

ARTICLES

C. D. Baker *

DELEGATION OF TESTAMENTARY POWER AFTER McPHAIL v. DOULTON

The rule against delegation of testamentary power seems to have a peculiarly Australian significance. Although having its origin in various judicial pronouncements in English cases¹, it did not have any practical application until the High Court of Australia relied on it to declare a clause in a will invalid in *Tatham v. Huxtable*². Subsequently it received the attention of an Australian writer, D. M. Gordon, who pointed out the illogicality of applying the rule to powers of appointment while recognising as exceptions general and special powers of appointment³. However, a majority of judges confirmed the existence of the rule in litigation commencing in the South Australian Supreme Court and ending on appeal in the High Court of Australia⁴. The purpose of this article is not to question the existence of the rule as a means of nullifying powers in wills, although the writer is impressed by the views of those who think that there are strong arguments *ab inconvenienti* for restricting the application of the rule to the making of the will itself rather than extending it to provisions in the will which are arguably a partial delegation of the testamentary function⁵. For the purpose of this article, however, it will be assumed that it is now established that there is a rule against delegation of testamentary power which may have the effect of striking down certain powers that have been included in wills. The intention of this article is to explore the extent of the rule, bearing in mind the recent House of Lords decision in *McPhail v. Doulton*⁶ concerning the validity of trust powers. It is of course too early to say whether the new law introduced by *McPhail v. Doulton* will be followed in Australia. The decision, however, though in certain respects revolutionary, seems to represent a welcome approach of greater flexibility to a branch of the law which had been bedevilled by hair-splitting distinctions.

Notion of the Trust Power

The words trust power may be applied to three distinct situations: (i) a bare power vested in a trustee or executor⁷; (ii) a power of selection coupled with a trust for distribution; (iii) a power of appointment, combined with a gift

* M.A., B.C.L.(Oxon.), Lecturer in Law, University of Leicester.

1. See esp. per Lord Haldane in *Houston v. Burns* [1918] A.C. 237, at 342; also in *Attorney-General v. National Provincial Bank* [1924] A.C. 262, at 268; per Lord Halsbury in *Grimond v. Grimond* [1905] A.C. 124, at 126; per Viscount Simon, Lord MacMillan and Lord Simonds in *Chichester Diocesan Board v. Simpson* at 348, 349 and 371 respectively.

2. (1950) 81 C.L.R. 639.

3. (1953) 69 L.Q.R. 334.

4. *In re Stapleton* (1969) S.A.S.R. 115; *Lutheran Church of Australia v. Farmers' Co-operative Executors and Trustees Ltd.* (1969-70) 121 C.L.R. 628.

5. See esp. Keeler (1971) 4 Adelaide Law Review 210; see also Campbell (1956) 7 *Res Judicatae*, 244, who would appear to confine the doctrine to trust powers—on this see also n.21; and Hutley (1956) 2 Sydney Law Review 93, who challenges the view of the court in *Tatham v. Huxtable* that the power in question involved an evasion of the Wills Act, 1837.

6. [1970] 2 All E.R. 228.

7. Sometimes also referred to as a trustee power.

in favour of the class in the absence of selection being made. A power of the first type cannot be released, and the donee of the power has fiduciary obligations as regards its exercise in the sense that he must act in good faith, he must apply his mind to the question of the power's exercise and he must not take into account improper or irrelevant considerations. The second situation is often referred to as a discretionary trust. In the third situation, the gift to the class might be regarded as an implied trust in default of appointment, or as an immediate trust in favour of the class, the power of appointment therefore operating by way of divestment from or accretion to the shares of the members of the class. In both (ii) and (iii) the identity of all the individual members of the class needed to be ascertainable, i.e. the power had to comply with the certainty of objects test appropriate to trusts. The only difference between (ii) and (iii) was that in (ii) the court itself would enforce the power in default of its exercise by ordering equal division among the class of beneficiaries, whereas in (iii) the court really gave effect to the wishes of the testator by giving effect to the trust in favour of the class. In theory, therefore, in (ii) the power was enforced whereas in (iii) there was no obligation to exercise the power—the gift in favour of the class prevailed in the absence of its exercise. In practice, the same provision in a will or deed could give rise to all three interpretations⁸, and it made no practical difference which the court adopted. Both (ii) and (iii) were fundamentally different from (i) in that their validity depended upon compliance with the certainty of objects rule for trusts whereas in (i) compliance with the certainty test for powers was sufficient. Even so, there might be difficulties in distinguishing situations coming within (i) from those coming within (ii) and (iii). If a mere power to distribute income were conferred on the trustee, this would clearly come within (i). If, however, a trust to distribute income was combined with an absolute discretion to retain the whole of the income, this was held in *McPhail v. Doulton* to be a trust power, even though there was clearly no trust in favour of the class in default of its exercise and the trustees could not be compelled to exercise the power but only to give proper attention to the question of its exercise⁹.

The effect of *McPhail v. Doulton* on situations (ii) and (iii) is at the moment difficult to assess. It will be remembered that the case has introduced two major changes into the law relating to trust powers. The first is that the test for certainty of objects is that for powers rather than for trusts, i.e., that it is not necessary that a complete list of all the objects of the power should be capable of being drawn, provided it is possible to say of any given person whether or not he is within its ambit. The second is that the court can now enforce the exercise of the power by remedies apart from equal division among the objects of the power. There seems no reason for saying that situation (iii) has been affected by *McPhail v. Doulton* since in that situation the court is merely providing judicial recognition of the existence of a trust which it was the intention of the testator to execute. Presumably such trust must comply with the certainty of objects test for trusts, i.e. that all the objects must be ascertainable. Even in situation (ii) the court may decide that equal division is the best method of ensuring the exercise of the power. After *McPhail v. Doulton*, however, no court can rely on the

8. I.e. that it was situation (ii) or either situation involved in (iii).

9. There is not much academic discussion of these points; but see Sheridan, "Discretionary Trusts" (1951) 21 Conv. (N.S.) 55; Harris, "Trust, Power and Duty" (1971) 87 L.Q.R. 31; Hopkins, "Certain Uncertainties of Trusts and Powers" (1971) 29 C.L.J. 68.

impossibility of equal division as a ground for failure of the power in situation (ii)¹⁰.

The Australian Position as Established by *Tatham v. Huxtable*

In several cases prior to *Tatham v. Huxtable*, Australian courts had held that a trust power in favour of a class whose members were all individually ascertainable was enforceable, although no clear judicial conclusion was reached whether this was enforcing the exercise of the power or enforcing the trust that would arise in default of or subject to the exercise of the power¹¹. Similarly, although no Australian case actually followed the Court of Appeal decision in *I.R.C. v. Broadway Cottages*¹², which laid down that trust powers were subject to the same test in relation to certainty of objects as trusts it seemed clear that a trust power in favour of an indefinite class failed because of lack of enforceability. Thus, in *Re Dwyer*¹³ the testator had left the residue of his estate to his executrix "in trust to be disposed of in whatever manner she may think fit". It was held that the executrix took the property subject to a trust to distribute, and the trust being too vague failed for uncertainty. Since the trust was to make distribution and the person who had to make the distribution was given an absolute discretion as to how to distribute, the notion of uncertainty is here rather special. Clearly the gift failed because the court could by no means at its disposal enforce the obligation to distribute. The ground for failure was therefore unenforceability rather than uncertainty, and since this was the basis of the decision in *I.R.C. v. Broadway Cottages*, the case affords clear Australian support for the latter case.

In *Tatham v. Huxtable*, the testator's will contained the following provision: "I hereby authorise and empower in law my Executor, the said Edgar Ernest Huxtable, to distribute any balance of my real and personal estate which may at the time of my decease be possessed wholly or in part by me, to the beneficiaries of this my Will and Testament, in addition to amounts already specified, or to others not otherwise provided for who in my (executor's) opinion have rendered service meriting consideration by the Testator." This clause was held invalid by a majority¹⁴ of the High Court of Australia on the ground that it amounted to a delegation of the testator's testamentary power. The third member of the High Court, Latham C.J. did not question the rule concerning delegation but dissented on the ground that the clause created a general power of appointment which was an exception to the rule against delegation.

The judgments in this case will need analysis in order to understand the basis of the rule concerning delegation. Presently, however, the narrower question of whether this clause created a trust power or a bare (or trustee) power will be examined. The actual language used by the testator seems clearly apt to

10. Unless the unlikely situation arose in which the court came to the conclusion that equal division was the *only* way in which to enforce the power and the members of the class were not individually ascertainable. The possible survival of equal division is further discussed in text following n.62.

11. See, for example, the judgment of Harvey J. in *Permanent Trustee Co. v. Redman* (1916) 17 S.R. (N.S.W.) 60, at 65, in which he expressly refrained from deciding between the two views, it being immaterial on the facts of the case which view he preferred.

12. [1955] Ch. 20.

13. [1916] V.L.R. 114.

14. Fullagar and Kitto JJ.

create a power rather than a trust. Only if the authorisation given by the testator was regarded as being limited to the mere selection of beneficiaries and not as extending to the question of whether distribution should be made at all could the will be regarded as creating a trust power. Unfortunately in view of the importance of the point, the judgments lack clarity. Latham C.J. thought¹⁵ that the first part of the clause (i.e., that conferring power to distribute among the beneficiaries under the will) imposed a trust power which presumably, although this was not stated, was valid under the doctrine of *Burrough v. Philcox*¹⁶, and *In Re Combe, Combe v. Combe*¹⁷. The second part could not be regarded as valid and was void as being a delegation of testamentary power unless the whole clause could be regarded as a general power of appointment. This it could, because the executor, being a beneficiary under the will, could exercise the power in his own favour. Since it would be an impossible construction of the clause that it created a trust power in favour of the beneficiaries under the will but not in favour of the other class, it seems to have been Latham C.J.'s opinion that the whole provision created a trust power which was valid because it was a general trust power of appointment. This view creates difficulties. The validity of general trust powers has generally not been accepted by the courts, although admittedly no case seems to have concerned a situation in which the donee of the power could appoint to himself¹⁸. The choice of delegation of testamentary power as a ground for invalidity of the second part of the clause also seems surprising in view of Latham C.J.'s conclusion that a trust power was involved. It could far more convincingly have been based on unenforceability, the class concerned being clearly incapable of individual ascertainment. The same point may be made in relation to the judgment of Fullagar J., who stated quite unequivocally that the clause as a whole conferred a trust power¹⁹. Kitto J., did not mention²⁰ the phrase "trust power", and his judgment is rather equivocal on the question whether there was an obligation or a mere power to distribute. Such equivocality can hardly be viewed with indifference since only if a bare power was conferred would there have been a need to invoke the rule against delegation of testamentary power as a ground for the invalidity of the clause since the power concerned would clearly have complied with any of the possible tests for certainty of powers, and no problems of enforceability would arise in the case of a bare power whose exercise the courts cannot compel, although over whose exercise when vested in a trustee or executor they can exercise some control. If, on the other hand, a trust power was imposed by the will, delegation of testamentary power, as stated before, would not need to be relied on as a ground for failure²¹.

15. (1950) 81 C.L.R. 639, at 645-646.

16. (1840) 5 My. and Cr. 72.

17. [1925] 1 Ch. 210.

18. *Yeap Cheah Neo v. Ong Cheng Neo* L.R. 6 P.C. 381; *Fenton v. Nevin* (1893) 31 L.R. Ir. 478; *Re Carville, Shone v. Walthamstow* [1937] 4 All E.R. 465; *Re Mack* [1939] O.R. 100; *Gollan v. Pyle* [1907] A.L.R. 431; *Re Dwyer* [1916] V.L.R. 114; *In the will of Bourk* [1907] V.L.R. 171.

19. (1950) 81 C.L.R. 639, at 650.

20. *Id.*, at 652.

21. It is interesting to note the view of Campbell (1956) *Res Judicatae*, 244, to the effect that the power in *Tatham v. Huxtable* failed because it was a trust power in favour of an indeterminate class. If this is all the court was saying in *Tatham v. Huxtable*, then of course most of the difficulties would disappear. The individual judgments are however based on a much wider principle.

The Validity of Powers and Trust Powers

It is now time to attempt to define the precise extent of the rule against delegation of testamentary powers, and the effect upon the rule of the law laid down in *McPhail v. Doultton*. The High Court of Australia in *Tatham v. Huxtable* established two clear exceptions to the rule, general and special powers of appointment, and a possible third, hybrid powers of appointment (i.e. powers in which the class is defined by process of exclusion). The extent of these exceptions, which, as Gordon states, tend to eat up the rule itself, will be examined first. Some consideration will then also be given to the question of the validity of powers in favour of non-charitable purposes.

The General Powers Exception

General powers of appointment have been stated to be exceptions to the rule against delegation of testamentary power by all except one of the Australian judges who have expressed themselves in favour of the rule itself, by Latham C.J., Fullagar and Kitto, J.J. in *Tatham v. Huxtable*, and by McTiernan and Menzies J.J. in *Lutheran Church of Australia v. Farmers' Co-operative Executors and Trustees*. The one exception is Bray C.J. in *In re Stapleton*. He appeared to recognise an exception in the case of special powers of appointment but not general powers.

The following points arise in relation to the general powers exception. They are to some extent interrelated, but may be distinguished as follows:

- (i) What is a general power of appointment?
- (ii) What is the effect of making a general power a trust power?
- (iii) To what extent is it permissible to justify the general powers exception by recourse to the notion of property?

(i) GENERAL POWER OF APPOINTMENT

The usual definition of a general power of appointment is one in which no restriction is placed upon the donee's choice of objects. What is the position where the donee of the power can appoint to himself but his power of appointment is otherwise restricted? Latham C.J. in *Tatham v. Huxtable* appeared to think²² that the ability to exercise the power in the donee's own favour was enough to make the power a general power. In other words, such ability was at least a sufficient condition of a general power. He therefore upheld the power concerned. Kitto J. regarded²³ the ability to appoint in the donee's favour as a necessary though not a sufficient condition of a general power. In the case itself, the power was not a valid general power since the power to appoint in one's own favour as a member of a limited class did not make the power a general power. Authority tends to support Kitto J. on this point. In *Re Byron's Settlement*²⁴ Kekewich J. held that where a power to appoint "in any manner" with an exception was conferred, the exception destroyed the generality of the power. "Anything less than a power to appoint as he thinks fit is not equivalent to ownership." This argument provides a counter to possible support of Latham C.J.'s view based on the fact that since the donee of the power can make himself the owner of the property by appointment, the power falls within the justification of the general powers exception, viz. that the donee is effectively the owner of

22. *Id.*, at 647.

23. *Id.*, at 656.

24. (1891) 3 Ch. 414.

the property. Ownership normally includes the power of disposition. Further support is provided by *Buckle v. Bristow*²⁵ in which an otherwise unrestricted power of appointment could only be exercised with the agreement of three people. It was held that this was not a general power. Latham C.J.'s judgment shows a considerable breadth of view as to the size of the general powers exception. Thus hybrid powers would come within the exception, provided the exclusionary clause did not rule out the donee of the power. Kitto J. would clearly not have agreed with this, and Fullagar J. expressed disapproval²⁶ of the English cases in which hybrid powers in wills had been upheld. Fullagar J. also said²⁷ that whether or not the executor in *Tatham v. Huxtable* could appoint to himself could make no difference since "the power was in the nature of a trust power and the class of possible beneficiaries was not defined with sufficient certainty to give to its creation the character of a testamentary disposition". This is hard to understand, since if the power qualifies as a general power there can be no question of the class being defined with certainty. The ground for the general powers exception is not the certainty of definition of the class but the notion of a property in the donee of the power. This statement of Fullagar J. is therefore difficult to reconcile with his earlier recognition of an exception to the rule against delegation of testamentary power in the case of general powers. Admittedly, Fullagar J. may have been thinking of a different ground of failure, viz. the unenforceability of a trust power in favour of an indefinite class, but this his judgment does not make clear.

What is the position where the donee of the power cannot exercise it in his own favour? The answer to this question seems tolerably certain. Kitto J. would clearly have regarded this as being fatal to establishing a general power, and it seems unlikely that Latham C.J. would have extended the breadth of his views concerning general powers any further. The "property" justification of the general powers exception is obviously not present where the donee of the power cannot appoint to himself. It also seems correct to say that the mere fact that a power is conferred on a trustee or executor means that, unless there is an express indication to the contrary (which Latham C.J. found present in *Tatham v. Huxtable*), the power cannot be exercised in favour of the trustee or executor himself: such exercise is an abuse of his fiduciary position, and so cannot be regarded as a general power. It is probably true, as Gordon states²⁸, that though general powers are very commonly given to trustees, it has never been suggested that they are either easier or harder to sustain on that ground alone. This, however, begs the question. The absence of a judicial distinction between general powers conferred on trustees, and other general powers would only have been significant where such powers had actually been considered in the light of the rule against delegation of testamentary power. No case which has examined a general power conferred on a trustee in that light has upheld it. In *Tatham v. Huxtable* the one judge who regarded the power as general relied on an express conferment on the executor by the testator of power to distribute in his own favour. Similarly in *Re McEwen*²⁹ a general power vested in a trustee

25. (1864) 10 Jur. (N.S.) 1964.

26. (1950) 81 C.L.R. 639, at 648.

27. *Id.*, at 650.

28. (1953) L.Q.R. 334, at 343.

29. [1955] N.Z.L.R. 575.

was upheld, but again there was an express indication that the trustees could appoint in their own favour.

Finally, what is the position where a trust power of a mandatory nature is imposed upon a person who is neither a trustee or executor under the will? Here again, it seems that the power is held in a fiduciary capacity, and so cannot be exercised in the donee's own favour. No case has been traced which suggested that in the absence of express indication in the will, such power could be exercised by the donee of the power in favour of himself. The only case that has been discovered which in fact concerned a person not an executor or trustee is *In the Will of Bourk*³⁰. The testator had said, "I will and direct that the said fund shall be distributed by my sister L.B. as she may deem fit". On the question whether the sister took the fund beneficially or subject to a trust to distribute the Court ruled in favour of the latter, and declared the trust void for uncertainty. This seems to rule out any question of the sister being able to exercise the trust power in her own favour.

(iii) WHAT IS THE EFFECT OF MAKING A GENERAL POWER A TRUST POWER?

Suppose that a will contains the following provision: "to A in trust to distribute among such persons as he shall think fit". Such a provision seems to fail for two reasons. First of all, since a trust power is imposed and A can therefore not distribute in his own favour, it is not a general power, and therefore fails as a delegation of testamentary power. Secondly, since the court cannot enforce distribution, the power fails for uncertainty. Williams, in considering the failure of the bequest in *Morice v. Bishop of Durham*³¹, makes the following point³²: "Yet a testator may clearly leave a third party to make his will for him, for he may confer upon a third party a general power of appointment, which is perfectly valid. Why a similar power may not be conferred upon the trustee himself is not at all clear." It is true that in this case Williams was considering the possibility that *Morice v. Bishop of Durham* is explicable by reason of the rule against delegation of testamentary power. His difficulty in deciding why a general power should not be conferred on a trustee is answerable by reference to principles explained already. But it by no means follows that had the Bishop of Durham merely been empowered, even in the capacity of trustee, to distribute the testatrix's estate to "objects of benevolence and liberality", this power would have failed. This is to ignore the distinction between trust powers and bare powers. *Morice v. Bishop of Durham* concerned a trust power which failed because it could not be enforced, rather than because the testatrix had delegated her testamentary power. In many other cases concerning trust powers to distribute as the donee of the power has thought fit, the ground for failure of the power has been uncertainty or lack of enforceability³³. Furthermore in *Re McEwen*, Gresson J. approved the validity of a general power of appointment, which was conferred on trustees (who were expressly made objects of the power), after finding that the power was not a trust power. Gordon, in writing of this case³⁴, appears to think that it creates an untenable distinction between cases where the class of possible objects included non-charitable purposes (as in *Yeap Cheah Neo v. Ong Cheng Neo*)³⁵ and that where it is limited to

30. [1907] V.L.R. 171.

31. (1805) 10 Ves. 522.

32. (1940) 4 M.L.R. 20, at 21.

33. See the cases cited under n.18.

34. (1955) 33 Can. Bar Rev. 953, at 957.

35. L.R. 6 P.C. 381.

persons as in *Re McEwen* itself. Here again it seems that the crucial factor in *Re McEwen* was the finding that the power was not a trust power and that this was sufficient to distinguish it from the *Yeap Cheah Neo* case³⁶.

The decision of the House of Lords in *McPhail v. Douulton* to the effect that trust powers will not fail for lack of complete ascertainability of the objects of the power has thrown the position of general trust powers into the melting pot. The mere inability to draw up a list of the objects of the power is now not enough to enable us to conclude that the trust power is not enforceable. This is not to say that now no barrier exists to the enforcement of such powers. The suitability of the three remedies for the enforcement of trust powers proposed³⁷ by *McPhail v. Douulton* seems questionable. The appointment of a new trustee to replace one in whom the creator of the power reposes such absolute confidence seems unsatisfactory. This, however, is preferable to the second remedy (approval of a scheme drawn up by the prospective beneficiaries), which is clearly impossible, and to the third, distribution in the court's discretion, which seems to give to the court an impossible task. Would the donor of the power prefer any of these remedies to the failure of the power? It may be, therefore, that, despite *McPhail v. Douulton*, general trust powers will remain unenforceable. One further point may be made. Since *Morice v. Bishop of Durham*, courts have rejected the argument that if the trustee is willing to distribute in accordance with the will, he should not be prevented from doing so merely because he is under a trust to act rather than a mere power. It may be that one result of *McPhail v. Douulton* with its more flexible approach will be a revision of this attitude. After all, if trust powers in favour of a class which does not satisfy the certainty of objects test for trusts no longer fail as a matter of law, so that the only difficulty is the administrative one of how to enforce the trust, no obvious means by which the trust can be enforced should be ignored. It is true that unenforceability was the chief reason in law for failure of such trust powers, and it may be objected that merely to allow the donee of the power to exercise it can barely be regarded as enforcement. There seems no reason, however, why this should not be regarded as enforcement provided the court lays down rules about the time limits with which the power of trust be exercised, and the rights of persons to apply to the court in the event of its not being exercised. There are precedents for this in the case of purpose trusts³⁸.

If problems of unenforceability no longer affect the general trust power, the only difficulty remaining is that of the rule against delegation of testamentary power. This will not invalidate the power if the trustee is expressly empowered to appoint to himself. Further, it will be argued below³⁹ that after *McPhail v. Douulton* no trust power should be invalidated by the rule against delegation of testamentary power.

36. Is Gordon correct in thinking that in the *Yeap Cheah Neo* case the trustees could have distributed to non-charitable purposes? The terms of the will seemed to preclude this.

37. [1970] 2 All E.R. 228, at 247.

38. See for example *Re Thompson* [1934] Ch. 342; *Re Denley's Trust Deed* [1969] 1 Ch. 373. Ames (1891-92), 5 Harvard Law Review 389, 395, and II Scott, *The Law of Trusts* (3rd edn., 1967), 924, took the view that *Morice v. Bishop of Durham* was wrongly decided on the ground that since the Bishop of Durham was willing to perform the trust he should have been allowed to do so. Gray (1902), 15 Harvard Law Review, 510, at 515 approved the decision. After *McPhail v. Douulton* it is much easier to agree with Ames and Scott.

39. See text between notes 62 and 67.

(iii) CAN THE GENERAL POWERS EXCEPTION BE JUSTIFIED BY RECOURSE TO THE NOTION OF PROPERTY?

The basis of the general powers exception as stated in the judgments in *Tatham v. Huxtable* is simple. Since the donee of the power is in effect owner of the property subject to it, there has been an effective disposition by the will in his favour. Gordon is dismissive⁴⁰ of this argument on the ground that the donee of the power clearly has no such property, and in strict legal theory this seems correct. However, it is unrealistic to deny that courts in dealing with general powers of appointment have constantly explained their decisions in terms of the virtual property right which the donee of such a power possesses. We have seen already that courts appear to view as cardinal features of the general power the ability of the donee to appoint to himself and the absence of restrictions on the exercise of the power and that these features tend to be justified on the ground that the donee of a general power ought to be in the position of an owner. Certain features of general powers are difficult to explain on any other basis than that the donee of such a power has something akin to a right of property. Thus if a general power is capable of being exercised by will, a general devise or bequest (e.g. "I give all my property to X") will operate to exercise the general power unless a contrary intention appears⁴¹. An even more emphatic illustration is the rule that personal property appointed by will under a general power of appointment is property which creditors of the donee of the power have an equitable right to take in satisfaction of their debts, and in preference to those appointed⁴². Finally, although an appointee under a special power derives title from the instrument creating the power, the appointees under a general power derive title from the instrument of appointment itself⁴³. For these reasons, the Australian courts have respectable support for establishing an exception to the rule against delegation of testamentary power in the case of general powers, based on the virtual property right the donee of such a power enjoys⁴⁴.

Special Powers Exception

The merits of the special powers exception are much more debatable. A certain judicial contortionism is evident in the efforts of the High Court to explain the basis for this exception. For example, Fullagar J. in *Tatham v. Huxtable* stated⁴⁵ as a general proposition that a power could only be valid if it amounted to a "true testamentary disposition of property". He went on: "it also seems consistent with legal principle to say the same of the creation of a special power of appointment among a class, where the class is described with certainty, and (as in the normal case) there is, unless and until the power is exercised, a trust for the class or for persons who are to take in default of appointment. Where there is, as a matter of construction, no such trust, there does seem to be a departure from principle if we say that the creation by will

40. (1953) 69 L.Q.R. 334, at 343.

41. Wills Act, 1837, s.27; see, e.g. *Re Lawry* [1938] Ch. 318.

42. For a clear statement of the rule, see the judgment of Lord Buckmaster in *O'Grady v. Wilmot* [1916] 2 A.C. 231, at 248. It is fair to point out that the cases establish that the property appointed does not pass to the executor as assets belonging to the deceased—see *Drake v. Attorney-General* (1843) 10 Cl. & F. 257. It is clear however that equity treats the property appointed as if it belongs to the appointor.

43. *Muir or Williams v. Muir* [1943] A.C. 468.

44. It is of course an unfortunate consequence of the insistence upon property that the most common type of "general" power, that vested in trustees, appears to fall outside the exception.

45. (1950) 81 C.L.R. 639, at 649.

of a special power to appoint among a class is a testamentary disposition of property, but to say so represents a natural enough latitude of view." Fullagar J. did not really explain why a similar latitude of view was less "natural" in relation to the facts with which he was dealing. Kitto J. thought⁴⁶ that the "validity of special powers depended upon the certainty of description of the class or group within which a testator authorises a selection to be made", since if such certainty existed an interest was "in some sense" conferred on the class or beneficiaries so as to justify the existence of an exception to the general rule, even in the case where no gift in default of appointment existed or could be implied. On the facts before Kitto J. however, it was impossible to save the power since the testator had not provided definite criteria for the ascertainment of his beneficiaries but had purported to delegate the choice of them to the "insufficiently guided judgment of another person". It is quite clear, of course, that the objects of a special power of appointment do not take beneficial interests in the property subject to the power, unless there is an implied trust in favour of the class of objects in default of or subject to the exercise of appointment. This proposal for the justification of a special powers exception is therefore weak. Latham C.J. contented himself with saying⁴⁷ that a power cannot be a special power of appointment unless a class of possible appointees is selected by the testator himself, although the case on which he relied for this⁴⁸ concerned a trust power whose validity clearly depended (in the then state of the law) upon individual ascertainability of the class members.

Whatever the merits of the individual rationalisations of the special powers exception, all three members of the High Court were in agreement that a special power of appointment in favour of a class which is described with sufficient certainty by the testator does not infringe the rule against delegation of testamentary power even though there is no trust in default of appointment in favour of the members of the class or of anyone else. The notion of certainty in this context is not an easy one to understand and will need further investigation. Uncertainty, however, could not have been the reason for the failure of the power contained in clause 6 of the will which concerned the court in *Lutheran Church of Australia v. Farmers' Co-operative Executors and Trustees*⁴⁹. The clause provided as follows: "My trustees have discretionary power to transfer my mortgages to the Lutheran Mission . . . for building homes for Aged, Blind Pensioners." The clause was construed as conferring a bare power to appoint to a specific charity. As such it was held to be void as being a delegation of testamentary power by Bray C.J. in the South Australian Supreme Court⁵⁰ and his judgment was upheld by the High Court of Australia, the court being equally divided on this issue⁵¹. The clause could not be upheld as a special power of appointment, nor could it be saved by reference to the rule that a trust to distribute to such charitable purposes as a third person might determine would fail neither for uncertainty nor because of the rule against delegation of testamentary power⁵². It is not obvious why a power of this sort should be distinguished from a special power

46. *Id.*, at 654.

47. *Id.*, at 647.

48. *Re Hughes* [1921] 2 Ch. 208.

49. (1969-70) 121 C.L.R. 628.

50. *In re Stapleton* [1969] S.A.S.R. 115.

51. *McTiernan and Menzies JJ.* in favour, Barwick C.J. and Windeyer J. against

52. Because here no trust was involved, but a bare power.

of appointment. If the reason for the validity of special powers is the certainty of description of the class among whom appointment is to be made, as Kitto J. indicated in *Tatham v. Huxtable*, a power to appoint to a particular person only or to a particular institution or charity only is equally if not more certain. Again, if special powers of appointment where there is no trust in default of appointment are justifiable only by a "latitude of view", as Fullagar J. thought in *Tatham v. Huxtable*, there is no clear reason why such latitude should not have saved the power in question. Windeyer J. in his dissenting judgment in the *Lutheran Church* case seemed to think⁵³ that the explanation of the invalidity of the power in that case must turn on the absence of a trust in default of appointment, although he disagreed with the view that this was a reason for holding the power invalid. It is clear however in the judgments in *Tatham v. Huxtable* (and nothing in the joint judgment of McTiernan and Menzies J.J. in the *Lutheran Church* case contradicts it) that the existence of a trust in default of appointment is not necessary to ensure the validity of a special power. Such a power of appointment is valid provided it is in favour of a class described with sufficient certainty. The reason for the invalidity of the power in the *Lutheran Church* case was not therefore the absence of a trust in default of appointment (although the presence of such a trust would have saved the power), but the fact that Bray C.J. and McTiernan and Menzies J.J. could not bring themselves to regard the power in question as a special power or as a power which could be regarded as valid by recourse to the reasoning which upheld special powers.

It is now time to examine the notion of certainty referred to in the judgments in *Tatham v. Huxtable*. If the requisite certainty exists, the will will have effectually disposed of the beneficial interest so that there has been no delegation of testamentary power. The meaning of certainty is thus clearly important, but the judgments afford little help in determining what test of certainty is to be followed. The first possibility is that the test is the same as that for certainty of powers, viz. that it must be possible to say of any given person whether he is within the ambit of the power. There seem at least two reasons to doubt whether this was the test intended by the High Court. Firstly, although this is by no means conclusive, the tenor of the judgments indicate that the class which is to take must be a limited class. Kitto J. described⁵⁴ a special power of appointment as a power of appointment to a "limited class or group of persons". Furthermore the idea of the members of the class obtaining "in a sense" beneficial interests in the property subject to the power hardly seems consistent with a class containing a vast, fluctuating number of people. Yet under the certainty of powers test, such a class might quite validly be constituted the objects of power. Thus in *Re Sayer*⁵⁵, a power to appoint to "dependent relatives of any such employees or ex-employees", or to "infant dependants of any such employees or ex-employees" was upheld. Secondly, the certainty of powers test, at least as interpreted in England would have recognised as valid the power in *Tatham v. Huxtable* itself, since it was clearly possible to say of any given person that he came within the ambit of the power. Some support exists in the judgments in *Tatham v. Huxtable* for the view that the fact that the executor was given a discretion to determine the membership of the class was the factor fatal to the validity of the power.

53. (1969-70) 121 C.L.R. 628, at 653-4.

54. (1950) 81 C.L.R. 639, at 654.

55. [1957] Ch. 423.

If this was so, one wonders what process of reasoning led the High Court to this conclusion. In principle there seems little point in distinguishing a power to determine both the membership of the class together with who among the class and in what amounts should take from a power which is limited to matters of the latter sort. Moreover, the existence of a discretion to determine the membership of the class seems in fact productive of greater certainty than a power to appoint to a class where no such discretion is conferred. A power to appoint among "the testator's friends" is less certain than a power to appoint among "those whom my executors consider my friends". Similarly although a power to appoint among "those worthy of my consideration" seems obviously too uncertain, if the executor is given a discretion to determine who are worthy of the testator's consideration, no certainty problem arises. To say that the executor's judgment is insufficiently guided misses the point. All that the executor needs to do in order to safeguard himself is to give proper attention to the matter, to act in good faith and not to take improper considerations into account. In cases very similar to *Tatham v. Huxtable*, English courts have experienced no problems relating to certainty. In *Re Coates*⁵⁶, the testator had empowered his wife to pay any "friend" whom "his wife feels that I have forgotten" a sum not exceeding £25 a friend. The fact that the wife had a discretion to determine the question of whether a person had been "forgotten" by the testator did not invalidate the power. Similarly in *Re Wootton*⁵⁷, a power of appointment was conferred in favour of, *inter alios*, "such other person or persons who owing to age or ill health shall be in need of financial help for their respective care or maintenance as my trustees shall in their absolute discretion from time to time select or determine". The power was upheld. It is interesting to note that Pennycruick J. had to consider⁵⁸ an argument that the power represented a delegation of testamentary power. This he dismissed by holding that the doctrine applied only in the case of a trust (and presumably in the case of a trust power) and not in the case of a bare power. There is an attractive simplicity about this view but nothing else seems to commend it.

Some indication of the thinking of the High Court on the issue of certainty can be seen in its discussion of the hybrid power. Fullagar J. in *Tatham v. Huxtable* went out of his way to criticise⁵⁹ the English decisions⁶⁰ upholding such powers although he agreed that certainty may be achieved as well by an exclusive as by an inclusive definition. The mere exclusion of "one person or some persons" from the class would not, generally speaking, be enough to achieve the requisite certainty. Here again, there is a mystifying lack of certainty as to what is meant by certainty. Fullagar J.'s rather desperate gropings towards a test of certainty which is not the same as the certainty of powers test seem oddly reminiscent of that part of the judgment of Lord Wilberforce in *McPhail v. Douilton* in which he attempts to think of a class which would satisfy the certainty of powers test but yet was "nothing like a class" and could not properly be made the objects of a trust power⁶¹. The attempt is unconvincing, and in any case was made in the context of trust powers alone. Kitto J. however, was prepared to recognise the validity of

56. [1955] Ch. 495.

57. [1968] 2 All E.R. 618.

58. *Id.*, at 623-624.

59. (1950) 81 C.L.R. 639, at 648.

60. *Re Park* [1932] 1 Ch. 580; *Re Jones* [1945] Ch. 105.

61. [1970] 2 All E.R. 228, at 247.

Re Park and *Re Jones* on the ground that certainty could be achieved by an exclusive as well as by an inclusive definition⁶².

If, despite what is said above, the certainty of powers test is the relevant one for determining whether there has been a delegation of testamentary power, the latter rule seems a mere barren parade of learning since special powers need to satisfy such a test in any case, and general powers of appointment will not fail for uncertainty.

If, however, the certainty of powers test is not the correct one, what are we to substitute? The only other possibility seems to be that all the members of the class should be individually ascertainable, viz., the test for certainty of objects for trusts and, until *McPhail v. Doulton*, for trust powers. The notion of the special power operating as a disposition in favour of the members of the class may in fact postulate that the certainty of objects rule in trusts should be observed. Did the High Court, however, in *Tatham v. Huxtable* intend to rewrite the law relating to validity of powers to this extent? It seems clear that Kitto J. did not by his admission that the powers in *Re Park* and *Re Jones* were valid.

In relation to special powers, the position established by *Tatham v. Huxtable* (and left undisturbed by the *Lutheran Church* case) is unsatisfactory in that, firstly, although an additional requirement for the validity of such powers seems to have been imposed, namely, that they should not amount to a delegation of testamentary power by the testator, this requirement or examination turns out to be nothing other than a requirement that the power be certain; secondly, what test of certainty is to be applied to such powers is unclear.

Effect of *McPhail v. Doulton* on Special Powers Exception

McPhail v. Doulton will of course have no effect upon a special power which is not a trust power. The validity of such a power must be tested by reference to considerations already discussed. If, however, the special power is a trust power, three situations must be distinguished: (i) the trust power may be one which the courts would in any case have upheld since equal division among the class was possible (i.e. the class complies with the certainty of objects test for trusts); (ii) the class in whose favour the trust power is conferred may comply with the rules of certainty laid down in *Tatham v. Huxtable* but not with the certainty of objects rule for trusts; (iii) the class in whose favour the trust power is conferred complies neither with the rules of certainty laid down in *Tatham v. Huxtable* nor with the certainty of objects rule for trusts.

In the case of (i), *McPhail v. Doulton* has clearly made no difference to the validity of the power. It seems beyond question that the rule against delegation of testamentary power would not have affected trust powers which were valid under the doctrine of *Burrough v. Philcox*, and in any case such trust powers clearly complied with the test for special powers laid down in *Tatham v. Huxtable*. According to the view taken of the juridical status of such a power, *McPhail v. Doulton* may nevertheless have affected the method of enforcement of the power. If such a power is regarded as valid because the court can enforce the wishes of the donor of the power by ordering equal division among the class, *McPhail v. Doulton* may have introduced refinements

62. (1950) 81 C.L.R. 639, at 656.

to this solution. Equal division may have been regarded as appropriate because it was the only possibility of enforcing the power. In other words, given the choice, the donor of the power would prefer this solution to the failure of the power. There seems no reason therefore why the new remedies proposed by *McPhail v. Douulton* should not produce a result other than equal division if this was felt appropriate by the court. If however equal division is based upon the fact that an implied trust exists in favour of the members of the class, either in default of appointment or subject to the exercise of such appointment, it seems unlikely that the existence of such a trust has been affected by the availability of new remedies for the enforcement of the power.

In situation (ii) also, there can be no failure because of delegation of testamentary power and so the only problem is one of enforceability. The problem existing in relation to the enforceability of hybrid powers will be discussed below. In the case of other special powers, the remedies proposed by *McPhail v. Douulton* will solve questions of enforceability. The same results as to enforceability apply to situation (iii). But here, there is the further problem that the power appears to fail because of the rule against delegation of testamentary power. On examination, however, it will appear that *McPhail v. Douulton* may have made an important difference not only to the enforceability of such a power but also to the infringement of the rule against delegation of testamentary power. That rule, it has been observed, requires that the will must effectively dispose of the property subject to it. This involves an ambiguity since it is not clear whether this means that the will must simply compel distribution or that the selection of the persons to benefit must be made by the will itself. If the former view is correct, *McPhail v. Douulton* must save the power since its effect is to render enforceable a compulsory direction for distribution among a class contained in a will where the will leaves the selection of persons in that class to benefit from such distribution to another person. On the other hand, if the testator himself must choose his beneficiaries in order to comply with the rule against delegation of testamentary power, *McPhail v. Douulton* will not have affected the position.

This matter may be tested by considering the attitude of the High Court to a gift in default of appointment. What is the position if the testator has made an express gift in default of appointment either to the objects of the special power or to some other person or persons? Fullagar J. in *Tatham v. Huxtable* thought⁶³ that a special power of appointment (where the class is described with certainty) and coupled with a "trust for the class or for persons who are to take in default of appointment" was an exception to the rule against delegation, although where there was no trust in default of appointment there was a "departure from principle" which could only be justified by a "latitude" of view. Part of the content of these remarks may be directed to trust powers in favour of a class each member of which is ascertainable. But it is clear that also comprehended within their ambit are special powers of appointment which are not trust powers but are accompanied by an express gift in default of appointment to persons other than the objects of the special power. It is tempting to argue, therefore, that the existence of the trust in default of appointment is the thing which saves such power from offending the rule against delegation. Such a trust ensures that there be a complete "disposition" of the testator's property since whatever is not appointed to the objects of the power must go under the trust in default of appointment.

63. (1950) 81 C.L.R. 639, at 649.

The only difficulty with this conclusion is that Fullagar J. stressed that the class in whose favour the special power is created must be described with certainty. Furthermore, where such certainty existed, the absence of a trust in default of appointment did not invalidate the power (though only by a latitude of view). Thus the requirement that the testator must choose his beneficiaries (at least to the extent of providing a certain description of the class) appears more important than the fact that there is a trust in default of appointment. Kitto J. also seems to rely on the idea that the testator must choose his beneficiaries. Thus he quotes⁶⁴ the following passage from Lord Haldane's speech in *Houston v. Burns*: "The choice of beneficiaries must be the testator's own choice. He cannot leave the disposal of his estate to others. The only latitude permitted is that, if he designates with sufficient precision a class of objects or persons to be benefited, he may delegate to his trustees the selection of individual persons or objects within the defined class"⁶⁵. In other words, any delegation of the selection of beneficiaries is void unless the testator has sufficiently clearly indicated a class from which selection is to be made. On this view the existence of a trust in default of appointment would not have saved the power in *Tatham v. Huxtable*. Windeyer J. in the *Lutheran Church* case is the only judge who clearly favours the view that the existence of a gift in default of appointment would exclude the application of the rule against delegation. He said⁶⁶ "The validity of a power of disposition given by will is not in my view to depend on whether the will says expressly that if the power be not exercised the subject property is to go to the testator's next of kin or simply leaves this as an inevitable consequence of the law." Clearly he thought there could be no argument that a power infringing the rule against delegation if it were accompanied by a gift over in default of appointment. It is submitted that Windeyer J. is right, and that the element of compulsory distribution involved in an enforceable trust power should provide the necessary "disposition" for the purpose of complying with the rule against delegation of testamentary power.

In this connection, the facts of *McPhail v. Douulton* itself present a conceptual difficulty. Clause 9(a) of the will although appearing to impose an obligation to distribute income among the specified class, gave the trustees absolute discretion as to times of distribution and amounts to be distributed. In theory, therefore, the trustees could with perfect propriety have retained the whole of the income provided they had applied their minds to the question of distribution. Only in the House of Lords was it decided that this clause involved a trust power rather than a power. For present purposes there is no point in disputing this finding although it gives rise to the problem already referred to of drawing a line between trust powers and bare powers vested in trustees. The relevant question for these purposes is, "Assuming the power could be held valid only by recourse to the trust power argument presented above (i.e. the class itself is not sufficiently certainly described for the power to rank as a special power of appointment), is there a sufficient "disposition" of the beneficial interest in the income bearing in mind that the trustees cannot be compelled to distribute but can only be compelled to give their minds to the question whether distribution ought to be made?" The answer to this question must be left open, since speculation beyond a

64. *Id.*, at 655.

65. [1918] A.C. 337, at 342. The words quoted by Kitto J. are not, in fact the exact words used by Lord Haldane, although they bear a resemblance to them.

66. [1969-70] 121 C.L.R. 628, at 654.

certain point becomes unprofitable. It may be noted however that English courts have decided that the beneficiaries under a similar discretionary trust have an interest as a class in the property subject to the discretionary trust, although the individual beneficiaries have no interest whatsoever⁶⁷.

Hybrid Powers

For the sake of completeness the position as to hybrid powers will be stated briefly. The exact meaning of the expression, "hybrid power", is not clear but for these purposes it will be taken to mean a power in favour of a class defined by an exclusive rather than an inclusive definition, for example, "all persons except X and Y"⁶⁸. Where the exclusion does not affect the donee of the power, the power is arguably a general power although, for reasons already stated⁶⁹, the better view is that it is not. If the hybrid power is not a trust power its validity depends upon the certainty of description of the class. The disagreement between Fullagar J. and Kitto J. about whether a class could be certainly described by an exclusive definition has already been noticed. The validity of such a power remains uncertain in consequence. Since general powers vested in trustees must, it seems, be regarded as hybrid powers, unless the trustees can appoint in their own favour, this uncertainty is unfortunate. If the hybrid power is a trust power, it may be saved from the operation of the rule against delegation of testamentary power by the argument described above to the effect that the existence of an enforceable trust power excludes the operation of the rule against delegation. However, the difficulties already noticed⁷⁰ concerning the enforceability of general trust powers may well also affect hybrid powers.

Trust Powers in Favour of Non-human Objects

The case of *Morice v. Bishop of Durham*⁷¹ concerned the following provision in a will: "to the Bishop of Durham upon trust . . . to dispose of the residue to such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve of". This provision was held to fail. "As it is a maxim that the execution of the 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; or if the trustee dies, the court itself can execute the trust"⁷².

At least five possible *rationes decidendi*, drawing varying amounts of support from the actual judgments given, have been suggested for this case. These are: (i) that a trust which is not a charitable trust fails in the absence of a human beneficiary; (ii) that such a trust fails because it cannot be enforced; (iii) that the words "benevolence and liberality" were too uncertain so that the court could not decide whether the objects chosen by the Bishop came within them; (iv) that, in the case of a trust for distribution, the objects

67. Since they can if all are *sui juris*, terminate the trust and call for the trust property to be handed to them—*Re Smith* [1928] 1 Ch. 915; for the lack of interest in the individual member see *Gartside v. I.R.C.* [1968] A.C. 553.

68. There are difficulties about this. A class which excludes all but "non-combatants and conscientious objectors in the last World War" is not really defined by exclusion.

69. See text following n.24.

70. See text at n.33.

71. (1805) 10 Ves. 522; 32 E.R. 656, 947.

72. Per Lord Eldon, L.C., 32 E.R. 947, at 954.

of distribution must be certain, otherwise the trust cannot be enforced; (v) that the testatrix had delegated to the Bishop her testamentary power. There is admittedly no support for ratio (v) in the judgments in *Morice v. Bishop of Durham* but it was suggested as a possible explanation for the decision by Glanville Williams⁷³, and support is derived from the judgment of Lord MacMillan in *Chichester Diocesan Board v. Simpson* who based his view as to the invalidity of a trust to distribute to "charitable or benevolent purposes" on the fact that the testator had delegated his testamentary

Of these *rationes* (i) and (ii) seem to assume the existence of a trust for retention rather than for distribution. There was no reason why a trust for non-charitable purposes should have been created by this will. An outright gift by the Bishop of Durham to such objects of benevolence and liberality as he chose would clearly have constituted compliance with the will. In *Re Ogden*⁷⁵ a trust to distribute money among such "political federations or bodies in the United Kingdom having as their objects the promotion of liberal principles in politics as he shall in his absolute discretion select" was a valid trust power, the court being satisfied on the evidence that it was possible to draw up a complete list of such bodies. This was not an attempt to create trusts for political purposes but to benefit political institutions by outright gift, the only trust involved being a trust to distribute. *Morice v. Bishop of Durham* is distinguishable only because the objects of the trust for distribution were defined entirely in terms of abstract qualities, and because such objects were too uncertain for the court to enforce a trust to distribute to them. There seems no reason, however, why the Bishop should not have furthered these objects by making outright gifts rather than by creating invalid trusts. The objection based on uncertainty comprises both *rationes* (iii) and (iv). The *ratio* based on the uncertainty inherent in the words "benevolence and liberality" seems unsatisfactory. Such words are not totally without meaning, and the Bishop had a discretion and felt himself able to choose such objects. The requirement of court control over the execution of the trust need not have given rise to difficulty since in its control over the exercise of a discretion the court need only be satisfied that the person exercising the discretion has given proper attention to the matter, and has acted in good faith and not taken into account improper considerations. *Ratio* (iv), based on the unenforceability of the trust to distribute should the Bishop prove unwilling to make such distribution, has met with the objection that the fact that the trustee could not be compelled to distribute should not lead to the conclusion that he should not be allowed to distribute if he wished to do so⁷⁶. *Morice v. Bishop of Durham* represents a clear barrier against construing an invalid trust as a valid power in this way. It has been suggested above⁷⁷ that *McPhail v. Doulton* may have made a difference in this respect, that once the validity of the trust power is accepted, no obvious way of ensuring its execution should be ignored and that if the trustee is willing to exercise the power, this should be regarded as a method of enforcing it. It may be, although it is not apparent, that *McPhail v. Doulton* was not intended to affect trust powers in favour of purposes; this may be a legitimate deduction from the fact that the remedies proposed by *McPhail v.*

73. (1940) 4 M.L.R. 20, at 21.

74. [1944] A.C. 341, at 349.

75. [1933] Ch. 678.

76. *Cf.* n.38.

77. See text at n.33.

Doulton for the enforcement of trust powers appear to presuppose the existence of a class of human beings who can apply for them. Nevertheless it is suggested that it is reasonable to take *McPhail v. Doulton* in a wider sense than this, and that if this is accepted, the decision has removed the only basis upon which the decision in *Morice v. Bishop of Durham* can rest. In future therefore a trust for distribution among non-human, non-charitable purposes should not automatically fail. There remains the explanation of *Morice v. Bishop of Durham* based on delegation of testamentary power. There seems no reason, however, why this should invalidate a trust power in favour of non-human objects, if it is accepted that the enforceability of the power justifies the conclusion that there is a sufficient disposition under the will to comply with the rule against delegation of testamentary power. If, however, a mere power to distribute in favour of such purposes were conferred, the latter rule would seem to be infringed⁷⁸.

78. My thanks are due to Mr. J. F. Keeler who read the article and made a number of helpful comments and suggestions. I alone am responsible for its remaining imperfections.