MCPHAIL V. *DOULTON* AND CERTAINTY OF OBJECTS: A "SEMANTIC" CRITICISM

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I. INTRODUCTION

The House of Lords' pronouncement in *McPhail* v. *Doulton*[1] that the test for the validity of trust powers is "that the trust is valid if it can be said with certainty that any given individual is or is not a member of the class"[2] has been described as "revolutionary."[3] It explicitly repudiated the test previously enunciated by the Court of Appeal in *I.R.C.* v. *Broadway Cottages* that "a trust for such members of a given class of objects as the trustees shall select is void for uncertainty, unless the whole range of objects eligible for selection is ascertained or capable of ascertainment."[4] At the same time, the House of Lords was not so revolutionary as to countenance the test suggested by Lord Denning M.R. for "powers collateral" in *Re Gulbenkian's Settlement*, namely that, "if there is some particular person at hand, of whom you can say that he is fairly and squarely within the class to be benefitted, then the clause is good."[5]

Interestingly, subsequent commentators on these cases have not always been able to agree about the *effective* distinctions among the three tests.

Some, for example, have seen the *Broadway Cottages* "class ascertainability" test as tending to merge with the *McPhail* "individual ascertainability" test. In *Re Baden's Deed Trusts (No. 2)*,[6] Megaw L.J. was troubled that a literal reading of Lord Wilberforce's words "*is or is not* a member of the class" might suggest that the whole class had to be ascertained — a requirement that the House of Lords had "expressly

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[1] (1970), [1971] A.C. 424, [1970] 2 All E.R. 228 (H.L.) [hereinafter *McPhail*].

[2] *Ibid.* at 456, [1970] 3 All E.R. at 246 *per* Lord Wilberforce.

[3] *See* F.R. Crane, *Note* (1970) 34 CONV. 287, at 287. The word is adopted by C.T. Emery, *The Most Hallowed Principle—Certainty of Beneficiaries of Trusts and Powers of Appointment* (1982) 98 L.Q. REV. 551, at 551.

[4] (1954), [1955] Ch. 20 at 35-36, [1954] 3 All E.R. 120 at 128 (C.A.), *per* Jenkins L.J.

[5] (1967), [1968] 1 Ch. 126 at 134, [1967] 3 All E.R. 15 at 18 (C.A.).

[6] (1972), [1973] Ch. 9, [1972] 2 All E.R. 1304 (C.A.).

rejected."[7] More positively, Paul Matthews, who disputes that *McPhail* was "revolutionary" and contends that it "merely returned the state of the law to what it had always been before the wayward decision . . . in . . . *Broadway Cottages*,"[8] regards the distinction between "class ascertainability" and "individual ascertainability" as misconceived in relation to the *validity* of a trust. Even for a fixed trust, he argues, it is not necessary to its validity that at the outset an exhaustive list of the members of the class be compiled — only that the description of the class be such that "if and when members come into existence they *can* be ascertained."[9] As long as the criteria for membership in the class are certain, the only difficulty that remains is the evidentiary one of determining who fulfils the criteria: "[B]ut such difficulties have never in the past made a trust void for uncertainty."[10] On this view, "class ascertainability" and "individual ascertainability" tend to converge.

Similarly, a convergence between the "individual ascertainability" test and Lord Denning's "particular person" test has been noted. Again, in *Re Baden (No. 2)*, Stamp L.J. regarded the approach to the *McPhail* formulation taken by the other members of the Court of Appeal as tantamount to "holding that the trust is good if there are individuals — or even one — of whom you can say with certainty that he is a member of the class."[11] This, of course, is the Lord Denning test, rejected even for "mere powers" by the House of Lords in *Gulbenkian*.[12] Stamp L.J. probably infers too much here as his brethren's deletion of "or is not" from Lord Wilberforce's "is or is not a member of the class" goes only to the issue of proof of non-membership and not to the question of clear demarcation of concept. His concerns, however, do point to the elusiveness of the distinctions between the two tests.

In a rather more cogent exposition, L. McKay[13] has similarly noted that, at least in practical terms, the differences between the "individual ascertainability" test, as interpreted in *Re Baden (No. 2)*, and Lord Denning's approach are more apparent than real. He implies, for example, that while *Re Baden (No. 2)* does require that the class-defining words be "conceptually certain," the presumption created by the majority that a person is outside the class unless he or she can prove membership means that not all those who actually present themselves will be accurately classified; only some will. Thus, as in the Denning test, there will be "certainty" where only some of the members are identified. Moreover, there may be a tendency for the class to be re-defined in terms of the

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[7] *Ibid.* at 23-24, [1972] 2 All E.R. at 1313.

[8] *A Heresy and a Half in Certainty of Objects* [1984] CONV. 22, at 22.

[9] *Ibid.* at 27.

[10] *Ibid.* at 28.

[11] *Supra*, note 7 at 27, [1972] 2 All E.R. at 1315.

[12] (1968), [1970] A.C. 508, at 525, [1968] 3 All E.R. 785 at 794 (H.L.) *per* Lord Upjohn.

[13] *Re Baden and the Criterion of Validity* (1973-75) 7 V.U.W. LAW REV. 258.

"attributes of those who 'clearly' [fall] within the class."[14] Again, the test may be satisfied by identifying a few "standard instances." McKay goes so far as to conclude that "in all phases of their operation there are no fundamental distinctions between [the *McPhail* test as applied in *Re Baden (No. 2)* and Lord Denning's test]."[15]

The effect of putting Matthews' and McKay's arguments together is rather startling. Matthews argues that the "class ascertainability" test, in so far as it is taken to require the drawing up of a complete list, is irrelevant to the question of validity: there is only one test — that in *McPhail*. McKay accepts the re-formulation of the latter in *Re Baden (No. 2)*, and affirms that, as re-formulated, it is practically indistinguishable from the Lord Denning test. In other words, all three tests amount to the same thing. Stated baldly like this, the proposition appears preposterous. However, it deserves consideration. Even adopting the concerns expressed by Megaw L.J. and Stamp L.J. respectively, there may be only *two* tests: the *McPhail* test, depending on how it is interpreted, merging with either the "class ascertainability" test or the Lord Denning test.

In this paper, I shall attempt to characterize the different tests for certainty more precisely and to elucidate the relationships among them. Doing this will require some consideration of those characteristics of language and language use which make words "certain" or "uncertain," and examination of the semantic assumptions underlying the tests.

II. Preliminary Considerations

Before proceeding, however, I should take note of several matters — some of them implicit in the foregoing — which are central to the certainty of objects issue.

First is the question of the *rationales* for insisting on certainty of objects. In *Broadway Cottages*, Jenkins L.J. summarizing what was said in *Morice* v. *Bishop of Durham*,[16] stated that the underlying "principle can be concisely stated by saying that, in order to be valid, a trust must be one which the court can control and execute."[17] This points to two concerns: (1) that the court should be able to discern whether trustees are exercising their discretion properly, and (2) that, on the failure of the trustees to exercise their discretion, the court should itself be able to give effect to the trust.

In terms of these rationales, one sees two kinds of arguments for the "class ascertainability" test, even for discretionary (as opposed to "fixed") trusts. Although it cannot be said that the court needs to know

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[14] *Ibid.* at 276.
[15] *Ibid.*
[16] (1805), 10 Ves. Jr. 849, 32 E.R. 947.
[17] *Supra*, note 4 at 30, [1954] 3 All E.R. at 124.

the whole class in order to determine whether the trustees are selecting within the class, it has been argued that the trustees are not exercising their discretion properly if they have not ascertained the whole class. This is because they are in effect considering a different (narrower) class.[18] The other argument is that, should the trustees fail to act, the court must execute the trust, and the only way that this can be accomplished is by equal division; equal division requiring that the whole membership of the class be ascertained.[19] Both these contentions were dealt with, and rejected, by the majority in *McPhail*.

With respect to the "individual ascertainability" test, it is clear that the first concern is met: the test requires that, of any individual presenting himself or herself, it must be possible to say that he or she is within the class. Thus, the court will be able to say with certainty at least whether the trustees have selected inside the class. The other concern relating to trustees' standards of conduct — that they have the class within their contemplation — is now apparently satisfied by the *McPhail* requirement that a fairly wide, though not exhaustive, survey be made, or by Megaw L.J.'s suggestion that a "substantial number" of class members be identified.[20] As for the execution of the trust by the courts, if equal distribution is not the principle that must be observed, courts should be able to give some effect to the trust on the basis of this test.

Lord Denning's test again allows the court to control the trustees' selection — in the sense that it permits the court to say with respect to at least *some* persons that the selection is proper, even though for many this will not be possible. Presumably, where the class-defining word is such that there is a periphery of uncertainty, persons in the periphery might be deemed excluded or the court might make a determination on such cases as they arose. Again, assuming that the "equality is equity" principle is no longer determinative, a court could execute the trust by ordaining some kind of distribution among those certain to be within the meaning of the class-defining term.

One observation to be made about the general requirement that the trust must be such that it can be controlled and executed by the courts is that these matters are very much within the power of the courts themselves to determine. Indeed, a characteristic activity of courts is to determine the meaning and range of application of words. To say that a class-defining term is "uncertain" may amount to no more than saying that the courts will not (as opposed to cannot) exercise their ordinary functions in certain cases. I shall return to this point elsewhere in this paper.

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[18] *See, e.g.*, Lord Hodson (dissenting) in *McPhail*, *supra*, note 1 at 443, [1970] 2 All E.R. at 235, citing Lord Upjohn in *Re Gulbenkian*, *supra*, note 12 at 524, [1968] 3 All E.R. at 793.

[19] The fact that the court would not itself execute a *mere* power was seen as a justification for a different test in such cases, one that would allow the court to say whether the power had been exercised properly, if the trustee chose to exercise it.

[20] *Re Baden (No. 2)*, *supra*, note 6 at 24, [1972] 2 All E.R. at 1313.

A second preliminary observation relates to the recognition by courts and commentators of different kinds of "certainty" in this context. In *McPhail*, for example, Lord Wilberforce distinguishes three kinds of uncertainty: "linguistic or semantic uncertainty which, if unresolved by the court, renders the gift void"; "the difficulty of ascertaining the existence or whereabouts of members of the class, a matter with which the court can appropriately deal on an application for directions"; and the case where, although "the meaning of the words is clear," "the definition of beneficiaries is so hopelessly wide as not to form 'anything like a class' so that the trust is administratively unworkable . . . ."[21] Both Matthews and McKay emphasize the distinction between "linguistic" or "conceptual" certainty ("Is the meaning of the word clear?") and "evidentiary" certainty ("Does this person have the attributes required by the word's meaning?") Like Lord Wilberforce, they insist that the crucial test is conceptual certainty.

C.T. Emery subdivides Lord Wilberforce's second category, so that the question whether a person can be shown to belong to a class is different from the question whether he or she is still alive or can be located.[22] Thus, Emery would say that for a discretionary trust, only conceptual certainty is required in terms of the *McPhail* test. However, for a fixed trust ("Divide the fund *equally* among the members of the McGill Law School graduating class of 1947"), he would say that both conceptual certainty and evidentiary certainty (evidence allowing a complete list to be compiled) are necessary — although, as long as one had the list (so that the size of the equal shares could be determined), it might not matter that some of the persons on the list could not be located. As we have seen, Matthews would question whether evidentiary certainty is required at the time of determining *validity*, even for a fixed trust.

The point is that much is made of the distinction between "conceptual" and "evidentiary" certainty — as if this distinction is the key to the certainty of objects conundrum. I have some doubt that it is, largely because of the inherent uncertainty in *all* language and hence the elusiveness of "linguistic" or "conceptual" certainty. This feature of language has several implications in the present context. It means that the notion of some kind of *a priori* "meaning" of a word, somehow fixed and precise, is illusory. Correspondingly, it reminds us that defining a word and determining whether the word's meaning is certain are often "inductive" processes: we do not know the meaning of a word until we have looked at a number of representative instances and asked, "What

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[21] *Supra*, note 1 at 457, [1970] 2 All E.R. at 247. *See also Re Baden (No. 2)*, *ibid.* at 19, [1972] 2 All E.R. at 1309, *per* Sachs L.J. Regarding the third category, administrative impracticability, Lord Reid in *Re Gulbenkian*, *supra*, note 12 at 519, [1968] 3 All E.R. at 788, noted that it does not involve "uncertainty as that term is generally understood."

[22] *Supra*, note 3. Emery uses the expressions "evidentiary certainty" and "ascertainability," respectively, to distinguish these categories.

is it about X that makes it part of the class we want this word to designate?" Thus, the process of definition frequently involves looking at "evidence," although not in the same way as the conventional understanding of "evidentiary certainty" implies. Further, the inherent uncertainty of language reminds us that we often (perhaps always) do not *find* existing meanings; rather, we impart meanings.

Significantly, Lord Wilberforce envisages the possibility of a court's resolving *both* conceptual uncertainty ("if unresolved by the court, renders the gift void") and evidentiary uncertainty ("a matter with which the court can appropriately deal on an application for directions"). McKay similarly emphasizes that courts can not only settle evidentiary questions, but can give clarity to words by stipulating definitions for them.[23] To the extent that this is true, uncertainty of both kinds may boil down to the court's refusal to act so as to make the disposition "one that can be controlled and/or executed." Emery cites the following passage from Lord Wilberforce's judgement in *McPhail*, which again makes the point that the workability of a trust is a matter which the court has considerable power to ensure or deny:

> [A] trust should be upheld if there is sufficient practical certainty in its definition for it to be carried out, if necessary with the administrative assistance of the court, according to the expressed intention of the settlor.[24]

The ultimate test of certainty may very well not be some theoretical "conceptual certainty," but rather, the court's willingness to make the disposition "practically certain."

A third — and related — observation that I want to make now, concerns the *time* at which a judgment about the certainty of the class must be made. In *Re Gulbenkian*, Lord Upjohn said that the certainty question "must be determined as of the date of the document declaring the donor's intention . . . ."[25] That is, the determination is rather abstract. The courts do not wait for a doubtful situation to arise and then decide how the word applies, or whether it can be applied precisely. Rather, they purport to know from looking at the word itself (and perhaps the context of its use by the donor) whether it can be precisely applied in any situation that might arise. Even the *Broadway Cottages* formulation, "ascertained or *capable of ascertainment*," suggests that the judgment about certainty occurs 'before the event.' In Matthews' terms, what is required is to be able to say of the class-defining word is that "if and when members come into existence they *can* be ascertained."[26]

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[23] *Supra*, note 13 at 263ff. *E.g.*, citing *Re Gulbenkian*, he says: "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" (at 264).

[24] *Supra*, note 1 at 450, [1970] 2 All E.R. at 241.

[25] *Supra*, note 12 at 524, [1968] 3 All E.R. at 793.

[26] *Supra*, note 8 at 27.

What is interesting about this is that it again points to an assumption that there is something about words which makes it possible to say whether they are precise or certain, prior to their being applied. I want to develop this point later.

A fourth preliminary observation, or set of observations, relates to the implications of combining the "conceptual/evidentiary" distinction and the timing issue with respect to the various tests of certainty.

Thus, the *Broadway Cottages* "class ascertainability" test would seem to require, at the time of the making of the dispositive document, "conceptual" certainty — that is, that the class-defining word must be such as to allow the whole class to be ascertained, at the time of distribution. Then, presumably, at the time of the distribution, all the members of the class must be identified, which is a matter of evidence. Interestingly, in *Broadway Cottages* itself, two points were conceded:

> (1) that the qualifications for inclusion in the class of 'beneficiaries' prescribed by the schedule are sufficiently precise to make it possible to determine with certainty whether any particular individual is or is not a member of the class;
>
> (2) that the persons who . . . constitute 'the beneficiaries' for the purposes of the settlement, comprise an aggregate of objects which is incapable of ascertainment, in the sense that it would be impossible at any given time to achieve a complete and exhaustive enumeration of all the persons then qualified for inclusion in the class . . . .[27]

Matthews complains that the court here inappropriately found the disposition invalid on the basis that "the class was *evidentially* uncertain."[28] That is, he would argue, concession (1) establishes that the class-defining word is conceptually certain, and this determination can be made at the outset. Concession (2) goes only to the practical difficulty of finding all the members of the class or of proving membership in the class.

Several comments are in order here. Concession (1) does seem to entail conceptual certainty. However, given the premise of *Broadway Cottages*, that class ascertainability is required, evidentiary certainty, at least in the sense that Emery uses the term, is necessary; the means must be available for identifying the whole class. However, is the court saying that this kind of certainty is absent? Or is it saying that it is possible to say who was employed by A, B, C, etc., and who are the wives or widows of such persons, but that some of these people may be hard to locate, or that there are so many of them that it is unrealistic to expect the trustees to compile a complete list?[29] What is at stake here might not be evidentiary uncertainty at all, but "administrative unworkability."

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[27] *Supra*, note 4 at 29, [1954] 3 All E.R. at 124.

[28] *Supra*, note 8 at 25.

[29] Matthews, *ibid.* himself says: "The problem was simply that the class was enormous".

More important than whether the difficulty in *Broadway Cottages* was "evidentiary uncertainty," in Emery's sense or something else, are two matters to which I have already alluded. First, is it possible to say, at the time of the making of the settlement, what subsequent evidentiary problems might be? It seems that, at least in many cases, courts will be doing little more than guessing about an inevitably unstable future. Second, in any case, courts are not normally stymied by evidentiary problems. Presumably, a court could settle such problems at the appropriate time — that is, when a distribution is to be made. Requiring a court to say in advance whether a class will be evidentiarily certain is rather unrealistic.

Broadway Cottages, then, seems to require conceptual certainty from the outset, and some kind of haruspication about evidentiary certainty in order to permit actual ascertainment of the whole class at the time of distribution. The *McPhail* test, on the other hand, similarly seems to require theoretical ascertainment of the whole class from the outset: if you can say of *any* individual whether he or she is within or without the class, then, theoretically, you can sort *all* individuals this way, thus establishing the whole class. What *McPhail* says, however, is that you never actually have to do this: it is enough that you theoretically could, and that you select individuals who actually are within the class.

Thus, both the *Broadway Cottages* test and the *McPhail* test require that the class-defining word be conceptually certain, in a way that inevitably makes it capable of distinguishing the whole class. *Broadway Cottages* requires in addition that the whole class be actually ascertained and in view, so to speak, not from the setting up of the trust, but at the time the trustee exercises his or her discretion, *and* that a judgment be made about this at the outset. As we have seen, the latter aspect of this distinguishing feature of the *Broadway Cottages* test is a little hard to maintain. *McPhail* apparently requires only that some — perhaps a "substantial number" — of the class membership be actually ascertained when the trustee acts. It is not, however, clear that this is really part of the test of validity; rather, it appears to be a requisite of the trustees' exercise of discretion. Whether or not there will actually be anybody in the class may be irrelevant, as long the word is conceptually certain. Indeed, at the time of determining conceptual certainty, the future extent of the class may be doubtful.

Re Baden (No. 2) ostensibly does not change the basic configuration. The class-defining term must still be such that, theoretically, each member of the class *could* be ascertained. Again, *Re Baden (No. 2)* does not require that the whole class be actually ascertained. Moreover, it creates or recognizes a presumption, which operates at the time the trustee acts, to aid in distinguishing which persons "have" the attributes required by the terms of the definition.

The Denning test is somewhat difficult to fit neatly into this context, partly because it is ambiguously formulated. On one reading, it seems to depend on evidentiary certainty, in the sense that at least one person

must be actually shown to be in the class: "if there is some particular person *at hand* . . . ."

At the same time, it might be argued that this is simply Lord Denning's way of indicating the kind of "conceptual" certainty required. That is, he may be saying simply that the word need not be so definite that it allows us, theoretically, to say of every possible propositus that he or she falls within or without the definition; it is enough that the word has a "core" of certain meaning, allowing us to say of at least some individuals that they are certainly within the class, even though the boundaries of the word's meaning are indistinct. Thus, the epithet "tall people" is conceptually uncertain in the *McPhail* sense because we do not know the precise dividing line between "tall" and "not tall." But, in Lord Denning's sense, it would be conceptually certain, because there is no question that someone seven feet tall is "tall," even though we cannot say of someone five foot eleven that *he* is.

Two points are worth making about the Denning test at this point. First, it may rate more consideration than it is often given because it acknowledges what may be an important feature of language: that words do not have precise boundaries of meaning. Second, to the extent that it suggests that validity might depend on the actual identification, at the outset, of at least somebody who is clearly within the class, it acknowledges what I have referred to as the "inductive" element that is often present in definition.

These preliminary observations provide a setting for consideration of what I believe is a crucial aspect of this question — the notion of "conceptual certainty." As we have seen, the test that emerges not only from *McPhail* v. *Doulton*, but also arguably from *Broadway Cottages*, seems to boil down to, "Is the word conceptually certain?" To the extent that the approach to certainty of objects issues depends on this notion, it may have to be modified if the notion is in some ways untenable.

III. "Conceptual Certainty"

Emery defines "conceptual certainty" in the following terms:

> We may say that a class of potential beneficiaries is conceptually certain to the extent that the terms used by the settlor to define the class have precise boundaries of meaning: in so far as it is possible to state the criteria which it is necessary and sufficient for a person to fulfil in order to be a member of the class.[30]

Note the reference to "precise boundaries of meaning." Emery goes on to indicate that there are two "quite different reasons" why it might be difficult to state the criteria he mentions:

> On the one hand, it may be that the concept employed has more than one precise meaning. . . .

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[30] *Supra*, note 3 at 555-56.

> On the other hand, difficulty in stating the criteria which a person must fulfil to fall within a particular concept may arise not because the concept employed has more than one meaning whose boundaries are precise but, rather, because it has no such meaning . . . . This type of difficulty may be insoluble . . . .[31]

The implication of this is that there are some words that *have* "precise boundaries of meaning" — although some of these may have more than one such meaning. In these terms, the conceptual certainty issue becomes one involving the sorting of words on the basis of whether they are or are not precise.

Such an account gives rise to several problems, not the least of which is what is meant by "concept." Emery, probably unconsciously, seems to equate "concept" with "word." Thus, he says that "the concept employed" may have "more than one precise meaning." Surely, he means to say "word." If the "concept" has another meaning, it is a different concept. Perhaps what Emery means to say is that a particular word may refer to different concepts, each of which has a corresponding meaning — although that meaning may be more or less precise. Even if this is what he means, however, it does not tell us what a "concept" is.

I cannot presume to answer this question; all I can do is identify it as problematic. At one level, it probably leads back to the contention between "realists" and "nominalists" about whether general or class concepts ("universals") have "extra-mental, or objective existence."[32] If they do have such objective existence (and I have no views about this), and if existence can in some way be equated with identity, perhaps the certainty issue is concluded.

If, on the other hand, we accept with the nominalists that universals are only names, and that "only individuals exist. . .; and there [are] no objective, extramental universals,"[33] then concepts are at best mental constructs — ideas in the mind of some subject capable of having ideas. That mind may not have an idea of the boundaries of the concept; or, even if it does, those boundaries need not correspond to the boundaries entertained by other minds.[34] Thus, into the notion of "concept" would

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[31] *Ibid.*, at 556.

[32] J. Lyons, SEMANTICS (Cambridge University Press, 1977), at 111. Gilbert Ryle has noted that "[o]ur forefathers, at one time, talked . . . of the *concepts* or *ideas* corresponding to expressions." Although he regards this as a "convenient idiom," he sees as a "drawback" its encouraging "people to start Platonic or Lockean hares about the status and provenance of these concepts or ideas" and its tendency to force people to decide "whether concepts have a supramundane, or only a psychological existence; whether they are transcendent intuitables or only private introspectibles" *See*, G. Ryle, *Ordinary Language* (1953) 62 PHILOSOPHICAL REV. 167 at 172.

[33] Lyons, SEMANTICS, *ibid.*, at 111.

[34] *See, e.g.*, G. Frege, *On Sense and Reference* in Geach & Black, eds, PHILOSOPHICAL WRITINGS OF GOTTLOB FREGE (Oxford: Basil Blackwell, 1960) at 121: "The same sense is not always connected, even in the same man, with the same idea. The idea is subjective: one man's idea is not that of another".

be introduced a subjective or relative element. Uniformity of concepts would be a matter at best of agreement, perhaps ultimately testable only by looking at particulars and saying whether each is comprehended by the idea, as understood by each observer.

This takes us to a second problem: the possibility that, because of the perhaps inevitable subjectivity and relativity of concepts, there may be no such thing as a word that is precise in the way Emery and others imagine. This problem has probably been recognized by judges — although its implications for the certainty of objects issue have not been explicitly developed. Thus, for example, Roxburgh J. in *Re Coates*, somewhat ambiguously, noted the difficulty of defining "a priori. . .the limit of the degree of certainty required" for a word like "friends," and said: "I have often wondered whether it is ever possible to do that in connexion with any set of words."[35] And perhaps Lord Denning formulated the test he did because of an apprehension that not only "residing," but any word, can be made uncertain "by imagining borderline cases."[36] If what this suggests is true — that is, that words are inevitably imprecise — then reliance on "conceptual certainty," in the sense outlined by Emery, may be untenable.

I now want to look at this problem in rather more detail. To do so will require giving consideration to some accounts of "meaning" — especially those which might support the inference that the meanings of words can be "certain."

Michael Moore[37] has outlined several such theories of meaning, which he describes by the epithet "formalist." Within this broad category, he identifies two subcategories: "objective" theories, and "subjective" theories. An objective theory, he says, "asserts that the meaning of words and sentences can be ascertained independently of the mental states of any particular speaker or listener."[38] Moore further subdivides objective theories into those which are "extensional" and those which are "intensional." Subjective theories, on the other hand, "urge that the context (usually the mental state of speaker) determines the meanings of sentences and thus of words."[39] I shall adopt Moore's classification, not because it is the only one,[40] but because it provides a convenient framework for discussing the certainty question. Again, these formalist theories are relevant to this question because they suggest that expressions have meanings constrained by something other than, say, the vagaries of readers' responses. Such constraints carry with them the possibility that meanings may be more or less "certain."

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[35] (1954), [1955] 1 Ch. 495 at 500, [1955] 1 All E.R. 26 at 29 (Ch.D.).
[36] *Re Gulbenkian, supra*, note 5, at 135, 3 All E.R. at 19.
[37] *The Semantics of Judging* (1981) 54 SOUTHERN CALIF. LAW REV. 151.
[38] *Ibid.* at 168n.
[39] *Ibid.*
[40] He himself acknowledges other, even more typical, "taxonomies" (*ibid.*)

Among "objective" theories of meaning, as I have already indicated, Moore distinguishes those which emphasize the "extension" of expressions[41] from those which emphasize their "intension."[42] I want to say something about each of these.

The extension of a predicate, in Moore's words,

> . . . is the class of all things of which the predicate is true. The extension of the predicate, "is a dog," is the class of all dogs, of "is red," is the class of all red things, and so forth.[43]

He notes that an extensional theory of meaning "directly addresses the problem of formalism: the classification of factual particulars as within the extension of some legal predicate because of the meaning of that predicate alone."[44] This sounds like the kind of thing that would support the notion of conceptual certainty. If the meaning, or extension, of "is a friend," for example, is the class of all friends, then arguably one has a class with Emery's "precise boundaries."

However, this approach presents difficulties. For one thing, it supposes the very thing which is in issue — that there exists a certain class, say, of "friends." Moreover, it does not tell us how to recognize who is within the class, even assuming that the class is certain. "[H]ow," Moore asks, "does a judge know whether the thing in front of him is or is not within the extension of the words or phrase?"[45] This kind of extensional account leads, in the context of the certainty of objects issue, to a paradox: it seems to tell us that the class is certain, but may still leave us unable to say of *any* person whether or not he or she is within the class. We may be able to do no more than say, as a matter of intuition, that *some* persons are clearly within the extension of the word; that is, we may be able to say only that, normally, the Denning test is satisfied.

More relevant to the certainty of objects issue is the "intensional" theory adumbrated by Moore. "The sense or intension of a word," he says,

> is what remains of the meaning of the word after one has determined the extension of the word. For a logical positivist the sense of an expression is encompassed in the list of criteria used to define it. Thus, the intension

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[41] The extensional theory that he considers in some detail is the "referential" theory.

[42] He focuses on "logical positivism" as a theory which depends on an intensional account of meaning.

[43] *Supra*, note 37 at 167. Compare Lyons, *supra*, note 32 at 158: "First, how do we define, or establish, class-membership?

One way of doing so, for closed classes at least, is by listing their members. This is known as extensional definition. For, by the extension of a term is meant the class of the things to which it is correctly applied."

[44] *Supra*, note 37 at 169.

[45] *Ibid.*

> of "is a dog" could well be "is a carnivorous mammal with non-retractable claws."[46]

What is involved in this approach is first determining (or assigning) the necessary and sufficient criteria for a word — its "intension." Then, to determine whether the particular object before one is within the extension of the word, one asks whether the object has the appropriate properties.

This approach seems much more what those who have discussed certainty of objects have had in mind: we are reminded, for example, of Emery's emphasis that what the *McPhail* test requires is the possibility of stating "the criteria which it is necessary and sufficient for a person to fulfil in order to be a member of the class." Moreover, the intensional approach seems to involve two steps analogous to the "conceptual certainty"/"evidentiary certainty" dichotomy. That is, first one defines the criteria; if this can be done with precision, then the word is conceptually certain. Then, one looks at particulars and evaluates, on an empirical basis, whether they satisfy the criteria. Such an account allows us to speak sensibly of a word's being "certain," even though (because of evidentiary difficulties) we might not be able to say of every person who comes along whether the word describes him or her.

Unfortunately, this is not the whole story, for it assumes the possibility of stating precise criteria for a word — an enterprise that is not without obstacles. Moore outlines several problems with the criterial theory of meaning, two of which — "ambiguity" and "vagueness" — are of immediate concern.

The distinction between "ambiguity" and "vagueness" is essentially that between Emery's two different kinds of difficulty standing in the way of stating the criteria of a word. One is that the word may have more than one meaning: that is, it is ambiguous, or "multivocal." "Vagueness," on the other hand, is the difficulty of "combining the criteria of any word to form a set of necessary and sufficient conditions."[47] Emery speaks of a word's possibly having more than one *precise* meaning; however, an ambiguous word may have more than one meaning, each of which is vague. As an example, take the class-defining words in *Re Gibbard*[48]: "any of my old friends." "Old" is ambiguous, in that it can

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[46] *Ibid.* at 167. Again, *compare* Lyons, *supra*, note 32 at 158-59:

> "Suppose, for example, we summarize the set of properties assumed to be essential for something to qualify as a dog in the word 'canine.' Then we can say that the class of dogs comprises all those objects in the universe which have this, no doubt very complex, but we will assume identifiable, set of properties. This would be an intensional definition: the intension of a term is the set of essential properties which determines the applicability of the term."

[47] *Supra*, note 37 at 193.

[48] (1965), [1967] 1 W.L.R. 42, [1966] 1 All E.R. 273 (Ch.D).

refer to either the age of the friends, or the length of time they have been friends. In either of these senses, it is also vague: How old must one be to be "old"? How long need one have been a friend to be an "old" friend? In any particular case, one may have to deal with both ambiguity and vagueness.[49]

As Emery notes, "ambiguity" (at least if it is uncontaminated with "vagueness") presents less of a barrier to conceptual certainty than does "vagueness" itself. If a word is merely ambiguous, one need simply select one of its meanings, which will be "precise," in the sense of having clear criteria (assuming this is ever possible). If, however, a word is vague, by definition it lacks clear criteria, and therefore cannot be conceptually certain.

Although the "ambiguous"/"vague" distinction is well-established, it calls for a few comments.

First, it is not always easy to distinguish the two, notably in circumstances where definition requires the drawing of a line on a continuum of some sort — what Moore calls "degree-vagueness."[50] There may be in existence more than one meaning of the word, which simply draw the line at different points. Take, for example, the noun "relative": is it ambiguous or is it vague? One could say that it is vague, because one does not know where to draw the line — that is, because one does not know its necessary and sufficient criteria, or how related two persons must be. And, if we do draw a line, we are simply arbitrarily resolving the inherent vagueness in the word. On the other hand, one could say that "relative" is merely ambiguous, because it has a number of possible meanings — that is, because the line could be drawn in a number of places, depending on the definition seen to be appropriate. Thus, "relative" might have meaning #1, "nearest blood relations" and meaning #2, "descended from a common ancestor." The problem here is arguably not so much that we do not know where to draw the line, but that it is drawn in two different places, and a choice has to be made. My point is that the distinction between "ambiguity" and "vagueness" may not always be clear.

Related to this is the fact that similar processes are involved in resolving ambiguity — at least of the kind ostensibly illustrated by a word like "relatives" — and vagueness. That is, selecting which of an ambiguous word's meanings is "appropriate" may bring together the same complex of interpretive factors — "literal" meanings, syntactic

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[49] *Re Gulbenkian*, *supra*, note 5, is another example, involving a slight variation. There, the problematic expression was "any person . . . by or with whom the said Nubar Sarkis Gulbenkian may from time to time be employed or residing." There is at least a syntactic ambiguity here: "by" and "with," on one reading (arguably a perverse one), each applying to each of "employed" and "residing," as an alternative to applying to "employed" and "residing" respectively. One resolution of the ambiguity would aggravate the vagueness: the persons by whom Gulbenkian was residing might be even harder to define than those with whom he was residing.

[50] *Supra*, note 37 at 195.

and other contextual matters, "policy," readers' preferences, etc. — as may the process of artificially limiting a word's "natural scope" to eliminate vagueness, or even the process of deciding whether a word is "vague."

Most important, however, is the question of whether it is possible to say of any class-defining word that it is *not* vague. The notion of "conceptual certainty" assumes that at least some class-defining words will be precise, and that these can be distinguished from those which are not. To what extent does this assumption mistake the nature of language?

One need not seek far to find the observation that vagueness is an inherent characteristic of language. Dwight Bolinger, for example, says that such inherent vagueness is one of the conditions that "needs to be met for the signs in language, limited in number, to designate reality, which is infinite."[51]

Of two of those conditions, Bolinger states:

> [R]eality must be *segmented*. Whenever we manipulate an object we separate it from its environment. . . . Language gives us a map of reality in which everything is covered but much detail is left out.
>
> [There is] built-in *vagueness*; absolute identity of segments cannot be required, for dealing with a continuum of experience would then be impossible; explicitly or implicitly we have to be able to say X *is* Y and mean "X is a kind of Y," "X is like Y."[52]

Class names are used to refer to "things" on the basis not of identity, but of similarity; always present is the problem of determining how much similarity is necessary for the class name to apply.

Moore makes a like observation: while, he says, some language theorists

> believe that intensional vagueness is a characteristic of only some words . . . others believe that all words are intensionally vague in this sense, and that the things within the extension of any predicate will only bear a "family resemblance" to each other.[53]

While noting that "speculation on this question is not conclusive," Moore himself inclines to "the probable pervasiveness of vagueness."[54]

I am, of course, not in a position to resolve this question. One might "test" some common words in the way that Moore suggests — by

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[51] D. Bolinger, ASPECTS OF LANGUAGE, 2d ed. (New York: Harcourt Brace Jovanovich, 1975), at 187.

[52] *Ibid.* at 187-88.

[53] *Supra*, note 37 at 195 (footnotes omitted).

[54] *Ibid.* at 196.

attempting to specify criteria that are both necessary and sufficient.[55] A few examples of common words that have arisen in certainty of objects cases will illustrate the difficulty of specifying the necessary and sufficient criteria for the sense of words: in addition to "relatives," consider "family," "dependants," "friends," perhaps even "employees." For each of these, identifying criteria that at one time include all relevant instances and exclude all others may prove troublesome.

In each case, the line of demarcation is not "given"; rather, it will be have to be declared. A word like "dependants" is not certain because it is inherently precise; indeed, it inevitably raises the question "How dependent?" However, courts have been prepared to impart to it a "precision" which satisfies them.

The above examples are all, perhaps, prejudicial, since they are taken from sources in which their certainty was in question. But even more specific (frequently in the sense of referring to a *smaller* class) words such as "children" or "sons" are, without further arbitrary qualification, vague.

If all class words are intensionally vague, the possibility of "conceptual certainty" is doubtful at best — unless the vagueness can be remedied, or unless there is some other account of meaning (besides the criterial) that eliminates the vagueness.

Perhaps the most obvious way of attempting to remedy vagueness is by "explicit definition," and, as Moore observes, this is fairly common in the law.[56] However, he also notes that these definitions "are not analyses of what a word . . . means," but that they are "stipulations" of "what it henceforth shall be taken to mean."[57] In other words, there is not an

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[55] Moore, *ibid.* at 193, gives the example, taken from W.P. Alston, PHILOSOPHY OF LANGUAGE (Englewood Cliffs, N.J.: Prentice-Hall, 1964), of the word "religion." He lists the nine criteria suggested by Alston, and points to two aspects of the list which "make it intensionally vague": "To begin with, only a few of the institutions normally thought of as religious meet all of these criteria . . . . Therefore, some subset of this list must be sufficient . . . ."; "Second, not one of these nine criteria . . . is necessary to establish the existence of religion".

[56] *Ibid.* at 196. Indeed, in *Re Gulbenkian*, *supra*, note 12 at 522, [1968] 3 All E.R. at 790-91, Lord Upjohn made the point that courts frequently must formulate definitions for imprecise words:

> "Counsel for the appellants argued that you must give the words used their literal meaning and then apply the test to see . . . whether a given individual is or is not within the class and no modification of the literal language is permissible to make sense of it. This argument is based on a fallacy.
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> . . . .
>
> "[Sometimes] 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.

[57] *Ibid.* at 196.

attempt to discern and specify the "intrinsic" meaning of the word, but rather there is an imposition of criteria upon the word, usually for a specific purpose.

Several problems arise in relation to stipulated definitions in the context of certainty of objects cases. One of these is that a settlor very likely will not have stipulated a definition of the class term that he or she uses. Thus, there is no question of his having specified what a term will henceforth (for his purposes) be taken to mean. More likely, the court will stipulate a definition *ex post facto* — perhaps calling in aid the settlor-author's "intention." Thus, for example, Stamp L.J. in *Re Baden (No. 2)* would have defined "relatives" as "nearest blood relations," not because the settlor so specified, but because some definition was necessary.

Another problem with stipulative definitions is, as Moore puts it, that "the words used to define a vague word will themselves be vague." Thus, "[a]n explicit definition of 'man' as 'rational animal,' for example, merely substitutes the vagueness of 'rational' and of 'animal' for the vagueness of 'man'"[58] One can identify examples of this phenomenon in the cases. In *Re Coates*, Roxburgh J., confronted with a disposition to "friends," said, "it appears to me that it is only friends of a considerable degree of intimacy who are to be included in this gift."[59] One wonders whether the expression "considerable degree of intimacy" makes "friends" any more certain. Perhaps Roxburgh J. was committing the error of supposing that words defining a smaller class are therefore more certain.

In *Re Baden (No.2)*, Sachs L.J. said, with regard to "relatives," that

> In practice [the trustees] would presumably select those whom a reasonable and honest employee or ex-employee would introduce as 'relative', rather than as a 'kinsman' or as a 'distant relative'. Indeed, on a construction summons some such definition might emerge for the word 'relative' . . . .[60]

Although, as we have seen, selecting a meaning for "relative" can be taken to involve resolving *ambiguity*, the words here suggest that Sachs L.J. is contemplating a case of "degree-vagueness": where do you draw the line regarding the necessary degree of relationship? He finds it unnecessary actually to stipulate a definition in this case, but if he had to the terms he seems ready to invoke — "reasonable and honest employee" or "relative" versus "kinsman" or "distant relative" are hardly precise. In fact, Sachs L.J. feels that he does not have to stipulate a definition because the widest definition of "relative" — tracing legal descent from a common ancestor — is already (in his view) sufficiently certain. The fact is, of course, that in proposing (or, if this is a case of ambiguity, in

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[58] *Ibid.* at 197.
[59] *Supra*, note 35 at 500, [1955] 1 All E.R. at 29.
[60] *Supra*, note 6 at 22, [1972] 2 All E.R. at 1311.

selecting) this definition, he *is* stipulating a definition — and one that by his own admission may be at variance with the meaning intended by the settlor. Indeed, his definition is not the widest, since it appears to exclude relatives by marriage — a category recognized elsewhere, for example, in the old case of *Bennett* v. *Honywood*.[61] This is apart from the fact that the terms making up the definition ("legal descent," "common," "ancestor") may themselves be vague.

Perhaps even more problematic is the stipulated definition — "nearest blood relations" — proposed by Stamp L.J.. Again, because it refers to a smaller class, it appears more certain; Stamp L.J. seemed to think so. But all that he has done is affixed to the vague word "relations" two words that are themselves vague.[62] Apart from some legal rule (itself a stipulative definition) fixing degrees of consanguinity, are, for example, grandparents nearer blood relations than cousins?

And what would Stamp L.J.'s definition do to my adoptive brother's illegitimate son, whom I have always referred to as my nephew? Even Sachs L.J.'s "widest possible definition" would not include this person. The example illustrates that, even if it is possible to reduce vagueness by definition, this may be at the cost of arbitrarily excluding persons who "reasonably" should be in the class.

Two observations might be made by way of summary of the foregoing. First, *any* class word is, or may be, vague. This means that no such word, at least without further qualification, is conceptually certain. Second, a word may be given the appearance of having conceptual certainty by being qualified or defined — that is, by having its "necessary and sufficient" criteria stated. But these criteria do not exist *a priori*; rather, they occur as the result of the *act* of definition. The implication of this is that for any "vague" word, it should be possible to stipulate a definition, and thus to make it conceptually certain (subject, of course, to the likelihood that the words of the definition will themselves be conceptually vague). When courts speak of some words as conceptually certain and others as conceptually uncertain, then, they may be doing no more and no less than saying, "for word A we will stipulate a definition, but for word B we will not."[63] The question may be, not "Is this class-defining word conceptually certain or uncertain?" but, to adopt Emery's

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[61] (1772), Amb. 708. It is worth noting that the postulation of a definition of "relatives" that includes relationship by marriage, as opposed to by blood, clearly raises a problem of ambiguity, in that the distinction is based on a difference in kind, rather than only of degree.

[62] Moore, *supra*, note 37 at 197-98, discusses the possibility that precision may be increased "by increasing the number of vague words describing the situation." He concludes that this strategy "only moves the vagueness around a bit. It does not eliminate or even reduce vagueness."

[63] One might note, incidentally, that if it is permissible to stipulate a definition so as to allow the "individual ascertainability" test to be satisfied, it should be equally possible to stipulate a definition that will satisfy the "class ascertainability" test (assuming that these are different, even at the "conceptual" stage).

words, "[W]hat degree of conceptual uncertainty will the courts tolerate in the definition of trust beneficiaries?"[64]

Because the courts have tended to formulate the issue in terms of the former question, they have not provided any very explicit answer to the latter. Thus, I can merely speculate about how they will respond implicitly to the question of what kinds or degrees of uncertainty they will tolerate or attempt to resolve.

One possible explanation is that the courts tend to rely on what Moore describes as another of the "presupposition[s] of formalism . . . the empiricist thesis."[65] This thesis requires that, to be meaningful, a word's criteria must be empirically verifiable or reducible to terms which are empirically verifiable.[66] We have seen that "conceptual certainty" involves a word's having criteria that can be satisfied by evidence, assuming it to be available. "Evidence" suggests what is observable, measurable and so on. We would like to have criteria to which observable facts can be made to correspond. Moreover, we — and the courts — feel more comfortable with the proof of certain kinds of facts than with the proof of others. Thus, we feel more secure about saying "X shot Y" than saying "X intended to kill Y." The overt act and the intent are equally facts, but, because we cannot see, hear, or touch "intent," we will be rather more diffident about making assertions about it.

Therefore, it may be that courts will be more willing to stipulate definitions for, and thus find "certain," words that lend themselves to empirical verification. "Relatives," for example, lends itself more readily to this kind of definition and verification than, for example, "friends." "Descent from a common ancestor" or "nearest blood relations" may be tested by "objective" observation; whereas "friendship," because it depends upon internal dispositions, is not so easily observed. One would expect courts to be less generous to classes defined in terms of what Moore calls "mental predicates" ("those who intend to study medicine") or "ethical words" ("honest citizens") than to, say, those defined in terms of blood ties or financial relationships ("dependants"). This is not necessarily because the latter are inherently less vague than the former, but because in the case of the latter there are fewer intervening steps between the word and the empirically-verifiable criteria to which it may be reduced, or because we feel more confident about the empirically-verifiable criteria we stipulate for them.

If the foregoing does identify a factor affecting the courts' determinations of the certainty issue, it may raise questions about the "conceptual"/"evidentiary" distinction. That is, a court presented with a term

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[64] Emery, *supra*, note 3 at 561.

[65] *Supra*, note 37 at 175ff.

[66] *See also* W.V. Quine, *Two Dogmas of Empiricism* in W.V. Quine, ed., FROM A LOGICAL POINT OF VIEW (Cambridge, Mass.: Harvard University Press, 1961), 20 at 20. One of these "dogmas" is "*reductionism*: the belief that each meaningful statement is equivalent to some logical construct upon terms which refer to immediate experience."

which entails serious difficulties of proof because it is not readily reducible to empirically-verifiable criteria, may be disinclined to stipulate a definition which would give it the necessary certainty and thus may say that the disposition fails for want of "conceptual certainty." Take, for example, a word like "honest." It might be defined as "disposed to tell the truth." Is the problem with this simply that it is uncertain as a concept, or that we do not know how to prove the disposition? Even if we translate it into empirically-verifiable terms ("has never told a lie"), we might still say that this is very difficult to prove and hesitate to propose the definition.

Perhaps another example will make the point even more clearly. Suppose that the class is "my three best-loved children." A conventional analysis of this might take the form:

"The criterion here is subjective to the settlor or testator. Only he or she can know which children he or she loved best. Therefore, the gift fails for uncertainty." But what is the nature of the uncertainty? Is not the notion of the *three* children a parent loves best "conceptually certain"? (At least as conceptually certain as many other formulations that have been so found.) The problem here is again "evidentiary" — what might be the only reliable evidence of membership in the class, the testator's emotional disposition, may be inaccessible. The point is that there may be times when our consciousness of evidentiary difficulties will affect our readiness to undertake the process of imparting "conceptual certainty."

Thus, an account involving the identification of "objective" criteria of a word's meaning presents problems which call into question the notion of "conceptual certainty." Reflection on some of the implications of Moore's other sub-class of "formalist" theories of meaning — the "subjectivist" — points to similar problems.

A person, Moore says, instead of relying on a referential theory or upon objective criteria of meaning,

> might adopt certain contemporary theories of meaning that consider the meaning of an utterance as more a function of the speaker's intention than of any set of linguistic conventions. He will usually be a "contextualist" of one stripe or another, perhaps urging that words as words have no meaning that is not completely dependent upon the particular context of their utterance, and that the most important item in the context in which a statement is made is the intention of the person making the statement.[67]

Note that the subjective element here is supplied by the *author* and not, as in other "subjectivist" accounts, by the reader. Such authorial subjectivism still constrains meaning to something outside the interpreter, although the possibility that different "authors" may impart different

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[67] *Supra*, note 37 at 179. *See, e.g.*, McKay, *supra*, note 13 at 265, for a discussion of Lord Upjohn's identification in *Re Gulbenkian* of the settlor's intention as one of the important limitations on the construction a court can put on 'imprecise' language. An example of a theory of meaning emphasizing the utterer's intention is Paul Grice's: *see* P. Grice, *Meaning* (1957) 66 PHILOSOPHICAL REV. 377.

meanings to a word introduces an element of relativism into meaning. Paradoxically, it may be argued that the only kind of class definition that is undeniably "certain" is that which explicitly mandates *reader* subjectivism: for example, "among such persons as my trustee deems to be my friends." This is certain not because "friends" is more precise here than in other contexts, but because the addressee (the trustee) is given absolute authority to impart meaning to it.

In some ways, the "subjectivist" account is not much different from the criterial theory I have just been discussing. Again, the enterprise is to identify the defining criteria of the word in question. The difference is that, instead of pretending that these criteria exist "objectively," we say that they are given by the author (the settlor or testator). The search is, then, for the criteria he or she had in mind or attached to the word, when using it. Again, several comments are in order.

One is that this approach may give certainty to a word that, outside the specific context, would seem vague.[68] For example, a settlor might designate the class as "the boys." "Boys," standing alone, is both ambiguous and vague, and therefore conceptually uncertain. However, if we know that the settlor invariably referred to his two adult sons and his nephew, and nobody else, as "the boys," the uncertainty evaporates. Here, incidentally, the class would be defined extensionally rather than intensionally; if the settlor were asked what he meant by "the boys," he would not give a definition, but would indicate A, B, and C. But one can imagine situations in which consulting the settlor's intention would yield criteria instead of a list.

Although this subjectivist approach suggests the possibility of there being "conceptual certainty" in a particular context, there may again be difficulties.

First, while knowing the whole extension of a class on the basis of the author's understanding does yield certainty, identifying the criteria the author attaches to the word may still leave us with the problem of vagueness endemic in all language, including the words in the definition. We may merely feel slightly more comfortable if we can point to a definition given by the author, rather than stipulated by us.

Another problem is one I have already alluded to, in a different context. That is the difficulty of identifying intention. Almost invariably, this will involve drawing inferences from observations which will be more or less compelling. This means that often a court will not be

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[68] *See, e.g.*, McKay's observation, *ibid.* at 266, that:

> "[i]n *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.'

discovering the author's intentions, but attributing intentions to him or her. The process of establishing criteria by stipulating the author's intention may not be very different from the process of stipulating criteria directly.

Perhaps most important, our awareness that the meaning of a word, and its certainty, are functions of the context of its *use* leads to the reflection that they might also be functions of the context of its *application*. I have been considering the situation in which a court asks questions like, "What did the settlor mean when she used this word?" or "Did the settlor mean something certain when she used this word?" However, another relevant question is, "Will this word's meaning be certain when it has to be applied?" In fact, these two kinds of question are not as distinct as the way I have set them out suggests — for two reasons. First, in answering the question, "Did the settlor mean something certain when she used this word?" the courts purport to be determining whether the word can be applied with certainty. Second, it seems to me that you cannot say that a person meant something certain when she used a word until that certainty is actually tested by the application of the word to unforeseen circumstances. I want to say more about this second point because it calls into question the possibility of judging in advance of its application whether a word is certain. This doubt applies equally to words which appear objectively certain and to those whose certainty is "established" by reference to authorial intention.

Walter Benn Michaels has made the following observation, which relates to this issue:

> [A]lthough some texts are ambiguous, no texts are inherently ambiguous, and although some texts are precise, no texts are inherently precise either. . . . no text is inherently anything — the properties we attribute to texts are functions, [*sic.*] instead of situations, of the contexts in which texts are read.[69]

What is important here is his claim that "the properties we attribute to texts are functions . . . of the contexts in which texts are *read*," not just of the contexts in which they are written. Thus, the properties of a text are to be ascertained in the light of circumstances prevailing at the time that the words are to be applied or interpreted.

An implication of this is that a word, prima facie certain, may be rendered uncertain by the context of its application. Suppose that the word in question is "nephews." Our intuition might be that this is a "precise" term. However, suppose that at the time the word is to be applied or interpreted there is in existence the person postulated earlier: the testator's "adoptive brother's illegitimate son." Suppose also that,

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[69] W.B. Michaels, *Against Formalism: The Autonomous Text in Legal and Literary Interpretation* (1979) 1 POETICS TODAY 23 at 32. Michaels is, I think, using the word "ambiguous" imprecisely, to mean "ambiguous" and/or "vague."

contrary to the earlier hypothetical, the testator never referred to this person as his "nephew," perhaps died before the latter was born. Is the word certain or uncertain?

Similarly, a word *prima facie* uncertain may nevertheless appear certain in the context of the author's intent in using it *or* it may become certain because of the situation in which it is interpreted. To take an example, consider the facts of *Re Connor*,[70] in which the class in question was "my close friends." Just looking at the words, we might say that "friends" is inherently vague and "close" is a word of degree, which merely compounds the vagueness. On this "objective" basis, the class fails the conceptual certainty test. We might look further, at the context in which the testatrix used the class-defining expression: she had lived in a small town, for many years, and had a limited sphere of acquaintances. In these circumstances, a court might be prepared to say that what she meant by "close friends" was sufficiently certain. But assume that the degree of her intimacy with various acquaintances was on such a continuum as to make it impossible to say what she meant. The expression would make it uncertain. But suppose at some future time, when her words were being read, only three of her acquaintances remained, and these had been her constant companions for many years. Arguably, at the time it fell to be interpreted, the expression would be certain.

An obvious objection to this approach is that it violates one of the ground rules of the "conceptual certainty" test, namely, that this issue is to be determined as of the time of the making of the document. My point is simply that the ground rule is at least artificial, if not worse, because it makes very tenuous assumptions about how language works. If a judgment about certainty must attend the event, it is somewhat perverse to insist that the judgment be made at an earlier time.

Again, what this means is that the "conceptual certainty" test, as it seems to be conventionally understood, involves a substantial measure of guesswork and wishful-thinking. It may boil down to little more than being satisfied that there are "standard instances" of the class in question and a reluctance to consider what are at that time still hypothetical "borderline cases."

IV. Conclusion

Where does this leave us? At the outset, I said that I wanted to elucidate the relationship among the three tests of certainty that have been postulated. Let us reconsider them in the light of foregoing discussion.

Both the class ascertainability test and the individual ascertainability test require conceptual certainty — the former such that, theoretically,

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[70] (1970), 10 D.L.R. (3d) 5, 72 W.W.R. 388 (Alta. C.A.).

the whole class might be identified; the latter such that, theoretically, a court could say of any person whether he or she is within or without the class. I have suggested that, at the theoretical level, these two tests amount to much the same thing. If a word is so certain that every person clearly falls within or outside its meaning, it is theoretically possible to identify every person who is within its meaning. Distinguishing the tests on the basis that they go to the lesser or greater difficulty of so identifying every person involves invoking evidentiary considerations, which, by hypothesis, are extraneous to the notion of conceptual certainty.

My discussion questions the viability of the notion of conceptual certainty, first, because uncertainty (vagueness) seems to be a characteristic of at least class words, and second, because decisions *a priori* about the certainty of expressions often prove unreliable. The usual way of dealing with the first problem — by stipulating definitions — creates "certainty" which is likely to be only rhetorical.[71] One way of forestalling the second is to postulate definitions that take account only of individuals who are strong exemplars of the class term. In either case, the test of "conceptual certainty" is satisfied by the artificial re-creation of the class. Conferring this kind of certainty on the word in question is thus very much a function of the willingness of the court to act.

Lord Denning's test, at the conceptual level, takes account of what the other two implicitly deny: that there may not be for any class-word a clear and precise boundary of meaning. This test does not depend upon the postulate that some words are certain and others uncertain. Rather, it acknowledges that between the standard instances and the standard non-instances of any general word's application, there may be a range of borderline cases. What is required is that it may be said of word that there are some standard instances. Moreover, because it does not depend upon absolute certainty, this test is not likely to be confounded by the uncertainties revealed by the context of application. Nor is it likely to be embarrassed by invalidating on the grounds of uncertainty a word whose context of application would have shown to be "certain."

This means that Lord Denning's test is probably the most defensible of the three — because it is not hindered by unrealistic assumptions about language. Thus, it can operate without pretending to be something other than it is. It implicitly recognizes that the normal function of the courts is to make decisions about how to give effect to wishes and expectations expressed in language, and that, in a sense, as long as there is something to work with, this function can be performed.

Moreover, in terms of the rationales of some kind of test for certainty of objects, the Lord Denning approach can be as readily justified as the others. If the courts are now ready to execute discretionary trusts on some basis other than equal distribution, the critical issue becomes whether the class-defining word allows the court to identify *somebody* to whom

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[71] But not necessarily, for that reason, inconsiderable.

the distribution can be made. In fact, under the Lord Denning test, the class considered will probably consist of the "standard instances" of the word's application; those who are "fairly and squarely" within its meaning. One wonders whether this is significantly different from what would have been the case under the class ascertainability or individual ascertainability tests. Although in the case of the former, courts might have purported to have an exhaustive list of the class, what they likely often had was a set of clear examples. Similarly, what Sachs L.J. says in *Re Baden (No. 2)* about the likelihood of a court of construction treating "relatives" as some class of 'near' relatives suggests that, for practical purposes, the court would be seeking a definition in terms of standard instances. Stamp L.J. almost explicitly does this: confronted with an uncertain word, he gives it a definition sufficiently narrow to exclude anybody who is not a standard instance. Thus, the Denning test allows the courts to "control" discretionary trusts, probably in much the same ways that they would under the other formulations.

What this brings us back to is a point that has arisen in different places in this essay: that it is in the power of the courts to give effect to discretionary trusts, and therefore, for them to say that unless the language is "precise" they cannot do so is rather disingenuous. The case must be rare in which the language is so eccentric that a court can make nothing of it. In the others, the most meaningful constraint is likely to be some kind of serious impracticability that compromises the trust itself.