Re-thinking administrative unworkability in discretionary trusts

James Brown*

Mark Pawlowski**

*James Brown, Barrister, Reader in Property Law, School of Law, Aston University. Email: j.p.brown1@aston.ac.uk.

**Mark Pawlowski, Barrister, Professor of Property Law, School of Law, Maritime Greenwich Campus, London, SE10 9LS, UK. Tel: +44 (0)20 8331 8473. Email: m.pawlowski@gre.ac.uk.

Abstract

This article seeks to explain the current doctrine of administrative unworkability as it applies to discretionary trusts in the context of English trust law with a view to identifying some of its problems and suggesting a reframing of the doctrine in terms of economic viability in the light of modern information technology.

The doctrine of administrative unworkability operates as a separate and distinct legal concept in English trust law. The concept was first proposed by Lord Wilberforce in *McPhail v Doulton*,[1] where his Lordship suggested that there may be cases where "the meaning of the words used is clear but the definition of the beneficiaries is so hopelessly wide as to not form 'anything like a class' so that the trust is administratively unworkable". His Lordship gave the example of a discretionary trust in favour of "all the residents of Greater London". The point was also addressed by Sir Robert Megarry V-C in *Re Hay's Settlement Trusts*,[2] who considered that a discretionary trust for all the people in the world except for an excluded class would be administratively unworkable.

The concept, however, was first applied in *R v District Auditor, ex parte West Yorkshire Metropolitan County Council*,[3] involving a trust "for the benefit of any or all or some of the inhabitants of the County of West Yorkshire". The trust fund was to be used primarily to provide financial assistance towards the economic development of the County with the object of relieving unemployment and poverty and to provide assistance for bodies concerned with

[1] [1971] AC 424, at 457.
[2] [1982] 1 WLR 202.
[3] [1986] 26 RVR 24. See, C Harpum, "Administrative Unworkability and Purpose Trusts", [1986] CLJ 391.

youth and community problems (including ethnic and minority groups) within West Yorkshire. It was held that the trust could not succeed as a valid charitable purpose trust because it contained a non-charitable purpose, namely, the dissemination of information about the consequences of the proposed abolition of the Metropolitan County Councils. The question then arose as to whether the trust could succeed on the basis of being a valid express private trust. On this point, the Divisional Court acknowledged that three requirements were necessary to create a valid private trust: (1) a clear intention to create the trust; (2) certainty as to subject matter; and (3) certainty as to the persons intended to benefit.[4] Lloyd LJ accepted that the first two requirements had been met, but declined to uphold the trust on the ground that the size of the class was too large. His Lordship stated:

> "[Counsel for the Council]…argued that the beneficiaries of the trust were all or some of the inhabitants of the county West Yorkshire. The class might be on the large side, containing as it does some 2.5 million potential beneficiaries. But the definition, it was said, is straightforward and clear cut. There is no uncertainty as to the concept. If anyone were to come forward and claim to be a beneficiary, it could be said of him at once whether he was within the class or not. I cannot accept counsel for the county council's argument. I am prepared to assume in favour of the council, without deciding, that the class is defined with sufficient clarity. I do not decide the point because it might, as it seems to me, be open to argument what is meant by 'an inhabitant' of the county of West Yorkshire. But I put that difficulty on one side. For there is to my mind a more fundamental difficulty. A trust with as many as 2.5 million potential beneficiaries is, in my judgment, quite simply unworkable. The class is far too large".

It is noteworthy, in passing, that whilst a mere power of appointment[5] to benefit a large class, such as the residents of Greater London, might fail for capriciousness on the ground that the settlor could have no sensible intention to benefit "an accidental conglomeration of persons" who had "no discernible link with the settlor",[6] this type of objection had no relevance to the *West Yorkshire* case, where the Council had every reason to create a fund in favour of its residents.

Rationale underlying the doctrine

Undoubtedly, the doctrine is concerned with the sheer size of the beneficial class. If it is too large, discretionary trustees are effectively precluded from carrying out their duty to survey the range of objects and make appropriate distributions of the trust fund. In essence, the size of the class makes it too difficult, expensive or time-consuming for the trustees to consider how to exercise their discretion and make distributions within the class. In default, the court would likewise be faced with the same problem, although there would be alternative

[4] Ibid, at 26.

[5] The principle of administrative unworkability has no application to mere powers. Thus, a general power of appointment "to whomsoever X may appoint" will not fail for this reason.

[6] See, *Re Manisty's Settlement* [1974] Ch 17, per Templeman J.

mechanisms available to the court if the trustees fail to exercise their discretion such as ordering a scheme of distribution. On a more fundamental level, it has been argued[7] that the size of the class should not in itself be a bar to validity:

> " . . . why should the width of the class itself be critical? Trustees of a discretionary trust are not required to ascertain each and every beneficiary, merely to survey the range of objects; 'range' is a fluid concept which allows the trustees to adjust their sights according to the type of class to be considered."

In practical terms, the same objection relating to the size of the class of beneficiaries could also be said to apply to large fixed interest trusts where a relatively small trust fund falls to be divided equally between a vast number of beneficiaries spread across different parts of the country. In this type of case, the costs of identification and distribution could easily take up the whole, or a disproportionately large part, of the fund. Clearly, a number of factors will be relevant to both discretionary and fixed trusts apart from the size of the objects. Much may depend on the amount of the trust fund and the lack (or presence) of suitable criteria in the trust deed providing guidance to the trustees as to how they should distribute the trust fund. In particular, it may be crucial to identify the likely cost of identifying the individuals within the class of objects and the costs in making the distributions given the size of the fund. The capacity and identity of the trustees[8] may also influence the workability of the trust. Thus, it may prove far more difficult to administer a large discretionary trust by two ordinary individuals acting as trustees than say, a large trust corporation employing a large team of experts.

Comparison with semantic and evidential uncertainty

Semantic (or linguistic or conceptual) uncertainty involves vagueness in defining the class of individuals in respect of whom the trustees are entitled to exercise their discretion. The requirement applies to both powers and (fixed and discretionary) trusts. Thus, a gift of property to discretionary trustees for the benefit of "all the tall men living in my street at my death" would fail for semantic uncertainty, it being unclear what is meant by the term "tall". Similarly, a discretionary trust in favour of anyone who has a "moral claim on the settlor” or for his "old friends" would be treated as void.

Evidential uncertainty, on the other hand, which again applies to both powers and trusts, concerns uncertainty in identifying the existence or whereabouts of the objects. This form of uncertainty is not necessarily fatal to the trust since the trustees may apply to the court for directions and the court may make an appropriate order. In this connection, a Benjamin order[9] allows a court to authorise the trustees to distribute all of the trust property even though, after

[7] See, IM Hardcastle, "Administrative Unworkability: A Reassessment of an Abiding Problem", [1990] Conv 24, at 25.
[8] The acceptable width of the class may also depend on the exact nature of the trustee's duties and whether they must actually survey the entire class of objects.
[9] See, *Re Benjamin* [1902] 1 Ch 723.

all practical inquiries have taken place, the whereabouts or continued existence, of all of the beneficiaries is not known. Such an order protects the trustees from liability of those beneficiaries who did not receive anything under the distribution but subsequently come forward and claim. A Benjamin order protects the trustees, although it does not bar a beneficiary who later comes forward from bring a proprietary tracing claim against any wrongful recipient of the trust property.

Is capriciousness different?

A discretionary trust may be void for the separate reason that the settlor had no sensible intention in establishing the trust. In the *West Yorkshire* case, the Council clearly had a sensible reason for wishing to benefit the inhabitants of West Yorkshire, so the discretionary trust was not capricious. The key attribute of administrative unworkability, on the other hand, is the size of the class which has no necessary connection with capriciousness. As one writer[10] puts it:

> ". . . both notions are alternative vitiating factors; a settlor is permitted to earmark whomsoever he pleases to be the objects of his benefaction, but, as a matter of policy, the court will not aid the settlor in all his eccentricities. If the disposition is devoid of any sensible purpose, then it will be avoided as capricious. Conversely, the sheer size of the problem of converting an otherwise sensible intention into actuality may make the endeavour implausible, and the disposition may then be abandoned as unworkable. As Jill Martin succinctly puts it: 'The objects must either be unlimited, in which case the trustees can perform their obligations sensibly, or limited to a sensible class.'"

Thus, for example, in *Re Manisty's Settlement*,[11] Templeman J suggested that a special power of appointment in favour of "residents of Greater London" would be capricious in the absence of any rational reason why the donor selected the specified class. Where there is no obvious link with the donor, the class falls to be characterised as just a random/accidental collection of individuals. By contrast, in *Re Hay's Settlement Trusts*, referred to earlier, Megarry V-C suggested that a power of appointment in favour of "residents of Greater London" would not be capricious if the donor were a former chairman of the Greater London Council.

Test for certainty of objects

In *McPhail*, mentioned earlier, the House of Lords adopted the so-called "given postulant" test in determining the validity of a discretionary trust - the trust is valid if it can be said with certainty that any given individual is or is not a member of the class. Unfortunately, however,

---

[10] IM Hardcastle, "Administrative Unworkability: A Reassessment of an Abiding Problem", [1990] Conv 24, at 32.

[11] [1974] Ch 17.

in *Re Baden's Trust Deed (No 2)*,[12] the Court of Appeal gave varying interpretations as to the application of this test. Sachs LJ stated that, if the class of persons to be benefitted is semantically certain, it then becomes a question of fact, to be determined on evidence, whether any postulant has on inquiry been proved to be within it. In this respect, it makes no difference whether the class is small or large. Megaw LJ, on the other hand, considered the test was satisfied if, as regards at least a substantial number of objects, it can be said with certainty that they fall within the trust, and it is immaterial whether it is not possible to say with certainty that other objects are within or outside the class. Interestingly, Stamp LJ adhered to the orthodox view that any individual must be able to establish that they are or are not within the class. Accordingly, if everyone is classified as being within or outside the class of objects, the gift is valid.

The approach of Stamp LJ most closely follows the test given by Lord Wilberforce in *McPhail* and, when dealing with a trust with potentially a large number of objects, it is this approach, it is submitted, which is to be preferred in that it provides clarity and precision in defining the qualifying class of objects. This, coupled with the possible use of the notice procedure available to trustees under s.27(1) of the Trustee Act 1925, referred to later, to notify potential beneficiaries of their intention to make a distribution of the trust fund, would mean that a discretionary trust would not necessarily fail just because it sought to benefit a potentially large group of objects, although it might well result in an increase in costs in terms of trust administration.

Problems with the doctrine

Not surprisingly, the doctrine of administrative unworkability has been the subject of academic criticism.[13] First, assuming conceptual and evidential certainty, it leaves unclear when a class of discretionary beneficiaries will be deemed too numerous as to render the trust administratively unworkable. The answer is by no means clear from the judgment in the *West Yorkshire* case. However, drawing from Lord Wilberforce's example in *McPhail* of "all the residents of Greater London" and the size of class in *West Yorkshire* itself, it may be possible to conclude that administrative unworkability will only render a discretionary trust void if the size of beneficiaries runs into the millions, but this is by no means free from doubt. What about a class numbering tens of thousands? It has been recognised, for example, that a class of hundreds of thousands is not inherently defective.[14] In any event, it has been argued that

---

[12] [1973] Ch 9.

[13] See, JW Harris, "Trust, Power and Duty", [1971] 87 LQR 31; L McKay, "*Re Baden* and the Third Class of Uncertainty", [1974] 38 Conv. 269. See also, more generally, C Emery, "The Most Hallowed Principle - Certainty of Beneficiaries in Trusts and Powers", (1982) 98 LQR 551; Y Gribch, "Baden: Awakening the Conceptually Moribund Trust", (1974) MLR 643; A Grubb, "Powers, Trusts and Classes of Objects", [1982] Conv 432.

[14] See, *Re Baden's Deed Trust (No 2)* [1973] Ch 9, at 20, per Sachs J. See also, *Re Harding (Deceased)* [2008] Ch 235, at 240, where it was recognised that a trust for the black community of four London boroughs would have been treated as void for being administratively unworkable had it not been a charitable trust.

the size of the class can be infinitely variable and the trustees need only be aware of the width of the field so that they can adapt their method of selecting objects.[15]

Secondly, on a more theoretical level, the ruling in the *West Yorkshire* case represents a clear interference with the liberal theory of property - the notion that, in a free society, any individual should, as a general rule, be able to dispose or alienate his property on such terms as he or she wishes, free from any undue interference from the state and its offices. In this vein, it is arguable that the decision clearly fetters the ability of settlors to create large scale discretionary trusts as an instrument through which to freely alienate and distribute their bounty.[16]

Thirdly, it is, perhaps, interesting to note that the decision of Lloyd LJ pays no regard to the potential use of s.27(1) of the Trustee Act 1925, which allows trustees to give notice by advertising in the London Gazette[17] or a newspaper, of their intention to make a distribution, giving potential beneficiaries at least two months in which to provide trustees with particulars of their claim to the trust assets. After the expiration of the time fixed by the advertisement, the trustees can make the distribution to those persons who have claims of which the trustees had notice and the trustees will not be liable to anyone of whose claim they did not have notice.[18] It is interesting to speculate whether, if the notice procedure under s.27(1) had been adopted (as a means of allowing beneficiaries to put themselves forward so as to be considered for distribution of the trust fund), the trust in *West Yorkshire* would have been treated as valid.

Amendment of s.27 of the 1925 Act?

Let us assume that X, a famous rock star, gives a fund of £10 million to trustees to be distributed as they think fit to "any fan of X on Twitter" as at the date of the gift. X has two million fans registered on Twitter at the relevant date. The issue of conceptual certainty seems easily resolvable in this scenario in so far as it can be said with certainty that any given individual is or is not a fan on Twitter. The real problem with such a gift is the sheer size of class of objects to be considered by the trustees. As it stands, applying *West Yorkshire*, the trust fails for being administratively unworkable. However, it is submitted that the trust in our example might well be saved, so as to give effect to the intentions of the settlor, by applying an amended form of s.27(1) of the 1925 Act so as to allow trustees to advertise with notices for beneficiaries using computer information technology, including social media platforms.

The trustees seeking to administer such a large trust would still be faced with the problem of preparing a scheme for distribution. But here again, modern computer technology may assist

[15] See, G Virgo, *The Principles of Equity & Trusts*, (2nd ed., 2016), at p. 112.
[16] See, for example, S. Gardner, *An Introduction to the Law of Trusts*, (3rd ed., Clarendon Law Series), at p.31-38.
[17] The Official Newspaper of Record, first published in 1665.
[18] See, s.27(2) of the Trustee Act 1925. This provision cannot be excluded by the trust instrument: s.27(3), but it does not prevent those who were entitled, but did not come forward, from bringing a proprietary claim against the person who has received the property other than as a purchaser: s.27(2)(a).

in the administration of such a trust. A computer programme, for example, could be devised to allow for equal distribution (in the case of a fixed interest trust) or the selection of beneficiaries according to a scheme of distribution approved by trustees (in the case of a discretionary trust).

Conclusion

The use of modern technology would go a long way to saving large discretionary trusts and safeguarding the intentions of wealthy benefactors who wish to donate to a wide class of potential objects. At the same time, the concept of administrative unworkability would acquire a different emphasis being grounded firmly on a cost/benefit analysis of trust administration costs versus fund costs. This would essentially replace the test of administrative unworkability with an economic viability test. The point here is that computer technology may offer an efficient (and relatively inexpensive) means of distribution of trust assets to a large class of beneficiaries in accordance with a scheme devised and approved by the trustees. If, however, the cost is disproportionate to the actual fund available, this would warrant invalidating the trust on grounds of lack of economic viability. What constitutes a disproportionate amount would depend on the circumstances of the individual case. In most cases, it is submitted, a cost implication of more than 50 per cent of the trust fund could reasonably justify the trustees in not executing the trust. Anything beyond this figure (where more than half of the fund is dissipated in administration) could be said to defeat the settlor's intentions and render the trust economically unworkable. As Lord Reid put it in *Re Gulbenkian's Settlement*:[19]

> "I could understand it being held that if the classes of potential beneficiaries were so numerous that it would cost quite disproportionate inquiries and expense to find them all and discover their needs and deserts, then that provision will fail."

As already noted by some commentators,[20] with better research tools available for identifying and analysing potential beneficiaries, using the facilities of computer programmes and, in particular the internet (which admittedly was not available at the time of the decision in *West Yorkshire* decision), the potential size of the class of beneficiaries should not automatically render a trust void where the trust is otherwise semantically and evidentially certain.

[19] [1970] AC 508, at 519.

[20] See, for example, G Virgo, *The Principles of Equity & Trusts*, (2nd ed., 2016), at p. 106, who also suggests that the doctrine should be rejected altogether and the issues instead examined when considering the test of evidential certainty: "a preferable interpretation of evidential certainty is that, if an object cannot be proved to be within the class, he or she should be considered to be outside it. This should be a sufficient filter to deal with the workability problem". The author gives the example of a discretionary trust for relatives. This is semantically certain since "relatives" are defined as all descendants from a common ancestor which could comprise millions of people, but most people will not be able to prove that they are related to the settlor. and this should be sufficient to make the exercise of trustees' selection workable. See also, IM Hardcastle, "Administrative Unworkability: A Reassessment of an Abiding Problem", [1990] Conv 24, at 33.