

# Trusts, powers and default appointment clauses

by John Ioannou, CTA, Partner, and Darius Hii, Lawyer, McCullough Robertson Lawyers

**Abstract:** A default appointment clause in a trust deed is a clause which operates where the trustee fails to exercise the discretion to either distribute or accumulate trust income, or distribute the capital on the trust vesting. Must a valid discretionary trust include a default appointment clause? After all, the consequence of incompetent or inappropriate drafting may be that the trust is void for uncertainty, resulting in there being no trust. This article argues that a default appointment is not necessary, provided the trust deed is drafted appropriately, the intentions of the parties establishing the trust are clear, and the trust deed suits the client's circumstances and objectives. The article provides an overview of trusts, powers and default appointment clauses, and examines the underlying English and Australian case law, to conclude that a default appointment is not required when the correct trust or power is bestowed on the trustee.

## Overview

Is a default appointment clause required to have a valid discretionary trust? Does anyone care?

Perhaps the majority do not. However, for those practising in the private client space and providing advice in the context of family law, stamp duty, estate and succession planning, it is relevant and surprisingly subject to differing and extreme views.

These extreme views are obvious in the sense that either a trust deed contains a default appointment clause or it does not. The consequence of getting it wrong is that the trust is void for uncertainty, resulting in no trust being in place.

The authors' view is that default appointments are not necessary, provided:

- (1) the trust deed is drafted appropriately;
- (2) the intentions of the parties establishing the trust are clear; and
- (3) the trust deed suits the client's circumstances and objectives.

This can be colloquially summarised by saying that, provided the ultimate destination of the trust assets is clear, a default appointment clause is not required, on the condition that it suits the client's circumstance.

In reaching this view, it is important to differentiate between the nature and type of power available to a trustee when considering the requirement to have certainty of object for a discretionary trust

and the effect that it has on the use of default appointment clauses.

This article overviews trusts, powers and default appointment clauses and examines the underlying case law to conclude that a default appointment is not required when the correct trust or power is bestowed on the trustee.

## Introduction

The common features of a typical "family" discretionary trust include:

- (1) the person who establishes the trust, otherwise known as the settlor;
- (2) a trustee, who holds the trust property and administers the trust property for the benefit of the beneficiaries of the trust;
- (3) an appointor or principal, who is the entity that has power to appoint and remove trustees of the trust without the trustees' consent. In some older trust deeds, it is common to have a guardian. This is a remnant of the death duties era and was a role that ensured that a trust was ultimately administered for a particular class of beneficiaries but not sufficient to be taxed under that regime;
- (4) a range of beneficiaries or objects (to whom the trustee may have the discretion to distribute trust income or capital);
- (5) the terms of the trust;
- (6) governing rules, typically found in a trust deed, or which will include the

powers available to the trustee and appointor/principal; and

(7) trust property.

Particularly, a discretionary trust requires certainty in relation to three matters:<sup>1</sup>

- (1) certainty of intention (ie the settlor intended to create a trust over their property);
- (2) certainty of subject matter (ie the property of the trust must be specified with certainty); and
- (3) certainty of object (ie the beneficiaries or objects of the trust must be sufficiently identifiable).

Failure to have certainty of any of the three matters may result in the trust being established to hold the trust property for the benefit of the settlor<sup>2</sup> and having the trust fund taxed at the settlor's tax rate.<sup>3</sup>

## Default appointment clauses generally

Generally, discretionary trusts provide the trustee with the discretion to determine which beneficiaries may be entitled to the income or capital of the trust fund. That discretion can be coupled with the power to accumulate income and apply it to the capital of the trust fund for future distribution.

Common clauses found in a standard discretionary trust deed include:

- (1) clauses giving the trustee the power to either accumulate any income of the trust to form part of the capital of the trust fund or distribute any income

of the trust to a particular class of beneficiaries;

- (2) a clause giving the trustee the power to hold the assets of the trust for the benefit of a particular class of people and, on vesting, the power to decide who from that class may be entitled to the capital of the trust; and
- (3) clauses that operate should the trustee fail to exercise their discretion to either distribute or accumulate the income, or distribute the capital on the trust vesting.

The latter are referred to as default appointment clauses as they operate on the default or failure to make an appropriate appointment under the preceding general clauses mentioned.

A few common examples often cited in support of the need for clauses that operate in default are:

- (1) to ensure that the trustee is not taxed on the income of the trust at the marginal rate for any accumulation under s 99A of the *Income Tax Assessment Act 1936* (Cth);
- (2) for default capital appointments to assist in ensuring that dispositions would not breach the rule of perpetuities — being 80 years from the date of creation of the trust;<sup>4</sup> and
- (3) finally, the failure to have adequate provisions in the trust instrument may result in income of the trust fund neither being distributed nor accumulated and ultimately held under a resulting trust in favour of the settlor<sup>2</sup> or their estate and being taxed according to s 102 of the *Income Tax Assessment Act 1936* (Cth).

For the practitioners who slavishly adhere to default clauses, the underlying rationale is to ensure that a trust has certainty as to the objects that may benefit from the income and capital of the trust fund. While cases that support this proposition will be covered shortly, it ought to be clear after a review that a court can competently identify who may benefit (provided the trust deed is drafted appropriately) in the absence of a default clause.

## Powers and trusts: the differences and why that is important

### Powers of appointment

There are three powers of appointment which a trustee may possess when

disposing of property in favour of a class of objects:

- (1) a general power of appointment (ie a power allowing the trustee to distribute to any person it chooses (including themselves));
- (2) a specific or special power of appointment (ie a power allowing the trustee to distribute to an ascertainable class of persons such that it is possible to decide whether an individual is or is not a part of the class); and
- (3) a hybrid power of appointment (ie a power allowing the trustee to distribute to any person apart from those included in an excluded class).

It is important to distinguish between the three, as a trustee of a discretionary trust is generally only ever able to utilise a special or hybrid power of appointment (unless it is a trustee of a testamentary trust, in which case, they may exercise a general power of appointment but not a hybrid power of appointment).<sup>5</sup> This is often due to restrictions imposed on the trustee limiting their ability to benefit the settlor. Described by Lord Jessel MR in *Freme v Clement*,<sup>6</sup> a power of appointment:

“... is a power of disposition given to a person over property not his own by some one who directs the mode in which that power shall be exercised by a particular instrument.”

The relevance is that a power of appointment may dictate how the trust fund may be exercised (or disposed of) by a trustee in favour of a range of objects, and should be differentiated from administrative powers that a trustee may possess such as the power to insure, mortgage or invest trust property.

### Mere powers and trust powers when dealing with income or capital

As the trustee of a trust will generally hold a special or hybrid power of appointment (unless it is a trustee of a testamentary discretionary trust), it is important to appreciate that the nature of these powers of appointment can be further categorised as either “mere” (or bare) powers or trust powers.

The difference between the two powers was described by the Right Honourable Sir George Farwell in *A Concise treatise on powers*<sup>7</sup> by referencing Lord Eldon’s judgment in *Brown v Higgs*:<sup>8</sup>

“Where there is a mere power of disposing and it is not executed, the Court cannot execute it; but

wherever a trust is created and the execution of that trust fails by the death of the trustee or by accident, the Court will execute the trust.”

The rationale is that trust powers look to the initial intentions of the settlor, that a class of objects may benefit from the trust, and that the trustee of a trust should be entrusted to distribute the benefits among the said class, subject to the terms of the settlement.<sup>9</sup>

The trustee does not have a discretion whether to exercise the power or not, and must exercise a trust power so as to avoid disappointing the interests of the beneficiaries for whom the trustee holds the trust property.<sup>8</sup>

While neither are mere powers, there is a difference between a “fixed” trust power and a “discretionary” trust power. Beneficiaries of a “fixed” trust power would have an entitlement to a fixed proportion of the trust fund, while a discretionary trust power merely confers on the trustee the discretion as to the proportions of the income or capital of the trust fund that any beneficiary of the discretionary trust power may receive.<sup>10</sup>

Although different, the practical difference between a “mere” discretionary power and a trust discretionary power is minimal, as the objects to both powers:

- (1) only have a “mere expectancy” to receive any of the trust fund<sup>11</sup> and cannot force a trustee to distribute trust funds in their favour, subject to the rule of equity in *Saunders v Vautier*;<sup>12</sup> and
- (2) can only compel the trustee to properly administer the trust (ie right of due administration) as found in the matter of *Gartside v Inland Revenue Commissioners*.<sup>13</sup>

### The tests for mere and trust powers

The rationale for default clauses and the correlation with certainty of objects is to ensure that there is sufficient certainty as to who may benefit (hence, the generally smaller class of ascertainable beneficiaries for default appointment clauses).

This was a result from the historical “list” certainty test that required objects of a power to be ascertainable by listing each beneficiary.

*Re Gulbenkian’s Settlement Trusts*<sup>14</sup> (*Gulbenkian*) and *McPhail v Doulton*<sup>15</sup> (*Re Baden*) changed the required certainty test to one of “criterion” for both “mere” and trust powers, respectively. In other

words, there was certainty of object where it could be determined that an object is within a class as opposed to having to be able to list out all objects of a class. As the judgments in *Re Baden* refer heavily to the rationale in *Gulbenkian*, both cases will be examined.

### “Mere” powers

In the case of *Gulbenkian*, the court considered the relevant powers for a trust established in 1927 by Mr Calouste Sarkis Gulbenkian for the benefit of his son, Nubar Sarkis Gulbenkian.

The question posed to the court was whether the following powers under the trust deed were void for uncertainty:<sup>16</sup>

“2(i) The trustees shall during the life of the said Nubar Sarkis Gulbenkian at their absolute discretion pay all or any part of the income of the property hereby settled and the investments for the time being representing the same (hereinafter called the trust fund) to or apply the same for the maintenance and personal support or benefit of all or any one or more to the exclusion of the other or others of the following persons namely the said Nubar Sarkis Gulbenkian and any wife and his children or remoter issue for the time being in existence whether minors or adults and any persons or persons in whose house or apartments or in whose company or under whose care or control or by or with whom the said Nubar Sarkis Gulbenkian may from time to time be employed or residing and the other persons or person other than the settlor for the time being entitled or interested whether absolutely contingently or otherwise to or in the trust fund under the trusts herein contained to take effect after the death of the said Nubar Sarkis Gulbenkian in such proportions and manner as the trustees shall in their absolute discretion at any time or times think proper.

2(ii) Subject to the discretionary trust or power hereinbefore contained the trustees shall during the life of the said Nubar Sarkis Gulbenkian hold the said income or so much thereof as shall not be paid or applied under such discretionary trust or power upon the trustee and for the purposes for which the said income would for the time being be held if the said Nubar Sarkis Gulbenkian were then dead.”

Importantly, the court noted that cl 2(i) of the trust deed was a mere power and that cl 2(ii) was the trust power for the income of the trust.<sup>17</sup>

In this regard, *Gulbenkian* was a case relating to the certainty of a “mere” power as opposed to a trust power but is still important in determining the relevant test

to apply when considering whether a mere power is void for uncertainty.

It was argued that the power at cl 2(i) would be void for uncertainty if it was not possible to compile a list of the potential beneficiaries at the time when the power failed to be exercised. This followed the reasoning in a recent line of cases at the time, the most prominent being *Inland Revenue Commissioners v Broadway Cottages Trust*<sup>18</sup> (*Broadway Cottages Trust*), which stated that a trust power for income is invalid for certainty (such that a court would not be able to enforce it) “unless the whole range of objects eligible for selection is ascertained or capable of ascertainment”.<sup>19</sup>

This “list certainty” approach was rejected in relation to mere powers in *Gulbenkian* and replaced with the “criterion certainty” approach.

In rejecting the “list certainty” approach, Lord Reid required that it be possible to identify whether a person was or was not “on the facts at a particular time, within one of the classes of beneficiaries”. The failure to be able to reasonably make that identification would mean that the trust power be void for uncertainty. His Lordship’s rationale was on the basis that the court should be able to identify whether a person was within the class of beneficiaries itself.<sup>20</sup>

Similarly, Lord Upjohn (Lords Hodson and Guest concurring) reached the same conclusion, referencing the decision of Justice Lauson in *In re Park*<sup>21</sup> where his Honour held that a mere power of appointment be valid if it could be said with certainty “whether any given individual is or is not a member of the class”.<sup>22</sup>

After reaching his conclusion, Lord Upjohn undertook an analysis of the clause in the context of the settlor’s intention before construing cl 2(i) after the words “the said Nubar Sarkis Gulbenkian and any wife and his children or remoter issue for the time being in existence whether minors or adults” (imperfectly as he admitted, but sufficient for the purposes of the decision) to read as follows:<sup>23</sup>

“... and any person or persons by whom the son may from time to time be employed and any person or persons with whom the son from time to time is residing whether in the house or apartments of such person or persons or whether in the company or under the care or control of such person or persons.”

His Lordship consequently held that the above clause was certain enough for a court to enforce, notwithstanding his noting of ambiguous terms that may cause difficulty in its interpretation. In acknowledging the ambiguity, he commented that “[i]f the trustees feel difficulty or even doubt upon the point the Court of Chancery is available to solve it for them”.

### Trust powers

Prior to *Re Baden*, a line of English cases supported a “list certainty” approach when determining whether a trust power was void for uncertainty.<sup>24</sup>

*Gulbenkian* rejected the “list certainty” test in favour of a criterion certainty for mere powers before *Re Baden* subsequently adopted the criterion certainty test for trust powers.

In a narrow judgment, Lord Wilberforce, with whom Viscount Dilhorne and Lord Reid assented, (Lord Hodson and Lord Guest dissenting) held that the test that applied to mere powers in *Gulbenkian* should apply to trust powers, being that, the trust will be valid if it could be said with certainty that any given individual was or was not a member of the class.

The issue for the court in *Re Baden* related to the establishment of a fund in which the trust powers were argued to be void for uncertainty.

The relevant trust clauses for the court’s consideration were as follows:<sup>25</sup>

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

(b) The trustees shall not be bound to exhaust the income of any year or other period in making such grants as aforesaid and any income not so applied shall be dealt with as provided by clause 6 (a) hereof. [Clause 6. (a) All moneys in the hands of the trustees and not required for the immediate service of the fund may be placed in a deposit or current account with any bank or banking house in the name of the trustees or may be invested as hereinafter provided.]

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

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

In particular, the court unanimously held that cl 9(a) of the trust deed constituted a trust power but disagreed on which test should apply to determine whether the trust power was sufficiently certain.

In his dissenting judgment, Lord Hodson emphasised the difference between a trust and mere power and therefore different treatments that should apply between the two types of powers.<sup>26</sup> That is, the test of certainty for trust powers should remain as decided in *Broadway Cottages Trust*, being the ascertainment of the whole range of objects of the trust, rather than adopting the *Gulbenkian's* argument for trust powers.

In contrast, Lord Wilberforce considered the decision in *Broadway Cottages Trust* but then went on to reject the list certainty approach in favour of the criterion test from *Gulbenkian*.<sup>27</sup>

In reaching their respective opinions, Lords Hodson, Guest and Wilberforce all considered the effect of the test of certainty for trust powers in circumstances when a court would be required to enforce the trust power due to the failure of a trustee to exercise the power. This is notwithstanding reaching different conclusions.

## Enforcement

### English cases

The key difference between a mere power and a trust power in relation to a discretionary power is the ability of a court to enforce the trust power if a trustee fails to exercise their discretion. That is, if a trustee has not exercised their discretion with a trust power, the court must be able

to ascertain how to exercise the trust power with clear certainty.

This was reiterated by the judgments of Lords Hodson, Guest and Wilberforce, and formed the basis of their respective arguments as to what test of certainty should apply for trust powers.

The question was how the court would ascertain the appropriate way to exercise the trust power.

The two views submitted to ascertain whether a trust power has not been exercised were as follows:

- (1) the court must be able to ascertain all of the objects of the power so that it can make an equal distribution to each object of the trust; or
- (2) the court must be able to distribute in accordance with the settlor's intention and is not required to ascertain all of the objects, but rather the objects which the settlor intended to benefit.

Lord Hodson asserted that the court would be unable to exercise any discretion conferred onto the trustee in relation to a distribution of income or capital of the trust fund, and that the exercise of a trust power from a court would be by way of equal division between all of the beneficiaries.<sup>28</sup>

His Lordship supported his argument on the basis that a court does not have the same freedom to exercise its discretion as a trustee and must abide to some principle or rule. The principle in this context is one that equity is equality. Interestingly, his Lordship acknowledged that, where there is guidance to aid the court as to the exercising of the trust power, it may move away from the equal distribution principle.

Lord Guest supported Lord Hodson's reasoning but further commented that any change should come via legislative action and not judicial reform.<sup>29</sup>

In contrast and more influentially, Lord Wilberforce argued against the requirement for a court to exercise a trust power by equal division by referencing the intentions of a settlor. His Lordship questioned whether equal division of the income or capital of a trust would be in line with a settlor's intention on the basis that equal division for trusts with larger classes of beneficiaries would result in nominal benefits being received, despite acknowledging the appropriateness of the principle where there is a limited class of beneficiaries.<sup>30</sup>

Lord Wilberforce then listed various cases where a court executed a trust power disproportionately:<sup>30</sup>

- (1) *Mosely v Mosely*<sup>31</sup> — the court assumed power "... to nominate from the sons of a named person as it should think fit and most worthy and hopefully, the testator's intention being that the estate should not be divided";
- (2) *Clarke v Turner*<sup>32</sup> — on a discretionary trust for relations, the court decreed conveyance to the heir-at-law, judging it "most reputable for the family that the heir-at-law should have it";
- (3) *Warburton v Warburton*<sup>33</sup> — on a discretionary trust to distribute between a number of the testator's children, the House of Lords affirmed a decree of Lord Keeper Wright that the eldest son and heir should have a double share, the court exercising its own discretionary judgment against equal division; and
- (4) *Richardson v Chapman*<sup>34</sup> — there was a discretionary trust of the testator's "options" (namely, rights of named or specified persons, including present and former chaplains and other domestics; also "my worthy friends and acquaintance, particularly the Reverend Dr Richardson of Cambridge". The House of Lords ordered the trustees to present Dr Richardson as the most suitable person.

Of the above cases, Lord Wilberforce commented that "the Court can in a suitable case execute a discretionary trust according to the perceived intention of the truster".<sup>30</sup>

The key aspect of Lord Wilberforce's analysis is that a court will exercise a trust power (when a trustee has failed to exercise it) to reflect the intentions of the settlor, which may range from an equal distribution to disproportional distributions.

### Australian cases

*Re Baden* and *Gulbenkian* were English law cases. Australian courts adopted a similar approach as the English courts prior to *Re Baden* in relation to trust powers. That is, list certainty would be required to have a valid trust power.<sup>35</sup> Since *Re Gillespie*,<sup>36</sup> however, cases suggest that the courts have adopted the criterion certainty approach from *Re Baden*.

This shift in approach first appeared in the dissenting judgments of Brennan,

Dawson and McHugh JJ in *Registrar of the Accident Compensation Tribunal v FCT*.<sup>37</sup>

Although their Honours accepted the view that the failure to exercise a trust power would result in each object obtaining an equal share in the benefit,<sup>38</sup> they recognised other potential avenues that the court may undertake where a trustee failed to exercise a trust power. These included:

- (1) appointing a new trustee; and
- (2) the court determining the appropriate distributions,<sup>38</sup>

which appreciated Lord Wilberforce's comments and approach in *Re Baden*.

The subsequent cases of *Horan v James*,<sup>39</sup> *Re Blyth*<sup>40</sup> and *West v Weston*<sup>41</sup> suggested acceptance of the *Re Baden* principles by state courts, subject to any rejection from the High Court.

Although the issue in *Horan v James* was whether a trust power of appointment of hybrid nature in a will was valid, their Honours commented that the relevant hybrid trust power was not void for uncertainty while applying the criterion certainty test from *Re Baden*.<sup>42</sup> Referring to Mahoney JA's judgment in *Horan v James*, Justice Thomas (in *Re Blyth*) applied the criterion certainty test from *Re Baden* to hold that a special power of appointment in the nature of a trust was sufficiently certain.<sup>43</sup> It is important to note that *Horan v James* and *Re Blyth* dealt with discretionary trust powers and therefore the acceptance of the criterion certainty test from *Re Baden* from English law was of logical sense.

In contrast, the acknowledgment of a modified *Re Baden* test in the case of a fixed trust in *West v Weston* supports the idea that even fixed trust powers may be exercised by courts when all objects are not identifiable. In that case, Justice Young had to consider the validity of a fixed trust where the objects of the trust were consistently increasing as they were being identified. The relevant clause in question was as follows:

"I GIVE to my Trustee the residue of my real and personal estate ... upon the following further trusts ...

(b) To divide the balance then remaining equally (per capita) amongst such of the issue living at my death of my four grandparents, THOMAS CASTLES, MARY CASTLES nee WEBB, JOHN ALBERT COGHLAN and ANNIE COGHLAN nee CARR as attain the age of twenty-one (21) years."

The executor had initially identified 1,385 potential beneficiaries (with the help of a genealogist and historical researcher) before the number of beneficiaries increased to 1,675. The issue was whether the fixed trust established was void for uncertainty — which would have been the case if "list certainty" applied as there may have been additional beneficiaries not yet identified. Justice Young acknowledged that, although *Re Baden* did not relate to the relaxation of list certainty required for fixed trusts, his Honour found it justifiable that there should be some relaxation in relation to list certainty such that:<sup>44</sup>

"The rule [list certainty] will be satisfied if, within a reasonable time after the gift comes into effect, the Court can be satisfied on the balance of probabilities that the substantial majority of the beneficiaries have been ascertained and that no reasonable inquiries could be made which would improve the situation."

Although his Honour relaxed the requirement for certainty in relation to fixed trusts, it should be noted that a fixed trust will still fail if the objects are defined by uncertain concepts (in *West v Weston*, Justice Young was able to quantify the "issue" concept), but that it would not fail simply if there are doubts as to whether an object meets the criteria.<sup>45</sup>

A consistent theme from the Australian cases is that a trust power can be enforced by Australian courts, even where all beneficiaries are unable to be ascertained. In enforcing a trust power, the courts will consider whether replacing the trustee of the trust power is acceptable, as well as other methods in determining the appropriate distribution. That said, while there has been a relaxation in what is required to have certainty of objects for discretionary trusts, trust powers may still fail the criterion certainty test if:

- (1) identifying the beneficiaries is administratively unworkable,<sup>46</sup> or
- (2) the class of beneficiaries has been selected capriciously by the settlor.<sup>47</sup>

### Where does that leave us?

The argument for having a default appointment clause in a discretionary trust is based on the notion that, in relation to a discretionary specific or hybrid power, there is potentially no trust at all. This stems from the fact that a trustee would be able to have the full discretion (subject to the rule in *Saunders v Vautier*) to determine which beneficiaries may be entitled to the trust income or fund, and therefore

none of the objects are truly entitled to the trust fund such that they can force a trustee to make a distribution. In this regard, it is important to note that this argument can be distinguished between the use of a discretionary mere power and a discretionary trust power. That is, does the trustee have the power to make a discretionary distribution to a class of objects or is the trustee obliged to make a distribution with the discretion to select the intended beneficiary within a class of objects?

In the case of a mere discretionary power, no beneficiary from the class of objects would be able to force the trustee to make the distribution, nor would a court as the power would be a "mere" power. In this situation, the income or capital of a trust fund would be at risk of falling on a resulting trust for the benefit of the settlor as there was no trust at all, since there would have only been a "mere" power to deal with the income or capital.

Although the use of a default appointment clause in this situation ensures that the failure to exercise the "mere" power would result in the income or capital of the trust automatically falling on trust for the default income or capital beneficiaries, it could equally be addressed by the trust deed providing for the power to be a trust discretionary power.

A historical case which highlights the effect of a trust power over a mere power is *In re Park*,<sup>48</sup> which was relied on by the court in *Gulbenkian*. In that case, a testator gave his residuary estate to his trustees on trust to:<sup>49</sup>

"... pay the income thereof to any person, 'other than herself,' or persons or charitable institution or institutions, and in such shares and proportions as his sister, J.A., should from time to time during her lifetime direct in writing, and from and after her decease in trust as to both capital and income for the Imperial Merchant Service Guild for the benefit of their stress fund absolutely."

The "mere" discretionary power in this case was with the deceased's sister, Jane Armstrong, to distribute as she may dictate. The default appointment clause, and trust power in this case, was for the benefit of the Imperial Merchant Service Guild if Jane Armstrong did not exercise her discretion or if she had passed away. This was noted by Justice Clauson as if "there was no such direction [from Jane Armstrong] the charitable gift to the stress fund of the Imperial Merchant Service Guild will

operate".<sup>50</sup> Other than the gift over in favour of the Imperial Merchant Service Guild, it would have been with great difficulty for a court to ascertain the settlor's intentions and who could have benefited if Jane Armstrong had not turned her mind to the exercise. A contrary finding may have resulted if the author of the clause had provided a class of beneficiaries from which Jane was to choose.

### The case against default appointment clauses

In contrast, where there is a valid trust discretionary power in place, it is unnecessary to have a default appointment clause. This follows the underlying reasoning of Lord Wilberforce in *Re Baden*, being the notion that a court will endeavour to execute the intentions of a settlor.<sup>51</sup> That is, with a valid trust power, a court will be able to execute the intentions of a settlor and there would be no risk of a resulting trust arising in favour of the settlor and there would be no need to have a default appointment clause.

In the absence of a default clause, assistance could be provided to a court when drafting a trust deed by any of the following:

- (1) suggestions that particular beneficiaries are intended to be the primary receivers of the trust income or capital;
- (2) clauses which a court or a trustee should consider before exercising the trust power for the benefit of the beneficiaries;
- (3) in conjunction with the above, references of the settlor's intention on how the trust discretionary power is to be exercised; and
- (4) suggestions as to what happens with particular trust property if a trust power is not exercised (ie whether it is accumulated to form part of another trust in the trust deed).

It is therefore important to consider the interpretation of a trust deed as a whole; as long as a court is able to interpret the trust deed and ensure that the trust power is exercised, then there is no need to have a default appointment clause in the deed.

### Conclusion

Previous cases were born from drafting and language that are comparatively ambiguous and improperly conceived compared to modern day drafting, so a settlor's intentions are likely to be more

easily ascertained under a modern deed. Therefore, default appointments are unlikely to be necessary provided the ultimate objective is clear and defined.

**John Ioannou, CTA**  
Partner  
McCullough Robertson Lawyers

**Darius Hii**  
Lawyer  
McCullough Robertson Lawyers

#### Acknowledgment

This article has been based on material prepared by a number of the partners and staff at McCullough Robertson Lawyers.

#### References

- 1 *Knight v Knight* (1840) 3 Beav 148 at 160.
- 2 *In Re Sayer* [1957] Ch 423 at 436.
- 3 S 102 of the *Income Tax Assessment Act 1936* (Cth).
- 4 S 8 of the *Perpetuities Act 1984* (NSW); s 8(1) of the *Perpetuities and Accumulations Act 1985* (ACT); s 187 of the *Law of Property Act 2000* (NT), s 209 of the *Property Law Act 1974* (Qld); s 6 of the *Perpetuities and Accumulations Act 1992* (Tas); s 5 of the *Perpetuities and Accumulations Act 1968* (Vic); and s 101 of the *Property Law Act 1969* (WA). That said, the respective state legislation provides for a "wait-and see" rule should there be no default capital clause and the capital beneficiaries are uncertain. S 9 of the *Perpetuities Act 1984* (NSW); s 9 of the *Perpetuities and Accumulations Act 1985* (ACT); s 190 of the *Law of Property Act 2000* (NT); s 210 of the *Property Law Act 1974* (Qld); s 9 of the *Perpetuities and Accumulations Act 1992* (Tas); s 6 of the *Perpetuities and Accumulations Act 1968* (Vic); and s 103 of the *Property Law Act 1969* (WA). South Australia is the only state where the perpetuity period has been abolished.
- 5 *Tatham v Huxtable* (1950) 81 CLR 639, and *Horan v James* (1982) 2 NSWLR 376, but note that some Australian jurisdictions have overcome this restriction.
- 6 *Freme v Clement* (1881) 18 Ch D 499 at 504.
- 7 Farwell, CJW, assisted by Archer, FK, *A concise treatise on powers*, Stevens & Sons, 3rd ed, 1916.
- 8 *Brown v Higgs* (1803) 8 Ves Jr 561.
- 9 *Re Weekes' Settlement* [1897] 1 Ch 289.
- 10 *Gartside v Inland Revenue Commissioners* [1986] AC 553 at 606.
- 11 *Pearson v Inland Revenue Commissioner* [1981] AC 753.
- 12 *Saunders v Vautier* [1841] EWHC Ch J82.
- 13 [1986] AC 553. In *Gartside*, the court held that: "... [n]o object of a discretionary trust has, as such, any legal right to or in the capital. His sole interest, if it be an 'interest' within the scope of these provisions is with regard to the income: he can require the trustees to exercise, in bona fide, their discretion as to how it shall be distributed, and he can take and enjoy whatever part of the income the trustees choose to give him. I cannot see any ground for holding that he can have any 'interest' in the capital if he has no interest in the income."
- 14 *Gulbenkian's Settlement Trusts* [1970] AC 508.
- 15 *McPhail v Doulton* [1971] AC 424.
- 16 [1970] AC 508 at 520.
- 17 [1970] AC 508 at 521.
- 18 [1955] Ch 20.
- 19 [1955] Ch 20 at 35 and 36.
- 20 [1970] AC 508 at 518.

- 21 [1932] 1 Ch 580.
- 22 [1970] AC 508 at 521.
- 23 [1970] AC 508 at 522.
- 24 [1995] Ch 20.
- 25 [1971] AC 424 at 428.
- 26 [1971] AC 424 at 442.
- 27 [1971] AC 424 at 456.
- 28 [1971] AC 424 at 442 and 443.
- 29 [1971] AC 424 at 446.
- 30 [1971] AC 424 at 451.
- 31 (1673) Fin 53.
- 32 (1694) FreeCh 198.
- 33 (1702) 4 BroPC 1, HL(E).
- 34 (1760) 7 BroPC 318, HL(E).
- 35 *Re Gillespie (dec'd)* [1965] VR 402.
- 36 [1965] VR 402.
- 37 [1993] HCA 1.
- 38 [1993] HCA 1 at 14.
- 39 (1982) 2 NSWLR 376.
- 40 (1997) 2 Qd R 567.
- 41 (1998) 44 NSWLR 657.
- 42 (1982) 2 NSWLR 376 at 382.
- 43 (1997) 2 Qd R 567 at 576.
- 44 (1998) 44 NSWLR 657 at 664.
- 45 Creighton, P, "The certainty of objects of trusts and powers: the impact of *McPhail v Doulton* in Australia", (2000) 22(1) *Syd LR* 93 at p 98.
- 46 [1971] AC 424 per Wilberforce J where the beneficiaries do not constitute a coherent class, and *R v District Auditor; Ex parte West Yorkshire Metropolitan County Council* [1986] RVR 24 where the beneficiaries are too numerous to have their claims properly considered.
- 47 Creighton, P, *ibid* note 45, at 104.
- 48 *In Re Park; Public Trustee v Armstrong* [1932] 1 Ch 580.
- 49 [1932] 1 Ch 580 at 580.
- 50 [1932] 1 Ch 580 at 583.
- 51 [1971] AC 424.