v. *Doulton* there remains the suggestion that the donee of a trust-power may have to consider the objects' claim more closely than in the case of a mere power. A wider and more comprehensive range of enquiry, it is said, is called for in the case of trust-powers than in the case of powers. In particular, Lord Wilberforce's treatment of Lord Upjohn's dictum in *Gulbenkian* is not convincing.[33] Because of that there remains

29. [1932] 1 Ch. 580.
30. [1933] Ch. 678.
31. [1953] Ch. 672, 684.
32. [1971] A.C. 424, 449.
33. Ibid., 455, 456. Referring to Lord Upjohn's dictum, quoted earlier, Lord Wilberforce said: "What this does say, and I respectfully agree, is that, in the case of a trust, the trustee must select from the class. What it does not say, as I read it, or imply, is that in order to carry out their duty of selection they must have before them, or be able to get, a complete list of all possible objects." This is a remarkable interpretation and clearly open to criticism.

the suspicion that while the *McPhail* v. *Doulton* position is admirable from a practical point of view, *Gulbenkian* is still correct in theory.[34] Quite the reverse is true.

Q. Was there any other justification for the trust-certainty test apart from Lord Upjohn's argument which you have just rejected?

A. Yes, there was. I have already mentioned that at the time *McPhail* v. *Doulton* was decided the operation of trust-powers was often explained in terms of an implied gift for the objects equally on default of appointment. At this stage there were two possible ways of looking at a trust-power. Firstly, it could have been looked at as a power followed by a trust for the objects equally on default of appointment. Failure of this trust for uncertainty, or for any other reason, would not necessarily have destroyed the power; failure to appoint could have been followed by a resulting trust (as in the case of a mere power where no gift on default is provided). Secondly, a trust-power could have been viewed as primarily a trust for the objects with their interests subject to alteration or even defeasance by execution of the power. On this second view failure of the trust would also mean falure of the power to alter shares. Cases such as *Broadway Cottages* and *Gulbenkian* clearly settled for the second approach by adopting the view that an invalid trust-power could not be regarded as a valid power.[35] The analogy between trust-powers and fixed trusts had become almost complete. The trust-certainty requirement was being applied, not to the power itself, but to the trust for the objects which vested on creation on the trust-power subject to defeasance by appointment.

Q. What effect has *McPhail* v. *Doulton* had on this view of trust-powers?

A. The majority opinion in *McPhail* v. *Doulton* went back to the view that a trust-power will be executed by the court on default.[36] It also rejected the idea that the court must always give to the objects equally which had been the basis of the implied gift theory. Once this position was reached the need and justification for the trust-certainty rule disappeared; no trust for the objects equally therefore no need for trust certainty. Although *McPhail* v. *Doulton* was apparently concerned only with the appropriate certainty test, the conclusions reached on that issue were based on a fundamental change in attitude to the nature and enforcement of trust-powers. Trust-powers were seen once more as powers rather than as

34. See Cohen "Certainly Uncertain: The Discretionary Trust" (1971) 24 C.L.P. 133, 143.
35. See the much quoted statement of Jenkins L. J. in *Broadway Cottages* case [1955] Ch. 20, 36, that a valid power is not to be spelt out of an invalid trust.
36. [1971] A.C. 424, 457.

trusts, the only difference between the two being that on default of appointment by the donee a trust-power will be executed by the court, whereas a mere power will not.

Q. If a trust-power is not executed by the donee does the power then devolve upon the court to be exercised in the same way as the donee himself might have exercised it? Does the court just step into the donees' shoes?

A. The early trust-power cases said that if the donee of a trust-power does not execute it, "the court will, to a certain extent, discharge the duty *in his room and place*".[37] But in fact the court has never taken upon itself the full discretionary power which the donor himself had. The donee of a power can, within the very broad limits imposed by the doctrine of fraud on a power, exercise the power in any way he wishes; it is discretionary. The donee need not give any explanations for his decisions. The court, understandably, has taken the view that this wide, unfettered, almost arbitrary discretion cannot devolve upon it. The court is not exercising the donee's power which, by definition, has come to an end, it is interfering in order to prevent the settlor's intentions being frustrated. The court, unlike the donee, must have some basis, some justification, for the form of its interference.[38]

Q. If the court does not have the donee's discretion how does it execute a trust-power for a wide class?

A. In Lord Wilberforce's words the court executes a trust-power "in the manner best calculated to give effect to the settlor's or testator's intentions."[39] Obviously the settlor's principal intention was that the donee should appoint; there is nothing the court can do about that. The next best solution, without the court exercising any discretion or making any judgments, is to give to the objects equally where this is possible. Even after *McPhail* v. *Doulton* I think where the objects are ascertained the court's interference will always take the form of equal division.

Q. How will the court interfere where equal division is not possible?

A. Before the court can attempt to give effect to the settlor's intentions those intentions must be apparent. Before the court can execute a trust-power (other than by equal division) there must be an intention on the part of the settlor which is more particular than the general intention to benefit those who might be appointed. This is what Lord Wilberforce was referring to at the end of his

37. *Brown v. Higgs* (1803) 8 Ves. Jun. 561, 570.
38. Hence the fact that the Court invariably gave to the objects equally, even at the time before the implied gift theory: *Longmore* v. *Broom* (1802) 7 Ves. Jun. 124.
39. [1971] A.C. 424, 457.

judgment in *McPhail* v. *Doulton* when he said that the definition of the objects must not be so hopelessly wide as not to form "anything like a class" so that the trust is administratively unworkable".[40] He gave as an example a trust-power to appoint among "all the residents of Greater London" which, although capable of execution by the donee, could not be executed by the court. There is no particular intention in that trust other than to benefit those who might be appointed. Equal division is impossible. The court will not choose among the objects where no clue is offered by the settlor. The trust-power is administratively unworkable and cannot be executed by the court.

Q. But was this "administrative workability" test not rejected by Brightman J. in *Re Baden* (No. 2)?[41] He decided that the effect of *McPhail* v. *Doulton* was that the test to be applied to trust-powers was precisely that in *Re Gulbenkian* in relation to powers.

A. It is clear that at the very least the House of Lords rejected the application of the old trust-certainty rule to trust-powers. However, in *McPhail* v. *Doulton* the only issue actually before the House was whether the provision in question was a power or trust-power, the Court of Appeal having decided that it was a power.[42] The House of Lords reversed that decision and ordered that the case be remitted to the Chancery Division for a decision on the validity of the provision on the basis that it constituted a trust-power. Thus, when the case came before Brightman J. as *Re Baden* (No. 2) the wide observations of the House of Lords about the enforcement of trust-powers were, arguably, still open to interpretation, as were their observations about the appropriate certainty test.[43]

Q. Yes, and as I read his judgment Brightman J. decided that the effect of *McPhail* v. *Doulton* was that the test to be applied to trust-powers was precisely that which *Re Gulbenkian* had decided was appropriate for powers. He rejected the argument that a trust-power is invalid, notwithstanding that it satisfies the given-postulant test, "if the class is so large or arbitrary that the trustees cannot know how to set about instituting inquiries which will reveal the membership . . . and if the trustees cannot therefore properly discharge their duty to consider how the fund should be divided . . . and what further inquiries they should make."[44]

---

40. Idem.
41. [1972] 1 Ch. 607, 623.
42. *Re Baden* [1969] 2 Ch. 388.
43. Brightman J. apparently saw the issue as one of interpretation of the speeches of the members of the House of Lords rather than as a question of precedent. He felt his decision was 'required' by the decision of the House of Lords, [1972] 1 Ch. 607, 623.
44. [1972] 1 Ch. 607, 620.

A. If these remarks are read as a rejection of Lord Upjohn's approach then of course I agree with them; the donee of a trust-power may appoint from known members of the class not necessarily being all the members. As far as the donee is concerned there is no distinction between powers and trust-powers and no need to apply a different certainty test.

However, quite different considerations apply to the execution of trust-powers by the court and Lord Wilberforce's requirement that trust-powers be "administratively workable" is not to be lightly dismissed. The decision of Brightman J. does not emphasise the fact that the real difficulty with trust-powers is not the range of inquiry which must be undertaken by the donee before appointment, but how, on default, they can be executed by the court. Execution by the court is a requirement only of trust-powers and not powers and this remains the basis of the distinction between the two types of power.

Q. You must concede, however, that only Lord Wilberforce in the House of Lords gave any consideration to the issues raised in the enforcement of trust-powers by the court and even in his speech this aspect was treated almost as an afterthought rather than as an essential part of his reasoning.[45]

A. Yes, but when a later court has to directly face the issue whether or not a trust-power is enforceable, Lord Wilberforce's approach will provide the only solution. *Re Baden* (No. 2) gives no indication as to how the court might enforce a trust-power for a wide class satisfying the given-postulant test. Therefore I suggest that it does not affect my earlier comments about the court's enforcement of trust-powers and in particular Lord Wilberforce's requirement that the trust-power be "administratively workable".

Q. If it is conceded that the court is not exercising the donee's full discretion does this not cast doubt on the idea that it is exercising *the power* at all? If it were exercising the power to appoint would it not be exercised discretion and all? The court acts in a manner which is nothing like an exercise of the power given to the donee. It "interferes" in a special and limited way.

A. I agree. The court does not exercise any real discretionary power but imposes a form of constructive trust in order to give effect to any perceived intention on the part of the settlor, other than the intention that there should be an appointment. All the cases can best be explained on this basis — even those involving equal distribution. Instead of saying that the discretionary power devolves upon the court, but that the discretion will not be exer-

45. Although Lord Reid and Viscount Dilhorne agreed with the opinion given by Lord Wilberforce it is not entirely clear that their concurrence extended to his observations about the requirements of "administrative workability".

cised, is it not better to say simply that on default of appointment there is a constructive trust for the objects equally? Obviously there is no judicial support for this view in any of the cases since the implied gift theory was adopted, but it does explain *McPhail* v. *Doulton* more realistically than the theory that the court is exercising the power given to the donee. It manifestly is not.

Q. Could you give an example of a trust-power for a wide class of objects which does show a particular intention that can be given effect to by the court?

A. Since the very earliest cases it has been held that a trust-power for such relations of a given person as the trustees may select, while enabling the trustee to select relations of any degree, operates in default of selection as a trust for the statutory next of kin — a trust for all relations being void for uncertainty.[46]

These "relations" cases were relied on heavily by Lord Wilberforce in *McPhail* v. *Doulton* to establish the proposition that trust-powers may be executed by the court in ways other than by an equal distribution among all the objects.[47] Unless they are treated as merely anomalous the relations cases certainly establish that. They also show how the court, not having the donee's wide discretion, may be able to give to a select group within the class and still give effect to the settlor's general intention.

A good example of the "relations" cases is *Gower* v. *Mainwaring*[48] which involved a trust-power to distribute among the testator's friends and relations where the trustees should see most necessity and as they should think most just. The Lord Chancellor said:

> Where trustees have a power to distribute generally according to their discretion without any object pointed out or rule laid down, the court interposes not, unless in case of charity . . . But here a rule is laid down and the word 'friends' is synonymous to 'relations'; otherwise it is absurd.[49]

The reason that the court was able to execute trust-powers for relations, despite the impossibility of equal division, was that the Statute of Distributions provided a limited class through which the settlor's general intention could be achieved. Thus the court

46. *Harding* v. *Glyn* (1739) 1 Atk. 469; *Car* v. *Bedford* 2 Cha. Rep. 146; *Brunsden* v. *Woolredge* (1765) Amb. 507; *Bennett* v. *Honywood* (1772) Amb. 708.
47. [1971] A.C. 424, 452. "They prompt me to ask why a practice or rule, which has been long followed and found useful in 'relations' cases should not also serve in regard to 'employees' . . . "
48. (1750) 2 Ves. Sen. 87.
49. Ibid., 89.

the same time being able to impose a just and equitable solution.[50] was relieved of the necessity of making an arbitrary decision, at

Another example of the court giving within the class is provided by the case of *Richardson* v. *Chapman*[51] which was also referred to in *McPhail* v. *Doulton*. If the justification for the court's execution of trust-powers is the achievement of the settlor's general intention then it follows, if the settlor has shown a general intention in favour of a class but a particular intention in favour of an individual, that the individual should take on default of appointment by the donee. This is what occurred in *Richardson* v. *Chapman*. The objects of the trust-power in that case were a number of named persons, former chaplains and domestics, and "my worthy friends and acquaintances, particularly the Reverend Doctor Richardson". The House of Lords set aside a fraudulent appointment and directed the trustees to appoint to Dr Richardson. As Lord Wilberforce pointed out in *McPhail* v. *Doulton* "this shows that the court can in a suitable case execute a discretionary trust *according to the perceived intention of the truster*".[52] In *Richardson* v. *Chapman* neither the trustees nor the Court could have given among all the objects for they could not all be ascertained. There had to be some selection and the intention was that the persons to take were to be determined by a sound discretion exercised by the trustee. When that discretion was not exercised soundly by the trustee the Court interfered, but it did not exercise the trustee's discretion. It directed an appointment which best achieved the settlor's intention and, since equal distribution was impossible, that intention was achieved by appointing to Dr Richardson who had been mentioned by the settlor as meriting particular consideration. Dr Richardson was the only object before the Court.

Q. The two cases you have just described are rather exceptional. In one there was a statute which conveniently provided a narrow class and in the other the settlor had indicated a particular person whom he preferred over the other objects. Neither case suggests how the court might execute an ordinary trust-power to appoint among a wide class.

A. That remains a difficult problem. In *McPhail* v. *Doulton* Lord Wilberforce said that if called up on to execute a trust-power the court will do so "by authorising or directing representative persons of the classes of beneficiaries to prepare a scheme of distribution,

50. Lords Guest and Hodson treated the relations cases on this basis in their dissenting speeches in *McPhail* v. *Doulton*. "These cases where there were indications which acted as pointers or guides to the trustees and enabled the Court to substitute its own discretion for that of the trustees" — Lord Hodson [1971] A.C. 424, 443.
51. (1760) 7 Bro. P.C. 318.
52. [1971] A.C. 424, 451.

or even, should the proper basis for distribution appear, by itself directing the trustees so to distribute".[53] There must be many trust-powers in which no scheme or proper basis for distribution by the court is apparent. Although such trust-powers are administratively unworkable, if, as invariably happens, the donees exercise their power, the question of execution by the court will never arise. It may be a long time before the court is ever called upon to be more explicit about its enforcement of trust-powers for wide classes.

Q. This raises another question. You have drawn a distinction between the execution of a trust-power by the donee and execution by the court; "administrative workability" being necessary only in the latter case. One of the major features of the pre-*McPhail* v. *Doulton* test for certainty of trust-powers was that a trust-power for uncertain objects failed *ab initio*. If the trust-power could not be executed by the court[54] it could not be executed by the donee even though he might be perfectly willing to do so.[55]

After *McPhail* v. *Doulton* it is still possible to have a trust-power which can be executed by the donee, because it satisfies the power-certainty rule,[56] but which cannot be enforced by the court, because it is administratively unworkable. Is such a trust power still void *ab initio*, or can the donees appoint if they are willing? In other words, does the question whether the trust-power is "administratively workable" arise only upon, and if, there is no appointment, as you appear to suggest, or is it an issue that has to be decided at the outset before even the donee can appoint? If the latter were the case, it would be a severe limitation on the progress made in *McPhail* v. *Doulton*.

A. The fact that a trust-power for uncertain objects was regarded as void *ab initio* was an inevitable consequence of that same confusion between trust-powers and fixed trusts which also resulted in the trust-certainty rule. The court can never adopt a wait-and-see approach to the limitations in a fixed trust and it was thought that a trust-power had always to be capable of execution by the court, despite the fact that the possibility of no appointment being made might be practically non-existent. Obviously if trust-powers are still regarded as fixed trusts they must also still be void *ab initio* if they cannot be enforced by the court. Despite suggestions to the contrary in *McPhail* v. *Doulton*,[57] however, the substance of that decision was to treat trust-powers as *powers*

53. Ibid., 457.
54. At that stage by equal division.
55. Criticism of this situation was foreshadowed by Ames in "The Failure of the 'Tilden Trust'" (1891) 5 H.L. Rev. 389.
56. As established in *Gestetner & Gulbenkian*.
57. *McPhail* v. *Doulton* proceeded on the basis that trust-powers must comply with the principles relating to trusts: [1971] A.C. 424, 441.

rather than trusts.[58] If the court can enforce a trust-power after default by the donee it will do so, but the question "Power or trust-power?" is only relevant *after* default. If a trust-power cannot be executed by the court upon default there will be a resulting trust.

Q. But if, as you emphasise, a trust-power must be contained within a trust, does that trust not have to be capable of enforcement from the time of its creation?

A. Yes, but the question is how does the court enforce such a trust? Even a trust containing a mere power must be capable of enforcement — this does not mean that all the objects of a mere power must be ascertainable at the time of its creation. The court adopts a method of enforcement appropriate to the type of trust involved. In the case of trusts containing powers it adopts a wait-and-see approach. If the power is executed those who are appointed become beneficiaries; if the power is not executed the gift in default takes effect or there is a resulting trust.[59] The problem with the *Gestetner - Gulbenkian* line of cases is that the court did not adopt an appropriate method of enforcement. It tried to enforce trust-powers as fixed trusts rather than as trusts containing powers.

Once the trust-power is seen as a power rather than a trust the way is open to allow enforcement in a suitable way. As with mere powers the court will wait and see if there is an appointment. Until default of appointment, and particularly as far as the donees are concerned, a trust-power differs in no way from a mere power. It is only on default that the court adopts the further procedure appropriate to trust-powers and, if possible, "executes" the power in one of the ways we have discussed.

Q. If one thing has emerged from this discussion it is that the assimilation of trust-powers with fixed trusts has been the single most important factor in the difficulties which have surfaced in the *Gestetner - McPhail* v. *Doulton* line of cases. This has been the basis of the "duty" approach to trust-powers, the implied gift theory, the trust certainty requirement and the requirement that a trust-power be enforceable from its creation. All these we have rejected.

---

58. See the speech of Lord Wilberforce [1971] A.C. 424, 456, 457.
59. Provided of course that the power-certainty test is complied with. The 'given postulant' test suggested in *Gestetner* and approved in *Gulbenkian* is the minimum requirement consistent with the Court's supervision of the execution of mere powers. If the given postulant test were not applied, the Court could not, with certainty, say whether or not any possible execution was a fraud on the power — the doctrine of fraud on a power being the way the Court 'enforces' mere powers.

A. Yes. There are three types of trust which a settlor may create. Firstly, he may create a fixed trust in which he himself sets out the beneficiaries who are to take and the extent of their interests. Secondly, he may create a trust containing a power of appointment either in the trustee or in someone else. Or, thirdly, he may create a trust which contains a trust-power. All three are trusts. The important question is: What type of trust has been created? In a sense it can be said that a trust "for such of the children of A as the trustees may appoint" is a trust for distribution among the children of A. But the object of a power is in a very different position from the beneficiary of a fixed trust and when we say "a trust for A's children" we usually mean a fixed trust in their favour. Although a trust is involved in both cases, common usage reflects the distinction between a "trust for the children of A" and a "power to appoint among the children of A".

Unfortunately the distinction between trust-powers and fixed trusts has not been so preserved. The distinction is commonly drawn between a power of selection (where a mere power exists) and a trust for selection (where there is a trust-power). This suggests that a trust power is a *trust* in a sense that a mere power is not and this has given rise to many of the difficulties we have been discussing.

Q. Has *McPhail* v. *Doulton* exposed this false assimilation of trust-powers with fixed trusts?

A. Yes and No. "No" in the sense that the House of Lords continued to discuss the problem in terms of "trusts" rather than trust-powers. For example Lord Hodson said that where trust-powers are concerned "the Court's position differs in no way from that which it occupies in the case of trusts generally."[60] "Yes" in the sense that, terminology apart, the majority decision emphasises that the fact that trust-powers are not fixed trusts. Lord Wilberforce took as his starting point the assumption that a trust must be capable of execution by the court. The conclusion which he eventually reached, however, was that the difference between a trust-power and a mere power is that on default of execution by the donee the former will be executed by the court and the latter will not.[61] If this is the only distinction between trust-powers and powers, it follows that a trust-power is essentially a power, athough of a special type, rather than a trust.

Now it can be seen that trust-powers form a third category falling between fixed trusts and trusts containing ordinary powers. The objects of a trust-power are in a more favourable position than the objects of a mere power, because the court will interefere on their behalf on default, but their position is not that of bene-

60. [1971] A.C. 424, 456, 457.
61. Ibid., 456, 457.

ficiaries of an ordinary fixed trust. Indeed it was precisely in order to benefit those to whom there should have been an appointment, but who were not strictly beneficiaries of a fixed trust, that the category of trust-power was first created. If there had been a fixed trust for the class from the beginning the trust-power concept would have been unnecessary.

Q. One final question. You have said that both powers and trust-powers must exist within a valid trust; that the trust must be capable of "enforcement" by the court but that trusts containing powers are enforced in a different manner from fixed trusts. How can this be reconciled with *Morice* v. *Bishop of Durham?*[62] That was a trust containing a power and yet it has become the leading authority on the requirements of a valid fixed trust. Did the trust in *Morice* fail for no reason other than the fact that it was not seen to involve a trust-power?

A. Before *McPhail* v. *Doulton* a trust "for such of [a wide class] as my trustees shall in their absolute discretion appoint" failed whether it was construed as a fixed trust or trust-power.[63] For this reason it was often not particularly important to decide whether a trust or a trust-power had been created in any particular case. This assimilation of trust-powers with trusts resulted in cases in which words, which might have been construed as giving trustees a trust-power, were taken as no more than an imprecise or uncertain way of describing the beneficiaries of a fixed trust.[64] This was the ultimate "trust" approach to trust-powers.

Morice v. *Bishop of Durham* itself was such a case. It was discussed solely in terms of fixed trusts, the need for their control by the court and consequently the need for certainty of beneficiaries. It was not discussed in terms of powers or trust-powers.

The *Gestetner* and *Broadway Cottages* decisions were at least consistent with the view that the trust in *Morice* failed because the testator, instead of naming the beneficiaries himself, had left that to his trustees in a way which the court could not enforce. In the pre-*McPhail* v. *Doulton* test of certainty *Morice* would have failed as a trust-power. With the trust-power rule as to certainty the same as the trust rule, it was unnecessary to explain why the trust in *Morice* was not discussed in terms of powers or trust-powers. As your question suggests, the rejection of the trust-certainty rule in *McPhail* v. *Doulton* brings into question a possible conflict between trust-powers for a wide range of objects and the *Morice* line of cases.

---

62. (1805) 10 Ves. Jun. 522.
63. Because the 'certainty' test was the same in both cases.
64. *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875) L.R. 6 P.C. 381; *Fenton* v. *Nevin* (1893) 31 L.R. Ir. 478; *Re Carville* [1937] 4 All. E.R. 465.

It has been suggested that the "uncertainty" in *Morice* was not simply the wide range of objects but the way they were described; the semantic uncertainty of the words "benevolence" and "liberality".[65] On that view *Morice* would have failed the certainty test applied to powers, and, since *McPhail* v. *Doulton*, to trust-powers. *Morice* can be explained on the basis that it involved "linguistic or semantic uncertainty"[66] and would have failed as a trust, trust-power or mere power. This must now be the correct interpretation of *Morice* if it is to be reconciled with *McPhail* v. *Doulton*.

R. L. CONGREVE*

65. Ames "The Failure of the 'Tilden Trust'" (1891) 5 H.L. Rev. 389.
66. The words used by Lord Wilberforce in *McPhail* v. *Doulton* [1971] A.C. 424, 457. It is suggested that the 'semantic' certainty test and the 'given postulant' test are identical.

* Ph.D., Lond. LL.M. Senior Lecturer in Law Victoria University of Wellington.