Re Baden (No 1) McPhail v Doulton [1970] UKHL 1 (06 May 1970)
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HOUSE OF LORDS

McPHAIL and Others

v.

DOULTON and Others

Lord Reid
Lord Hodson
Lord Guest
Viscount Dilhorne
Lord Wilberforce

Lord Reid

MY LORDS,

For the reasons given by my noble and learned friend, Lord Wilberforce, I would allow this appeal and make the Order which he suggests.

Lord Hodson

MY LORDS,

The question under appeal is whether on its true construction the provisions of Clause 9*(a)* of a Deed dated 17th July, 1941, by which one Bertram Baden established a fund to provide benefits for the staff of Matthew Hall & Co. Ltd., and their relatives and dependants, constitutes a trust binding the Trustees to distribute income in accordance with its provisions or is a mere power not imposing any such duty. Clause 9 provided :

" *(a)* The trustees shall apply the net income of the fund in making " at their absolute discretion grants ... in such amounts at such " times and on such conditions (if any) as they think fit. ...

" *(b)* The trustees shall not be bound to exhaust the income of any " year or other period in making such grants . . . and any income not " so applied shall be ... [placed in a bank or invested].

" *(c)* The trustees may realise any investments representing accumula- " lions of income and apply the proceeds as though the same were " income of the fund and may also ... at any time prior to the

" liquidation of the fund realise any other part of the capital of the
" fund ... in order to provide benefits for which the current income
" of the fund is insufficient."

Clause 10 provided that all benefits being at the discretion of the trustees, no person had any interest in the fund otherwise than pursuant to the exercise of that discretion.

Of the preceding clauses, Clause 6*(a)* provided that all moneys in the hands of the trustees and not required for the immediate service of the fund may be placed in a deposit or current account with any bank or banking house in the name of the trustees or may be invested as hereinafter provided ; Clause 7 dealt with the trustees' power of investment.

The settlor died in April, 1960, and his executors, the present Appellants, claim that, the deed being wholly void, payment of the fund is due to the settlor's estate. This claim is resisted by those whose interest it is to establish that, whether there is a trust or a mere power under which they may benefit, in neither case is the provision which they seek to support void for uncertainty.

The importance to the parties of the particular question under appeal lies in the circumstance that as the law stands on the authorities it appears at least probable that the prospect of success for the Appellants upon the question whether the deed is void for uncertainty are considerably greater if the effect of Clause 9 is to constitute a trust that if, on the other hand, it only has the effect of giving to the Trustees a mere power not amounting to a trust.

At first instance Goff J. held that nothing more than a power imposing no duty was contained in the provision contained in Clause 9. On appeal the majority of the Court of Appeal sustained his judgment without being

able to find any certainty in their conclusion, in view of the even balance, as it seemed to them, of the arguments presented. The majority felt able to sustain the judgment by relying on the doctrine *ut res magis valeat quam pereat* in order that the terms of the deed might have a chance of being effective since, without flying in the teeth of its provisions, the view of the trial judge might prevail thus giving a better opportunity to those upon whom the testator wished to confer benefit.

There is no doubt that the primary trust here is expressed in a mandatory form. True that this is not necessarily conclusive, cf. *In re Main's Settlement* [1961] 1 W.L.R. 440 per Lord Evershed M.R. at page 443, but it is powerful foundation for the argument that a trust so created in its inception is not converted into a power by the mere addition in a later clause of a power to accumulate surplus income. Notwithstanding the different views expressed by the learned judges who have considered the matter in the Courts, I cannot for myself resist the conclusion reached by Russell L.J. that Clause 9 is a provision for the distribution of the whole with power to accumulate. There is a complete disposition with a primary duty to distribute, a trust for the whale period of its existence with a power to carry forward from year to year.

Clause 10 is relied upon by the Respondents as showing that no member of the class was to be entitled to benefit from the fund otherwise than by the exercise of the discretion of the Trustees. So it is said that there cannot be a trust of the income but only a power over it. I do not accept this.

I agree with Russell L.J. that Clause 10 correctly recites the effect of Clause 9 viz. that all benefits are at the discretion of the Trustees. The remainder of the clause states the legal result. If this makes Clause 10 superfluous it does not justify, in my opinion, the conclusion that it produces a resulting trust to the settlor of income over which the Trustees might not exercise their discretion in the event of accumulation being no longer permissible. On the face of it, Clause 9*(b)* is no more than a provision for retention of monies unexpended during the lifetime of the trust and as Russell L.J. pointed out it has no other function. True that the language of Clause 9*(c)* using the word " accumulation " which often has a technical significance, denoting capital, followed by the permission to apply the proceeds as though the same were income and the succeeding reference to any other part of the capital of the fund suggest and lend support to the contrary conclusion. I am, I admit, unable to account for this language except on the footing of attributing to the draftsman a failure to give accurate expression to the intention of the Settlor. I am, however, satisfied after construing this deed as a whole that the Appellants are right in their first contention viz. that Clause 9*(a)* constitutes a trust or power coupled with a duly under which the Trustees are bound to distribute the whole estate. Clause 9*(a)* and *(b)* together are mandatory, the latter being assisted by administrative proviso including provision for the retention and investment of unexhausted income. Clause 9*(c)*, notwithstanding its references to capital, is concerned only with those investments which it is to be noted can be realised only with the consent of all the Trustees. This treatment is in contrast with powers given to two (or more) trustees as to the trust fund generally (see Clause 6*(b)*). For these reasons I am of opinion that the order of the Court of Appeal should be reversed in so far as it affirmed that part of the order of Goff J. dated 12th July, 1967, which declared that the provisions of Clause 9*(a)* constitute a power and not a trust. Unfortunately this does not settle the dispute between the parties.

Goff J. had in addition held that the power was valid and was not void for uncertainty, and on that footing had held that an amending Deed dated 21st December, 1962, was also valid. This additional holding was discharged by the Court of Appeal which ordered remission to the Chancery Division for further hearing of the question whether upon the true construction of the Deed of the 17th July, 1941, the provision for the benefit of officers and employees and ex-employees of the company and relatives or dependents of such persons are *(a)* valid or *(b)* void for uncertainty or for any other reason.

This latter part of the order of the Court of Appeal should stand together with a declaration that the provisions of Clause 9*(a)* constitute a trust, not a power.

There remains the vexed question, much canvassed before your Lordships not only in this case but in *Whishaw and Another* v. *Stephens and Others* [1968] 3 W.L.R. 1127, as to the distinction, if any, between trusts and bare powers in favour of a class of persons when the Court has to consider whether a disposition fails by reason of uncertainty.

Of late years a number of dispositions have been considered by the Courts in which donors have sought to make elaborate provisions in favour of beneficiaries including such persons as the employees of limited companies and their wives and widows. Such a case was the *Broadway Cottages* case decided in the Court of Appeal and reported in [1955] Ch. 20. It was there

recognised that the accepted test of the validity of a trust was that it must be such as the Court can control. The authority for this proposition is to be found in *Morice* v. *Bishop of Durham* (1805) 10 Ves. 522 as stated by Lord Eldon at page 540 where he said : " As it is a maxim, that the execution " of a trust shall be under the control of the Court, it must be of such a " nature, that it can be under that control; so that the administration of it " can be reviewed by the Court; or, if the trustee dies, the Court itself " can execute the trust; a trust therefore, which, in case of mal-administration " could be reformed ; and a due administration directed ; and then, unless " the subject and the objects can be ascertained, upon principles, familiar " in other cases, it must be decided, that the Court can neither reform mal- " administration, nor direct a due administration." In a sentence there is no trust over which the Court cannot assume control. If the inability arises from inability to ascertain the objects of the alleged trust, it is said to be void for uncertainty.

The language used on this topic may have varied from time to time but is, I think, consistent with that used in the *Broadway Cottages* case where, in holding that the trusts of income were not such as the Court could enforce, the Court based itself upon the judgment of Lord Tomlin (sitting at first instance) in *In re Ogden* [1933] Ch. 678 who held that a trust for such members of a given class of objects as the trustees shall select is void for uncertainty, unless the whole range of objects eligible for selection is ascertanied or capable of ascertainment.

I adhere to the view expressed in the Court of Appeal in the *Broadway* case, that this proposition is based on sound reasoning. The *Broadway Trust* ease has stood for many years. Disquiet has, however, now arisen about a strict adherence to the requirement of certainty there propounded. This disquiet is due to the narrow distinction between trust, on the one hand, where certainty is required and mere powers, on the other hand, where something less is needed. This matter was discussed before your Lordships in *Whishaw* v. *Stephens* (supra) (usually called the *Gulbenkian* case) and disquiet at the effect of the *Broadway Trust* decision is, I think, to be discerned in the speech of my noble and learned friend, Lord Reid, in the *Gulbenkian* case; and was clearly expressed by the two learned Lords Justices, both experienced equity lawyers, in the Court of Appeal in this case. The observations upon the distinction to which I have referred were not strictly necessary to the discussion in the *Gulbenkian* ease but the matter does become of crucial importance in the instant case in view of the *ratio decidendi* which prevailed in the Court of Appeal.

The problem itself is not new. I may. I hope, be forgiven for referring to the leading case of *Brown* v. *Higgs* twice heard before the Rolls Court by Sir Richard Arden and finally in your Lordships' House by Lord Eldon (see *4* Ves. Jun. 709, 5 Ves. Jun. 495 and 8 Ves. 562). At the rehearing at page 505 Sir Richard is reported as admitting that the distinction between trust and power was very nice. He illustrated the nicety by reference to the case of the *Duke of Marlborough* v. *Lord Godolphin 2* Ves. Jun. page 61.

The distinction between a trust and a mere power can be stated shortly although the short statement will require some explanation. It is that where there is a trust there is a duty imposed upon the trustees who can be

controlled if necessary in the exercise of their duty. Whether the trust is discretionary or not the Court must be in a position to control its execution

in the interests of the objects of the trust. Where there is a mere power entirely different considerations arise. The objects have no right to complain. Where by the instrument creating the power the discretion is made absolute and uncontrolable the Court cannot interfere *(Gisborne v. Gisborne* 2 App. Cas. 300). The trust in default controls and he to whom the trust results in default of exercise of the power is in practice the only one competent to object to a wrongful exercise of the power by the donee. Counsel did not profess to know of any successful application to the Court by a person claiming to be an apparent object of a bare power. I exclude from consideration cases in which bad faith may be alleged.

I do not deny that what I have said about powers is, so to speak, blurred at the edges by cases in which powers of donees who refuse to exercise their discretion have been treated by the Courts as trusts. These powers have been described as intermediate between trusts and powers and are described in detail in Farwell on Powers 2nd edition page 468 where he cites from the judgment of Lord Eldon in *Brown* v. *Higgs* (supra) the following passage:

> " Where there is a mere power of disposing and it is not executed.
> " the Court cannot execute it; but wherever a trust is created and the
> " execution of that trust fails by the death of the trustee or by accident,
> " the Court will execute the trust. But there arc not only a mere
> " trust and a mere power, but there is also known to the Court
> " a power which the party 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 on him does not discharge
> " it, the Court will to a certain extent discharge the duty in his room
> " and place. The principle is that if the power is one which it is the
> " duty of the donee to execute, made his duty by the requisition of
> " the will, put upon him as such by the testator, who has given him an
> " interest intensive enough to enable him to discharge it, he is a trustee
> " for the exercise of the power, and has a discretion whether he will
> " exercise it or not. 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."

This passage as quoted by the learned author is to the same effect but not verbatim the same as that which appears in the report of Vesey Junior. It does, however, show that where powers of a fiduciary character, as opposed to being mere powers not coupled with a duty, are concerned the Court's position differs in no way from that which it occupies in the case of trusts generally. Lord Eldon in the same case at page 576 of the report in 8 Vesey said that it was difficult to reconcile all the cases.

Examples of interference by the Court are to be found in such cases as *Gower* v. *Mainwaring 2* Ves. Sen. 87 which shows that the Court, where a rule has been laid down for the guidance of donees of powers, will act upon it in the same way as the donees might have done. If trustees disclaim the power, the Court may execute it—see *Hewall* v. *Hewell 2* Eden 332. In *In re Hodges, Davey* v. *Warr* 7 Ch.D. 759 the Court interfered where trustees were considered to be acting capriciously. Where duty and power are coupled the Court can compel the trustees to perform the duty—see *Gisborne* v. *Gisborne* (supra) and *Tempest* v. *Lord Camoys* 21 Ch.D. 571.

In the *Gulbenkian* case (supra) the majority of your Lordships held the view that where there is a valid gift over in default of appointment a mere or bare power of appointment among classes is valid if it can be said with certainty whether any given individual is or is not a member of a class and that the power did not fail simply because of the impossibility of determining every member of the class.

In my opinion a mere power is a different animal from a trust and the test of certainty in the case of trusts which stems from *Morice* v. *Bishop of Durham* (supra) is valid and should not readily yield to the test which is sufficient in the case of mere powers.

The unhappy results which may follow from incompetent drafting may be, in the case of an instrument held to impose a trust, that it is so much waste paper whereas in the case of an instrument differing perhaps on the face of it very little from the invalid trust instrument a good gift of a power to benefit objects may emerge. Thus it is said in order to avoid fine distinctions the test should be the same for both.

One persuasive argument used is that, in applying the principle that where there is a trust the Court must be in a position to exercise it, the Court cannot exercise the trustees' discretion in the event of their failing to do so. The discretion being conferred on and exercisable by the trustees alone the Court cannot do other than authorise a distribution in equal shares. This, in cases comparable with the present, must lead to a result tending towards absurdity and makes the strict test of certainty open to serious criticism. This disability of the Courts to exercise the discretion reposed in trustees was referred to in the recitation of the argument for the Crown in the judgment of the Court in the *Broadway* case (supra) at page 30. It was not referred to specifically in the conclusion reached by the Court although it would be fair to say that the arguments of the Crown set out in the judgment were implicitly accepted. For myself I do not deny that there is force in the argument based on the absurdity of an equal division especially as it has not always been accepted.

In what are called the relations cases, *Moseley* v. *Moseley* (1673) Rep. Temp. Finch 53, *Clarke v. Turner* (1694) 2 Freeman 198 and *Warburton* v. *Warburton* (1702) 4 Bro. P.C.1, the Court did exercise its own discretionary judgment against equal division. Similarly, in a different context the same principle was applied in the case of *Richardson* v. *Chapman* (1760) 7 Bro. P.C.318 where it appears from the reported argument that the Court decreed the proper act to be done not by referring the matter to the trustee's discretion but by directing him to perform as a mere instrument the thing decreed (pages 726-7). These cases may be explained as 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.

This practice, however, has fallen into desuetude and the modern, less flexible, practice has it appears been followed since 1801 when Sir R. Arden MR. in *Warburton* v. *Warburton* 5 Ves. 849 stated that the Court now disclaims the right to execute a power and gives the fund equally. The basis of this change of policy appears to be that the Court has not the same freedom of action as a trustee and must act judicially according to some principle or rule and not make a selection giving no reason as the trustees can. The Court, it is said, is driven in the end to the principle that equity is equality

unless, as in the relations cases, the Court finds something to aid it. Where there is no guide given the Court, it is said, has no right to substitute its own discretion for that of the designated trustees.

I regret that the Court is driven to adopt a *non possumus* attitude in cases where trustees fail to exercise a trust power. In this connection it is perhaps not irrelevant to note that the Court has not shown itself helpless in cases of failure and uncertainty where an order has been made to distribute part and pay the balance into Court (see Re *Benjamin* [1902] 1 Ch. 723. Difficulties of fact in these cases must often arise especially after the passage of time when it is not known what has happened to members of a class who have gone abroad or disappeared and should be capable of solution. Certainty of description, however, if required, must be required at the moment when a trust instrument operates.

I have had the advantage of reading the speech which has been prepared by my noble and learned friend Lord Wilberforce whose opinion particularly on this topic is of very strong persuasive power. I cannot, however, bridge

the gulf which still I think yawns between us. If one bases oneself, as I do, on the passage from Lord Eldon's judgment in *Morice* v. *Bishop of Durham* (supra) as defining the features of a trust, it is, in my opinion, impermissible to sanction, in the case of an uncertain disposition in the sense of the passage quoted, the authorisation by the Court of a scheme of distribution such as he suggests. I cannot accept that this is justified by stating that a wider range "of enquiry is called for in the case of trust powers than in the case of powers (meaning " mere " as opposed to " trust powers "). To adopt this solution is I think to do the very thing which the Court cannot do. As was pointed out by my noble and learned friend Lord Upjohn in the *Gulbenkian* case (at page 1139)—

> " The trustees 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 claimants
> " who are within the class, for that is constituting a narrower class and
> " the donor has given them no power to do this ".

I have read and re-read the speech of my noble and learned friend, Lord Wilberforce, with, I hope, a readiness to change my mind and to temper logic with convenience, but have given the best consideration I can to the problem I still adhere to the view I have previously expressed in the *Broadway Cottages* case and in the *Gulbenkian* case as to the requirements for certainty in the case of the objects of a trust.

I agree with Russell L.J. that the appeal should be allowed and declare that the provision of clause 9 *(a)* constitute a trust, and remit the case to the Chancery Division for determination whether clause 9 is (subject to the effects of section 164 of the Law of Property Act, 1925), valid or void for uncertainty.

Lord Guest

MY LORDS,

I have had the advantage of reading the speech of my noble and learned friend, Lord Hodson. I agree with it. I only make a few observations of my own.

Upon the question of construction I have no doubt, in agreement with Russell L.J. in the Court of Appeal, that this is a trust and must be so construed. Clause 9 *(a)* is mandatory and provides that the Trustees shall apply the net income of the Fund in making at their absolute discretion grants to or for the benefit of certain persons. By clause 9 *(b)* they are not bound to exhaust the income of any one year or period in making such grants. Any income not so applied is to be dealt with according to clause 6 *(c)* which provides that moneys in the hands of the Trustees not required for the immediate service of the Fund are to be placed on deposit or current account or invested. There is a distinction made between the Fund as defined by clause 1 and consisting of the capital of the Fund and the income which according to clause 9 *(a)* is to be distributed among the beneficiaries. It was argued for the Respondents that the terms of the deed imported an accumulation of income with power to distribute. I prefer the Appellants' description as a direction to distribute income with a power to withhold income.

There is, in my view, a complete answer to the argument that clause 9 *(c)* contains a mere power and not a trust in that if it was a power the Trustees would not be bound to distribute one penny of the income. This is quite which according to clause 9 *(a)* is to be distributed among the beneficiaries, should be distributed with a power to withhold.

If I understand English law correctly there is a basic distinction between a deed containing a power and a deed containing a trust. The distinction may be difficult to draw, but once drawn the effect is different. In the former case there is a resulting trust in favour of the Settlor upon failure to exercise the power or in the case of an invalid exercise. In the case of a

trust the beneficiaries are the objects of the trustee's bounty. The trustees are acting in a fiduciary capacity. If the trustees fail to exercise their discretion, the Court can compel them to exercise the trust. This distinction has been recognised in the authorities over the years (see *Gisborne* v. *Gisborne 2* App. Cas. 300) and finally confirmed by a majority of your Lordships in *Whishaw* v. *Stephens* [1968] 3 W.L.R. 1127. In that case the deed admittedly contained a power and the test accordingly was whether in the case of any individual the trustees could safely say that he did or did not come within the category of objects of the power and it was held that the deed was valid (see Lord Upjohn at page 1113). But my noble and learned friend Lord Upjohn having dealt with the question of a mere power proceeded to make some general observations upon the question where there was a trust and not a power. The distinction between a power and a trust was clearly recognised in those observations albeit *obiter* by Lord Upjohn. My noble and learned friend, Lord Hodson, and I concurred in his opinion. But I do not detect in the opinions of the other noble Lords in that case any disagreement with the distinction.

Upon the assumption that this is a deed containing a trust power and not a mere power—as I understand all your Lordships agree—the question then arises what test is to be applied in order to determine the validity of the trust. Up till the present day the test in each case has been different. In the case of a power it is only necessary for the trustees to know whether a particular individual does or does not come within the ambit of the power. *(Whishaw* v. *Stephens (sup. cit.)* In the case of a trust power it is necessary for the validity of the trust that the class among whom the trustees are to

exercise their discretion must be ascertainable. This is the result of the decisions in *In re Ogden* [1933] Ch. 678 (a decision of Lord Tomlin) and latterly in *Broadway Cottages Trust* [1955] Ch. 20 as confirmed in the opinions of the majority of your Lordships in *Gulbenkian's* case *sub. nom. Whishaw v. Stephens* [1968] 3 W.L.R. 1117.

It is now suggested for the first time that so far as the test of validity is concerned a mere power and a trust power can be assimilated. It is worth observing at the outset that this is a change of direction from the opinion expressed by the majority as recently as 1968. This is justified not upon the ground that the arguments in the previous case were not fully canvassed nor upon the ground that the previous decision was plainly wrong, but upon the basis of expediency.

I will now attempt to analyse the basis of the view of those who consider that there should be an assimilation of the tests for validity. As I have already said, the distinction between a mere power and a trust power is fundamental. The Court, apart from a *mala fide* exercise of a mere power has no control over the exercise of the power by the donee or trustees as the ease may be. If it is not exercised or fails for invalidity the fund goes to those entitled in default, under the settlement or on a resulting trust as the ease may be. It is very different in the case of a trust power. There the trustees are under a fiduciary duty to exercise the power. The beneficiaries can compel the trustees to exercise the power by application to the Court if necessary. If the beneficiaries agreed among themselves to equal divisions they could compel the trustees to distribute the whole fund. (See Harman L.J. in *in re Gestetner* [1953] Ch. 672 at page 686.) One of the reasons which, it is said, requires complete ascertainment of the class of objects is that if the Court has to administer the trust then, as it is only the trustees who have discretionary powers, the Court can only make an equal division. " *Equity is equality ".* This basic conception is challenged by reference to what is known as the " relation " cases. It is said that the Court in these eases has, instead of making an equal division, made a selection in the exercise of its discretion. This shows, it is said, that the principle of equal division is not a necessary result of the exercise of a trust power by the Court. I regard the " relation " cases as special for this reason, that in all of them some guide or pointer was given to the trustees as to the manner in which that discretion was to be exercised. The settlor entrusted a discretion to his trustee with certain guide lines and in these circumstances the Court

did not find it difficult to exercise its own discretion in accordance with the supposed intention of the settlor. For example in *Clarke* v. *Turner 2* Free 198 the devise was to " such of the relations as he should think fit, most reputable for his family". The Court chose the heir-at-law as the most reputable. In *Warburton v. Warburton* (1702) 4 Bro. P.C.I "a most extraordinary case " as described by the Master of the Rolls in *Kemp* v. *Kemp (infra cit.)* the discretion was among the executors, brothers and sisters according to their needs. The Court gave a double share to the heir. *Richardson* (1760) 7 Bro. P.C. 318 was not a "relation" case but depended on its own very special facts. Granted that the Court did not in these cases direct an equal division, it by no means follows that in a non-relation case where the trustees are given the discretion to distribute amongst a wide class of objects with no guide lines the Court would exercise a power of selection. The Court has no discretion and is given no guide lines upon

which to exercise a discretion. It is on the trustees that the settlor has conferred the discretion. The Court can in these circumstances only order an equal division. I consider that the reliance on the "relation" cases is based upon an insecure foundation. Moreover in none of those cases was it ever suggested that the class of objects was not ascertainable. The test of validity never therefore arose.

A more fundamental objection, however, to the reliance on these cases as a basis for a change in the law is not only their great antiquity—all in the eighteenth century—but also that they were all decided before *Kemp v. Kemp* (1801) 5 Ves. Jun. 849 and *Morice* v. *Bishop of Durham* (1805) 10 Ves. Jun. 522 where the principle of equality was firmly established and has, so far as my researches go, never been questioned since. In *Kemp* the relation cases were cited but were not thought of sufficient importance to alter the practice. I do not re-quote the passage from Lord Eldon's judgment in *Morice* v. *Bishop of Durham* referred to in the speech of my noble and learned friend Lord Hodson.

It Would be presumptuous on my part to attempt to improve upon the language of my noble and learned friend Lord Upjohn in *Gulbenkian (supcit).* I agree with the conclusions he expresses in that part of his speech which has been correctly described as *obiter dictum.* It seems to be as plain as can be that if all the objects are not ascertainable then to distribute amongst the known objects is -to take a narrower class than the settlor has directed and so to conflict with his intention.

It has been suggested that it is not in conformity with the Court's duty to administer a trust that the settlor's intentions are to be defeated by this " narrow distinction " between mere power and trust power. As I have already said I regard the distinction as basic. It is also suggested that it is in the public interest that trusts of the nature of the present should be saved, if possible, because of the great benefit conferred on the beneficiaries. I agree, but if this is desirable the remedy is by legislation and not by judicial reform.

For these reasons, I adhere to my concurrence with the whole of the opinion of my noble and learned friend, Lord Upjohn, in *Gulbenkian.*

I would allow the appeal.

Viscount Dilhorne

MY LORDS,

I have had the advantage of reading the opinion of my noble and learned friend, Lord Wilberforce. I agree with it. For the reasons he gives in my opinion the provisions of Clause 9*(a)* of the Deed constitute a trust and I entirely agree with his observations as to the tests to be applied to determine the validity of a trust.

I too, would allow the appeal and make the orders he proposes.

Lord Wilberforce

MY LORDS,

This appeal is concerned with the validity of a Trust Deed dated 17th July, 1941, by which Mr. Bertram Baden established a fund for the benefit, broadly, of the staff of the Respondent company Matthew Hall *&* Co. Ltd. Mr. Baden died in 1960 and the Appellants are the executors of his will. They claim that the Trust Deed is invalid and that the assets transferred to the Trustees by their Testator revert to his estate. The Trusts established by the Deed are of a general type which has recently become common, the beneficiaries including a wide class of persons among whom the Trustees are given discretionary powers or duties of distribution. It is the width of the class which in this, and in other cases before the Courts, has given rise to difficulty and to the contention that the trusts are too indefinite to be upheld.

The Trust Deed begins with a recital that the Settlor desired to establish a fund for providing benefits for the staff of the Company and their relatives or dependants. The critical clauses are as follows:

" 9. *(a)* THE Trustees shall apply the net income of the Fund in " making at their absolute discretion grants to or for benefit of any of " the officers and employees or ex-officers or ex-employees of the Com- " pany or to any relatives or dependants of any such persons in such " amounts at such times and on such conditions (if any) as they think " fit and any such grant may at their discretion be made by payment to " the beneficiary or to any institution or person to be applied for his " or her benefit and in the latter case the Trustees shall be under no " obligation to see to the application of the money.

" *(b)* The Trustees shall not be bound to exhaust the income of any " year or other period in making such grants as aforesaid and any " income not so applied shall be dealt with as provided by Clause 6 *(a)* " hereof.

" [Clause 6 *(a)* -All moneys in the hands of the Trustees and not " required for the immediate service of the Fund may be placed in a " deposit or current account with any Bank or Banking House in " the name of the Trustees or may be invested as hereinafter provided.]

" *(c)* The Trustees may realise any investments representing accumula- " tions of income and apply the proceeds as though the same were " income of the Fund and may also (but only with the consent of all " the Trustees) at any time prior to the liquidation of the Fund realise " any other part of the capital of the Fund which in the opinion of the ' Trustees it is desirable to realise in order to provide benefits for which " the current income of the Fund is insufficient.

" 10. ALL benefits being at the absolute discretion of the Trustees, " no person shall have any right title or interest in the Fund otherwise " than pursuant to the exercise of such discretion, and nothing herein " contained shall prejudice the right of the Company to determine the " employment of any officer or employee."

Clause 11 defines a perpetuity period within which the trusts are, in any event, to come to an end and Clause 12 provides for the termination of the Fund. On this event the Trustees are directed to apply the Fund in their discretion in one or more of certain specified ways of which one is in making grants as if they were grants under Clause 9 *(a).* There are certain other provisions in the Deed upon which arguments have been based, but these are of a subsidiary character and citation of them is unnecessary.

The present proceedings were started in 1963 by an Originating Summons taken out in the Chancery Division by the Trustees of the Deed seeking the decision of the Court upon various questions, including that of the validity or otherwise of the trusts of the Deed. It came before Goff J. in 1967. He first decided that the references in Clauses 9 and 12 to employees of the Company were not limited to the " staff" but comprised all the officers and employees of the Company. There was no appeal against this.

On the main question of validity, the learned judge was, it seems invited first to decide whether the provisions of Clause 9 *(a)* constitute a Trust or a power. This was on the basis that certain decided cases (which I shall examine) established a different test of invalidity for trusts on the one hand and powers on the other. He decided in favour of a power, and further that on this footing Clause 9 *(a)* was valid. On appeal, the Court of Appeal by a majority upheld the decision in favour of a power, but held also that the learned judge had applied the wrong test for the validity of powers, the correct test being that stated (subsequent to the hearing before Goff J.) by this House in *re Gulbenkian's* Settlement, *Whishaw* v. *Stevens* [1968] 3 W.L.R. 1127. The Court of Appeal therefore remitted the case to the Chancery Division to reconsider the validity of Clause 9 *(a)* as a power.

In this House, the Appellants contend, and this is the first question for consideration, that the provisions of Clause 9 *(a)* constitute a trust and not a power. If that is held to be the correct result, both sides agree that the case must return to the Chancery Division for consideration, on this footing, whether this trust is valid. But here comes a complication. In the present suite of authority, the decision as to validity would turn on the question whether a complete list (or on another view a list complete for practical purposes can be drawn up of all possible beneficiaries. This follows from the Court of Appeal's decision in *In re Broadway Collages Trust* [1955] Ch. 20 as applied in later cases by which, unless this House decides otherwise, the Court of Chancery would be bound. The Respondents invite your Lordships to review this decision and challenge its correctness. So the second issue which arises, if Clause 9 *(a)* amounts to a trust, is whether the existing test for its validity is right in law and if not, what the test ought to be.

Before dealing with these two questions some general observations, or reflections, may be permissible. It is striking how narrow and in a sense artificial is the distinction, in cases such as the present, between trusts or as the particular type of trust is called, trust powers, and powers. It is only necessary to read the learned judgments in the Court of Appeal to see that what to one mind may appear as a power of distribution coupled with a trust to dispose of the undistributed surplus, by accumulation or otherwise, may to another appear as a trust for distribution coupled with a power to withhold a portion and accumulate or otherwise dispose of it. A layman and, I suspect, also a logician, would find it hard to understand what difference there is.

It does not seem satisfactory that the entire validity of a disposition should depend on such delicate shading. And if one considers how in practice reasonable and competent trustees would act, and ought to act, in the two cases, surely a matter very relevant to the question of validity, the distinction appears even less significant. To say that there is no obligation to exercise

a mere power and that no court will intervene to compel it whereas a trust is mandatory and its execution may be compelled may be legally correct enough but the proposition does not contain an exhaustive comparison of the duties of persons who are trustees in the two cases. A trustee of an employees' benefit fund, whether given a power or a trust power, is still a trustee and he would surely consider in cither case that he has a fiduciary duty: he is most likely to have been selected as a suitable person to administer it from his knowledge and experience, and would consider he has a responsibility to do so according to its purpose. It would be a complete misdescription of his position to say that if what he has is a power unaccompanied by an imperative trust to distribute he cannot be controlled by the Court if he exercised it capriciously, or outside the field permitted by the trust, c.f. Farwell on Powers 3rd ed. p. 524. Any trustee would surely make it his duty to know what is the permissible area of selection and then consider responsibly, in individual cases, whether a contemplated beneficiary was within his powers and whether, in relation to other possible claimants, a particular grant was appropriate.

Correspondingly a trustee with a duty to distribute, and particularly among a potentially very large class, would surely never require the preparation of a complete list of names, which anyhow would tell him little that he needs to

know. He would examine the field, by class and category; might indeed make diligent and careful enquiries, depending on how much money he had to give away and the means at his disposal, as to the composition and needs of particular categories and of individuals within them ; decide upon certain priorities or proportions, and then select individuals according to their needs or qualifications. If he acts in this manner, can it really be said that he is not carrying out the trust?

Differences there certainly are between trusts (trust powers) and powers, but as regards validity should they be so great as that in one case complete, or practically complete ascertainment is needed, but not in the other? Such distinction as there is would seem to lie in the extent of the survey which the trustee is required to carry out: if he has to distribute the whole of a fund's income, he must necessarily make a wider and more systematic survey than if his duty is expressed in terms of a power to make grants. But just as, in the case of a power, it is possible to underestimate the fiduciary obligation of the trustee to whom it is given, so, in the case of a trust (trust power), the danger lies in overstating what the trustee requires to know or to enquire into before he can properly execute his trust. The difference may be one of degree rather than of principle: in the well-known words of Wilmot C. J. (Wilmot p. 23) trusts and powers are often blended, and the mixture may vary in its ingredients.

With this background I now consider whether the provisions of Clause 9 *(a)* constitute a trust or a power. I do so briefly because this is not a matter on which I or, I understand, any of your Lordships have any doubt. Indeed, a reading of the judgments of Goff J. and of the majority in the Court of Appeal leave the strong impression that if it had not been for their leaning in favour of possible validity and the state of the authorities, these learned judges would have found in favour of a trust. Naturally read, the intention of the Deed seems to me clear: Clause 9 *(a),* whose language is mandatory (" shall "), creates, together with a power of selection, a trust for distribution of the income, the strictness of which is qualified by Clause 9 *(b)* which allows the income of any one year to be held up and (under Clause 6 *(a)*) either

placed, for the time, with a Bank, or, if thought fit, invested. Whether there is, in any technical sense, an accumulation, seems to me in the present context a jejune enquiry: what is relevant is that Clause 9 *(c)* marks the difference between " accumulations " of income and the capital of the fund: the former can be distributed by a majority of the trustees, the latter cannot. As to Clause 10, I do not find in it any decisive indication. If anything, it seems to point in favour of a trust, but both this and other points of detail, are insignificant in the face of the clearly expressed scheme of Clause 9. I therefore agree with Russell L. J. and would to that extent allow the appeal, declare that the provisions of Clause 9 *(a)* constitute a trust and remit the case to the Chancery Division for determination whether on this basis Clause 9 is (subject to the effects of section 164 of the Law of Property Act 1925) valid or void tor uncertainty.

This makes it necessary to consider whether, in so doing, the Court should proceed on the basis that the relevant test is that laid down in *In re Broadway Cottages Trust* (u.s.) or some other test.

That decision gave the authority of the Court of Appeal to the distinction between cases where trustees are given a *power* of selection and those where they are bound by a *trust* for selection. In the former case the position, as decided by this House, is that the power is valid if it can be said with certainty whether any given individual is or is not a member of the class and does not fail simply because it is impossible to ascertain every member of the class. *(In re Gulbenkian's Settlement* (u.s.).) But in the latter case it is said to be necessary, for the trust to be valid, that the whole range of objects (I use the language of the Court of Appeal) should be ascertained or capable of ascertainment.

The Respondents invited your Lordships to assimilate the validity test for trusts to that which applies to powers. Alternatively they contended that in any event the test laid down in the *Broadway Cottages* case was too rigid,

and that a trust should be upheld if there is sufficient practical certainty in its definition for it to be carried out, if necessary with the administrative assistance of the Court, according to the expressed intention of the settlor. I would agree with this, but this does not dispense from examination of the wider argument. The basis for the *Broadway Cottages* principle is stated to be that a trust cannot be valid unless, if need be, it can be executed by the Court, and (though it is not quite clear from the judgment where argument ends and decision begins) that the Court can only execute it by ordering an equal distribution in which every beneficiary shares. So it is necessary to examine the authority and reason for this supposed rule as to the execution of trusts by the Court.

Assuming, as I am prepared to do for present purposes, that the test of validity is whether the trust can be executed by the court, it does not follow that execution is impossible unless there can be equal division.

As a matter of reason, to hold that a principle of equal division applies to trusts such as the present is certainly paradoxical. Equal division is surely the last thing the settlor ever intended: equal division among all may, probably would, produce a result beneficial to none. Why suppose that the Court would lend itself to a whimsical execution? And as regards authority, I do not find that the nature of the trust, and of the Court's powers over trusts, calls for any such rigid rule. Equal division may be sensible and has been

decreed, in cases of family trusts for a limited class, here there is life in the maxim " equality is equity", but the cases provide numerous examples where this has not been so, and a different type of execution has been ordered, appropriate to the circumstances.

Moseley v. *Moseley* (1673) Rep. Temp. Finch 53 is an early example, from the time of equity's architect, where the Court assumed power (if the executors did not act) to nominate from the sons of a named person as [it] should think fit and most worthy and hopeful, the testator's intention being that the estate should not be divided. In *Clarke* v. *Turner* (1694) 2 Freeman 198, on a discretionary trust for relations, the Court decreed conveyance to the heir at law judging it " most reputable for the family that the heir at law should "have it". In *Warburton* v. *Warburton* (1702) & Bro. P.C.1 on a discretionary trust to distribute between a number of the testator's children, the House of Lords affirmed a decree of Lord Keeper Wright that the eldest son and heir, regarded as necessitous, should have a double share, the Court exercising its own discretionary judgment against equal division.

These are examples of family trusts but in *Richardson* v. *Chapman* (1760) 7 Bro. P.C. 318 the same principle is shown working in a different field. There was a discretionary trust of the testator's " options " (viz. rights of presentation to benefices or dignities in the Church) between a number of named or specified persons, including present and a former chaplains and other domestics; also " my worthy friends and acquaintance, particularly the Rev. " Dr. Richardson ". The House of Lords (reversing Lord Keeper Henley) set aside a " corrupt" presentation and ordered the trustees to present Dr. Richardson as the most suitable person. The grounds of decision in this House, in accordance with the prevailing practice, were not reported, but it may be supposed that the reported argument was accepted that where the Court sets aside the act of the trustee, it can at the same time decree the proper act to be done, not by referring the matter to the trustee's discretion, but by directing him to perform as a mere instrument the thing decreed (l.c. pages 726-7). This shows that the Court can in a suitable case execute a discretionary trust according to the perceived intention of the truster. It is interesting also to see that it does not seem to have been contended that the trust was void because of the uncertainty of the words " my worthy " friends and acquaintance". There was no doubt that Dr. Richardson came within the designation.

In the time of Lord Eldon, the Court of Chancery adopted a less flexible practice: in *Kemp* v. *Kemp* (1801) 5 Ves. 849 Sir R. Arden, M.R. commenting on *Warburton* v. *Warburton* (" a very extraordinary case ") said that the Court now disclaims the right to execute a power (i.e. a trust power) and

gives the fund equally. But I do not think that this change of attitude, or practice, affects the principle that a discretionary trust can, in a suitable case, be executed according to its merits and otherwise than by equal division. I prefer not to suppose that the great masters of equity, if faced with the modern trust for employees, would have failed to adapt their creation to its practical and commercial character. Lord Eldon himself, in *Morice* v. *Bishop of Durham* (1805) 10 Ves. 522 laid down clearly enough that a trust fails if the object is insufficiently described or if it cannot be carried out, but these principles may be fully applied to trust powers without requiring a complete ascertainment of all possible objects. His earlier judgment in the leading, and much litigated, case of *Brown v. Higgs* (1801) 8 Ves. 561,

shows that he was far from fastening any rigid test of validity upon trust powers. After stating the distinction, which has ever since been followed, between powers, which the Court will not require the donee to execute, and powers in the nature of a trust, or trust powers, he says of the latter that if the trustee does not discharge it, the Court will, to a certain extent, discharge the duty in his room and place. To support this, he cites *Harding* v. *Glyn* (1739 1 Atk. 469) an early case where the Court executed a discretionary trust for " relations " by distributing to the next of kin.

I dwell for a moment upon this point because, not only was *Harding* v. *Glyn* described by Lord Eldon as having been treated as a clear authority in his experience for a long period, but the principle of it was adopted in several nineteenth century authorities. When the *Broadway Cottages Trust* case came to be decided in 1955, these cases were put aside as anomalous (see [1955] Ch. pages 33, 35) but I think they illustrate the flexible manner in which the Court, if called on, executes trust powers for a class. At least they seem to prove that the supposed rule as to equal division does not rest on any principle inherent in the nature of a trust. They prompt one 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 ", or " employees and their relatives ", and whether a decision which says the contrary is acceptable.

I now consider the modern English authorities, particularly those relied on to show that complete ascertainment of the class must be possible before it can be said that a discretionary trust is valid.

In re Ogden [1933] Ch. 678 is not a case which I find of great assistance. The argument seems to have turned mainly on the question whether the trust was a purpose trust or a trust for ascertained objects. The latter was held to be the case and the Court then held that all the objects of the discretionary gift could be ascertained. It is weak authority for the requirement of complete ascertainment.

The modern shape of the rule derives from *In re Gestetner* [1953] Ch. 672 where the judgment of Harman J., to his later regret, established the distinction between discretionary powers and discretionary trusts. The focus of this case was upon powers. The judgment first establishes a distinction between, on the one hand, a power collateral, or appurtenant, or other powers " which do not impose a trust on the conscience of the donee " and on the other hand a trust imposing a duty to distribute. As to the first, the learned judge said: " I do not think it can be the law that it is necessary " to know of all the objects in order to appoint to any one of them ". As to the latter he uses these words: " It seems to me there is much to be said " for the view that he must be able to review the whole field in order to " exercise his judgment properly". He then considers authority on the validity of powers, the main stumbling block in the way of his own view being some words used by Fry J. in *Blight v. Hartnoll* (1881) 19 Ch. D. 294, 301, which had been adversely commented on in Farwell on Powers, and I think it worth while quoting the words of his conclusion. He says:

> " The settlor had good reason, I have no doubt, to trust the persons " whom he appointed trustees ; but I cannot see here that there is such

" a duty as makes it essential for these trustees, before parting with any
" income or capital, to survey the whole field, and to consider whether A
" is more deserving of bounty than B. That is a task which was and
" which must have been known to the settlor to be impossible, having
" regard to the ramifications of the persons who might become members
" of this class.

" If, therefore, there be no duty to distribute, but only a duty to
" consider, it does not seem to me that there is any authority binding
" on me to say that this whole trust is bad. In fact, there is no
" difficulty, as has been admitted, in ascertaining whether any given
" postulant is a member of the specified class. Of course, if that could
" not be ascertained the matter would be quite different, but of John
" Doe or Richard Roe it can be postulated easily enough whether he
" is or is not eligible to receive the settlor's bounty. There being no
" uncertainty in that sense, I am reluctant to introduce a notion of
" uncertainly in the other sense, by saying that the trustees must worry
" their heads to survey the world from China to Peru, when there are
" perfectly good objects of the class in England."

Subject to one point which was cleared up in this House in *Re Gulbenkian's Settlement* all of this, if I may say so, seems impeccably good sense, and I do not understand the learned judge to have later repented of it. If the judgment was in any way the cause of future difficulties, it was in the indication given—not by way of decision, for the point did not arise—that there was a distinction between the kind of certainty required for powers and that required for trusts. There is a difference perhaps but the difference is a narrow one, and if one is looking to reality one could hardly find better words than those I have just quoted to described what trustees, in either case, ought to know. A second look at this case, while fully justifying the decision, suggests to me that it does not discourage the application of a similar test for the validity of trusts.

So I come to *I.R.C. v. Broadway Cottages Trust* [1955] Ch. 20. This was certainly a case of trust, and it proceeded on the basis of an admission, in the words of the judgment, " that the class of ' beneficiaries " is incapable of ascer-
" tainment ". In addition to the discretionary trust of income, there was a trusl of capital for all the beneficiaries living or existing at the terminal date. This necessarily involved equal division and it seems to have been accepted that it was void for uncertainty since there cannot be equal division among a class unless all the members of the class are known. The Court of Appeal applied this proposition to the discretionary trust of income, on the basis that execution by the Court was only possible on the same basis of equal division. They rejected the argument that the trust could be executed by changing the trusteeship, and found the relations cases of no assistance as being in a class by themselves. The Court could not create an arbitrarily restricted trust to take effect in default of distribution by the trustees. Finally they rejected the submission that the trust could take effect as a power: a valid power could not be spelt out of an invalid trust.

My Lords, it will have become apparent that there is much in this which I find out of line with principle and authority but before I come to a conclusion on it, I must examine the decision of this House in *Re Gulbenkian's Settlement* (u.s.) on which the Appellants placed much reliance as amounting to an endorsement of the *Broadway Cottages* case. But is this really so? That case was concerned with a power of appointment coupled with a gift over in default of appointment. The possible objects of the power were

numerous and were defined in such wide terms that it could certainly be said that the class was unascertainable. The decision of this House was that the power was valid if it could be said with certainty whether any given individual was or was not a member of the class and did not fail simply because it was impossible to ascertain every member of the class. In so deciding their Lordships rejected an alternative submission, to which countenance had been given in the Court of Appeal, that it was enough that one person should certainly be within the class. So, as a matter of decision, the question now

before us did not arise or nearly arise. However the opinions given were relied on, and strongly, as amounting to an endorsement of the " complete " ascertainment" test as laid down in the *Broadway Cottages* case.

My Lords, I comment on this submission with diffidence, because three of those who were party to the decision are present here today, and will express their own views. But with their assistance, and with respect for their views, I must endeavour to appraise the Appellants' argument. My noble and learned friend Lord Reid's opinion can hardly be read as an endorsement of the *Broadway Cottages* case. It is really the opinion of my noble and learned friend Lord Upjohn which has to be considered. Undoubtedly the main part of that opinion, as one would expect, was concerned to deal with the clause in question, which required careful construction, and with the law as to powers of appointment among a numerous and widely defined class. But having dealt with these matters the opinion continues with some general observations. I have considered these with great care and interest: I have also had the advantage of considering a detailed report of the argument from counsel on both sides who were eminent in this field. I do not find that it was contended on either side that the *Broadway Cottages Trust* case was open to criticism—neither had any need to do so. The only direct reliance upon it appears to have been to the extent of the fifth proposition appearing on page 31 of the report, which was relevant as referring to powers, but does not touch this case. It is consequently not surprising that my noble and learned friend Lord Upjohn nowhere expresses his approval of this decision and indeed only cites it, in the earlier portion, in so far as it supports a proposition as to powers. Whatever *dicta* therefore the opinion were found to contain, I could not, in a case where a direct and fully argued attack has been made on the *Broadway Cottages* case, regard them as an endorsement of it and I am sure that my noble and learned friend, had he been present here, would have regarded the case as at any rate open to review. In fact I doubt very much whether anything his Lordship said was really directed to the present problem. I read his remarks as dealing with the suggestion that trust powers ought to be entirely assimilated to conditions precedent and powers collateral. The key passage is at page 1139 where he says:

> " Again the basic difference between a mere power and a trust power " is that in the first case trustees owe no duty to exercise it and the " relevant fund or income falls to be dealt with in accordance with the " trusts in default of its exercise, whereas in the second case the trustees " *must* exercise the power and in default the court will. It is briefly " summarised in 30 Halsbury's Laws (3rd edn.) page 241, para. 445:
>
> > " '. . . the court will not . . . compel trustees to exercise a purely " ' discretionary power given to them ; but will restrain the trustees " ' from exercising the power improperly, and if it is coupled with a " ' duty . . . can compel the trustees to perform their duty ' ".

"It is a matter of construction whether the power is a mere power
" or a trust power and the use of inappropriate language is not decisive
" (*Wilson* v. *Turner* (1833) 22 Ch. D. 521 at p. 525)."

" So, with all respect to the contrary view, I cannot myself see how,
" consistently with principle, it is possible to apply to the execution
" of a trust power the principles applicable to the permissible exercise
" by the donees (even if trustees) of mere powers: that would defeat the
" intention of donors completely.

" But with respect to mere powers, while the court cannot compel
" the trustees to exercise their powers, yet those entitled to the fund in
" default must clearly be entitled to restrain the trustees from exercising
" it save among those within the power. So the trustees, or the court,
" must be able to say with certainty who is within and who is without
" the power. It is for this reason that I find myself unable to accept
" the broader proposition advanced by Lord Denning M.R., and Winn
" L.J., mentioned earlier, and agree with the proposition as enunciated
" in *Re Gestetner* [1953] 1 All E.R. 1150 and the later cases."

The reference to " defeating the intention of donors completely " shows that what he is concerned with is to point to the contrast between powers

and trusts which lies in the facultative nature of the one and the mandatory nature of the other, the conclusion being the rejection of the "broader" proposition as to powers accepted by two members of the Court of Appeal. With this in mind it becomes clear that the sentence so much relied on by the Appellants will not sustain the weight they put on it. This is :

" The trustees 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."

What this does say, and I respectfully agree, is that, in the case of a trust, the trustees 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.

So I think that we are free to review the *Broadway Cottages* case. The conclusion which I would reach, implicit in the previous discussion, is that the wide distinction between the validity test for powers and that for trust powers, is unfortunate and wrong, that the rule recently fastened upon the courts by *I.R.C. v. Broadway Cottages Trust* ought to be discarded, and that the test for the validity of trust powers ought to be similar to that accepted by this House in *Re Gulbenkian's Settlement* for powers, namely that the trust is valid if it can be said with certainty that any given individual is or is not a member of the class.

I am interested, and encouraged, to find that the conclusion I had reached by the end of the argument is supported by distinguished American authority. Professor Scott in his well known book on Trusts (1939) discusses the suggested distinction as regards validity between trusts and powers and expresses the opinion that this would be " highly technical " (I.c. s. 122. p. 613). Later in the second Restatement of Trusts (1959) section 122 (which Restatement aims at stating the better modern view and which annotates the *Broadway Cottages* case) a common test of invalidity is taken,

whether trustees are " authorised" or " directed " : this is that the class must not be so indefinite that it cannot be ascertained whether any person falls within it. The Reporter is Professor Austin Scott. In his abridgement, published in 1960, Professor Scott maintains the same position. " It would " seem that if a power of appointment among the members of an indefinite " class is valid, the mere fact that the testator intended not merely to confer " a power but to impose a duty to make such an appointment should not " preclude the making of such an appointment. It would seem to be the " height of technicality ... (as above) " I.c.. § 122.

Assimilation of the validity test does not involve the complete assimilation of trust powers with powers, As to powers, I agree with my noble and learned friend Lord Upjohn in *In re Gulbenkian's Settlement* that although the trustees may, and normally will, be under a fiduciary duty to consider whether or in what way they should exercise their power, the Court will not normally compel its exercise. It will intervene if the trustees exceed their powers, and possibly if they are proved to have exercised it capriciously. But in the case of a trust power, if the trustees do not exercise it, the Court will: I respectfully adopt as to this the statement in Lord Upjohn's opinion (page 1139 B—D). I would venture to amplify this by saying that the Court, if called upon to execute the trust power, will do so in the manner best calculated to give effect to the settlor's or testator's intentions. It may do so by appointing new trustees, or by authorising or directing representative persons of the classes of beneficiaries to prepare a scheme of distribution, or even, should the proper basis for distribution appear by itself directing the trustees so to distribute. The books give many instances where this has been done and I see no reason in principle why they should not do so in the modern field of discretionary trusts (see *Brunsden* v. *Woolredge* (1765) Amb. 507. *Supple* v. *Lowson* (1773) ib. 729, *Liley* v. *Hey* (1842) 1 Hare 580 and Lewin on Trusts 16th ed. p. 630. Then, as to the trustees' duty of enquiry or ascertainment, in each case the trustees ought to make

such a survey of the range of objects or possible beneficiaries as will enable them to carry out their fiduciary duty (c.f. *Liley* v. *Hey* u.s.). A wider and more comprehensive range of enquiry is called for in the case of trusts powers than in the case of powers.

Two final points: first, as to the question of certainty, I desire to emphasise the distinction clearly made and explained by Lord Upjohn (page 1138

D--G), between linguistic or semantic uncertainty which, if unresolved by the

Court, renders the gift void, and the difficulty of ascertaining the existence or whereabouts of members of the class, a matter with which the Court can appropriately deal on an application for directions. There may be a third case where the meaning of the words used is clear but the definition of beneficiaries is so hopelessly wide as not to form " anything like a class" so that the trust is administratively unworkable or in Lord Eldon's words one that cannot be executed *(Morice* v. *Bishop of Durham* (u.s.) 527). I hesitate to give examples for they may prejudice future cases, but perhaps " all the residents of Greater London " will serve. I do not think that a discretionary trust for " relatives " even of a living person falls within this category.

I would allow the appeal and make the order suggested earlier in this opinion. The costs of the Appellants of this appeal taxed on a common fund basis should be paid out of so much of the Trust Fund subject to the Trust Deed of the 17th July, 1941, as was derived from Bertram Baden deceased.

(306614) Dd. 197055 100 5/70 St.S.