

TAB 9

other properties.” The trustees were not given the discretion to determine what constituted a “reasonable income.” Was the quantum of subject matter uncertain? The English court held that it was not:

It is, however, submitted that what the court is concerned with in the interpretation of this will is not to ascertain what is “reasonable income” in the opinion of the court but to ascertain the testator’s intention in using the words “reasonable income.” The question therefore comes to this: whether the testator by the words “reasonable income” has given a sufficient indication of his intention to provide an effective determinant of what he intends so that the court in applying that determinant can give effect to the testator’s intention.

...
In this case, however, the yardstick indicated by the testator is not what he or some other specified person subjectively considers to be reasonable but what he identifies objectively as “reasonable income.” The court is constantly involved in making such objective assessments of what is reasonable and it is not to be deterred from doing so because subjective influences can never be wholly excluded. In my view the testator intended by “reasonable income” the yardstick which the court could and would apply in quantifying the amount so that the direction in the will is not in my view defeated by uncertainty.

Golay is an English authority and may not be followed in Canada. Despite the court’s pains to suggest that “reasonable income” can be dealt with objectively, what amounts to a reasonable income may differ from person to person. It is hard to envisage how quantum can be seen to be sufficiently certain when what is given to the beneficiary will vary depending on who holds the office of trustee, as each trustee will be called upon to determine what is reasonable income. It would seem that the requirement of certainty of subject matter of quantum is to preclude just such variations.

3) Certainty of Objects

The third requirement that all trusts must meet in order to be valid is that the objects must be described with sufficient certainty. The phrase “certainty of objects” is used to describe two very different concepts. One meaning of the phrase is that a trust must be in favour of persons, and not for non-charitable purposes. The second meaning of the phrase is that the class of beneficiaries must be described in sufficiently

certain terms that the trust can be performed. It is this latter meaning of certainty of objects which is considered now.

Certainty of objects is required because the trustee cannot be sure that he is performing properly unless the objects are clearly specified at the time of distribution. The requirement of certainty of objects is also important to the creator of the trust and to the beneficiaries. The creator must be assured that the trustee will carry out her intention. If the creator has not defined the class to be benefited in sufficiently clear terms, there can be no assurance that the intended class will take. The beneficiaries have an obvious interest in the requirement. If the class of objects is not sufficiently well defined, no one can know whether she is a member of the class and therefore entitled to a proprietary interest in the subject matter of the trust. The beneficiaries will be unable to join together and terminate the trust once all are *sui juris* and absolutely entitled. Indeed, the court itself has an interest in having the class adequately defined, for if the trustees fail to distribute, the court must be able to step in and perform. As well, the court must be able to identify those persons with sufficient standing to enforce the trust. A trust that fails to pass the certainty of objects test will fail, and the property will result to the settlor or testator's estate.

The test for certainty of objects is different for a fixed trust than for a discretionary trust. The test for a fixed trust is the "class ascertainability" test, whereas a discretionary trust must comply with the "individual ascertainability" test. In the case of a fixed trust, it must be possible to ascertain each and every object, so that a trustee can make a complete list of all beneficiaries.

A moment's reflection on the nature of a fixed trust will illustrate why this requirement is necessary. A fixed trust is one in which the trustees have no discretion to decide who the beneficiaries are or in what proportions they are to take; the shares or interests of the beneficiaries are specified in the trust instrument or are ascertainable. If the trustees are to perform their duties, they must know the identity of each and every beneficiary. For example, a trust of \$10,000 "to the members of my family in equal shares" is a fixed trust. Unless the trustees know who all the family members are, they cannot distribute equally.

The test for certainty of objects of a discretionary trust has been "assimilated" to that of certainty of objects of a power of appointment. For both a discretionary trust and a power of appointment, it must be possible to say with certainty whether "any given individual is or is not a member of the class."⁶ Thus, there is no need to be able to ascertain

⁶ *McPhail v Doulton* (1970), [1971] AC 424 at 456 (HL).