

This is a repository copy of "*The execution of a trust shall be under the control of the court*": A Maxim in Modern Times.

White Rose Research Online URL for this paper:

<https://eprints.whiterose.ac.uk/88217/>

Version: Published Version

Article:

Nolan, Richard orcid.org/0000-0002-7134-5124 (2016) "The execution of a trust shall be under the control of the court": A Maxim in Modern Times. Canadian Journal of Comparative and Contemporary Law. pp. 469-496. ISSN 2368-4046

Reuse

Items deposited in White Rose Research Online are protected by copyright, with all rights reserved unless indicated otherwise. They may be downloaded and/or printed for private study, or other acts as permitted by national copyright laws. The publisher or other rights holders may allow further reproduction and re-use of the full text version. This is indicated by the licence information on the White Rose Research Online record for the item.

Takedown

If you consider content in White Rose Research Online to be in breach of UK law, please notify us by emailing eprints@whiterose.ac.uk including the URL of the record and the reason for the withdrawal request.

“The execution of a trust shall be under the control of the court”: A Maxim in Modern Times

Richard C Nolan*

This article examines the ancient, well attested, but largely unexamined, inherent jurisdiction of the court to supervise, and if necessary administer and execute, any trust. It considers the modern and inventive use of this jurisdiction, and its vital role in the juridification of innovative trust practice. The final section of the article draws out the significant theoretical implications of the court's inherent jurisdiction and sets out an agenda for further research.

* Anniversary Professor of Law, University of York. The author is grateful to Professor Matthew Conaglen, Dr David Fox, Professor Simon Halliday, Professor Jenny Steele, Dr Adam Tucker, Dr Peter Turner and Professor Peter Watts for comments on earlier drafts of this article. The views expressed in the article should not necessarily be attributed to anyone other than the author.

-
- I. INTRODUCTION
 - II. AN OUTLINE OF THE JURISDICTION AND ITS PRACTICAL UTILITY
 - III. THE JURISDICTION IN RECENT CASES: MEETING NEW NEEDS
 - IV. THEORY
 - V. CONCLUSION: A RESEARCH AGENDA
-

I. Introduction

The inherent jurisdiction of the court in relation to trusts is ancient and well attested. The quotation in the title is taken from *Morice v Bishop of Durham*,¹ decided in 1805:

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.²

Notwithstanding its antiquity, the court's inherent jurisdiction has attracted little academic attention.³ However, it is of great importance to the administration of trusts and to the law of trusts generally. This article seeks to demonstrate the practical and theoretical significance of the court's inherent jurisdiction using recent examples to show that the jurisdiction is very much alive and well and that an important research agenda flows from a proper awareness of the court's inherent jurisdiction.

The first part of the article is a brief outline of the court's inherent jurisdiction in relation to trusts, something that should be common knowledge to all those concerned with the law of trusts. The second part of

1. (1805) 32 ER 947 (Ch) [*Morice*].

2. *Ibid* at 954, per Eldon LC.

3. Practitioners' works cover the technical aspects of the subject: see David Hayton, Paul Matthews & Charles Mitchell, *Underhill & Hayton's The Law of Trusts and Trustees*, 18d (London: LexisNexis, 2010) [Hayton]; and Lynton Tucker, Nicholas le Poidevin QC & James Brightwell, *Lewin on Trusts*, 19d (London: Sweet & Maxwell, 2014) [Lewin].

the article uses recent cases from England and some “offshore” jurisdictions to establish the continuing vitality and importance of the court’s inherent jurisdiction. Next, the practical importance of the inherent jurisdiction of the court is examined, particularly its importance in the context of novel developments in the law of trusts and its consequent great utility in the juridification of trust practice. The final part draws out the theoretical implications of the inherent jurisdiction and considers possibilities for further research. These theoretical implications touch on central areas of the law of trusts — theories of contractarianism, asset partitioning and competing perspectives on trusts — the structural importance of the performance interest in the law of trusts and the nature of a trust beneficiary’s rights. The research agenda focuses on the vital position of discretion in the law of trusts and what that means for future research and analysis.

II. An Outline of the Jurisdiction and its Practical Utility

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.

While there is no comprehensive judicial statement of the court’s inherent jurisdiction in relation to trusts, it may be useful to begin with a well-known statement of part of the jurisdiction given in *Public Trustee v Cooper*⁴ by Justice Hart, who was in turn quoting part of an unreported judgment of Justice Robert Walker (later Lord Walker) from 1995:

At the risk of covering a lot of familiar ground and stating the obvious, it seems to me that, when 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

4. [2001] WTLR 901 (Ch (Eng)).

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 ... [He then gave an example].

(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 and which is within their powers. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but 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 a good reason, the most obvious good reasons 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. 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 though it sometimes occurs. It may be that ultimately all will agree on some particular course of action or, at any rate, will not violently oppose some particular course of action. 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. I mention that fourth category, obvious though it is, for a reason which will appear in a moment.⁵

This is certainly not the whole of the court's inherent jurisdiction.

5. *Ibid* at 922-24.

One quite common aspect of the court's inherent jurisdiction — not mentioned above — is the court's inherent power to remove and appoint trustees, even contrary to the wishes of the trustees and the terms of the trust (if any) governing the succession of trustees.⁶ The court also has power, in an emergency, to: authorise acts of administration of the trust that are not otherwise authorised;⁷ authorise the trustees to take court proceedings paid out of trust funds;⁸ authorise as a matter of salvage, the expenditure of capital in keeping up the trust property, for instance by raising money on mortgage and spending it on repairs of the property to save it from ruin which would otherwise ensue;⁹ sanction a transaction which would otherwise constitute a breach of the trustee's fiduciary duty;¹⁰ authorise a trustee to charge remuneration where none is provided by the terms of the trust or to charge remuneration in excess of that provided pursuant to the trust;¹¹ authorise the maintenance of minor beneficiaries out of income directed to be accumulated, and even out of capital in some circumstances, where this course is contrary to the strict terms of the trust instrument and the statutory power of maintenance in section 31 of the *Trustee Act 1925* is excluded or is otherwise not

-
6. See e.g. *Re Chetwynd's Settlement*, [1902] 1 Ch 692 (Eng); *Re Harrison's Settlement Trusts*, [1965] 3 All ER 795 (Ch); and more generally Hayton, *supra* note 3 at 70.15-70.16, 71.32-71.57.
 7. See e.g. *Re New*, [1901] 2 Ch 534 (CA (Eng)); *Re Tollemache*, [1903] 1 Ch 955 (CA (Eng)); *Chapman v Chapman*, [1954] 1 All ER 798 (HL) [*Chapman*]; and more generally Hayton, *supra* note 3 at 43.20-43.25; and Lewin, *supra* note 3 at 45-50.
 8. *Re Beddoe*, [1893] 1 Ch 547 (CA (Eng)); *Evans v Evans*, [1986] 3 All ER 289; and *Alsop Wilkinson v Neary*, [1995] 1 All ER 431 (Ch).
 9. *Re Jackson*, (1882) 21 Ch D 786 (Eng).
 10. See e.g. *Campbell v Walker* (1800), 31 ER 801 (Ch); *Farmer v Dean* (1863), 55 ER 128 (Ch); *Holder v Holder*, [1968] 1 Ch 353 (Eng); and more generally John McGhee et al, *Snell's Equity* 33d (London, Sweet & Maxwell, 2015) [Snell's] at 17. See also Matthew Conaglen, "The Extent of Fiduciary Accounting and the Importance of Authorisation Mechanisms" (2011) 73:3 Cambridge Law Journal 548 at 564-73.
 11. *Re Duke of Norfolk's Settlement*, [1982] Ch 61 (Eng).

applicable;¹² and approve on behalf of minor, unborn and unascertained persons compromises of genuine disputes over the destination of trust property.¹³ There is, however, no general power to alter the terms of a trust because the court thinks it beneficial to do so.¹⁴

This summary of the court's inherent jurisdiction does not purport to be exhaustive. It would take a full paper in itself to exhaustively describe the jurisdiction. But it is immediately apparent from this summary that the inherent jurisdiction of the court, though far from limitless, is still a wide and important jurisdiction. Recent cases show how flexible and useful this jurisdiction remains.

III. The Jurisdiction in Recent Cases: Meeting New Needs

The first such case to consider is *Schmidt v Rosewood Trust Ltd*¹⁵ ("Schmidt"). The question at issue in this case was quite simple. Mr. Schmidt's late father had established two discretionary settlements in the Isle of Man. Mr. Schmidt, the appellant in the present proceedings, sought to obtain trust accounts and other information from the trustees of the two settlements. The sole trustee of each settlement was Rosewood Trust Ltd, the respondent in the appeal, and an Isle of Man company whose business was to provide corporate and trustee services. Mr. Schmidt brought his claim for disclosure of the trust accounts and other information in two capacities: first, as a personal beneficiary and second, as the administrator of his father's estate which claimed an interest under the trusts. The claim was made in the Isle of Man and the final appeal

12. See e.g. *Re De Teissier's Settled Estates*, [1893] 1 Ch 153 (Eng); and more generally Snell's, *supra* note 10 at 28-53.

13. *Re Lord Hylton's Settlement*, [1954] 1 WLR 1055 (CA (Eng)); *Chapman*, *supra* note 7.

14. *Chapman*, *supra* note 7. In response to the *Chapman* case, statutory jurisdiction to approve alterations of beneficial interests on behalf of certain categories of people was conferred on the court by the *Variation of Trusts Act*, 1958 (UK) 6 and 7 Eliz 2, c 53; and see Hayton, *supra* note 3 at 43.25.

15. [2003] UKPC 26 (Isle of Man)[*Schmidt*].

of the Manx proceedings was therefore heard in the Privy Council in London. The Privy Council did not resolve the issues, but rather gave a ruling as to the correct law that the courts in the Isle of Man should apply to determine those issues. The importance of the court's inherent jurisdiction in that ruling is apparent from the following concluding summary from Lord Walker's advice:

Their Lordships have already indicated their view that a beneficiary's right to seek disclosure of trust documents, although sometimes not inappropriately described as a proprietary right, is best approached as one aspect of the court's inherent jurisdiction to supervise (and where appropriate intervene in) the administration of trusts. There is therefore in their Lordships' view no reason to draw any bright dividing-line either between transmissible and non-transmissible (that is, discretionary) interests, or between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character).¹⁶

The key point for present purposes is not who was entitled to access trust documents. Rather, it is that the foundation of any such rights is the inherent jurisdiction of the court to determine, and if necessary compel, the due administration of a trust.

While *Schmidt* concerned trusts operating in their traditional context of providing for the management and distribution of family wealth over generations, the next case illustrates the vital contemporary importance of the court's inherent jurisdiction in a commercial context. *Re Lehman Brothers International (Europe)*¹⁷ ("*Lehman*") was one of the many cases which arose out of the collapse of Lehman Brothers International (Europe) ("LBIE") in the financial crisis of 2008. LBIE held a large amount of property on trust for thousands of clients. However, its record-keeping left a very great deal to be desired. When LBIE went into administration, it proved impossible for the administrators to work out which assets were held for which client. In order to resolve these problems, the administrators of LBIE applied to the High Court in London to establish whether a scheme of arrangement under Part 26 of the *Companies Act 2006*,¹⁸ which the administrators wished to promote

16. *Ibid* at para 66.

17. [2009] EWHC 2141 (Ch (Comp)) [*Lehman*].

18. (UK), c 46 [*Companies Act*].

between the company and certain “scheme creditors”, was one which the court has jurisdiction to sanction under the *Companies Act*. (A scheme of arrangement, if approved by the requisite majorities provided by the *Companies Act* and sanctioned by the court, binds all scheme creditors, irrespective of any particular scheme creditor’s consent.) The present scheme was designed to compromise and eliminate all the clients’ existing rights against LBIE in respect of the assets and instead give the clients the right to seek payment out of a fund constituted by all the assets held by LBIE for all the clients. Both the High Court, and subsequently the Court of Appeal, held that the *Companies Act* could not be used to give effect to the scheme because the *Companies Act* provided for schemes of arrangement which compromised only personal rights and any security for such rights; it could not be used to give effect to a scheme which sought to alter equitable beneficial interests in assets.

This left the administrators of LBIE in a very difficult position, and one to which the court was very sympathetic, even though it could not give effect to the administrators’ original proposal. The court did not want to leave the administrators with no way forward other than an inordinately expensive, and probably ultimately futile, forensic exercise of trying to identify precisely which assets were held for which client. Therefore, what the High Court and the Court of Appeal both did was to suggest that the administrators, acting on behalf of LBIE in its capacity as a trustee of client funds, should use and take advantage of the court’s inherent jurisdiction in relation to trusts:

Establishing what client assets of any given client LBIE holds or controls, what competing claims there may be to those assets by other clients or by LBIE (or others) and how LBIE and the administrators are to discharge their duties in respect of those assets with a view to their due distribution to those entitled to them are all matters where the court has, in the exercise of its trust jurisdiction, well-developed processes to assist the accountable trustee or other fiduciary. For example, the court is well used to authorising a trustee to make distribution of a fund where there can be no certainty that all of the claimants to it have been identified and the trustee desires the protection of a court order in the event that a further claimant should subsequently appear or matters subsequently come to light which question the basis on which the distribution is made. In one sense, dealing with the matter by recourse to the court’s assistance in this way can be simpler (and less costly) than the often complex processes involved

in the promotion of a scheme under Part 26. ...¹⁹

Like Patten LJ and Blackburne J, I have some sympathy with the administrators' desire to have a scheme under section 895 (of the 2006 Act) which extends to trust property, in the light of the difficulties which would otherwise almost certainly arise in connection with seeking to satisfy the rights of beneficiaries in relation to trust property held in the name of LBIE. However, as Blackburne J held, the fact that such a Scheme might well represent a reasonable proposal in this case is plainly not enough to bring it within the ambit of section 895, and, as is evidenced by the opposition to the proposed Scheme mounted by the London Investment Banking Association, it may, viewed in the wider perspective, be positively undesirable that such a Scheme could be approved under section 895. I hope, indeed I would expect, that, if the administrators decide to make an application under the Trustee Acts or pursuant to the court's inherent equitable jurisdiction, in relation to dealing with beneficiaries' rights, the court will provide effective assistance, by arriving at a practical and fair outcome, while ensuring that delay and cost are kept to a minimum.²⁰

In this case, the administration of assets worth many millions of pounds by those responsible for resolving important aspects of one of the biggest corporate collapses in history was consigned to the inherent jurisdiction of the court in respect of trusts. By any standard, this was a significant invocation of that jurisdiction.

More recently still, the jurisdiction has been similarly deployed to deal with the distribution of client monies held by an investment bank in special administration in the case of *Re Worldspreads Limited*.²¹ The company, a regulated bank, had provided an online trading platform for spread betting and trading in contracts for differences. The company became insolvent and was put into "special administration", a specialised form of insolvency proceeding for an insolvent investment bank.²² There was a large deficiency in its client account. Monies in the client account were held on statutory trusts.²³ To cut a long story short, the statutory

19. *Lehman*, *supra* note 17 at para 77, per Blackburne J.

20. [2009] EWCA Civ 1161, per Longmore LJ.

21. [2015] EWHC 1719 (Ch).

22. See the *Banking Act 2009* (UK), c 1; and the *Investment Bank Special Administration Regulations 2011* (UK), SI 2011/245.

23. See UK Financial Conduct Authority, *Client Assets Rules*, made in exercise of its powers under the *Financial Services and Markets Act 2000* (UK), c 8, ss 137(a), 137(b).

powers enabling an administrator to distribute the client monies in those circumstances proved inadequate. On application to the court, the court made an order exercising its inherent jurisdiction in relation to trusts and gave directions to the administrators (who controlled the company, which was trustee of the monies), authorising them to distribute the trust property on a particular basis, as the court was satisfied that it was just and expedient to make such an order in the circumstances of the insolvency.

Another commercial context in which the court's inherent jurisdiction over trusts has proven very useful and able to react to modern developments in finance is its use by the trustees of note issues. Notes are often issued pursuant to the terms of a trust deed. In such a case, the issuer (borrower/debtor) owes sums of money (interest, and ultimately capital) to one or more noteholders. The issuer also promises to pay equivalent sums of money to, or to the order of, a trustee. The trustee holds the benefit of that obligation on trust for the noteholders. In normal (solvent) circumstances, payment to the underlying investors will discharge the issuer's obligations both to the noteholder(s) and to the trustee, because the trustee (and, if necessary, the noteholder) will have directed payment to the investors until default. On default, the terms of the notes will prohibit separate actions by a noteholder. Instead, the trustee will enforce the debt owed to it for the benefit of the noteholders and thus the underlying investors. In effect, there will be collective realisation by the trustee, for the benefit of the noteholders, of the sums outstanding from the issuer. The trustee in these cases is usually little more than a cipher in economic terms.²⁴ The trustee will very likely have some minor administrative discretions, but on most questions of substance, such as whether to waive a material breach of covenant, whether to declare an event of default, and whether to enforce the debt, the trustee deed will direct the trustee to act on the directions of the noteholders (that is, the beneficiaries of the trust), usually acting by some specified majority. It is not unusual for the trustee to be caught in between competing groups of noteholders (beneficiaries).

24. Consider *Concord Trust v Law Debenture Trust Corporation*, [2004] EWCA Civ 1001 at para 38; and *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL*, [2011] EWCA Civ 227 at paras 102-105.

In those circumstances, the trustee has the great help of the administrative jurisdiction of the court. The trustee can apply to court for directions on the appropriate course of action (or the range of possibilities from which it may lawfully choose) and is totally protected from all liability if it acts in accordance with the court's order.²⁵ Most of these applications take place on short notice, often in chambers. They leave no record easily accessible. Various practitioners in this field in both the City of London and in Hong Kong have, in conversations with the author, attested to the importance and usefulness of the court's inherent administrative jurisdiction in these circumstances. One reported example of this process is *Citibank NA v MBIA Assurance SA*.²⁶

This case concerned one of several restructurings of debt issued by Eurotunnel, the builder and operator of the fixed train link between England and France under the English Channel. Citibank ("Citi") applied for directions from the court in Citi's capacity as trustee of a trust constituted by a trust deed dated 20 February 2001. This trust deed was itself the result of an earlier restructuring in which a company called FLF acquired a large tranche of Eurotunnel subordinated debt and paid for it by issuing seven ranked tranches of notes subject to the terms of the trust. The trust deed contained a covenant from FLF to pay the notes when due, which would then be financed out of the returns from the Eurotunnel debt it owned. The trust deed also provided for other covenants (including a covenant to pay equivalent sums to the trustee, or to the trustee's order) to be held on trust for the noteholders. Further, the deed provided for MBIA Assurance SA ("MBIA") to be able to give directions and exercise a lot of control over what would otherwise be Citi's duties and discretions as a trustee, so long as MBIA remained the

25. See *Civil Procedure Rules* (UK), r 64 and its accompanying Practice Direction; and see generally Hayton, *supra* note 3. In Australia, see also *Re Mirvac Ltd*, [1999] NSWSC 457 (Austl) at paras 40-41, a case in which Austin J considered this jurisdiction and a parallel jurisdiction under a New South Wales statute.

26. [2006] EWHC 3215 (Ch). A very recent example of an alternative means of proceeding, namely an application for a declaration rather than directions, is: *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No 1*, [2015] EWHC 1560 (Ch).

“Note Controlling Party”, that is, while MBIA remained liable under a guarantee it had given of some of the notes. When the underlying Eurotunnel debt was again restructured, MBIA exercised some of its powers under the terms of the trust to its own advantage so that it would be paid certain cash sums. This was challenged by other noteholders (that is, other beneficiaries of the trust), *inter alia* on the grounds that the trustee, if it acted in accordance with MBIA’s directions, would breach its duties to look after the interests of all beneficiaries. Citi, as trustee, applied for directions. The court held it lawful for the trustee to act in accordance with MBIA’s directions. If the express terms of the trust make a beneficiary’s rights subject to the effect of such a direction, those express terms cannot be overridden or altered by some alleged “duty of fairness” to those beneficiaries.

What is important for present purposes is the availability of the court’s inherent jurisdiction to give directions and thereby resolve the trustee’s concerns. The court laid to rest a major financial question affecting notes worth in aggregate some £432,050,000 plus €745,000,000 and did so in a very short time. The originating process seeking the directions was issued on 20 November 2006. The Chancery Division of the High Court in London gave judgment on 13 December 2006; and on 22 January 2007 the Court of Appeal dismissed an appeal against the High Court’s judgment. The whole process, from start to finish, took just nine weeks, including the Christmas and New Year vacation periods.

Cases from recent years in another area of law, this time in the traditional context of family wealth management, also illustrate the flexibility of the court’s inherent jurisdiction and its enduring vitality. The cases in question concern protectors and they show the continuing ability of the inherent jurisdiction to cope with novel situations.

In English law, the term “protector” is not a term of art, though it is sometimes used as a defined term in the trust legislation of some (often offshore) jurisdictions.²⁷ 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

27. See *e.g. Trustee Act 1998* (Bahamas), c 176, ss 3, 81.

may or may not be acting as a fiduciary in relation to those powers.²⁸ Other words are sometimes used to describe the person in this situation, such as “supervisor” or “special appointor”, but nothing turns on the nomenclature for present purposes. What is significant is the court’s use and development of its inherent jurisdiction over trusts to supervise and control protectors, and, when necessary, to intervene in the administration of the trust where its provisions for protectors have for some reason failed to work as anticipated.

In *Steele v Paz Ltd*,²⁹ a Manx appellate court had to consider a trust where the protector’s consent was required for payments of income and capital and for the exercise by the trustees of a number of administrative powers. The protector also had power to appoint new or additional trustees. Unfortunately no protector was appointed when the trust was created and an issue arose as to whether the trust was therefore invalid. The court held that the position of protector in that trust was fiduciary and that the court could accordingly appoint a protector with fiduciary powers 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*³⁰ (“*Freiburg*”), 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), had been sentenced in his absence to a term of imprisonment and had disappeared.

A final, more recent example is the Jersey case of *In the Matter of the A and B Trusts*.³¹ Much of the factual background of the case was not

28. See e.g. *Kan Lai Kwan v Poon Lok To Otto*, [2014] HKCFA 65 at para 67, per Gummow NPJ, citing with approval Matthew Conaglen & Elizabeth Weaver, “Protectors as Fiduciaries: Theory and Practice” (2012) 18:1 Trusts & Trustees 17.

29. [1995] Manx LR 426 (Isle of Man) [*Steel*].

30. [2004] JRC 056.

31. [2012] JRC 169A.

reported publicly for reasons of confidentiality. The court only authorised the publication of an extract from its judgment. In short, the applicants, who were the overwhelming majority of the adult beneficiaries of two Jersey discretionary trusts had lost confidence in the protector of the two trusts. Relationships between the parties had completely broken down, principally because the protector conceived of 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 ordered removal of the protector, exercising its inherent jurisdiction, because the protector had fundamentally misconceived his role. Though the protector's motivation for the way he exercised his role was *bona fide*, his role, ascertained from the terms of settlement, was to protect the beneficiaries' interests, not those of the settlors. It was also open to the settlors to specify a different role for the protector. It was common ground between the parties that the court had an inherent jurisdiction to remove a protector from office, akin to its power to remove a trustee from office,³² and that the jurisdiction was an aspect of the court's inherent jurisdiction over the administration of trusts. The new development in the case is that the court made it clear that the jurisdiction could be exercised well beyond the extreme circumstances of cases such as *Freiburg*; 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.

However, the inherent jurisdiction of the court has not been seen as entirely helpful. It has been seen by some as standing in the way of provision in a trust deed for mandatory arbitration of trust disputes. The argument, though it is contested, is that the inherent jurisdiction of the court cannot be ousted, so any provision of the trust requiring mandatory arbitration to the exclusion of court proceedings would necessarily be an attempt to oust the jurisdiction of the court in a manner which is not permissible and therefore void. The consequence would be that primary legislation would be required to authorise the mandatory arbitration of trust disputes. Certainly, this appears to be the view of the well-respected

32. *Supra* note 6.

Trust Law Committee as expressed in the journal of the Society of Trust and Estates Practitioners.³³

Whatever the precise strength of this argument, it undoubtedly has a chilling effect on the adoption of arbitration for disputes arising under a trust deed. Yet for the reasons seen above, those who might seek to oust the inherent jurisdiction of the court should be careful what they wish for. The inherent jurisdiction is extremely flexible and useful, and ousting it could well result in a disadvantage to trustees and beneficiaries. For that reason alone, it seems preferable to provide for the arbitration of trust disputes, if desired, by carefully drafted legislation that preserves the advantages of access to court for guidance, directions and assistance, even if it invests the resolution of disputes in an arbitral tribunal. For present purposes, it is only fair to note that some practitioners indeed see some downside in the existence and availability of the inherent jurisdiction of the court, because of the doubt that jurisdiction casts on the effectiveness of arbitration clauses in trusts.

IV. Theory

It is surprising, given the ubiquity and importance of the inherent jurisdiction of the court over the administration and execution of trusts, that this jurisdiction has not attracted more academic attention. In England, this may be the consequence of so much academic attention being focused on implied trusts and their place in the taxonomy of the law, rather than on the express trust as a voluntary, substantive and functionally important legal institution used in a whole range of circumstances, many of them far removed from the origins of the trust in the intergenerational management of primarily land-based family wealth. In North America there has been, in recent years, renewed interest in

33. Trust Law Committee, "Arbitration of Trust Disputes" (2012) 18:4 Trusts and Trustees 296. For a thorough review of the law, see Matthew Conaglen, "The Enforceability of Arbitration Clauses in Trusts" (2015) 74:3 Cambridge Law Journal 450.

the trust as an organisational form and in legal theorising of this form.³⁴ But still, the existence and impact of the inherent jurisdiction has not featured much in these debates.

In fact, the existence of the inherent jurisdiction has significant theoretical ramifications in the law of trusts. At the risk of oversimplification, trust law has been seen as primarily about asset partitioning (essentially a matter of property law),³⁵ or contractarian freedom of management and disposition of trust assets (essentially a matter of the law of voluntary obligations — contract law in the economic, rather than the strictly legal sense),³⁶ or else, most persuasively, as a matter of organisational law.³⁷ The existence of the inherent jurisdiction challenges these simplicities. The inherent jurisdiction is a matter of positive law, not replicable by contract, and yet it is not concerned with asset partitioning, the traditionally conceived function of mandatory (property) rules in the law of trusts.

For example, it would be impossible by private bargain to provide for authoritative guidance and directions the effect of which, if followed, would be to insulate the trustee from all potential liability. At present, positive law in England would most likely forbid this as an impermissible ouster of the jurisdiction of the court.³⁸ But even if that were changed

-
34. See *e.g.* John H Langbein, “The Contractarian Basis of the Law of Trusts” (1995) 105:3 Yale Law Journal 625 [Langbein, “The Contractarian Basis”]; Henry B Hansmann & Ugo Mattei, “The Functions of Trust Law: A Comparative Legal and Economic Analysis” (1998) 73:2 New York University Law Review 434 [Hansmann & Mattei, “Functions of Trust Law”]; Henry B Hansmann & Reinier Kraakman, “The Essential Role of Organizational Law” (2000) 110:3 Yale Law Journal 387 [Hansmann & Kraakman, “The Essential Role”]; Henry B Hansmann, Reinier Kraakman & Richard Squire, “Law and the Rise of the Firm” (2006) 119:5 Harvard Law Review 1333 [Hansmann et al, “Rise of the Firm”]; and Robert Sitkoff, “An Agency Costs Theory of Trust Law” (2004) 89:3 Cornell Law Review 621.
 35. Hansmann & Mattei, “Functions of Trust Law”, *supra* note 34 at 454-59, 479.
 36. Langbein, “The Contractarian Basis”, *supra* note 34 at 650.
 37. Hansmann & Kraakman, “The Essential Role”, *supra* note 34 at 393-95; and Hansmann et al, “Rise of the Firm”, *supra* note 34 at 1337-56.
 38. *Steel*, *supra* note 29.

by statute, which is possible,³⁹ no tribunal can make itself immune from review by the courts. So the finality of any ruling by such a tribunal binding under the (now permitted) terms of a trust would always be subject to review. Only the state, through positive law, can provide complete finality, which trustees enjoy when acting in accordance with the directions of the court. It would be similarly impossible to provide for a body that will provide long stop enforcement of a trust, come what may. And private parties, by bargain, could not replicate the powers of the court to intervene in the administration of the trust, for example by removing trustees and appointing new ones, or by authorising deviations from the terms of the trust. Again, while in theory such powers could be conferred by the terms of a trust on a tribunal, the actions of such a tribunal would be open to review, and it would require the assistance of the state's (most likely the court's) coercive powers in order to secure compliance with its orders should they not be given effect willingly. In short, these forms of assistance offered by the court cannot be fully replicated by private bargain.

In theory, the role of the court in the *Lehman* litigation might just have been replicated by contract. But in practical terms, there was no such chance of a purely contractual solution, which was the very reason why the administrators had proposed a scheme of arrangement. There were so many people who were creditors or beneficiaries or both of the relevant LBIE entity that there was no practical possibility whatsoever of them all agreeing to a particular proposal for administering the funds held for their benefit. Indeed, even the administrators' proposal for a scheme of arrangement, which essentially saw the rights of LBIE's customers as *in personam* obligations (whether strictly contractual or not) nevertheless required the assistance of statute law and the intervention of the courts, through which the majority could be made to bind all the customers, if it were to be remotely feasible. In that event, the inherent jurisdiction of the court was used to achieve what in practical terms could not be achieved by private bargain alone.

The court's inherent jurisdiction is also important at the structural

39. See e.g. *Trusts Law 2007* (Guernsey), c 2, s 63.

level of the law of trusts. Rules such as the requirements of “certainty of subject matter”⁴⁰ and “certainty of objects”⁴¹ find their origin and justification in the court’s inherent jurisdiction. These rules show distinct structural differences from their analogues in the law of contract and those differences are a consequence of the court’s inherent jurisdiction.

The law of trusts, like the law of contract, requires certainty of intention. This is no more than a way of saying, in doctrinal terms, that there needs to be a sufficient and objective manifestation that the parties wish to create a particular form of legal relationship to which the organs of state, principally the courts, will then respond.

But the law of trusts is much more rigorous than the law of contract in its requirements that the subject matter of the trust be accurately identified or identifiable and that the beneficiaries of the trust likewise be clearly identified or identifiable. Contracts to deal with assets do not necessarily require that the assets be immediately identified or identifiable on formation of the contract; it is generally sufficient that the assets be identified on performance of the contract.⁴²

In theoretical terms, it is the remedial structure of the law of contract which admits the more liberal rules on certainty. The courts do not need to know so much about what assets are in question if all they are required to do is award damages if assets of a particular description are not ultimately delivered as agreed. Correspondingly, the courts need to

40. See *e.g.* *Sprange v Barnard* (1789), 2 Bro CC 585 (Ch (Eng)); *Knight v Knight* (1840), 3 Beav 148 (Ch (Eng)); *Boyce v Boyce* (1849), 16 Sim 476 (Ch (Eng)); *Palmer v Simmonds* (1854), 2 WR 313 (Ch (Eng)); *Mussoorie Bank Ltd v Raynor* (1882), 7 App Cas 321 (Ch (Eng)); *Re Kayford Ltd*, [1975] 1 All ER 604 (Ch); *Re London Wine Co (Shippers) Ltd*, [1986] PCC 121 (HC (Eng)); *Hunter v Moss*, [1994] 1 WLR 452 (CA (Civ) (Eng)); *Re Harvard Securities Ltd* (1997), 2 BCLC 369 (Ch (Eng)); and *White v Shortall*, [2006] NSWSC 1379 (Austl), *aff’d* [2007] NSWCA 372 (Austl) [*Shortall*] (approved by the Court of Appeal in *Lehman*, *supra* note 17). See generally Hayton, *supra* note 3 at 8.11-8.33.

41. See *e.g.* *Re Gulbenkian’s Settlement Trusts*, [1970] AC 508 (HL) [*Gulbenkian’s*]; and *McPhail v Doulton*, [1971] AC 424 (HL) [*McPhail*]. See generally Hayton, *supra* note 3 at 8.34-8.70.

42. See generally Gareth Jones & William Goodhart, *Specific Performance* (London: Butterworths, 1996) at 9-11.

know more if they are to be able and willing to order parties to deal with particular assets and subject them to penalties, including contempt of court, should they not do so.

The law of trusts therefore requires that trustees should know *ab initio* what the assets to be held on trust are, or to be able to ascertain that immediately,⁴³ again because of the (different) remedial structure of the law of trusts. Axiomatically, the law of trusts requires trustees to execute the trust, rather than merely pay compensation in respect of their failure to execute the trust. Ultimately, and equally axiomatically, the court will execute the trust if the current trustees fail to do so, whether acting itself or through the appointment of new trustees.⁴⁴ These axiomatic propositions require much more information to be available if they are to be realised. In other words, axiomatic doctrines which form part of the court's inherent jurisdiction are responsible for the tighter certainty requirements of the law of trusts as opposed to the law of contract.

Similar points can be made in connection with the rules on certainty of objects. The rules are not just about ascertainment of those who have *locus standi* to enforce the trust. If they were, then it would be very difficult to argue with the proposition that identification of a single such beneficiary would be sufficient to validate the trust, a proposition that was rejected decades ago in *Re Gulbenkian's Settlement Trusts*.⁴⁵ While the rules are designed to make sure that the trustees can execute the trust rather than pay compensation in respect of a failure to execute it, they are also designed to enable the court to execute the trust, or bring about

43. Langbein, "The Contractarian Basis", *supra* note 34 at 650. The statement in the text is consistent with the interpretation given to *Hunter v Moss*, [1994] 1 WLR 452 (CA (Civ)(Eng)), and in the Australian case of *Shortall*, *supra* note 40, which in turn was itself approved in England by the Court of Appeal in *Lehman*, *supra* note 17.

44. *Morice*, *supra* note 1. Note also *Re Astor's Settlement Trusts*, [1952] Ch 534 (Eng) at 549; *McPhail*, *supra* note 41 at 439-40; *McLean v Burns Philp Trustee Co Pty Ltd* (1985), 2 NSWLR 623 (SC (Austl)) at 633, 637; *Re Rabaiotti 1989 Settlement* [2000], WTLR 953 (Royal Court (Jersey)) at 970; *Schmidt*, *supra* note 15 at paras 36, 51, 66; and *Crociani v Crociani*, [2014] UKPC 40 (Jersey) at para 36 [*Crociani*].

45. *Gulbenkian's*, *supra* note 41.

its execution, should the current trustees fail to do so.⁴⁶ The theoretical implications are the same as those flowing from the rules about certainty of subject matter. The axiomatic rule that a trust will, if necessary, be executed by the court or at its direction, generates the strict — or at the very least stricter — requirements in the law of trusts for information about the identity of beneficiaries.

The court's inherent jurisdiction also offers theoretical insights to counterbalance the undoubted insights of contractarianism.⁴⁷ Unlike contracts, trusts proceed from the axiom that the court will compel a trustee to perform his or her undertaking, regardless of any question of the adequacy of monetary compensation for non-performance, as was noted earlier. Trusts assume the "good person" theory of obligations (where the "good person" does faithfully as he or she is bound to in accordance with the terms or purposes of the trust), rather than a "bad person" theory (where he or she is allowed to breach his duties at the price of paying money). The relevance of this to remedies for breach of trust and their quantification has been explored elsewhere.⁴⁸ But the interest of trust law in performance has implications well beyond the law of remedies for breach of trust.

This interest in performance, if it is to be realised consistently in practice, necessitates some means of keeping the trust operating for its proper purposes in circumstances even where the beneficiaries are not all ascertained and *sui juris* — capable of reforming the administration of the trust themselves by consensual action. Even if the law allowed other mechanisms of enforcement, they too could break down. The court's inherent jurisdiction provides the necessary support that guarantees performance and execution of the trust. The court's inherent jurisdiction provides a kind of state-backed regulatory oversight of, and support for, the trust. As such, the court's inherent jurisdiction could not be replicated by private bargain. That fact provides a necessary corrective to an

46. *Morice*, *supra* note 1.

47. See Langbein, "The Contractarian Basis", *supra* note 34 at 629.

48. See e.g. David Hayton, "The Development of Equity and the 'Good Person' Philosophy in Common Law Systems" (2012) 76 *The Conveyancer and Property Lawyer* 263.

excessively contractarian understanding of trusts. Trusts certainly exhibit similarities to contract — they respond to private bargaining and so are very flexible — but trusts are not contracts. Contractarianism provides one important perspective on trusts, but it is not the only perspective and must certainly not imply an identity between trusts and contracts. But equally, the court's inherent jurisdiction should remain deferential to the terms of the trust as established by the settlor; respect for voluntary undertakings should be maintained. The court's inherent jurisdiction can usefully aid the execution of voluntary undertakings and help them cope with unexpected events and maladministration; but, as hitherto, a court should not alter the terms of a trust simply because it thinks that it is beneficial to do so.⁴⁹

A recent case from the Privy Council, *Crociani v Crociani*,⁵⁰ emphasises that the involvement of the court in the affairs of a trust is an important factor distinguishing trust from true contract. The Privy Council indicated that it would approach a jurisdiction clause in a trust differently from an equivalent clause in a contract, because of the court's concern for the beneficiaries' interests. In other words, beneficiaries are not treated just like a third-party beneficiary of a contract *stricto sensu*, or the assignee of the benefit of a contract. Clearly, execution of the undertaking as mandated by the settlor is key to the law of trusts. But the court's approach to interpretation, like the court's jurisdiction to aid and supplement the trustees' execution of the trust, is used to advance the beneficiaries' interests more firmly than those of a third party beneficiary of a contract or an assignee of the benefit of a contract. The *Crociani* case confirms from the perspective of interpretation what is also clear from the inherent jurisdiction: an unsophisticated equivalence between trust and contract is entirely inappropriate, even when considering the rights and duties of trustees and beneficiaries *inter se*, quite aside from any consideration of the proprietary aspects of a trust.

More fundamentally still, in theoretical terms, the very conceptualisation of an interest under a trust must accommodate and

49. *Supra* notes 13, 14.

50. *Crociani*, *supra* note 44.

reflect the implications of the court's inherent jurisdiction. An interest under a trust had its origins in the jurisdiction of the Chancellor, and later his court, and these origins are still visible. An interest under a trust, while it may be conceptualised as a single interest, is a complex of juridical components. The interest will involve proprietary aspects — the right to maintain and when necessary restore the integrity of the trust fund — as well as claims on the trustee by way of obligation.⁵¹ But that interest also still crucially involves the holder's — the beneficiary's — right to invoke the inherent jurisdiction of the court. The non-proprietary aspects of the interest cannot simply be reduced to nothing more than a series of obligations owed to the holder of the interest. Of course, this is not to say that in a modern conceptualisation of a trust, such obligations do not exist, far from it. It is simply to emphasise that they are not the whole of the interest-holder's rights.

For example, the ability of the court to intervene in the administration of a trust when necessary to give guidance, to rule on the exercise of powers, to appoint new trustees and to permit departure from fiduciary and other rules, cannot all be conceptualised as obligations owed by the trustees. Nor are they in any sense rights of property. Nor could they be practically replicated by private bargain. And in some cases, such as the ability of the court to provide authoritative directions immunising the trustees from liability if they act within those directions, they could not be replicated by private bargain even in theory, because these rules depend on the state's unique ability to quieten disputes with finality and, when necessary, exercise coercive force to achieve such finality. A beneficiary's right to invoke the court's inherent jurisdiction is *sui generis*.

The court's inherent jurisdiction will inevitably involve an element of discretion. Discretion in the decisions of courts, particularly equitable discretion, has been roundly condemned by, amongst others, the late

51. Richard Nolan, "Equitable Property" (2006) 122:2 Law Quarterly Review 232.

Professor Birks.⁵² Yet the experience of social practice — the day to day activities of the courts — suggest that such discretion is not and need not be arbitrary and lacking in any predictability. Its existence is practically inevitable and, it seems, theoretically unavoidable.

Even a cursory survey of the court's inherent jurisdiction makes it very clear that the jurisdiction can be invoked in a large number of different circumstances and for a large number of different purposes. The court, in exercising its inherent jurisdiction, has to encompass a vast range of possibilities. The idea that enough fixed rules could be developed to deal with each one within that vast range to come before the court is self-evidently absurd. Any purported rule would soon become the subject of so many glosses, carve-outs and exceptions necessary to cope with changed circumstance that the process would amount in substance to the application of discretion but without the clarity of calling it such. In other words, discretion is practically inevitable as a component of the court's inherent jurisdiction.

Indeed, it is noticeable that the courts rely on equitable discretion when intervening in organisations to cope with the unexpected and the unanticipated and the breakdown of relationships even in other areas than the court's inherent jurisdiction over trusts. In these areas, the court's involvement in the organisation is rather less intense than its inherent jurisdiction over trusts: in these areas, the court sticks to resolving disputes, and, where necessary, arranging for the dissolution of the organisation, but does not offer the range of assistance, guidance and ultimately administration of the organisation that are part of the court's inherent jurisdiction over trusts.

A good example of the court's equitable discretion outside the law of trusts is the court's jurisdiction to wind up unincorporated

52. See *e.g.* the unrestrained criticism in Peter Birks, "Three Kinds of Objection to Discretionary Remedialism" (2000) 29:1 *The University of Western Australia Law Review* 1. Compare and contrast Paul Finn, "Equitable Doctrine and Discretion in Remedies", ch 17 in WR Cornish et al, eds, *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Oxford: Hart, 1998) at 251.

associations and partnerships.⁵³ Where statute law has created new forms of organisations, such as the company limited by shares or by guarantee, statute, from very early on, had to provide discretion for the court to wind up such companies,⁵⁴ and later found it necessary to confer further discretion to allow the court to deal with disputes between members without necessarily winding up the company.⁵⁵ So even in statute law dealing with organisations, giving discretion to the courts was seen as necessary from the beginning, and the scope of that discretion only grew with time. Both practicality and history seem to suggest that such discretion is unavoidable and necessary when a court becomes involved in the administration of an organisation.

But this discretion certainly does not entail chaotic unpredictability in legal relations between the members of the organisation. Lawyers are perfectly capable of advising in such disputes, as patterns of circumstance, behaviour and judicial response allow the lawyers to predict and advise with a considerable degree of probability, if not complete certainty. Further, it should be remembered that purportedly fixed rules, which can nevertheless be manipulated and distinguished, are themselves far from entirely certain in their application. It is primitive and naive, indeed misleading, to set up a bipolar distinction between “rules” as certain and “discretion” as chaotic.

The same points can be made in theoretical terms. Given the multiplicity of parties and circumstances that may come before the court in its inherent jurisdiction over trusts, some of which are noted above, it

53. The jurisdiction of the court in relation to partnerships originated in equity but was later codified in statute as section 35 of the *Partnership Act, 1890* (UK), c 53, 54 Vict, 39. See Roderick l’Anson Banks, *Lindley & Banks on Partnership* 19d (London: Sweet & Maxwell, 2013) at 1-01, 1-04-1-06, 1-13. The jurisdiction over unincorporated associations which are not partnerships remains a matter of the court’s inherent equitable jurisdiction: *Re William Denby Sick and Benevolent Fund*, [1971] 1 WLR 973 (Ch (Eng)); and *Re GKN Bolts & Nuts Ltd (Automotive Division) Birmingham Works Sports and Social Club*, [1982] 1 WLR 774 (Ch (Eng)).

54. *Companies Act, 1862* (UK), c 39, s 79(5).

55. *Companies Act, 1948* (UK), c 38, s 210, and its much modified successors, culminating in the current *Companies Act, supra* note 18 at ss 944 *et seq.*

would be impossible for a court composed of human beings with limited information and bounded rationality to be capable of prospectively structuring rules to cope with every one of those parties and every one of those circumstances.

What this means is that any attempt to eliminate the element of the court's discretion from the law of trusts and the rights of beneficiaries is doomed to failure. Any such attempt would be doomed simply because of the court's involvement in the affairs of a complex organisation, as illustrated above. However the intensity of the court's inherent jurisdiction over trusts — that is, the much greater extent to which a court will positively become involved in the administration of a trust than the administration of any other organisation such as an unincorporated association, a partnership or a company — serves further to emphasise the inevitability of discretion in the administration of trusts and the corresponding inevitability of access to the court's discretion as an aspect of a beneficiary's rights.

V. Conclusion: A Research Agenda

A richer and more complete understanding of discretion is therefore a vital step in the study of the law of trusts. Discretion is not going to go away, notwithstanding a strong strain of academic distaste for discretion at least in England, particularly a distaste for equitable discretion.⁵⁶

So what of future research? In 1956, while a visitor at Harvard Law School, the leading Oxford scholar of jurisprudence, Professor HLA Hart, considered the question of discretion in a presentation to the Harvard Law School Faculty. The text of that presentation was lost until very recently, but has now finally been published.⁵⁷ We need to

56. Birks, *supra* note 52.

57. HLA Hart, "Discretion" (2013) 127:2 Harvard Law Review 652.

Professor Hart's own text is accompanied by two fascinating essays about his once lost, now recovered, concern with discretion: Nicola Lacey, "The Path Not Taken: HLA Hart's Harvard Essay on Discretion" (2013) 127:2 Harvard Law Review 636; and Geoffrey C Shaw, "HLA Hart's Lost Essay: Discretion and the Legal Process School" (2013) 127:2 Harvard Law Review 666.

take forward its stalled agenda, and move beyond the unsophisticated excoriation of discretion.

One of the key aspects of Hart's consideration of discretion was his awareness of the widely varying circumstances in which discretion may be deployed. It is certainly not just a matter for a court. In the context of trust law, discretion is often vitally important in the decisions of trustees and others involved in the administration of trusts such as a protector. In all these contexts, we need a clear understanding of what distinguishes discretion both from rules and from arbitrary decisions. It is trite to say that trustees and protectors must not make arbitrary decisions,⁵⁸ but what precisely is "arbitrary" and to what extent does the nature of what is "arbitrary" vary, depending on the identity and duties of the decision-maker? And equally, we need to consider the limits of discretion and how it is to be controlled and reviewed without being abolished.

When the consideration of discretion focuses on the court, much broader questions emerge. The first, and so far unarticulated question, is the nature of the court's discretion in the context of the inherent jurisdiction: to what extent is it exercising administrative (or executive) discretion and to what extent is it exercising judicial discretion? In other words, to what extent is the court using its discretion to decide how a trust should be run, if necessary adjudicating between competing points of view as to what is appropriate or desirable, and to what extent is it adjudicating a disputed point of law, or claims to some entitlement pursuant to an obligation or a proprietary interest? The well known debate between Hart and Dworkin focused very much on the latter form of judicial discretion, that is, discretion in the interpretation, and possibly creation, of rules and discretion in the adjudication of claims to

58. See *e.g. Re Manisty's Settlement*, [1974] Ch 17 (Eng) at 26, per Templeman J.

some entitlement.⁵⁹

To the extent that the discretion of the court's inherent jurisdiction is administrative in nature, it raises questions about the role of discretion in the very structure of the trust as a juridical institution and about the impact of that discretion on the nature of the rights and duties which arise under a trust, given that access to the discretionary remedies of the court is a fundamental aspect of a beneficiary's rights. Administrative discretion vested in a court also raises questions about the nature of courts and judging. To the extent that they exercise administrative discretion, courts and judges are not solely concerned with the resolution of disputes and the interpretation and application of rules. What does that imply for the idea of "access to justice": does the idea include access to such administrative functions of the courts?

To the extent that the discretion of the court's inherent jurisdiction is truly judicial — not merely the exercise of discretion by a judge, but the exercise of discretion in the interpretation of application of rules, or in the adjudication of claims to some entitlement — then that discretion does raise questions about the nature of judicial discretion, its legitimacy and its relation to the rule of law. These questions are the more familiar stuff of the debate between Hart and Dworkin. And though these questions arise principally in relation to judicial discretion, they do nevertheless still arise in connection with a court's administrative discretion, though perhaps not in such an acute form.

These broad questions may seem a long way removed from an area of doctrine that is often seen as dry and merits little academic attention, that is, the inherent jurisdiction of the court over the administration and execution of trusts. But they are the inevitable consequence of what is a

59. See Ronald Dworkin, "Judicial Discretion" (1963) 60 *Journal of Philosophy* 624, which was published seven years after Hart had presented his work on discretion at Harvard, but long before the work's publication. Hart returned to the debate, particularly in the postscript to *The Concept of Law*, 2d (Oxford: Oxford University Press, 1997). Dworkin returned often to the debate in his later works. See generally Scott Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed* (Ripstein, UK: Cambridge University Press, 2007) at 22-55.

vital and important jurisdiction.