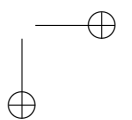
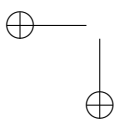
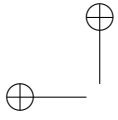


**PART IV**  
**Trust Law**



## SOME PARTICULAR AND SOME GENERAL REFLECTIONS ON TRUSTEE CONTRACTS

By Richard C. Nolan\*

### Introduction

This paper begins by looking at a well known problem that arises when trustees make a contract in their capacity as such. It is a problem that becomes particularly acute when trusts are used as the juridical structure for a business, which, by its very nature, involves contracting. The proposed solution to this problem is, however, certainly not the final conclusion of the paper. It is, rather, an example of much broader, and vitally important, themes. It illustrates the legal, and hence the economic, significance of solutions generated by lawyers in private, transactional practice. That, in turn, has several broader implications: practical, doctrinal, theoretical and educational.

### The Problem with Trustee Contracts

Trusts are used as vehicles for business but are not entirely comfortable as such.<sup>1</sup> Key problems that have attracted considerable attention are the difficulties in contracting “with” a trust.<sup>2</sup> The reality, in systems such as the common law of Singapore or England, is that there is no contracting with a trust, just contracting with people who happen to be trustees.<sup>3</sup> Or, to put the point in the language of recent American scholarship, there is no separate “trust” pool of assets that the trustees bond to a contract.<sup>4</sup>

This generates two well known and significant problems. The first is that the trustees—the managers, rather than the owners, of the business conducted by a trust—are personally liable on such a contract. The second is that creditors of the trustees cannot easily reach the trust assets to satisfy their claims against the trustees: the creditors must enforce

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1 Hayton, “Trading Trusts”, in Glasson ed., *The International Trust* (Bristol: Jordans, 2002), chapter 8 at 481.

2 See, generally, Ford & Lee, *Principles of the Law of Trusts*, 3<sup>rd</sup> ed. (Sydney: Law Book Company, 1996 and updates), chapter 14, and Tjio, “Lending to a Trust” (2005) 19 *Trust Law International* 75.

3 See, e.g., *Donaldson v. Smith* [2006] EWHC 1290 (Ch.) at [55], per David Donaldson Q.C. sitting as a Deputy High Court Judge. This point is, nevertheless, a matter of case law and may be affected by statute in particular circumstances: see, e.g., *Business Trusts Act* (Cap. 31A, 2005 Rev. Ed. Sing.), ss. 24-25.

4 See Hansmann & Kraakman, “The Essential Role of Organizational Law” (2000) 110 *Yale L.J.* 387, esp. at 393-395.

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their rights against the trustees’ own, beneficially owned, assets, and the trustees may then in turn look to the trust assets by way of indemnity.<sup>5</sup> Of course, there are glosses on this law. The trustees can, by suitably clear (and usually express) stipulation, limit their own liability on a contract they make for the benefit of their trust. The trustees’ creditors can sometimes claim to be subrogated to the trustees’ rights of indemnity; but the trustees (and hence the creditors) can easily lose such rights of indemnity, because the right essentially extends to re-imbusement of the net sum due to the trustees, a sum which will necessarily be diminished by any liability of the trustees to restore the trust fund in consequence of their breach of trust.<sup>6</sup> In addition, the trustees can, if they have suitable powers, grant security over the trust assets. But these glosses skirt round, rather than address head on, the basic unavailability of trust assets to creditors of the trustees where the creditors’ claims were generated in the course of the trustees’ administration of the trust.

The first problem is easily dismissed. While an individual may not wish to incur liabilities as a trustee which are nevertheless binding on him or her personally, the easy availability of incorporation in contemporary legal systems means that it is simple to create a corporate trustee, which holds only its own minimum capital and the trust assets, so protecting any individual from personal liability as trustee. That solves the trustees’ problems, though it compounds the problems of the trustees’ creditors, who essentially are now dealing with a “trustee of straw”: a trustee which has no free assets against which the creditor can enforce its claims, but only the trust assets, which remain fairly inaccessible to the creditor for the reasons noted a moment ago. This situation has brought forth various legislative responses in jurisdictions where trading trusts are often found.<sup>7</sup> Alternatively, as already noted, the trustees can by contract limit their own personal liability, where doing so is a practical possibility.

These solutions to the first problem, while helpful to the trustee (or to the controllers of a corporate trustee), generate corresponding difficulties for the trustee’s creditors: they reduce the practical utility and value of the creditor’s claims against the trustee and consequently make any recourse the creditor may have against the trust assets so much more important. Essentially, therefore, these solutions to the first problem highlight, and focus the debate on, the second problem: the difficulty of bonding trust assets to a contract: that is, the difficulty a creditor has in reaching trust assets to satisfy any claim the creditor may have against a trustee of the

<sup>5</sup> See the works cited at note 2, *supra*.

<sup>6</sup> *Ibid.*

<sup>7</sup> See, e.g., *Business Trusts Act, supra*, note 3, s. 11, and *Corporations Act 2001* (Cth.), s. 197, as interpreted in *Hanel v. O’Neill* (2004) 48 A.C.S.R. 378, *O’Neill v. Hanel* [2007] S.A.S.C. 58.

assets where the claim was generated in the course of administering the trust.

This second problem is essentially about the enforcement of claims, not the formation of obligations. That is, after all, what “bonding” assets to the performance of an unsecured obligation is actually about: putting unsecured creditors in a position where they can enforce their claims against a pool of assets.<sup>8</sup> A trustee can contract readily, subject only to normal rules concerning the capacity of persons to make contracts and the validity of any contract purportedly made. What is difficult for the counterparty to any such contract—the creditor—is the subsequent enforcement of that claim, should enforcement become necessary. And naturally, since the value of personal claims is necessarily related to the ease of their enforcement, any problems relating to the enforcement of claims will affect their incidence, value and utility before enforcement. This paper, therefore, focuses on the problems relating to the enforcement of claims against trustees—the problems in the law relating to the execution of judgments against trustees—rather than issues such as the trustees’ rights of indemnity against trust assets or, occasionally, against beneficiaries personally.<sup>9</sup> It seeks to understand those problems in order to suggest methods through which they might be resolved.

### **Enforcement of Obligations by Fieri Facias: Defining the Problems**

Perhaps the most obvious mechanism of enforcing a judgment is through a writ of *fieri facias*: a writ entitling a state official to seize and sell sufficient of the judgment debtor’s property to satisfy the judgment debt, and any interest on it, and the costs of enforcement.<sup>10</sup> The problems that surround a writ of *fieri facias* against trustees are exemplified by *Jennings v. Mather*.<sup>11</sup>

In that case, a trustee under a creditors’ deed was empowered by the deed to carry on a business for the benefit of the creditors. In doing so, the trustee incurred debts for which he was personally liable: he had incurred the relevant debts, and the fact that he had done so in his capacity as trustee did not affect his personal liability in respect of them. Judgment was obtained against him for one of these debts, and

<sup>8</sup> See, generally, Hansmann & Kraakman, *supra* note 4.

<sup>9</sup> As to these problems, see, generally, the works cited at note 2, *supra*, and D.J. Hayton *et al.*, *Underhill & Hayton—The Law of Trusts and Trustees*, 17<sup>th</sup> ed. (London: LexisNexis Butterworths, 2007) §83.

<sup>10</sup> See, generally, *Halsbury’s Laws of England*, 4<sup>th</sup> ed., volume 17(1) (London: LexisNexis Butterworths, 2002, re-issue) §§152-194.

<sup>11</sup> [1901] 1 K.B. 108, *aff’d* [1902] 1 K.B. 1 (C.A.).

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goods which were assets of the business were taken in execution of that judgment. The trustee then became bankrupt, and the goods were claimed by his trustee in bankruptcy. The case was then tried as an interpleader issue, to ascertain who had the better claim to the assets—the trustee’s trustee in bankruptcy, or the execution creditor.

The Court of Appeal, affirming the decision of the Divisional Court, held for the trustee in bankruptcy. Its reasons were as follows. The bankrupt trustee was entitled to an indemnity out of the trust estate against liabilities incurred by him in carrying out the trusts, and so had a *prima facie* right to a lien on the goods in question, which passed to his trustee in bankruptcy. Consequently, the claimant (the trustee in bankruptcy) was entitled to the goods as against the execution creditor, who had no right to have goods held by the debtor as trustee taken in execution. As Collins M.R. put it<sup>12</sup>:

“As such trustee he had, in dealing with the trust estate, incurred personal liabilities, among which was the debt due to the execution creditor. Having incurred these debts as a trustee in dealing with the trust estate, he would have a right as against the trust estate to indemnity in respect of the personal liabilities so incurred by him. That right would of course be accompanied by a collateral obligation to make good to the estate any amount which he might wrongfully have withdrawn from it, or to which he might be in default in his dealings with it. Goods which formed part of the trust estate under the deed clearly were not liable to be taken in execution upon a judgment for a debt due from him personally. The execution creditor, Jennings, having obtained judgment against Mather for a debt due from him, was only entitled to have taken in execution on that judgment goods of which Mather was the beneficial owner, and not goods which, like those in question, were only his subject to a trust.”

There are plenty of other cases in which the same, or similar, points are made or assumed, some of them concerning the administration of estates.<sup>13</sup>

From such statements, the problem appears to be that creditors simply cannot have direct recourse to trust assets by means of *feri facias*, because the trustee, against whom execution is ordered, does not own the assets beneficially. In fact, that is an overstatement of the problem.

Older authority is rather more subtle. It provides the foundation of cases such as *Jennings v. Mather*; but it shows that what is in issue is not

<sup>12</sup> [1902] 1 K.B. 1 at 5.

<sup>13</sup> See, e.g., *Haselinton v. Gill* (1788, 1790, 1817) 3 T.R. 620, 100 E.R. 766; *Caillaud v. Estwick* (1817) 2 Anst. 381, 145 E.R. 909; *Duncan v. Cashin* (1875) L.R. 10 Eq. 554; *Wright v. Redgrave* (1879) 11 Ch.D. 24; *In re Morgan* (1881) 28 Ch.D. 93; *In re Evans* (1887) 34 Ch.D. 597; *In re Gorton* (1889) 40 Ch.D. 536. Note also *Dowse v. Gorton* [1891] A.C. 190.

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a blunt mandatory rule, forbidding outright any execution on trust assets, but rather a rule of priority. That may seem a small distinction. In fact it is crucial. Mandatory rules are just that: it is impossible to contract round them directly, though the ingenuity of lawyers is such that it is often, but not always possible, to devise structures that achieve a result identical, or very similar, to the result ostensibly prohibited by the mandatory rule.<sup>14</sup> Rules of priority, by contrast, are generally default rules, around which it is quite possible to contract.<sup>15</sup> And therein lies a potential solution to the problem of execution against trust assets.

The old case of *Finch v. Earl of Winchelsea*<sup>16</sup> clearly establishes that the rules about taking trust assets in execution of a judgment against trustees are essentially rules of priority. To cut a long story short, the Earl of Winchelsea agreed for value to settle freehold lands, but died before executing the anticipated settlement. The intended beneficiaries of that settlement brought an action in Chancery to have the Earl’s agreement performed, but judgment creditors of the Earl claimed to be entitled to execute their judgment on the land in priority to the beneficiaries. In the event, the judgment creditors won.

Though the land was impressed with a trust for the beneficiaries by virtue of the agreement, the agreement was not for adequate consideration, and so it did not entitle the beneficiaries to priority over a perfectly good claim at law for recourse to the land. The words of Lord Chancellor Cowper make it quite plain that the issue was one of priority<sup>17</sup>:

“Articles made for a valuable consideration, and the money paid, will, in equity, bind the estate and prevail against any judgment creditor, mesne betwixt the articles and the conveyance; but this must be, where the consideration paid is somewhat *adequate* to the thing purchased; for if the money paid is but a *small sum*, in respect of the value of the land, this shall not prevail over a mesne judgment creditor.”

One problem with the case, however, is that it is no where stated precisely how the creditors’ judgment would be enforced: it was simply accepted that the plaintiff judgment creditors had a legal lien on the land.<sup>18</sup> And in 1715, any judgment would have been executed against

<sup>14</sup> See *infra*, text to note 61.

<sup>15</sup> See, generally, Meagher, Gummow & Lehane, *Equity: Doctrines & Remedies*, 4<sup>th</sup> ed. (Sydney: LexisNexis Butterworths, 2002), chapter 8.

<sup>16</sup> (1715) 1 P. Wms. 277; 24 E.R. 387.

<sup>17</sup> (1715) 1 P. Wms. 277 at 282; 24 E.R. 387 at 389; emphasis in the original.

<sup>18</sup> (1715) 1 P. Wms. 277 at 278 (in argument for the beneficiaries) and 282 (*per* Lord Chancellor Cowper), 24 E.R. 387 at 388, 389. Other notes of the litigation provide no further relevant information: see 2 Eq. Ca. Abr. 257-258 and 460-461, 22 E.R. 218 and 392.

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the land through a writ of *elegit*,<sup>19</sup> rather than a writ of *feri facias*, as a writ of *feri facias* would not issue against a freehold.<sup>20</sup>

Still, the case is important for present purposes. The case concerned the proprietary effect of a judgment and its priority. A writ of *feri facias* similarly has proprietary effect: while general property in the goods upon which a sheriff executes the writ remains with the judgment debtor, and no property vests in the judgment creditor, a special property does vest in the sheriff.<sup>21</sup> This means that the debtor may not lawfully sell the goods, and any unlawful sale of the goods by the debtor only conveys title to them subject to the sheriff’s rights to reclaim them. Any contest between a sheriff who has seized goods in execution from trustees and the beneficiaries of those goods is, therefore, a question of priority between two or more competing proprietary interests in the goods, as was the case in *Finch v. Earl of Winchelsea*.<sup>22</sup> The crucial point for present purposes therefore stands: the rules governing whether trust assets may be taken in execution of a judgment against trustees in their capacity as such are essentially rules of priority.

None of this is to say or suggest that the cases which put trust assets beyond the reach of the trustee’s judgment creditors are wrong, even where the judgment debt was incurred in the course of duly administering the trust. It is simply to say that they were truly about priority contests. In those cases, the rules of priority were such as to defer the judgment creditor’s ability to execute its judgment debt on assets legally owned by a person to the rights of those with equitable entitlements in those same assets. But that fact opens up various possibilities.

19 A writ of *elegit* created a conditional legal estate for security and satisfaction of debts. It allowed the judgment creditor, the tenant by *elegit*, to hold and enjoy one half of the judgment debtor’s legal estates until the judgment debt was satisfied. See *Blackstone’s Commentaries*, vol. 2, at 161.

20 See *Halsbury’s Laws of England*, (*supra*, note 10), §§131, 154-155. More than a century after *Finch v. Earl of Winchelsea* (1715) 1 P. Wms. 277; 24 E.R. 387, a judgment was given further proprietary effect as a charge over the judgment debtor’s land by section 13 of the *Judgments Act 1838*. Later, section 4 of the *Judgments Act 1864* gave a tenant by *elegit* the right to seek an order for sale of the land through a summary process. Judgments continued to operate as a charge on the judgment debtor’s land, but only when registered, under the *Land Charges Act 1900*. This law was consolidated into section 195 of the *Law of Property Act 1925* and section 59 of the *Land Registration Act 1925*. Under the *Administration of Justice Act 1956*, s. 35 charging orders replaced these mechanisms for enforcing judgments against land. See, generally, *Irani Finance Ltd. v. Singh* [1971] Ch. 59 at 76-79, *per* Cross L.J., and the *Charging Orders Act 1979*.

21 See *Halsbury’s Laws of England*, (*supra*, note 10), §166 and the cases cited there.  
22 (1715) 1 P. Wms. 277; 24 E.R. 387. Indeed, even today, *Finch v. Earl of Winchelsea* is cited as authority for the effect of a writ of *feri facias* on trust assets: *Halsbury’s Laws of England*, (*supra*, note 10), §163.



## **Enforcement of Obligations by Fieri Facias: Routes to a Possible Solution**

The priority of rights under a trust as against others who gain subsequent rights in the trust assets can be manipulated by a number of techniques. These are addressed elsewhere in more detail,<sup>23</sup> but a short review is useful here, before going on to see how they might be used to allow an execution creditor of trustees to gain priority over beneficiaries for whom the trustees hold.

Overreaching is the most common means by which the effects of proprietary rights under a trust are limited.<sup>24</sup> Overreaching allows a purchaser of a trust asset, or a purchaser of an interest in the asset, to take free of the beneficiaries' rights in the trust asset. In essence, the trustees are empowered to dispose of trust assets to purchasers free of the beneficiaries' interests in those assets; and in return, the trustees hold any proceeds of the assets for the beneficiaries, unless the terms of the trust provide otherwise.<sup>25</sup> When trustees lawfully use one of their powers to dispose of a trust asset to a purchaser,<sup>26</sup> the purchaser will acquire a derivative title to the asset, or a derivative interest in it, from the trustees, unless statute provides to the contrary.<sup>27</sup> The trustees had some title to the asset and could accordingly pass that title to the purchaser, or confer some interest on the purchaser granted out of their title. So long as the trustees acted lawfully within their powers, the beneficiaries can have

23 Nolan, “Understanding the Limits of Equitable Property” (2006) 1 *Journal of Equity* 18 at 20-28.

24 See Harpum, “Overreaching, Trustees’ Powers and the Reform of the 1925 Legislation” (1990) *Cambridge L.J.* 277 (hereafter, ‘Harpum, “Overreaching” ’). See also Fox, “Overreaching”, chapter 4 in Birks and Pretto, eds., *Breach of Trust* (Oxford: Hart Publishing, 2002).

25 A beneficiary’s right to assets lawfully acquired by trustees in substitution for other assets always depends on the terms of the relevant trust: the beneficiary would not have such a right if the trust instrument provided to that effect, which very occasionally it might. For example, if a trust provided that realty should be held for X, personalty for Y, and the trustees exercised a power conferred on them to sell land and turn it into money, then Y, not X, would take an interest in what had become personalty: *Rich v. Whitfield* (1866) L.R. 2 Eq. 583. See also Vaizey on *Settlements*, volume 1 (London: H. Sweet & Sons, 1887), at 424, but note *Settled Land Act 1925*, s. 75(5). Overreaching does not necessarily generate proceeds, though it usually does: Harpum, “Overreaching” (*supra*, note 24), at 282, approved by the Court of Appeal in *State Bank of India v. Sood* [1997] Ch. 276 at 281 per Peter Gibson L.J.

26 The qualification “lawfully” indicates that the trustees must respect any implicit limitation on their explicit power: for example, they must not use it in bad faith or for an improper purpose (see, e.g., *Klug v. Klug* [1918] 2 Ch. 67; *Tempest v. Lord Camoys* (1882) 21 Ch.D. 571) or on the basis of irrelevant or inadequate considerations (see, e.g., *Re Hastings-Bass* [1975] Ch. 25 and *Sieff v. Fox* [2005] EWHC 1312 (Ch), [2005] 3 All E.R. 693).

27 See, e.g., *Settled Land Act 1925*, s. 18.

no complaint about this. The beneficiaries’ rights against their trustees are subject to, and limited by, the trustees’ powers, so the beneficiaries simply do not have sufficient title to sue the trustees if the trustees act within their powers. Furthermore, where the trustees dispose of a trust asset without any breach of trust, the beneficiaries have no grounds for any claim against the purchaser either, so he or she can enjoy a derivative interest in the asset free from the beneficiaries’ equitable interests or claims. The trustees do not dispose of the beneficiaries’ rights, nor do they infringe the principle of *nemo dat quod non habet*. The trustees deal with their property in an asset, and the beneficiaries’ property or other interest in that asset is simply so limited *ab initio* that it does not affect the purchaser from the trustees in those circumstances.<sup>28</sup>

Overreaching can be extended beyond the core case described above. From a purchaser’s perspective, overreaching turns crucially on two things: first, the ability of the trustees as owner of an asset to transfer their title to the asset in question, or to grant an interest out of that title; and, secondly, the immunity from claims by the beneficiaries which the purchaser enjoys by virtue of the terms of the trust. So long as those two conditions obtain, the purchaser will gain clean title to the asset, whether or not the trustees are liable for breach of trust in respect of the disposition to the purchaser, unless there is some reason to impose a trust (or other burden) *de novo* on the purchaser.<sup>29</sup> In these circumstances, the purchaser’s immunity from the beneficiaries’ claims will be wider than the trustees’ immunity (if any).<sup>30</sup>

A useful example, dating from the nineteenth century, concerns trustees’ powers to mortgage trust estates. Under the law as it then stood, if trustees mortgaged trust estates unnecessarily, that could amount to a breach of the trust.<sup>31</sup> That breach could affect the mortgagees and mean

28 Note that sometimes a purchaser will be affected by the beneficiaries’ rights because other distinct principles apply to the facts. For example, if Trustees A and B sell an asset to Trustee B within the terms of the trustees’ administrative powers, that sale is valid at law (*Law of Property Act 1925*, s. 72(4)) and the purchaser (B) consequently ceases to be a trustee of the asset, but the sale to him or her is *voidable* at the instance of the beneficiaries because Trustee B has engaged in self-dealing: *Campbell v. Walker* (1800) 5 Ves. Jun. 678; 31 E.R. 801; *Guinness plc v. Saunders* [1990] 2 A.C. 663 at 697-698, *per* Lord Goff; *Shalson v. Russo* [2003] EWHC 1637 (Ch.), [2005] Ch. 281.

29 For examples of such situations, see *Neste Oy v. Lloyds Bank plc* [1983] 2 Lloyd’s Rep. 658 and *Re Japan Leasing (Europe) plc* [1999] B.P.I.R. 911, though the reasoning of those cases has recently been called into doubt by *Shalson v. Russo* [2003] EWHC 1637 (Ch.), [2005] Ch. 218.

30 See also Nolan, “Property in a Fund” (2004) 120 L.Q.R. 108 at 115.

31 The problem arose where lands had to be mortgaged in order to raise portions—cash—for certain beneficiaries: *Vaizey on Settlements*, *supra* note 25, volume 2, at 1131.

that they took their mortgage subject to, rather than free from, the interests of beneficiaries under the trust. Settlements sought to avoid these problems by exonerating mortgagees from enquiry. For example, following a power for trustees to mortgage the trust estates, it was often provided that:

“no mortgagee shall be obliged to inquire into the necessity, propriety, or occasion of any mortgage being made by the said trustees or trustee for the time being, by virtue of the power hereinbefore contained”.<sup>32</sup>

The effect of this clause was to ensure that the mortgagee took good title to the mortgaged estates even if the mortgage granted pursuant to the power were unnecessary, and even though grant of the mortgage would still amount to a breach of duty by the trustees. In more modern language, the mortgage served to overreach the beneficiaries’ interests under the trust, notwithstanding the defect in granting the mortgage, because the grant was authorised and lawful from the perspective of the mortgagee. Similar clauses are still used in settlements today.<sup>33</sup>

Of perhaps even greater interest for present purposes is the fact that a trust instrument can provide that an interest arising under the trust will not endure (or will not have priority) in certain circumstances. So, for example, a trust deed can provide that:

“Where the Trustees are authorised or required to pay or apply any capital money or income to or for the benefit of any person who does not have the capacity to give a valid receipt for it the Trustees may pay the same to any parent or guardian of such person for the benefit of such person without seeing to the application of it or themselves apply the same for the benefit of such person as may be directed in writing by such parent or guardian and the receipt of such parent or guardian shall be a sufficient discharge to the Trustees”.<sup>34</sup>

Thus, should the trustees pay the minor’s parents in good faith,<sup>35</sup> the trustees’ obligations are discharged, and the minor cannot sue the trustees,

32 Vaizey, *A Collection of Precedents and Forms*, (London: H. Sweet & Sons, 1888) at 74.

33 See, e.g., Lord Millett, *et al.*, *The Encyclopaedia of Forms and Precedents*, volume 40(1), 5<sup>th</sup> ed. (London: Butterworths, 2001), form 169. Note also *Law of Property Act 1925*, s. 27(1).

34 *The Encyclopaedia of Forms and Precedents*, *ibid.*, note 33, volume 40(2), form 327, clause 27.1.

35 The limitation of the clause’s effect to payments in good faith would surely be implied: neither trustees nor anyone else should expect exoneration from bad faith, as it would be contrary to public policy and likely repugnant to the very nature of a trust. See, generally, Hayton, “The Irreducible Core Content of Trusteeship”, chapter 3 in Oakley, ed., *Trends in Contemporary Trust Law* (Oxford: OUP, 1996). See also *Armitage v. Nurse* [1998] Ch. 241.

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or anyone else, on the grounds that the trustees misapplied the funds, whatever happened after the payment to his or her parents. Of course, the minor may have independent and distinct claims against his or her parents (and possibly others) in respect of any breach by the parents of their obligations in respect of the assets they received.

All this is easily explained. So long as trust assets are properly paid or transferred in accordance with the relevant provision of the trust instrument, the recipients of trust assets and their successors in title to the assets are immune from any claims by beneficiaries arising out of the trust: the beneficiaries' equitable property rights simply do not extend to affect such people. In principle, there is nothing odd about this. The trust instrument, as given effect by rules of equity, is constitutive of the beneficiaries' claims, and if the instrument does not give them any claims in the circumstances, then that is an end of the matter.

### **Enforcement of Obligations by Fieri Facias: A Possible Solution**

The immediate point of examining these techniques is that they could be employed to create a solution to the problem highlighted in *Jennings v. Mather*,<sup>36</sup> as properly characterised in the light of *Finch v. Earl of Winchelsea*.<sup>37</sup> The rights of beneficiaries under a trust could simply be subordinated by the terms of that trust to anyone taking property in execution of a debt incurred by the trustees in due (or ostensible) administration of the trust.<sup>38</sup>

In other words, the trust instrument could provide that an interest arising under the trust will not endure (or will not have priority) as against creditors executing on the trust property in defined circumstances. So, for example, the trust instrument could state something along the lines that:

"No person taking possession of, or title to, or an interest in, any part or parts of the Trust Fund [as defined] through or as a result of the enforcement of a judgment against the Trustees shall be affected by the trusts powers and interests arising under or pursuant to this instrument over the Trust Fund (or any part or parts of it) provided the judgment in question is in respect of (a) an obligation [lawfully *or* ostensibly] undertaken by the Trustees in the course

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36 *Supra*, note 11.

37 *Supra*, note 16.

38 Whether or not the fund is available to meet obligations in due execution, or ostensible execution, of the trusts over it depends on how closely those creating the trust wish to mimic the effects of an agent's actual and ostensible authority to his or her principal to an obligation, and thereby commit the principal's assets to use in the discharge of that obligation.

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of administering the Trust Fund (or any part or parts of it), or (b) an obligation imposed by law on the Trustees in connection with the administration of the Trust Fund (or any part or parts of it) and (c) in either case is not in respect of a claim for breach of any obligation owed to beneficiaries under or pursuant to this instrument.”<sup>39</sup>

The technique employed here is to limit the rights of the beneficiaries—the last of the techniques examined in the previous section. This technique is used, rather than some version of overreaching, as the object of the exercise is to give certain execution creditors of the trustees automatic priority of recourse to assets held by the trustees, ahead of any rights in those assets arising under the terms of trust itself, rather than a priority dependent on some positive act—some exercise of a power—by the trustees.

Of course, it would have been logically and doctrinally possible for a court of equity to infer such an ordering of priorities as between beneficiaries and judgment creditors seeking to enforce their judgment debt through a writ of *feri facias*. The courts might have done this on the basis that it formed a natural implication from the trustees’ powers to engage in the transactions which found the judgment debt. Nevertheless, the courts did not take this path. While that is an interesting historical fact, and also raises some interesting questions about the economic efficiency of the default terms which the courts did imply into trusts (giving the beneficiaries priority over the judgment creditors), it does not alter the crucial fact for present purposes: the better view is that the courts’ rule is a default rule of priority, which the parties who create a trust can alter so as to subordinate interests of beneficiaries under the trust to the rights of execution creditors.

### **Other Mechanisms of Enforcing a Judgment Debt**

Before addressing the broader implications of this discussion, of which there are several, it is useful to look at other methods of enforcing judgments against trustees, to see whether they too can be used to allow direct recourse to trust assets in satisfaction of the trustees’ obligations which arose in the course of administering the trust. These methods comprise charging orders, third party debt orders (the name currently used in England for what were formerly known as “garnishee orders”, before the advent of the Civil Procedure Rules) and the appointment of a receiver.

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<sup>39</sup> This text is by way of example only for the purposes of argument. It is not, and should not be used as, a precedent.

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## CHARGING ORDERS

In their modern form, charging orders were established by the *Charging Orders Act 1979*.<sup>40</sup> Orders under that Act impose a charge over certain nominated assets of a judgment debtor in favour of the judgment creditor as security for discharge of the judgment debt. If the debt is not paid, the assets can be realised and the proceeds of sale used to discharge the debt.<sup>41</sup>

The procedure for granting a charging order is regulated by Part 73 of the *Civil Procedure Rules*,<sup>42</sup> as supplemented by its accompanying practice direction. Such an order can be imposed over land in England and Wales, UK government stock, corporate securities (other than the stock of a building society) issued by a body incorporated in England and Wales, other corporate securities registered in a register held within England and Wales, units in a unit trust if the register of unit holders is kept in England and Wales, and funds in court.<sup>43</sup>

Section 2(1) of the 1979 Act specifically allows for the imposition of a charging order over “any interest held by a person as trustee of a trust”, if the interest is in one of the assets within the scope of the Act, or else is itself an interest under another trust, and “the judgment or order in respect of which a charge is to be imposed was made against that person as trustee of the trust”. It is immediately apparent, therefore, that the obligations of a trustee incurred in the administration of a trust can be enforced by way of a charging order. Nothing more need be said, other than noting that a court can only impose a charging order over a limited range of assets.

## THIRD PARTY DEBT ORDERS

A third party debt order, formerly called a garnishee order, is an order of the court directing someone (usually a bank) who owes money to the judgment debtor to pay the judgment creditor instead. That way, the judgment is satisfied; and in addition, the debtor’s (the bank’s) original obligation to pay the judgment debtor is extinguished.<sup>44</sup> These orders have a long history.<sup>45</sup> Choses in action could be taken in execution under the Judgments Acts 1838 and 1840, and the procedure is now established

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40 See note 20, *supra*, as regards the genesis of charging orders.

41 See, generally, *Halsbury’s Laws of England*, *supra* note 10, §§303-320.

42 SI 1998/3132 as amended, made under authority of the *Civil Procedure Act 1997*.

43 *Charging Orders Act 1979*, ss. 2(2) and 6.

44 See, generally, *Halsbury’s Laws of England*, *supra* note 10, §§251-271.

45 See generally *Soci t  Eram Shipping Company Ltd. v. Hong Kong and Shanghai Banking Corporation Ltd.* [2003] UKHL 30, [2004] 1 A.C. 260, particularly at [10]-[15], *per* Lord Bingham of Cornhill.

and governed by Part 72 of the *Civil Procedure Rules*,<sup>46</sup> together with its accompanying practice direction. Where does that history leave the question of whether a debt due to trustees in their capacity as such can be seized by means of a third party debt order to satisfy a judgment against the trustees in the same capacity?

There is no authority equivalent to *Jennings v. Mather*,<sup>47</sup> limiting the issue of a third party debt order to debts owed to a trustee personally. Nor is there any such limitation in Part 72 of the *Civil Procedure Rules* or its accompanying practice direction. The natural course in the circumstances would therefore be to proceed by way of analogy. So it is quite possible that a court would not allow a judgment creditor of the trustees to seize a debt owed to them even though the judgment creditor's claim arose out of a transaction with the trustees in their capacity as such. But even if that were the case, by equal analogy the question should turn on the priority of claims on the debt, as between the judgment creditor and the beneficiaries of the relevant trust. And priorities can be adjusted, as noted earlier.<sup>48</sup>

## APPOINTMENT OF A RECEIVER

The final mechanism of enforcement to be considered is the appointment of a receiver. A receiver will take possession of the judgment debtor's property (or some specified part of it) in order to generate income which will be used to pay off the judgment debt. A receiver is very commonly given powers of sale as well, so that he can also sell the property in question and use the proceeds to pay off the judgment debt.<sup>49</sup>

The jurisdiction of the High Court to appoint a receiver to execute a judgment, though of ancient origin,<sup>50</sup> is presently contained in section 37 of the *Supreme Court Act 1981*. The High Court may by order appoint a receiver in all cases where it appears to the court to be just and convenient to do so. Any such order may be made unconditionally or on such terms and conditions as the court thinks just. The court's jurisdiction to appoint a receiver in execution of a judgment is not now confined to those cases where the Court of Chancery would have done so before the Judicature Acts.<sup>51</sup>

The jurisdiction of the court is therefore surely wide enough to allow a receiver to take possession of, and where authorised to sell, assets held

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46 SI 1998/3132 as amended.

47 *Supra* note 11.

48 See note 15, *supra*.

49 See, generally, *Halsbury's Laws of England*, *supra* note 10, §§332-346.

50 See *Halsbury's Laws of England*, *supra* note 10, §§332-334.

51 *Soinco SACI v. Novokuznetsk Aluminium Plant* [1998] Q.B. 406, not following earlier authority.

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on trust in satisfaction of an obligation validly incurred by the trustees of that trust in their capacity as such. What a claimant would have to show is that it would be just and convenient for the court to make such an order. There do not appear to be any cases which indicate whether, and if so when, a court would make such an order. Still, the court might well appoint a receiver in such circumstances, even where the terms of the trust make no provision in that regard, precisely because the problems of enforcement through a writ of *feri facias*, noted earlier, would render it just and convenient to order the appointment of a receiver. *A fortiori*, if the trust in question specifically provided that beneficial interests under the trust were to be subordinated to the execution of judgments against its trustees in their capacity as such, and it was otherwise just and convenient for a receiver to execute such judgment, then the court certainly could make the requisite order appointing the receiver; and it should do so.

### Summary

So far, this paper has addressed the four most important means of executing a judgment debt owed by trustees in their capacity as such: a writ of *feri facias*, a charging order, a third part debt order and the appointment of a receiver. Problems or uncertainties exist in relation to all of them. These problems could undoubtedly be resolved by legislation. However, it is very strongly arguable that self-help, by those who set up trusts, could very substantially ameliorate or even resolve those problems and uncertainties. That self-help would take the form of a provision in the relevant trust instrument which subordinated beneficial interests under the trust to the execution of judgments against its trustees in their capacity as such.

This form of self-help is quite distinct from another which has been proposed, namely widening and reinforcing the trustees' right of indemnity against the trust assets, to which judgment creditors of the trust might be subrogated in an appropriate case.<sup>52</sup> There is no reason at all why both methods of self-help should not be used and complement each other; but the aim of the self-help proposed in this paper is to enable judgment creditors to enjoy direct rights against trust assets in suitable cases, rather than to become involved in the difficulties surrounding trustees' rights of indemnity.<sup>53</sup>

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52 Tjio, "Lending to a Trust", *supra* note 2.

53 *Ibid.*



## Implications

Various theoretical and practical implications flow from the foregoing survey of techniques to manipulate the effect of equitable proprietary rights under a trust. They break down into five broad categories.

### THE NATURE OF EQUITABLE PROPERTY RIGHTS UNDER A TRUST

The first such implication is that equitable property rights under a trust should not be seen or treated as some uniform or unitary species of interest. It is manifestly obvious that beneficiaries' positive claims to benefit under a trust should not, and indeed cannot, be treated as uniform in their nature and incidents.<sup>54</sup> The same is true, however, of the “negative” property rights generated by a trust, that is, the rights of beneficiaries to exclude non-beneficiaries from access to trust assets. Equitable property rights under a trust are not uniform in their effect on third parties: their effect on third parties can be moulded to a very significant degree.<sup>55</sup> Of course, the extent to which people can modify the *prima facie* incidents of equitable property rights is constrained by the very doctrinal nature of trusts in English law, namely that trusts involve more than just the personal claims of beneficiaries against trustees<sup>56</sup>: so, for example, it would simply be self-contradictory, within the axioms of English law, to deny a trust any effect on a third party, because trusts, by definition, involve the beneficiaries having claims to exclude others from trust assets. Still, such constraints clearly do not limit very greatly the extent to which parties can modify equitable property rights under a trust, as witness the law and practice reviewed earlier.

The notion of what amounts to equitable property rights under a trust is therefore flexible and is itself responsive to the bargain or undertaking on which a particular trust is founded. Equity gives further effect to a settlor's intention than the settlor could ever practically replicate by agreement: equity creates property rights out of the settlor's intention to create a trust, assuming that intention is effectually realised. But equity does not contradict the intentions of the settlor: it gives proprietary effect to his or her intentions to the extent they ordain. The settlor's intentions are ascertained from all the terms used to establish a trust or settlement,

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54 See, generally, Nolan, “Equitable Property” (2006) 122 L.Q.R. 232.

55 See, generally, Nolan, “Understanding the Limits of Equitable Property”, *supra* note 23.

56 Underhill & Hayton, *The Law of Trusts and Trustees*, *supra* note 9, §§1.1-1.10. See also Nolan, “Equitable Property”, *supra* note 54, and “Understanding the Limits of Equitable Property”, *supra* note 23.

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including administrative powers, exemption clauses, limitations of liability and other managerial provisions such as those examined earlier. These powers and provisions are all too often dismissed as “boiler plate clauses” and ignored; but they are vital to understanding and ascertaining what rights, powers, immunities and interests have been brought into being by a trust or settlement. They have fundamental theoretical significance, as well as crucial practical consequences for the execution and management of a trust or settlement.

## GENERAL PRINCIPLES OF PROPERTY LAW

This first implication of techniques to manipulate equitable proprietary rights under a trust leads naturally to the second. An awareness of the great flexibility of equitable property rights under a trust serves to enrich our general understanding of proprietary rights. Equitable interests under a trust are acknowledged to have a proprietary aspect, even where the proprietary aspect of such interests has been limited and moulded. These less-than-absolute equitable proprietary rights, in their turn, can shed light on the notions of “property” and “proprietary rights” as they are understood in English law (and similar systems). Property rights as general concepts of English law, rather than as notions specifically defined for specific (often statutory) purposes,<sup>57</sup> are flexible and malleable: they do not necessarily have the absolute character of *dominium*; and they do not necessarily imply the ability to exclude all the world, or even all the world apart from a bona fide purchaser for value without notice.

“[W]ithin a system founded on judicial precedent, establishing the current meaning of juridical concepts is necessarily an inductive, rather than deductive, process. The meaning so ascertained can then itself be used in, and modified by, subsequent cases in a continuing process of iteration; and categorisation is therefore necessarily provisional, rather than a matter of applying rigid definitions or a priori concepts.”<sup>58</sup>

A proper awareness of such matters is absolutely vital when seeking to understand the English legal system, or a similar system, as well as when making comparisons with concepts derived from another, radically different system.<sup>59</sup>

<sup>57</sup> Nolan, “Equitable Property”, *supra* note 54, at 255-256.

<sup>58</sup> *Ibid.*, at 234.

<sup>59</sup> See, for example, the stipulation that property shall be absolute in its nature in the French *Civil Code* (§544); though even that stipulation is now subject to the new (2007) provisions concerning *La Fiducie* (*ibid.*, §§2011-2031).

## THE IMPORTANCE OF TRANSACTIONAL LAWYERS IN LEGAL DEVELOPMENT

The next implication concerns legal development, and the primary importance of transactional lawyers in that development. Transactional lawyers deal with vastly more relevant cases through which juridical structures such as trusts are created or refined than do lawyers and policy-makers in the public sector. Transactional lawyers also deal with each case in much greater detail, and with far greater intensity and frequency, than Parliament—or any regulator—possibly could: there are far more transactional lawyers, who collectively (and sometimes individually) possess far greater resources (in terms of time, finance and information) than those dealing with trust structures in the public sector. Transactional lawyers also spread their expertise swiftly, so that evolution of new forms is fast and vigorous. This is partly because the relevant specialist lawyers operate mostly within a concentrated, interconnected community, where new developments can spread quickly and easily. The legal profession in the City of London is a classic example of this phenomenon. It is also partly because the results of these lawyers’ work—trust instruments—are disseminated informally as lawyers move from firm to firm, or more formally through the advice given by barristers to different firms, or else through books of precedents.<sup>60</sup>

One recent example of such development in the context of trust law is the emergence of the very widely drawn discretionary settlement. Case law, culminating in some decisions of the early 1970’s, laid down certain principles about the degree of certainty with which a trust instrument must specify its discretionary objects (*i.e.*, beneficiaries).<sup>61</sup> The cases laid down mandatory rules, not just default rules, which could be rather restrictive of what settlors wished to achieve. The professionals who drafted trust instruments on behalf of their clients did not demand law reform from the courts, or from Parliament. Instead, they set about mitigating the effects of the rule by drafting intermediate powers of appointment (*i.e.*, a power to appoint to anyone in the world with the exception of certain named persons),<sup>62</sup> and powers to add to a class of discretionary objects.<sup>63</sup> This continued to the point where, bringing matters full circle, the courts themselves have acknowledged that the original mandatory rules have been rendered functionally irrelevant by

<sup>60</sup> See Nolan, “Property in a Fund”, *supra* note 30.

<sup>61</sup> *Re Gulbenkian’s Settlement Trusts* [1970] A.C. 508; *McPhail v. Doulton* [1971] A.C. 424; *Re Baden’s Deed Trusts (No. 2)* [1973] Ch. 9.

<sup>62</sup> *Re Hay’s Settlement Trusts* [1982] 1 W.L.R. 202.

<sup>63</sup> *Blausten v. I.R.C.* [1972] Ch. 256; *Re Manisty’s Settlement* [1974] Ch. 17.

careful drafting.<sup>64</sup> Lawyers must nowadays know the rules, but only in order to draft around them successfully.<sup>65</sup> The rules are a reef marked on a chart, acknowledged only to be avoided.

All this adds up to the very vigorous evolution of trust structures through the frequent interaction of private parties and the rather less frequent interactions of those parties with the state, manifested in the courts and Parliament. This system for creating and developing the internal structures of companies acknowledges that law, and the arrangements made pursuant to law, are necessarily provisional, and will need to evolve, because law, and the arrangements made pursuant to it, are founded on bounded information and rationality deployed in an ever changing context. In other words, the system rests on pragmatic, rather than idealistic, assumptions about the process of forming legal structures. (The question of how the goals of the law are, and should be, set is another matter, demanding informed legal, economic and social policy debate.) Consequently, the system allows for trial—and error. It demands a minimum acceptance of risk—that there may be undesirable results. This, however, is what exposes it to its critics.

It is always easy to highlight the risk of harm, and to use such risk as an argument against any particular course of action. It is much more difficult to acknowledge such risk and yet still advocate the action, even following an honest, careful attempt at a risk/benefit calculation (or, more accurately, a risk/benefit estimation) which gives reasonable grounds for predicting that any harm will be outweighed by good. The problem is the fear of risk itself. Correspondingly, when something undesirable has happened, it is seductively easy to blame those who took the risk of that consequence. In turn, fear of blame becomes another reason not to take a risk in the first place. Again, it is much more difficult to show that the risk-averse course of action could well have produced worse results. Conversely, if risk is allowed, with desirable consequences, those who took the risks, rather than those who allowed them, are likely to get the credit. In short, advocating any system which allows risk has asymmetrical advantages and disadvantages to the advocate of risk: it is hard to argue in favour of risk. Yet would modern trust law or corporate

64 *Schmidt v. Rosewood Trust Ltd.* [2003] U.K.P.C. 26, [2003] 2 A.C. 709 at [34]-[35], per Lord Walker of Gestingthorpe.

65 Of course, the techniques to avoid the rules do reverse the effect of those rules absolutely precisely. For example, it is marginally more difficult to review the discretion of a trustee empowered to add anyone in the world to a class of beneficiaries, who is told nevertheless by a non-binding letter of wishes to add the settlor’s “friends” to the class, than it is to say that a trustee empowered to appoint trust funds to “friends” has abused his discretion. The non-binding nature of the letter of wishes and its consequent evidential status as evidence of the purposes for which powers can be lawfully exercised accounts for the difference.

law (let alone contract law) exist if such an aversion to risk had always governed the law? It is highly unlikely. Risk is the inescapable cost of innovation.

The history of English commercial law, in its broadest sense, provides some useful guidance for the future development of trust law: how to accept risk as the price of innovation, but nevertheless manage and mitigate it. Much of modern commercial law, for example, developed as the courts accepted commercial practice. Specific problems were addressed individually and were resolved through litigation, and, much more rarely, through specific legislative intervention. Only later did Parliament attempt to codify, restate or significantly amend these bodies of law.<sup>66</sup> To put the point in more general terms, there was first an acceptance of innovation, and an acceptance of trial and error. Only later, once a significant corpus of law, practice and experience had built up, did Parliament intervene in any systematic fashion.

More generally still, the point is that inductive, minimally categorising, “bottom up” methods of rule-making were used in the earlier stages of developing a system, when understanding of the system was sketchy; and deductive, generally categorising, “top down” methods were used once a significant body of knowledge had accumulated to form the premises in this process of reasoning.<sup>67</sup> There is much to commend such an approach: it takes account of the varying—let it be hoped expanding—boundaries of knowledge; it accepts that hasty intervention, in the absence of adequate knowledge and experience, can stifle innovation and even be counterproductive; but it accepts also that there is a very useful role for legislation and regulation—in clarifying the law and dealing in a principled fashion with the problems revealed by experience, rather than by conjecture, however well informed.

## IMPLICATIONS FOR THE GENERAL LAW

This approach to the generation of law can be usefully applied to the problems addressed in this paper regarding trustees’ contracts. Practice can show the way; then the courts, and Parliament, can adopt (and modify) where they see fit what has been tried and tested in practice.

So, if those who create business or trading trusts wish to assuage the potential creditors of their trustees, then they can include provisions in the relevant trust instrument, such as that suggested above, to provide that creditors of the trustees can levy execution on assets held by the trustees as part of the trust fund, notwithstanding the beneficiaries’ interests. Of

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<sup>66</sup> See, generally, Goode, *Commercial Law*, 3<sup>rd</sup> ed. (London: Penguin, 2004).

<sup>67</sup> As regards the different types of rule, see Hart, *The Concept of Law*, 2<sup>nd</sup> ed. (Oxford: OUP, 1994,) at 124-136.

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course, that is not, and cannot be, a universal solution for creditors, because some trusts will not include such a provision. But that does not exhaust the relevance of the analysis in this paper.

In the first place, a court could imply such a provision—that is, a court could itself legitimately manipulate the priorities of claims on trust assets, as it did in *Finch v. Earl of Winchelsea*, if the facts warranted such a course of action. That might seem odd. At present, the cases very clearly indicate that the courts will prefer the claims of beneficiaries on trust assets over those of creditors seeking to levy execution on those assets in respect of debts owed by trustees as a result of their administration of that trust. Nevertheless, if the central argument of this paper is correct, namely that such a conflict between beneficiaries and creditors essentially involves a question of priorities, then it is open to the courts to adjust those priorities where the facts warrant it. The courts certainly could conclude that a trust which is established for the very purpose of trading, rather than trading incidentally in the course of administering an estate that happened fortuitously to include a business, should implicitly involve such an adjustment of priorities. Indeed, principles of estoppel might lead to the same conclusion if the beneficiaries of the trust were also its settlors, and had led creditors to expect recourse to trust assets employed in the business. In short, there is no absolute rule in the way of such conclusions. Admittedly, it will very likely be difficult to persuade a court to depart from the “normal” result in any such competition between beneficiaries and creditors. Difficult, perhaps, but not impossible. There is no absolute rule of priorities set by precedent: rules of priority are, under well established law, much more sensitive to facts than that.<sup>68</sup>

The analysis in this paper could also have general legal significance in another way, this time depending on Parliament.<sup>69</sup> There is no doubt that appropriate, well tailored and timely legislation can assist the development of trust law and remove uncertainties in the law. Most provisions of successive Trustee Acts have their substantive origins in practice: useful terms of trust instruments are incorporated into statute as (usually default) rules of law.<sup>70</sup> Other well known techniques of trust administration, such

<sup>68</sup> See note 15, *supra*.

<sup>69</sup> The issues raised in this paper, namely the rights of creditors against trustees and trust funds, now forms part of the 9<sup>th</sup> Programme of Law Reform to be addressed by the Law Commission for England and Wales: *The Law Commission Ninth Programme of Law Reform* Law Com No. 293 (London: TSO, 2005), §§2.36-2.40.

<sup>70</sup> See, generally, *Trustees’ Powers and Duties* Consultation Paper No. 146 (London: Law Commission, 1997), §1.5. The *Trustee Act 2000* was the product both of common practice and a thorough-going project of law reform by the Law Commissions for England and Wales and for Scotland: *ibid.* and *Trustees’ Powers and Duties* Law Com No. 260, Scot Law Com No. 172 (London: Law Commission, 1999). The development of trustees’ powers of investment is very usefully explored by

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as overreaching, were developed in legal practice before being set to use by statute.<sup>71</sup> This practice could be adopted in the present context: reform would work with the grain of trust law. Statute could provide a default, or even a mandatory, provision along the lines of the clause suggested earlier for inclusion in a trust deed to privilege creditors over beneficiaries. And when reform works within established, well understood principles, it is less likely to generate any nasty surprises.

### IMPLICATIONS FOR LEGAL EDUCATION

As well as its immediate practical relevance, the points raised in this paper have a wider significance for legal education. For a property lawyer in the common law world, the importance of understanding how trusts work, and how they evolve, cannot be overstated. The importance is both functional and theoretical. A knowledge of how trusts work, how the basic concepts of trust law can be and often are manipulated, and how trust law evolves, is crucial to understanding modern techniques of asset management in the common law world.<sup>72</sup> Such a knowledge is also crucial to understanding notions of property, both in common law jurisdictions and more widely. It throws important light on legal change and legal evolution. Indeed, if, as has been suggested earlier, the impact of transactional lawyers on the law is vitally important, and generally beneficial, it is surely important to educate those who will become lawyers about these perspectives on the law of trusts. London, at the very least, would be much the poorer if the lawyers practising there were to become ignorant of them. A proper understanding of rights is vital to a legal education; but so too is a proper understanding of institutions. It is well past time to restore the study and understanding of how trusts work, and how they are manipulated, to a much more prominent place in the law school.

It is astonishing, therefore, that law courses in England at least so very often pay such little attention to these aspects of the law of trusts, leaving them to be discovered later by trial and error in practice. Courses agonise over the precise circumstances in which a constructive or resulting trust arises; over how such trusts are categorised, and over questions such whether a trust for “my old friends” could ever be conceptually certain. Students can easily graduate, having passed an Equity or Trusts paper, with a sketchy notion, at best, of core concepts within the law of trusts

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Dr Chantal Stebbings in chapter five of her book, *The Private Trustee in Victorian England* (Cambridge: C.U.P., 2002).

71 See, generally, Harpum, “Overreaching”, *supra* note 24.

72 Nolan, “Property in a Fund”, *supra* note 30; Langbein, “The Secret Life of the Trust: The Trust as an Instrument of Commerce” (1997) 107 Yale L.J. 165.

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and, crucially, key techniques used by trust lawyers over the years: it is all too easy for students to survive a law course with little, if any, awareness of how these concepts and techniques relate to each other and have been put to use in many diverse contexts. In consequence, law students can easily come to think that the marginal is central, and treat the trivial as vital. It would hardly be surprising if, having such a view of equity and trusts, they took a very dim view of the whole subject.

Young lawyers are therefore often ill-prepared for a professional and juridical world in which trusts figure prominently. Their education often leaves them with little appreciation for what Maitland described as “an ‘institute’ of great elasticity and generality, as elastic, as general as contract” and “the most distinctive achievement of English lawyers”.<sup>73</sup> Instead, it commonly leaves them either with an impression that trusts are insignificant or with the idea that trusts, in so far as they are significant, essentially constitute a judicial response to unanticipated events and misfortunes. It gives them very little idea of trusts as one of the vital functional tools for asset partitioning and asset management in common law jurisdictions.<sup>74</sup>

Furthermore, while legal practice is vitally important to an economy such as London’s, the critique of legal education in this section is not purely functional, seeking to prioritise the needs of legal practice over all others. A thorough understanding of positive law is a necessary prerequisite of any informed theoretical understanding or normative assessment. How can theories of “property” be informative or useful if their analytical foundations are weak? How can any normative assessment of the uses and functions of trusts be valuable if it is based on ignorance of what trusts can do and how they do it? A lack of knowledge and understanding will leave law students—or, indeed, anyone else—unequipped to address theoretical and normative questions for themselves. Unless students have their own knowledge and understanding of a subject, the only thing they can do is to parrot other people’s views of it. Ill-informed and unreflective repetition is surely not the object of studying law.

Similarly, an understanding of juridical institutions, the ends to which they are put and the means by which such ends are achieved is just vital to understanding law through the prism of economic theory. Unless a commentator understands both a juridical structure and the means by which it is put to use, how can he or she usefully identify or evaluate the efficiency of the legal rules in question. Once again, ill-informed speculation is no substitute for knowledge and understanding.

73 Maitland, *Lectures on Equity* (Cambridge: C.U.P., 1929), at 23.

74 See, e.g., Langbein, “The Contractarian Basis of the Law of Trusts”, *supra* note 72; Hansmann & Mattei, “The Functions of Trust Law: A Comparative and Economic Analysis” (1998) 73 N.Y.U.L. Rev. 434.



## **Conclusion**

This paper began with a very specific problem of trust law, and then looked to find a solution. The problem is that a creditor cannot easily reach trust assets to satisfy any claims he may have against trustees incurred in the administration or purported administration of a trust: generally speaking, the creditor must enforce his rights against the trustees, who in turn may in some circumstances look to the trust assets by way of indemnity. As so often, self-help can be the way forward. The trust can provide for the creditor's rights in executing his judgment to have priority over any countervailing claim of the beneficiaries under the trust. But a proper appreciation of such self-help has much broader consequences: it has significant implications for understanding, and teaching, the law.

