Pure Power and Power in Trust

A short comment upon a recent English case[1] seems justified in the light of the very clear distinction drawn by Harman J. between a power of appointment and a trust. So much has been written upon the problems involved in the meeting of powers and trusts that it is sufficient for the moment to refer to the New Brunswick case of **Re Gilbert**[2] where Harrison J. refers to some of the literature dealing with gifts to persons to be selected by trustees or others from among the members of a specified class and the problems arising in such situations when the selection is not made: was it a power only, in which case the property results back to the settlor's estate (in the absence of a gift over in default of appointment) or was there a gift to all members of the class equally either by way of an implied gift to all members or by way of an argument that the power was held in trust to be exercised and if not exercised, the court would carry out the trust by giving to all potential beneficiaries. The result of either route in the second alternative may appear to be the same so far as those persons who are members of a definite class are concerned: they take equally in default of appointment.

Where the class is indefinite or one with a variable content at any particular moment the result is not reached so easily. If the solution is by way of trust, problems are raised as to whether the requirements for validity of an ordinary trust are to be made applicable to a power held in trust. It would seem that a power alone, apart from trust (and apart for the moment from any testamentary problem) is valid whether it be a general power, a special power to select from the members of a definite class of persons, or an intermediate power which is neither general nor restricted to a definite class—i.e., a class all of whose members can at any moment be identified. Does it make any difference if either the power is held in trust or the property to be appointed is held in trust and the power of selection is to be made by the trustee? And if it does make a difference in the second case, can there be a pure power, unfettered by trust problems, exercisable with respect to property held in trust, even by the trustee?

The first question is raised in part by the trust rule that the metes and bounds of the trust must be sufficiently marked out so that the court can enforce. There is no problem where the limits of the class are clearly defined as in the **Gilbert** case[2]—"descendants . . . of my late Father Henry Gilbert" at the appropriate date, remembering (a) a prior life estate to A, (b) the power was to be exercised by the will of the donee who was herself given a life estate if she survived A. And it can be argued that where the power is general it amounts to a beneficial gift, even though this may involve some strained reasoning because of the trust. But what of the intermediate type of power? Clauson J. had held in **Re Park**[3] that a power to appoint to anyone other than the donee of the power was valid in these circumstances: residue of estate given by will to a trustee to pay the income to such person or persons (other than

1. **Re Gestetner** [1953] 1 All E.R. 1150.
2. [1948] 3 D.L.R. 27.

herself) or charitable institution or institutions and in such shares and proportions as Jane Armstrong should from time to time during her lifetime direct in writing, and after her death capital (and any income not appointed) to a named charity. His lordship noted the requirement that a trust must be spelled out so that the court can, if necessary, enforce it. But this trust was quite definite and marked out: the income was to go, if Jane Armstrong designated a person or charity, to that person or charity. If not, it was to go to the named charity. Quite clear, his lordship declared. This view was followed in **Re Jones**[4] where the power was to appoint to any person living at the death of the donee, thus excluding corporations. Clauson J. had emphasized in **Re Parks**[3] that the donee of the power was not a trustee.

> Now Jane Armstrong is not a trustee. If she refused to act in the matter the Court could not appoint another person to act in her place.[5]

In this state of the law **Re Gestetner**[1] came before Harman J. No testamentary problem was involved. It was an **inter vivos** trust created by Gestetner by way of transfer of £100,000 to trustees to apply the income and the capital or such portions of each as they thought fit for such member or members of a class composed of four named individuals, five named charities, any descendant of the settlor's father or of his uncle J. G., any spouse, widow or widower of the persons so far included, any person for the time being a former employee of the settlor or of his wife or who was for the time being the widow or widower of a former employee, any person for the time being a director, employee, former director or former employee or the spouse, etc. of a former employee or former director of Gestetner Ltd. or of any company of which the directors for the time included any one or more of the persons who were for the time being directors of Gestetner Ltd., but excluding from the class the settlor, any wife of the settlor and any trustee. Subject to and in default of such selection, there was a trust in favour of the settlor's children (and their representatives) and in default of such children or issue to a named charity. Care was taken to avoid the perpetuity problem. The problem of the trust's validity was put before the court by the trustees who had paid some of the income to one of the five charities (not the residuary charity) in exercise of their power of selection. The tax authorities had declined to remit the tax deducted at the source on the ground that the trusts (or at least some of them) were invalid because the membership in the class was so wide as to make the settlement uncertain and to cause a resulting trust in favour of the settlor.

It was argued at the hearing of the motion by those attacking the trusts that the power of selection, being a power coupled with a duty, a power held in trust, was bad because it was impossible to know the limits of the area of selection – "that is to say, though the trustees

3. [1932] 1 Ch. 580.
4. [1945] Ch. 105 (Vaisey J.).
5. **Ibid.**, at p. 582. Doubt has been cast on the validity of both of these cases in the High Court of Australia in **Tatham v. Huxtable** (1950) 81 C.L.R. 639 in the judgment of Fullagar J. The main problem there, however, was testamentary, and will be noted later.

can at any moment tell whether John Doe or Richard Doe is a person within the power, they cannot tell how many more people there may be who may be within it". The case was argued throughout on the admission of all parties (five interests including the tax authorities were represented) that the class was "not one ascertainable at any given time, because it is a fluctuating body . . . it is impossible to know at any one moment the names of all the members of the specified class." But Harman J. held that it was not necessary, in connexion with every power, to know all the objects in order to appoint to one of them. "There is much to be said for the view" that such knowledge was necessary if the power was coupled with a duty to distribute. His lordship referred to the **Park** and **Jones** cases for the view that if there was no duty, the power may be not merely general or special, but also "betwixt and between" where the membership is less definite, and to **Re Ogden**[6] for the view that where there was a duty to distribute – to exercise the power – then there must be a certainty among the recipients. His lordship also referred to Farwell's view that if the power be a power not involving a duty to distribute, it is not necessary to know all possible objects at the moment of exercise. In application to the facts of the **Gestetner** case, Herman J. held that despite the inability of the trustees to release the power absolutely (one of the terms of the settlement), there was not any duty on the trustees to distribute either income or capital in whole or in part among the members of the class. The settlement by its terms made provision for a gift over to the extent that the power of selection was not exercised.

In the view of the court, as there was no duty to distribute (even assuming a duty to consider) under the Gestetner instrument "it does not seem to me that there is any authority binding on me to say that this whole trust is bad or that this whole power is bad". His lordship added that there was no difficulty in ascertaining whether any postulant was a member of the class–"if that could not be ascertained the matter would be quite different."

> There being no uncertainty in that sense, I am reluctant to introduce a motion of uncertainty in the other sense, by saying that the trustees must worry their heads to survey the world from China to Peru, where there are perfectly good objects of the class in England . . . There is no uncertainty in so far as it is quite certain whether particular individuals are objects of the power. What is not certain is how many objects there are; and it does not seem to me that such an uncertainty will invalidate a trust worded in this way.[7]

In effect, though there was a power to select vested in trustees, the court carefully separated the power from the trust. The requirement of certainty in the latter was at all times met. The **cestuis que trust** were those selected upon selection, and until selection or in default of selection in whole or in part, they were the settlor's children and issue, and in default, the charity. The selection when made was quite definite and certain. And his lordship twice pointed out that it was possible at any time to ascertain whether any individual selected

6. [1933] Ch. 678 (Lord Tomlin).
7. [1953] 1 All E.R. 1150, at p. 1156.

was within the class. That is, with respect, a very salutory decision. So much has been said in the name of "uncertainty" recently (e.g. the **Diplock** case[8]) that the occasional simple analysis by an English judge of the fundamentals of some of our legal concepts is extremely refreshing.

Earlier it was asked whether the combination of trust and power altered the rules that would otherwise be applicable to each had they been standing alone. It would seem that if the power is a pure power and not one to be exercised, then the power is no different from any other power, even though the property which is the subject matter of the power is held in trust and the donee of the power is the trustee (a factual point of difference from the **Park** case). It would also seem that if the power is held in trust, on the basis of the **obiter** in the **Gestetner** case, that the rules about the metes and bounds of the trust being marked out with certainty must equally apply to the power.[9]

What are the implications of the **Gestetner** decision? The suggestion that a power as such is valid even though all objects may not be ascertainable at the moment, as long as it can be ascertained whether a particular person is within or without the class, leads to three questions. In the **Gestetner** case all potential objects were individuals with the exception of five named charities, and were defined largely in an inclusive manner, rather than the exclusive manner of **Re Park.** Would the trust have still been valid if it had been one for all the world except the settlor, his spouse for the time being and the trustees (the same exceptions as in the **Gestetner** case)? There is no reason why it should not be valid.[10]

Secondly, would the power have been valid if it had been in favour of corporations (other than charitable corporations) defined by such words as "benevolent," "philanthropic," "recreational" remembering that in the view of Harman J. it is not necessary to know the metes and bounds of the power as long as we can ascertain whether any proposed beneficiary falls within the class – i.e., is "benevolent" etc. Again there is no reason why such words should not be capable of this limited interpretation, even though their full ambit may not be definable. However, this may be a point of separation between **Re Gestetner,** where any object, when picked out for examination, could be

8. **Re Diplock; sub nom. Chichester Diocesan Board v. Simpson** [1944] A.C. 341.

9. A full discussion of this point is reserved, however. Additional **obiter** in the same case also suggested a further difference from ordinary powers where the power is held in trust to be exercised—that all potential objects may join together and agree to take the property in equal shares (or any unequal basis they agree upon?), and that they could put an end to the trust and to the power by coming to court and seeking distribution. To the extent that this is true of an ordinary trust, it would seem to follow that it might apply to a power held in trust. (Again, this point is reserved for full analysis at another time.)

10. It will be noticed that this question raises an issue as to whether there was any uncertainty in the **Gestetner** case at all — difficulty in ascertaining membership of a class is not uncertainty ,and no trust and therefore, it would seem, power will fail just because of difficulty in ascertaining the beneficiaries or objects, as long as the metes and bounds are marked out. Thus even if this power had been held in trust might it have been valid if the initial assumption on which the case was argued was cast overboard?

declared to be within or without the class, whereas, in such cases as "benevolent" and similar objects outside of the charitable field, the description is at one end indefinite so that it may not be simple to say that objects A and B are benevolent and objects Y and Z are not. But exactly where the line in between falls is truly uncertain in the legal sense and, for simple powers, should this difference matter?

Thirdly, will the **Gestetner** view of powers be carried over into the testamentary field? Most statements that a man may not leave it to others to make a will for him are careful to except powers of appointment. If general and special powers created by will are valid, why not those in the **Gestetner** type of case, had the power there been created by will? **Re Park** held such a testamentary power valid. That was a single judge. In the High Court of Australia, Fullagar J. has suggested that case is wrong as being an invalid delegation of the **testamentary power, but Kitto J.** does not go that far – he seems to recognize that the House of Lords dicta against delegation, and there has been a lot of it lately culminating in the **Diplock** case, leaves available to testators all valid powers which are pure powers and which are certain enough to allow the court to say whether any particular beneficiary selected by the donee of the power is within it. Latham C. J. did not discuss the point. The remarks of Fullagar and Kitto JJ. might be considered **obiter** if the power there involved could be said to be held in trust. [11]

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11. **Tathom v. Huxtable** (1950), 81 C.L.R. 639, particularly at pp. 649-9, 655-6.

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