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- 'The House of Lord's decision in *McPhail v Doulton* can be viewed as an attack on the basic distinction between trusts and powers; however that is not to say that the decision was not also pragmatic, certain and in keeping with the spirit of Equity.' Discuss. (Equity)

Words: 1500 (approx.).

The struggle between the typically rivaling values of legal certainty and pragmatic flexibility can be easily seen throughout many areas of the law and despite that equity was originally intended as a separate system to complement the law, this struggle pervades there too. For indeed, whilst the equity's spirit aims to assuage the harshness of the common law, which demands flexibility and reasonableness, contemporary equity also provides rights and duties in the same manner as the statutory and common law systems, and thus some certainty is required for it to be faithful to the rule of law. Nevertheless, a suitable equilibrium can be attainable; the approach of the majority's judgment in *McPhail v Doulton* (1971) provides a prime example of such a balance. By analysing this case in light of certainty and flexibility's contest, it shall be considered that the impact of *McPhail v Doulton* (1971) is not an attack on the settled rules of equity, but rather a well-reasoned decision that achieves both certainty and flexibility, and is absolutely representative of the spirit of equity.

The trust is perhaps equity's greatest creation, providing a means by which persons can have their interests in property acknowledged and enforced, despite that they are ignored by the common law. Given this significance, it has long been deemed fundamental that desired trusts fulfill several requirements, possessing firm intention, definite subject matter and clearly identified beneficiaries: the three certainties. It is with this third certainty that *McPhail v Doulton* (1971) is concerned. Traditionally, in ascertaining whether there was certainty of objects for trusts, both fixed and discretionary, Courts would consider whether an exhaustive list of beneficiaries could be formed, as per *IRC v Broadway Cottages* (1955). Meanwhile, in establishing certainty of objects for powers, Courts took a less stringent approach in light of the fact that they do not give rise to obligatory consequences, and would simply consider whether it was determinable if a given individual was a member of the benefiting class, as per *Re Gulbenkian* (1970). *McPhail v Doulton* (1971) overturned the application of the 'complete list' test in cases of discretionary trusts, with the Court instead determining that discretionary trusts should share the same test as powers.

This decision has had a mixed reception from commentators, with some contesting that it represents an erosion of the essential distinction between trusts and powers, represented by the entirely different obligations that accompany each. Contrastingly, the academic heavyweight Penner posits that this decision has little real relevance to the trust/power distinction. Rather, as Lord Wilberforce in *McPhail v Doulton* (1971) argued it can also be viewed that, whilst it is reasonable that a complete list ought be conceivable in fixed trust cases, it is an unnecessarily strict requirement in circumstances of discretionary trusts where the absence of a complete list of beneficiaries does not impact upon the trustee's discretionary obligations. In this manner, the basic distinction between trusts and powers is still recognised, but greater flexibility is granted for consideration of discretionary trusts. Moreover, this decision can be seen to be in accordance with the equitable maxims 'Equity will not strive officiously to defeat a gift' and 'Equity looks to substance over form'.

Notably, *McPhail v Doulton* (1971) was not a unanimous decision, but rather a 3-2 split: whilst Lord Wilberforce numbered amongst the majority, alongside Viscount Dilhorne and Lord Reid, Lords Guest and Hodson dissented. The minority took an intransigent position, contending that it was integral to distinguishing trusts and powers that discretionary trusts retained the same test for objects as fixed trust. Further, they posited that where the settlor's intention was such that the trust property must be distributed to the class, rather than to simply give the trustee the non-imperative power to do so, it is only appropriate for the full class to be known. In contrast, the leading judgment for the majority, as presented by Lord Wilberforce, contemplated at the duties specifically placed upon trustees, as aforementioned. In this regard, Lord Wilberforce identified such duties as including the examination of the trustee's objects, with use of 'diligent and careful enquiries', reaching decisions founded upon 'principles and proportions' for choosing the individuals to benefit. In contrast, executors and powers were not obliged to conduct this 'wider and more systematic survey'.

Furthermore, countering the dissenting views, Lord Wilberforce also opined that the test for objects was not the crucial distinguisher between trusts and powers,

noting that for the former Courts retained the ability to intervene where a trustee failed to exercise their obligations, whilst they were more limited in situations concerning powers. Nonetheless, some commentators continue to believe the trust representative of a now worn distinction that ought be overturned. Given the decades that have passed since the judgment, such an by the British Supreme Court seems rather improbable.

The decision in *McPhail v Doulton* (1971), whilst momentous, has no impact at all on the fact that trustees in discretionary trusts hold an imperative obligation to fulfill their duty and distribute the trust property, as per the conditions of the trust, whilst the executors of powers have the option of distribution without an accompanying responsibility to do so. Indeed, in cases concerning fixed trusts, the beneficiaries may act together in requesting that a Court forces the execution of the trust in their favour, as seen in *Saunders v Vautier* (1841). It remains that Courts cannot force an executor of a power to distribute property, where they show they have properly considered the power given to them. Lord Wilberforce's logic regarding the degree of influence and authority a Court may exert in the name of equity for honouring the rights of the beneficiaries is thus highly persuasive.

In contrast, the critical views of the Lords Guest and Hodson, seem representative of an old-fashioned legal approach, where coherence with precedence is paramount, and judicial activism relatively frowned upon. It seems likely that their views would be met with the approval of legal formalists who view the law as consisting of norms which the judiciary ought apply in a mechanical fashion. Interestingly, given the emphasis that Lords Guest and Hodson place on looking to the trustee's intentions in their dissenting opinions, it can be reasoned that their approach would in fact generally hinder the trustee's intent being realised. Indeed, equity assigns great weight to a testator's intent. Thus it seems illogical to accept the methodology of the Lords Guest and Hodson, as it would mean that if a discretionary trust was unable to satisfy the more stringent complete list test, it would fail and the trust property would revert back entirely to the settlor's estate. Thus, whilst they posit that not every beneficiary is given their appropriate due consideration by a 'given postulant' scenario, it certainly seems that objects fare better generally. However, it is submitted that this formalistic approach juxtaposes with the spirit of Equity, which is better considered as possessing a 'creative principle', as described by Lord Devlin. Whilst equity has undoubtedly evolved considerably since Lord Ellesmere's observation in 1615 that equity operates to 'soften and mollify the extremities of the law', this objective remains at the heart of Equity's approach. The majority's view can be praised as practical given that it results in fewer discretionary trusts being defeated for a lack of conceptual certainty. 'A trust should be upheld if there is sufficient practical certainty in its definition for it to be carried out', Lord Wilberforce stated, and it would be difficult to dispute the simple accuracy of such a statement. Further, it advises consideration of all the circumstances of a case, giving the Court greater discretion in reaching a just and equitable result.

In conclusion, whilst trusts and powers have various differences, their key distinction can be identified as pertaining to the duties they place on their executors, and the rights afforded to their objects; the test for determining conceptual certainty of objects holds no such fundamental significance. Subsequently, it would be erroneous to view *McPhail v Doulton* (1971) as having lessened this distinction. This decision has not lessened legal certainty in this area, but rather simply shifted the test for discretionary trusts to the already recognised and successfully implemented one for powers. Moreover, aside from being defensible from much of the criticism levied against it, *McPhail v Doulton* (1971) can in fact be praised as a sensible decision, in line with the nature of equity. As Levin accurately asserts 'considerations of fairness, justness, and right dealing' riddle Lord Wilberforce's judgment. Thus, despite that the law in this area was satisfactory prior to 1971, it is submitted that the reform made in *McPhail v Doulton* (1971) is highly desirable and ought be echoed in imminent considerations for developing equity.

Words: 1448

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