

Bob was a builder. He therefore amassed a lot of money. Before his death he made a will. In his will he makes the following disposition (amongst others):

‘On trust to Farmer Pickles in the hope that he will distribute a large slice of my considerable fortune to any or all of my customers who were satisfied with my work during my lifetime.’ The will further provides that if there is any doubt about the above ‘Farmer Pickles is to refer to Wendy—my loyal assistant and worker for many years.’ The residue of the estate is left to Bob’s sister Ethel. Advise Farmer Pickles as to whether the disposition is valid as a trust or power and whether Mrs Broadbent (a former customer of Bob’s), Farmer Pickles or Ethel can claim any of the money.

Suggested Answer

‘Bob the builder’ is a problem about the three certainties. Many students will probably just regurgitate their notes on this topic, but the better answers will identify the legal issues raised by the facts of the problem.

There is a doubt about certainty of intention. The word ‘trust’ is used, but so is the word ‘hope’. A discussion of contrasting cases such as *Lambe v Eames* and *Hunter v Moss*, for example would be appropriate.

The words ‘considerable fortune’ and ‘large slice’ also raise doubts about certainty of subject matter: *Palmer v Simmonds*, *Re Golay*.

Whether this instrument is a fiduciary power or a discretionary trust is hard to tell from the wording. There is no gift over in default of appointment (*Re Gulbenkian*, *Re Gestetner*), but the wording does not seem mandatory (*McPhail v Doulton*) and there is no requirement that all the income should be distributed, so it seems most likely to be a fiduciary power. I suppose that a non-exhaustive discretionary trust is possible, but it does seem less likely.

The certainty of objects test is the same, whether it is a fiduciary power or a discretionary trust (*McPhail v Doulton*). The weaker students just quote the test and move on, but the better students would attempt to explain the test and apply it, probably by reference to *Re Baden*. ‘Customers’ would pass the certainty test. There is even a recent case on this, *OT Computers v First National*. The ‘satisfied’ bit is the problem. It looks conceptually uncertain, but there are cases (*Re Coates*, *Re Gibbard*) where the courts have allowed such words if there is a third party or other factors that enable the trustees to make a decision. *Re Gulbenkian* may have disapproved of such cases.

‘Administrative unworkability’ is unlikely to be in issue, because even builders who are TV stars do not have that many customers. Strictly speaking, if this is a fiduciary power, the power can be disallowed for ‘capriciousness’ (*Re Manisty*), the definition of the class is just not sensible.

Whether it is a fiduciary power or a discretionary trust, the trustees have a duty to consider their choice: *Re Hay*, *McPhail v Doulton*. All Mrs Broadbent has is a hope (*spes*) that she is chosen. Failure to consider at all would be actionable: *Turner v Turner*. The trustees do

not have to choose her and they do not have to give reasons for any choice that they make: *Re Beloved Wilkes* [1851] 3 Mac & G 440.