



Equity Trustees

SIR NINIAN STEPHEN LECTURE

**SUPERVISORY JURISDICTION OF THE COURT
IN THE ADMINISTRATION OF TRUSTS**

Presented by

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Overview of the jurisdiction and Trustees surrendering their discretion to the Court

Equity Trustees
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Index

1. Overview – supervisory jurisdiction of the Court with respect to the administration of trusts.....	4
2. Administration in equity – the supervisory jurisdiction of the Court in the administration of a trust	12
3. Trustees surrender of discretion to the Court.....	17
4. <i>Marley & Ors v Mutual Security Merchant Bank and Trust Co Ltd</i> [1991] 3 All ER 198 (“ <i>Marley’s Case</i> ”).....	25
5. <i>Abacus (CI) Ltd v Hirschfield & Ors (2001)- (02) 4 ITELR 686 (“the Abacus Case”)</i>	29
6. <i>Re Allen - Re Allen – Meyrick’s Will Trusts</i> [1966] 1 W.L.R. 499	32
7. <i>Re PV Trust Services</i> [2017] NZHC 2957	33
8. In the matter of the Y Trust, Royal Court Reported Judgment 25 March 2015.	33

1. **Overview – supervisory jurisdiction of the Court with respect to the administration of trusts**

1.1 The concept of the supervisory jurisdiction of the Court in equity refers to the Court's role in supervising and, if necessary, administering trusts.

1.2 The Court's role in administering trusts arguably differs from other areas of law. The Court's involvement in the administration of trusts revolves around the concept that the Court, in the exercise of its equitable jurisdiction, will ensure that trusts are in fact executed. The Court has wide discretion when it comes to supervise (and if necessary) intervene in the administration of trusts. The supervisory jurisdiction of the Court has the dual role of protecting equitable rights, with supervising against the inherent risk of excessive execution (and even abuse) by those with legal title to trust assets. As was observed by Lord Elton in *Attorney General v Brown* (1818) 1 Swans 265, 290-1:

It is the duty of a court of equity, a main part, originally almost the whole, of its jurisdiction, to administer trusts; to protect not the visible owner, who alone can proceed at law, but the individually equitably, though not legally, entitled.

1.3 Given the protective nature of the supervisory jurisdiction, the Court's powers are broad. As a definitional point, by their very nature trusts are relationships whereby those entitled at equity are in a position of weakness as compared to those who have legal control of the trust assets. Indeed, as was observed by Mason J in *Hospital Products v United States Surgical Corporation* (1984) 156 CLR 41 at 96:

The critical feature of these relationships is that the fiduciary undertakes or agrees to act of and on behalf or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.

1.4 The central role of the Court's supervisory jurisdiction can therefore be seen in the context equity:

- (a) ensuring the due execution (being the performance) of a trust; and
- (b) protecting beneficiaries from any misuse by trustees which may arise as a result of their position of power (given, for example, a trustee's legal ownership of trust property).

1.5 As was discussed by the Privy Council in *Schmidt v Rosewood Trust Ltd* [2203] 2 AC 709 at [51], after observing that the right to obtain disclosure of trust documents was an aspect of

the Court's supervisory jurisdiction (again, to "... supervise, and if necessary to intervene ...") with respect to the administration of trusts, it was observed that:

The right to seek the Court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion.

- 1.6 Indeed, the view is that the very nature of a trust is a relationship which may necessarily involve judicial intervention, as a trustee is not the absolute owner of trust property at equity. Sir W Grant MR in *Morice v The Bishop of Durham* (1804) 9 Ves. Jr. 399, 32 ER 656 observes that: "There can be no trust, over the exercise of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership, and not trust." Further, it was observed that "Every other trust must have a definite object. There must be somebody, in whose favour the court can decree performance...". Lord Eldon LC at 539-540 in *Morice v The Bishop of Durham* observed as follows:

As it is a maxim, that the execution of a trust shall be under the control of the Court, it must be of such a nature, that it can be under that control; so that the administration of it can be reviewed by the Court; or, if the trustee dies, the Court itself can execute the trust: a trust therefore, which, in case of maladministration could be reformed; and a due administration direction; and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the court can neither reform maladministration, nor direct a due administration.

- 1.7 The Court has always had a broad role in the supervision of trusts. Further, it is the "irreducible core of obligations" which a trustee owe, including the obligation of a trustee to act in good faith, which is at the heart of the supervisory jurisdiction of the Court as Millett LJ in *Armitage v Nurse* [1998] Ch 241 at 253 observed that it is the "... irreducible core of obligations owed by the trustee to the beneficiaries ... [which are] ... owed by the trustees to the beneficiaries and enforceable by them ... [that is, the beneficiaries] ... which is fundamental to the concept of a trust...". Furthermore, if "... the beneficiaries have no rights enforceable against trustees there are no trusts ...".

- 1.8 Protection is also afforded a trustee. Lord Hardwicke LC in *Knight v Early of Plymoth* 21 ER 214 at 216 observed that if "... there is no mala fides, - nothing wilful in the conduct of a trustee, the Court will always favour him...". The general principle was outlined as follows:

For as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble, and anxiety, it is an act of great kindness in any one to accept it: to add hazard or risqué

to that trouble, and to subject a trustee to losses which he could not foresee, and consequently not prevent, would be a manifest hardship, and would be deterring every one from accepting so necessary an office.

- 1.9 There is no one principle that outlines the supervisory jurisdiction of trusts. As observed by Clarry (Clarry, Daniel, *The Supervisory Jurisdiction Over Trust Administration*, Oxford University Press, 2018 (“Clarry”)) at [1.23], the “... Court’s supervisory jurisdiction has proved remarkably adaptive and responsive to the needs of trust administration over time in tailoring intervention to meet the needs of trust practice”. Further, Clarry at [1.23] observes that:

As trust administration has become increasingly complex with the variety of purposes for which trusts may be created to fulfil, running the full gamut of diverse charitable to commercial purposes, the supervisory jurisdiction over trust administration has evolved to meet the day-to-day demands for facilitating the due performance of trusts.

- 1.10 That protection of a beneficiaries interest, and the due execution of a trust, is important in the scope of the supervisory jurisdiction of the Court may be viewed in *Re X (Trust)* [2012] (2) JLR 260, a decision of the Royal Court of Jersey (“**Re X (Trust)**”). *Re X (Trust)* concerned an application by beneficiaries of a trust, that they would be justified in pursuing a claim for a breach of trust, with recourse to the trust fund to prosecute the claim. The Court permitted recourse to trust funds, from the commencement of proceedings until two (2) months after the process of discovery. In discussing the Court’s jurisdiction to supervise trusts, Deputy Bailiff Bailhanche observed at [22] in *Re X (Trust)* as follows:

The Court’s inherent jurisdiction to supervise the administration of a trust is self-evidently a jurisdiction which the Court should exercise in the best interests of the trust. There is no logical reason why that exercise of jurisdiction should not extend in the Court’s discretion in an appropriate case, to making an order that the costs of legal action against the trustee be met out of the trust fund. The inherent jurisdiction is supplemented by – or supplements, or perhaps merely reflects, and we do not have to decide which, if any of those options in this case... . In the exercise of a discretion of this nature, the Court will clearly have to have regard to all the circumstances, and may have to balance the interests of different beneficiaries as well as the interests of beneficiaries and trustees, or conceivably the interests and third parties At the end of the day, the question is whether the order sought is in the best interests of the trust, and thus the beneficiaries as a whole.

- 1.11 That is, judicial intervention was justified in *Re X (Trust)* on the basis that it was in the best interest of the trust, and therefore the beneficiaries as a whole. Fundamental is also the

facilitation of expedient performance of the trust (Sheller J in *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 440-441).

- 1.12 As outlined by Clarry at [1.22] the "... constituent aspects of the supervisory jurisdiction in trust administration cohere around the central principle of performance ...". Further: "As a jurisdiction broadly striving for expediency in facilitating performance, the supervisory jurisdiction over trust administration is refined by trust practice, ever responsive to the challenges of trust administration from time to time and the effective use of its constituent aspects."
- 1.13 Young J in *Stevedoring Employees Retirement Fund Pty Ltd v The Association of Employers of Waterside Labour* (NSWSC, 1 March 1995) 4 outlined the principle of proactive and unrequested intervention in trust administration which remains "unmapped":
- ... the Court has wide powers to intervene in the affairs of a trust in order to see that it does not fail as a result of the lack of trustee of because there is some breakdown of the necessary machinery. In the appropriate case, the court may even act on its own motion The exact boundaries of this principle remain unmapped ... the rule is that the court may direct that a trust be carried out in the unforeseen events that have occurred since its inception in a way that as nearly as possible conforms to what the settlor would have done in the circumstances.
- 1.14 The underlying policy and principles behind the administration of trusts must be considered when justifying judicial in trust administration generally (see Young J in *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623 at 639).
- 1.15 Young J in *Stevenson v Samist Pty Ltd* (NSWSC), 20 February 1986 observed as follows:
- All trusts are in the long run under the jurisdiction of this Court. The Court leaves the trustee to administer the trust when that is a sensible thing to do, but when it is made to appear to the Court that there are problems with administration it is always open to the Court to take back into itself the administration of the trust to make sure that fair play prevails and the Court will do this if it can see that there has been maladministration in the past and if that is the appropriate way to remedy the problem.
- 1.16 An example of the Court exercising its supervisory jurisdiction with respect to the administration of trusts is the power to remove trustees pursuant to the Court's inherent jurisdiction (which is the same test as that contained in section 70 of the *Trustee Act 1925* (NSW)).
- 1.17 The High Court in *Miller v Cameron & Ors* (1936) 54 CLR 572 (**'Miller v Cameron'**), in determining whether it was proper to remove a trustee, held that the dominant

consideration was the welfare of the beneficiaries. Stark J at 579 in *Miller v Cameron* considered the interests of the beneficiaries:

No general rule can be laid down for the removal of trustees from their office. The only guide is the welfare of beneficiaries, and a trustee may be removed if the Court is satisfied that his continuance in office would be detrimental to their interests.

1.18 Further, Stark J at 579 of *Miller v Cameron* concluded that the trustee needed to be removed for the 'protection of the trust estate': *'In the present case, the order removing the appellant from his office is clearly right, and indeed necessary for the protection of the trust estate.'* Further, Dixon J in *Miller v Cameron* at 580 observes that:

The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, the security of the trust property and an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee.

1.19 That is, Dixon J held that in determining whether a trustee should be removed, and another trustee substituted in its place, consideration needs to be given to:

- (a) protecting the interests of the beneficiaries;
- (b) security of the trust property;
- (c) efficient and satisfactory execution of the trusts; and
- (d) faithful and sound exercise of the powers conferred upon the trustee.

1.20 Dixon J in *Miller v Cameron* at 580 observed that, in deciding on whether to remove a trustee and appoint another in substitution, the considerations to be taken into account are many and varied, with the welfare of the beneficiaries paramount:

In deciding to remove a trustee the Court forms a judgement based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation in the office.

1.21 Further, Dixon J at 580-1 in *Miller v Cameron* observed of the discretionary nature of an action to remove a trustee:

Such a judgement must be largely discretionary. A trustee is not removed unless circumstances exist which afford ground upon which the jurisdiction may be exercised. But in a case where enough appears to authorise the Court to act, the delicate question whether it should act and proceed to remove the trustee is one upon which the decision of a primary Judge is entitled to especial weight.

1.22 Turner LJ *In re Tempest* (1866) 1 Ch App 485 (*'In re Tempest'*) at 487 considers that in determining appointments of trustees, '*... the Court acts upon and exercises its discretion ...'*, but that it '*... is not ... a mere arbitrary discretion ...'*. Rather, in exercising the discretion, Turner LJ outlined three '*... rules and principles ... [which] ... may, I think, safely be laid down as applying to all cases of appointments by the Court of new trustees ...'*, being that:

- (a) '*... the Court will have regard to the wishes of the persons by whom the trust has been executed, if expressed in the instrument creating the trust, or clearly to be collected from it ...'* (at 487)
- (b) '*... the Court will not appoint a person to be trustee with a view to the interest of some of the persons interested under the trust, in opposition wither to the wishes of the testator or to the interests of others of the cestuis que trusts ...'* (at 487)
- (c) '*The Court in appointing a trustee will have regard to the question, whether his appointment will promote or impede the execution of the trust, for the very purpose of the appointment is that the trust may be better carried into execution ...'* (at 488)

1.23 That is, the jurisdiction of the Court to remove a trustee is supervisory, and not remedial. The role of the Court is determining how the relevant trust is best to be executed / performed.

1.24 Indeed, as observed by Clarry at [1.17], the removal of trustees is not remedial in nature – it does not compensate beneficiaries, correct wrongdoing or punish trustees, and indeed that "*... the removal of trustees is not remedial is evident from the fact that trustees who do not commit any breach of trusty may be removed from removed from office. Conversely, a person may be allowed to remain in the office of trustee even though that person has committed a breach of trust. Breach of trust and removal of trustees do not correspond in a remedial sense."*

1.25 Rather, it is the facilitation of the performance of a trust, which is an essential consideration in the Court's jurisdiction to remove trustees. Clarry at [1.17] observes as follows:

The function of removing trustees is not intended to remedy a wrong but is exercised to facilitate the performance of a trust and thereby reasonably ensure due administration. A person may be removed from the office of trustee if due performance of the trust or security of trust property is threatened or even just to make trust administration more workable prospectively. Thus, the inherent power of the Court to remove trustees is not punitive but performative. Its performative nature is borne out by the administrative and protective qualities of its exercise. A sensitive assessment is undertaken in the circumstances. The function of removing

trustees is more meaningfully understood as an aspect of the supervisory jurisdiction over trust administration than in a remedial jurisdiction of the Court.

- 1.26 Further, as outlined in Clarry at [1.19], the concepts of “benefit” and “best interests” of the beneficiaries, as well as “performance” (or execution of the trust) are enabling concepts. The purpose is to invoke a broad and beneficial jurisdiction.
- 1.27 Rice QC and Holden “The trust supervisory jurisdiction: how broad is it really? How far can it be stretched?”, *Trusts & Trustees*, Oxford University Press, Vol 25, No 5, June 2019, pp 523-538 (“**Rice and Holden**”) outline some of the outliers with respect to the supervisory jurisdiction with respect to trusts in the context of:
- (a) the approval of trustee pre-decisions – Rice and Holden outline the Courts’ reluctance to accept surrenders of discretion, but the ability to obtain “blessings” from the Court;
 - (b) compelling trustee action – Rice and Holden outline the competing authorities with respect to compelling trustee action (which is prima facie not the role of the Court), being when the refusal to exercise a power may itself constitute a breach of trust;
 - (c) disclosure orders against beneficiaries – which may be ordered “... for the purpose of vindicating, or at least promoting, some right or interest arising directly out of the trust relationship ...” (Re B, C and D Settlements [2010] JLP 653 at 670 per Martin JA);
 - (d) directions with respect to underlying companies – which may be considered as a “short circuit” (per *Butt v Kelson* [1952] Ch 197).
- 1.28 Clarry at [2.11] observes the following:

The performance (or “execution”) of trust was the guiding principle of equitable intervention in trust administration that was carried forward from the 18th century into the 19th century by two prominent Lord Chancellors of Great Britain and Ireland (Lord Eldon and Lord Redesdale, respectively), who transformed that principle into basic (duty) of the Court to “control” the execution (or performance of a trust by supervising trust administration). By the expression “the execution of a trust”, the Court meant the actual performance of the trust, rather than the finalisation of a legal instrument to satisfy any formal requirements. As such, “execution” contemplated the completion of the extant duties of the trustee under judicial supervision. The term “execution” admits of ambiguity in its technical meaning. It is often used to refer to the finalisation of a legal instrument of some kind (e.g. a deed or contract) to satisfy formality requirements – for example, affixing a corporate seal to a legal instrument in accordance with a company’s article of association so as to bind the corporation. In early Chancery practice, however, “execution” has a

particular meaning apart from compliance with formality requirements to finalise a legal instrument, but instead referred to the actual performance of primary obligations thereby created. Ironically, that meaning of “execution” is demonstrated by the ambiguity arising and other derivatives of the word “execute” in Equity jurisprudence between trusts that are either “executed” or “executory” trusts in which the performative sense of the term was used to demonstrate the common basis of all trusts – that is, that all trusts are “executory” in the sense that the Court facilitates their performance, which reiterates the central principle of performance in Equity.

1.29 Clarry at [4.06] observes as follows:

Whether a trust is performed judicially (under the direct supervision of the Court) or extrajudicially (by private trustees appointed for that purpose), the essential aim is the same: the lawful performance of extant obligations to fulfil the purpose/s for which the trust was created (or settled). In this was judicial and extrajudicial performance of a trust are complimentary in achieving the essential aim the trust must be performed. It will be recalled that this is the continuation of the principle of performance around which much of modern trust law was developed and shaped historically.

1.30 Clarry at [4.07] observes as follows:

Although it remains the duty of the Court to see that trusts are performed, the Court favours minimal juridical intervention in trust administration with the Court assuming a supportive role in facilitating performance of trusts extrajudicially. One reason for the deferential, passive and supportive role assumed by the Court vis-à-vis extrajudicial trust administration is that private trustees may be appointed specifically for the purpose of performing a particular trust and, in any event, private trustees may possess certain backgrounds and skills that may be regarded as desirable or even essential in exercising the powers (and discretions) of trustee under the relevant trust. Extrajudicial trust administration is also generally more expedient in performing a trust than general administration by the Court and, thus, furthers the interest of beneficiaries in the efficient application of trust property. Extrajudicial trust administration also avoids needless use of scarce public resources. As such, various aspects of trust law generally support the principle of deference towards extrajudicial trust administration, including decision-making by trustees.

2. Administration in equity – the supervisory jurisdiction of the Court in the administration of a trust

2.1 As outlined above, it is the supervisory jurisdiction of the Court, as it relates to the administration of a trust, that is being considered. As a result, the concept of “administration” ought to be explored.

2.2 In the essay “Equity in Administration” in P.G. Turner (ed) *Equity Administration*, Cambridge University Press, 2016 (“P.G. Turner”) at page 16 it is said of the term “administration”, the following:

Administration in ordinary language refers to the administration of affairs. The management of a business’ administration: typically it is the management of the collective commercial interests of individuals through a partnership of some type, or through a corporate form. The management of government and public affairs are typically of administration. The management of government is done by the executive branch: the rules and doctrines as to the lawfulness and legal propriety of the actions of the executive form administrative law...

2.3 P.G. Turner observes that a consideration of the nature of modern equity requires also a consideration of administration. At page 17 in P.G. Turner, the following is observed:

For an enquiry into the nature of modern equity, it is revealing to study administration. That is because administration is practical. Where equity aids administration, equity assists practical action and processes. It does not obstruct them. Studying administration equity’s attitude towards it thus shows a facilitative nature of much of equity. Indeed it shows that equity’s assistance strongly tends to promote objectives that are desired, since the assistance of equity is directed to the management of deliberately established schemes, relationships, transactions and legal forms.

2.4 P.G. Turner then outlines how assistance by equity is provided in the form of administration. Seven (7) “techniques” are mentioned to demonstrate the variety of legal techniques by which equity promotes administration including:

(a) First technique – administration by courts of equity. P.G. Turner at page 18 observes the following:

This grew from the historical adoption of inquisitorial methods by equity courts but not common law courts. How are these methods seen in the law of today? One cause of equitable jurisdiction have declared their supervisory jurisdiction over trusts in general, not narrow, terms. The modern supervisory jurisdiction of equity courts to administer trusts is not confined to the arguments of the party or parties before the Court.

Common law litigation of common law rights, in contrast, remains adversarial and largely confined to litigants' arguments. Courts of equity hold administrative jurisdiction not found in common law jurisdiction as traditionally understood.

- (b) Second technique – instead of an equity court undertaking the administrative task, courts of equity can order litigants to perform or carry out administration. P.G. Turner at page 18 observes as follows:

This is founded in equity's in personam jurisdiction which empowered Chancellors and the Court of Chancery to order parties to perform specific acts, including administrative acts, or suffer imprisonment for contempt. Orders in the exercise of equity's supervisory jurisdiction over trusts represent the most intense form of administration at the behest of equity courts. Nevertheless, this administrative jurisdiction is manifested more widely over, for example, deceased estates, insolvencies and winding up. Equitable doctrines articulate what must and must not be done by a person with administrative responsibilities for the affairs of others; courts of equity can coerce such a person to act accordingly.

- (c) Third technique (corollary of the first and second techniques) – by assuming supervisory jurisdiction to administer and to order administration, particularly by trustees and other fiduciaries, equity has created entitlements allowing particular persons to seek to have a deliberately created scheme or plan administered by obtaining equitable relief.

- (d) Fourth technique – the provision of an enforceable foundation for administrative tasks in equitable doctrines, principles and rules where such a foundation is not supplied by statute or the common law. P.G. Turner at page 19 observes as follows:

Taking the express trust once again, the enforceability of law of the terms of trust depends not as such on the common law or on statute but on the principle, doctrines, procedures and remedies of courts of equity. In recognising and enforcing trusts, equity gives effect to deliberately established regimes to the management of assets. It makes administrative tasks possible where the common law and statute do not.

- (e) Fifth technique – equity treats a failure to take a series of formal steps utterly correctly as still having some effect, even though by other measures – the requirements of statute, the judge made common law or voluntary instrument – the steps would not have their full potential effect. P.G. Turner at page 19 observes as follows:

As will be seen, equity's upholding of trustees' defective execution of trust powers can be taken in illustration; other instances are where an informal conveyance of property has effect in equity though it lacks its intended effect at law because a required formality has not been completed.

- (f) Sixth technique – equity facilitates practical action through so-called default rules and principles. P.G. Turner at page 19 observes as follows:

In more traditional terms, these are rules and principles with a presumptive effect that can be avoided through expression of appropriate intention. A default rule at odds with the practical aims of a deliberately created scheme of legal relations may be displaced by a stipulation that promotes the scheme's objects and thus its administration. For example, a private scheme to found a company or trust can displace "default" rules concerning resulting trusts. The presumptive application of fiduciary doctrines can frequently be displaced by a suitable expression of intention to do so.

- (g) Seventh technique – administration is helped where widely stated equitable doctrines are constrained by equity itself. P.G. Turner at page 20:

Equity often operates through widely phrased principles. Like widely stated rules of all kinds, widely stated equitable doctrines can disrupt and undermine other parts of a legal system and the interests served by the legal system's constituent parts. The Judge-made common law tends to avoid that difficulty by operating through tightly stated rules. In contrast, equity avoids the same problem by operating through open-textured principles which, while widely stated, are only applied once a thorough evaluation of the facts has occurred, and where that evaluation shows that the animating concerns of the relevant principle arise in a particular case. Thus, widely stated notions of equitable fraud are constrained by the requirements of the particular doctrines, such as undue influence, by which equitable fraud is redressed. The existence of discretion to refuse equitable relief where a prima facie entitlement to relief is made out can also be used to constrain wide equitable doctrines, as where a prima facie entitlement to an injunction is defeated on discretionary grounds.

- 2.5 P.J. Turner then discusses the seven (7) techniques outlined above in the context of the express trust at pages 20 to 23 as follows:

Doctrinal illustrations

To illustrate equity's various techniques more fully, the express trust may be further considered - especially since many of equity's facilitative principles across the areas of

private and public law considered in this volume have an ancestry in the doctrines concerning the administration of express trusts.

Administration is a familiar heading in the trust law treatises, where it is used in a narrower sense than that employed so far in this chapter. Strictly, trust administration involves the exercise of powers and performance of duties that apply at stages logically prior to the exercise of powers (and performance of duties) to distribute trust assets to those entitled to them under the terms of the trust. Although the administrative processes and tasks are facilitated by equity in fields far beyond the law on express trusts, the law on express trusts is of special significance; all of the ways in which equity aids (or indeed conducts) administration, as listed earlier, operate in the law of trusts. And from the law of trusts certain doctrines have been adopted to aid administration elsewhere, including in public law. Those extensions are discussed in several of the following chapters. It is appropriate at this stage, then, to indicate points at which the techniques just listed operate in the law of trusts before moving to other examples.

At the most basic level, equity makes trust administration possible simply by recognising and enforcing trusts. The significance of this facility of equity cannot be overemphasised, though the point itself requires no further elaboration for the present purpose. What of the other - ways in which equity facilitates trust administration? One is to recognise and enforce equitable powers of administration. The means by which this amounts to facilitation by equity include all seven of the techniques listed earlier. For example, a 'default rule' of trust law is that a trustee must not use any of the trustee's common law powers, as the owner of an asset. That reflects a passive and static notion of the trust as a property-holding relationship. However, the default position can be overcome by conferring 'equitable powers'⁵² on the trustee (the sixth technique). Although the trustee could at law exercise the trustee's legal rights and powers without any equitable powers, the presence of equitable powers allows the trustee's legal powers to be exercised in permitted ways without thereby committing a breach of trust. The terms of the trust will be the source of these equitable powers.⁵³ Applied to these powers is a body of rules specifically addressed to trust administration which the court itself may undertake where required (the first technique) or order other persons to do (the second technique).

Under these rules, equity sees to it that if any equitable power is exercised at all, the exercise is proper. Improper exercise of equitable powers can attract negative relief. A purported exercise of power may be void or voidable; an improper disposition of trust assets may be reversed through equitable relief. But the negative quality of such relief is fully compatible with equity's doctrines on trust administration being facilitative. The relief merely holds the trustee to that which the creator of the trust

actually intended, or is taken to have intended. The only intentions that are thwarted are those of the trustee who maladministers the trust - and that thwarting aids the administration of the trust. So much is clear, for example, from the treatment of discretionary trusts and mere powers. The court may order the trustee to consider re-exercising the trustee's discretion where the purported exercise failed or was improper (the second technique).⁵⁴ However, the court will 'not normally' compel a trustee to exercise a mere power. If the power is a trust power, the court in a proper case will go further by exercising the discretion itself. When it does, the court will do so in the manner best calculated to give effect to the settlor's or testator's intentions (the first technique).⁵⁵

The exercise of dispositive powers has a strong administrative quality, in the sense of administration used in this chapter, although dispositive powers are outside the strict definition of trust administration found in some cases and trust law treatises. Failure to exercise a dispositive power with perfect correctness can be overlooked in some circumstances in equity. An appointment in substantial accordance with the expressed purpose of a power will be good in equity, even where it does not strictly accord with the form of the power (the fifth technique).⁵⁶ Further, an actual attempt at execution that is defective may, though not itself good in equity, be made good by obtaining equitable relief. If there is a good consideration, and if compelling the person entitled in default of execution to make good the defect would execute the intentions of the donor, of the power, equity will interfere (the fifth technique).⁵⁷ Generally, the exercise of a trustee's powers is always subject to fiduciary prohibitions on placing a trustee's interest in conflict with the trustee's duty and on the trustee's making of an unauthorised profit. These widely expressed principles have a correspondingly wide application to trustees. But their application is controlled by findings that particular acts that are prima facie within the wide prohibition have been authorised (the seventh technique). When relief is awarded for breach of a fiduciary prohibition it is tailored to the specific facts in order to meet, not to exceed, the purpose of the fiduciary prohibitions.

A deliberately created scheme involving practical tasks and processes could not be administered if its terms were thwarted. In this respect, an attitude of equity towards express trusts has general application. In equity's approach to express trusts, a general policy is seen of staying out of areas in which there exist plans, schemes, arrangements and other lawfully expressed intentions as to how future events shall unfold. The policy is seen, for example, in discretionary trusts where equity is generally unwilling to exercise a discretion that was vested in a trustee. As Maitland saw, this desire on the part of equity Judges to leave well alone was applied by equity to other legal relations.⁵⁸ From the attitude and doctrines developed in the law of

trusts, analogous equitable doctrines have been applied to those other legal relations in ways of which the courts today are increasingly aware.

3. Trustees surrender of discretion to the Court

3.1 It is now commonly accepted in New South Wales that provided that there is a question concerning the management or administration of a trust estate and / or a question concerning the interpretation of a trust instrument, trustees have (as of right) an ability to seek judicial advice from the Court (see *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66).

3.2 In the often cited decision of Hart J in *Public Trustee v Cooper* [2001] W.T.L.R. 901 ("**Public Trustee v Cooper**"), wherein four (4) categories of trustee applications was outlined. The categories were outlined at 922H in *Public Trustee v Cooper* as follows:

... [W]hen the Court has to adjudicate on a course of action proposed or actually taken by trustees, there are at least four distinct situations (and there are no doubt numerous variations of those as well).

(1) *The first category is where the issue is whether some proposed action is within the trustees' powers. That is ultimately a question of construction of the trust instrument or a statute or both. The practice of the Chancery Division is that a question of that sort must be decided in open court and only after hearing argument from both sides. It is not always easy to distinguish that situation from the second situation that I am coming to...*

(2) *The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved which is within their powers... In such circumstances... they think it prudent and the court will give them their costs of doing so to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries.*

(3) *The third category is that of surrender of discretion properly so called. There the court will only accept a surrender of discretion for good reason, the most*

obvious good reason being either that the trustees are deadlocked (but honestly deadlocked, so that the question cannot be resolved by removing one trustee rather than the other) or because of the trustees are disabled as a result of a conflict of interest. Cases within Categories (2) and (3) are similar in that they are both domestic proceedings traditionally heard in Chambers in which adversarial argument is not essential although it sometimes occurs... The difference between Category (2) and Category (3) is simply as to whether the court is (under Category (2)) approving the exercise of discretion by trustees or (under Category (3)) exercising its own discretion.

(4) The fourth category is where trustees have actually taken action, and that action is attacked as being either outside their powers or an improper exercise of their powers. Cases of that sort are hostile litigation to be heard and decided in open court.

3.3 That is, Hart J in *Public Trustee v Cooper* outlined four (4) categories of cases where a trustee may make an application to the Court for directions, being:

- (a) whether the proposed action is within a trustee's power;
- (b) Whether the proposed course of action is a proper exercise of a trustee's powers in a situation where there is no doubt as to the nature of the trustee's power, yet the decision proposed is particularly momentous;
- (c) where there is a surrender of discretion due to the trustees being limited by a deadlock or conflict of interest; and
- (d) where the trustee has already taken the action, which is being attacked in proceedings.

3.4 Given the above, seeking advice from the Court (being categories 1, 2 and 4) differ in their nature to category 3 (being a surrender of a discretion to the Court).

3.5 Indeed, seeking advice from a Court differs from a trustee surrendering its discretion to the Court. When providing advice, the Court does not direct a trustee as to the manner in which a discretion is to be exercised. In *Royal Society for the Prevention of Cruelty of Animals v Attorney-General* [2001] 3 All ER 530 at 544 Lightman J observed as follows:

In cases where there is a surrender, the Court starts with a clean sheet and has an unfettered discretion to decide what it considers should be done in the best interests of the trust. In cases where there is no surrender, the primary focus of the Court's attention must be on the views of the trustees and the exercise of the discretion imposed by the trustees. Though not unfettered by those views, the

Court is bound to lend weight to them unless tested and found wanting and it will not, without good reason, substitute its own view for those of the trustee.

3.6 There are limited circumstances in which a trustee may surrender a discretion to the Court. The two main situations where a trustee may surrender a discretion are:

- (a) a disabling conflict of interest;
- (b) where there is a deadlock.

3.7 The English authority of *Public Trustee v Cooper* is a decision dealing with the situation where a trustee is faced with having to make a “momentous decision” regarding the management and administration of a trust. Hart J in *Re PV Trust Services Ltd* [2017] NZHC 2957 was faced with having to make a “momentous decision” regarding the distribution of a trust estate’s final balance in particularly exceptional circumstances. *PV Trust Services* is an example of a “second category” type of decision.

3.8 There are four categories where a trustee might make an application for the Court’s direction (at [922]-[924]):

- (a) whether the proposed action is within the trustee’s powers;
- (b) whether the proposed cause of action is a proper exercise of the trustee’s power in a situation where the trustee has no doubt as to the nature of the trustee’s power, yet the decision proposed is particularly momentous;
- (c) whether there is a surrender of discretion due to the trustees being limited by a deadlock or conflict of interest; and
- (d) where the trustee has already taken the action, which is then being attacked in proceedings.

3.9 In *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198 (PC) at [201] the Privy Council limited “second category” type claim to circumstances where the trustee is in “genuine doubt”.

3.10 Thomas, G and Hudson, A, *The Law of Trusts* (2nd ed) Oxford University Press, 2010 (“**Thomas and Hudson**”) at [21.32] to [21.34] discuss the right of trustees to seek directions from the Court. At [21.33] in *Thomas and Hudson*, the following is observed in relation to directions from the Court:

The circumstances in which trustees might require the directions of the Court clearly vary considerably in nature. Trustees are expected and are required to discharge their trusts without being over-cautious in seeking the protection of the Court; for example, where the time for distribution of trust property arrives, the trustee shall distribute it and, indeed, may be liable for breach of trust, and for the consequences

of such breach, they fail to do so or delay doing so unreasonably. However, there may be circumstances, for instance, where third parties are seeking to have the settlement set aside as being in fraud of creditors, in which the prudent trustee will seek directions from the Court as to whether to distribute all or whether to litigate the claim. Hypothetical questions or ones that may only arise in the future cannot be raised. Nor should disputes with third parties be dealt with under this procedure.

- 3.11 The concept of a trustee surrendering discretion is discussed at [21.34] in *Thomas and Hudson*, where it is observed that:

The trustees may also surrender their discretion, either generally or in a particular instance, to the Court, or they may simply seek the sanction of the Court to a proposed exercise of a discretion by the trustees themselves. Seeking the Court's sanction or guidance does not, of itself, involve a surrender to the Court of the trustees' discretion: they may simply be asking whether a proposed transaction is within their powers, or seeking the approval of the Court that it would be a proper exercise by them, or they may be asking for a declaration that a decision or action which has already taken place was proper.

- 3.12 *Thomas and Hudson* [21.35] discuss the right to have a trust administered by the Court:

A trustee has a right in exceptional circumstances to have the trust administered by the Court. However, this course of action is appropriate, and the Court will make an administration order, only where there are difficulties which cannot be resolved or dealt with in some other way, for example by removing the trustees and appointing new ones. A person who applies for an administration order without good reason, for instance a trustee who merely wishes to be release, or a beneficiary who has no basis for impugning the competence of the trustees, or where there is no difficulty in administering the trust, will probably have to pay all costs. An applicant who acted in good faith, but without good cause, will not get his own costs.

- 3.13 At [27-082] in *Tucker, Le Poidevin and Brightwell, Lewin on Trusts* (19th ed), sweet & Maxwell, 2015 ("**Lewin on Trusts**") the authors outlined when an application of surrendering a discretion is suitable. The authors observed the following:

The court is not obliged to accept a surrender of the trustees' discretion. It will not, for example, accept a surrender of a discretion to be exercised from time to time in changing circumstances, such as a discretion to distribute income under a discretionary trust. The trustees have accepted office under the terms of the particular trust instrument and are not entitled to hand over the trusteeship to the court. Otherwise no principles have been laid down to determine when a court will and when it will not accept a surrender but there must be a "good reason" for the surrender.

3.14 In *Lewin on Trusts* at [27-082] some “good reasons” include:

- (a) cases in which there is a deadlock between the trustees of a kind which cannot be resolved by removing one trustee rather than another. At the footnote (264) it is said that “*all deadlocks can be resolved by removing enough trustees; the terms used in the judgment (“honestly deadlocked”) appear to refer to a deadlock in which all trustees are behaving reasonably*”;
- (b) cases in which the trustees are disabled from acting by a conflict of interest and like cases; and
- (c) cases in which the trustees are faced with a proposed compromise of litigation against the third party where the beneficiaries take strong and opposed views at the merits of accepting it, and perhaps even where they do not.

3.15 At [11.71] in Thomas, G, *Thomas on Powers* (2nd ed), Oxford University Press, 2012 (“**Thomas on Powers**”) the following is observed with respect to the surrender of discretion to the Court:

Various other causes of action are also available to trustees. In Public Trustee v Cooper, Hart J referred with reproof to an unreported decision given in Chambers by Robert Walker J (as he then was) in 1995 which described four types of situations in which a trustee (or an executor) might apply to the Court to adjudicate upon a cause of action proposed or actually taken.

- (1) *Where the issues is whether some proposed action is within the trustees’ powers;*
- (2) *Where there is no real doubt that the trustees have the power to do what they propose, but because the decision is so momentous, they wish to have the blessing of the Court;*
- (3) *Where the trustees wish to surrender their discretion and have the Court exercise it in their place; and*
- (4) *Where the trustees have taken some action, but their conduct is impugned and they therefore seek the Court’s ruling on what they have done.*

Here, we are concerned with heads (2) and (3). They are distinct categories, despite the observation of Lord Oliver, in Marley v Mutual Security Merchant Bank and Trust Co, that, where a trustee “seeks the approval of the Court to an exercise of his discretion” he, thus surrenders his discretion to the Court. On the other hand, as Hart J also observed in Cooper, there might be variation within each category and that particular case might straddle more than one category.

3.16 At [11.73] in *Thomas on Powers* the following is observed:

The Court will accept a surrender of a trustee's discretion only for a good reason. The "most obvious good reasons", according to Robert Walker J, "being either that the trustees are deadlocked (but honestly deadlocked, so that the question cannot be resolved by removing one trustee rather than another) or because the trustees are disabled as a result of a conflict of interest. Another example and possibly a more common one, is the case where the trustees propose to compromise litigation against a third party and the beneficiaries strongly object to it. If the Court accepts the surrender, then it acts in place of the trustees and gives appropriate directions. However the Court has no greater powers to act than the trustee themselves possessed.

3.17 At [11.74] in *Thomas on Powers* the following is observed:

*The Court is reluctant, however, to accept a surrender of a trustee's discretion. This is consistent with the general principle that a trustee, who has accepted the office with full knowledge of the terms of the trust instrument, should either do his utmost for the trust (act in its best interest) or relinquish his office in favour of someone who is prepared to do so. Moreover, where the discretion is a continual one and is exercisable from time to time, it is particularly inappropriate for the Court to take it over. Thus, in *Re Allen – Meyrick's Will Trusts*, for example, because the proper exercise of a discretionary power to apply income depended essentially on circumstances which might change from time to time, a Court would not accept a surrender of the obligation to apply income received by the trustee in the future. If trustees were unable to decide how to exercise their discretion, they could apply to the Court for directions given the necessary information as to the circumstances then prevailing. Presumably, if disagreement becomes persistent in such a case, the appropriate remedy is to replace some or all of the trustees. Similarly, in *Harding v Joy Manufacturing Holdings Ltd*, following the corporate acquisition and a proposal that certain pension schemes be consolidated, the trustees of a pension and life assurance scheme asked whether they were entitled to surrender their exercise of their discretion to the Court. The Court of Session held that, even if there were ever circumstances where a Court might exercise such a discretion in future, there was a practical reason not to do so in the instant case, as a provision in the trust deed that at least half of the trustees were to be employees meant the trustees could have detailed knowledge of the company. Furthermore, similar cases showed that pension scheme trustees could be required to negotiate with the company, which was a cause for action not open to the Court and could not be effectively carried out by a Court reporter.*

3.18 At [27-082] in *Lewin on Trusts* the following is observed:

A Court is not obliged to accept a surrender of a trustees' discretion. It will not, for example, accept a surrender of discretion to be exercised from time to time in changing circumstances, such as a discretion to distribute income under a discretionary trust. Trustees have accepted office under the terms of the particular trust instrument are not entitled to hand over the trusteeship to the Court. Otherwise no principles have been laid down to determine when the Court will and when it will not accept a surrender but there must be a "good reason" for the surrender. Good reasons include:

- (1) cases in which there is deadlock between the trustees, of a kind which cannot be resolved by removing one trustee rather than another;*
- (2) cases in which the trustees are disabled from acting by conflict of interest and like cases; and*
- (3) cases in which the trustees are faced with a proposed compromise of litigation against a third party where the beneficiaries take strong and opposed views as the merits of accepting it and perhaps even where they do not.*

Where trustees are faced with a proposed compromise, however, they may instead seek the Court's approval for their own decision to accept or reject it or may do so without applying to the Court at all. Likewise, it is not every conflict of interest which requires a trustee to surrender their discretion: except in those cases in which there is an absolute rule vitiating a transaction with the trust property, such as cases within the self-dealing rule, without applying to Court, though if they do the latter they bear the burden of establishing that the transaction was fair and reasonable.

3.19 At [27-083] in *Lewin on Trusts* the authors discuss the role of the Court where there is an application to surrender discretion:

Where the trustees surrender their discretion to the Court, it acts in their place by giving directions. In doing so, the Court will act as a reasonable trustee could be expected to act having regard to all the material circumstances and is not bound by the wishes of any beneficiary. The Court has, however, no greater power than the trustees have either under the trust instrument or under the general law.

3.20 At [27-084] in *Lewin on Trusts* the authors discuss the role of trustees in any application to surrender a discretion:

Trustees who surrender their discretion must put the Court into position of all the material necessary to enable the discretion to be exercised, including, for example, any requisite expert advice.

3.21 In *Re IMK Family Trust* [2008] JLR 250 at 276-277, it was observed that in exercising its supervisory jurisdiction, and instead of providing judicial advice, "... the trustee might surrender its discretion to the Court ..." in which case "... the Court would stand in place of the trustee and consider how the powers under the trust deed should be exercised in the interests of the beneficiaries, taking account of all relevant circumstances ...".

3.22 Clarry at [4.47] observes as follows:

Trustees may surrender a discretion to the Court in limited circumstances. The first main situation where trustees may surrender a discretion to the Court is a disabling conflict of interest. For example, where a trustee is a member of the class of beneficiaries in respect of whom the trustees a discretion distribute trust property, the conflict rule "does not rest of any technical rule of trust law; common sense dictates that no man should be asked to exercise a discretion as to the application of a fund amongst a class of which he is a member. He cannot be expected fairly to weigh his own merits against the merit of others". It is a strict rule of Equity that fiduciaries, including trustees, must not put themselves in a position of conflict of interest in duty. This stricture of the conflict rule is founded "in that hallowed orison 'lead us not into temptation'". The Court can deliver trustees from that evil in its supervisory jurisdiction over trust administration. For example, trustees may be appointed and/or removed and existing trustees may approach the Court for judicial advice or surrender their discretion to the Court. The latter course may often be more expedient.

3.23 In [4.49] in Clarry, the second main situation where trustees may surrender a discretion was outlined:

The second main situation where trustees may surrender a discretion to the Court is a deadlock. Like the first main situation (conflicts), the means by which the Court may break a deadlock evidenced the interchangeability of the different aspects of the supervisory jurisdiction over trust administration and their essential aim in due administration and facilitating the ongoing performance of trust beyond the deadlock. Deadlocks may be broken in various ways, including appointing and removing trustees. It may, however, be more expedient for a discretion to be surrendered to the Court so that the trustees may continue in office beyond the administrative difficulty, rather than appointing and removing trustees. A particular problem may require a tailored solution and the exercise of different aspects of the supervisory jurisdiction over trust administration to the extent required, especially where a discretion must be exercised by trustees at a particular point in time and again in the future.

- 3.24 In *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32 Lindsay J considered that the trustees had a disabling conflict, but in furtherance of “securing the competent administration of trust property”, His Honour directed that the trustees were “... at liberty to implement the proposals of their present scheme as amended in the course of the hearing”. Justice Lindsay considered that judicial advice in surrendering a discretion were “escape routes” for a trustee in a position of conflict by observing at [39]:

The first is a route by which trustees placed in the position of conflict surrender their discretion to the Court. The way in which the trustees propose here to exercise their discretion is very far from being the only reasonable way in which the discretion could be exercised. If the Court were now or later to turn from asking whether the trustees’ proposals were ones which they could probably be given general liberty to carry into effect to the different questions of how should the Court, having the trustees’ discretion surrendered to it, exercise that power, not only the trustees but equally the four classes of beneficiaries would... wish to file further evidence and... then press for the adoption of proposals more favourable to each respectively than is the present proposal. There would be considerable delay and further expense.

In doing so, and as outlined by Clarry at [4.46]:

As the Court is exercising a discretion of the trustees, the exercise by the Court of a discretion surrendered to it by trustees is not concerned with morality or wrongdoing but is undertaking with the view to facilitating the due performance of the trust, which may involve pragmatic considerations affecting the administration of the trust. As the essential purpose of the Court in exercising the discretion surrendered to it by trustees is to facilitate ongoing performance of the trust, discretions may be exercised privately by the Court, which demonstrates the administrative and protective nature of this jurisdiction.

4. **Marley & Ors v Mutual Security Merchant Bank and Trust Co Ltd [1991] 3 All ER 198 (“Marley’s Case”)**
- 4.1 *Marley & Ors v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198 (“**Marley’s Case**”) is often cited as an authority for the proposition that a trustee can surrender the exercise of a discretion to the Court.
- 4.2 *Marley’s Case* dealt with the estate of the late Bob Marley (with the deceased passing away intestate). The estate held items of real property and musical rights. The relevant legislation that applied to intestate estates (being the Intestates’ Estates and Property Charges Act of Jamaica) contained no express provision for the assets of an intestate’s estate to be held upon trust for sale. On a prior application, Margan J held that it was the duty of the administrators to sell the musical rights, but the Court directed their retention until further order of the Court.

4.3 The administrators executed conditional contracts for the sale of the estate assets. However, the beneficiaries opposed the sales.

4.4 The question before the in *Marley's Case* Court was whether the trustees were justified into selling trust assets. On its face, the decision seems to not be one that relates to the surrender of a discretion, but judicial advice proceedings as to the extent of an administrator's powers, and whether an administrator is justified in taking a particular course.

4.5 The headnote to *Marley's Case* observes (amongst other things):

A trustee seeks the approval of the Court to the exercise of his discretion about the propriety of any contemplated course of action in the course of his fiduciary duties surrenders his discretion to the Court and accordingly must put the Court in possession of all the material necessary to enable that discretion to be exercised. If the discretion which the Court is called upon to exercise in place of the trustee involves for its proper execution the obtaining of expert advice or evaluation, the trustee's duty is to obtain that advice and place it fully and fairly before the Court, since the Court should not be asked to act in incomplete information...

4.6 In the second paragraph of the headnote to *Marley's Case* the following is observed:

In exercising its jurisdiction to give directions on a trustee's application, the Court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties. Accordingly, the principles applicable to the Court's approval of the trustee's exercise of his discretion are not the same as those applicable in a case where the conduct of the trustee is impeached by the beneficiaries and therefore the question for the Court is not whether the trustees exercise due diligence, but whether there is sufficient evidence before the Court to enable it to properly exercise its discretion. The question whether a professional trustee has demonstrated that a Contract of Sale of the trust assets submitted to the Court for approval is in the best interest of the beneficiaries depends upon whether the trustee can satisfy the Court that it has taken all necessary steps to obtain the best price that would be taken by reasonably diligent professional trustee or has shown that it has fully discharged its duties...

4.7 The Privy Council in *Marley's Case* stated "two general propositions" in such applications, being:

- (a) if a trustee seeks the approval for the exercise of a discretion, that (in essence) is the surrender by the trustee of its discretion to the Court. If a trustee does so, then the trustee has a duty to put before the Court all of the material necessary for the exercise of the discretion; and

- (b) in exercise in its jurisdiction to give directions on a trustee's application, the Court is engaged solely in determining what ought to be done in the best interests of the trust estate (and not in determining the rights of adversarial parties).

4.8 As to the first of the two general propositions, at 201 in *Marley's Case* the following was observed:

In the first place, there has always to be borne in mind the position and duties of a trustee who applies to the Court for directions. A trustee who is in genuine doubt about the propriety of any contemplated course of action in the exercise of his fiduciary duties and the discretions is always entitled to see proper professional advice and, if so advised, to protect his position by seeking the guidance of the Court. If, however, he seeks the approval of the Court to an exercise of his discretion and thus surrenders his discretion to the Court, he has always to bear in mind that it is of the highest importance that the Court should be put into possession of all the material necessary to enable the discretion to be exercised. It follows that, if the discretion which the Court is now called upon to exercise in place of the trustee is one which involves for its proper execution the obtaining of expert advice or valuation, it is the trustee's duty to obtain that advice and place it fully and fairly before the Court, for it cannot be right to ask the Judge in effect to assume the burdens of a trustee without the information which the trustee himself either has or ought to have to enable him to carry out his duties personally. The Court ought not to be asked to act upon incomplete information and, if it is so asked, the proper course is either to dismiss the application or to adjourn it until full and proper information is provided.

4.9 As to the second general proposition, it was observed at [201] as follows:

Secondly, it should be borne in mind that in exercise in its jurisdiction to give directions on a trustee's application the Court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties. That is not always easy, particularly where, as in this case, the application is being conducted as if it were hostile litigation; but it is essential that the primary purpose of the application – indeed, it's only legitimate purpose – be not lost sight of in academic discussion regarding the discharge of burdens of proof. Where beneficiaries oppose a proposal of a trustee with a host of objections of more or less weight, the Court is, of course, inevitably concerned to see whether these objections are or are not well-founded, but that must not be permitted to obscure the real questions at issue which are what directions ought to be given in the interests of the beneficiaries and whether the Court has before it all material appropriate to enable it to give those directions.

4.10 At 205 to 206 in *Marley's Case* the following was observed:

Any Court which is called upon to consider whether a bargain which has been negotiated is the best reasonably obtainable in the interests of the beneficiaries will normally, as a minimum, require to be satisfied by evidence on a number of matters. It will need to have at least an appropriate assessment of the value of the property of which it is intended to dispose. Where that value depends upon accounts, it will need to be satisfied of the accuracy of the accounts upon which the value has been based. He will need to have an informed professional assessment of whether any proposed sale has been effected under the most favourable conditions. Particularly in a case where there is scope for divergent views regarding the value of the property sold, it will normally need to know what efforts have been made to explore the market and what advice has been received with regard to the marketing of the property to the maximum advantage.

4.11 The Court in *Marley's Case* refused to provide directions that the administrator's were justified in completing the conditional contracts. This was on two (2) grounds:

- (a) the first (and probably the most important) was that the administrators had not provided to the Court all of the evidence available for the Court to make a proper assessment; and
- (b) the second (and not as important factor as the first) was that the beneficiaries all opposed the proposed course.

4.12 Indeed at 210 of *Marley's Case* the following was observed:

It is the combination of all these features which has finally persuaded their Lordships that the Order of the Court of Appeal sanctioning in advance the conditional contract as it was proposed to be amended ought not to be permitted to stand. It has to be borne in mind that the transaction proposed by the respondents as the one best suited to the interests of the beneficiaries was one which the same beneficiaries, to a man, opposed root and branch. The Court of Appeal was, of course, perfectly correct in saying that, where infants' interests are concerned, this cannot be conclusive. Nevertheless, where ex facie responsible guardians ad litem, on professional and expert advice, are unanimous in their objections, those objections merit the most careful investigation and should not have been dismissed out of hand on the ground that, owing to a dearth of material available to the beneficiaries, they are "speculative" or "conjectural", much less that they fail to demonstrate conclusively that better terms are available.

It may very well be that the respondent will be able to meet all the points which have been made by Mr Strauss in his evidence and that the alternative offer made (which

their Lordships have been given to understand remains open) will, on investigation, prove to be less advantageous than it might at first appear. But it is far from clear that it is so on the evidence as it stands and their Lordships are unable, on that evidence, to express themselves as satisfied that the terms so far proposed by the respondents represent the best that could reasonably be obtained in the interests of the beneficiaries.

- 4.13 The Privy Council reverted the matter back to the Supreme Court of Jamaica for further consideration and at 210 in *Marley's Case* observed that the remission was: "*On the basis of accurate and up-to-date figures, expert advice and appraisals so far as necessary, and of sufficient evidence to demonstrate that the potential market for these very valuable assets has been fully and effectively explored.*"
- 4.14 The Privy Council in *Marley's Case* allowed for the costs of all of the parties to be borne out of the estate, and observed at 210 that it "... *should be stressed once again that there is no question whatever of the good faith of the respondent or its advisors...*".
5. ***Abacus (CI) Ltd v Hirschfield & Ors (2001)- (02) 4 ITELR 686 ("the Abacus Case")***
- 5.1 *Abacus (CI) Ltd v Hirschfield & Ors (2001)- (02) 4 ITELR 686 ("Abacus Case")* related to the surrender of a trustee's discretion to the Court the context of a family dispute.
- 5.2 The decision in the *Abacus Case* stands for the proposition that if the Court accepts a surrender, then it acts in place of a trustee and gives appropriate discretions. However, the Court has no greater power to act than the trustees themselves possessed.
- 5.3 The broad facts in the *Abacus Case* are as follows:
- (a) The deceased settled his estate onto a discretionary trust, and wrote letters of wishes which exhorted the trustee to make his wife the primary beneficiary during her lifetime.
 - (b) The wife took action against the estate, alleging breach of a promise by the deceased to leave his estate to her. On the basis of the promise, the wife married the deceased and (amongst other things) thereby forfeited a pension payable in respect of the death of her first husband.
 - (c) Other family members challenged the Will and the letters of wishes on the basis of undue influence (exercised by the wife over the deceased) and mental incapacity on the part of the deceased.
 - (d) Prior to hearing of the matter, the parties arrived at a compromise, pursuant to which the wife became the life tenant of the estate.

5.4 The trustee applied to the Court and requested the Court accept the surrender of the trustee's discretion and give directions as to whether to accept the parties' compromise. The Court considered that there was good, and indeed compelling, reason for the Court to accept the surrender of discretion to it by the trustee. It was accepted by the Court that the trustee was in no position to judge the possible outcome of the trial, especially with respect to the action for breach of promise or the consequent impact on the trust. It was only the Court that could determine the appropriateness or otherwise of the trustee entering into the proposed agreement and taking the steps set out in it. At [7] and [8] the Court observed as follows:

[7] *Mr Le Cocq submitted that the good reason in the present case was that neither he nor the trustees were in a position to judge the possible outcome of the trial or its consequent impact on the trust. He contended that only this Court could make these judgments and therefore determine the appropriateness or otherwise of the trustee entering into the proposed agreement and taking the steps set out in it.*

[8] *There was some suggestion that in this jurisdiction the Court may be somewhat more ready to accept a surrender of discretion in the Court in England and Wales. However we do not have to decide this question as we are satisfied that the reason put forward by Advocate Le Cocq is a good, indeed a compelling reason and accordingly we accept the proposed surrender of the trustee's discretion to the extent indicated.*

5.5 At [9] in the *Abacus Case*, the Court noted that there was a conflict in the authorities as to the correct approach when a Court is determining whether to be seized with the trustee's discretion by observing as follows:

*Becoming seized of the trustee's discretion does not, of itself, mean that we must or should exercise it by entering in the proposed agreement. The decision as to whether or not to do so must be made by us on exactly the same criteria as would have been applicable had the trustee itself made the decision. There is apparent conflict in the authorities as to the correct approach. In *Marley v Mitchell Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198 the objective was described as determining what ought to be done in the best interests of the trust estate. According to *Cowan v Scargill* [1985] Ch 270, [1984] 2 All ER 750 the paramount consideration was stated to be the interests of the beneficiaries.*

5.6 However, the Court at [10] in the *Abacus Case* considered that:

... this conflict to be more apparent than real and this is certainly so in the instant case. What would be in the best interests of the trust estate would, we believe, be in the best interests of all of the beneficiaries and vice versa. Having said this we

bear in mind that the trust is a discretionary one so that not all beneficiaries need receive benefit from it to the same extent or at the same time or at all. Furthermore, we must weigh in the balance not only the short-term interest of the trust and the beneficiaries, but also their long-term interest.

- 5.7 At [11] in the *Abacus Case*, the Court observed that in order “... to enable us to exercise discretion now vested in this Court it is incumbent on the trustee to put the Court in possession of all the material necessary to enable the discretion properly to be exercised...”. The Court noted that the trustee had “attempted to do so”, and noted at [11] in the *Abacus Case* that:

We say “attempted to do so” because, of course, the reason for the surrender of the trustee’s discretion and its acceptance by the Court is the inability of the trustee to accurately weigh in the balance the possible outcome of the trial if it were to continue.

- 5.8 After considering the advantages and disadvantages of the proposed settlement, and the terms of the Trust Deed, the Court at [27] observed as follows:

In these circumstances we approach the question before us as follows: The test is whether what is proposed is in the best interests of the trust and the beneficiaries. We think that it is. In our judgment all of the steps required of the trustee are within the scope of the trustee’s powers under the trust instrument and the law. Irrespective of this litigation the trustee would have had power under Cl 5(a) of the trust instrument to confer on Eliza a life interest in the trust assets so that she would have been entitled to the net income of the trust fund in her lifetime. Again the trustee would have had power under Cl 5(b) to apply capital for Eliza’s benefit and to make a loan to her out of the trust fund under para 7(a) of the Regulations set out in the First Schedule in the trust instrument. Giving effect to the proposed settlement will prevent the dissipation of the trust assets by way of legal costs. It will eliminate the risk of the destruction of the trust or the removal from it of all of its assets, or of more of its resources than will be the case if the proposed agreement is implemented. It is true that the proposed agreement involves the conferring of benefits on Eliza which might not have occurred had the litigation not been in being. But the litigation is in being and the risks of the Breach of Promise Proceedings in particular clearly justify this Court to accede to all that the agreement proposes. As has been demonstrated, in doing so the Court is doing nothing more than directing a trustee to exercise powers it already has.

- 5.9 That is, the relevant factors that the Court considered in the *Abacus Case* were as follows:

(a) whether the proposal was in the best interests of the trust and the beneficiaries;

- (b) whether the proposal was within power of the trustee;
- (c) consideration of the prevention of dissipation of the trust assets by way of legal costs;
- (d) the elimination of risks associated with continuing with the litigation.

6. **Re Allen - Re Allen – Meyrick’s Will Trusts [1966] 1 W.L.R. 499**

6.1 In *Re Allen – Meyrick’s Will Trusts* [1966] 1 W.L.R. 499 the decision related to whether trustees could surrender discretion to a court, where the discretionary trusts were to “*apply the income... for the maintenance of [testatrix’s]... husband and subject to the ... discretion upon trust for my two godchildren*”.

6.2 Justice Buckley at 503A-F considered that where trustees have a discretionary power, the trustees can obtain directions:

As it appears to me, wherever trustees have some discretionary power of this kind, whether it is properly described as a power or as a pure discretion, or however it may be described, where trustees have got something to do in the execution of their trust which involves exercise of discretion on their part and they are in doubt as to how, in the relevant circumstances, they ought to exercise that discretion, they must be able to come to the court and obtain directions as to what is the proper thing for them to do...

6.3 At 503F to H the court considered that because of proper exercise of a discretionary power depended on the circumstances which may change from time to time, the court would not accept a surrender of the obligation in that scenario:

I see great force in the submission that the court ought not to accept a surrender of such a discretion as this of a kind which would relieve the trustees of their obligations to consider from time to time how the power ought to be exercised. And I do not think that it would be right for the court to accept any sort of surrender of a discretion which will relieve the trustees of their obligation from time to time to apply their minds to the problem and to inform the court, if they cannot themselves arrive at a satisfactory answer, of the relevant circumstances and seek the court’s direction from time to time. This is a direction of a kind which essentially depends upon circumstances which will change or may change from year to year or from period to period, and of the court were to attempt to undertake the exercise of this discretion, the court itself would have to be informed from time to time of the changing circumstances.

7. Re PV Trust Services [2017] NZHC 2957

7.1 *Re PV Trust Services* [2017] NZHC 2957 concerned a category two incident as outlined in *Public Trustee v Cooper*. It concerned a “momentous” decision that was within power (being a proposed distribution).

7.2 Although the proposed distributions were considered by the trustee as within power, and the best course of action, it was nevertheless a “*momentous decision*” that it did not want to make without the support of the Court.

7.3 Justice Fitzgerald relied on the decision in *Marley’s Case* in holding that the trustee was able to apply for directions for such a significant decision, as the mechanism could apply to “*any contemplated course of action*” (at [201]).

7.4 However, contrary to the decision in *Marley*, Fitzgerald J in applying the reasoning from *Cooper* (at [925]), considered that the trustee need not be in “*genuine doubt*” in order to make an application under section 66 of the *Trustee Act 1956 (NZ)*. Justice Fitzgerald adopted the following principles of the second category from *Cooper* which was stated to be relevant considerations for making “*blessing orders*”:

- (a) whether the trustee had in fact formed the opinion in question;
- (b) whether the opinion formed was one that a properly instructed trustee could reasonably and properly arrive at; and
- (c) whether the opinion was vitiated by any conflict of interest on the part of the trustee.

7.5 Justice Fitzgerald considered the trustee’s proposed course of action to be both:

- (a) proper; and
- (b) lawful (these are the two qualifications of such an assessment as summarised in David Hayton et al, *Underhill and Hayton Law of Trusts and Trustees*, 19th Edition (London: LexisNexis, 2016) at [85.7]).

7.6 It was “*lawful*” due to it falling within the trustee’s wide range of discretionary powers under the Trust Deed. With particular regard to the unusual facts, Justice Fitzgerald held that the proposition was “*proper*” and the trustee had genuinely formed the view, which was both reasonable in the interests of the trust and its beneficiaries. As a result, the trustee received the Court’s “*blessing*” ([35]-[67]).

8. In the matter of the Y Trust, Royal Court Reported Judgment 25 March 2015.

8.1 The (“*Y Trust Case*”) concerned a hostile and protracted divorce proceedings, which had an international cross-border dispute aspect. The two (2) main beneficiaries in the

proceedings (given the divorce interplay) were referred to by the Court as the “mother” and the “father”.

- 8.2 The divorce proceedings commenced in 2012. There were three (3) attempts at settling the matter. It was only on the third (3) attempt at the settlement that a settlement agreement was obtained (“**the Agreement**”).
- 8.3 The Agreement provided for the division of the relevant trust’s property between the mother, father and the children.
- 8.4 However, whilst the mother and the children were beneficiaries of the trust, the father had inadvertently become an excluded beneficiary of the trust. Pursuant to the Agreement, it was proposed that the Trustee (referred to as “E” in the decision) should close the class of beneficiaries and terminate the Trust so that the beneficiaries could direct the Trustee to distribute the assets of the Trust in accordance with the Agreement. The Agreement also included provisions that sought to limit the potential exposure of the Trustee in making a payment to an excluded beneficiary, being the father.
- 8.5 There was a concern held by the Trustee that there was a conflict between the Trustee’s interests in limiting its liability, as compared to its duties to the Trust. As a result, the Trustee sought to surrender its discretion to the Court in relation to the exercise of the powers contained in the Agreement. At [1] in the *Y Trust Case* the Court observed that:
- On 10 February 2015, the Court, in what was an unusual application, accepted the surrender of the discretion of the representor (E) as Trustee of the Y Trust (“the Trust”) in order to bring to an end several years of very lengthy, expensive and bitter litigation concerning the affairs of the Trust and in particular, to give effect to the settlement of equally lengthy, costly and hostile divorce proceedings between the second respondent (“the mother”) and her husband (“the father”).*
- 8.6 The test applied in applications to surrender discretion to the Court is provided for in *In re S Settlement* [2001] JRC 154, which provided as follows:
- “[T]he court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so the question cannot be resolved by removing one trustee rather than another), or because the trustees are disabled as a result of a conflict of interest.”*
- 8.7 However, the test may only be applied on a restricted basis. This was emphasised in *In re B Settlement* [2010] JLR 653, where it was held that a surrender of discretion should be regarded as a last resort and that it would normally only be accepted by the Court where no “sensible alternative” exists.

8.8 The Court held that the Agreement was undoubtedly in the interests of the mother and the children as it would bring an end to the expensive and lengthy divorce proceedings. However, the Court also accepted that the express intention to remove any risk to the Trustee in the Agreement also represented a conflict of interest to the Trustee.

8.9 At [24] in Y Trust Case the following was observed:

We accept that these proposals were unquestionably for the benefit of the mother. We were given to understand that she had been constrained to borrow money in order to fund her huge costs in the various proceedings to which her estrangement from the father had given rise. Since late 2012, the trust fund has effectively been frozen and with limited exceptions, unable to be used to benefit the beneficiaries in the ordinary course, which had caused her real difficulty. If the arrangements contemplated were put into place, she would be able to effect a clean break from the father and focus no more on hostile litigation, but instead as she would wish on her children and grandchildren. E was also aware that the various proceedings had placed considerable strain on her already fragile health.

8.10 At [25] in Y Trust Case:

E was aware that there was a strong bond amongst the mother and her children and grandchildren and she would be not only able but ready and willing to re-organize her financial affairs in cooperation with her advisors so as to ensure that the future of all of them is financially secure. This is not a case, therefore, as Advocate Stewart pointed out, where the arrangements are intended to defeat the interests of those who cannot yet speak for themselves; on the contrary, we were satisfied that the arrangements were deliberately framed so as to ensure that new arrangements could be made for their protection into the future.

8.11 At [26] in the Y Trust Case:

What was proposed was also unquestionably for the benefit of the children. We therefore found that the primary purpose of the proposed arrangements were to benefit the mother and the children, who are beneficiaries, albeit that the father would also indirectly benefit. That benefit was not just in terms of the direct distributions they were to receive, but in the extraordinary haemorrhaging of the trust fund in various litigation in various jurisdictions being brought to an end. We were satisfied therefore, that these arrangements being put in place would not amount to a fraud on the relevant powers.

8.11 The Court considered that, while the Trustee could have distributed the entirety of the Trust to the mother to discharge its obligations under the Agreement, this would not be acceptable to the father following the lengthy and fraught divorce process to date. The

Court also looked at whether it would have been preferable for the Trustee to have made the relevant decisions under the Agreement before seeking the Court's blessing. However, it was felt that it may have presented a problem on the grounds that the Court had to be satisfied that the decisions taken by the Trustee had not been vitiated by any actual or potential conflict of interest which has or might have affected its decision. At [27] the following was observed:

It is true that E could have distributed the entirety of the trust fund to the mother on the basis that she would discharge her obligation under the agreement to the father, but we could understand why, in the light of the bitter relationship between them, this might not have been acceptable to the father. His interests under the Agreement are in effect safeguarded by the involvement of his sister and one of the remaining adult beneficiaries who will be a necessary party to the Trust being terminated.

- 8.12 Before accepting the surrender of discretion, the Court first looked to whether a "sensible alternative" existed. Indeed, the alternative solution to a surrender of discretion would have been arbitration. However, the Court considered that the alternative proposal was not appropriate as the arbitrator had no control over the Trustee or the Trust property.
- 8.13 At [28] to [31] in the *Y Trust Case* the Court outlined why it agreed to the surrendering of the trustee's discretion to it:
28. *The potentially more difficult decision for the Court was as to whether it should accept a surrender from E rather than requiring E itself to make the relevant decisions and then seeking the Court's blessing.*
 29. *We accepted that E had a conflict of interest in that the proposals had been designed by the adult beneficiaries with the express intention of removing any risk to E and that may have presented a problem to the Court if E had simply sought the Court's blessing to a momentous decision under the second category in Re S. One of the three matters the Court has to consider under that category is whether it is satisfied that the decision of the trustee had not been vitiated by any actual or potential conflict of interest which has or might have affected its decision (paragraph 11 of Re S).*
 30. *The Agreement, no doubt as a consequence of carefully considered expert advice, was expressly premised upon E applying to the Court to surrender its discretion. Although the Agreement provided for arbitration in the event that the Court refused the application, the arbitrator would have had no power over E and the assets within the trust. Advocate Speck described the alternative to these arrangements as "unthinkable".*

31. *On the facts of this case the Court, which was very much minded to do everything it properly could to facilitate the settlement that the mother and father had been able to reach, was prepared to accept that no sensible alternative existed to a surrender of E's discretion in relation to these specific powers. We therefore accepted the surrender and directed the exercise of these powers accordingly, to take effect after the notice given to the Guardian had expired.*

8.14 The Court was prepared to accept that no sensible alternative existed to a surrender of the Trustee's discretion. The Court therefore accepted the surrender and directed the exercise of the relevant powers in accordance with the Agreement.

Denis Barlin
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11 September 2019