DISCRETIONARY TRUSTS: CONCEPTUAL UNCERTAINTY AND PRACTICAL SENSE

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In the wake of *Re Gulbenkian's Settlement Trusts*[1] and *Re Baden's Deed Trusts*,[2] some Chancery practitioners have relied on a distinction between "conceptual uncertainty" and "evidential uncertainty" in testing the validity of discretionary trusts.[3] According to this view, if the class of objects is conceptually uncertain, it is said that the trustees' power of selection is necessarily invalid and they cannot exercise the power. If the problem is evidential uncertainty, the power cannot be invalid for uncertainty, the trustees may make a selection, and the court will assist the trustees to overcome any difficulties which arise in the execution of the power. The notion of conceptual uncertainty has been illustrated by contrasting "someone under a moral obligation" (conceptually uncertain) with "first cousins" (conceptually certain even though it may be difficult on the evidence to determine whether a given claimant is or is not a first cousin).[4] It seems to cover both ambiguity and vagueness.[5]

The distinction suggests an important, though rather narrow, message. A power may be sufficiently certain even though it is difficult to ascertain the continued existence or whereabouts of some of the members of the class of objects. Suppose that a testator has created

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[1] [1970] A.C. 508, House of Lords, (*sub. nom. Whishaw* v. *Stephens*).

[2] [1971] A.C. 424, House of Lords, (*sub nom. McPhail* v. *Doulton*).

[3] See S. W. Templeman, Q.C.'s submissions in *Re Gulbenkian, supra* n. 1 at 512; John Vinelott, Q.C. in *Re Baden's Trusts (No. 2)* [1973] Ch. 9 at 13, adopted in part by Sachs, L.J. at 19-20. The distinction asserted by Lord Upjohn in *Re Gulbenkian, supra* n. 1 at 524, and Lord Wilberforce in *Re Baden, supra* n. 2 at 457, is narrower: see *infra* pp. 67-8. By "discretionary trust" the writer means an arrangement under which the trustees of property are as such the donees of a special or hybrid power with respect to capital or income of that property, whether the power is a trust power or a bare power. This is the usage adopted by I. J. Hardingham and R. Baxt, *Discretionary Trusts* (1975), Ch. 2, and seems to correspond with the Australian profession's usage of the term; contrast, *inter alia, Hanbury and Maudsley's Modern Equity* (10th ed. 1976 by R. H. Maudsley), at 226 ff. The distinction between conceptual and evidential uncertainty has recently been relied upon as a test for validity of conditions precedent: *Re Tuck's Settlement Trusts* [1978] Ch. 49 at 53 ff. *per* G. B. H. Dillon, Q.C., but that approach was criticized by Lord Denning, M.R. at 59-60. The law on conditions precedent was set out by Peter Butt, "Testamentary Conditions in Restraint of Religion" (1977) 8 *Syd. L.R.* 400; see now *Re Barlow's Will Trusts* [1979] 1 W.L.R. 278.

[4] *Re Baden (No. 2)* [1973] Ch. 9 at 20 *per* Sachs, L.J.

[5] As in *Jones* v. *Executive Officers of T. Eaton Co. Ltd.* (1973) 35 D.L.R. (3d) 97.

a discretionary trust in favour of his children. The class of "children" is precise. But at the date of the testator's death, one of his children has gone to sea and cannot be traced, so neither the trustees nor the court knows whether the child is still alive, and if so, where he is. It would be unfortunate if the whole gift were struck down, preventing the ascertained children from being considered for selection, and the court will not do so. Rather, the court may order that an appropriate portion of the trust fund be paid into court, allowing the trustees to distribute the residue, perhaps with undertakings from the recipients.[6]

If the conceptual approach to validity was merely intended to make that point, no one could object to it. But it seems to imply two more controversial propositions: that conceptual uncertainty is always fatal, even when it is undeniable that the trustees would experience no difficulty in exercising the power; and that evidential uncertainty will never produce invalidity, however difficult it renders the trustees' task.[7] The aim of this article is to refute both of these propositions, and to suggest that uncertainty should be treated as a practical problem.[8]

Conceptual Uncertainty Without Practical Difficulty

In the vast majority of cases conceptual uncertainty and practical difficulty of execution will occur together. Thus, a power to select from "persons to whom X owes a moral obligation" is conceptually uncertain, and it is very likely that trustees exercising such a power would wish to consider claims from persons whom they could not classify. But, exceptionally, there may be cases where the conceptual uncertainty will present no factual problems: for example, where the class is "persons towards whom X has incurred a moral obligation in December, 1977", and the evidence shows that X and Y sailed a yacht out of Sydney harbour in November, 1977, encountered no-one else until January, 1978, but Y saved X from drowning when he fell overboard on December 15. Let us take two extreme situations, one a case of ambiguity and the other a case of vagueness, and examine the considerations of principle which affect their validity.

First, suppose a discretionary trust to distribute a fund immediately amongst persons who are, at the date on which the trust instrument takes effect, Sydney members of the New South Wales Academics

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[6] A *"Re Benjamin"* order: *Re Benjamin* [1902] 1 Ch. 723. See *Re Baden, supra* n. 2 at 443 *per* Lord Hodson. *Dowley* v. *Winfield* (1844) 14 Sim. 277 is a more extreme case; for the practical basis of the court's approach see *Re Gess* [1942] Ch. 37.

[7] Both propositions are accepted by Hardingham and Baxt, *op. cit. supra* n. 3 at 41 ff. Not all advocates of the conceptual approach are purists; evidently John Vinelott, Q.C. would not accept the second proposition: *supra,* n. 4 at 13.

[8] For a broadly similar approach, see D. W. Waters, *Law of Trusts in Canada* (1974) at 73 ff; and, more generally, *Re Coates* [1955] Ch. 495 at 499. The article is confined to discretionary trusts as defined in note 3 *supra.* A trust power or a bare power vested in a non-trustee donee may be subject to a different rule, since he is not under such a strict fiduciary duty as a trustee, and the court's jurisdiction over him is more limited. But one hopes, for simplicity's sake, that the rule is the same.

Club.[9] The settlor is unaware of the composition of the club, and his syntax has left his intention obscure. It is impossible to determine, as a matter of construction, and on the evidence, whether he meant members of the club residing in Sydney at the date of commencement of the trust, or members who at that date were employed by the University of Sydney, or members fulfilling both of these qualifications, or members who have in the past resided in Sydney or worked for the University of Sydney.[10] Therefore the power is ambiguous and hence conceptually uncertain. However, in fact the 52 people who are members now have been the sole members since the club was formed. Thirty have always lived in Sydney and worked for the University of Sydney. Twenty have no connection with the University or City of Sydney. The other two lived in Armidale and worked for the University of Armidale until, two years before the trust instrument took effect, they retired (though not from the club) and moved to Sydney's gentler climate. Clearly, if the power is valid, the 30 are eligible for selection, and the 20 are not. Only two candidates are in doubt.[11] But both are millionaires whose lives have not been specially meritorious, and the trustees, properly taking the view that they should prefer needy or deserving members,[12] say that they would under no circumstances consider the two for distribution. Therefore, there would be absolutely no practical difficulty in the trustees executing the power. Would a court hold that the conceptual uncertainty rendered the power invalid, so that the trustees would be unable to select anyone?

Common sense requires a negative answer, but nevertheless the arguments for striking down the power must be explored. In *Re Gulbenkian*[13] Lord Upjohn thought that two considerations of principle determined the standard of certainty: they related to the settlor's intention and limitations on the court's powers. He was dealing with the test of certainty for trust powers. In view of the decision in *Re Baden* that the test for certainty is the same for trust powers and bare powers,[14] we must now be concerned with the proper single standard of certainty for both trust powers and bare powers. But we may take Lord Upjohn's lead, with necessary modifications, and consider whether the settlor's intention and limitations on the court's powers point to the failure of the Academics Club power. The first possible argument is that it would be inconsistent with the settlor's intention to

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[9] Compare *Jones* v. *Executive Officers of T. Eaton Co. Ltd., supra* n. 5, where the facts were harder. If our class included future as well as present members, the probability of practical difficulty would be increased.

[10] See *Re Bethel* (1971) 17 D.L.R. (3d) 652 at 657 *per* Gale, C.J.O., dissenting; majority decision affirmed *sub nom. Jones* v. *Executive Officers of T. Eaton Co. Ltd., supra* n. 5.

[11] If there were no doubtful candidates, the arguments which follow would apply *a fortiori*.

[12] It appears from *Re Manisty's Settlement* [1974] Ch. 17, at 24 ff, that trustees are entitled to take such an attitude.

[13] *Supra* n. 1 at 524.

[14] *Supra* n. 2; *Re Baden (No. 2), supra* n. 4.

confine the trustees to distribution amongst the 30 members; the settlor used the words "Sydney members", and in our hypothetical case the court has not been able to conclude as a matter of construction that he meant only the 30 members, so if the trustees are allowed to proceed they will be executing a power different in terms from the vague power contained in the trust instrument.

This argument is weak. In the first place, our problem arises because the settlor's intention is incurably obscure on the central point. We cannot, as a matter of construction, confine his words to the 30 members; but neither can we assert that, whatever he intended, it was wider than the thirty. Distribution confined to the 30 is within the range of the settlor's ambiguity.

A second line of rebuttal of the intention argument is supported by some of Lord Wilberforce's reasoning in *Re Baden.*[15] In *Re Gulbenkian*[16] Lord Upjohn had appeared to adopt the "list certainty" test for certainty of trust powers:[17] that the class of objects will be uncertain unless it is possible at the date on which the trust instrument takes effect to prepare a list of all members of the class of objects. One of his reasons for doing so was that the trustees holding a trust power have a duty to make a selection from the class designated by the settlor; the settlor has not given the trustees any power to select from a narrower class, such as those members of the class of objects known to the trustees; therefore it would be inconsistent with the settlor's intention to allow the trustees to distribute unless the total membership of the class can be listed. Lord Wilberforce took a more practical approach. He first asked how in practice reasonable and competent trustees would and should act. He concluded that trustees holding a trust power to distribute among a large class of objects would never require the preparation of a complete list of names. Therefore, in his view, the court should not adopt a test of certainty for trust powers which would require that the preparation of a list be possible. Similar reasoning may be applied to the present problem. No reasonable trustees would consider the doubtful two as candidates for a distribution. Why impose a test of certainty which requires that the trustees be able to determine whether those two are members, when the trustees will never wish or be required to do so?

A second possible argument for striking down the Academics Club power might be based on limitations on the court's powers. In the case of a *trust* power, if the trustees fail to make a selection the court will intervene. Since *Re Baden*[18] the court is not limited to

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[15] *Supra* n. 2.
[16] *Supra* n. 1 at 524.
[17] But in *Re Baden, supra* n. 2 at 455-6, Lord Wilberforce put a different construction on Lord Upjohn's speech.
[18] *Supra* n. 2.

ordering equal division, as was once thought.[19] But it might be argued that the court must be able to determine whether those in the doubtful group are members, in order to enforce the trustees' duty impartially. However, this argument also fails. On our facts the trustees, acting reasonably, would never consider the two members as candidates for distribution, and it is hard to see why the court should. In *Re Baden*[20] Lord Wilberforce indicated that the court will execute a trust power in the manner best calculated to give effect to the settlor's intention, and this includes itself ordering a distribution, "should the proper basis for distribution appear". It would surely be appropriate for the court or the Master to take evidence that the doubtful two are not proper candidates for distribution, and may be excluded. Since the court may be "partial" to that extent, there is no limitation on its powers justifying a test of certainty which would strike down the Academics Club power.

If trustees holding a *bare* power fail to make a selection, the court will not interfere, unless (perhaps) there has been a breach of the trustees' duty to consider.[21] But it is arguable that complete conceptual certainty is needed so that the interests of the person entitled in default of appointment may be indicated. He needs to be able to work out whether the donee has exceeded the power, whatever selection the donee may purport to make. However, the answer to this is that on our facts the trustees will never select a doubtful claimant, and therefore there is no practical risk that the claimant in default will be put in such a quandary.

Thus, considerations regarding the settlor's intention and limitations on the powers of the court do not operate against the validity of the Academics Club power. Common sense requires that it be upheld, though it is conceptually uncertain, and Lord Wilberforce's reasoning tends to support that result.

Secondly, consider an equivalent case of vagueness. Suppose that the objects of a power to distribute a fund immediately are those present members of the Students' Representative Council who are red-headed. Three are clearly red-headed, 20 are clearly not, and the only two doubtful cases would never apply and would never be considered by reasonable trustees for selection,[22] because they have spurned all material possessions and donated all their assets to a left-wing terrorist group. Every step in the analysis applied above to the Academics Club power would also apply to this case.

In both of our examples a class which includes the objects of the power (the members of the Academics Club and the Students'

[19] E.g. *Inland Revenue Commissioners* v. *Broadway Cottages Trust* [1955] Ch. 20.

[20] *Supra* n. 2 at 457.

[21] For the content of this duty see *Re Baden, supra* n. 2 at 449, 457 *per* Lord Wilberforce; and see note 12 *supra.*

[22] As to the propriety of the trustees' attitude, see note 12 *supra.*

Representative Council) is listable. It might be pleaded that conceptual certainty is required at least when listing is not possible. But the analysis offered above does not depend on the fact that listing is possible. For example, it is conceptually uncertain whether the class of "Oxford academics" includes persons who live in Oxford but commute to universities elsewhere, as well as those who live and work in Oxford. It is plausible to assume that a list of the commuting academics cannot be drawn up; but if the trustees take the view that a distribution would not be made to such persons,[22] whatever their personal circumstances, the power ought to be valid, on the above analysis. The crucial issue relates to the factual probability that difficult decisions may arise.

Conceptual Certainty With Practical Difficulty

Conversely, consider a discretionary trust for any persons who have purchased a vegemite sandwich at the Law School canteen within the last ten years.[23] The class is conceptually precise, but there are evidential difficulties. The canteen does not issue receipts, and even if it did, the receipts would not indicate the nature of the purchase. The only persons clearly within the class would be those few individuals whose purchases have been observed and remembered by reliable witnesses. The evidential problem is so enormous that it cannot be overcome by payment into court, for in this case, practically all of the income would have to be paid in, never to be paid out to members of the class of objects. Would the power of selection be valid?

Common sense and analysis dictate a negative answer. Once again, Lord Upjohn's considerations of principle are relevant. The settlor has clearly expressed his intention as to the definition of the class of objects; but in practical terms, what duty did he intend the trustees to perform? How could they ever consider the range of objects, or any substantial part of it? What are they to do? They can advertise, of course, but the problem is not to do with locating claimants. It is that only a very few of the claimants will be classifiable, and the trustees will be practically certain that the class of objects is very much wider than those identifiable as members. In the absence of any indication in the trust instrument as to the way the trustees might overcome this evidential problem, a distribution among those few individuals who establish membership does not seem to be authorized by the trust instrument.[24]

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[23] John Vinelott, Q.C.'s prosaic but less parochial example (*supra* n. 4 at 13), was "persons with whom the donor had ever travelled in a railway coach". Curiously, while he conceded that the concept is itself clear, he wished to treat the example as a kind of conceptual uncertainty.

[24] Lord Denning's test for certainty of bare powers (*Re Gulbenkian* [1968] Ch. 126 at 134), that a power is valid if there is some one person at hand who is a member of the class of objects, would save the vegemite power. But that test has twice been rejected by the House of Lords: *Re Gulbenkian, supra* n. 1, esp. at 525 *per* Lord Upjohn; *Re Baden, supra* n. 2 at 456 *per* Lord Wilberforce.

As regards the court's powers, suppose that our trust instrument has created a trust power. How could the court execute it if the trustees failed to act? None of the methods of "execution" outlined by Lord Wilberforce in *Re Baden*[25] would produce a satisfactory solution.

A Precise Test of Invalidity?

Our discussion so far seems to demonstrate that factual considerations prevail over conceptual matters, whenever they indicate different results. It also suggests that factual considerations should determine validity on all occasions, conceptual uncertainty being relevant only to the extent that a conceptual problem will usually lead to a practical difficulty. On the special facts of our "moral obligation" case, above, the power should be valid. Similarly, the validity of a discretionary trust in favour of "X's friends" should depend on factual matters. If admissible evidence shows that X is on cordial terms with a large number of people, to a greater or lesser degree, but has no close friends, the trust is obviously invalid. But the reason for invalidity should be the practical difficulty of execution, which cannot be overcome by the trustees, or the court on their application, not the conceptual uncertainty. The evidence should always be examined. If admissible evidence had shown that X lived in a small community, and was in close and frequent contact with only six individuals, that evidence should be allowed to cure the conceptual problem. If the settlor knew the facts, it may be inferred that he intended those individuals,[26] with the result that there is no conceptual uncertainty after all; but even if the settlor did not know the facts, the court should uphold the power because the trustees will be able to distribute (with the protection of a court order, if they wish[27]) without practical difficulty.[28]

Faced with these arguments, an adherent to the conceptual approach to validity might retort that his approach is at least precise; a test based on practical considerations is an abandonment of precision. But each of these assertions is dubious. Conceptual certainty is not as sharp a notion on examination as it may initially appear to be, in two ways. First, since the objects of a discretionary trust are groups of people, the issue of conceptual certainty invariably raises questions of fact, or in forensic terms, questions of evidence — evidence about

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[25] *Supra* n. 2 at 457. They are appointment of new trustees, directing representatives of the classes of beneficiaries to prepare a scheme of distribution, and distribution by the court itself.

[26] See *Re Connor Estate* (1970) 10 D.L.R. (3d) 5; see the discussion by D. W. Waters, *op. cit. supra* n. 8 at 115, 117.

[27] Trustee Act, 1925 (N.S.W.), s. 63.

[28] It is assumed that the relevant evidence would be admissible. The rules of evidence have not yet been judicially considered in the light of *Re Gulbenkian, supra* n. 1, and *Re Baden, supra* n. 2, but they appear to be sufficiently open-ended to permit the practical aproach advocated in this article. See generally *Cross on Evidence* (2nd Aust. ed. 1979 by J. A. Gobbo, David Byrne and J. D. Heydon) at 625-647.

what is possible. Take the class of children of a female settlor. It is generally assumed that this class is conceptually certain, but the assumption will be correct only if there are no borderlines. If the settlor's ovum is fertilized outside her body and replaced, so that the foetus grows in the settlor's body, it is fair to say that the child is hers. But what if the fertilized ovum is placed in another womb, or the settlor receives someone else's fertilized ovum? These are borderline cases. Ten years ago, we might have rejected them on the basis that an ovum fertilized outside the woman's body cannot survive, but today, the development of medical science seems relevant to our problem. However, both the outdated claim and the modern development are matters of fact or evidence, rather than concept. If these illustrations are thought to be recondite and peripheral, it might be added that the oddity of determining the validity of a very common discretionary trust by reference to the frontiers of medical science supports the view that purely theoretical possibilities ought to be irrelevant to validity.

Conceptual uncertainty is an imprecise test of validity in a second way. It is established that the conceptual uncertainty of some words will be overcome by the court, which will either produce a definition, or resolve doubts by deciding whether claimants fall within the class. For example, the English Court of Appeal has defined "relatives" and "dependants"[29] and the House of Lords has held that any difficulties in the execution of a power to distribute among, *inter alios,* persons with whom G. was "residing" would be solved by the court.[30] Thus, "raw" conceptual uncertainty is not necessarily fatal; invalidity arises only if the judicial process will not refine it. But when will the court assist? Presumably it will not do so when the definition of the class depends on matters of taste (e.g. handsome barristers), because the court's taste, the trustees' and the settlor's may well be different with respect to many likely claimants. Outside matters of taste, there are no clear guidelines. Would the court define "children" to overcome our medical borderline, for instance? The conceptual approach to validity does not contain or imply any answer. A reasonable approach is to say that the court will assist when it cannot foresee any insuperable difficulties in the execution of the power, and this appears to be Lord Upjohn's solution, though his words are not clear, with respect;[31] but it involves abandoning the first of the two propositions which the conceptual approach to validity implies.

Further, a test based on practical considerations need not be wholly lacking in precision. The test of certainty, according to Lord Wilberforce, is whether it can be said with certainty that any given

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[29] *Re Baden (No. 2), supra* n. 4.
[30] *Re Gulbenkian, supra* n. 1.
[31] *Id.* 523; see also Lord Reid at 518.

individual is or is not a member of the class.[32] The question must be considered at the date of commencement of the trust instrument.[33] Seen as a practical test, this requires the court to assess the probability that difficulties will arise in the execution of the power, which are insuperable having regard to the court's powers, including its power to order payment into court. This assessment must take into account the degree of likelihood of uncertain claims, and the range of attitudes which reasonable trustees may properly take towards uncertain claimants. (The present trustees' actual attitude within that range must be irrelevant, because they may retire or be replaced, and the new trustees may have a different attitude.) What degree of probability of difficulty will lead to invalidity? Here, it is true, there must be some imprecision, the answer being of this sort: if the probability is *substantial* the power fails.[34] In difficult cases, no doubt, the trustees will be well advised to test the validity of the power by litigation before distributing. But in view of *Re Baden,*[35] powers for most of the common classes of objects (such as children, dependants, relatives, employees and ex-employees) will clearly be valid, in the absence of destruction of the means used in factual enquiries, like the burning down of the Registrar-General's department or the total destruction of employment records. Problems are most likely to arise with classes like "friends", "persons to whom the settlor owes a moral obligation", and other subjective expressions. Neither a conceptual nor a practical test will keep the parties out of court when such words are used.

Authorities

So far the discussion has been concerned with matters of principle. Some comments must be made on the authorities. *Re Gulbenkian*[36] and *Re Baden*[37] all but rendered earlier cases obsolete. However, one case which survived in part is *Re Sayer.*[38] One of the questions was whether a bare power in favour of dependants and dependant relatives was sufficiently certain, and Upjohn, J. answered affirmatively. Though he drew a distinction between uncertainty of fact and uncertainty in the language used to describe the class, he did not accept either of the two propositions implied by the conceptual approach to validity. He contemplated that uncertainty of fact may lead to invalidity.[39] He also found that the power was valid even though many difficulties may arise in classifying, because approaching the problem in a practical

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[32] *Supra* n. 2 at 456.
[33] *Re Gulbenkian, supra* n. 1 at 524.
[34] This is approximately Megaw, L.J.'s approach in *Re Baden (No. 2), supra* n. 4 at 24.
[35] *Supra* n. 2.
[36] *Supra* n. 1.
[37] *Supra* n. 2.
[38] [1957] Ch. 423; referred to without disapproval in *Re Gulbenkian, supra* n. 1 at 524 *per* Lord Upjohn, and affirmed by Sachs, L.J. on the relevant points in *Re Baden (No. 2), supra* n. 4 at 19.
[39] *Id.* 432.

way and exercising common sense, trustees and the court could solve all problems which may arise.[40] The case therefore supports a practical approach and is inconsistent with the conceptual approach.

Re Gulbenkian[41] and *Re Baden*[42] themselves support a practical approach. The test of certainty, "that a trust is valid if it can be said with certainty that any given individual is or is not a member of the class",[43] is literally ambiguous. It may refer to *practical* certainty with respect to individuals given as persons with a practical chance of receiving a distribution. Or it may refer to *absolute* certainty with respect to anyone in the world, without regard to the probability of a claim being made by that person or considered by the trustees.[44] But judgments should not be read as statutes; read as a whole, the speeches of Lords Upjohn, Reid and Wilberforce all rejected the latter approach. Lord Upjohn (who had decided *Re Sayer*[45]) introduced the test by saying that those entitled in default must be able to restrain the trustees from exercising the power outside the class of objects.[46] This is a factual consideration; if there is no practical possibility that the trustees will distribute to the doubtful group, the power should pass Lord Upjohn's test. Lord Reid, having stated the test, said, "if the donee of the power . . . desires to exercise it in favour of a particular person it must be possible to determine whether that particular person is or is not within the class of objects of the power,"[47] and he allowed the trustees' duties to determine the standard of certainty. The central importance of Lord Wilberforce's speech lies in its emphasis on the proper actions of "practical reasonable and competent trustees,"[48] and the breadth of the court's powers.

Lords Upjohn and Wilberforce emphasized the distinction between insufficiency of definition (which Lord Wilberforce called "linguistic or semantic uncertainty"), which leads to invalidity, and difficulty in ascertaining the existence or whereabouts of members of the class, which can be overcome on an application for directions.[49]

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[40] *Id.* 436.
[41] *Supra* n. 1.
[42] *Supra* n. 2.
[43] *Id.* 456 *per* Lord Wilberforce. See also *Re Gulbenkian, supra* n. 1 at 518 *per* Lord Reid, 525 *per* Lord Upjohn.
[44] There may be another kind of ambiguity. Conceivably, the test may be read as applying only to vagueness, and not to ambiguity. On this approach, if it can be said of any claimant that he is either within the class of objects, or outside it, or either within or outside the class (depending on which of two clear meanings is correct), then the power is valid. Invalidity arises, on this view, only when the vagueness of the expression used gives rise to absolute borderlines. Though this interpretation is open on a literal meaning of Lord Wilberforce's test, it is out of step with his emphasis on the duties of trustees in practice. It is inconsistent with Lord Reid's formulation of the test (*Re Gulbenkian, supra* n. 1 at 518), and with *Jones* v. *Executive Officers of T. Eaton Co. Ltd., supra* n. 5.
[45] *Supra* n. 38.
[46] *Re Gulbenkian, supra* n. 1 at 525.
[47] *Id.* 518.
[48] *Re Baden, supra* n. 2 at 449.
[49] *Re Gulbenkian, supra* n. 1 at 524; *Re Baden, supra* n. 2 at 457.

This is the point referred to above.[50] But it does not follow from this that their Lordships would accept the two propositions implied by the conceptual approach to validity, and the rest of their speeches indicates that they would not, as has been shown.

The case which has most to say on our problem is *Re Baden* (No. 2).[51] There the class of objects included employees, ex-employees, their dependants and relatives. Brightman, J. at first instance,[52] and Sachs, L.J. and Megaw, L.J. in the Court of Appeal,[53] took "dependants" to mean persons dependant on another for necessaries, and "relatives" to mean descendants from a common ancestor. It appeared on the facts that no practical difficulty would arise if the trustees executed the powers according to these meanings. Nevertheless, counsel argued that the power in favour of relatives was uncertain because in respect of many individuals it could not be said that they were outside the class. If the test for certainty depends on the degree to which it is probable in practice, that there will be insuperable difficulty, counsel's argument must fail simply because there was no practical difficulty on the facts of this case. Megaw, L.J. took this practical approach:

> To my mind, the test is satisfied if, as regards at least a substantial number of objects, it can be said with certainty that they fall within the trust: even though, as regards a substantial number of other persons, if ever they for some fanciful reason fell to be considered, the answer would have to be, not "they are outside the trust", but "it is not proven whether they are in or out". What is a "substantial number" may well be a question of common sense and of degree in relation to the particular trust: particularly where, as here, it would be fantasy, to use a mild word, to suggest that any practical difficulty would arise in the fair, proper and sensible administration of this trust in respect of relatives and dependants.[54]

At first instance Brightman, J. took a similar approach:

> I do not see why the court should be constrained to hold clause 9 void merely because countless persons exist who are not able to prove their relationship, who are not even interested in proving their relationship and whom the trustees have no intention of benefiting.[55]

On the other hand, if the test for certainty depends on the distinction between conceptual and evidential certainty, counsel's submission should equally fail, because "descendants from a common ancestor"

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[50] *Supra,* pp. 58-9.
[51] *Supra* n. 4.
[52] [1972] Ch. 607.
[53] *Supra* n. 4. Stamp, L.J. construed "relatives" as next of kin.
[54] *Id.* 24.
[55] *Supra* n. 52 at 626.

is probably conceptually precise, and the difficulty in concluding that some individuals are not relatives is merely evidential. Sachs, L.J. took this approach.[56]

Sachs, L.J.'s approach is unsatisfactory in various ways. First, it is not clear that he would adopt the first of the two propositions implied by the conceptual approach to validity, though he clearly adopted the second. That is, he may not have agreed that a conceptually uncertain power is invalid even though no practical difficulty arises. He was dealing with the converse case, a conceptually certain power with an evidential difficulty given certain hypothetical facts. Indeed, his statement that the court should adopt a practical, common sense approach to certainty suggests that he would not go so far.[57] Secondly, on the evidential problem, Sachs, L.J. says that a person who is not proved to be within the class is not within it. This proposition is not a necessary consequence of his attitude to conceptual certainty, and it seems to the writer an undesirable development. It appears to exclude the possibility of overcoming deficiencies of evidence at one particular moment in other ways, for instance, by the court ordering that a portion of the fund be paid into court to cover claims established by evidence later acquired. Indeed, on Sachs, L.J's principle the claimant who cannot collect his evidence immediately may miss out, though those facts would give rise to interesting questions of liability if the trustees were unwise enough to distribute without a court order. Further, his principle would render powers like the vegemite power valid, and the trustees would distribute among the few persons who could prove their purchases. This is unfortunate for the reasons already given.

Counsel's submission was really an attempt to impose a double requirement for validity: that the concept must be precise, so that there would be no semantic problem in classifying anyone in the world; and that the nature of the trustees' task would enable them to perform the factual work of classifying anyone in the world. This double requirement would involve the examination of theoretical possibilities both in testing the concept and in testing the trustees' factual task. But why must the trustees be able to classify someone who has not claimed and would never be considered for a distribution by reasonable trustees? It is unfortunate, with respect, that Stamp, L.J. in effect accepted counsel's submission.[58] He thought that any other view would involve a return to Lord Denning's rejected test of certainty, that it is enough that there is some person who is within the class.[59] But this is not so. The approach advocated in this article, which is a development of Megaw, L.J.'s approach, demands that the trustees must be able to

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[56] *Supra* n. 4 at 20.
[57] *Id.* 19.
[58] *Id.* 28.
[59] *Supra* n. 24.

classify sufficient individuals that the power may be executed without insuperable difficulties. Stamp, L.J. also thought that under any other view the trustees could not perform their duty to survey the range of objects.[60] But Sachs, L.J.'s view of this duty, that it merely requires the trustees to assess in a business-like way "the size of the problem,"[61] is more attractive, and more in accordance with Lord Wilberforce's emphasis on practical considerations.

In the result, the reasoning of Megaw, L.J. and Brightman, J. seems to the writer to be in line with the approaches of Lords Wilberforce, Reid and Upjohn, and is supported by the arguments of principle made above. The views of Sachs, L.J. and Stamp, L.J. are not supported by principle or other authority. Validity should not depend on the distinction between conceptual and evidential uncertainty, and a practical test of certainty should be used. However, adopting a practical approach will not solve all of the problems which flow from *Re Gulbenkian*[62] and *Re Baden.*[63] It will not clarify the so-called "loose class" requirement,[64] the test of certainty for fixed trusts,[65] the rule about delegation of will-making power[66] or the increasingly mysterious distinction between powers and conditions precedent.[67] The law of evidence may have to develop to allow the courts to take into account all of the facts relevant to the practical problem.[68] With so many substantial issues still to be resolved, we can well do without the conceptual approach.

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[60] *Supra* n. 4 at 27-28.
[61] *Id.* 20.
[62] *Supra* n. 1.
[63] *Supra* n. 2.
[64] See esp. L. McKay, *"Re Baden* and the Third Class of Uncertainty" (1974) 38 *Conv.* 269.
[65] See esp. *Hanbury and Maudsley, op. cit. supra* n. 3 at 167-8.
[66] *Tatham* v. *Huxtable* (1950) 81 C.L.R. 639.
[67] See *Re Barlow's Will Trusts* [1979] 1 W.L.R. 278.
[68] See n. 28.