

Certainty of beneficiaries in Jersey and the First Principles of Trust Law

“Underlying and underpinning the trust obligation is the fundamental principle that just as a car needs an engine, so a trust needs an enforcer”.¹

Introduction and abstract

A fairly recent decision of the Jersey Royal Court² involving the rules for validity of trusts reveals a need to clarify the scope and application of the provisions for identification of beneficiaries. This is an area where there is little case law to go on.³ The way in which the Royal Court understands and applies Articles 10 and 11 of the Trusts (Jersey) Law 1984 will define whether Jersey is seen internationally as overly restrictive in the recognition of trusts. Indeed, following *Re Representation AIB Jersey Trust Ltd, the Exeter Settlement*,⁴ academic commentary suggests that Jersey may be adopting a more restrictive approach to validity than that seen, for example, in English law.⁵ This may have a negative impact on the number of settlors who set up trusts in Jersey.⁶ Indeed, the Jersey Law Commission are conscious that “Jersey trust law [offers] the advantages to settlors afforded by other jurisdictions”.⁷ Therefore, this article will examine the reasoning of the Royal Court in *Exeter*, and the first principles that underpin Articles 10 and 11, in order to determine whether Jersey law in fact takes a more restrictive approach to the validity of trusts than that taken by English law.⁸

In the second part of this article, I will consider black hole trusts generally, the style of trust used in the *Exeter* case, focussing on the extent to which such trusts possess the necessary legal characteristic of *enforceability* by the beneficiaries.⁹ Without this element, they are mere technical devices and not trusts at all. Black hole trusts are used throughout the offshore financial industry.¹⁰ Although they can attract rogues, there are situations in which they provide a legitimate benefit to settlors.¹¹ As the Jersey Law Commission observes, the law should not facilitate “the instigation of trusts which are merely devices, or which cannot be

¹ D.Hayton, “Developing the obligation characteristic of the trust” (2001) 117 *Law Quarterly Review* 96, p.100.

² *Re Representation AIB Jersey Trust Ltd, the Exeter Settlement*, 2010 JLR 169.

³ For a recent case see *Harper v Apex Trust Company Ltd* [2014] JRC 253 (the trust here was held void for uncertainty).

⁴ 2010 JLR 169, referred to hereafter as *The Exeter Settlement* or *Exeter*.

⁵ P.Fudakowska (2010) 14 JGLR 331, para.25.

⁶ Fudakowska, above, paras 25-26, although this observation was made as a joint comment on *The Exeter Settlement* and *Re the “A” Employees Shares Trust* [2010] JRC 013.

⁷ Jersey Law Commission, *The Rights of Beneficiaries to Information Regarding a Trust* (Consultation Paper No.1 February 1998), para.2.1, in the context of allowing settlor restrictions in access to trust information.

⁸ Whilst Jersey trust law is not bound to follow English trust law, particularly where questions of policy differ: *Re B* [2012] JRC 229, as stated in *Re Esteem Settlement* [2012] JRC 229, “a Jersey trust is essentially the same animal as is found in English law, subject to certain local modifications”. Therefore, Jersey often adopts the features of English trust law. See The Jersey Institute of Law, *Trusts Law Study Guide 2014-15*, pp.12-13.

⁹ D.Hayton, “The Irreducible Core Content of Trusteeship” in *Trends in Contemporary Trust Law* (1996, A.J.Oakley ed., Clarendon Press, Oxford), p.47.

¹⁰ See for example, Hon Mr Justice David Hayton, Caribbean Court of Justice, “The Future of the Anglo-Saxon Trust in the Age of Transparency”, Paper for the STEP Caribbean Conference 2015, May 4, 2015, accessed 26 June 2015; P.Matthews, “The black hole trust – uses, abuses and possible reforms: Part 1” (2002) *Private Client Business* 42, (“The black hole trust 1”); “The black hole trust – uses, abuses and possible reforms: Part 2” [2002] *Private Client Business* 103 (“The black hole trust 2”).

¹¹ P.Matthews, *The black hole trust 1 and 2*. In Part 2 Matthews proposes certain reforms to help prevent the use of these trusts as shams or pure nomineeships.

effectively enforced”.¹² The Island has a commitment to integrity in its trust law and seeks to ensure that Jersey trusts are practically enforceable by the beneficiaries. Therefore, one should locate the minimum level at which trustees should be required to account to the beneficiaries under the trust, and this accountability should be a practical reality and fully realisable.¹³ This article considers whether black hole trusts bear this core legal characteristic of enforceability and accountability.¹⁴

A. *The Exeter Settlement*

i) Black hole trusts

To analyse the basis of the decision in *The Exeter Settlement*, it is firstly necessary to consider some background on the structure of black hole trusts. Black hole trusts have certain characteristic elements: There are initially no named primary beneficiaries, or fewer than intended by the settlor. Trustees are given a wide power of addition.¹⁵ The power to add and delete beneficiaries from the class of potential objects of a discretionary trust originated from the need to obtain “maximum flexibility” in, for example, tax planning strategies.¹⁶ At the time of the set-up of the trust, the settlor names an ultimate default beneficiary, usually a charity such as the Red Cross, hence the alternative name of such trusts Red Cross Trusts.¹⁷ The default beneficiaries, the charities, are not usually intended to benefit, or, if they are, it is only as a last resort.¹⁸ In *Re TR Technology Investment Trust plc*.¹⁹ Hoffman J. commented on the nature of black hole trusts:

“Sometimes the trustee will be given a ‘letter of wishes’ by the real settlor saying whom he wishes to benefit. Sometimes the real beneficiary, who may be the real settlor himself, will remain a matter of oral understanding between him and the trustee.”

¹² Jersey Law Commission, above, para.6.5, in a different context, commenting on whether a restriction on information rights would “be appropriate to the standing of Jersey as a responsible and sophisticated finance centre”.

¹³ As the Jersey Law Commission observes, “[i]t is essential that the trust remains pragmatically enforceable by the beneficiaries”: *The Rights of Beneficiaries to Information Regarding a Trust* (Consultation Paper No.1 February 1998), para.6.4, in considering whether to allow settlor restrictions on access to trust information.

¹⁴ Jersey Law Commission, *The Rights of Beneficiaries to Information Regarding a Trust* (Consultation Paper No.1 February 1998), para.2.2. The Commission observes: “[W]e believe that the principle of accountability is... central to any reputable trust jurisdiction”, para. 6.3.

¹⁵ Hon Mr Justice David Hayton, Caribbean Court of Justice, “The Future of the Anglo-Saxon Trust in the Age of Transparency”, Paper for the STEP Caribbean Conference 2015, May 4, 2015, accessed 26 June 2015.

¹⁶ The considerably more lenient certainty of object test in *McPhail v Doulton* [1971] AC 424 enabled the furtherance of these aims. Donovan Waters, “The Protector: New Wine in Old Bottles” in *Trends in Contemporary Trust Law* (1996, A.J.Oakley ed., Clarendon Press, Oxford, p.73.

¹⁷ Jersey Institute of Law, *Trusts Law Study Guide*, 2014-15; also, P.Matthews, “The black hole trust 1”, p.43.

¹⁸ *Re Gea Settlement* (1992) 13 TLI 188, cited Matthews, “The black hole trust 1”, p.48: Tomes, Deputy Bailiff, observes that “[I]n practice, the charities will receive nothing, because letters of wishes referred to hereafter will be implemented by the trustees for the time being and will dispose of the whole of the trust fund.” In *The Exeter Settlement* itself the default charity beneficiary (the RNLI) was only intended to benefit as a last resort.

¹⁹ [1988] BCLC 256, cited Matthews, “The black hole trust 1”, pp.45-46.

This structure gives the trust an extra layer of secrecy.²⁰ It limits the information given both about, and to, trust beneficiaries. Until someone is actually appointed into the class there is no legal record as to their existence as a beneficiary.²¹ Further, only *beneficiaries* are prima facie entitled to information about trust accounts under Article 29 of the Trusts (Jersey) Law 1984. A person does not fulfil the Article 1 definition of “beneficiary” by being mentioned in the settlor’s letter of wishes.²² Black hole trusts are vulnerable to misuse for tax evasion and money laundering. They may be shams disguising pure nominee trusts.²³ However, a settlor may have genuine reasons for desiring an extra layer of secrecy,²⁴ for example, in the context of legitimate asset protection,²⁵ or “to provide for persons who he did not judge capable of handling the knowledge of their position – or who might, in his view, abuse it”.²⁶

ii) The Exeter Settlement: outline of facts and judgment

The settlor executed a discretionary trust in 1983. The schedule of primary beneficiaries was left blank initially, and the trustees were given a power to add to this class.²⁷ The ultimate default beneficiary was intended to be the RNLI. However, due to an error, the charity was never added to the trust instrument. In 1984 the trustees exercised their power to add to the class of beneficiaries. The error went unnoticed for many years, at which point the trustees brought this application for rectification of the trust. The Royal Court approved the application and added the RNLI as default beneficiary.²⁸ However, before doing so, it considered whether the trust, without the addition of the default charity, was void for uncertainty.

It is axiomatic that a trust must possess certainty as to the settlor’s intention to create a trust, the property that is to be subject to the trust, and the objects/beneficiaries who are to benefit.²⁹ In Jersey law, these three certainties are represented in Articles 10 and 11 of the Trusts (Jersey) Law 1984. Article 11(2)(b)(iii) provides that the court can declare a trust invalid if its terms are “so uncertain that its performance is rendered impossible”.³⁰ Article 10(1) enacts an additional requirement for certainty of beneficiaries: A beneficiary must be identifiable by name or ascertainable by reference to a class or a relationship to some person. Although these provisions were enacted after the creation of the trust in *Exeter*, not much appeared to turn on this. Clearly the main issue in *Exeter* was certainty of beneficiaries. With the omission of the default charity, and with no-one in the class of primary beneficiaries at the time of the set-up of

²⁰ “These trusts therefore reveal very little and depend upon the trust and confidence reposed in the trustee”: *Re TR Technology Investment Trust plc*. [1988] BCLC 256, per Hoffman J.

²¹ Matthews, “The black hole trust 1”, p.45.

²² *West v Lazard Bros & Co (Jersey) Ltd*. 1987-88 JLR N-22a.

²³ Matthews, The black hole trust 2 [2002] PCB 103, p.106, who suggested a useful reform to eliminate this possibility.

²⁴ Matthews, “The black hole trust 2”, p.103; also by the same author: “The New Trust: Obligations without Rights?” in *Trends in Contemporary Trust Law* (1996, A.J.Oakley ed., Clarendon Press, Oxford), p.28.

²⁵ Matthews, “The black hole trust 1”, p.47.

²⁶ *Ibid*.

²⁷ The power of addition in *The Exeter Settlement* was an intermediate power, i.e. exercisable in favour of the whole world except certain excluded individuals: para.22; for similar in English law see *In Re Manisty's Settlement* [1974] Ch. 17.

²⁸ All parties had proceeded in good faith, there was a genuine mistake so that the document failed to carry out the parties’ true intentions, there was full and frank disclosure, and there was no other remedy available except rectification: [2010] JLR 169, para.37. For this test for rectification: *Re Sesemann* 2005 JLR 421.

²⁹ *Knight v Knight* (1840) 3 Beav. 148 pp.172-3, confirmed as part of Jersey law in *Exeter*.

³⁰ For recent application of this provision see the decision of the Royal Court in *Harper v Apex Trust Company Ltd* [2014] JRC 253, which considered *The Exeter Settlement*.

the trust, the trust had no named beneficiaries at the relevant time.³¹ The Royal Court accepted the relevant legal test for certainty of object in discretionary trusts was that laid down by the English House of Lords in *McPhail v Doulton*. According to this test, it was not necessary to be able to identify every member of the class of objects. The trust is valid “if it can be said with certainty whether any given individual is or is not a member of the class and does not fail simply because it is impossible to ascertain every member of the class”.³² What is required here therefore, is *conceptual certainty* within the settlor’s description of the beneficiaries, for example, “employees of Leicester Law School” or “members of the Derby Concert Orchestra”.³³ The advocate for the trustees argued that the *Exeter* trust did not fail for uncertainty of object.³⁴ Even though there were no named beneficiaries in the class, the trustee had a power to add to the class. This provided sufficient conceptual identification of beneficiaries to validate the whole trust, i.e. it could be said of anyone in the world whether they did or did not fall within the class of beneficiaries: Just look at whether the trustee had exercised the power or not. This argument relied on the Isle of Man case of *Rawcliffe v Steele*.³⁵ This similar fact case held that there was no conceptual uncertainty in the class of potential objects of the power of addition (“individuals not resident in the Isle of Man”), and there was no uncertainty about the process of appointing from that class into a smaller class of beneficiaries: a “sub-class” of beneficiaries from the wider class under the power of addition.

iii) The Royal Court’s reasoning and academic commentary

The Royal Court in *The Exeter Settlement*³⁶ rejected this argument and held that the trust had been void from the outset. It declined to follow *Rawcliffe v Steele* on the basis that the certainty requirements must apply and be effective separately in relation to the class of *actual beneficiaries under the trust*. Identifying certainty of beneficiaries under a trust, and identifying a class of potential objects under a power of addition, must be dealt with entirely separately. The reasoning of the Royal Court suggests that each has a logically distinct function in respect of the validity of a trust, and furthermore, that there are important reasons for keeping them distinct:³⁷ “[T]hey are not a sub-class of beneficiary, they are only beneficiaries. There is no wider class of beneficiary which includes persons who are the object of the power of addition”.³⁸ Birt, then Bailiff, reasoned as follows:³⁹

³¹ The time for assessing whether a trust certain in its objects is the time of the set-up of the trust. *Re Gulbenkian* [1970] AC 508, p.524 emphasised this point in relation to powers of appointment, which attract the same test for certainty of object as discretionary trusts.

³² [1971] AC 424, p.450, per Lord Wilberforce. The test originated as the certainty test for powers of appointment in *Re Gulbenkian’s Settlement* [1970] AC 508. In holding that this was the relevant test to determine certainty of object in discretionary trusts, Lord Wilberforce in *McPhail* overrules the case of *IRC v Broadway Cottages Trust*, which required the ability to compile a complete list of beneficiaries, i.e. the ascertainment of every member of the class.

³³ It is necessary to identify every member of the class of beneficiaries where the settlor intends equal distribution in default, in which case the trustees must be able to compile a complete list of all beneficiaries before the trust is valid. For example, *Burrough v Philcox* (1840) 5 My & CR 72, 5 Jur 453, 48 RR 236, in which case the *IRC v Broadway Cottages* test would apply: C.T.Emery (1982) 98 LQR 551.

³⁴ It was also argued that even if it did, the trustees’ exercise of the power of addition in 1984 validated the trust, but these arguments will not be considered in this article as they fall outside its scope.

³⁵ 1993-95 MLR 426.

³⁶ Comprising Birt (then Bailiff) and de Veulle and Tibbo (Jurats).

³⁷ *The Exeter Settlement* paras 26-28. We will explore these reasons below in order to see whether such a distinction is necessary, or whether *Rawcliffe v Steele* 1993-95 MLR 426 could have been followed.

³⁸ Para.28.

“In our judgment, one must return to first principles. A beneficiary of a discretionary trust is a person in whose favour a discretion to distribute income or capital of a trust may be exercised. Trustees may only exercise their power to distribute income or capital in favour of a person who is a beneficiary. It is the beneficiaries who are the objects of the discretionary trust. They must be sufficiently certain to satisfy the requirement as to certainty of objects... A power to add beneficiaries is something completely different. It means what it says. A person who is a possible object of a power to add beneficiaries is not in fact a beneficiary unless or until the power is exercised in his favour and he is added as a beneficiary. Until that moment, the trustees may not apply income or capital for his benefit and he does not have any of the rights attached to being a beneficiary of the trust. The sole right that he has is as a possible object of the power to add beneficiaries”.

Applying *McPhail v Doulton*,⁴⁰ Bailiff Birt considered it to be an obvious case of failure of a trust for uncertainty of beneficiaries. The schedule of beneficiaries and the schedule naming the default beneficiary were both left blank.

“It would be impossible to say in the case of any given person whether or not he was a beneficiary because there was simply no list or guidance as to what constituted a beneficiary.”

“It was therefore impossible for the trustees or the court to ascertain whether or not any particular person was a beneficiary of the trust, which is the accepted test for establishing the necessary certainty of objects.”⁴¹

It is submitted that there are two aspects to this reasoning, both of which can be analysed on the basis of the first principles of trust law: Firstly, the role of a beneficiary, exercising his or her rights *qua beneficiary*, has an essential importance within the validity of a trust. A potential object of a power of addition cannot perform the same function. Secondly, the application of the certainty of object test in *McPhail v Doulton*⁴² and consequent failure of the trust. However, it was somewhat unfortunate that both were elided into the heading “certainty of object”.

The decision of the Royal Court in *The Exeter Settlement* has attracted academic hostility.⁴³ This may be a result of the fact that black hole trusts are, in practice, administratively workable without reference to the default charity.⁴⁴ Indeed, it is intuitively unsatisfactory that a peripheral aspect of the trust should be capable of having such a devastating impact on its validity. One would expect the formal requirements for the creation of trusts to align with the reality of their administration. After all, the principal policy behind the three certainties is to assist the trustees in the performance of their duties.⁴⁵ Academic commentary on *Exeter* focussed on the application of the *McPhail v Doulton* test, arguing that the Royal Court had applied the test too restrictively. It *could* be said with certainty that no one in the world was in the class until the trustees exercised their power to add beneficiaries, and once the trustees added beneficiaries to the class, it could be said with certainty who *did* fall within the class.⁴⁶

³⁹ Paras 29-30.

⁴⁰ [1971] AC 424.

⁴¹ 2010 JLR 169, para.17. The “accepted test” referred to was *McPhail v Doulton*, identified above.

⁴² [1971] AC 424.

⁴³ P.Fudakowska, “No beneficiaries, no Trust?” (2010) 14 JGLR 331; Jersey Institute of Law, *Trust Law Study Guide* (2014-15), para. 2.52.

⁴⁴ See the observations of Hoffmann J in *Re TR Technology Investment Trust plc*. [1988] BCLC 256 (quoted above).

⁴⁵ Hanbury and Martin, *Modern Equity* (18th ed., Jill E. Martin, 2009, Sweet & Maxwell).

⁴⁶ P.Fudakowska (2010) 14 JGLR 331; Institute of Law, *Trusts Law Study Guide* (2014).

Beneficiaries have either been appointed or they have not and therefore the existence of the power of addition provided sufficient conceptual certainty.⁴⁷ When considered alongside the first principles of the validity rules, these academic criticisms are very plausible. However, it will also be shown that they are incomplete and, ultimately, inaccurate.

B. Returning to first principles⁴⁸

i) Certainty of object

If black hole trusts, such as that in *The Exeter Settlement*, are recognised as part of the offshore financial services provided to settlors, then their validity should be analysed squarely in accordance with the first principles of trust law, just as the Royal Court sought to do in *The Exeter Settlement*. To rest the validity of the trust on the identification of the default charity, whose role in the trust is peripheral at best and whose only chance of benefiting is extremely remote, could make the trust look like a device. This is not a desirable reproach for any system of trust law.⁴⁹

The first principle of the certainty of object test is to provide sufficient definition to enable the trustees to perform their obligations,⁵⁰ and to ensure that the court has enough information about the objects of the settlor's bounty to execute the trust in default by the trustees.⁵¹ The latter principle is now more flexible in relation to discretionary trusts, following *McPhail v Doulton*. Unless the beneficiaries are sufficiently defined "the court can neither reform maladministration, nor direct a due administration."⁵² In short, as Lord Wilberforce observed in *McPhail v Doulton*,⁵³ "the test of validity is whether the trust can be executed by the court". According to Lord Wilberforce, the court could execute a discretionary trust by removing a

⁴⁷ Jersey Institute of Law, *Trust Law Study Guide 2014-15*, para.2.53-4; P.Fudakowska, above, paras 10-11. To deal with a peripheral aspect of this argument, Fudakowska refers to the part of Bailiff Birt's reasoning (identified in the first quote at note 40 above), describing the lack of a "list or guidance" within the trust documents as to what constitutes a beneficiary. She argues that this led to an overly restrictive view of the validity requirements, and should not have led to the trust being declared void. She observes that "[t]here is no need for a comprehensive list to be drawn up, as confirmed by the House of Lords in *McPhail v Doulton*." Above, paras 10-11: "[t]his statement confuses the concept of certainty of objects with evidence". This criticism refers to the fact that *McPhail v Doulton* had overruled *IRC v Broadway Cottages Trust* [1955] Ch.20, which required that every single member of the class of beneficiaries of a discretionary trust should be identified. Following *McPhail*, it was no longer necessary to compile a complete list of beneficiaries. However, the wording of the Royal Court ("as to what") suggests that Bailiff Birt's observations should not be construed as a misapplication of the certainty test. Instead, the observations remain directed at the requirement that it should be possible to say of any *hypothetical* individual that he is or is not a beneficiary. It would not be possible to do this where there is no class description at all, without some form of list or guidance to assist the trustees in their execution of the trust. The choice of wording was, perhaps, a little unfortunate.

⁴⁸ The Royal Court had expressed a desire to "return to first principles": *The Exeter Settlement*, para.29.

⁴⁹ Jersey Law Commission, *The Rights of Beneficiaries to Information Regarding a Trust* (Consultation Paper No.1 February 1998), para.6.5, commenting in the context of information rights.

⁵⁰ Hanbury and Martin, *Modern Equity* (above).

⁵¹ "As it is a maxim, that the execution of a trust shall be under the control of the court, it must be of such a nature, that it can be under that control; so that the administration of it can be reviewed by the court": *Morice v Bishop of Durham* (1805) 10 Ves 522, p.539, per Lord Eldon, quoted in E.H.Burn and G.J.Virgo, *Maudsley & Burn's Trusts & Trustees Cases and materials* (2008), 7th ed., p.361; C.T.Emery (1982) 98 LQR 551.

⁵² *Ibid.*

⁵³ [1971] AC 424, p.451. Lord Wilberforce gave the leading judgment for the majority.

trustee and appointing a new one, or by approving or directing a scheme of distribution.⁵⁴ In order to exercise its supervisory jurisdiction over trusts, the description of beneficiaries under the trust must therefore provide sufficient yardstick for the court to ascertain whether the trustee's action, or proposed action, is reasonable.⁵⁵ In terms of the trustees' ability to undertake their duties as discretionary trustees, the reason for requiring conceptual certainty is to provide discretionary trustees with sufficient information about the field of potential objects, so that the trustee can examine that field and reach a considered and reasonable decision as to the distribution of the trust assets.⁵⁶ The terms must bring such clarity to the object of the trust, as to enable the trustee to make diligent inquiries and select "according to [the] needs or qualifications" of the beneficiaries.⁵⁷

As to whether the Royal Court could have accepted the less restrictive application of the *McPhail v Doulton* test,⁵⁸ a blank schedule on its own and with little other evidence on the face of the document, clearly does not enable the trustees to make selections of beneficiaries diligently and reasonably. However, such trusts appear to be administered along similar lines to those suggested in the English High Court by Templeman J. in *Re Manisty's Settlement*,⁵⁹ where a level of practical clarity *is* obtained despite the lack of information to be derived from the document conferring the power. The case concerned an intermediate power of appointment,⁶⁰ where the duty to consider appropriately is owed to the ultimate default beneficiary.⁶¹ Such powers are very wide and often do not indicate on the face of the

⁵⁴ [1971] AC 424, p.457, per Lord Wilberforce, citing *Brunsdon v Woolredge* (1765) 1 Amb. 507; *Supple v Lowson* (1773) 2 Amb. 729; *Liley v Hey* (1842) 1 Hare 580 and *Lewin on Trusts*, 16th ed. (1964), p.630 for the proposition that there was no reason why this could not apply to discretionary trusts. Although Lord Hodson dissented on this point, amongst others, it being "the very thing which the court cannot do": p.443.

⁵⁵ *Re S Settlement* [2001] JRC 154; *S v Bedell Cristin Trustees Ltd* [2005] JRC 109, where the Jersey Royal Court considered the exercise, or rather the non-exercise, of a dispositive discretion on an application under Article 51 of the Trusts (Jersey) Law 1984, in terms of whether it was a decision that a reasonable trustee could have arrived at. The court will not substitute its own discretion for that of the trustee. (Although there have been recent statements from the Jersey Royal Court that the court could reserve its discretion for cases involving trustees' decisions relating to disclosure or non-disclosure of trust information: *In the Matter of the Y Trust, E Trust Company Ltd v B, C, and D* 2014(1) JLR 199).

⁵⁶ *Re Gulbenkian's Settlement* [1970] AC 508, p.524. This case involved the execution of a power of appointment.

⁵⁷ *McPhail v Doulton* [1971] AC 424, p.449. The fact that objects of a discretionary trust can compel a distribution, even though not necessarily to them, strengthens the obligation to consider the class diligently, and a greater degree of certainty is therefore required: See for example, Lord Wilberforce's observations in *McPhail v Doulton*, above, pp.453, 457-458. Discretionary trusts "will attract the more exacting and demanding court order": Donovan Waters, "The Protector: New Wine in Old Bottles" in *Trends in Contemporary Trust Law* (1996, A.J.Oakley ed., Clarendon Press, Oxford), p.83.

⁵⁸ i.e. that the trust was valid because it could be said with certainty who was or was not in the class by reference to the time at which the trustees exercised their power of addition to the class.

⁵⁹ [1974] Ch. 17. The case concerned an intermediate power of addition.

⁶⁰ This is where a trustee has a power to appoint to anyone except certain individuals, e.g. "residents of the Isle of Man: e.g. *Rawcliffe v Steele* 1993-95 MLR 426.

⁶¹ This is not to suggest that there are not obvious differences. Objects of a discretionary trust have rights of enforcement and concomitant rights to trust information due to their status as a beneficiary (see below). Nevertheless, in terms of the breadth of the class, little should turn on the distinction in terms of certainty of object apart from this, provided that the trustees can perform their duties and the court can execute the trust. The doctrine of administrative unworkability applies to discretionary trusts not powers, and a broad class of objects such as that in *Re Manisty's Settlement* would be void as a discretionary trust on this basis: *R v District Auditor, ex p West Yorkshire Metropolitan County Council* [1986] RVR 24 (QB); McKay, "*Re Baden and the Third Class of Uncertainty*" [1974] Conv. 269.

instrument what the intentions of the settlor were or, indeed, how the trustee should exercise the power.⁶² Yet the power is not void for uncertainty:

“[R]easonable trustees will endeavour, no doubt, to give effect to the intention of the settlor in making the settlement and will derive that intention not from the terms of the power necessarily or exclusively, but from all the terms of the settlement, the surrounding circumstances and their individual knowledge acquired or inherited.”⁶³

The power could be controlled by the court, by removing the trustees, or by an order requiring the trustees to consider exercising the power.⁶⁴

It is at least arguable that, in reference to Templeman J.’s approach, the Royal Court in the *Exeter* case could have accepted the broad application of the *McPhail v Doulton* test, articulated by the academic commentary and implicitly by the advocate for the trustee.⁶⁵ Provided that the administration of the trust could be controlled by the court, there is nothing else in *McPhail v Doulton* to suggest that there had to be any primary beneficiaries in the class initially. The “is or is not” test was aimed solely at ensuring the proper administration and court execution of the trust, although against the background of cases where settlors might use hopelessly unclear descriptions which defied rational construction on ordinary principles for the construing of documents.⁶⁶ By analogy, Lord Wilberforce did not put any limits on the breadth of classes for discretionary trusts, save for one: The identified objects under a discretionary trust must also amount to “something like a class”. The reason was so that the trust can still be practically administered by the trustees, in accordance with their higher duties, and can still be executed by the court in default by the trustee.⁶⁷ A trust is void if it is “one that cannot be executed”.⁶⁸ Applying this to the *Exeter* trust, although a trustee of a discretionary trust is under stricter duties than those applicable to the donee of a power of appointment, i.e. they must undertake more diligent inquiries before selecting objects of the settlor’s bounty,⁶⁹ from the clear evidence of the settlor’s intentions in *Exeter*,⁷⁰ the trust was practically administrable in accordance with the trustee’s fiduciary duty of good faith. The trustee was able to examine the field of potential beneficiaries, against the known intentions of the settlor,

⁶² Per Templeman J. *Re Manisty’s Settlement* [1974] Ch. 17, p.26.

⁶³ *Re Manisty’s Settlement* [1974] Ch.17 was held in *The Exeter Settlement* to be accepted in Jersey law: Bailiff Birt accepted the case of *Re Manisty’s Settlement* as showing that an intermediate power of appointment was also valid in Jersey, the implication of this argument is that the Royal Court also accepted the reasoning behind their validity.

⁶⁴ [1974] Ch.17, pp.27-28. Only limited and fiduciary powers are subject to the court’s supervisory jurisdiction. See *Re Representation Centre Trustees* [2009] JRC 109 in Jersey trust law, pointing to the three-fold distinction between beneficial powers, limited powers and fiduciary powers drawn by Hayton, *Underhill & Hayton Law of Trusts and Trustees* (17th ed.); *Re Representation DG, AN and TTL* [2009] JRC 140, and N.O’Higgins, “The Nature of Protectors’ Powers” (IFC Review.com (IFC Media Ltd. 2014)), last accessed 19:8:2015. A beneficial power can be exercised in self-interest. The doctrine of fraud on a power only applied to limited and fiduciary powers: see also *Re Bird Charitable Trust* [2008] JRC 103 and N O’Higgins, *ibid*.

⁶⁵ i.e. that the trust was valid because it could be said with certainty who was or was not in the class by reference to the time at which the trustees exercised their power of appointment to the class.

⁶⁶ *Re Gulbenkian*.

⁶⁷ Gardner, “Fiduciary Powers in Toytown” (1991) 107 LQR 214; *R v District Auditor, ex p West Yorkshire Metropolitan County Council* [1986] RVR 24 (QB); *McPhail v Doulton* [1971] AC 424, p.457 per Lord Wilberforce.

⁶⁸ Per Lord Wilberforce, *McPhail v Doulton*, above, p.457, citing Lord Eldon in *Morice v Bishop of Durham*, 10 Ves. Jr. 522, p.527.

⁶⁹ *McPhail v Doulton* [1971] AC 484, p.457, per Lord Wilberforce.

⁷⁰ 2010 JLR 169, see, for instance, para.11.

and appoint according to the needs of the beneficiaries.⁷¹ Furthermore, there is no reason why the court could not faithfully execute the trust in default by the trustee. It is just as absurd to suggest that the only way in which the court will execute an *Exeter*-style trust would be to order an immediate distribution to the default beneficiary, as it is to suppose that, in a large class discretionary trust, the court would order equal distribution in default.⁷² According to Lord Wilberforce in *McPhail v Doulton*, the court will execute the trust in accordance with the settlor's intentions, and if immediate distribution is not appropriate, there are other ways of doing so:⁷³

“the court, if called upon to execute the trust power, will do so in the manner best calculated to give effect to the settlor's or testator's intentions. It may do so by appointing new trustees, or by authorising or directing representative persons of the classes of beneficiaries to prepare a scheme of distribution, or even, should the proper basis for distribution appear by itself directing the trustees so to distribute.”⁷⁴

The court could not have executed the *Exeter* trust by directing a distribution. There were no beneficiaries in the class to distribute to initially and the trustee could not be compelled to execute the fiduciary power of addition.⁷⁵ Nevertheless, the court could execute the trust by appointing new trustees to administer the trust in accordance with the identified intentions of the settlor. Almost by definition, immediate distribution was clearly not intended in the *Exeter* trust.

So it may well be the case that it was incorrect to hold that the *Exeter* trust was void for uncertainty of object, and that it would initially appear that the Royal Court took a more restrictive approach than would be taken, for example, by the Chancery Division of the High Court. Ultimately however, it did not. The glaring omission in any of these ideas, which recurs time and again when reflecting on the court's execution of a trust, is the absence of an *enforcer*. And this is why there needed to be beneficiaries in the class in *The Exeter Settlement*. This time, what is required is a person with a legal *status*, i.e. a named beneficiary with rights against the trustee. This is the first aspect of the reasoning in the Royal Court's judgment. The Royal Court commented on the absolute importance of the identification of beneficiaries under a trust:⁷⁶

“A power to add beneficiaries is something completely different. It means what it says. A person who is a possible object of a power to add beneficiaries is not in fact a beneficiary unless or until the power is exercised in his favour and he is added as a beneficiary. Until that moment, the trustees may not apply income or capital for his benefit and he does not have any of the rights attached to being a beneficiary of the trust. The sole right that he has is as a possible object of the power to add beneficiaries”.

⁷¹ And indeed, had been doing so from 1983-2010.

⁷² The argument of Lord Wilberforce against the “list test”: *McPhail v Doulton*.

⁷³ Although the authorities relied upon by Lord Wilberforce in determining how a court could execute a discretionary trust (*Moseley v Moseley*, Fin. 53; *Clarke v Turner*, Free. Ch. 198; *Warburton v Warburton*, 4 Bro. P.C. 1; *Richardson v Chapman*, 7 Bro. P.C. 318; *Harding v Glyn* (1739) 1 Atk. 469; cf *Kemp v Kemp*, 5 Ves. Jr. 849) all appeared to order a distribution, the cases were actually relied upon to show that *equal* distribution was not necessary in all cases.

⁷⁴ *McPhail v Doulton*, above, pp.456-7. Directed at the point that equal distribution was unnecessary, requiring a complete list of objects: cf *IRC v Broadway Cottages Trust* [1955] Ch.20.

⁷⁵ Lord Wilberforce in *McPhail* was very conscious of the distinction between a power and a trust, a power not being compellable.

⁷⁶ Paras 29-32, quoted as part of the judgment above.

Therefore, it is submitted that the true ground for invalidity of the *Exeter* trust, although only implied here, was that there was *no named beneficiary*.⁷⁷ It was not that there was uncertainty of object.⁷⁸

ii) The beneficiary principle⁷⁹

The rule requiring the existence of a beneficiary is found in Article 11(2)(a)(iv) of the Trusts (Jersey) Law 1984, and is an enactment of the English *beneficiary principle*.⁸⁰ A trust shall be invalid if “it is created for a purpose in relation to which there is no beneficiary, not being a charitable purpose.”⁸¹ As shown above, the reason for the requirement for certainty of object is to enable trustees to perform their duties, and to ensure that the court can adequately exercise its supervisory jurisdiction over trusts. The basis of the beneficiary principle is the trustee’s obligation to account to the beneficiary: a highly valued constituent of the Jersey trust.⁸² Maitland’s view of the trust was, in essence, an obligation enforceable by the beneficiaries against the trustee.⁸³ Hayton elaborated on the core nature of the obligation as the trustee’s duty to account to the beneficiaries for their stewardship of the trust property. Without this, there can be no trust.⁸⁴ This was recognised by the English Court of Appeal in *Armitage v Nurse*,⁸⁵ in which Millett LJ commented that “[t]he duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts.”⁸⁶ The trustee’s obligation to account, as a legal obligation, must be supported by the existence of someone with a corresponding right of enforcement through the courts, usually the beneficiary:⁸⁷ hence the need for Article 11(2)(a)(iv) of the Trusts (Jersey) Law 1984. Without this, a trust would only be what Pothier would term an “imperfect

⁷⁷ Institute of Law, *Law of Trusts Study Guide 2014-15* observes that the issue was that there were no beneficiaries, but does not pursue the issue further.

⁷⁸ P.Matthews, “The New Trust: Obligations without Rights?” in *Trends in Contemporary Trust Law* (1996, A.J.Oakley ed., Clarendon Press, Oxford), pp.3-13, points out that the two requirements are separate.

⁷⁹ “No principle, perhaps, has greater sanction or authority behind it than the general proposition that a trust by English law, not being a charitable trust, in order to be effective must have ascertained or ascertainable beneficiaries”: per Lord Evershed MR, *Re Endacott* [1960] Ch. 232, p.246.

⁸⁰ Matthews concludes that when enacted in 1984, the Jersey equivalent of the beneficiary principle left out those exceptions that are still known in English law, e.g. trusts for the maintenance of monuments, graves etc.: P.Matthews, “The New Trust: Obligations without Rights?” in *Trends in Contemporary Trust Law* (1996, A.J.Oakley ed., Clarendon Press, Oxford), p.5.

⁸¹ *Ibid.*

⁸² The Jersey Law Commission observes: “[W]e believe that the principle of accountability is so central to any reputable trust jurisdiction”: The Jersey Law Commission, *The Rights of Beneficiaries to Information Regarding a Trust* (Consultation Paper No.1 February 1998), para. 6.3.

⁸³ Although the Court of Chancery extended the beneficiaries’ rights to be capable of enforcement against third parties: F.Maitland, *State, Trust and Corporation* (2003, ed. D.Runciman and M.Ryan), p.94; also F.Maitland, *Lectures on Equity* (1936, Revised by J.Brunyate), p.23.

⁸⁴ D.Hayton, “The Irreducible Core Content of Trusteeship” in *Trends in Contemporary Trust Law* (1996, A.J.Oakley ed., Clarendon Press, Oxford), p.47.

⁸⁵ [1997] 3 WLR 1046.

⁸⁶ Pp. 253-4.

⁸⁷ “There must be somebody, in whose favour the Court can decree performance”: *Morice v Bishop of Durham* (1804) 9 Ves. 399, p.404, per Sir William Grant MR, affirmed by Lord Eldon (1805) 10 Ves. Jr. 522, e.g. p.539. D.Hayton, “Developing the obligation characteristic of the trust” (2001) 117 *Law Quarterly Review* 96. For this understanding of the concept of the trust in relation to certainty of *intention* see *Re Adams and the Kensington Vestry* (1884) 27 Ch. D 394. The trust in *Morice* was invalid because of uncertainty of its objects (a lack of definition) and not for unenforceability per se: L.H.Leigh, “Trusts of Imperfect Obligation” (1955) MLR 120, p.123.

obligation”⁸⁸ and on Hohfeld’s rights analysis, could not be a legal obligation at all.⁸⁹ This was articulated in *Re Astor’s Settlement Trusts*:⁹⁰

“[A] trustee would not be expected to be subject to an equitable obligation unless there was somebody who could enforce a correlative equitable right, and the nature and extent of that obligation would be worked out in proceedings for enforcement.”⁹¹

Thus, a trust for a pure purpose, i.e. one without a human beneficiary, is void because there is not an available litigant to enforce it. English law recognises the validity of a number of “anomalous exceptions” to this rule, e.g. trusts for the maintenance of graves, monuments,⁹² and upkeep of an animal.⁹³ Article 11 did not enact these exceptions.⁹⁴

There has been more explicit recognition of this core obligation of the trust in recent years. In *Schmidt v Rosewood*,⁹⁵ the basis of the beneficiary’s right to trust information was recast as the correlative of the trustee’s duty to account, rather than as a necessary consequence or derivative of beneficiaries’ property rights, as was thought to be the case in *O’Rourke v Darbishire*.⁹⁶ *Re Denley’s Trust Deed*⁹⁷ upheld a trust that conferred no proprietary rights at all. A trust for the provision of land for the maintenance of a recreation ground for employees was held valid. Although the employees were not beneficiaries in the traditional sense, they had sufficient interest in the purpose being fulfilled to enforce the trust obligation in accordance with the terms imposed by the settlor.⁹⁸

As the *Exeter* trust had no beneficiaries, either in the primary class or in default, the trust plainly failed the Article 11(2)(a)(iv) beneficiary principle. There was no one who could support the trustees’ core duty to account by enforcing the trust.⁹⁹ The trust therefore rightly

⁸⁸ R.J.Pothier, *A Treatise on Obligations considered in a Moral and Legal View*, (translated by Francois-Xavier Martin), The Lawbook Exchange Ltd, New Jersey, 1999), Preliminary Article, para.1.

⁸⁹ Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23(1) *Yale Law Journal* 16-59. D.Clarry also refers to this analysis: master’s thesis D.Clarry “The Irreducible Core of the Trust” (Institute of Comparative Law, Faculty of Law, McGill University, Montreal August 2011 (Open Access Theses and Dissertations: <http://digitool.library.mcgill.ca/thesisfile106559.pdf>).

⁹⁰ [1952] Ch 534, per Roxburgh J., applying *Bowman v Secular Society Ltd.* [1917] AC 406, Lord Parker. It has been suggested that Lord Parker’s observations were directed at uncertainty rather than unenforceability: Lord Parker “does not concern himself here at all with the problem raised by the absence of an available litigant”: L.H.Leigh, “Trusts of Imperfect Obligation” (1955) MLR 120, p.123. Compare the interpretation of Roxburgh J in *Re Astor’s Settlement Trust* [1952] Ch. 534, in the quote identified here, which was challenged in this article.

⁹¹ Prior to the recognition of certain cases as “exceptions” to the beneficiary principle in *Re Endacott* [1960] Ch. 232, e.g. trusts for the maintenance of graves, monuments, animals etc. (which Harman LJ considered in that case to be “troublesome, anomalous and aberrant”), there was a strong thread of academic opinion that argued that trusts could be valid even in the absence of a litigant to enforce them: See D.C.Potter, 13 Conv. (NS) 418, Glanville Williams, 4 MLR 20, and Hart, 53 LQR 29. This was identified by L.H.Leigh, above, p.127.

⁹² *Re Hooper* [1932] 1 Ch. 38.

⁹³ *Re Dean* (1889) 41 Ch.D 552; *Pettingall v Pettingall* (1842) 11 LJ Ch. 176.

⁹⁴ P.Matthews, “The New Trust: Obligations without Rights?” in *Trends in Contemporary Trust Law* (1996, A.J.Oakley ed., Clarendon Press, Oxford), p.5.

⁹⁵ [2003] UKPC 26.

⁹⁶ [1920] AC 581.

⁹⁷ [1969] 1 Ch. 373.

⁹⁸ Also *Re Grant’s Will Trusts* [1979] 3 All ER 359.

⁹⁹ Interestingly, in the recent case of *Harper v Apex Trust Company Ltd.* [2014] JRC 253 which applied *The Exeter Settlement*, a Jersey non-charitable purpose trust was held void for uncertainty because its intended schedules were mistakenly not executed as part of the trust deed. The schedules specified, inter alia, who the enforcer was and what the purposes were. The Royal Court was prepared to assume that with the power to appoint an enforcer at a later date – contained in the trust deed, the trust would still have been valid: Para.23. However,

failed. The existence of potential objects of a power of addition will not support the accounting obligation, nor are they “beneficiaries” within the meaning of Article 11.¹⁰⁰ All they can do is to force the donee of the power to consider exercising it.¹⁰¹

The Royal Court in *The Exeter Settlement* implicitly recognised this as the basis of the failure of the trust in that case: “A person who is a possible object of a power to add beneficiaries is not in fact a beneficiary... he does not have any of the rights attached to being a beneficiary of the trust.”¹⁰² It is submitted that had the case been heard in the Chancery Division of the High Court, it would have been decided in the same way.

C. Accountability in black hole trusts

The Exeter Settlement clearly accepted that the trust would have been upheld had the default charity not been omitted. Nevertheless, the above first principles raise a question concerning the validity of black hole trusts, even where all their component elements are present and correct. It is at least arguable that in many cases there will be insufficient means within the trust to hold the trustees to their accounting obligation. If this is proven correct, it raises a question mark over the validity of these trusts. As the Jersey Law Commission observes,¹⁰³ “It is essential that the trust remains pragmatically enforceable by the beneficiaries.”

i) Accountability

At the time of the set-up of the trust, or at points throughout its lifetime, there are often fewer named beneficiaries in the primary class than the settlor actually intends to benefit, or there are no beneficiaries at all. The assumption that the default charity will inevitably support the trustees’ obligation to account, is flawed.¹⁰⁴ The insubstantial and peripheral connection with the trust, both in terms of the intentions of the settlor and in the administration of the trust, means that the default charity has little or no incentive or will to ensure that the trust is administered properly. The general expectation is that the default charity does not benefit from the trust, or at least only as a last resort.¹⁰⁵ Consequently it might be argued that whilst the charity will have certain rights to trust information: as the beneficiary that will ensure the

Article 12 of the Trusts (Jersey) Law 1984 specifically provides that a non-charitable purpose trust is valid if it provides “for the appointment of an enforcer”. The trust failed because the purposes were not identified: Para. 26.

¹⁰⁰ On the basis of the Article 1 definition of “beneficiary”, persons mentioned in the settlor’s letter of wishes do not qualify: *West v Lazard Bros & Co. (Jersey) Ltd.* 1987-88 JLR N-22.

¹⁰¹ The enforcers under a power of appointment, or other powers such as removal, addition or exclusion, would be those interested in default of the power’s exercise, e.g. default beneficiaries who have an interest in the trust property: D.Hayton, “Developing the obligation characteristic of the trust” (2001) 117 LQR 96, p.104, citing *Re Brooks ST* [1939] 1 Ch. 993; It is those people to whom the trustees owe a duty of due consideration: Hayton, *ibid*, citing *Karger v Paul* [1984] VR 161.

¹⁰² *The Exeter Settlement*, paras 29-32, per Birt (then Bailiff). Article 11 was not referred to, although the trust was set up prior to the enactment of the 1984 legislation.

¹⁰³ *The Rights of Beneficiaries to Information Regarding a Trust* (Consultation Paper No.1 February 1998), para.6.4, in considering whether to allow settlor restrictions on access to trust information the Law Commission emphasises the importance of the trust’s being enforceable in *practice*, see also D.Clarry, note 89 above.

¹⁰⁴ Under English law the Attorney-General or the Charity Commissioner will be the enforcer of charitable trusts: Charities Act 2011.

¹⁰⁵ *Re Gea Settlement* (1992) 13 TLI 188 (Jersey case), cited by Matthews, “Black hole trusts 1”, p.48.

accountability of the trustees, it is predictable that these rights will not be exercised.¹⁰⁶ Therefore, it is submitted that black hole trusts which rely on the default charity to ensure the trustee's obligation to account, are invalid.

ii) Information rights

If it is accepted that, on some occasions, it is the default charity that provides the element of accountability in the trust, then a further element must be considered: The trustees may come under a duty to inform the charity that they *are* a beneficiary.¹⁰⁷

Under English trust law it appears to be accepted that trustees are under a duty to inform beneficiaries of their interest under the trust.¹⁰⁸ This duty is part of the trustee's duty to account to the beneficiaries for the property.¹⁰⁹ Unless the beneficiaries are aware of their status, they cannot exercise their rights: for payment, for consideration, for trust information and performance.¹¹⁰ They cannot hold the trustees to account for their stewardship of the trust assets.¹¹¹ No correlative right: no trust obligation, according to both Hohfeld and Pothier.¹¹² With a fixed interest trust, the trustee must find and pay the beneficiary, if he is entitled, or at least make him aware that he is a beneficiary and of his rights to call for the property.¹¹³ In the case of a discretionary trust, the duty extends as far as taking reasonable steps to inform the

¹⁰⁶ It has been assumed on at least one occasion that they have no interest in making representations to the Royal Court concerning the trust: *Re Gea Settlement* (1992) 13 TLI 188, cited by Matthews, "Black hole trusts 1", p.48:

"The beneficiaries of the settlement are, by the third schedule to the settlement, stated to be 'Save the Children, RNLI, RSPCA'. Of course, these are the ultimate beneficiaries of the trust and, in practice, the charities will receive nothing, because letters of wishes referred to hereafter will be implemented by the trustees for the time being and will dispose of the whole of the trust fund. For this reason the Court has not considered it necessary to convene HM Attorney General to represent the charities."

¹⁰⁷ For recent recognition by the Jersey Royal Court that the right to trust information is correlative to the trustees' fundamental accounting obligation see *In the Matter of the Y Trust, E Trust Company Ltd v B, C, and D* 2014(1) JLR 199.

¹⁰⁸ For example, E.H.Burn and G.J.Virgo, *Maudsley & Burn's Trusts and Trustees Cases and Materials* (7th ed. 2008); G.Virgo, *The Principles of Equity and Trusts* (2012), p.466; C.Webb and T.Akkouh, *Trusts Law* (2008, Palgrave Macmillan Law Masters Series), p.318. The theory was first advanced by D.Hayton, "The Irreducible Core Content of Trusteeship" in *Trends in Contemporary Trust Law* (1996, A.J.Oakley ed., Clarendon Press, Oxford), p.49. D.Clarry makes an interesting similar point in the work referred to in note 89. The trustee's duty to account depends on the beneficiary being informed of his status, otherwise this would violate the essential "irreducible core" of the trust.

¹⁰⁹ P.S.Davis and G.Virgo, *Maudsley & Burn's Equity and Trusts Text, Cases and Materials* (2013), p.620, citing Fox, "The Irreducible Core for a Valid Trust (2011) 17 T&T 16. Hayton observes that this is "a necessary incident of the trustee-beneficiary relationship at the core of the trust": D.Hayton, "The Irreducible Core Content of Trusteeship" in *Trends in Contemporary Trust Law* (1996, A.J.Oakley ed., Clarendon Press, Oxford), p.49.

¹¹⁰ In considering the trustees administrative and dispositive duties, and correlative rights: "such rights are meaningful only if beneficiaries or objects have information in relation to the trust, so that they can assess whether the trustees have complied with their duties and, if they have not, take appropriate steps to have the trust fund reconstituted, the relevant decision declared invalid, and/or the misbehaving trustee(s) removed from office": C.Webb and T.Akkouh, *Trusts Law* (2008, Palgrave Macmillan Law Masters Series), p.318.

¹¹¹ D.Hayton, "The Irreducible Core Content of Trusteeship" in *Trends in Contemporary Trust Law* (1996, A.J.Oakley ed., Clarendon Press, Oxford), p.49. The object of a fiduciary power of appointment does not have a similar right to be informed as to their status: *Re Manisty's Settlement* [1974] Ch. 17, p.25; cited by Hayton, above, p.50.

¹¹² Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23(1) *Yale Law Journal* 16-59.

¹¹³ *Hawkesley v May* [1956] 1 QB 305, p.322, per Havers J. There is no similar duty on an executor of a will, because a will is a public document: *Hawkesley v May* [1956] 1 QB 305, p.322.

beneficiaries of their rights to put their case to the trustees for a distribution.¹¹⁴ The Jersey Law Commission considers that this duty to inform beneficiaries of their status is part of Jersey trust law, although commented that the English law was uncertain.¹¹⁵

“A strong argument can therefore be made that a beneficiary is entitled to know of the fact of his interest... However, the Trusts (Jersey) Law 1984 does not make any express provision in this respect, and whilst it is felt that here Jersey law will follow English law the English law is itself relatively uncertain.”

Considering black hole trusts, where there have been beneficiaries appointed into the class, e.g. the settlor and his issue, they will have rights of information and a right to be informed of their status. This will ensure the existence of the trust obligation as it will be these primary beneficiaries that will hold the trustees to account. However, as I have argued above, it may often be the default charity in a black hole trust that will have to support the trustees’ accounting obligation.¹¹⁶ The position is the same as if there were an ordinary non-compellable power of appointment with a trust over in default.¹¹⁷ Therefore, the effect of the above analysis is that where the default charity is the relevant beneficiary that holds the trustee to account, the trustees must inform the charity of its status as beneficiary. However, it may often be the case that these default charities are not informed of the existence of the trust. In such cases, and where there are no beneficiaries yet appointed into the primary class, it is highly arguable that the trust is invalid.

iii) Conclusions and reform suggestions

Matthews argues in favour of a reform in relation to these trusts, i.e. that where a trustee is in the practice of acting on the instructions of the settlor, the trust would have to be declared to a regulator. Although this would encompass many genuine situations,¹¹⁸ it would also catch arrangements that were, in reality, pure nominee ships.¹¹⁹ It would not require amending legislation to address the very different problems of validity identified in this article. The Jersey Law Commission identified that it is always important “to define the minimum level of accountability required for a trust to be valid”.¹²⁰ In this article I have argued that in a black hole trust, the default charity may be the only named beneficiary who can call the trustees to

¹¹⁴ Hayton, above, p.49. See also G.Virgo, *The Principles of Equity and Trusts* (2012), p.466, citing *Murphy v Murphy* [1999] 1 WLR 282. Obviously the trustee only has to make reasonable attempts to inform beneficiaries so this will depend upon the size of the trust: Hayton, above, p.49; Virgo, above, p.466, citing *Hartigan Nominees Pty Ltd. v Rydge* (1992) 29 NSWLR 405.

¹¹⁵ *The Rights of Beneficiaries to Information Regarding a Trust* (Consultation Paper No.1 February 1998), para.4.1.2, footnotes omitted.

¹¹⁶ Potential objects of a power of addition cannot hold the trustees to account. Also, a person merely mentioned in the settlor’s letter of wishes is not a beneficiary who is prima facie entitled to trust information: *West v Lazard Bros & Co (Jersey) Ltd.* 1987-88 JLR N-22a.

¹¹⁷ With a power of appointment, it is the ultimate default beneficiary that holds the trustee to account: *McPhail v Doulton* [1971] AC 424, p.441 per Lord Hodson: “Where there is a mere power entirely different considerations arise. The trust in default controls and he to whom the trust results in default of exercise of the power is in practice the only one competent to object to a wrongful exercise of the power”: cited Hayton, above, p.51.

¹¹⁸ Situations “where in practice the trustee after considering the alternatives, does what the settlor suggests”.

¹¹⁹ “The black hole trust 2”, p.107.

¹²⁰ Jersey Law Commission, *The Rights of Beneficiaries to Information Regarding a Trust* (Consultation Paper No.1 February 1998), para.7.2.

account for their stewardship of the trust property. However, the charity will often have no incentive to call the trustees to account, having very little *de facto* connection with the trust.

To address this accountability gap, trustees could ensure that settlors consider carefully the role that a charity could play in the trust. Where there are no beneficiaries envisaged to be appointed into the class at the beginning of the trust, or at significant intervals throughout the trust, the default charity must be informed of its interest under the trust. In the alternative, the trustees should be given the power to appoint an enforcer, to be effective in the absence of primary beneficiaries.¹²¹

Author

Dr Nicola Jackson is Lecturer in Law at the University of Leicester, School of Law. She is Visiting Professor in Jersey Trust Law at the Institute of Law, Jersey (since October 2014). Nicola has written widely on the subject of Property Law in a number of leading law journals, and has written two books on Land Law. She was awarded her Ph.D (Birmingham) in 2005 and her doctoral thesis is on the subject of trustees' powers and overreaching.

¹²¹ As is the case with Jersey non-charitable purpose trusts: Trusts (Jersey) Law 1984, Articles 12 and 13.