**[Chapter number]**

**Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures**

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1. **Introduction**

Modern settlements are very often discretionary in form. This means that they generally consist in various, often very wide form, discretionary dispositive powers, with some final default trust or trusts. The powers might be powers of appointment over capital or income or both, or powers of advancement, or a combination of both. A particular power might be vested in the trustees, a named appointor or a protector or, again, a combination of both, such as where trustees may appoint an interest in the trust fund but only with the prior (often written) consent of the protector. There might be powers to add or subtract beneficiaries. The variety is nigh on limitless.

Yet the width of the discretions in these settlements has led some to raise questions about their enforceability, and hence their validity. The first purpose of this chapter is to address those concerns, and to demonstrate just how such settlements are enforceable. This involves a clear focus on the fundamental mechanisms for the enforcement of trusts. A proper appreciation of basic, but often overlooked, principles provides the answers. The key is the inherent administrative jurisdiction of the court, which works in a manner fundamentally different from the paradigm common law bipartite right-remedy form of action. The chapter shows how, and to what extent, the objects of a dispositive fiduciary power may invoke the administrative jurisdiction of the court in order to enforce the obligations of a trustee to replenish the trust fund. Next it briefly considers whether the objects of a mere (non-fiduciary) power may do likewise, before considering the position of protectors. The chapter then goes on to consider the practical and theoretical implications of this body of law. Before that, however, some historical background to the questions is useful.

1. **History**

Discretionary dispositive powers in settlements have a long history and were used first to allow trustees (and others) to react to changing circumstances.[[2]](#footnote-2) The importance of these powers in this regard has not diminished. Indeed, the present author, when an articled clerk in private client practice over 25 years ago, was advised never to create a settlement whose funds could not be distributed fully at a moment’s notice by the use of powers. But it was the introduction of Estate Duty in the Finance Act 1894 that really brought discretionary settlements into vogue.

Estate Duty was imposed on the full capital value of land, and all other property, real or personal, settled or free, which passed or was deemed to pass on the death of an individual. As part of that scheme, the 1894 Act contemplated, and taxed, strict settlements.[[3]](#footnote-3) Indeed, while Estate Duty was originally introduced as a source of revenue, it later was used as a deliberate instrument for the redistribution of wealth, particularly the break-up of large aristocratic, often settled, estates. A feature of the duty, controversial at the time of its introduction, was its progressive nature with a rate of 1% for estates between £100 and £500 rising to a maximum of 8% for estates exceeding £1m.[[4]](#footnote-4)

It comes as no surprise that those who, today, would be called “wealth management advisors” – lawyers, accountants and the like – immediately set out to devise means of mitigating the new tax. One of these was to create discretionary settlements, under which the trustees had power to distribute the income at their discretion amongst a named group of beneficiaries, but no beneficiary had any right to any part of the income, and thus no interest in the settled property passed on death to trigger a charge to tax: discretionary settlements were simply outside the scope of the charging provisions in the 1894 Act, as originally enacted. Income tax considerations also drove the growing use of discretionary settlements and offshore discretionary settlements.[[5]](#footnote-5)

Lord Walker usefully summarised the increasing use of discretionary settlements, and the fiscal reasons for that, in *Schmidt v Rosewood Trust Ltd*. As he noted:

“Counsel have very properly referred the Board to a considerable number of authorities, some of them going back to the early years of the 19th century. It is appropriate to reflect that during the long period covered by these authorities (but especially during the second half of the 20th century) the forms and functions of settlements have changed to a degree which would have astonished Lord Eldon. By the 1930s high rates of personal taxation led some wealthy individuals to make settlements which enabled funds to be accumulated in the hands of overseas trustees or companies: see for instance *Lord Vestey's Executor v Inland Revenue Comrs* [1949] 1 All ER 1108. This practice increased enormously with the introduction of capital gains tax in 1965. …

“There is another element, also linked (though less directly) to taxation, which has encouraged the inclusion in settlements of very widely defined classes of beneficiaries. After the Second World War estate duty was charged in the United Kingdom at very high rates, with much less generous reliefs for agricultural and business property than those now available. A wealthy landowner or businessman might be advised that the safest way to preserve his fortune was to give most of it away, while he was still in the prime of life, to trustees of an irrevocable settlement in discretionary form under which the settlor himself was not a beneficiary. It is not surprising that a settlor in such a position should wish to cover as comprehensively as he could all possible current and future claims on his bounty, since he was being asked to make an immediate, irrevocable disposition of much of his wealth, rather than being able to review from time to time the ambulatory dispositions in his will and codicils. But his lawyers might also advise him that the most natural expressions for defining discretionary objects of his bounty (such as “relatives”, “old friends”, “dependants” or “persons with moral claims”) were of doubtful legal efficacy. So there was a tendency to define the class in the widest possible terms. The process can be seen in a long line of cases starting with *In re Gestetner Settlement* [1953] Ch 672. It led to *In re Manisty’s Settlement* [1974] Ch 17, upholding the validity of an “intermediate” power comparable to that in clause 3.3 of the Everest Trust [at issue in the case] (that is, a power to add as beneficiaries anyone in the world apart from a very small class of excluded persons).” [[6]](#footnote-6)

In all these contexts, the state had imposed tax – income tax or estate duty – by reference to fixed entitlements, and settlors, and their advisors, sought to avoid that tax by creating settlements in which there were no fixed entitlements in possession, that is, settlements which were very largely discretionary in form, with only remote fixed entitlements in remainder: “[r]arely did a beneficiary take an indefeasibly vested interest with an ascertainable market value.”[[7]](#footnote-7) But the state, as is only to be expected, reacted with ever stricter tax legislation.

Two Acts of Parliament deserve mention as major factors in bringing to an end the “glory days” of discretionary settlements. These were the Finance Act 1965, which, in Part III, introduced Capital Gains Tax,[[8]](#footnote-8) and the Finance Act 1975, which, also in Part III, introduced Capital Transfer Tax, that later became Inheritance Tax.[[9]](#footnote-9) Capital Gains Tax was charged on trustees as a single continuing body of persons. This taxation of the trustees made it much harder to avoid tax through the creation of ever more refined beneficial interests under the settlement.[[10]](#footnote-10) Capital Transfer Tax simply devised a special regime for discretionary settlements – or, as the 1984 Act more precisely calls them, “settlements without interests in possession”.[[11]](#footnote-11) Of course, that is not to say the legislation was perfect in its aim of taxing trusts; and much amending legislation has since been passed. But the basic principles of the two new taxes did make discretionary settlements much less effective as devices for tax planning.

Still, discretionary settlements held their enduring attraction for some settlors, as witness *Schmidt v Rosewood Trust Ltd* itself, and there are still many such settlements in existence which were created before the tax regime became as strict as it is today. So the question of how such settlements are enforced retains its importance.

The rights, if any, of protectors to enforce an obligation of the trustees to replenish the trust fund are also important. Again, some background is useful in order to appreciate this. The use of “protectors” in settlements has become much more common, particularly in offshore settlements: to quote Lord Walker once more,

“It has become common for wealthy individuals in many parts of the world (including countries which have no indigenous law of trusts) to place funds at their disposition into trusts (often with a network of underlying companies) regulated by the law of, and managed by trustees resident in, territories with which the settlor (who may be also a beneficiary) has no substantial connection. These territories (sometimes called tax havens) are chosen not for their geographical convenience … but because they are supposed to offer special advantages in terms of confidentiality and protection from fiscal demands (and, sometimes from problems under the insolvency laws, or laws restricting freedom of testamentary disposition, in the country of the settlor’s domicile). The trusts and powers contained in a settlement established in such circumstances may give no reliable indication of who will in the event benefit from the settlement. Typically it will contain very wide discretions exercisable by the trustees (sometimes only with the consent of a so-called protector) in favour of a widely-defined class of beneficiaries. The exercise of those discretions may depend on the settlor’s wishes as confidentially imparted to the trustees and the protector. …

“All these considerations may encourage a settlor to entrust substantial funds to an apparently secure and confidential off-shore shelter.”[[12]](#footnote-12)

A recent text on protectors puts the point as follows:

“For at least 40 years instruments establishing international trusts in many relevant jurisdictions have often appointed a protector of the trust, as well as a trustee. Protectors of trusts governed by English law have also been appointed, but their use in domestic contexts has not as yet become commonplace.

……

“The modern use of protectors of trusts can be argued to have arisen as an alternative to the reservation of powers by the settlor and as a way of extending the idea of the reservation of powers beyond the settlor’s lifetime. …. The idea being that the appointee would not have the trust assets vested in him and hence would not be a trustee. This was understood to mean that there would normally be no fiscal or other reason why the protector would need to be resident offshore. The appointee would be, or would appear to be, independent of the settlor, so the latter could not be said to be retaining control over the trust assets.”[[13]](#footnote-13)

In other words, the appointment of a protector was a means of squaring the circle. The settlor could appoint offshore trustees, with the fiscal benefits, and protection from creditors and forced heirship laws, that comes from vesting assets in residents of a jurisdiction that is generally hostile to such claims. Yet by appointing a protector, the settlor could solve the problem that he does not know or necessarily trust (in the colloquial sense) the trustee he has appointed, without endangering the advantages which flow from appointing offshore trustees. Equally, the settlor would not retain such control himself because of anti-avoidance provisions in the tax legislation: were he to do so, he would put in jeopardy the very tax benefits *prima facie* associated with appointing offshore trustees.[[14]](#footnote-14) So custody of the trust assets could be vested in offshore trustees, but at the same time control over the trust assets could be given to someone whom the settlor actually trusts – a protector.

When discussing protectors, however, it is important to remember that the word “protector” is not an unvarying term of art, though it is occasionally defined in the trust legislation of some (often offshore) jurisdictions.[[15]](#footnote-15) But all it means, essentially, is a person who is not acting as a trustee but who nevertheless has certain powers in relation to the administration and/or distribution of a trust fund, and may or may not be acting as a fiduciary in relation to those powers.[[16]](#footnote-16) Other words are sometimes used to describe a person in this situation, such as “supervisor”, “special appointor” or suchlike; nothing, however, turns on nomenclature for present purposes.

Still, for reasons outlined above, the use of protectors in offshore settlements has grown. And it has become correspondingly important to understand the rights of the protector under the settlement.

1. **The Enforcement of Trusts: Basic Principles of Enduring Significance**

The inherent jurisdiction of the Court of Chancery, and all its successor courts in common law jurisdictions across the world, to supervise, and if necessary intervene in, the administration of trusts is an ancient and well-established jurisdiction of such courts. It is a jurisdiction that marks a radical distinction between the law of trusts and the wider law of obligations. Lord Eldon LC referred to the jurisdiction as long ago as 1805, though it is older than that by far.

“As it is a maxim, that the execution of a trust shall be under the controul [*sic*] 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 directed; 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.”[[17]](#footnote-17)

More recently, Lord Browne-Wilkinson stated in *Target Holdings Ltd v Redferns* that:

“The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instruments, if any, and the general law. ... Accordingly, in the case of a breach of such a trust involving the wrongful paying away of trust assets, the liability of the trustee is to restore to the trust fund, often called "the trust estate," what ought to have been there.”[[18]](#footnote-18)

In the context of beneficiaries’ rights to information about a trust, Lord Walker supplemented these statements with a dictum that has become highly influential, as will be seen.

“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: see Lord Wilberforce in *Gartside v Inland Revenue Comrs* [1968] AC 553, 617-618 and in *In re Baden* [1971] AC 424, 456-457, Templeman J in *In re Manisty’s Settlement* [1974] Ch 17, 27-28 and Warner J in *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1617-1618.”[[19]](#footnote-19)

Lord Walker’s views have since been cited with approval by the High Court of Australia.[[20]](#footnote-20)

The inherent jurisdiction of the court in relation to trusts is wide and extends to much more than simply enforcing the obligations of the trustee.[[21]](#footnote-21) But for present purposes, what is important to understand is that it is this inherent jurisdiction of the court to secure the performance and execution of trusts that lies at the root of enforcing trustees’ obligations. A beneficiary had, and has, standing to invoke that jurisdiction, and to have the administration of the trust reformed: the beneficiary’s powers extend to more than merely recovery of compensation for harm done to him.

Where trustees’ liabilities are concerned, the beneficiary’s power was given effect through the process of accounting, and the orders made consequent on the account. Professor Conaglen puts it thus:

“Equity traditionally approached a trustee’s liability for a breach of trust through the mechanism of taking an account of the trust: ‘[t]he taking of an account is the means by which a beneficiary requires a trustee to justify his stewardship of trust property. The trustee must show what he has done with that property.’ ”[[22]](#footnote-22)

The account might be in common form, or on the footing of wilful default.[[23]](#footnote-23) In either case, if the claimant beneficiary was successful, the account would show that the state of the trust fund as it ought to be, if the trustee’s unjustified action(s) were ignored. This would very likely be more than the trust fund actually comprised.[[24]](#footnote-24) Consequently, there would be an order for re-instatement of the trust fund, usually by the payment of a sum of money by the trustee personally into the trust fund, perhaps from funds realised by the sale of an asset found to be subject to an equitable lien, but occasionally by means of the transfer of an asset *in specie*.

Lord Millett NPJ put the point as follows. It is worth quoting his judgment at some length.

“[A]n order for an account does not in itself provide the plaintiff with a remedy; it is merely the first step in a process which enables him to identify and quantify any deficit in the trust fund and seek the appropriate means by which it may be made good. Once the plaintiff has been provided with an account he can falsify and surcharge it. If the account discloses an unauthorised disbursement the plaintiff may falsify it, that is to say ask for the disbursement to be disallowed. This will produce a deficit which the defendant must make good, either in specie or in money. Where the defendant is ordered to make good the deficit by the payment of money, the award is sometimes described as the payment of equitable compensation; but it is not compensation for loss but restitutionary or restorative. The amount of the award is measured by the objective value of the property lost determined at the date when the account is taken and with the full benefit of hindsight.

“But the plaintiff is not bound to ask for the disbursement to be disallowed. He is entitled to ask for an inquiry to discover what the defendant did with the trust money which he misappropriated and whether he dissipated it or invested it, and if he invested it whether he did so at a profit or a loss. If he dissipated it or invested it at a loss, the plaintiff will naturally have the disbursement disallowed and disclaim any interest in the property in which it was invested by treating it as bought with the defendant’s own money. If, however, the defendant invested the money at a profit, the plaintiff is not bound to ask for the disbursement to be disallowed. He can treat it as an authorised disbursement, treat the property in which it has been invested as acquired with trust money, and follow or trace the property and demand that it or its traceable proceeds be restored to the trust in specie.

“If on the other hand the account is shown to be defective because it does not include property which the defendant in breach of his duty failed to obtain for the benefit of the trust, the plaintiff can surcharge the account by asking for it to be taken on the basis of “wilful default”, that is to say on the basis that the property should be treated as if the defendant had performed his duty and obtained it for the benefit of the trust. Since *ex hypothesi* the property has not been acquired, the defendant will be ordered to make good the deficiency by the payment of money, and in this case the payment of “equitable compensation” is akin to the payment of damages as compensation for loss.

“In an appropriate case the defendant will be charged, not merely with the value of the property at the date when it ought to have been acquired or at the date when the account is taken, but at its highest intermediate value. This is on the footing either that the defendant was a trustee with power to sell the property or that he was a fiduciary who ought to have kept his principal informed and sought his instructions.

“At every stage the plaintiff can elect whether or not to seek a further account or inquiry. The amount of any unauthorised disbursement is often established by evidence at the trial, so that the plaintiff does not need an account but can ask for an award of the appropriate amount of compensation. Or he may be content with a monetary award rather than attempt to follow or trace the money, in which case he will not ask for an inquiry as to what has become of the trust property. In short, he may elect not to call for an account or further inquiry if it is unnecessary or unlikely to be fruitful, though the court will always have the last word.”[[25]](#footnote-25)

As Lord Millett notes, sometimes the process of accounting can be short-circuited by an application for an award of equitable compensation. Professor Conaglen has provided a fuller account of the evolution of a direct award of equitable compensation for breach of trust out of the process of accounting.[[26]](#footnote-26) In the case of a breach of trust:

“It is not a question of concurrent liabilities under different causes of action generated by the same conduct. There is only one claim and the only question is whether the remedy for that claim differs depending on how it is brought. It is suggested that there is no reason why the result should differ simply because the plaintiff seeks equitable compensation directly rather than following the taking of an account.”[[27]](#footnote-27)

Notwithstanding the evolution of a direct claim by a beneficiary for equitable compensation to be paid into the trust fund, or occasionally to himself personally if he is or was solely entitled to the fund, the right to an account, and the right to orders made in consequence of the state of the account, remain the fundamental means of enforcing trustees’ obligations. To put the point in more general terms, notwithstanding the evolution of direct actions for equitable compensation, the invocation and utilisation of the administrative jurisdiction of the court is and remains fundamental to the enforcement of trusts.

It follows that the ability to invoke the administrative jurisdiction is the key to the enforcement of a trust. Standing to invoke the administrative jurisdiction in connection with a trust is a necessary (but, as will be seen, possibly not sufficient) condition to enforce the trust. The question of just who may invoke that jurisdiction for the purpose of enforcing the trustees’ obligations is, therefore, crucial to understanding the enforcement of trusts.

1. **Claims for Breach of Trust: Claims by Fixed Beneficiaries and by Objects of Dispositive Fiduciary Powers**

It is axiomatic that a trust may be enforced by a beneficiary who has some positive claim to benefit from the trust fund, whether income or capital or both, which does not depend on the exercise of any discretion. Trusts are, *ex hypothesi*, matters of enforceable obligation, unless and until validly revoked or else set aside on the basis of some recognised vitiating factor. As Sir William Grant MR said in *Morice v Bishop of Durham*:

“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.”[[28]](#footnote-28)

Cases also clearly establish that a trust providing that some members of a class must receive benefit, though there is discretion as to which members of the class and how much benefit, are also valid if the class is expressed with sufficient certainty.[[29]](#footnote-29) Given that such an arrangement constitutes a trust in favour of such persons, it necessarily follows that they are beneficiaries with standing to enforce the trust.

But what of a person who is simply the object of a power to benefit him (and likely others as well)? Modern trusts make enormous use of such powers, and the objects of the powers are very often intended to take the benefit of the trust fund to the exclusion of the (fixed) default beneficiaries. Again, to quote Lord Walker:

“[I]ncreasingly stringent anti-avoidance measures encouraged legal advisers to devise forms of settlement under which the true intended beneficiaries were not clearly identified in the settlement. Indeed their interests or expectations were often barely perceptible. Rarely did a beneficiary take an indefeasibly vested interest with an ascertainable market value.”[[30]](#footnote-30)

In these circumstances, it is vital to understand the rights of the object of such a power to enforce the trustees’ duties. Three recent cases have addressed this issue, one quite directly. Both cases concerned the objects of dispositive fiduciary powers; so the position of the object(s) of a mere personal power will be examined separately in the next section.

The first of the recent cases is *Lemos v Coutts (Cayman) Ltd*.[[31]](#footnote-31) The issue of interest to the present enquiry was raised only obliquely; but the case is still important in its impact on later decisions.

In 1984, Captain Lemos, a wealthy Greek ship-owner, had established a discretionary settlement known as the Trofos Foundation: both income and capital were subject to discretionary powers of appointment and trusts in default of appointment. The principal beneficiaries of the trust were the four children of Captain Lemos and their issue. Captain Lemos died on 3 December 1989, and subsequently a rift developed between his sons and daughters. This resulted in litigation which was settled by compromise in early 1994. The compromise involved a substantial re-writing of the trusts, with the court supplying approval of the compromise on behalf of unborn beneficiaries and beneficiaries incapable of giving their own consent. The capital of the settlement comprised, *inter alia*, substantial shipping assets and investments. By 1998, the first and second plaintiffs, who were beneficiaries of the trust, had become very concerned about the performance of the shipping investments. On 29 July 1998, the plaintiffs issued the present proceedings in the Grand Court of the Cayman Islands, alleging negligence by the trustees in their management of the trust fund, which had caused it loss.

The proceedings were slow to progress. In part at least, this was because there was another action, commenced in October 1998, originally seeking the court’s directions for the management of the settlement, and the replacement of its trustees, but resulting in the division of the settlement into four new settlements, one for each of the families of Captain Lemos’s children. This was achieved by appointments out of the original settlement to create the four new settlements.

Eventually the July 1998 action progressed to the stage of discovery. At that point, further facts came to light which led the plaintiffs to seek leave to re-amend the statement of claim to include allegations of wilful misconduct by the trustees. It is this application for leave that is of present interest.

The trustees sought to resist the application on grounds of limitation. They alleged that if the new allegations had been made in a new action begun by a separate writ, they would be time barred. Therefore, they argued, any such action should not be allowed to proceed by way of amendment to an existing statement of claim, because that would amount to an end-run around the protection of the statute of limitation. However, section 27(3) of the Limitation Law (Laws of the Cayman Islands, 1996 Revision) provided:

“… For the purposes of this subsection [dealing with limitation periods applicable to an action for breach of trust], the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.”[[32]](#footnote-32)

This could be read so as to mean that the plaintiffs’ claims were not yet time barred: if the plaintiffs had “a future interest in the trust fund”, the limitation period applicable to their claims would not run until the later date contemplated by the section. In response, the trustees alleged that the plaintiffs, as mere objects of fiduciary dispositive powers, did not have a “future interest in the trust property” within the meaning of the statute, so it could not apply to extend the limitation period applicable to their claims.

Levers J was ultimately able to avoid this question and allow the plaintiffs’ application. He held that:

“the facts relevant to this particular amendment are substantially the same facts as those that founded the original cause of action albeit cast in a different light after the specificity which only discovery can expose came to light. Accordingly, these amendments are expressly permitted by the Rules of Court.”[[33]](#footnote-33)

Levers J went on to say, in the alternative, that:

“Even if I am wrong in that [above] assessment of the facts forming the basis of these amendments, it can only be because they are sufficiently distinct from the original facts to be considered entirely new facts in which event, these facts having come to light as a result of discovery by the defendants must be presumed to have been entirely within the defendants' purview prior to discovery and, as such, deemed to have been deliberately concealed. In that event … the time for limitation purposes did not start to run until the plaintiffs obtained discovery.”[[34]](#footnote-34)

Nevertheless, Levers J, while not ruling on the point, appears to prefer the view taken by the English Court of Appeal in *Armitage v Nurse*,[[35]](#footnote-35) and by the New Zealand Court of Appeal in *Johns v Johns*,[[36]](#footnote-36) that the object of a discretionary, dispositive power did not have an “future interest” in the trust fund within the meaning of the Limitation Law.

However, the key point to remember is Lord Wilberforce’s admonition in *Leedale (Inspector of Taxes) v Lewis*,[[37]](#footnote-37) repeated by Millett LJ in *Armitage v Nurse*,[[38]](#footnote-38) that:

“The word ‘interest’ is one of uncertain meaning and it remains to be decided on the terms of the applicable statute which, or possibly what other, meaning the word may bear.”[[39]](#footnote-39)

While the object of a discretionary dispositive power may not have a “future interest” within the meaning of the Cayman, English and New Zealand statutes of limitation, that is a matter of the proper construction of the statutory language in context: it does not necessarily follow that the object of such a power has no rights at all to enforce the trustees’ duties.

This was explicitly recognised in *Lemos v Coutts (Cayman) Ltd*. After considering the implications of *Target Holdings Ltd v Redferns[[40]](#footnote-40)* and *Schmidt v Rosewood Trust Ltd*,[[41]](#footnote-41) noted above, Levers J said:

“The cases state the principle very clearly that a discretionary beneficiary has the right to invoke the court’s power to ensure that the trust fund is properly administered. However, does that then give them a future interest in the trust fund? Mr Briggs argues that it does not. He concedes that a discretionary beneficiary, the object of a mere power, has the right to invoke the court’s inherent jurisdiction to seek the proper administration of the trust fund and the relief claimed can be the reconstitution of the trust fund. However, he submits, that since the discretionary beneficiary has no proprietary interest, then it cannot be said that he has a future interest in the trust fund. He further submits that the discretionary beneficiaries in this case do not have a future interest. What they have is an immediate interest to ensure that the breach is rectified forthwith by invoking the court's jurisdiction here and now.”[[42]](#footnote-42)

The clear view of the judge, albeit *obiter* – and the considered concession of counsel for the trustees, Michael Briggs QC, now Briggs LJ – was that the object of a fiduciary dispositive power may enforce obligations of the trustees. Which of the trustees’ obligations he may enforce is another matter, of course.

The views of Levers J and Briggs QC are entirely consistent with earlier learning. In *Gartside v IRC*, Lord Wilberforce said:

“No doubt in a certain sense a beneficiary under a discretionary trust has an “interest”: the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity. Certainly that is so, and when it is said that he has a right to have the trustees exercise their discretion “fairly” or “reasonably” or “properly” that indicates clearly enough that some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that the right is more than a mere *spes*. But that does not mean that he has an interest which is capable of being taxed by reference to its extent in the trust fund's income: it may be a right, with some degree of concreteness or solidity, one which attracts the protection of a court of equity, yet it may still lack the necessary quality of definable extent which must exist before it can be taxed.”[[43]](#footnote-43)

More recently, in *Johns v Johns*, Tipping J, delivered the judgment of the New Zealand Court of Appeal that the object of a discretionary power did not have a “future interest” within the meaning of section 21(2) of the Limitation Act 1950 (NZ), but said (again *obiter*) that:

“Nevertheless a discretionary beneficiary may well be able to bring proceedings to compel proper administration of the trust. In this respect we note that in *Jacobs’ Law of Trusts in Australia* (6th ed, 1997) at para 317 (p 68) the learned authors, Justices Meagher and Gummow, state that although a discretionary beneficiary has no proprietary interest in the trust assets he has sufficient standing to compel proper administration of the trust.”[[44]](#footnote-44)

The point actually arose for decision in the second of the recent cases to be considered, *Freeman v Ansbacher Trustees (Jersey) Ltd*.[[45]](#footnote-45) This case involved three claims against Ansbacher, the former trustee of a settlement, for breaches of its duties of care and skill in managing the trust fund during its tenure as trustee of the fund. The claims arose out of facts which were complex but for present purposes need no further explanation. The law applicable to the claims was Jersey law, and the proceedings in respect of them were brought before the Jersey Royal Court (Samedi Division).

Ansbacher applied to have the claims struck out before trial. It put forward five grounds in support of its application, four applicable to all the claims, the fifth applicable only to one of them. Just one of those grounds is of present interest: Ansbacher alleged that the plaintiffs in the action lacked “the necessary standing to bring the claims, being simply the objects of a mere power”.[[46]](#footnote-46) (Later in its judgment, the Court made it clear that the relevant power was a *fiduciary* power vested in the trustee – the words “*mere* power” simply indicated that there was no duty to distribute trust property.)[[47]](#footnote-47) The Court emphatically rejected Ansbacher’s allegation. And it did so on the explicit basis that the applicable Jersey law was the same as English law.[[48]](#footnote-48)

The Court could have chosen simply to rule that the claimant’s *locus standi* was at least arguable and therefore should be considered at trial. But it thought the point was one of pure law, on which full argument had been heard, and Deputy Bailiff Birt therefore made a definitive ruling on the point:

“I am in no doubt that I should declare Jersey law to be … that the object of a fiduciary power (whether a trust power or a mere power) has *locus standi* to apply to the Court for relief and that such relief can include the reconstitution of the trust fund where loss has been caused by a trustee’s breach of trust.”[[49]](#footnote-49)

The view taken *obiter* by Levers J in *Lemos*, and conceded by counsel, was upheld.

The main argument put by Ansbacher against that conclusion was that it was contrary to the “traditional” position:

“The traditional approach of the court was to draw a line between discretionary trusts and fiduciary powers. Objects of discretionary trusts had *locus standi* to bring an action to secure the trust fund and their right in it, while objects of fiduciary powers had *locus standi* to seek a removal of trustees who failed to give due consideration to an exercise of their fiduciary powers, but none to seek any other kind of relief, with the possible exception of a claim to enforce an exercise of the power in special circumstances.”[[50]](#footnote-50)

This position was said to be illustrated by *dicta* of Templeman J in *Re Manisty’s Settlement Trusts*:

“If a person within the ambit of the power is aware of its existence he can require the trustees to consider exercising the power and in particular to consider a request on his part for the power to be exercised in his favour. The trustees must consider this request, and if they decline to do so or can be proved to have omitted to do so, then the aggrieved person may apply to the court which may remove the trustees and appoint others in their place. This, as I understand it, is the only right and only remedy of any object of the power…”.[[51]](#footnote-51)

Deputy Bailiff Birt, following the learned authors of *Lewin*,considered that this position could not survive the decision of the Privy Council in *Schmidt v Rosewood Trustees Ltd*.[[52]](#footnote-52) He gave four reasons for this conclusion.

First, the *dicta* of Templeman J needed to be understood in context: the *Manisty* case was concerned with what, if anything, the object of a dispositive power might do to remedy failure by the holder of the power to consider exercising it. It was not concerned with, and did not even address, what the object of such a power might do in response to a breach of trust which had depleted the trust fund. The *dicta* should therefore not necessarily be taken as a comprehensive statement of the rights of an object of a fiduciary dispositive power.

Secondly, even if *Manisty* were to be read widely – too widely – as suggesting that the object of a fiduciary dispositive power has no standing to bring proceedings to remedy a breach of trust that has depleted the trust fund, such a reading of *Manisty* could not survive *Schmidt*.[[53]](#footnote-53) Lord Walker, in *Schmidt*, asserted the court’s general jurisdiction to secure the due administration of a trust, and to reform its maladministration; and he did so in terms that did not draw a dividing line between the holders of fixed interests or discretionary interests and those who were merely the object of a dispositive fiduciary power.

Thirdly, the practicalities of the situation – which should never be forgotten, particularly in a case where there is argument about the correct view of the law – spoke strongly in favour of acknowledging that the object of a dispositive fiduciary power had *locus standi* to bring proceedings to have the trust fund which is subject to that power restored to its proper state. As Deputy Bailiff Birt said:

“It would be in my judgment be a highly unsatisfactory situation if such beneficiaries [*ie* objects of a fiduciary power, who are often those realistically expected to benefit from the trust fund] were held not to have standing to sue the trustees for breach of trust where, for example, the trustees had made speculative investments which had resulted in devastating loss to the trust fund.”[[54]](#footnote-54)

Finally, Deputy Bailiff Birt noted that:

“As was made clear in *Schmidt* (see para [66]) the differences in this context between trusts and powers are a good deal less significant than the similarities.”[[55]](#footnote-55)

He also noted for completeness that none of the foregoing reasoning based on English law was precluded by, or inconsistent with, the written provisions of the Jersey Trusts Law.

Support for this conclusion, albeit *obiter*, can be found in the recent English case of *Blades v Isaac*.[[56]](#footnote-56) The case concerned a discretionary trust established by will. The trustees were legatees under the will and held their gift upon trust and, *inter alia*, subject to a dispositive fiduciary power of which the claimant was an object. When considering the extent to which the claimant could obtain information about the estate, of which she was not a direct beneficiary, Master Matthews noted that:

“[T]the Claimant could hold the trustees to account, for what the trustees had received and for what they had done with it: see *Schmidt v Rosewood Trust Co Ltd* [2003] 2 AC 709. But what she could not claim to be was a legatee of the estate, and therefore directly to enjoy the information rights of a legatee. …

“Nevertheless, in my judgment the rights of the trustees as legatees to information about the estate (whatever they were) were properly part of the trust estate in which she was interested as a trust beneficiary. If need be, therefore, she could claim as against the trustees that they as trustees should exercise those rights, or, if they could not or unreasonably would not do so, claim to exercise them herself, though in that case on behalf of the trust: *Parker-Tweedale v Dunbar Bank plc* [1991] Ch 12.”[[57]](#footnote-57)

The clear doctrinal conclusion is that the object of a fiduciary dispositive power has standing to invoke the jurisdiction of the court to remedy a breach of trust, though that does not mean the court has to grant his claim, as will be seen. And the practical conclusion implicit in that doctrinal position is that settlements which make great use of dispositive fiduciary powers, and which, in practical terms, contemplate that the objects of those powers are to be the economically and socially significant beneficiaries of the settlement (rather than the default beneficiaries, who usually have fixed interests) are trust structures that can perfectly well be enforced. They are not beyond control. Their widespread use is entirely consistent with the axiomatic proposition that:

“the execution of a trust shall be under the controul [*sic*] of the court, [so] it must be of such a nature, that it can be under that control”.[[58]](#footnote-58)

There may be practical risks in the use of such settlements – for example, trustees who do not properly understand or properly use their powers, or objects of those powers who decide that they have no practical motivation to use their standing to enforce obligations of the trustees, because the objects believe they stand to gain little or nothing personally by taking such action. But those are practical, not legal, risks.

There is one further issue to consider in relation to enforcement of a trust by the object of a dispositive fiduciary power. It is one thing to establish that such an object has standing to invoke the court’s jurisdiction to administer trusts and remedy their maladministration. What the court does in response to that invocation is another matter. This is because the claim to enforce a trust is not conceptualised as an absolute right in the fashion of the common law. It is worth remembering here words of Lord Millett, cited earlier, that in remedying a breach of trust, “the court will always have the last word”.[[59]](#footnote-59) As in the case of all equitable remedies, the court retains its own discretion whether or not to allow the remedy;[[60]](#footnote-60) and, if it allows the remedy, the discretion to mould it.[[61]](#footnote-61) The existence and importance of this discretion is evidenced very clearly in *Schmidt v Rosewood Trust Ltd* itself, in the court’s attitude to applications for the disclosure of documents or information relating to a trust.[[62]](#footnote-62)

So any object of a dispositive fiduciary power should have standing to invoke the jurisdiction of the court. But it does not follow that the court must accede to every such invocation. If the object can demonstrate that he or she has a significant claim on the trustees’ consideration, it might well be appropriate to allow the case to proceed. But if the object only has a very remote chance of benefit – for example, he is a member of a very widely drafted class but there is nothing to show the settlor had any intention that the power should be used to benefit him – then the court could dismiss the case. Again, the point has been made in the context of access to documents and information concerning a trust:

“Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief.”[[63]](#footnote-63)

So in practical terms, recognising that objects of dispositive fiduciary powers, even very wide powers, all have *prima facie* standing to apply to court to remedy the maladministration of a trust certainly does not mean that the court will have to accede to claims by those with very little expectation of benefit under the trust. The court can limit the claims it hears to those made by an object who has a substantial possibility of seeing benefit from the trust or other good reason for bringing the proceedings – one of “the true intended beneficiaries” of the settlement.[[64]](#footnote-64) And even if it hears a claim, it does not have to accede to it, or do so in full. But the court need not entertain claims brought by those who have no substantial expectation of benefit. Who are the “true intended beneficiaries”, and who are not, simply turns on the evidence, and the court’s evaluation of that evidence. And there will often be a letter of wishes which makes the distinction clear, something that the court can always demand to see.

If the object of a fiduciary power succeeds in his application to remedy a breach of trust, his remedy is not confined to a sum that reflects only the infringements of his rights personally. His remedy is to compel the trustees to restore the trust fund to its proper state.[[65]](#footnote-65) Of course, the object, like any beneficiary, can only complain in respect of a fund, or part of a fund, from which he might see benefit.[[66]](#footnote-66)

In normative terms, the rights of an object of a fiduciary dispositive power warrant his standing to sue to remedy a breach of trust. A fund exists in respect of which they have claims. The claims may be weak claims in legal theory, though perhaps more significant in reality where they are “the true intended beneficiaries”: interesting as that contrast is, it is not relevant for present purposes. These objects have claims in relation to a fund and should therefore be *prima facie* entitled to complain if the integrity of that fund has been jeopardised or compromised. In short, the beneficiary principle, to which English law still adheres,[[67]](#footnote-67) gives standing to enforce a trust to those who have some claims on or in respect of the trust property.

1. **Claims for Breach of Trust: Claims by Objects of Personal, Non-Fiduciary Powers**

Personal, non-fiduciary powers are much less commonly encountered in settlements than fiduciary dispositive powers. It is unlikely that the objects of personal powers have rights of enforcement similar to those just outlined in the context of fiduciary powers.[[68]](#footnote-68)

The holder of a fiduciary dispositive power owes positive duties to the objects of that power. The holder must consider whether to exercise the power, consider the range of objects of the power, and consider the appropriateness of individual (proposed) exercises of the power.[[69]](#footnote-69)

By contrast, the holder of a merely personal power does not owe duties to the donor or the objects of the power.[[70]](#footnote-70) So the holder can ignore the power if he chooses; and he does not have to consider the objects of the power or their interests. He can release the power at will.[[71]](#footnote-71) The only constraint on the holder of the power is that he must stay within its bounds – both its express terms, and the implicit limitations which apply even to personal powers, such as the requirements to act in good faith and for proper purposes.[[72]](#footnote-72) However, those constraints on the holder of the power exist for the benefit of those who take in default of any exercise of the power: they are to be benefitted by the fund in question save to the extent that benefit is validly deflected away from them by proper exercise of the power. The constraints do not entitle the objects to anything; they merely delimit the extent to which benefit can be taken away from the default beneficiaries. Thus any infringement of the constraints is solely the concern of the default beneficiaries: they can claim their interests have been prejudiced if the constraints are infringed. The objects of the power never had any interest in the fund, nor any claim on the holder of the power; so any misbehaviour of the holder is of no *legal* significance to them, whatever their practical disappointment or concern.

So while the rights of an object of a fiduciary dispositive power warrant his standing to sue to remedy a breach of trust, as noted above, the objects of a mere power, by contrast, have no such rights and correspondingly no foundation for any complaint. The beneficiary principle gives standing to enforce a trust to those who have some claims on or in respect of the trust property, but not others.

1. **Claims for Breach of Trust: Claims by Protectors**

Any general statements about protectors are necessarily tentative. Protectors are all creatures of the specific terms of their appointment. Their powers are various both in form and function. Each such power may or may not be fiduciary in nature. As Ribeiro PJ noted in *Kan v Poon*:

“The position is explained in an article by Matthew Conaglen and Elizabeth Weaver entitled ‘Protectors as fiduciaries: theory and practice’. As the learned authors point out, the term ‘protector’ is not a term of art and generally ‘signifies little more than that a person who is not the (or a) trustee has been granted a power affecting the operation of the trust’. One cannot assume that such a power is held in a fiduciary capacity requiring it to be exercised only in the interests of others to the exclusion of the donee of the power.”[[73]](#footnote-73)

Consequently, general statements about someone in the position of a protector must be made and read with caution.

It is undoubtedly true, however, that a protector who holds fiduciary powers is subject to the inherent jurisdiction of the court to administer a trust and reform its maladministration. For example, in *Steele v Paz Ltd*,[[74]](#footnote-74) a Manx appellate court held that the position of protector in the settlement at issue was a fiduciary position, and that the court could accordingly appoint a new protector to fill a gap in tenure of the office, in the same way that it could appoint a trustee in order to prevent a trust from failing for want of a trustee. In *Re Freiburg Trust*,[[75]](#footnote-75) the Jersey Royal Court held that the protector of the trust, whose consent was required for the exercise by the trustees of a number of their powers, including payments of income or capital, was in the position of a fiduciary. The Court, accordingly, could remove him pursuant to its inherent jurisdiction, and did so, because he had been convicted of offences of fraud in Belgium (including misappropriation of monies from the Freiburg Trust itself). In the Jersey case of *In the Matter of the A and B Trusts*,[[76]](#footnote-76) the court again ordered removal of a protector in exercise of its inherent jurisdiction. Much of the factual background of the case was not reported publicly for reasons of confidentiality. Briefly, relations had broken down completely between the protector and the adult beneficiaries of two Jersey settlements and the protector of the settlements, who misconceived his role as ensuring that the wishes of the settlors were carried out, rather than upholding the interests of the beneficiaries at all times. The court made it clear that its jurisdiction could be exercised well beyond the extreme circumstances of a case such as *Re Freiburg Trust*: the protector’s mistaken view of his role, the breakdown in relations with so many beneficiaries, and the prejudice that caused to the administration of the trust, warranted his removal from office.

In the cases outlined above, the application was made by beneficiaries and the subject matter of the application was the protector or his office. But there are other cases indicating that a protector himself may make applications to court in connection with the exercise of his powers, for example, an application for a declaration as to the validity of his own action,[[77]](#footnote-77) or an application to invoke (what was then) the *Hastings-Bass* jurisdiction to set aside an exercise of his powers.[[78]](#footnote-78) A protector may bring an application to determine the legitimacy of action by the trustees where the trustees’ action is (at least alleged to be) an infringement of the protector’s powers.[[79]](#footnote-79)

However, none of these cases goes so far as to suggest that a protector, even a protector holding fiduciary powers (and *a fortiori* a protector who holds personal powers), can sue to restore the trust fund, assuming of course that the protector is not a beneficiary of the trust in question. And the rationale of the beneficiary principle, noted above,[[80]](#footnote-80) that standing to ask a court to compel reconstitution of a trust fund is given to those who have some claim under the trust on, or in respect of, the fund, would strongly suggest that protectors have no such standing by virtue of their office or powers.

This conclusion is strongly supported by the recent decision of Henderson J in *Davidson v Selig*.[[81]](#footnote-81) In that case, the judge noted that two joint protectors had:

“[F]our principal functions to perform in relation to the administration of the trusts. First, they have power to give or withhold consent to any exercise by the Trustees of their beneficial powers of appointment, or revocation of earlier appointments, from time to time. Secondly, they have power to remove any trustee from office, with or without cause, provided that there will still remain a minimum number of trustees. Thirdly, they have a contingent power to appoint new trustees which will be exercisable only after the death or incapacity of both Settlors. Finally, the protectors may together appoint new protectors. These powers are fiduciary, and they must be exercised in the interests of the beneficiaries. *The protectors do not, however, have a general power or duty to supervise the administration of the Settlements, and they may only apply to the court for relief which relates to the proper exercise of their own powers.*

“I would provisionally accept these submissions, which appear to me firmly based on general principles of trust law and to reflect the limited nature of the powers conferred on the Protector by the 2003 Deeds.”[[82]](#footnote-82)

Henderson J went on to deny the relief sought by one of the two joint protectors.[[83]](#footnote-83) His judgment was framed in narrower terms than the dicta cited above. In the context of two claims, no protector had no standing under the relevant statutory provisions,[[84]](#footnote-84) let alone one of two protectors who had to act jointly. In the third claim, for information about the trust, Henderson J declined to make any order while the claimant protector’s own status was under challenge. In the other claim, the judge held that the claimant protector could not, in the circumstances, seek replacement of his co-protector. Strictly, therefore, Henderson J’s comments on the general powers and duties of protectors to procure the due administration of a trust were *obiter*; but they are quite clear and, with respect, entirely consistent with principle.

Of course, where the law concerning the enforcement of trusts has been changed by statute, a different result may obtain. So, for example, a protector might well be considered a person sufficiently interested in a Bermudian purpose trust as to be able to enforce the trust under section 12B(1)(d) of the Trusts (Special Provisions) Act 1989 (Bermuda). Equally, a protector might well be the sort of person a Cayman court might appoint to enforce a special trust under section 100 of the Cayman Trusts Law (2011 revision). But these possibilities are purely a function of local legislation: they have no wider significance.

Still, a protector might still be of use where the trustees have committed a breach of trust that necessitates the re-instatement of the trust fund. If the beneficiaries are in no position practically to take the necessary action themselves, the court might allow the protector, as a suitably interested person, to take the proceedings on behalf of the beneficiaries. The court has such a jurisdiction to depart from the proper plaintiff rule – the rule that *prima facie* the correct person to bring proceedings is the person whose interests are at issue, which, for present purposes, is *prima facie* a beneficiary affected by the breach of trust in question.

This equitable jurisdiction is the origin of the “fraud on the minority” exception to the rule in *Foss v Harbottle*,[[85]](#footnote-85) that is, the exception where a member of a corporation may sue to remedy a wrong done to the separate legal person of the corporation.[[86]](#footnote-86) However, the equitable learning concerning a fraud on a minority has now been replaced, as regards companies registered under the Companies Acts, by Part 11 of the Companies Act 2006.

Courts of equity have also departed from the proper plaintiff rule in allowing a trustee to sue on behalf of beneficiaries in respect of a breach of trust.[[87]](#footnote-87) While it is true that a trustee has a duty to protect and where necessary take action to restore the trust fund,[[88]](#footnote-88) and these duties clearly have bearing on the readiness of the courts to give the trustee standing to sue to remedy a breach of trust, cases of this nature do illustrate the ability of the court to allow departure from the proper plaintiff rule in an appropriate case – and, for present purposes, an appropriate case of breach of trust. A protector might be an appropriate person for the court to appoint as nominal claimant in an action for breach of trust, whether under its equitable jurisdiction considered above, or under its statutory rules of procedure.[[89]](#footnote-89)

But in any such case, whether arising under the court’s equitable jurisdiction or its rules of procedure, the position of a protector as claimant in an action for breach of trust would be a representative position, enforcing beneficiaries’ rights on behalf of those beneficiaries who, for whatever reason, are not practically able to vindicate their own rights. Protectors still would not have standing to sue in their own right to put a trust fund back into its proper state.

1. **Practical Implications**

Those who create settlements that make significant use of dispositive fiduciary powers should be reassured: these structures are enforceable. This accords with a trend in trust law that sees the courts generally try to accommodate new developments devised by legal practitioners in response to the requirements of their clients. The widespread use of such settlements, and the main reasons for that, is examined above. A series of cases, most of them in the 1960s and 1970s, established the boundaries within which such powers are valid; and those boundaries are very widely drawn, as has been seen. Whilst logically the courts could have conceded the validity of such powers, but left enforcement of the trustees’ duties under such a settlement to beneficiaries with some more doctrinally substantial entitlement, that would fly in the face of the courts’ generally pragmatic approach to the law of trusts. If such powers are valid and widely used, it is surely much more natural for a pragmatically inclined judiciary to develop the law so that the trustees’ duties are enforceable by those who may – and in many cases, very likely will – take benefit under the powers.

This can still leave some practical problems. Allowing the object of a fiduciary power standing to enforce duties of trustees does not, and cannot, ensure that any such object has the motivation or incentive to hold the trustees to account. At first sight, it might therefore seem that settlements which make much use of dispositive fiduciary powers will be largely unenforced in practical terms, even if enforceable in doctrinal terms. But again, this may be too simplistic. The object of a power who is (very) likely to benefit under the power – one of the “true intended beneficiaries” – may well have the motivation to see the trust fund from which he stands to benefit restored to its rightful condition, especially when proceedings against the trustees to procure restoration of the trust fund are combined with an application for the removal of the miscreant trustees (if still in office) and the appointment of new trustees whose attitudes to a discretion vested in them will not be tainted by any hostility the miscreant trustees might harbour towards some object of that discretion who has had the temerity to sue them.

Also, any person with standing to sue the trustees may do so whatever others with similar standing may think of the action, unless the terms of the trust limit those rights, for example to circumstances where a majority of the beneficiaries concur. Trust law does not have the problem of default majority rule which makes it difficult for individual shareholders to take action in respect of a wrong done to the company.[[90]](#footnote-90) If there is an analogy in corporate law, the better analogy is with claims under section 994 of the Companies Act 2006 (remedying of unfair prejudice to a member’s interests): proceedings founded on breach of a fiduciary’s duties are often brought under the Act by those with a minority stake in a company who have the necessary standing under the section, irrespective of their status as a minority, so long as they have sufficient personal motivation to bring the proceedings.

A practical implication which concerns protectors is that they are not functionally equivalent to the non-beneficiary “enforcers” of trustees’ duties which exist under the legislation of many offshore jurisdictions, for example section 12B(1) of the Trusts (Special Provisions) Act 1989 (Bermuda) or section 84A of the Trustee Act 1961 (British Virgin Islands) or Part VIII of the Trusts Law (Cayman, 2011 revision). Nor does there seem any doctrinal basis upon which to develop the office of protector into such a role. Developments of that sort require a direct reformulation of the beneficiary principle, whether by statute or, possibly, judicial decision.

1. **Theoretical Implications**

The most important theoretical implication from the law surveyed above is the nature of the parties’ rights and the court’s role in the enforcement of trusts. Another key theme is the continuing importance of practitioners in the development of trusts, and the courts’ response to the practitioners’ efforts.

The invocation and utilisation of the administrative jurisdiction of the court is and remains fundamental to the enforcement of trusts: the ability to invoke the administrative jurisdiction is the key to the enforcement of a trust. This means that litigation to enforce trustees’ duties to restore the trust fund is not, at root, a simple matter of remedying the infringement of the claimant’s own interest. The claimant is seeking to do something else, to restore a fund in which he has an interest but not necessarily the only interest. The claimant is seeking a remedy for the benefit of himself and all others interested in the fund. While in form his action is an action in his own right, in substance it is neither purely personal nor purely representative. The aim of his action is not to repair harm done to him, in the manner of an action for damages at common law, but to restore the proper functioning – the due administration – of an organisation from which he may or will see benefit. Harm done to a person, even from the functioning of an organisation, can be remedied by an award of money to that person alone. By contrast, due administration of a trust necessarily benefits all those interested in the trust: due administration by definition involves administration of the trust for all those to benefit from it.

The primacy of securing the due administration of the trust as the aim of remedies for breach of trust has consequences in the scope of those remedies, which are not limited to revering harm done to the trust fund but allow remedies, including money remedies, equivalent to performance rather than loss. This phenomenon has been described as the “good man theory of trusts”, where a trustee in breach of duty must do his duty or pay the money equivalent of performance, as opposed to the to the “bad man theory of contract”, where a contract-breaker can breach contract, pay damages for harm done to the other party, but then take advantage of his breach.[[91]](#footnote-91) (Restitutionary damages for breach of contract are exceptional,[[92]](#footnote-92) even in jurisdictions such as England where they are available.)

But as well as informing the scope of remedies for breach of trust, the primacy of securing due administration of the trust informs the identification of those who may sue to remedy a breach of trust: those to whom the trustees owe obligations in respect of their application of the trust fund, rather than those who can show their property or chances have been devalued or lost. To focus on those who have lost property is too narrow: this category does not include those to whom the trustees owe obligations in respect of their dispositive discretions. To focus on those who lose chances by the trustees’ actions is too wide: that category could include those to whom the trustees owe no obligations, such as objects of a non-fiduciary power of appointment, whose chances of benefit from the trust are nevertheless factually diminished by a breach of trust. Trust law is a matter, *inter alia*, of obligations in respect of the application of the trust fund: correspondingly, those to whom such obligations are owed are the people who should be eligible to procure due administration of the trust.

Of course, as noted before, standing does not guarantee the court will entertain the allegations made, even if they are factually justified: an object of a wide fiduciary power who is far from one of the “true intended beneficiaries” might technically have standing to sue to remedy a breach of trust; but the court, in exercise of its discretion in its administrative jurisdiction may decline to hear the case, for example because in substance it amounts to officious meddling. And this is entirely acceptable in terms of the rule of law. The court, in such a case, is not capriciously refusing to remedy a wrong – harm – done to that claimant, in a way that might raise concern about equal protection under the law. It is refusing to allow someone to become embroiled in the affairs of an institution when he has no significant interest in the management of the institution and has himself suffered no loss.

The law surveyed also shows the importance of the interaction of the legal profession and the judiciary in developing the law. As seen above, practitioners pioneered the widespread use of fiduciary dispositive powers in response to their clients’ needs. Once the judges had accepted the validity of such powers; once they had clothed their tenure with obligations; once they had realised that the objects of such powers were more important to the settlor than the beneficiaries who took in default of any exercise of those powers, it was hardly surprising that the judges should accord standing to those objects. The judges, after all, are former practitioners: judges such as Lords Wilberforce, Templeman and Walker had careers at the Bar involved in the creation of settlements which made great use of such powers, and they brought that perspective to the bench. The practitioner perspective is important: it is clearly recognised by the judiciary, and so it needs to be recognised in the theoretical perspective, not just in a socio-legal perspective.

Finally, as noted earlier, the process of securing due administration of a trust through taking accounts can be short-circuited by an application for an award of equitable compensation. However, focusing on compensation alone, and a failure to examine thoroughly the process of accounting, can be the cause of considerable confusion, as witness two cases of high authority in the last 20 years, *Target Holdings Ltd v Redferns*,[[93]](#footnote-93) and *AIB Group (UK) plc v Mark Redler & Co Solicitors*.[[94]](#footnote-94) Yet both cases can be accommodated and explained perfectly well within the framework of the inherent jurisdiction to hold trustees to account.

Lord Millett first provided an elegant solution to the problems of *Target*.[[95]](#footnote-95) In that case, the defendant solicitors’ unauthorised disbursement of the £1.49m was a clear breach of the trusts on which they held those (client) monies: the monies had been released without obtaining a mortgage in exchange. So that action could be falsified in the trust accounts, leaving the solicitors liable, *at that time*, to pay £1.49m to reconstitute the trust fund. But by the time of action, the solicitors had received the relevant mortgage charges, and when they did so, their authority to execute the trust by paying out the trust funds on receipt of the mortgage still subsisted. So the receipt of the mortgage had to be taken into the account as a credit entry, balancing the disbursement of the £1.49m. So the trust accounts as they should appear would thus match the actual state of the trust fund, and therefore no compensation was payable.

There is much more debate about whether the second of two cases, *AIB v Redler*, can be equally elegantly explained by remembering and applying the principles of trust accounting. Professor Conaglen has suggested not.[[96]](#footnote-96) However, accounting can perfectly well explain the result in that case.

AIB agreed to lend £3.3m against the security of a property valued at £4.5m, but the lender insisted on securing its loan by a first charge. The existing mortgages on the property had to be redeemed so that could happen. The loan funds were advanced to solicitors, who released them without obtaining a first charge over the property. As a result of negligence, £1.2m was paid to the prior mortgagee to redeem its mortgage, but this was too little by £0.3m. So the prior mortgage continued on foot, albeit to secure just £0.3m. The £0.3m was instead paid to the borrower. In subsequent attempts to rectify the situation, it proved impossible for AIB to obtain a first mortgage. So the breach was never rectified, in contrast to *Target*. The borrower defaulted, the property was sold and the first £0.3m of the realisation was paid to the prior mortgagee, as was proper. But that meant AIB only received approximately £0.87m. The solicitors admitted negligence, but the claim in contract was limited to the £0.3m which the AIB had lost as a result of not having had a first charge. AIB therefore sued for breach of trust, arguing that the entire £3.3m had been disbursed in breach of trust, as no valid first charge had been received, and thus needed to be replaced. It failed: its claim was limited to the £0.3m extra that it would have received had it been the first mortgagee. The reasoning of the Supreme Court was couched in terms of equitable compensation. This has led some to question the result, as it is seen to be inconsistent with the process accounting. However, it is suggested that the result is in fact perfectly consistent with accounting as the primary remedy for breach of trust.

In brief, the process of accounting would begin with falsifying the disbursement of the £3.3m. The acquisition of a second mortgage did not cure the breach of trust, and so would not be taken into account. But what must be taken into account are the solicitors’ duties. It is true that, on taking an account, the defendant trustee is not allowed to speculate that he would have used his powers in certain way and thereby mitigated to the breach of trust. This rule is justified on the basis that the trustee should not be allowed to give self-serving, and very likely untrue, evidence in his defence. But what was at issue in *AIB* was not the trustee’s *powers*, but its *duties*. Once in possession of the £3.3 million, it was the trustee’s duty to acquire a first mortgage, and so what should show in the account is the first mortgage, not £3.3 million. It was clearly the *duty* of the trustee to acquire that mortgage, not merely its *power*: the trustee could hardly be heard to say that it might or might not choose to expend the monies on the mortgage; it had to do so. This duty was originally revocable, of course. AIB could have called off the whole transaction at least until it took the benefit of the second mortgage, though it is hard to see how AIB could resile once it had voluntarily taken benefit (the second mortgage) from the acquisition of the property: taking such a benefit and yet denying authority for the very transactions which generated that benefit would be inconsistent. So, on the assumption that AIB did not countermand acquisition of the mortgage, this mortgage is what should show in the accounts, not a sum of cash. On that basis, when the borrower defaulted, the trust fund would contain a second mortgage when it should contain a first mortgage; and the loss to the fund would be the difference between realisation of a first mortgage and realisation of the second mortgage, in other words, £0.3 million.

The trustee’s liability is a function of its duty; and there is no reason why the trustee cannot point to its *duty* (rather than its *powers*) in order to establish the scope of its liability. The trustee is not taking advantage of his own misconduct: it is open to a defendant who is liable, even a trustee who is liable, nevertheless to ask the court to pay attention to the basis and extent of its liability, that is, to pay attention to the nature of its duties.

So in both *Target* and *AIB*, the courts intuitively reached a justifiable result. But explaining the result in the correct terms is still useful in itself.

1. **Conclusion**

The inherent jurisdiction is flexible, innovative and vitally important. It allows for flexible and innovative trust structures and provides for their enforcement. It provides answers to the questions of who may enforce a trustee’s duties and in what circumstances. Modern trust structures which make great use of dispositive fiduciary powers do not present significant legal risk and their enforcement. There may be practical issues related to enforcement, but these go to the motivation, rather than the availability, of a beneficiary with standing to enforce the trustees’ duties.

Enforcement of a trustee’s obligations by a beneficiary is in principle different from a typical common-law claim and remedy as between two parties, though sometimes and, in some simple cases, it may bear some superficial similarity. The court’s inherent jurisdiction provides the mechanism for one member of a group of beneficiaries to secure enforcement of obligations owed to the entire group for benefit of the whole group. And it is this principle that underlies cases that are litigated as claims for equitable compensation against a trustee. There is no harm in such form of action as long as it is remembered that it is a way of achieving more quickly what is provided by an account of the trustee’s stewardship of the trust fund. The confusion surrounding some recent cases emphasises the importance of this point. But what cannot be overemphasised is the importance of understanding of the flexible and innovative inherent jurisdiction of court to secure the due administration of a trust.

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2. See generally, JS Vaizey, *Vaizey on Settlements*, vol 1 (London, H Sweet & Sons, 1887) ch VIII. [↑](#footnote-ref-2)
3. See Finance Act 1894, ss 2(1)(b) and 5. [↑](#footnote-ref-3)
4. See generally UK Valuation Office Agency *Inheritance Tax Manual*, section 2 <http://manuals.voa.gov.uk/corporate/publications/Manuals/InheritanceTaxManual/sections/b-section\_2/b-iht-man-s2.html> accessed 1 Sep 2016 [↑](#footnote-ref-4)
5. eg the affairs of the Vestey family as disclosed in *Lord Vestey's Executor v Inland Revenue Comrs* [1949] 1 All ER 1108 and *Vestey v IRC* [1980] AC 1148. [↑](#footnote-ref-5)
6. [2003] UKPC 26, [2003] 2 AC 707 [34]–[35]. [↑](#footnote-ref-6)
7. ibid [34] (Lord Walker). [↑](#footnote-ref-7)
8. See now Taxation of Chargeable Gains Act 1992, as amended. [↑](#footnote-ref-8)
9. See now Inheritance Tax Act 1984, as amended. [↑](#footnote-ref-9)
10. See Finance Act 1965, s 25, now reflected in Taxation of Chargeable Gains Act 1992, s 69. [↑](#footnote-ref-10)
11. Finance Act 1975, s 21 and Schedule 5, paras 12–13, now reflected in Inheritance Tax Act 1984, Part III, Chapter III. [↑](#footnote-ref-11)
12. *Schmidt* (n 5) [1]–[2]. [↑](#footnote-ref-12)
13. M Hubbard, *Protectors of Trusts* (Oxford, OUP, 2013) paras 1.1 and 1.15. [↑](#footnote-ref-13)
14. For examples of such anti-avoidance laws in the context of UK taxation, see Finance Act 1986, ss 102-102C (inheritance tax); Taxation of Chargeable Gains Act 1992, s 86 (capital gains tax), and Income Tax (Trading and Other Income) Act 2005, ss 624-625 (income tax). [↑](#footnote-ref-14)
15. eg Trustee Act 1998 (Bahamas), ss 3, 81. [↑](#footnote-ref-15)
16. See *Kan v Poon* [2014] HKCFA 65, (2014) 17 HKCFAR 414 [67] (Ribeiro PJ), citing with approval M Conaglen and E Weaver, ‘Protectors as Fiduciaries: Theory and Practice’ (2012) 18 *Trusts & Trustees* 17. The other Justices agreed with Ribeiro PJ. [↑](#footnote-ref-16)
17. (1805) 10 Ves 522, (1805) 32 ER 947, 954. [↑](#footnote-ref-17)
18. [1996] AC 421, 434. [↑](#footnote-ref-18)
19. *Schmidt* (n 5) [51]. [↑](#footnote-ref-19)
20. *CPT Custodian Pty Ltd v Commissioner of State Revenue* [2005] HCA 53, (2005) 224 CLR 98 [17]. [↑](#footnote-ref-20)
21. See generally R Nolan, ‘“The Execution of a Trust shall be under the Control of the Court”: A Maxim in Modern Times’ (2016) 2 *Canadian Journal of Comparative and Contemporary Law* 469, and the authorities cited there. [↑](#footnote-ref-21)
22. M Conaglen, ‘Equitable Compensation for Breach of Trust: Off *Target*” (2016) 40(1) *Melbourne University Law Review* 126, 128, citing *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1513] (Lewison J). [↑](#footnote-ref-22)
23. M Conaglen, ‘Equitable Compensation for Breach of Trust: Off *Target*” (n 21) 132-35. [↑](#footnote-ref-23)
24. Occasionally there may be no loss: eg *Blades v Isaac* [2016] EWHC 601 (Ch). [↑](#footnote-ref-24)
25. *Libertarian Investments Ltd v Hall* [2013] HKCFA 93, (2013) 16 HKCFAR 681 [168]–[172]. [↑](#footnote-ref-25)
26. M Conaglen, ‘Equitable Compensation for Breach of Trust” (n 21) 146-50; see also JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow & Lehane’s Equity: Doctrines & Remedies*, 5th edn (NSW, LexisNexis Butterworths, 2015) para 23-030. [↑](#footnote-ref-26)
27. M Conaglen, ‘Equitable Compensation for Breach of Trust” (n 21) 150; see also PG Turner, ‘The New Fundamental Norm of Recovery for Losses to Express Trusts’ [2015] 74 CLJ 188, 190. [↑](#footnote-ref-27)
28. (1804) 9 Ves Jun 399, 404-5; 32 ER 656, 658; see also *Armitage* v. *Nurse* [1998] Ch 241 (CA). [↑](#footnote-ref-28)
29. *McPhail v Doulton* [1974] AC 421, supplemented by *Re Baden’s Deed Trusts (No 2)* [1973] Ch 9 (CA). [↑](#footnote-ref-29)
30. *Schmidt* (n 5) [34]. [↑](#footnote-ref-30)
31. (2005) 8 ITELR 153. [↑](#footnote-ref-31)
32. This text follows exactly the equivalent text of Limitation Act 1980 (UK), s 21(3). [↑](#footnote-ref-32)
33. *Lemos* (n 30) [50]. [↑](#footnote-ref-33)
34. *ibid* at [51]. [↑](#footnote-ref-34)
35. *Armitage* (n 27), considering Limitation Act 1980 (UK), s 21(3). [↑](#footnote-ref-35)
36. [2004] NZCA 42, [2004] 3 NZLR 202, considering Limitation Act 1950 (NZ), s 21(2). [↑](#footnote-ref-36)
37. [1982] 1 WLR 1319, 1329. [↑](#footnote-ref-37)
38. *Armitage* (n 27) 261. [↑](#footnote-ref-38)
39. See also *Gartside v IRC* [1968] AC 553; *Martin v Martin* [1988] 1 NZLR 722; *Commissioner of Taxation v Linter Textiles Australia Ltd* (2005) 220 CLR 592; *CPT Custodian Pty Ltd v Commissioner of State Revenue* [2005] HCA 53, (2005) 224 CLR 98. [↑](#footnote-ref-39)
40. [1996] AC 421. [↑](#footnote-ref-40)
41. *Schmidt* (n 5). [↑](#footnote-ref-41)
42. *Lemos* (n 30) [47]. [↑](#footnote-ref-42)
43. *Gartside* (n 38) 617–618. [↑](#footnote-ref-43)
44. *Johns* (n 35) [34]. [↑](#footnote-ref-44)
45. [2009] JRC 003, [2010] WTLR 569. [↑](#footnote-ref-45)
46. ibid [27(ii)]. [↑](#footnote-ref-46)
47. ibid [34]-[36]. [↑](#footnote-ref-47)
48. ibid [38], [42], [44]. [↑](#footnote-ref-48)
49. ibid [42]. [↑](#footnote-ref-49)
50. See L Tucker, N Le Poidevin, and J Brightwell (eds), *Lewin on Trusts*, 19th edn (London, Sweet & Maxwell, 2015) para 39-073, repeating text from L Tucker, N Le Poidevin, and J Brightwell (eds), *Lewin on Trusts*,18th edn (London, Sweet & Maxwell, 2014) para 39-069, cited with approval in *Freeman* (n 44) [39]. [↑](#footnote-ref-50)
51. [1974] Ch 17, 25. [↑](#footnote-ref-51)
52. *Schmidt* (n 5). [↑](#footnote-ref-52)
53. *Schmidt*, of course, is Isle of Man authority. But it has been accepted as representing English law in *Breakspear v Ackland* [2008] EWHC 220 (Ch), [2009] Ch 32. So Deputy Bailiff Birt was correct to treat *Schmidt* as representing English law, and justified in using the case in reasoning explicitly based on English law (see text to n 47). New Zealand law also follows *Schmidt* and allows a discretionary beneficiary standing to seek disclosure of trust documents and information: *Foreman v Kingstone* [2004] 1 NZLR 841; *Re Maguire (dec’d)* [2010] 2 NZLR 845; *Erceg v Erceg* [2016] NZCA 7. Australian law is in more of a state of flux on this point: see JD Heydon & MJ Leeming (eds) *Jacobs’ Law of Trusts in Australia*, 7th edn (NSW, LexisNexis Butterworths, 2006), para 1716, criticising *Schmidt*, and *Deutsch v Trumble* [2016] VSC 263 [71]–[72], (Hargrave J). [↑](#footnote-ref-53)
54. *Freeman* (n 44) [43(iii)]. [↑](#footnote-ref-54)
55. ibid [43(iv)]. [↑](#footnote-ref-55)
56. *Blades* (n 23). [↑](#footnote-ref-56)
57. ibid [53]–[54]. [↑](#footnote-ref-57)
58. See text to n 16. [↑](#footnote-ref-58)
59. See to n 24. [↑](#footnote-ref-59)
60. eg *British Steel v Granada Television Ltd* [1981] AC 1096, 1114 (Megarry VC in the High Court) 1174 (Lord Wilberforce in the House of Lords); *Warman v Dwyer* [1995] HCA 18, (1995) 182 CLR 544, 559 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 722 (Lord Woolf); *Sempra Metals Ltd v IRC* [2007] UKHL 34, [2008] 1 AC 561 [150] (Lord Scott) [186] (Lord Walker). See generally, WMC Gummow, ‘Equity: Too Successful?’ (2003) 77 *Australian Law Journal* 30, 39–42. [↑](#footnote-ref-60)
61. eg *Warman* (n 59). [↑](#footnote-ref-61)
62. *Schmidt* (n 5) [67]–[68] (Lord Walker). [↑](#footnote-ref-62)
63. ibid [67]; see also *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 432; *SAS Trustee Corp v Cox* [2011] NSWCA 408, (2011) 285 ALR 623 [148]; *Segelov v Ernst & Young Service Pty Ltd* [2015] NSWCA 156 [130]; *Erceg* (n 52). [↑](#footnote-ref-63)
64. See *Schmidt* (n 5) [34] (Lord Walker); see also *Murphy v Murphy* [1999] 1 WLR 282, 293 (Neuberger J). [↑](#footnote-ref-64)
65. *Target* (n 17) 434, cited in text to n 17. [↑](#footnote-ref-65)
66. See Tucker et al, *Lewin on Trusts* (n 49) para 39-076. [↑](#footnote-ref-66)
67. *Morice* (n 16); see generally Tucker et al, *Lewin on Trusts* (n 49) para 39-076 paras 4-043 – 4-046. [↑](#footnote-ref-67)
68. ibid para 39-074. [↑](#footnote-ref-68)
69. *Re Gulbenkian’s Settlement* [1970] AC 508, 518, (Lord Reid); *Re Hay’s Settlement Trusts* [1982] 1 WLR 202, 210 (Megarry VC). [↑](#footnote-ref-69)
70. See, for example, *Re Somes* [1896 1 Ch 250 at 255 (Chitty J); *Re Gulbenkian’s* (n 68) 518 (Lord Reid); *Re Wills’ Trust Deeds* [1961] Ch 219, 227–229 (Buckley J); *Re Hay’s Settlement Trusts* (n 68) 208–9 (Megarry VC). [↑](#footnote-ref-70)
71. See Law of Property Act 1925, s 155 and *Re Wills’ Trust Deeds* (n 69) 227 (Buckley J). [↑](#footnote-ref-71)
72. eg *Aleyn v Belchier* (1758) 1 Eden 132, 28 ER 634; *Lady Wellesley v Earl of Mornington* (1855) 2 K & J 143, 69 ER 728; *Redwood Master Fund Ltd v TD Bank Europe Ltd* [2002] EWHC 2703 (Ch), [2006] 1 BCLC 149; *Citibank NA v MBIA Assurance SA* [2006] EWHC 3215 (Ch), [2007] EWCA Civ 11; *Assénagon Asset Management SA v Irish Bank Resolution Corporation Ltd (formerly Anglo Irish Bank Corporation Ltd)* [2012] EWHC 2090 (Ch), [2013] 1 All ER 495. [↑](#footnote-ref-72)
73. *Kan* (n 15) [67], citing M Conaglen et al (n 15). [↑](#footnote-ref-73)
74. [1993–5] Manx LR 426. [↑](#footnote-ref-74)
75. [2004] JRC 56. [↑](#footnote-ref-75)
76. [2012] JRC 169A. [↑](#footnote-ref-76)
77. See, for example, *Re Omar Family Trust* [2000] WTLR 713 (Cayman); *Virani v Guernsey International Trustees (No 1)* [2004] WTLR 1007 (Guernsey); *Re Papadimitriou* [2004] WTLR 1141 (Isle of Man); *Alhamrani v Russa Management* [2010] WTLR 443 (Jersey). [↑](#footnote-ref-77)
78. *Re L* [2011] JLR 085. [↑](#footnote-ref-78)
79. *Re the Hare Trust* (2001) 4 ITELR 288 (Jersey). [↑](#footnote-ref-79)
80. See text to n 66. [↑](#footnote-ref-80)
81. [2016] EWHC 549 (Ch). [↑](#footnote-ref-81)
82. ibid [55]-[56], emphasis added. [↑](#footnote-ref-82)
83. ibid [57]-[64]. [↑](#footnote-ref-83)
84. One claim was for the appointment of new trustees by the court (Trustee Act 1925, ss 41, 58), and the other for an order to authorise dealings with trust property (Trustee Act 1925, s 57). [↑](#footnote-ref-84)
85. (1843) 2 Hare 461, (1843) 67 ER 189. [↑](#footnote-ref-85)
86. See, for example, *Foss* (n 84) 202–203 (Wigram VC), citing the general principle stated in *Wallworth v Holt* (1840) 4 My & C 619, 41 ER 238, 244–245 (Lord Cottenham LC); *Atwool v Merryweather* (1867) LR 5 Eq 464; *Russell v Wakefield Waterworks* (1875) LR 20 Eq 474, 480–481 (Jessel MR), again citing *Wallworth*; *Burland v Earle* [1902] AC 83, 93–94 (Lord Davey). [↑](#footnote-ref-86)
87. This is a well-established jurisdiction, fully and usefully discussed in *Young v Murphy* [1996] 1 VR 279 (see especially the judgment of Brooking J). Note also the result, but rather sparse reasons, in *Montrose Investment Ltd v Orion Nominees Ltd (No 2)* [2004] EWCA Civ 1032, [2004] WTLR 1133 [23]–[26]. There is further discussion in *Nicholson Street Pty Ltd (Receivers & Managers Appointed) (in Liquidation) v Letten* [2015] VSC 583. [↑](#footnote-ref-87)
88. *Re Brogden* (1888) 38 ChD 546; *Young* (n 86) and the cases discussed there. [↑](#footnote-ref-88)
89. eg Civil Procedure Rules, r 19.7. [↑](#footnote-ref-89)
90. See Companies Act 2006, s 263(2)(c), (3)(c) and (d). [↑](#footnote-ref-90)
91. See JD Hayton, ‘The Development of Equity and the ‘Good Person’ Philosophy in Common Law Systems' [2012] Conv 263. [↑](#footnote-ref-91)
92. *AG v Blake* [2001] 1 AC 268. [↑](#footnote-ref-92)
93. [1996] AC 421. [↑](#footnote-ref-93)
94. [2014] UKSC 58, [2015] AC 1503. [↑](#footnote-ref-94)
95. PJ Millett, ‘Equity’s Place in the Law of Commerce’ (1998) 114 *LQR* 214; see also M Conaglen, ‘Explaining *Target Holdings v Redferns*’ (2010) 4 *Journal of Equity* 288. [↑](#footnote-ref-95)
96. M Conaglen, ‘Equitable Compensation for Breach of Trust’ (n 21). [↑](#footnote-ref-96)