RE BADEN AND THE CRITERION OF VALIDITY

INTRODUCTION

The decision of the House of Lord in *McPhail* v. *Doulton, in re Baden's Deed Trusts*[1] was a remarkable one, if only because of the substantial changes it affected to the position taken by that same Court less than two years before.[2] It was also, in the opinion of most commentators, a commendable one in that it indicated the path by which future courts might restore some element of sanity and respectability to an area of the law in which both elements had been lacking over the preceding fifteen years. One thing the decision does not represent, however, is the last word on the subject of the requirement of certainty in relation to discretionary trusts. While it has laid to rest the greatest of the absurdities previously apparent, it may be many years before the problems which it itself has created are resolved.

Little point would be served by a detailed account of the law prior to *Re Baden* or of the facts and judgments of that case. Both of these matters are well documented.[3] It is sufficient introduction to the subject of this article to make the following points by way of summary. In *Re Baden,* by a bare majority,[4] the House of Lords adopted a new criterion of validity in relation to discretionary trusts in which the beneficiaries are described as a class, holding that such trusts will be valid if it can "be said with certainty that any given individual is or is not a member of the class."[5] This test of validity had been authoritatively accepted in the realm of powers of appointment among a class two years earlier in *Re Gulbenkian's Settlement.*[6] In that case, however, as in earlier cases,[7] a distinction had been drawn between the criterion of validity for powers and that for discretionary trust powers, the criterion in the latter case being that the beneficiaries had to be capable of "complete ascertainment" in the sense that an exhaustive list of all persons within the class described in the deed had

1. [1971] A.C. 424; hereinafter referred to as *Re Baden.* The subsequent decisions of Goff J. and the Court of Appeal will be referred to in the text as *Re Baden* (No. 2).
2. Rationalise as he might, Lord Wilberforce does not convince when he argues that his decision (and that of the majority) in *Re Baden* is not inconsistent with that of Lord Upjohn (with whom two other law Lords agree) in *In Re Gulbenkian's Settlements* [1970] A.C. 508. As to the conflict, see *Re Baden, ibid.,* 440, 443 per Lord Hodson, a party to both decisions.
3. See Hopkins, *Certain Uncertainties of Trusts and Powers* [1971] C.L.J. 68; Harris, *Trust, Power and Duty* (1971) 87 L.Q.R. 31; Palmer, *Private Trusts for Indefinite Beneficiaries* (1972) 71 Mich. L. Rev. 359; Hopkins, *Continuing Uncertainty as to Certainty of Objects of Trust Powers* [1973] C.L.J. 36.
4. Lords Wilberforce, Reid and Dilhorne; Lords Hodson and Guest dissenting.
5. *Re Baden* [1971] A.C. 424, 456, per Lord Wilberforce.
6. [1970] A.C. 508.
7. See e.g. *Re Gestetner Settlement* [1953] Ch. 672, 684-85 per Harman J.

to be capable of being drawn up.[8] The reason advanced for this requirement was that every trust had to be capable of being executed by the Court,[9] and that since the Court would only execute by ordering equal distribution among the members of the class all the beneficiaries had to be capable of ascertainment.[10] No such rule was regarded as necessary in the case of powers, since the Court would never be called upon to execute these: rather, its control over a donee was limited to an examination of whether the object to whom the appointment was made was within the class laid down by the donor and the power to order a transfer of the property to the person entitled on default if he was not.[11] It will be obvious how the test of validity adopted in *Re Gulbenkian* was adequate to ensure that powers were subject to control in this way. It will also be clear that, if an order for equal distribution was the only method a Court could execute a trust, the different rule in relation to these was justified.

The type of fact situation which strained[12] and ultimately broke the distinction thus drawn between the tests of validity was typified by *Re Baden* itself. A settlor placed a large capital sum on trust for various classes of persons who in total numbered several thousand. In the case of some of these classes (e.g. former employees of X Co. and their relatives and dependants) it was impossible to draw up the complete list required by the *Broadway Cottages* rule. Consequently, if the power to make distributions was properly construed as a discretionary trust power, the settlement failed. If, on the other hand, it was properly construed as a power *simpliciter* it probably[13] succeeded on the *Gulbenkian* test. In *Re Baden* the Court of Appeal was divided on this issue of construction.[14] In the House of Lords Lord Wilberforce took this division as his starting point: he observed:[15]

> It is striking how narrow and in a sense artificial is the distinction, in cases such as the present, between trusts . . .

8. The first decision to be based upon the rule as stated was *Inland Revenue Commissioners* v. *Broadway Cottages Trust* [1955] Ch. 20. The "complete ascertainment" rule is hereinafter referred to as the *Broadway Cottages* rule.
9. On the authority of *Morice* v. *Bishop of Durham* (1805) 10 Ves. Jun. 561.
10. *Inland Revenue Commissioners* v. *Broadway Cottages Trust* [1955] Ch. 20, 29, per Jenkins L. J. for the Court of Appeal.
11. 30 *Halsbury's Laws of England* (3rd ed.), para. 445: cited with approval in *Re Gulbenkian* [1970] A.C. 508, 525, per Lord Upjohn.
12. Prior to the decision of the House of Lords in *Re Baden* the justification for different criteria had been severely criticised. See e.g., *Re Baden's Deed Trusts* [1969] 2 Ch. 388, 397, per Harman L. J.; *Re Gulbenkian, supra,* 519 per Lord Reid; *Re Gulbenkian* [1968] 1 Ch. 126 (C.A.), 133 per Lord Denning M. R.
13. The House of Lords was required to determine only whether the deed created a trust or a power, and was not called upon to determine whether the test of validity was satisfied. It was clear, however, that if the *Gulbenkian* test was applied, the trustees stood a far better chance of success when that subsequent determination was made.
14. Harman and Karminski L.JJ. held the deed created a power; Russell L. J. that it created a trust. See [1969] 2 Ch. 388.
15. [1971] A.C. 424, 448-449.

> and powers. It is only necessary to read the learned judgments in the Court of Appeal to see that . . . A layman and, I suspect, also a logician, would find it hard to understand what difference there is.
>
> It does not seem satisfactory that the entire validity of a disposition should depend upon such delicate shading.

Prompted by this sentiment Lord Wilberforce went on to strike down the *Broadway Cottages* test and to replace it with the criterion of validity previously accepted in *Gulbenkian*.[16]

As indicated, the decision in *Re Baden* has given rise to many difficult problems.[17] That selected for discussion in this article is the appropriateness of the criterion which the decision erected in place of the *Broadway Cottages* rule. Should this test have been adopted, or should another, supposedly less stringent one, have been preferred? In the course of analysing that basic query, an opportunity will be taken to discuss the practical consequences of the *Re Baden* criterion. What does it mean? What is required to comply with it? And, most important, is it a meaningful barrier to a settlor wishing to create a trust in favour of a class rather than named individuals?

THE OTHER ALTERNATIVE

In the Court of Appeal in *Gulbenkian*[18] Lord Denning M. R. and Winn L. J. rejected the test of validity later to be adopted in the House of Lords and spoke in favour of a criterion which the former expressed as follows:[19]

> [I]f there is some particular persons at hand, of whom you can say that he is fairly and squarely within the class to be benefited, then the [power[20]] is good.

This test had been accepted in several High Court decisions[21] prior to *Gulbenkian* and prior to the decision of the House of Lords in that case probably represented the predominant view. Regrettably Lord Denning did not argue with great cogency in its favour. He asserted that this test was "quite meaningful" and capable of being "applied in practice", but even if true these qualities do not provide any sound reason for preferring his test over that ultimately adopted. The single attack which he appears to make on the latter criterion is his comment that "you should not hold [the power] bad simply because it would

16. [1970] A.C. 508.
17. Some are listed by Hopkins, *Certain Uncertainties of Trusts and Powers* [1971] C.L.J. 68, 101; others include the character and feasability of the duty to survey the range of objects, the meaning of the "administratively unworkable" basis of invalidity ([1971] A.C. 424, 457 per Lord Wilberforce) and the effect of the decision on criteria of validity for non-discretionary trusts.
18. [1968] Ch. 126.
19. Ibid., p. 134.
20. The actual word is "clause"; it was a power that was in fact being considered.
21. *Re Gibbard* [1967] 1 W.L.R. 42; *Re Leek dec'd.* [1967] Ch. 1061.

be difficult to say whether or not a person was within the class."[22] This point was, however, conclusively met by Lords Reid and Upjohn in the House of Lords.[23] Further, Lord Denning does not attempt to meet the argument which apparently found favour with those judges who in earlier cases adopted the criterion later to be adopted by the House of Lords; namely, that the Court must be able to determine whether the donee of the power is appointing within the class and for this reason must be able to judge whether *any* given individual is within it.[24] Whatever force there is in this argument is not met by Lord Denning.

A more detailed defence of what will be termed the "Denning test" is provided by G. E. Palmer in a Michigan Law Review article.[25] Arguing in support of the position taken by the Restatement (Second) of Trusts[26] — which is essentially the same as the Denning criterion in relation to both trusts and powers — Palmer asserts (a) that the *Re Baden* rule is "destructively narrow"; (b) that it has no support in English decisions until recent times; and (c) that it has no support in American decisions.[27] The second and third points are of little weight. While it is perfectly true that the *Re Baden* test was not explicitly enunciated until 1953,[28] and then of course only in relation to powers, it undoubtedly pre-dates the Denning test of validity.[29] In any event, in an area of the law wherein dramatic changes are taking place, largely in accordance with the dictates of policy, relative antiquity could not be a telling virtue. The third of Palmer's arguments may be a reason why, as he advocates,[30] the *Re Baden* rule should not be imported into the United States, but it should be noted that the decisions in that jurisdiction still evidence an adherence to the *Broadway Cottages* rule, and therefore it is not surprising that the *Re Baden* criterion has not as yet been adopted. Palmer's first argument, that Lord Wilberforce's rule is "destructively narrow", is possibly of more substance. He elaborates upon it by the example of a trust under which "the trustee is given the power to dispose of the trust assets to such friends of the testator as he selects."[31] Palmer asserts that this trust would be valid under the test adopted in the Restatement (Second), for although there would be many borderline

22. [1968] 1 Ch. 126, 134.
23. See *Re Gulbenkian* [1970] A.C. 508, 518 per Lord Reid; 523 per Lord Upjohn. See too infra, text at n. 37.
24. This reason was also advanced by Lord Upjohn to refute the Denning criterion: [1970] A.C. 508, 525. The merits of the suggestion are discussed infra, text at n. 93.
25. *Private Trusts for Indefinite Beneficiaries* (1972) 71 Mich. L. Rev. 359.
26. (1959); section 122.
27. Palmer, n. 25, 364.
28. By Harman J. in *Re Gestetner Settlement* [1953] Ch. 672, 688-689.
29. This criterion appears to have been first enunciated in the field of powers by Plowman J. in *In Re Gibbard* [1967] 1 W.L.R. 42, the learned judge relying on the test adopted in *Re Allen dec'd., Faith* v. *Allen* [1953] Ch. Ch. 180 in relation to uncertainties of conditions precedent to gifts.
30. (1972) 71 Mich. L. Rev. 359, 362, 364.
31. Idem.

cases there would be at least *one* person who clearly fell within the description of "friend".[32] He then goes on to allege that the same trust would fail under the "English" test, as "it is doubtful that the meaning of friendship is definite enough to meet [the rule that] the trust will be valid only if it can be said with certainty whether any person is or is not a friend."[33] This result is wrong, he concludes, as "If X was clearly a friend and the trustee disposes of property to him, why should the appointment fail merely because it cannot be said with certainty whether Y was or was not a friend?"[34] It is possible that this was the line of argument in the mind of Denning M. R. in *Gulbenkian.* It might also be the reason why A. J. Hawkins, in an article in the Conveyancer,[35] describes the Denning test as the "more attractive". Palmer's argument immediately raises two issues in relation to the *Re Baden* criterion: first, would it in fact lead to the voiding of the "friends" trust in the example supposed; and secondly, and more generally, what are the differences in practical effect between the two competing criteria? For reasons which will become clear, it is proposed to examine these questions now and take up the merits and demerits of the Denning test at a later stage.[36]

THE BADEN TEST EXAMINED

It is a convenient starting-point to this analysis to detail the circumstances when the criterion of the validity adopted by *Re Baden* will *not* be breached. First, and most obviously, the rule will not be breached merely because it is impossible to ascertain some members of the class. In *Re Gulbenkian* Lord Upjohn drew a distinction between uncertainty as to the range of the class itself arising from an "ambiguity of definition" and uncertainty as to whereabouts or even existence of persons within an unambiguously described class. Only the former category of uncertainty was capable of rendering the power void.[37] In *Re Baden* this reasoning was explicitly adopted in relation to trust powers.[38]

Secondly, it is equally well established that uncertainty sufficient to avoid a trust power is not proven merely because there might be doubts in the mind of the trustees as to whether a particular person falls within the class created by the settlor. In *Gulbenkian,* the principal issue before the court was whether the words "residing", "care and control' 'and "in whose company" as used in the class-describing clause of the deed introduced an element of "ambiguity of definition" into the definition of the class. Of these words Lord Upjohn said:[39]

> Many difficult and borderline cases may occur in any one

32. Idem.
33. Idem.
34. Idem.
35. *Power Collateral or Trust Uncertain* (1969) 33 Con. (N.S.) 233, 234.
36. For that discussion, see infra, text at n. 91 et seq.
37. [1970] A.C. 508, 524.
38. [1971] A.C. 424, 457.
39. [1970] A.C. 508, 523.

> of these situations. But mere difficulty is nothing to the point. If the trustees feel difficulty or even doubt upon the point the Court of Chancery is available to solve it for them.

Lord Reid spoke in virtually identical terms,[40] and Lord Wilberforce must be taken to have approved of his approach in *Re Baden*.[41]

Two points should be made in relation to Lord Upjohn's suggestion. First, it provides a total answer to Lord Denning's criticism in the Court of Appeal to the effect that the *Gulbenkian* test of validity renders a power void simply because of the existence of "difficult and borderline cases."[42] Secondly, it is submitted that this passage from Lord Upjohn's judgment disguises the fact that under the reading of those "difficult and borderline" cases there are in fact two different classes of case, in both of which the court is prepared to assist. One is where the class-defining words are unambiguous (say, "old boys of X College") but where the trustees have doubts as to whether on the evidence a particular person falls within that class (for example, if the records of X College for the period in question have been lost). The second situation is that arising where the "difficulty" stems not from the evidence as such but from the uncertain standard set by the class-defining words themselves. A trust in favour of "persons with whom A is or has been residing" will serve an an illustration.[43] Suppose that the evidence before the trustees is that A rented a room from B for a period of 18 months. B allowed A to use the kitchen and lounge when he himself was not using them, and about once a month invited A to his own part of the house to watch T.V. In determining whether A was "residing" with B so as to bring the latter within the class of beneficiaries, the trustees' difficulty is of course the impression of the word "residing". *Gulbenkian* is clear authority, however, for the proposition that in the example taken "residing" is not "ambiguous" in the sense that it creates uncertainly sufficient to avoid the trust.[44] The important point that must be stressed, therefore, is that the reference to the court solving the "difficult" cases is *not* limited to those where the trustees' doubts are caused through problems of evidence and the lack of it: it also extends to cases where those doubts are occasioned by the vagueness or lack of precision in the class-defining words themselves.

---

40. Ibid., 518.
41. Lord Wilberforce obviously contemplated that the Court could assist in "difficult" cases in the trust context. See his reference to matters "which the Court can appropriately deal [with] on an application for directions": [1971] A.C. 424, 457.
42. It will be remembered that Lord Denning implied that, on the basis of the *Re Gestetner* test of validity, the existence of such cases would prevent the trust being upheld.
43. This was essentially one of the issues (though in a power context) before the House of Lords in *Gulbenkian* itself. For a summary of the clauses in question, see [1970] A.C. 508, 517, per Lord Reid.
44. It was unanimously held that this term was sufficiently certain. The decision therefore overrules *Re Gresham* [1956] 1 W.L.R. 573 where the term was held to be too ambiguous.

This conclusion is supported by two further considerations. First, at an earlier part of his judgment, Lord Upjohn said:[45]

> The court, whose task it is to discover [the settlor's] intention, starts by applying the usual canons of construction . . . But very frequently . . . the application of such fundamental canons leads nowhere, the draftsman has used words wrongly, his sentences border on the illiterate and his grammar may be appalling. It is then the duty of the court by the exercise of its judicial knowledge and experience in the relevant matter, innate common sense and desire to make sense of the settlor's or parties' expressed intentions, however obscure and ambiguous the language that may have been used, to give a reasonable meaning to that language if it can do so without doing complete violence to it. The fact that the court has to see whether the clause is "certain" for a particular purpose does not disentitle the court from doing otherwise than, in the first place, try to make sense of it.

The specific reference to "ambiguous" language, to "obscurities" and the like make it reasonably clear that Lord Upjohn saw the court's remedial function as extending to the correction of language which might otherwise be too imprecise to satisfy the criterion of validity. This conclusion is further supported by the approach of Stamp L. J. in *Re Baden* (No. 2). That learned judge indicated that in his opinion the word "relatives" did not satisfy the *Re Baden* test.[46] He also indicated however that one manner in which its defects might be solved would be to construe it as "nearest blood relations or dependants", a construction which would both enable the test to be satisfied and accord — probably more clearly than the original word — with the settlor's intention.[47] In the same case Sachs L. J. implied that if the word "relatives" *was* uncertain for the purposes of the *Baden* rule then this defect might be cured on a construction summons by the adoption of a restrictive definition of it.[48] There is nothing new in these suggestions. A "restrictive" or "special" definition of words which might otherwise be too vague to satisfy the criterion of validity has been adopted in several power cases since the time of the *Gestetner*[49] decision. In *Re Coates*,[50] for example, Roxburgh J. was able to save a power to pay to any "forgotten friend" principally on the basis that the word "friend" was, in the circumstances, capable of construction as being only referable to those persons with whom the testator shared a relationship of considerable intimacy.[51]

45. [1970] A.C. 508, 522.
46. [1973] 1 Ch. 9, 28. For a discussion on this point, see infra, text at n. 56 et seq.
47. Ibid., 29.
48. Ibid., 22.
49. [1953] Ch. 672. As indicated, the decision of Harman J. laid down for the first time what was later to be the criterion of validity accepted in *Gulbenkian* by the House of Lords.
50. [1955] Ch. 495.
51. For a somewhat more detailed discussion of *Re Coates*, see text at n. 56,

If it is accepted that the courts have the power to construe class-defining words in such a way as to bring them within the *Re Baden* test, the obvious question which immediately arises is, when will the court exercise that power? Put more precisely, the issue is one of the extent to which the court can construe certainty out of ambiguous or imprecise language. It will be appreciated that the greater the extent to which this can be done, the less difference there is in practical effect between the *Re Baden* and the Denning criteria of validity.

There are at least two limitations on the extent to which the court can go in this matter. The passage from the judgment of Lord Upjohn previously cited refers to them, namely; (a) complete violence may not be done to the language used; and (b) a limitation implicit throughout the passage, the construction adopted must promote the intention of the settlor. Standing alone, the first is not a serious limitation. The adjective "complete' 'may indicate that some violence may occur; even if it does not, the extent to which the courts have regarded themselves as free to depart from language employed suggests that "violence" has itself been construed very narrowly. In addition to the cases previously cited, the "relatives" decisions are a useful indication of this point. It is well established that a testamentary[52] trust in favour of "relatives" is to be construed as a trust for the testator's next-of-kin.[53] but that this construction apparently does "violence" to the language used cannot be denied. As we have seen, the usual device adopted to cure what might otherwise be a fatal uncertainty is that of the restrictive definition. The effect of this approach is to narrow the range of beneficiaries, but since that narrowing takes place within the class originally established and will usually involve no addition to the persons without the original language, it is reasonable to assume that it will not fall into the "complete violence" category. This is certainly the impression left by *Re Baden* (No. 2).[55]

There is more difficulty in determining the weight of the second limitation stated by Lord Upjohn. If the alternative to a narrowing of the class by restrictive interpretation is invalidity, it will always be possible to argue that by its adoption the settlor's intention must be being advanced. This general assertion however overlooks the question, as yet unconsidered directly by the courts, of the extent to which a restrictive interpretation of the class-defining words must

52. In *Re Baden* (No. 2) [1973] 1 Ch. 9, 29, Stamp L. J. indicated that in his opinion "an inter-vivos trust for the relatives of a living person could properly be similarly construed."
53. See *Eagles* v. *Le Breton* (1973) L.R. 15 Eq. 148; *Re Gansloser's Will Trusts* [1952] Ch. 30.
54. In *Re Gansloser, supra,* Evershed M. R. gave as the reason for the restrictive interpretation "the word . . . is given a restricted significance so as to save the gift from total invalidity." Ibid., 35.
55. Neither Sachs L. J. nor Stamp L. J. suggested that a more limiting construction of "relatives" would be prohibited on the basis of "violence" being done to the language used.

be justified by the particular deed and the particular circumstances surrounding it. The distinction is illustrated by a trust for "friends". We have seen that in *Re Coates*[56] such a trust was held good on the basis, *inter alia*, that the evidence indicated that the class of friends the testator wished to benefit were those with whom he shared a relationship of considerable intimacy, the latter qualitative feature on this basis becoming the new definition of the class. But could the same result have been reached on the more general basis that (a) the testator would prefer the trust to succeed for some than fail for all; (b) therefore, a more specific definition which includes "some" will be adopted; (c) a more specific definition which does satisfy the criterion of the validity is that "of friends with whom the testator shared a considerable intimacy." Whether this line of argument is acceptable is, of course, a vital question, the answer to which determines whether the "promotes the settlor's intention" limitation is a real or merely a formal one.

In *Re Coates* there is little doubt that the trust could not have been saved had not the surrounding circumstances, together with the deed itself, indicated with some precision the restricted class that the testator intended to benefit. Of the word actually used, Roxburgh J. commented " 'Friendship', of course, draws a picture particularly blurred in outline," but, he went on "its context, and the circumstances of the case . . . may well fill in what would otherwise be vague."[57] In *Re Baden* (No. 2) both Sachs and Stamp L. J. J. indicated that the word "relative" might, in some circumstances, receive a restrictive definition on the basis of assumptions that the settlor did not intend to benefit every person who fell within the widest definition of that term and that the class he did intend to benefit was "nearest blood relations."[58] These assumptions, however, were — like that in *Re Coates* — drawn directly from the deed and its context, together with the obvious absurdity of holding that the settlor intended to benefit "relatives of an employee of whose very existence that employee might be ignorant."[59] These *dicta*, while indicating that the court will roam widely in its quest for the settlor's probable intention, do not support the view that it will always be promoted by saving a trust that would otherwise fail.

Two further considerations support the more positive view that a restrictive interpretation would not be justified on this broad and general basis. First, that passage from the judgment of Lord Upjohn in *Gulbenkian* which lays down the general approach to construction

56. [1955] Ch. 495.
57. Ibid., 499. At the commencement of his judgment Roxburgh J. indicated that he was not deciding whether "a power to appoint in favour of a testator's friends without qualification would be valid," (ibid., 497). The tenor of his judgment, however, indicated that invalidity *would* be the likely result unless evidence of surrounding circumstances or from the deed itself enabled a restrictive interpretation to be made.
58. [1973] 1 Ch. 9, 22 per Sachs, L. J.; 29 per Stamp L. J.
59. Ibid., 29 per Stamp L. J.

issues suggests that there must be a direct connection between the restrictive interpretation — or other remedial device adopted — and the "true" intention of the settlor.[60] Consistent with this, the re-drafting exercise undertaken by Lord Upjohn in that case proceeded on the basis of the settlor's intention as deduced from the deed, the surrounding circumstances, and a common sense view of what the settlor could *not* have intended.[61] Secondly, it is both dangerous and improper to proceed on the assumption that a settlor would rather have his trust succeed in a limited form than fail altogether. At least in regard to inter-vivos settlements, he may just as conceivably prefer to regain the property on resulting trust and execute a further trust using his own, more precise language. It is submitted therefore that the limitation in question is and should be a real one, and that unless justified by appropriate evidence from the deed, or its wider context, or by a deduction necessitated by the genuine absurdity of supposing the settlor intended anything else, reformative measures should not be adopted. So stated, of course, a considerable margin of flexibility remains within the test as to what will be "appropriate evidence" and the like. As long as it is borne in mind, however, that what is required is a reasonably clear definition of the class the settlor intended to benefit, such flexibility is both desirable and necessary.

To determine the proper weight to be attributed to the intention limitation is not of course to determine how great a barrier it provides in practice to the reformative powers of the court. Though to an extent one must enter the realm of conjecture to do so, it is submitted that it is not likely to be an overwhelming obstacle in most of the cases likely to arise in which the court is called upon to make sense of uncertainty. Of those words which are both frequently used and somewhat imprecise, "relatives" will generally be susceptible to the treatment suggested for it in *Re Baden* (No. 2) since it is highly unlikely to suppose that any settlor intends to benefit persons of whose existence everyone concerned is ignorant, and a trust for "friends" will usually evidence the character of intimacy which was relied upon in *Re Coates*.[62] There may of course be exceptions. A trust for "friends" would probably fail if (a) the trustee was a corporation; (b) the trust fund was very substantial; (c) no limit was placed upon the amount payable to any beneficiary; (d) no indication was given as to the use to which the payments were to be put.[63] But such cases would be very rare indeed.

If a reformative interpretation will usually be sanctioned on the basis of the "intention" criterion, and if, as is suggested, the "complete violence to the settlor's language" limitation is not a serious one, it will be seen that the power to reform an otherwise uncertain definition

60. It will be recalled that the passage commenced: 'The court, whose task it is to discover [the settlor's] intention . . . ": [1970] A.C. 508, 522.
61. See [1970] A.C. 508, 522 per Lord Upjohn; Lord Reid at 517.
62. [1955] Ch. 495.
63. These four points are of course the antithesis to the fact situation in *Re Coates* itself.

is a wide one. How wide it is, only future cases can say. But logically it is very difficult to envisage any discretionary trust, however vaguely its class is defined, which could not be validated by use of one of the reformative devices mentioned above. A trust for objects of benevolence has long been regarded as one that must fail on the basis of uncertainty.[64] While this was arguably[65] inevitable on the basis of the *Broadway Cottages* rule,[66] *Re Baden* may hold new promise for it. If satisfied on the basis of the deed and surrounding circumstances that the settlor had in mind a particular class of benevolent objects, or that by "benevolence" he meant to describe a quality — such as the provision of money and services to under-privileged or disabled persons — which can itself be more precisely defined, there is no reason why the term should not be re-defined so as to give to it the degree of certainty required. So to with a trust for "those persons who have a moral claim on me." Though it was implied in *Re Baden* (No. 2) that a trust so expressed was void for uncertainty,[67] and although *Re Leek*[68] contains *dicta* to a like effect, there is no reason why in appropriate cases a more precise definition of the term could not be given.

Before attempting to draw conclusions from the above discussion, one further aspect of the *Re Baden* test of validity warrants analysis. That test, as we have seen, is framed in terms of whether it can be said of any individual that he is *or is not* within the class-describing words used by the settlor. The italicised phrase may be said to be the basis for Palmer's contention[69] that in a trust for "friends" the *Baden* test avoids the trust as it cannot be said whether Y was *or was not* a friend. While it will be submitted that the thrust of Palmer's argument has been met in the analysis in the preceding pages, the point highlights the need for a specific examination of this aspect of the test.

THE "OR IS NOT" ASPECT OF THE BADEN TEST

The "or is not" component of Lord Wilberforce's criterion provided the basis of the executors' argument in *Re Baden* (No. 2).[70] In that case they argued that, even applying that criterion, the trust

64. *Morice* v. *Bishop of Durham* (1805) 10 Ves. 521 avoided a trust for 'objects of benevolence and liberality." *Morice* was one of the most influential cases behind the *Broadway cottages* rule: upon that decision Lord Hodson based his dissent in *Re Baden*.
65. There is no compelling reason why the courts could not have employed the device of a remedial interpretation to a greater extent than they were apparently prepared to.
66. On the basis that a complete list of objects of "benevolence" could not be drawn up: but see n. 65.
67. [1973] 1 Ch. 9, 20 per Sach L. J.: he did not however express a final opinion.
68. [1969] 1 Ch. 563: Harman L. J. suggested that a power to appoint among those that the *donee thought* had a moral claim was good, but that one to appoint to those *with* a moral claim was bad; ibid., 579.
69. Discussed supra, text at n. 31 et seq.
70. [1973] 1 Ch. 9.

must fail, as, specifically in relation to the word "relatives", "it would be quite impracticable for the trustees to ascertain in many cases whether a particular person was *not* a relative of an employee."[71] The argument went on: "The most that could be said is: 'there is no proof that he is a relative.' But there would still be no 'certainty' that such a person was not a relative."[72] The Court of Appeal was unanimous in rejecting this argument, but in the process of doing so three conflicting attitudes were adopted towards the "or is not" component. Sachs L. J. branded the executors' reasoning "wholly fallacious."[73] In his view, if the class-defining words were "conceptually certain"[74] (apparently another way of saying they were sufficiently unambiguous to meet the *Re Baden* criterion),

> It then becomes a question of fact to be determined on evidence whether any postulant has on enquiry been proved to be within [the class]; if he is not so proved then he is not in it.[75]

Accordingly, even accepting that "relatives" was properly to be construed as all descendants of a common ancestor, there was no conceptual uncertainty and that was the end of the matter.

Megaw L. J. also held that even if "relatives" were given its widest possible meaning, the *Re Baden* test was satisfied, for the reason that there was some rough equivalence between a holding that "he is not proven to be in" and the true intention and spirit of the "or is not" component of the *Re Baden* criterion. Unless this was so, he considered, the executors' argument involves a return to the rejected *Broadway Cottages* test. He did however add a qualification to the *Re Baden* principle: it is satisfied if "as regards at least a substantial number of objects"[76] it can be said with certainty that they *do* fall within the language used. The reason for and the validity of this qualification will be discussed subsequently.[77]

Stamp L. J. indicated, with a note of quiet desperation, that two considerations made it difficult not to accept the executors' contention. First, to reject it would involve of necessity a return to the Denning criterion of validity rejected in *Gulbenkian.* Secondly, giving the word "relatives' its widest possible meaning, it was inconveivable that the trustees could carry out their duties to survey, ascertain and distribute among so huge a class. He commented:

> Any 'survey of the range of the objects or possible beneficiaries' would certainly be incomplete, and I am able to discern no principle upon which such a survey could be conducted or where it should start or finish. The most you

71. Ibid., 23 per Megaw L. J.
72. Idem.
73. Ibid., 20.
74. Idem.
75. Idem.
76. Ibid., 24.
77. Infra, text at n. 90 et seq.

> could do, so far as regards relatives, would be to find individuals who are clearly members of the class — the test . . . rejected in the House of Lords in the *Gulbenkian* case.[78]

In order to reject the executors' contentions and at the same time avoid these considerations, Stamp L. J. saw himself as forced to adopt a restrictive interpretation of the word "relatives". Construed as "nearest blood relations",[79] he held, it was possible for the required survey to be conducted in a meaningful way and for the trust to be upheld without recourse to the rejected criterion of validity.

Several aspects of these judgments warrant discussion. J. Hopkins[80] criticises the approach of Sachs L. J. on the somewhat broad basis that "it scarcely answers the telling arguments of counsel."[81] In the writer's view, this is incorrect. Counsel argued that the *Re Baden* test demanded that the trustees be able to say of any individual whether or not he was in the class. Sachs L. J. replied that, in applying that test, *as long as the class-defining words are conceptually certain* any individual who could not be proved to be within the class must be regarded as being outside it. Is this not "an answer" to counsels' argument? It is vital to stress that it commences from the proposition that the class-defining word "relative" "conjures up a sufficiently distinct picture of the persons within it,"[82] in other words that it leaves no doubt that the class is made up of legal descendants of common ancestors of stated persons. The doubts that do arise, and in truth the real doubts upon which the executors relied, stem not from the words used to define the class but from difficulties of proving whether the standard set by those words is met, or, a difficulty one step more removed, of proving that it is *not* met. In assessing the effect and consequences of these problems, we are in an area of the law where the *Re Baden* test of validity has no jurisdiction and are confronted by a question that test was never designed to answer.

It is submitted that the "if not proved to be in, then out" approach enunciated by Sachs L. J. fills that gap in a way which must be regarded as both sensible and consistent with authority. In regard to the latter assertion, it will be remembered that in *Gulbenkian* both Lord Reid and Lord Upjohn spoke of the Court of Chancery being prepared to resolve the difficult "borderline" cases. In some such cases, the court might be able to reach a definite conclusion one way or other; for instance, "We are satisfied that there is no doubt that X is [or is not] a 'friend' of the testator." But in others, would it not frame its conclusion in less absolute — but equally determinative

78. [1973] 1 Ch. 9, 28.
79. Ibid., 29.
80. *Continuing Uncertainty as to Certainty of Objects of Trust Powers* [1973] C.L.J. 36.
81. Ibid., 38.
82. A phrase originally used as a test of whether the class was sufficiently certain by Upjohn J. in *Re Sayer* [1957] Ch. 423, and frequently used as a shorthand way of referring to the *Gestetner*, *Gulbenkian* and *Baden* tests in subsequent cases.

language — such as "on the evidence, we are not satisfied that Y is a 'dependant' and therefore he cannot be admitted to the class."? If the concession is made that this is a legitimate method of resolving the borderline cases, as it must, then does it matter *why* the court is not satisfied, as long of course as the cause is not the uncertainty of the class-defining words themselves? Can there be a valid distinction between a decision against X's admission on the basis that the evidence revealed he was *not* a dependant and one to the same effect but reached on the basis that there was insufficient evidence to prove he was? As a final point, test the matter in this way. A trust is established for "former employees of Z Co. and their dependants." B alleges that he was employed by Z Co. for a period of three weeks in March, 1947. The records of Z Co. for the years before 1949 are lost. The court declines to accept B's uncorroborated evidence and holds that on that basis he is not within the class. This is obviously a "not proven to be in, and therefore out" determination. On the argument of the executors in *Re Baden* (No. 2) not only would this determination be an improper manner of resolution but the trust would be void since the lost records would prevent the trustees from being able to say with certainty whether any given person was *not* within the class described. Yet in none of the cases in which the *Gulbenkian* rule or its *Gestetner*[83] ancestor has been applied has it ever been suggested that the power could be avoided on the basis that the donee might have to reject a particular object from consideration because it could not have been proved that this person was within the class.

Against the reasoning of Sachs L. J. it might be argued that the test of "if not proven to be in, then out" is in substance the test of validity approved by Lord Denning, but rejected by the House of Lords, in *Gulbenkian*. As we have seen,[84] Stamp L. J. would have accepted this argument had he been unable to restrict the meaning of "relatives". His view was that the huge numbers of persons falling within the literal meaning of that word rendered a survey of them (as required by Lord Wilberforce in *Re Baden*[85]) impossible: for the same reason the *Re Baden* criterion of validity was unworkable, as all that the trustees could do was to find individuals within the class. With respect, there is a flaw in this analysis. It is quite true that the duty to survey must be rendered extremely difficult in regard to a class a large as that in question. Stamp L. J. may well be correct in alleging that it is unworkable,[86] because the individuals produced by even the most diligent and expensive inquiry may be a totally insignificant proportion of the (probable or estimated) whole. But by his own admission *some* could and would be found, and in relation

83. [1973] Ch. 672.
84. See text at n. 78.
85. [1971] A.C. 424, 457: "the trustees ought to make such a survey of the range of objects or possible beneficiaries as will enable them to carry out their fiduciary duty."
86. For a discussion of this duty and the effect of recent cases upon it, see text at n. 95.

to those persons their entitlement to participate would be determined on the *Re Baden* criterion of validity. This test *is* workable — it is in operation in the very problem posed by the learned Lord Justice. The difficulty he expresses arises not from the test itself, but from the huge class of persons it is obliged to operate in regard to, for by virtue of that size alone it is virtually impossible to find a significant proportion of the total objects. But to say "the trustee cannot find a significant proportion of the class' is a totally different objection to saying "the trustee cannot determine whether any given person is within the class." Since Stamp L. J. does not raise the latter objection, there can be no question that the *Re Baden* criterion is both applicable and feasible in the problem before the Lord Justice.

For essentially the same reasons as those stated above the writer would respectfully disagree with Megaw L. J. and his "at least a substantial number" limitation previously noted.[87] At least insofar as the criterion of validity is concerned[88] there is no possible justification for importing this proviso. Should an "insubstantial" number of objects be determined to be within the class due to the evidentiary difficulties faced by trustees, that may, as indicated, be on a ground for arguing that the trust is invalid.[89] But it is a ground completely unrelated to the *Re Baden* criterion[90]

THE RE BADEN TEST CONCLUDED

On the basis of the foregoing analysis, it is submitted,

(a) That vagueness or imprecision in the class-defining words will not be a fatal objection to validity if a remedial construction is possible;

(b) Such a remedial construction must be justified by the intention of the settlor as manifested in the deed or its wider content or on the basis of a need to avoid an absurdity resulting from a literal construction of the deed;

(c) That within the limits set by (b) above there is no good reason why trusts for "friends", "those with moral claims upon me", "benevolent objects" or similarly vague expressions should not be rendered valid;

(d) That the "if not proven to be in, therefore out" approach adopted by Sachs L. J. in *Re Baden* (No. 2) does not offend the *Re Baden* criterion and must be regarded as being consistent with authority.

---

87. Supra, text at n. 71 et seq.
88. The limitation may have more justification if Megaw L. J. intended it to apply as a necessary prerequisite to the operation of the duty to survey. Its exact relevance is not stated, but Megaw L. J. appears to be stating it as a proviso to the test of validity: see [1973] 1 Ch. 9, 24.
89. Infra, text at n. 95 et seq.
90. For a more detailed discussion of how the test of validity relates to the numbers of objects ascertained, see infra, ibid.

On the assumption that these conclusions are well-founded, it is submitted that the labels of "more stringent' 'and "less stringent" that are usually attached to the *Re Baden* and Denning tests of validity respectively suggest a far greater difference than in fact exists. While the "traditionally vague" trusts such as those to friends and benevolent objects would be easier to uphold on the basis of the latter criterion, it has been seen that in practice they will usually be capable of validation within the context of the former as well. It may be possible to imagine a hypothetical situation in which the class-defining words were so vague and the settlor's intention so hard to discern that a reformative interpretation was impossible, and yet one person clearly fell within the vague language. Yet even putting aside the remoteness of the likelihood of such a trust arising, the very fact that one person is assumed to fall fairly and squarely within the class probably indicates either that the words are not *too* vague to be the subject of reform or that the settlor's intention is sufficiently clear to be the basis of such reform, all of which pushes the example that must be taken to indicate a difference in result further into the realm of the highly unlikely. The decision of Sachs L. J. in *Re Baden* (No. 2) has also reduced the distinctions between the two criteria. If followed, it will have the result of rendering irrelevant under the *Re Baden* test what always was irrelevant under Lord Denning's, namely the impossibility of proving that a given individual was *not* within the class.

It is accordingly submitted that in regard to the question of the classes of trusts validated by the respective criteria, there are but relatively insignificant distinctions between them.

THE DENNING TEST REVISITED

It remains only to consider whether there are any other bases upon which the two criteria in question may be distinguished. In this phase of the discussion, the Denning test must occupy the analytical hot-seat for in relation to that test two different reasons have been suggested as grounds for its "inferiority" to that adopted in *Re Baden.* First, in the House of Lords in *Gulbenkian*[91] Lord Upjohn suggested that the criterion approved by Denning M. R. and Winn L. J. in the Court below would prevent, or in some way impair, the court from restraining the donee of a power from applying outside the class. He said:[92]

> [T]hose entitled to the fund in default must clearly be entitled to restrain the [donees] from exercising it save among those within the power. So the [donees] or the Court must be able to say with certainty who is within and who it without the power. It is for this reason that I find myself unable to accept the broader proposition favoured by Lord Denning M. R. . . .

There is no point in translating this objection into the context

91. [1970] A.C. 508.
92. Ibid., 525.

of discretionary trusts; its validity in the realm of powers applies equally to that area. The only circumstance that Lord Upjohn can be taken as anxious to forestall is not when the power is exercised in favour of a person clearly in the class, or in favour of a person clearly without the class, but in favour of a person of whom it cannot be said with certainty whether he is in or out. How often would such cases have arisen, particularly when Lord Upjohn had already indicated that the Court of Chancery was ready and willing to resolve difficult or borderline cases? The answer has already been provided in the earlier section of his analysis, namely, in an insignificant number of cases. Consequently, although *ex facie* the Denning criteria would not have required a class-defining phrase as clear as that Lord Upjohn supported, in practice there would have been very little difference between the two. It is only by denying the Denning test the support of reformative interpretations and judicial resolution of "borderline" cases that any meaningful objection can be lodged on the basis of Lord Upjohn's criterion."[93]

It has also been suggested that the Denning test is inferior to that of *Re Baden* in that the former criterion renders the duty to survey more difficult or even unworkable. While not criticising the criterion in these terms, Stamp L. J. in *Re Baden* (No. 2) did advance the proposition that the duty was only capable of fulfillment in the context of the *Re Baden* test:[94] since he discussed the Denning test in the same paragraph it is fair to assume that the learned Lord Justice would support the opening sentence above.

Much has been, and much more could be, written on the subject of the duty to survey.[95] The decision of Sachs L. J. in *Re Baden* (No. 2) and that of Templeman J. in the more recent case of *Re Manisty's Settlement*[96] have indicated that as well as being a duty which cannot be enforced — as it has been since its inception[97] — it is now, in addition, a duty without any real obligations. In the area of pure powers the latter decision has removed any obligation to survey[98] the class at all. A donee of a power to appoint income to objects in several classes may now, with impunity, pay one person from within one class year after year to the exclusion of all others, his duty to survey being fulfilled by (a) a study of the terms of the power; (b) a decision to continue to pay X.[99] Any claims that the

93. In any event, it may be implicit in the Denning test that the class is narrowed so as to remove from it all persons who do not fall "clearly" within the words used. See *infra*, text at n. 103.
94. [1973] 1 Ch. 9, 28: 'Validity [depends upon] whether you can say of any individual . . . 'is or is not a member of the class' [sic] *for only thus* can you make a survey of the range of objects or possible beneficiaries." (emphasis added.)
95. For the best treatment, see Harris, *Trust Power and Duty* (1971) 87 L.Q.R. 31.
96. [1973] 3 W.L.R. 341.
97. 87 L.Q.R., pp. 57, 59.
98. Usually referred to, in the power context, as the duty to consider whether the power should be exercised: see *Manisty*, n. 96, 347 per Templeman J.
99. Idem.

duty is more meaningful in trust situations have been seriously weakened by the construction afforded the phrase "range of objects"[100] in *Re Baden* (No. 2) by Sachs L. J. Rather than take the view that this component of the definition of the duty required, by implication, a study of the competing sub-classes and a determination of how the available income should be distributed between them, Sachs L. J. held that it referred only to the "size of the problem".[101] He said: "The word 'range' . . . has an inbuilt and obvious element of elasticity . . . In modern trusts of the type now under consideration it may be sufficient to know whether the range of potential postulants runs into, respectively, dozens, hundreds, thousands, tens of thousands or even hundreds of thousands."[102] While it would not be accurate to suggest that Sachs L. J. necessarily saw this as the only incident of the duty to survey — though he refers to no other — the incompatibility of a trust with hundreds of thousands of objects with a meaningful duty to survey is eloquent testimony enough to the absence of anything more substantial in the make-up of the duty in the realm of trusts than in the realm of powers.

In the light of the observations made in the preceding paragraph the objection raised by Stamp L. J. against the Denning test can hardly be a substantial one. The duty lacks substance in any event. But on the assumption that future cases might give it more meaning, are those criticisms well founded?

Implicit in them are, it seems, two related assumptions: First, that the Denning criterion would validate a greater number of "vague" trusts in regard to which it would be difficult to establish membership, thus complicating the duty to survey; and secondly, that the *Re Baden* criterion is designed to yield a far greater number of beneficiaries (or a far higher percentage of the total beneficiaries), thus facilitating the carrying out of the duty. The first assumption, it is submitted, is only true if the writer has been incorrect in his analysis of the context of the *Re Baden* criterion. If this suggestion that there is only a very minor difference in the classes of trusts validated by the alternative criteria is well founded, then Stamp L. J's. assumption is substantially incorrect. His second assumption overlooks, with respect, that the *Re Baden* test has no quantitative component and no quantitative purpose. It cannot have, if a distinction is recognised between semantic or linguistic uncertainty and evidentiary uncertainty. The *Re Baden* test effectively provides trustees with a measure by which the entitlement of any given person may be judged. But the task of locating the "relevant" given persons is that of the trustees, and their chances of success or the extent of their success depend upon considerations totally unrelated to the ultimate test by which entitlement is to be

100. From the phase "the trustees ought to make such a survey of the range of objects . . . as will enable them to carry out their fiduciary duty;" [1971] A.C. 424, 457 per Lord Wilberforce.
101. [1973] 1 Ch. 9, 20.
102. Ibid.
103. See discussion *supra*, text following n. 90.

judged. Against this it might be said that Lord Denning's test validates trusts wherein, with the exception of those persons or classes who fall "clearly" within the language, the words are so vague that the trustees have no real idea for whom they are looking when carrying out their duty to survey, and that this of necessity renders the duty more difficult to discharge. If it has any merit at all, this argument is only applicable to those few cases where a trust would be upheld on the Denning criterion but not on that of *Re Baden*.[103] But even there the point is, with respect, without foundation. For had Lord Denning explicitly considered how the duty to survey was to operate in the context of his criterion he would probably have held that it was to be carried out only among those persons who fell "squarely" within the language used and whose existence was the cause of the validation of the trust at the outset. While this method of rationalisation must be an assertion, it is the clear impression left by his judgment that the trustees would limit their functions — and their payments — to this narrower class and that the 'borderline" cases would be ignored in practice as they were at the initial determination of validity.[104] If this is so, then even in relation to the very narrow range of cases in question the second assumption made by Stamp L. J. has no validity, for in such cases the number, or percentage, of beneficiaries located would again depend upon evidentiary considerations. The standard to be met by the evidence would be no less precise. A process of re-definition would have taken place by which the class-defining words were to be read as requiring the attributes of those who "clearly" fell within the class.

CONCLUSION ON THE DENNING TEST

None of the arguments which have been raised, explicitly or implicitly, against the Denning criterion provides any substantial reason why it should not operate as effectively as the *Re Baden* test. Further, the analysis throughout this paper has indicated that in all phases of their operation there are no fundamental distinctions between the two. In jurisdictions other than the United Kingdom — where the issue is of course academic in any event — the question of the test of validity is not, therefore, a really vital one. That same analysis has also indicated, however, that the hundreds of reported pages of argument and decision which constitute the legacy of the latter-day *Jayndice* v. *Jayndice* which is *Re Baden* have brought some promise but little certainty into the law. Even in relation to those topics selected for discussion in this article many authoritative decisions will be necessary before the label "certainty in relation to trust powers" describes an accomplished status rather than connotes a legal battle-ground.

L. McKAY*

104. [1968] Ch. 126, 134.
105. This is certainly, it is submitted, the answer that Lord Denning would have given since by implication he would exclude the borderline cases from the class.

* LL.M. Lecturer in Law, Victoria University of Wellington.