Trustees and Third Party Powers

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*Introduction*

Trustees are sometimes obliged by the terms of their trust to act in accordance with the wishes of some third party who is not himself the trustee or, necessarily, a beneficiary. There is nothing new about such arrangements. For centuries, it has not been uncommon for the terms of a trust to vest a power of appointment or some similar dispositive power in such a third party.

Powers vested in a third party have become particularly useful in connection with the “offshore” trust industry. Settlors may entrust property to trustees in some offshore jurisdiction, usually for fiscal reasons, and sometimes in order to avoid the forced heirship rules of their domicile, but they do not know or trust (in the colloquial, non-technical sense) their trustees. One way to resolve this conundrum is to retain the fiscal and other benefits of offshore trustees, but to vest certain powers in a third party. These powers usually concern dispositive arrangements under the trust, but occasionally also concern particularly important administrative aspects of the trust. Often the person holding these powers is not the settlor himself. This has nothing to do with trust law. It is often the consequence of fiscal consideration, as some jurisdictions such as the United Kingdom have tax rules which treat trust income and gains as accruing to the settlor for tax purposes if he retains any power or control over the trust assets. Also, if the settlor retains dispositive powers, he is at risk of being compelled to use those powers in a certain way by the courts of his domicile or residence should he become bankrupt.

All this has made the relationship of trustees to third-party powers a topic of some current importance. This paper will examine that relationship and consider how trustees can best ensure they do not commit a breach of trust. First, it will outline some typical forms of third-party power. Of course third party powers are bespoke, each the product of an individual trust instrument, but it is possible to discern broad groups of typical third party powers. Secondly, the paper will consider what may likely go wrong in connection with each type of power, and consider the liabilities of the trustee which may arise in consequence. What becomes clear is that these liabilities turn on a clear and accurate understanding of some very basic principles of trust law and equity. The paper also considers how trustees should act in the light of these potential liabilities. Next, it considers what in order to make life easier the trustees where they are dealing with some third party power. Finally, it takes a brief look at the possibility of legislation in this area.

*Types of Third Party Power*

It cannot be emphasised too strongly that third-party powers are bespoke: they are the creation and creatures of a particular trust instrument made by a particular settlor in a particular context. Nevertheless, it is possible to group third-party powers into four broad types. For brevity, these might be called consent, veto, direction and action.

Powers in the form of a consent require that the trustee only undertake some specified action – for example making an appointment of trust property – with the prior, often written, consent of the third party. The trustee is still undertaking the action in question, but in order to do so lawfully he must seek the prior consent of the third party.

Powers in the form of a veto, while possible, tend to be less common as they are administratively less convenient than powers in the form of a consent. Where a third party has a veto over action by trustees, the trustees may take the action, and it will stand as lawful unless and until struck down by the third party. Of course, this requires the third party to know about the trustees’ action and to do something about it. Sometimes communication will break down and the third party will not become aware of the trustees’ action within a sufficient time to do anything about it. Equally, where the third party does veto the trustees’ action, questions will necessarily arise about the validity of anything the trustees have done in between their original action and hearing about the veto. These practical problems are what make powers to veto less common than powers to give (or withhold) consent.

Where a third party has a power in the form of a direction, the third party may instruct the trustee what to do, and the trustee is obliged to comply with that instruction. It is still the trustee, not the third party, who has to undertake the necessary action, but the trustee does not do so of his own motion, nor in his own discretion, but at the behest of the third party.

Finally, where a third party has a power of action, third-party himself may affect entitlements under, or the administration of, the trust itself. The classic example of such a power is a third party’s power to appoint trust assets in favour of some one or more amongst a class of beneficiaries.

Before going on to consider the problems inherent in each type of power, and how it can lead to a breach of trust by the trustees, it is worth re-emphasising that the types of power described above are simply common patterns of power, not legal categories. Each power in a particular trust instrument is the product of its own terms.

*Practical Problems with Third Party Powers*

(a) Powers of Consent

There are three main ways in which problems can arise with third-party powers of consent. Two are very simple and do not merit much discussion. The third is distinctly more difficult.

The first, and perhaps most obvious, way in which a trustee can commit a breach of trust in connection with a third party power of consent is simply to act without seeking the relevant consent. This is self-evidently a breach of trust: the trustee has failed to act in accordance with the lawful terms of the trust instrument. It is no defence whatsoever to say that the trustee did not realise that consent was needed prior to his action: one of the first and most basic duties of the trustee is to know his trust.

The second way in which problems might arise with a third-party power of consent is also simple to understand. This is where the trustee seeks consent to an action for which he should not seek consent: for example, the trustee seeks consent for some action he is going to undertake in bad faith, or for improper purposes. Self-evidently, obtaining the third party’s consent does not make lawful something which, quite independently of that consent, is unlawful. Action in bad faith or for improper purposes remains unlawful whether or not the third-party consented to it. (Indeed, the trustee may come under additional liability if he in any way deceives or misleads the third party into giving consent for such action.) Similar points could be made about action by the trustee in breach of the rules governing conflicts of interest and duty: the consent of the third party will not relieve the trustee from such liability unless the terms of the trust explicitly make the third party’s consent a form of authorisation which allows the trustee to proceed with the transaction lawfully, notwithstanding the conflict.

The situation which raises the most difficult issues is where the trustee seeks consent for a particular action which the trustee believes is the right action, taken for the benefit of the beneficiaries, and the third party withholds his consent in circumstances where the trustee believes the withholding of consent is in some way unlawful, for example it was done for the third party’s own interests or otherwise for improper purposes. What is the trustee to do? Practical steps, such seeking the directions of the court, are discussed below. But it is still important to know, as a matter of doctrine, what the trustee should do in such circumstances. Indeed, should the trustee make an application to the court for directions, the court may not allow the trustee his costs out of the trust fund if it thinks that the trustee could quite easily have worked out for himself what to do, without the trouble and expense of going to court.

The trustee is, at first sight, between a rock and a hard place. If the trustee acts without the requisite consent, he has acted in defiance of the terms of the trust, and therefore in breach of trust, however much he did so in good faith and with the best interests of the beneficiaries at heart. The most the trustee can hope for is that, in the circumstances, a court might relieve him of liability pursuant to its discretion to do so. Yet if the trustee fails to act, because the consent of the third party is not forthcoming, but the withholding of consent is in some way unlawful, the trustee is again a risk that the beneficiaries will criticise him and hold him liable for failing to challenge the third party’s unlawful actions.

In these circumstances, therefore, it is vital for the trustee to know whether or not the third party’s action is unlawful. The answer to this question turns on proper construction and understanding of the third party’s power. And this is when it is so important to remember that all third-party powers are “bespoke”, that is, specific to the particular trust in question, to be construed and understood accordingly.

The third party may be given the power in a fiduciary capacity, so that he must exercise it in good faith and for proper purposes in the interests of the beneficiaries, ensure that his decisions are not tainted by any conflict of duty and interest, and that they are made properly, having taken into account relevant considerations and not taken into account irrelevant considerations. It may also be that the holder of such a fiduciary power must act with some degree of care and skill.

Alternatively, a power may be vested in the third party as a purely personal power, to be used as he sees fit subject only to limitations which apply to all powers, personal and fiduciary, namely that they should be used in good faith and for proper purposes. And it must be remembered that while the language of bad faith and proper purposes is used in connection with both fiduciary powers and purely personal powers, what actually will constitute action in bad faith or action for improper purposes may well vary depending on whether the power is held in a fiduciary or a purely personal capacity: what good faith requires, what amounts to a proper purpose, may vary depending on whether or not the holder of the power is expected to act for the benefit of others.

In short, a very careful and accurate appreciation of the third party’s power is necessary before anyone, let alone a trustee, can say whether or not the third party is acting unlawfully by withholding his consent to the trustee’s proposed action. What is lawful from one third party may be unlawful for another as a consequence of the different terms on which their respective powers are held. However ascertaining the correct construction of a particular power in its particular context is not always easy. What the trustees might do if the third party’s action transpires to be unlawful is discussed below.

(b) Powers of Veto

Three different problems arise in connection with powers of veto, as well as one further problem that is common to powers of veto and powers of consent. These will be examined in turn.

Clearly, when a trustee exercises the power that is subject to veto by some third party, the trustees’ action is valid and less and until vetoed, assuming all other requirements for valid exercise of the trustee’s power are met. So the first question is the problem of ascertaining precisely what trustees do when exercising a power of theirs which is subject to a veto from some third party, but not yet vetoed (or affirmed) by him.

In principle, the trustees’ action should be *prima facie* valid, but defeasible by the veto. For example, if the power in question were a power of appointment, the initial exercise of the power would create an interest defeasible by a subsequent veto from the third party. Of course, the trustees’ initial action may not be the whole story, even before any veto has been exercised. For example, if the trustees had power to sell some particularly important trust asset, but that power were subject to veto by a third party, then unless the third party had previously waved his right of veto, any sale by the trustees would not overreach the interests of the beneficiaries: the purchaser would not have immunity by virtue of the terms of the trust from the interests of the beneficiaries, as their interests would, consistently with the trust, still be capable of affecting the asset. However, the purchaser might well enjoy clear title to the asset as a bone of purchaser for value without notice of any continuing rights of the beneficiaries.

It is immediately apparent that these are awkward situations: the trustees’ actions have a very inconvenient lack of finality. This lack of finality constitutes a very good reason to avoid the use of third-party powers of veto. But such powers need to be examined as they can exist, and their problems, as will be seen, usefully throw light on some important basic principles.

The next question to arise is whether or not trustees should inform the person who holds the power of veto of what they are proposing to do, or have done, so that he may decide whether or not to exercise that power. Though there is little from the authorities to guide trustees one way or the other, prudence at least would suggest that they should. That way, finality can be brought to the trustees’ actions. Principle suggests the same conclusion as prudence. A trustee’s basic duty is to administer the trust according to its terms, express and implied, and in order to give efficacy to a power of veto, the trustees need to inform the person holding the power: the power means very little, and almost certainly not what the settlor intended, if any chance to exercise it arises out of the pure chance that the holder of the power heard about what the trustees had done. This conclusion seems to hold whether the third party holds the power of veto in a fiduciary or a purely personal capacity: inferences raised by the need to give efficacy to the power are the same in both cases.

What, the, is the effect of an actual veto? If the veto is exercised in connection with an exercise of the trustees’ dispositive powers, it would appear to defeat the interest created in exercise of those powers, but that of course is not mean that the interest is treated as void ab initio: the interest is valid until defeated, assuming that it was properly created in the first place, and anything done pursuant to it will be valid so long as the action does not assume that the interest is absolute. For example, if funds were appointed to a beneficiary, subject to a power of veto, then unless and until the veto was exercised or waived, it would be lawful to pay income arising from the funds to the appointee, as that is one of the incidents for the time being of an appointment funds; but it would not be appropriate to pay over the capital funds themselves, as there is always still the chance of the interest being defeated. If the veto was exercised connection with one of the trustees’ administrative powers, then again the trustees’ action should be undone, even though it had been valid *pro tempore*; but, as noted above, actually unravelling such action is likely to be very complicated indeed, and maybe impossible, because other issues (such as *bona fide* purchase) will very likely have come into play since the trustees’ original action. More reasons to avoid using a power of veto.

Finally, there is a question about powers of veto that also arose in connection with powers of consent. This is the question of what trustees should do if they think that the power of veto is being exercised in some way improperly. Again, what actually amounts to “impropriety” will turn crucially on proper construction of the power, and that in turn may be influenced by whether or not the power is held in a fiduciary or a purely personal capacity. And as noted earlier, ascertaining the correct construction of the power can be very difficult.

In principle, if the holder of a power of veto has purportedly exercised it, but in fact has acted outside its express terms, or outside the implicit limitations on its scope of good faith and proper purposes, the purported exercise should be void. By contrast, if the power is held in a fiduciary capacity, but its exercise is tainted by a conflict of duty and interest, the exercise will be voidable only. But even where the purported exercise of a power of veto is void, or at least voidable, the trustees’ action is still in limbo, as nothing would preclude a future, proper, exercise of the power of veto unless the power itself, by its own terms, were not capable of further exercise.

(c) Powers of Instruction

Powers of instruction raise four significant problems for trustees. Three of these are related. The third admits of an easy answer in principle, but in practice may leave trustees in an invidious position.

The first three problems arise where the third party who holds the power of instruction has purportedly exercised it, but the some reason, perhaps a failure in communication, the trustees do not realise that. If the third party has validly exercised his power of instruction, but the trustees remain unaware of that fact, the trustees will naturally continue to administer the trust according to the limitations that take effect in default of any exercise of power. Of course, in the circumstances that is objectively the wrong thing for the trustees to have done. Three subsidiary questions then arise. First, are the trustees liable in respect of the fact that they have, from a purely objective perspective, not administered the trust in accordance with the exercise of the power? Secondly, what should the trustees do, if anything, to find out about any exercise of the power? And thirdly, if the trustees have distributed any trust funds to those entitled under the default limitations, can such funds be recovered?

In order to answer the first question, it is important to have a very clear and precise understanding of the nature of the trustees’ liability for breach of trust. Such liabilities are often said to be strict. That is not strictly the case. As Lord Browne-Wilkinson reaffirmed in the *Westdeutsche* case, a trustee’s liability is founded on conscience: a trustee can only be charged with breach of trust if his conscience is affected. In the vast majority of cases, this will mean that a trustee is liable for any deviation from the terms of the trust (in the absence of defences and/or relief by the court): the trustee’s conscience will be affected by that deviation either because he knew it amounted to a breach of duty, or because he ought to have known, given that the most fundamental duty of a trustee is to know the terms of his trust. But case law indicates that where a trustee, under the terms the trust, is to do something at the behest of a third party, the trustee will only be liable if it is unconscionable for him to act at variance with the third party’s instruction. What is meant by “unconscionable” has been crystallised here into doctrinal form as the doctrine of notice. In other words, the trustee will be liable if he had notice of the instruction from the third party – that is, if he knew or ought to have known of that instruction – but not otherwise. In other words, the trustee’s liability always depends on whether he knew or ought to have known what he should do; it is just that in the vast majority of cases the trustee at the very least ought to know what to do, given that he should know the terms of his trust.

A related question is therefore to what extent trustees should enquire whether or not the holder of a power of instruction has in fact given any instructions pursuant to the power. The above analysis suggests that the answer to this question is again an application of the doctrine of notice. If the trustees are to be liable when they should have known of an instruction, then in order to avoid liability they should make such enquiries as are reasonable for a trustee to make in the circumstances. The problem of this formulation is immediately apparent. While it has some value, in that it stresses the trustee’s duty is not strict or absolute, it gives no indication, and the cases provide very little indication, of what is or is not reasonable in the present circumstances. In many situations where the doctrine of notice comes to be applied, what is or is not reasonable in the circumstances can be gauged either from case law or by reference to what an ordinary, prudent, personal business would do were he looking after his own affairs in the circumstances. But these forms of clarification and reference are very little help in the present case. That is one reason, as will be discussed later, to resolve this lack of certainty through appropriate drafting wherever possible.

The third issue raised by a failure of communication such as this is the fate of any funds distributed by the trustees under default limitations of the settlement when they should have acted on an instruction given by a third party. This question assumes that the instruction to the trustees concerns the beneficial distribution of trust funds: if it does not, the question simply does not arise. The answer to the question is slightly less clear than the answer to the equivalent problem that may arise under a power of action, discussed below. If the third party’s power is truly a power to give directions, then *ex hypothesi* the trustees must take further action to give full effect to the instruction. In other words, the beneficiary who will take trust funds, or an interest in them, pursuant to the direction does not yet have a perfect interest. Yet if the trustees must comply with the instruction, and have no discretion matter, principle suggests that the beneficiary would be treated as having some sort of equitable entitlement, given equity regards as done that which ought to be done,. As that entitlement arises out of a power which, ex hypothesi, takes precedence over the default limitations of the settlement, the entitlement should have priority to those default limitations. If that is right, and this argument is very much an argument a principle rather than precedent, then funds distributed to beneficiaries under the default limitations could be recovered by the beneficiary of the instruction in accordance with normal rules of priority.

Finally, there is the question of what trustees should do if and when faced with an instruction from third party which the trustees believe to be invalid. Again, it is obvious that they should not comply with such an instruction. The real problem is identifying when and whether an instruction from the third party is invalid and for what reasons. As in other contexts discussed above, the answer to this question turns on proper construction of the power which will necessarily involve consideration of whether the power is held in a fiduciary or a purely personal capacity. And once again, it has to be acknowledged that construction of the power will not necessarily be an easy exercise, and it is therefore wise to consider what assistance can be provided trustees in this connection.

(d) Powers of Action

The questions which arise here are very similar to those which arise in connection with powers instruction, but they admit of firmer answers in the light of authority. Again, the major problem which may arise where a third party has power to do some act in the administration of the trusts is that the trustees will, for some reason, not hear about that action so that they cannot behave consistently with it. And again, the problem is centred on dispositive powers held by the third party, such as a power of appointment.

The liability of the trustees again turns on state of their conscience, as crystallised in the doctrine of notice. Unless and until the trustees have notice of an appointment made by the third party, they will not be liable if they continue to administer the trust, and distribute the trust fund, according to the limitations which apply in default of any exercise of the power. This conclusion, tested in the case law in the present context, again turns on proper and exact understanding of the nature of trustees’ liability for breach of trust. And just as before, the nature of that liability provides very little practical guidance as to what enquiries a trustee should make of the third party holder of a power of appointment to see whether or not the power has been exercised: trustees should make such enquiries as are reasonable, but there is very little to guide the trustees in ascertaining what is or is not reasonable.

If the third party holder of power of appointment has made a valid point pursuant power, and assuming as is commonly the case that the appointment does not need to be communicated to the trustees for it to be effective, then the beneficiary of that appointment should be able to recover any funds that have been distributed to those entitled in default of appointment, even if the trustees bear no personal liability for misapplying the funds. This is because the recipients cannot in conscience maintain a better claim to the funds than the prior entitlement of the beneficiary under the appointment, even though the trustee’s conscience may be unaffected.

Finally, if the third party holder of the power of appointment acts in some way beyond the scope of the power, because he is outside its terms, or in bad faith, improper purposes, it is a nullity the trustees should take no action pursuant to it. Similarly, if the appointment is voidable, because was held in a fiduciary capacity and yet exercised in a situation where the holder of power found himself in a conflict of duty and interest, the trustees should take no action in respect of it until the appointment is avoided or affirmed. The problem, as before, is that it may be very difficult the trustees to ascertain whether or not exercise the power is, in fact, colourable.

*Themes*

Two key themes can be discerned in the foregoing discussion. The first is the importance of careful construction, of both the third party’s power(s) and the terms of the trust as a whole. The second is the need very carefully to appreciate the proper foundation of a trustee’s duties and liabilities.

(a) Issues of Construction

Careful construction of the third party’s powers and of the whole trust instrument is vital. It is the basis on which turns the question of whether the third party’s exercise of a power is lawful, be that power a power of consent, a power of veto, a power of instruction or a power of action.

Construction of a third party’s power(s) involve not only a careful appreciation of express terms, the language in which they are couched and their context, but also a careful appreciation of the implicit terms of such powers: limitations on their use such as good faith and proper purposes. The problem is, as always, that appreciation of language is an obvious source of differences and disputes; and so are the application of such open textured standards as “good faith” and “proper purposes”.

The question of whether or not a power is held in a fiduciary capacity is also an extremely important aspect of construction. It governs what may lawfully be done in exercise of the power, directly in the application or non-application of the rules governing conflicts of duty and interest which apply to a fiduciary holder of power, and also indirectly, in that the content of concepts such as good faith and proper purposes is informed by the their context, and vitally important part of that context is whether or not the power is held for the holder’s own benefit (that is, in a non-fiduciary capacity) or for the benefit of others (that is, in a fiduciary capacity).

Proper construction of the terms of the trust as a whole, and in particular purposive construction, is also the basis of discerning what action trustees should take of their own motion to engage with the third party holder of a power. This question arises particularly in connection with powers of veto, where it is important to discern whether or not, and if so with what degree of vigour, trustees should seek to communicate with the third-party in order to ascertain his views and reaction.

The issue of the trustees’ duties, if any, to deal of their own motion with the third-party also overlaps in two distinct, but related, ways with the application of the concept of conscience as the foundation of the trustees’ duties and liabilities. In the first place, conscience operates as the justification of why the trustees must behave as stipulated in the arrangements prescribed by a settlor. But where no such stipulation can actually be discerned, and implications therefore govern what the trustees should do, what good conscience requires will inform the content of those implications. Here, conscience, or action in good conscience, is an open textured standard on which the courts and others will draw in framing more precise expectations of conduct.

There is, therefore, no sharp and precise boundary between questions of construction questions of conscience. These questions are distinct in concept, construction being in its essence a forensic exercise in understanding what the parties objectively meant, conscience being a justification for holding a person to be bound by some obligation. However, when it comes to implying implications, a court may properly look to the reasons why obligations are imposed in the circumstances at issue to inform the content of those implications.

(b) The relevance of Conscience as the foundation of Trustees’ Duties and Liabilities

As well as the relevance just noted, conscience is fundamentally relevant to the liabilities of trustees. This should hardly be surprising, given that liabilities are the converse of obligations.

For present purposes, the context in which this is most clearly seen is where the third party holder of a power has done something, but the trustees, for whatever reason, are unaware of that and therefore unable to act on it. Here, a trustee’s liability is not strict, but turns on the question whether the trustee had notice of the third party’s action, notice being a doctrinal crystallisation of conscience. In fact, as Lord Browne Wilkinson has reminded us, all of a trustee’s liabilities ultimately find their root justification in the concept of conscience, as elaborated and refined in the case law. Whatever the criticisms of conscience – that it is of uncertain nature and application – a proper awareness of the trustee’s essentially fault-based liability is vital.

*Reaction in Drafting*

It is fair to acknowledge the uncertainty inherent in the concepts of conscience and notice, and in the process of construction. But that uncertainty, and its importance, should not be overstated: after all, both construction and open-ended evaluative concepts such as reasonableness are much at issue in the common law, even in commercial law, where certainty is so often said to be at a premium.

This is not cause simply to accept that uncertainty without demur. Just because it may well be impossible to draft a power with complete certainty, that does not mean there is no better or worse in drafting. In practical terms, therefore, a settlor (or, more accurately, the legal draftsman acting for him) can think through many, if not all, of the potential problems which might arise in connection with giving a third party some power in a trust, and draft to mitigate, if not eliminate, those problems.

For example it does not take much to consider, and then to express, whether or not a power is to be held by a third party in a fiduciary capacity. That alone will help trustees to understand the power and its consequences. Equally, the scope of a power can be expressed with greater precision. That may vary from a minor and still to a degree uncertain, stipulations such as a requirement that the power be used only reasonably, to much more subtle and explicit elucidation of the scope of the power. Similarly, trustees’ duties in relation to power held by a third party can be spelt out, for example what they should do to engage with the third party and in which circumstances.

Other ways in which trustees’ lives can be made simpler and easier are provisions relieving a trustee from liabilities that would otherwise attach. For example a trust deed could provide the trustees may, without fear of liability, distribute trust funds on the basis that third-party has not exercised his power unless the trustees have actual knowledge of such exercise. That might or might not be combined with a provision to protect a recipient beneficiary from any obligation to restore trust funds distributed to him in circumstances where the trustees objectively should not have made the distribution to him because of the effect of some exercise of a third party’s power.

In theoretical terms, all this reinforces the importance of a vital theoretical perspective on the law of trusts, namely contractarianism. Third-party powers are bespoke, the creation and creatures of voluntary drafting. Clearly there are limits on effective drafting, such as the rules governing the certainty of powers; but those limits still leave much room for settlors and their advisers to do as they wish.

*The Assistance of the Court*

The inherent jurisdiction of the court is extremely useful in mitigating or resolving problems raised by the use of third-party powers in settlements. It is axiomatic that the administration of a trust is under the control of the court. Lord Eldon LC put it thus:

“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]](#footnote-2)

And more recently, Lord Hodson put the point even more tersely:

“In a sentence there is no trust over which the court cannot assume control.”[[3]](#footnote-3)

The court’s inherent jurisdiction involves, *inter alia*, the ability to give guidance to trustees as to the lawfulness and/or propriety of their proposed action; and, *in extremis*, to assume itself the administration of the trust. The court may 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.[[4]](#footnote-4) The court also has power to authorise in an emergency acts of administration of the trust that are not otherwise authorised;[[5]](#footnote-5) to authorise the trustees to take court proceedings paid out of trust funds;[[6]](#footnote-6) to sanction a transaction which would otherwise constitute a breach of the trustee’s fiduciary duty;[[7]](#footnote-7) and to approve on behalf of minor, unborn and unascertained persons compromises of genuine disputes over the destination of trust property.[[8]](#footnote-8) There is, however, no general power to alter the terms of a trust because the court thinks it beneficial to do so.[[9]](#footnote-9)

The court has also assumed, by way of analogy, and administrative jurisdiction over protectors, or at least protectors who hold powers in a fiduciary capacity; and it is hard to see why the court would not also assume jurisdiction over any other third party holder of a fiduciary power. This development of the court’s administrative jurisdiction has allowed the court to intervene in the administration of the trust where its provisions for protectors have for some reason failed to work as anticipated. So, for example, the court has removed unsuitable protectors and appointed new protectors where the terms of the trust did not apply to the instant circumstances.[[10]](#footnote-10)

This set of powers vested in the court should be of considerable assistance to trustees. If they are genuinely unsure what to do, they can seek the directions of the court. (Of course, if they make an application to the court needlessly, they may find themselves personally liable for the costs of that application.) If the trustees encounter a holder of some third party power who is behaving obtusely or improperly, then they have at least two options. First, if the third party holds his powers in a fiduciary capacity, the trustees might apply to the court to exercise its administrative jurisdiction to remove and replace that third-party. Secondly, the trustees could themselves apply to the court for additional powers to do something without the involvement of the third party which, under the terms the trust, would require the involvement of that third party. This second possibility does raise some difficulties, however. The court has jurisdiction, both inherent and pursuant to statute, to give extra administrative powers to trustees, though it may well be wary of exercising such jurisdiction where the consequence of doing so is to allow the trustees to act in defiance of the terms of the trust. Where the problem with a third-party concerns either a dispositive discretion in the hands of trustees but subject to a third party’s powers of consent of veto, or a dispositive discretion in the hands of the third-party himself, conferring extra dispositive power on the trustees would appear to require a full-blown variation of the trusts under the principle of *Saunders v Vautier*, quite possibly with the court having to supply some necessary consents on behalf of certain beneficiaries under the Variation of Trusts Act 1958. Achieving such a variation may well be a very onerous undertaking.

The court’s inherent jurisdiction also offers theoretical insights, counterbalancing the insights of contractarianism. The inherent jurisdiction highlights the importance of a fundamental principle underpinning the law of trusts, something that makes the law of trusts significantly different from the law of contract. Under a contract, the obligee has no absolute right to performance as such, but only a right to payment of damages if the obligor fails in his primary duty to perform as promised. In some cases, but not many, the discretionary remedy of specific performance may be available; but that is exceptional. Trusts, however, proceed from the axiom that the trustee may be compelled to perform his or her undertaking, regardless of any question of the adequacy of monetary compensation for non-performance. Trusts assume the “good man” theory of obligations (he does faithfully as he is bound to in accordance with the terms or purposes of the trust) rather than a “bad man” theory (where he is allowed to breach his duties at the price of paying money).

The relevance of this to monetary remedies for breach of trust and their quantification has been explored. 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 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, and even if the law allowed other mechanisms of enforcement they too could break down. The inherent jurisdiction provides the necessary support that guarantees performance – execution of the trust. The inherent jurisdiction provides a kind of state backed regulatory oversight of, and support for, the trust. As such, the inherent jurisdiction could not be replicated by private bargain. That fact provides a necessary corrective to an 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 certainly must not imply an identity between trusts and contracts.

*Conclusion*

Third party powers demonstrate the importance of contractarianism in trust law but also show the limits of contractarianism. They illustrate the basic importance of understanding powers generally, and understanding the fundamental basis of trustees’ duties and liabilities. Important theoretical insights flow from what, at first sight, might look like an entirely practical subject.

1. \* Anniversary Professor of Law, University of York. The author is grateful to [ **ADD** ] 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. The errors are his alone. [↑](#footnote-ref-1)
2. *ibid*, 539-540, *per* Lord Eldon LC. [↑](#footnote-ref-2)
3. *McPhail v Doulton* [1971] AC 424 at 440. [↑](#footnote-ref-3)
4. See, for example, *Re Chetwynd’s Settlement* [1902] 1 Ch 692, *Re Harrison’s Settlement Trusts* [1965] 1 WLR 1492, and, more generally, Underhill & Hayton, *The Law of Trusts and Trustees* (*op cit* note ), [70.15]-[70.16], [71.32]-[71.57]. [↑](#footnote-ref-4)
5. See, for example, *Re New* [1901] 2 Ch 534, *Re Tollemache* [1903] 1 Ch 955, *Chapman v Chapman* [1954] AC 429, and, more generally, Underhill & Hayton (*op cit* note), [43.20]-[43.25], and *Lewin on Trusts* (*op cit* note ), [45-050]. [↑](#footnote-ref-5)
6. *Re Beddoe* [1893] 1 Ch 547; *Evans v Evans* [1986] 1 WLR 101; *Alsop Wilkinson v Neary* [1996] 1 WLR 120. [↑](#footnote-ref-6)
7. See, for example, *Campbell v Walker* (1800) 5 Ves 678, *Farmer v Dean* (1863) 32 Beav 327, *Holder v Holder* [1968 1 Ch 353 and, more generally, *Snell’s Equity* (ed McGhee *et al*, 33rd ed, London, Sweet & Maxwell, 2015), [17-017]. Note also Conaglen, “The Extent of Fiduciary Accounting and the Importance of Authorisation Mechanisms” [2011] CLJ 548, 564-573. [↑](#footnote-ref-7)
8. *Re Lord Hylton’s Settlement* [1954] 1 WLR 1055, *Chapman v Chapman* [1954] AC 429. [↑](#footnote-ref-8)
9. *Chapman v Chapman* [1954] AC 429. 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: see Underhill & Hayton (*op cit* note ), [43.25]. [↑](#footnote-ref-9)
10. See, for example, *Steel* v. *Paz Ltd* [1993-5] Manx LR 426, *Re Freiburg Trust* [2004] JRC 56 and *In the Matter of the A and B Trusts* [2012] JRC 169A. [↑](#footnote-ref-10)