Hay's Settlement Trusts, Re

[1981] 3 All ER 786

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Court:
Chancery Division

Judge:
Sir Robert Megarry V-C

Subject References:
trusts
Power of appointment
Uncertainty
Unascertainable class of objects
Intermediate power vested in trustees
Discretionary power to appoint to anyone in the world except specified class
Whether power invalid as being too wide
Excessive execution
Delegation of power
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Settlement giving trustees power to appoint to 'such persons' as they thought fit
Trustees executing deed of appointment empowering them to appoint to 'such persons' as they thought fit
Whether deed of appointment a valid exercise of power of appointment in settlement
Settlement
Power
Validity

Case References:
Baden's Deed Trusts (No 2), Re, Baden v. Smith, Pearson v Smith - [1972] 2 All ER 1304; [1973] Ch 9; [1972] 3 WLR 250; CA, Digest (Cont Vol D) 1005, 317a
Blausten v. Inland Revenue Comrs - [1972] 1 All ER 41; [1972] Ch 256; [1972] 2 WLR 376; 47 Tax Cas 549; [1971] TR 363; 50 ATC 278; CA, Digest (Cont Vol D), 485, 1569a
Gestetner (deceased), Re, Barnett v. Blumka - [1953] 1 All ER 1150; [1953] Ch 672; [1953] 2 WLR 1033; 37 Digest (Repl) 411, 1400
Gulbenkian's Settlement Trusts, Re, Whishaw v. Stephens - [1968] 3 All ER 785; [1970] AC 508; [1968] 3 WLR 1127; HL, Digest (Cont Vol C) 806, 1330b
Hunter's Will Trust, Gilks v. Harris - [1962] 3 All ER 1050; [1963] Ch 372; [1962] 3 WLR 1442; 37 Digest (Repl) 371, 1066
Manisty's Settlement Trusts, Re, Manisty v. Manisty - [1973] 2 All ER 1203; [1974] Ch 17; [1973] 3 WLR 341; Digest [Cont Vol D] 728, 1332a
McPhail v. Doulton - [1970] 2 All ER 228; [1971] AC 424; [1970] 2 WLR 1110, HL;
rvsg sub nom Re Baden's Deeds Trusts, Baden v. Smith - [1969] 1 All ER 1016; [1969] 2 Ch 388; [1969] 3 WLR 12; CA, Digest (Cont Vol C) 805, 1324a
Morris's Settlement Trusts, Re, Adams v. Napier - [1951] 2 All ER 528; CA, 37 Digest (Repl) 264, 217
Park, Re, Public Trustee v. Armstrong - [1932] 1 Ch 580; [1931] All ER Rep 633; 101 LJCh 295; 147 LT 118; 37 Digest (Repl) 403, 1328
Pilkington's Will Trusts, Re, Pilkington v. Inland Revenue Comrs - [1962] 3 All ER 622; [1964] AC 612; [1962] 3 WLR 1051; 40 Tax Cas 433; [1962] TR 265; 41 ATC 285; HL, 28(2) Digest (Reissue) 785, 1139
Triffitt's Settlement, Re, Hatt v. Hyde - [1958] 2 All ER 299; [1958] Ch 852; [1958] 2 WLR 927; 37 Digest (Repl) 264, 219

Hearing date: 12, 13, 14, 15 June 1981
Judgment date: 30 July 1981

By a settlement dated 7 May 1958 the trustees were directed to hold the trust fund for 'such persons or purposes' as the trustees should in their discretion appoint by deed within 21 years of the date of the settlement, and in default of appointment, for the settlor's nieces and nephews living at the date of the settlement in equal shares. Apart from the settlor, her husband and the trustees there was no restriction on the persons or purposes that could be the object of an appointment. The settlement further provided that prior to any appointment the income was to be paid or applied in the trustees' discretion to or for 'any niece or nephew of the settlor' or any charitable object. On 5 May 1969 the trustees executed a deed of appointment in which they appointed the whole of the trust fund to be held by themselves on a similar trust to that created by the settlement, namely for 'such person or persons and for such purposes' as the trustees should in their discretion appoint by deed within 21 years of the date of the settlement. The deed of appointment further provided that prior to any appointment the trustees were to hold the trust fund on trust to pay the income thereof to 'any person or persons whatsoever' or any charity as the trustees thought fit for a period until 21 years after the death of the last survivor of the settlor's nieces and nephews living at the date of the settlement. Following the expiration of a period of 21 years from the date of the original settlement the trustees instituted proceedings to determine

(i) whether the power of appointment in the original settlement in favour of 'such persons or purposes' as the trustees should appoint was invalid as being too wide, and therefore the trust fund vested *ab initio* in the nieces and nephews living at the date of the settlement,

(ii) whether, if the power of appointment in the original settlement was valid, the discretionary trust created by the deed of appointment was nevertheless invalid as being too wide and outside the power of appointment in the settlement, so that the nieces and nephews living at the date of the settlement became entitled to the trust fund on 7 May 1979 on the expiration of 21 years from the date of the settlement, or

(iii) whether both the power of appointment in the original settlement and the deed of appointment were valid so that the trustees continued to hold on trust to pay the income to such persons or charities as they thought fit until 21 years after the death of the last surviving niece or nephew.

Held-

(1) An 'intermediate' or 'hybrid' power of appointment vested in a trustee to appoint to anyone in the world except a specified number or class of persons was not, despite the fiduciary duties of the trustees, rendered invalid merely by the width of the power and the number of persons who were objects of the power, since in exercising such a power of appointment the duties of the trustee were

(a) to ensure that any appointment was within the power,

(b) to consider priodically whether to exercise the power,

(c) to consider the range of objects of the power, and (d) to consider the appropriateness of individual appointments;

and nothing in the nature of an intermediate power of appointment prevented trustees from discharging those duties. It followed that the power of appointment contained in the settlement was not void for uncertainty (see p 793 f g, p 794 g to j and p 795 b c, post); *Re Gestetner (deceased)* [1953] 1 All ER 1150, *Re Gulbenkian's Settlement Trusts* [1968] 3 All ER 785, *McPhail v Daulton* [1970] 2 All ER 228, *Re Baden (No 2)* [1972] 2 All ER 1304 and *Re Manisty's Settlement Trusts* [1973] 2 All ER 1203 applied; *dictum* of Buckley LJ in *Blausten v Inland Revenue Comrs* [1972] 1 All ER at 50 not followed.

(2) However, by requiring the trustees to hold the trust fund for 'such persons' as they should appoint, the deed of appointment had not, as the settlement itself required, designated the persons to whom the

appointment was to be made, but had merely provided the mechanism whereby appointees might be ascertained in the future, and in so doing the deed of appointment offended against the rule, which applied to intermediate powers of appointment, that unless authorised to do so a trustee could not delegate his powers. It was immaterial that the appointors under the deed of appointment were the same persons as the trustees under the settlement. The deed of appointment were the same persons as the trustees under the settlement. The deed of appointment was therefore void as being an excessive execution of the power to appoint contained in the settlement. It followed that the nieces and nephews living at the date of the settlement became entitled to the trust fund on the expiration of 21 years from the date of the settlement (ie on 7 May 1979) by virtue of the gift over in default of any valid appointment being made during the term of the settlement (see p 795 e to j and p 796 a to d, post); *dictum* of Viscount Radcliffe in *Re Pilkington's Will Trusts* [1962] 3 All ER at 630 applied.

Notes

For powers in relation to trusts, see 36 *Halsbury's Laws* (3rd Edn) 535-540, paras 808-814, for uncertainty in relation to powers, see ibid 540, para 815, and for cases on those subjects, see 37 *Digest* (Repl) 401-404, 1309-1332.

Originating summons

By an originating summons dated 11 September 1980 the plaintiffs, David Coventry Greig and Colin Henry Oliver, who were trustees of a settlement dated 7 May 1958 and of a deed of appointment made thereunder on 5 May 1969, sought the determination of the court on the question whether on the true construction of the settlement and in the events which had happened the trust fund subject to the trusts of the settlement and the income thereof

(a) had at all times since the date of the settlement been held on trust for such of the nieces and nephews of the settlor, Dame Isobel Rose Hay, as were living at the date of the settlement,

(b) was from the expiration of 21 years from the date of the settlement held on trust for such of the nieces and nephews of the settlor as were living at the date of the settlement, or was to be held on the discretionary trust of income specified in the deed of appointment until the expiration of 21 years after the last survivor of such of the nieces and nephews of the settlor as were living at the date of the settlement and subject thereto on trust for such nieces and nephews absolutely.

The defendants were the nieces of the settlor, Roxana Mary Jocelyn McGregor, Anne Coventry Ruck Keene, Elizabeth Rose Gimpel, and the Attorney General representing the interests of charity. The facts are set out in the judgment.

Cur adv vult

Judgment by:
Sir Robert Megarry V-C

This originating summons raises difficult questions on a settlement dated 7 May 1958 and a deed of appointment thereunder made on 5 May 1969. The settlor, Lady Hay, had two brothers and a sister; and each of them had children. Mr Child appears on behalf of the first three defendants, who are all nieces of the settlor (one from each stirps); and a representation order is sought for them to represent all the settlor's nieces and nephews, and the estates of those deceased. Mr Mummery appears for the Attorney General, as representing the interests of charity, and Mr Baxendale appears for the plaintiffs, the trustees of the settlement. The settlor is still living, I may say.

By cl 1 of the settlement, 'the Trust Fund' is defined as meaning the initial £100 settled and any additions made to it. In April 1980 the trust fund consisted of a property in Edinburgh and investments worth over £140,000, with an annual income of over £11,000. Clause 2, when read with cl 6, confers wide powers of investment on the trustees, and then cl 3 makes the first of the provisions for beneficial interests. For five years from the date of the settlement (called 'the accumulation period') the trustees were given power to pay

or apply the whole or any part of the income of the trust fund 'to or for the benefit of all or any person or persons or of any Charity appointed by them under Clause 5 hereof'. The reference to cl 5, I should say, is plainly a slip for cl 4. The trustees are then required to accumulate any part of the income not so paid or applied, and to hold the accumulation as an accretion to the trust fund.

Next, there is cl 4; and I must read a large part of it. The clause is not a model of clarity, but I think that it becomes rather more lucid if it is approached with the realisation that it may be divided into six parts. There is an introduction, two main limbs, a provision as to revocability and two provisos. The introduction is short:

'Subject as aforesaid the Trustees shall hold the trust fund ....'

Then there is the first main limb:

'on trust for such persons or purposes for such interests and with such gifts over and (if for persons) with such provisions for their respective maintenance or advancement at the discretion of the Trustees or of any other persons as the Trustees shall by any deed or deeds revocable or irrevocable (but if revocable not after the expiration of twenty one years from the day hereof) executed within twenty one years from the date hereof appoint (but so that all interest under any such appointment shall necessarily vest during the lives of the Settlor's nieces and nephews now living or within twenty one years of the death of the last survivor of such nieces and nephews).'

In this, I may say, I have supplied the bracket after 'if for persons' in the second line that is missing in the original. The second main limb is short:

'and in default of such appointment in trust for the nieces and nephews of the Settlor now living in equal shares among them.'

The provision as to revocability merely lays down that an appointment that is expressed to be revocable is to be revocable by the trustees for the time being, whether or not they are the same persons as those who made the appointment. The first proviso states that any niece or nephew who (or whose issue) takes any part of the trust fund under an appointment under the power shall (in default of appointment to the contrary) bring the share so appointed into hotchpot. The second proviso precludes any appointment being made to the settlor, any husband of hers and any trustee or past trustee of the settlement.

Clause 5 deals with the income of the trust fund for the period beginning with the end of the accumulation period and ending when the power of appointment has been finally exercised or ceases to be exercisable: the maximum length of the period is thus the 16 years which lie between 5 years and 21 years from the date of the settlement. During that period, the clause provides that the trustees shall-

'pay or apply any part of the income of the Trust Fund to which no person is for the time being entitled under any partial or revocable appointment in manner following that is to say to or for the benefit of any niece or nephew of the Settlor as aforesaid or to or for such charitable objects in such shares and proportion and in such manner as the Trustees shall in their absolute discretion think fit.'

The rest of the deed of settlement may be summarised briefly. Clause 6, as I have indicated, deals with the trustees' powers of investment; cl 7 is a professional charging clause; cl 8 gives the settlor the power to appoint new trustees; and cl 9 provides for the settlement to be interpreted according to the law of England.

I turn to the deed of appointment. This was made by the trustees, who are described as 'the Appointors'. It recites, inter alia, that the appointors 'have determined to make such irrevocable appointment of the Trust Fund as is hereinafter contained'. The deed then witnesses that the appointors, in exercise of the power conferred on them by cl 4 of the settlement, 'Hereby Appoint' as follows; but neither there nor anywhere else does the deed state in terms whether the appointment is revocable or irrevocable. Clause 1 of the deed then proceeds to repeat in substance the first main limb of cl 4 of the settlement with a number of minor variations. The trustees are to 'stand possessed to the Trust Fund and of the income thereof upon trust' (in place of 'hold the Trust Fund on trust'). The trust is 'for such person or persons and for such purposes' (instead of 'for such persons or purposes'). 'Maintenance and advancement' replace 'maintenance or advancement', and the date of the settlement is preserved by replacing 'day hereof' and 'date hereof' in the settlement with 'date of the settlement'. Finally, the phrase 'settlor's nieces and nephews now living' is

replaced by 'nieces and nephews of the Settlor and the survivor of them living at the date of the Settlement'. This leaves unchanged the requirement that all interest under any appointment must necessarily vest within 21 years after the death of the last survivor of the nieces and nephews living at the date of the settlement. The general effect of this clause of the deed of appointment is thus much the same as the first main limb of cl 4 of the settlement: it confers a power of appointment exercisable until 7 May 1979. However, the second main limb of the settlement, the provision as to revocability, and the two provisos are all without counterpart in this clause of the appointment.

The next clause of the deed of appointment, cl 2, like cl 5 of the settlement, deals with undisposed-of income; but the two provisions differ materially. Under the settlement, the income was to be paid or applied as the trustees thought fit between the nieces and nephews and charitable objects, whereas under the deed of appointment the class of objects of the discretionary trust is enlarged to any person or persons whatsoever (with only the very limited exception under cl 3), or any charity. Further, the duration of the trust under the deed of appointment is much greater. Instead of lasting for only 21 years from the date of the settlement (ie until 7 May 1979), it continues until 21 years after the death of the last survivor of the nieces and nephews living at the date of the settlement. Clause 2 reads as follows:

'PENDING the execution of an effective and irrevocable appointment of the whole of the capital and income of the Trust Fund and so far as any appointment thereof shall not for the time being and from time to time extend the trustees shall hold the Trust Fund upon trust until the lastest [sic] date for the vesting of the trust funds under the last preceding Clause hereof to pay the income of so much of the Trust Fund as is for the time being unappointed to or for the benefit of any person or persons whatsoever (save as hereinafter provided) whether or not related to Lady Isobel Rose Hay or to any Charity in such manner and in such shares and proportions as the trustees shall think fit.'

There are only two other clauses in the deed of appointment. Clause 3 prohibits any 'appointment under any power' in the deed, or 'under any other power exercisable by the trustees in relation to the Trust Fund', to be made in favour of the settlor, any husband of hers or any existing or former trustee of the settlement. In view of the words 'save as hereinafter provided' in cl 2, I think that the words 'any other power' in cl 3 must be read as including any discretion under any trust, and so as applying to cl 2.

Clause 4 reads as follows:

'SUBJECT as aforesaid and from and after the date for vesting provided by Clause 2 hereof the trustees shall stand possessed of the capital of the Trust Fund upon the trusts in default of appointment declared in Clause 4 of the Settlement but subject to the proviso for hotchpot therein contained.'

The 'date for vesting provided by Clause 2 hereof' is 'the lastest date for the vesting of the trust fund' under cl 1: and that is 21 years after the death of the last survivor of the nieces and nephews living at the date of the settlement. The 'trusts in default of appointment declared in Clause 4 of the Settlement' consist of the trust for the nieces and nephews living at the date of the settlement, in equal shares, under what I have called the second main limb.

Two provisions of these instruments are at the centre of the dispute. They are, first, the power of appointment conferred by what I have called the first main limb of cl 4 of the settlement; and, second, the discretionary trust of income under cl 2 of the deed of appointment. Under the power of appointment the trustees were to hold the trust fund on trust for 'such persons or purposes' as the trustees should appoint before 7 May 1979, subject to excluding the settlor, her husband and trustees or former trustees, by virtue of the second proviso. Such a provision raises obvious questions about the enormous class of persons who were possible objects of the power: everyone in the world is included save for a handful of persons. If that power is invalid, then of course the appointment made under it must also be invalid, and no other appointment could ever have been valid. The result would therefore be that the second main limb of cl 4 would take effect, and the nieces and nephews living at the date of the settlement would have become entitled to the trust fund in equal shares *ab initio* . That is the solution put by para 1(a) in the originating summons; and it is the result that counsel for the defendants puts forward on behalf of the nieces and nephews, but only as his second and alternative choice.

The first choice of counsel for the defendants is the solution put forward by para 1(b) of the originating summons. That is that the nieces and nephews living at the date of the settlement became entitled to the trust fund on 7 May 1979, at the expiration of 21 years from the date of the settlement. This has the fiscal

attraction for the nieces and nephews that it could not then be said that they had been entitled to past income which in fact they have not received. This result is reached if the power of appointment under cl 4 of the settlement is held to be valid, but the discretionary trust created by cl 2 of the deed of appointment is held to be void. If that is the case, then on 7 May 1979 it became impossible for any valid appointment ever to be made, for the 21 years' period for appointments then expired. The discretionary trust under cl 2 being void, the combined operation of cl 4 of the deed of appointment and the second main limb of cl 4 of the settlement would carry the trust fund to the nieces and nephews living at the date of the settlement, in equal shares. In order to arrive at this result, the amplitude of a class consisting of the whole world except a handful of individuals had to leave unaffected the power of appointment given to the trustees by the first main limb of cl 4 of the settlement, but at the same time bring to grief the discretionary trust created by cl 2 of the deed of appointment. This was the path which by preference counsel for the defendants trod, though he had an alternative ground for contending that cl 2 of the deed of appointment was invalid. This was that the power was not wide enough to authorise the appointment made by cl 2. Counsel for the Attorney General, on the other hand, contended that both the power and the discretionary trust created by cl 2 of the deed of appointment were valid; for only in that way could charity receive any benefit.

The starting point must be to consider whether the power created by the first limb of cl 4 of the settlement is valid. The rival arguments were presented by counsel for the defendants in his primary contention, and by counsel for the Attorney General, in favour of validity, and by counsel for the defendants, in his alternative contention, against validity. The essential point is whether a power for trustees to appoint to anyone in the world except a handful of specified persons is valid. Such a power will be perfectly valid if given to a person who is not in a fiduciary position: the difficulty arises when it is given to trustees, for they are under certain fiduciary duties in relation to the power, and to a limited degree they are subject to the control of the courts. At the centre of the dispute there are *Re Manisty's Settlement Trusts* [1973] 2 All ER 1203, [1974] Ch 17 (in which Templeman J differed from part of what was said in the Court of Appeal in *Blausten v Inland Revenue Comrs* [1972] 1 All ER 41, [1972] Ch 256); *McPhail v Doulton* [1970] 2 All ER 228, [1971] AC 424 (which I shall call *Re Baden (No 1));* and *Re Baden's Deed Trusts (No 2)* [1972] 2 All ER 1304, [1973] Ch 9, which I shall call *Re Baden (No 2).* Counsel for the defendants, I may say, strongly contended that *Re Manisty's Settlement* was wrongly decided.

In *Re Manisty's Settlement* a settlement gave trustees a discretionary power to apply the trust fund for the benefit of a small class of the settlor's near relations, save that any member of a smaller 'excepted class' was to be excluded from the class of beneficiaries. The trustees were also given power at their absolute discretion to declare that any person, corporation or charity (except a member of the excepted class or a trustee) should be included in the class of beneficiaries. Templeman J held that this power to extend the class of beneficiaries was valid. In *Blausten v Inland Revenue Comrs* which had been decided some eighteen months earlier, the settlement created a discretionary trust of income for members of a 'specified class' and a power to pay or apply capital to or for the benefit of members of that class, or to appoint capital to be held on trust for them. The settlement also gave the trustees power 'with the previous consent in writing of the settlor' to appoint any other person or persons (except the settlor) to be included in the 'specified class'. The Court of Appeal decided the case on a point of construction; but Buckley LJ ([1972] 1 All ER 41 at 49, [1972] Ch 256 at 271) also considered a contention that the trustees' power to add to the 'specified class' was so wide that it was bad for uncertainty, since the power would enable anyone in the world save the settlor to be included. He rejected this contention on the ground that the settlor's prior written consent was requisite to any addition to the 'specified class'; but for this, it seems plain that he would have held the power void for uncertainty. Orr LJ simply concurred, but Salmon LJ expressly confined himself to the point of construction, and said nothing about the power to add to the 'specified class'. In *Re Manisty's Settlement* [1973] 2 All ER 1203 at 1213, [1974] Ch 17 at 29, Templeman J rejected the view of Buckley LJ on this point on the ground that *Re Gestetner (deceased)* [1953] 1 All ER 1150, [1953] Ch 672, *Re Gulbenkian's Settlement Trusts* [1968] 3 All ER 785, [1970] AC 508 and the two *Baden* cases did not appear to have been fully explored in the *Blausten* case, and the case did not involve any final pronouncement on the point. In general, I respectfully agree with Templeman J.

I propose to approach the matter by stages. First, it is plain that if a power of appointment is given to a person who is not in a fiduciary position, there is nothing in the width of the power which invalidates it per se. The power may be a special power with a large class of persons as objects; the power may be what is called a 'hybrid' power, or an 'intermediate' power, authorising appointment to anyone save a specified number or class of persons; or the power may be a general power. Whichever it is, there is nothing in the number of persons to whom an appointment may be made which will invalidate it. The difficulty comes when the power is given to trustees as such, in that the number of objects may interact with the fiduciary duties of the

trustees and their control by the court. The argument of counsel for the defendants carried him to the extent of asserting that no valid intermediate or general power could be vested in trustees.

That brings me to the second point, namely, the extent of the fiduciary obligaitons of trustees who have a mere power vested in them, and how far the court exercises control over them in relation to that power. In the case of a trust, of course, the trustee is bound to execute it, and if he does not, the court will see to its execution. A mere power is very different. Normally the trustee is not bound to exercise it, and the court will not compel him to do so. That, however, does not mean that he can simply fold his hands and ignore it, for normally he must from time to time consider whether or not to exercise the power, and the court may direct him to do this.

When the does exercise the power, he must, of course (as in the case of all trusts and powers) confine himself to what is authorised, and not go beyond it. But that is not the only restriction. Whereas a person who is not in a fiduciary position is free to exercise the power in any way that he wishes, unhampered by any fiduciary duties, a trustee to whom, as such, a power is given is bound by the duties of his office in exercising that power to do so in a responsible manner according to its purpose. It is not enough for him to refrain from acting capriciously; he must do more. He must 'make such a survey of the range of objects or possible beneficiaries' as will enable him to carry out his fiduciary duty. He must find out 'the permissible area of selection and then consider responsibly, in individual cases, whether a contemplated beneficiary was within the power and whether, in relation to the possible claimants, a particular grant was appropriate': per Lord Wilberforce in *Re Baden (No 1)* [1970] 2 All ER 228 at 240, 247, [1971] AC 424 at 449, 457.

I pause there. The summary of the law that I have set out above is taken from a variety of sources, principally *Re Gestetner (deceased)* [1953] 1 All ER 1150, [1953] Ch 672, *Re Gulbenkian's Settlement* [1968] 3 All ER 785 at 787, 592-594, [1970] AC 508 at 518, 524-525 and *Re Baden (No 1)* [1970] 2 All ER 228 at 246, [1971] AC 424 at 456. The last proposition, relating to the survey and consideration, at first sight gives rise to some difficulty. It is now well settled that no mere power is invalidated by it being impossible to ascertain every object of the power; provided the language is clear enough to make it possible to say whether any given individual is an object of the power, it need not be possible to compile a complete list of every object: see *Re Gestetner (deceased)* [1953] 1 All ER 1150 at 1155, [1953] Ch 672 at 688; *Re Gulbenkian's Settlement* [1968] 3 All ER 785, [1970] AC 508; *Re Baden (No 1)* [1970] 2 All ER 228, [1971] AC 424. As Harman J said in *Re Gestetner (deceased)* [1953] 1 All ER 1150 at 1056, [1953] Ch 672 at 688, the trustees need not 'worry their heads to survey the world from China to Peru, when there are perfectly good objects of the class in England'.

That brings me to the third point. How is the duty of making a responsible survey and selection to be carried out in the absence of any complete list of objects? This queston was considered by the Court of Appeal in *Re Baden (No 2).* That case was concerned with what, after some divergences of judicial opinion, was held to be a discretionary trust and not a mere power; but plainly the requirements for a mere power cannot be more stringent than those for a discretionary trust. The duty, I think, may be expressed along the following lines: I venture a modest degree of amplification and exegesis of what was said in *Re Baden (No 2)* [1972] 2 All ER 1304 at 1310, 1315, [1973] Ch 9 at 20, 27. The trustee must not simply proceed to exercise the power in favour of such of the objects as happen to be at hand or claim his attention. He must first consider what persons or classes of persons are objects of the power within the definition in the settlement or will. In doing this, there is no need to compile a complete list of the objects, or even to make an accurate assessment of the number of them: what is needed is an appreciation of the width of the field, and thus whether a selection is to be made merely from a dozen or, instead, from thousands or millions. (Incidentally, in order to avoid the relevant passage in the judgment of Sachs LJ being self-contradictory I think a comma needs deletion: the words 'it refers to something quite different, to a need to provide ... ' should read 'it refers to something quite different to a need to provide ... ', or, preferably, 'it refers to something quite different from a need to provide ... ': see [1972] 2 All ER 1304 at 1310, [1973] Ch 9 at 20). Only when the trustee has applied his mind to 'the size of the problem' should he then consider in individual cases whether, in relation to other possible claimants, a particular grant is appropriate. In doing this, no doubt he should not prefer the undeserving to the deserving; but he is not required to make an exact calculation whether, as between deserving claimants, A is more deserving than B: see *Re Gestetner (deceased)* [1953] 1 All ER 1150 at 1155, [1953] Ch 672 at 688, approved in *Re Baden (No 1)* [1970] 2 All ER 228 at 243-244, [1971] AC 424 at 453.

If I am right in these views, the duties of a trustee which are specific to a mere power seem to be threefold. Apart from the obvious duty of obeying the trust instrument, and in particular of making no appointment that is not authorised by it, the trustee must, first, consider periodically whether or not he should exercise the power; second, consider the range of objects of the power; and third, consider the appropriateness of

individual appointments. I do not assert that this list is exhaustive; but as the authorities stand it seems to me to include the essentials, so far as relevant to the case before me.

On this footing, the question is thus whether there is something in the nature of an intermediate power which conflicts with these duties in such a way as to invalidate the power if it is vested in a trustee. The case that there is rests in the main on *Blausten v Inland Revenue Comrs* which I have already summarised. The power there was plainly a mere power; and it authorised the trustees, with the settlor's previous consent in writing, to add any other person or persons (except the settlor) to the specified class.

In that case, Buckley LJ referred to the power as being one the exercise of which the trustees were under a duty to consider from time to time, and said ([1972] 1 All ER 41 at 50, [1972] Ch 256 at 272):

'If the class of persons to whose possible claims they would have to give consideration were so wide that it really did not amount to a class in any true sense at all no doubt that would be a duty which it would be impossible for them to perform and the power could be said to be invalid on that ground. But here, although they may introduce to the specified class any other person or persons except the [settlor], the power is one which can only be exercised with the previous consent in writing of the [settlor] ... Therefore on analysis the power is not a power to introduce anyone in the world to the specified class, but only anyone proposed by the trustees and approved by the [settlor]. This is not a case in which it could be said that the [settlor] in this respect has not set any metes and bounds to the beneficial interests which he intended to create or permit to be created under this settlement.'

After referring to *Re Park* [1932] 1 Ch 581 at 583, [1931] All ER Rep 633 at 634, Buckley LJ went on ([1972] 1 All ER 41 at 50, [1972] Ch 256 at 273):

'... this is not a power which suffers from the sort of uncertainty which results from the trustees being given a power of so wide an extent that it would be impossible for the court to say whether or not they were properly exercising it and so wide that it would be impossible for the trustees to consider in any sensible manner how they should exercise it, if at all, from time to time. The trustees would no doubt take into consideration the possible claims of anyone having any claim on the beneficence of the [settlor]. That is not a class of persons so wide or so indefinite that the trustees would not be able rationally to exercise their duty to consider from time to time whether or not they should exercise the power.'

It seems quite plain that Buckley LJ considered that the power was saved from invalidity only by the requirement for the consent of the settlor. The reason for saying that in the absence of such a requirement the power would have been invalid seems to be twofold. First, the class of persons to whose possible claims the trustees would be duty-bound to give consideration was so wide as not to form a true class, and this would make it impossible for the trustees to perform their duty of considering from time to time whether to exercise the power.

I feel considerable difficulty in accepting this view. First, I do not see how mere numbers can inhibit the trustees from considering whether or not to exercise the power, as distinct from deciding in whose favour to exercise it. Second, I cannot see how the requirement of the settlor's consent will result in any 'class' being narrowed from one that is too wide to one that is small enough. Such a requirement makes no difference whatever to the number of persons potentially included: the only exclusion is still the settlor. Third, in any case I cannot see how the requirement of the settlor's consent could make it possible to treat 'anyone in the world save X' as constituting any real sort of a 'class', as that term is usually understood.

The second ground of invalidity if there is no requirement for the settlor's consent seems to be that the power is so wide that it would be impossible for the trustees to consider in any sensible manner how to exercise it, and also impossible for the court to say whether or not they were properly exercising it. With respect, I do not see how that follows. If I have correctly stated the extent of the duties of trustees in whom a mere power is vested, I do not see what there is to prevent the trustees from performing these duties. It must be remembered that Buckley LJ, though speaking after *Re Gulbenkian's Settlement* and *Re Baden (No 1)* had been decided, lacked the advantage of considering *Re Baden (No 2),* which was not decided until some five months later. He thus did not have before him the explanation in that case of how the trustees should make a survey and consider individual appointments in cases where no complete list of objects could be compiled. I also have in mind that the settlor in the present case is still alive, though I do not rest my decision on that.

From what I have said it will be seen that I cannot see any ground on which the power in question can be said to be void. Certainly it is not void for linguistic or semantic uncertainty; there is no room for doubt in the definition of those who are or are not objects of the power. Nor can I see that the power is administratively unworkable. The words of Lord Wilberforce in *Re Baden (No 1)* [1970] 2 All ER 228 at 247, [1971] AC 424 at 457 are directed to discretionary trusts, not powers. Nor do I think that the power is void as being capricious. In *Re Manisty's Settlement* [1973] 2 All ER 1203 at 1211, [1974] Ch 17 at 27 Templeman J appears to be suggesting that a power to benefit 'residents in Greater London' is void as being capricious 'because the terms of the power negative any sensible intention on the part of the settlor'. In saying that, I do not think that the judge had in mind a case in which the settlor was, for instance, a former chairman of the Greater London Council, as subsequent words of his on that page indicate. In any case, as he pointed out earlier, this consideration does not apply to intermediate powers, where no class which could be regarded as capricious has been laid down. Nor do I see how the power in the present case could be invalidated as being too vague, a possible ground of invalidity considered in *Re Manisty's Settlement* [1973] 2 All ER 1203 at 1208, [1974] Ch 17 at 24. Of course, if there is some real vice in a power, and there are real problems of administration or execution, the court may have to hold the power invalid: but I think that the court should be slow to do this. Dispositions ought if possible to be upheld, and the court ought not to be astute to find grounds on which a power can be invalidated. Naturally, if it is shown that a power offends against some rule of law or equity, then it will be held to be void: but a power should not be held void on a peradventure. In my judgment, the power conferred by cl 4 of the settlement is valid.

With that, I turn to the discretionary trust of income under cl 2 of the deed of appointment. Apart from questions of the validity of the trust per se, there is the prior question whether the settlement enabled the trustees to create such a trust, or, for that matter, the power set out in cl 1 of the deed of appointment. The power conferred by cl 4 of the settlement provides that the trustees are to hold the trust fund on trust 'for such persons or purposes for such interests and with such gifts over and (if for persons) with such provision for their respective maintenance or advancement at the discretion of the Trustees or any other persons' as the trustees shall appoint. Clause 2 of the deed of appointment provides that the trustees are to hold the trust fund on trust to pay the income 'to or for the benefit of any person or persons whatsoever ... or to any charity' in such manner and shares and proportions as the trustees think fit. I need say nothing about purposes or charities as no question on them has arisen. The basic question is whether the appointment has designated the 'persons' to whom the appointment is made.

Looked at as a matter of principle, my answer would be 'No'. There is no such person to be found in cl 2 of the deed of appointment: instead, there is merely the mechanism whereby a person or persons may be ascertained from time to time by the exercise of the discretion given to the trustees. If that mechanism is operated, then persons may emerge who will be entitled: but they will emerge not by virtue of any exercise of the power in the settlement but by virtue of the exercise of the discretion in the deed of appointment. That seems to me to be a plain case of delegation: the power in the settlement is not being exercised by appointing the persons who are to benefit but by creating a discretionary trust under which the discretionary trustees will from time to time select those who will benefit. True, the appointor under the settlement and the trustees under the discretionary trust are the same persons: but I do not think that this affects the matter. The power in the settlement is a power to appoint to persons and not a power to nominate those (whether the appointors or anyone else) who will select persons who are to benefit; and I do not see how identity between the appointors and nominators can alter the fact that the mechanism set up by the deed of appointment differs from anything authorised by the settlement. I can see nothing whatever in the power conferred by the settlement which even contemplates that an appointment should designate no appointees but instead should set up a discretionary trust under which the trustees could determine who should benefit.

Counsel for the defendants relied on *Re Hunter's Will Trusts* [1962] 3 All ER 1050, [1963] Ch 372 as supporting his contention that cl 2 of the deed of appointment was void. There, Cross J felt constrained by the decision of the Court of Appeal in *Re Morris's Settlement Trusts* [1951] 2 All ER 528 to hold that a special power to appoint to children and remoter issue did not authorise the imposition of protective trusts on appointments made to children, even though the power was to appoint to the objects 'with such trusts for their respective benefits' as might be appointed. It appears that apart from authority Cross J ([1962] 3 All ER 1050 at 1055, [1963] Ch 372 at 381) would have held that the power did authorise the imposition of protective trusts; but, significantly, he added 'though not the creation of an immediate discretionary trust'.

Now it is clear that in these authorities the rule delegatus non potest delegare was in issue. Does this rule apply to intermediate powers? This was not explored in argument, but I think that it is clear from *Re Triffitt's Settlement* [1958] 2 All ER 299, [1958] Ch 852 that the rule does not apply to an intermediate power vested in a person beneficially. Here, of course, the power is an intermediate power, but it is vested in trustees as

such, and not in any person beneficially; and the rule is that 'trustees cannot delegate unless they have authority to do so': per Viscount Radcliffe in *Re Pilkington's Will Trusts* [1962] 3 All ER 622 at 630, [1964] AC 612 at 639. Accordingly, I do not think that the fact that the power is an intermediate power excludes it from the rule against delegation. On the contrary, the fact that the power is vested in trustees subjects it to that rule unless there is something in the settlement to exclude it. I can see nothing in the settlement which purports to authorise any such appointment or to exclude the normal rule against delegation. In my judgment, both on principle and on authority cl 2 of the deed of appointment is void as being an excessive execution of the power.

That, I think, suffices to dispose of the case. I have not dealt with the submission which counsel for the defendants put in the forefront of his argument. This was that even if the power had been wide enough to authorise the creation of the discretionary trust, that trust was nevertheless bad as being a trust in favour of 'so hopelessly wide' a definition of beneficiaries 'as not to form anything like a class so that the trust is administratively unworkable'': see per Lord Wilberforce in *Re Baden (No 1)* [1970] 2 All ER 228 at 247, [1971] AC 424 at 457. I do not propose to go into the authorities on this point. I consider that the duties of trustees under a discretionary trust are more stringent than those of trustees under a power of appointment (see *Re Baden (No 1)* [1970] 2 All ER 228 at 247, [1971] AC 424 at 457), and as at present advised I think that I would, if necessary, hold that an intermediate trust such as that in the present case is void as being administratively unworkable. In my view there is a difference between a power and a trust in this respect. The essence of that difference, I think, is that beneficiaries under a trust have rights of enforcement which mere objects of a power lack. But in this difficult branch of the law I consider that I should refrain from exploring without good reason any matters which do not have to be decided. In my opinion, the question whether an appointment is within a power is anterior to the question whether, if the appointment is within the power, it is inherently good or bad; and having decided the first question against the validity of the appointment, I leave the second question undecided.

Subject to anything counsel may wish to say, I propose to answer para 1 of the originating summons in sense (b), and I make the representation order sought by para 2.

Order accordingly.