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Trustee Rights and Powers: A Taxonomical Analysis

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Abstract

This article examines what differences there are, if any, between the rights and powers of a trustee. Although these terms are commonly applied to distinguish between various aspects of trusteeship, there is no clear explanation of the basis of this taxonomy. This article argues that there is no conceptual difference between these two terms, and that they should merely be seen as labels of convenience and convention. As a result, the law should be understood as giving trustees a range of abilities, with there being no principled difference between what are commonly called rights and powers. This conclusion not only answers an unresolved taxonomical issue, but may also have implications for statutory interpretation and the constraints that trustees have when they exercise functions vested in them.

I Introduction

This article seeks to answer a single question – what are the differences, if any, between the rights and powers of a trustee? Or in other words, why is there a convention to refer to a trustee as having both rights and powers, and what flows from the use of those terms? It has been described as a question of considerable 'semantic and jurisprudential complexity';[1] however there is no settled answer to this question either in the literature or case law.[2] Over 100 years ago, Professor Wesley Hohfeld attempted to resolve the 'paucity and confusion' surrounding terms such as these by categorising them according to their jural 'opposites' and 'correlatives'. According to this analysis, the term 'right' should be applied where there is a correlative 'duty' imposed on another person, whereas a 'power' exists if there is a correlative 'liability'.[3] Whilst this analysis was developed at a

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1 Nuncio D'Angelo, 'Trustees' Rights: When Can a Trustee Act in its own Interests?' (Paper presented at the Libby Slater Plenary Session of the Superannuation Committee of the Law Council of Australia, Canberra, 8 March 2018) 24 [6.38].

2 For discussion of rights and powers in private law more broadly, and what those terms potentially cover, see Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012); Kit Barker et al (eds), *Private Law and Power* (Hart Publishing, 2017).

3 Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *Yale Law Journal* 16, 28-30; Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) *Yale Law Journal* 710.

general level, it has since been applied to trusts law on a number of different occasions. However, these applications deal with a subtly different question. In 1971, J W Harris applied a Hohfeldian analysis to characterise certain aspects of a trust. In that paper, Harris broadly argued that contemporary refinements to the principle that a trust must have sufficiently certain objects were misplaced.[4] However, he advanced three broad propositions that are relevant here: first, that a fundamental aspect of a trust is the existence of some duty on the part of the trustee, and that this duty has generally been understood in the Hohfeldian sense of there being a correlative right possessed by the beneficiaries;[5] second, that this fundamental duty is best understood as the requirement that a trustee complies with the rules of equity that are applicable to their type of trusteeship;[6] and that finally, the rule in *Saunders v Vautier* does not answer the description of this fundamental duty because it does not confer a right on the beneficiaries that is correlative with a duty on the trustee.[7] Whilst that article used a Hohfeldian analysis to clarify the meaning of certain terms used in trusts law, it focussed on the duties that a trustee has. According to Hohfeld, these duties give rise to *rights* that the *beneficiaries* possess. The key point of difference is that this article examines the rights and powers of a *trustee*, which are distinct from the duties of a trustee because there is no obligation to perform them. Later writers, and a number of judicial decisions, have applied Hohfeld's concepts in this way,[8] but they have not explained the distinction between a trustee's rights and powers. In any case, as I examine further in Part II(B), Hohfeld's analysis does not adequately explain the distinction.

This article explores this question in three parts. In the first part, I begin by reviewing a number of leading secondary sources on trusts law to develop a working classification of what are conventionally referred to as powers or rights. I then examine and ultimately reject a number of hypotheses that could explain this classification. In the second part, I advance the main thesis of this article: that there is no difference in principle between what are traditionally called the rights and powers of a trustee. In support of this position, I advance two arguments. First, as a matter of law, all aspects of trusteeship find their basis in either the trust instrument, statutory provisions, or the general law of trusts. As a result,

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4 See J W Harris, 'Trust, Power and Duty' (1971) 87 *Law Quarterly Review* 31.

5 Ibid 52. Harris noted that discretionary trusts are an exception to this principle.

6 Ibid 62.

7 Ibid 67-8; (1841) 4 Beav 115; (1841) 49 ER 282.

8 See Peter G Turner, 'Revolution?' (2006) 1 *Journal of Equity* 52 (utilising Hohfeld's terms to describe the beneficiary's interest in a trust); Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4(1) *Journal of Equity* 1 (equitable property rights, including the interest of a beneficiary, ought to be understood as a right against a right); Tatiana Cutts, 'The Nature of "Equitable Property": A Functional Analysis' (2012) 6 *Journal of Equity* 44 (arguing that the beneficiary's interest in a trust is Hohfeldian power with a corresponding liability on the trustee). As to judicial decisions, see *CPT Custodians Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98, 118-119 [44] (Gleeson CJ, McHugh, Gummow, Callinan and Heydon JJ); *Beck v Henley* (2014) 11 ASTLR 457, 466 [32]-[33] (Leeming JA) (both describing the 'rule' in *Saunders v Vautier* (1841) 4 Beav 115; (1841) 49 ER 282 as a power-liability relation).

distinguishing between rights and powers distracts from the essential question of construing the relevant instruments and analysing the state of the general law to determine whether the trustee acted lawfully. Second, I demonstrate that the various abilities of a trustee were a result of piecemeal historical development. This makes it difficult to identify any unifying theme that links the powers and rights of a trustee. In the final part, I explain the consequences that flow from that argument. In particular, I show that it is not merely a question of semantics, but may also have practical implications. When these terms appear in statute, there is a real question as to whether courts should construe them as technical terms in light of this uncertainty. Furthermore, it is accepted that a trustee has certain limits on how they can exercise their powers – in particular, they must do so in good faith, for a proper purpose and upon a genuine consideration as to whether they should act. I argue that there is no reason why those same principles should not apply to a trustee who is exercising their rights. In addition, in the same way that a beneficiary can compel a trustee to consider whether to exercise their powers, I suggest that they can equally require a trustee to consider whether they ought to exercise their rights.

II Possible Explanations for the Conventional Taxonomy

In this part, I examine three superficially appealing distinctions between a trustee's rights and powers: an analysis on the basis of first principles, the application of discretionary power principles, and whether a benefit is conferred. I ultimately conclude that none of these explanations are satisfying. However, before this can occur, it is necessary to develop a scheme of how rights and powers are conventionally classified.

A *Identifying a Conventional Taxonomy*

The starting point of this analysis is to develop a working list of what aspects of trusteeship are conventionally described as powers, and which are considered to be rights. From this starting point, I then consider a number of hypotheses that explain the basis of this taxonomy. An examination of leading Australian and English texts of the subject reveal the following division, with notable exceptions included as well:

- Powers of a trustee
  - The power to lease trust property.[9]
  - The power to repair and improve trust property.[10]
  - The power to insure.[11]

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9 John Dyson Heydon and Mark J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 462 [20-19]; LexisNexis, *Halsbury's Laws of Australia* (online at 30 January 2018) 430 Trusts, '3 Administration of Trusts' [430-4785].

10 Heydon and Leeming (n 9) 470-1 [20-30]; Westlaw Australia, *Ford and Lee: The Law of Trusts* (online at 1 April 2018) [12.9110]; Lynton Tucker et al, *Lewin on Trusts* (Sweet & Maxwell, 19th ed, 2015) 1532 [34-51]; LexisNexis (n 9) [430-4855].

11 Heydon and Leeming (n 9) 475 [20-35]; Westlaw Australia (n 10) [12.9510]; Tucker et al (n 10) 1537 [34-063]; LexisNexis (n 9) [430-4660].

- The power to compound debts.[12]
- The power to give receipts.[13]
- The power to sue and be sued.[14] The relevant material in *Halsbury's Laws of Australia* describe trustees as having a *right* to sue to enforce the rights of the trust.[15]
- A number of other powers that are commonly included in a trust instrument, such as the power of sale,[16] the power to carry on a business,[17] and the power to mortgage.[18]

- The rights of a trustee
  - The right of reimbursement and indemnity.[19]
  - The right of contribution and recoupment from co-trustees.[20] *Lewin on Trusts* described this as both a right and a remedy that a trustee has against a culpable co-trustee.[21]
  - The right to impound the beneficiary's interest.[22] *Lewin on Trusts* is silent on the label to be given to this mechanism. It is discussed alongside other materials on remedies available to, and against, trustees.[23]
  - The right to a discharge of their role as trustee.[24]
  - The right to pay money into court.[25] In *Ford and Lee: The Law of Trusts*, this is classified as both a right and a remedy to prevent a breach of trust.[26] Furthermore, *Lewin on Trusts* presumably classifies this as a power, and states that the relevant legislation '*empowers* trustees or a majority of trustees to pay into court trust money'.[27]
  - The right to approach the court.[28] In *Ford and Lee: The Law of Trusts*, this is classified as both a right and a remedy to prevent a breach of trust.[29] Alternatively, *Lewin on Trusts* treats this as

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12 Heydon and Leeming (n 9) 483-4 [20-46]; Westlaw Australia (n 10) [12.9970]; LexisNexis (n 9) [430-4975].
13 Heydon and Leeming (n 9) 485-6 [20-49]; Westlaw Australia (n 10) [12.10210]; Tucker et al (n 10) 1713 [37-053]; LexisNexis (n 9) [430-4985].
14 Heydon and Leeming (n 9) 489 [20-56].
15 LexisNexis (n 9) 430 Trusts, '2 Trusts' [430-3865].
16 Heydon and Leeming (n 9) 451 [20-02]; Westlaw Australia (n 10) [12.2010].
17 Heydon and Leeming (n 9) 479-80 [20-42]; Westlaw Australia (n 10) [12.9670]; Tucker et al (n 10) 1672-3 [36-106]; LexisNexis (n 9) [430-4880].
18 Heydon and Leeming (n 9) 469 [20-27]; LexisNexis (n 9) [430-4820].
19 Heydon and Leeming (n 9) 510-1 [21-02]; Westlaw Australia (n 10) [13.030]; Tucker et al (n 10) ch 21; LexisNexis (n 9) 430 Trusts, '2 Trusts' [430-3720].
20 Heydon and Leeming (n 9) 524 [21-17]; Westlaw Australia (n 10) [13.060], [13.070]; LexisNexis (n 9) 430 Trusts, '4 Breach of Trust' [430-5615].
21 Tucker et al (n 10) 1893 [39-081].
22 Heydon and Leeming (n 9) 527 [21-21].
23 Tucker et al (n 10) 1898 [39-093].
24 Heydon and Leeming (n 9) 530-1 [21-29]; LexisNexis (n 9) 430 Trusts, '2 Trusts' [430-3870].
25 Heydon and Leeming (n 9) 531 [21-30]; LexisNexis (n 9) 430 Trusts, '2 Trusts' [430-3840].
26 Compare Westlaw Australia (n 10) [13.6160], [17.800].
27 Tucker et al (n 10) 1143-4 [27-092] (emphasis added).
28 Heydon and Leeming (n 9) 532 [21-31].
29 Compare Westlaw Australia (n 10) [13.6010], [17.160].

> a power of the court pursuant to which trustees can make applications.[30] *Halsbury's Laws of Australia* has a similar classification, and specifies that it is an example of the court intervening to assist in the administration of a trust.[31]

Each text largely deals with the same rights and powers. This is unsurprising, because the list comprises incidents of trusteeship that either find their basis in legislation or the general law, or are commonly included in the trust instrument. Moreover, the texts provide a similar classification for the rights and powers of a trustee (with some exceptions noted), and this classification generally accords with the cases they cite in support of the relevant principles. However crucially, no text provides a clear explanation as to what exactly the distinction is between a trustee's rights and powers. The simplest explanation for this is that there is no need for there to be a detailed explanation of this point, because there is a well-accepted convention that certain aspects of trusteeship are powers, whilst others are rights.

However, there are a number of problems with merely relying on convention to classify a trustee's rights or powers as such. First, there are points of disagreement between the leading texts on this point. To take one example, the trustee legislation in most states permits a trustee to apply to the court to receive advice or directions on the proper administration of the trust.[32] The provision itself does not refer to it as a right or power, though in New South Wales it is located under the division titled 'powers'.[33] However, the literature variously refers to it as a right,[34] a remedy,[35] and a power of the court (that is, a specific instance of the court's jurisdiction).[36] Second, classifying a trustee's capabilities as a right or power may have significant legal implications. Most notably a trustee has a number of obligations that they must adhere to when exercising a power.[37] It is arbitrary and unsatisfying to conclude that these obligations apply to some aspects of a trustee's actions merely on the basis of naming conventions, particularly when there is some disagreement about that tradition. Finally, the category of rights or powers that can be conferred on a trustee by a trust instrument is not closed.[38] Without there being some conceptual distinction

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30 Tucker et al (n 10) 1112 [27-004].

31 LexisNexis (n 9) 430 Trusts, '3 Administration of Trusts' [430-5055].

32 *Trustee Act 1925* (ACT) s 63; *Trustee Act 1925* (NSW) s 63; *Trusts Act 1973* (Qld) s 96; *Trustee Act 1936* (SA) s 91; *Trustees Act 1962* (WA) s 92.

33 *Trustee Act 1925* (NSW) pt 2 div 2. The ACT places it in a subdivision headed 'protection of trustees': *Trustee Act 1925* (ACT) pt 2 sub-div 2.2.11. In Queensland and Western Australia, the provision is listed under the division titled 'jurisdiction to make other orders': *Trusts Act 1973* (Qld) pt 7 div 4; *Trustees Act 1962* (WA) pt VII div 3. South Australia titles its part as 'miscellaneous and supplemental': *Trustee Act 1936* (SA) pt 6.

34 Heydon and Leeming (n 9) 532 [21-31].

35 Westlaw Australia (n 10) [17.160].

36 LexisNexis (n 9) 430 Trusts, '3 Administration of Trusts' [430-5055]. For statutory support, see *Trusts Act 1973* (Qld) pt 7 div 4.

37 *Karger v Paul* [1984] VR 161, 163-166 (McGarvie J).

38 Indeed it seems there is no limitation, so long as the fundamental duty of performing the trust honestly and in good faith for the benefit of the beneficiaries is adhered to: Heydon and

between these two categories, it is impossible to properly categorise whether a novel provision confers a right or power on a trustee. By definition, merely referring to convention will be insufficient when a novel provision arises for consideration. As a result, it is necessary to consider whether there is in fact an underlying principled explanation for the division between a trustees' rights and powers.

B *Hypothesis One – First Principles Definition*

One possible way of distinguishing between a trustee's rights and powers is by looking at the meaning of those terms on a first principles basis. At a conceptual level, it is impossible to give a single definition of power.[39] As a result, it will be necessary to consider a number of different conceptions that have been proposed in private law. As outlined earlier, an attempt was undertaken by Professor Hohfeld to categorise a variety of terms (including rights and powers) in a scheme where they were grouped with jural 'opposites' and 'correlatives'.[40] For Hohfeld, rights are characterised by the existence of a correlative duty. This means that whenever 'a right is invaded, a duty is violated'.[41] As an example, if a person has a duty to not enter a certain parcel of land, there must be some other party who has a right to insist on the performance of that duty.[42] By contrast, the correlative of a power is a liability. In other words, an individual has a power when they are able to affect a change in the legal relations of another person.[43] That other person has a liability in the sense that their legal relations may be altered by the exercise of a power of another.

A close examination reveals that Hohfeld's schematic does not explain the accepted terminology for two reasons. First, many aspects of trusteeship that are referred to as rights do not impose a correlative duty on the beneficiary. For example, the right of a trustee to pay money into court is better understood in Hohfeld's analysis as being a power to transfer trust funds to the custody of the court, with the beneficiary having a disability (or lack of power) to prevent this from happening when the court is minded to make such an order. The abilities of a trustee to pay money into court, to impound the subject matter of the trust, or to be discharged from their role as trustee are often called rights but are in the same position of not imposing a correlative duty on the beneficiary. This suggests that the labels applied to some aspects of trusteeship are too simplistic in that they elide a number of different concepts that Hohfeld would give different labels, and as a result means that Hohfeld's analysis alone cannot explain the conventional taxonomy.

Leeming (n 9) 334 [16-20] quoted in *Rinehart v Walker* (2012) 95 NSWLR 221, 252 [139]-[140] (Bathurst CJ).

39 Arthur Berndtson, 'The Meaning of Power' (1970) 31 *Philosophy and Phenomenological Research* 73, 79.

40 Hohfeld, 'Some Fundamental Legal Conceptions' (n 3) 28-30; Hohfeld, 'Fundamental Legal Conceptions' (n 3).

41 Ibid.

42 Hohfeld, 'Some Fundamental Legal Conceptions' (n 3) 32.

43 Ibid 44.

Similarly, there are difficulties in applying Hohfeld's analysis to what are conventionally known as powers. Many of the powers discussed in Part IIA involve the treatment of trust property, such as the power to lease, insure or repair trust property. It is difficult to fit these within Hohfeld's definition of a power. The key definition appears to be that powers enable a change in legal relations.[44] It is difficult to see how these aspects of trusteeship are powers from the perspective of the beneficiary, given that they do not involve a change in legal relations vis a vis the beneficiary, but merely explain how trustee can treat the property. In that sense, these examples are probably best understood as immunities in the sense that the trustee has the freedom to take these actions, and so long as the trustee is acting in good faith for a proper purpose,[45] the beneficiary has no power to prevent that action.[46]

Second, insofar as some of these labels are appropriate, a difficulty arises in that their correlatives apply to different parties. The right of a trustee to be indemnified and to receive contributions from co-trustees can both be aptly described as rights, in that there is a correlative duty imposed on another party. However, those duties are owed by two separate parties. In the case of a right of indemnity, the beneficiaries of the trust have a duty to reimburse the trustees for any expenses that they incur. On the other hand, culpable co-trustees bear the correlative duty to contribute to any loss suffered by a trustee as a result of their actions. A similar difficulty applies to aspects of trusteeship that meet the Hohfeldian definition of a power – the party that is subject to a correlative liability varies, and can include the lessee of any leased trust property, the insurer of any trust property, or the purchaser of any trust property that is sold. Therefore, grouping aspects of trusteeship simply on the basis of their Hohfeldian definition appears artificial when their jural correlative applies to entirely different parties. This problem becomes even more apparent for aspects of trusteeship that have a number of conceptions. For example, the right of the trustee to seek judicial advice can arguably be characterised as a Hohfeldian right because it imposes a duty on the court to dispense advice so long as the application is properly made.[47] However, that characterisation is incomplete because it ignores that the key purpose of seeking judicial advice is that it gives the trustee a Hohfeldian immunity; that is, if the trustee acts in accordance with the advice then the beneficiary has a 'no-right' to commence proceedings arguing that there was a breach of trust.[48] In addition, the trustee's decision whether to bring an application for advice is arguably a power they possess which imposes a correlative liability on the trustee to pay for the costs of that application. This makes it difficult to apply Hohfeld's analysis with any certainty because aspects of trusteeship can answer to many different

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44 Ibid 44-5.

45 See *Karger v Paul* [1984] VR 161, 163-6 (McGarvie J).

46 See Hohfeld, 'Some Fundamental Legal Conceptions' (n 3) 55.

47 For example, courts have refused to give advice to determine substantive issues that should have been determined in adversarial proceedings through an originating summons: see *Re Trusts of the Will of Gilchrist* (1867) 6 SCR (NSW) Eq 74.

48 See Hohfeld, 'Some Fundamental Legal Conceptions' (n 3) 32.

jural conceptions. I concede that some aspects of trusteeship neatly align with the definitions given by Hohfeld. For example, in *Karger v Paul*, the trustee was permitted to transfer the entirety of the trust property to one of the co-trustees upon his request.[49] This answers the definition of a power because the beneficiaries were liable to have their interest in the trust property affected by the decision to transfer it. Nonetheless, the examples outlined above illustrate that Hohfeld's analysis is not a wholly acceptable solution.

Other definitions do not assist either. A leading text on the subject of powers, *Thomas on Powers*, proclaims that 'power' is a term of art.[50] The learned author then goes on to explain that there are at least two alternative definitions of the term. In my view, neither sufficiently explains the conventional taxonomy of trustee rights and powers.

The first definition is broad, and states that 'a power signifies an ability to do or effect something or to act upon a person or thing'.[51] This definition accords with the plain English meaning of the word.[52] However, it does not give any assistance in delineating between a right and a power. This conflation is evident when one looks at the ordinary meaning of the word 'right', which may be defined as 'a just claim or title, whether legal, prescriptive, or moral'.[53] Classifying the various incidents of trusteeship on the basis of these high level definitions is impossible. A trustee's ability to indemnify themselves from trust assets can either be characterised as an ability to treat trust property in that way (derived from the definition of a power), or alternatively as a legal entitlement to appropriate trust property for that purpose (derived from the definition of a right). The two categories substantially overlap, and there is no basis to delineate one from the other.

The narrower definition refers to powers that have some proprietary effect. According to this definition, the term can be used to 'signify an authority or mandate conferred on, or reserved by, a person to deal with, as well as dispose of, property which he himself does not own'.[54] As a preliminary matter, it is clear that the reference to property that a person 'does not own' can include property where its holder has the legal interest, but not the beneficial interest.[55] Therefore there is no problem per se with applying this definition to the trustee scenario. It is also notable that the definition refers to trustees dealing with property that they do not own, but does not specify that they must deal with the property as if it were their own. The difficulty with this definition is that the crux of trusteeship is the management of property where there are distinct legal and equitable rights.[56] As a result, the law outlining a trustee's rights and powers by

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49 *Karger v Paul* [1984] VR 161, 163 (McGarvie J).

50 Geraint Thomas, *Thomas on Powers* (Oxford University Press, 2nd ed, 2012) 1 [1.01].

51 Ibid.

52 *Macquarie Dictionary Online* (online at 1 October 2018) 'power'.

53 Ibid 'right'.

54 Thomas (n 50) 2 [1.01].

55 *Commissioner of Stamp Duties v Stephen* [1904] AC 137, 140 (Lord Lindley).

56 In *Public Curator of Queensland v Union Trustee Company of Australia Ltd,* Higgins J stated that '[a] trust must be associated with property, and rights to property': (1922) 31 CLR 66, 75.

definition is concerned with delineating what a trustee can do with the property that the beneficiaries' have a beneficial interest in. It is reasonably clear that the aspects of trusteeship that are generally referred to as powers – such as a power of sale, or power to carry on business – are cases of the trustee dealing with property that they do not have a full and beneficial interest in. Rather, they are instead managing trust property held for the benefit of some other party. However, it is equally true that some of the aspects of trusteeship referred to as 'rights' answer this definition. The ability of a trustee to indemnify themselves for any loss or expense incurred in administering the trust manifests itself in a power to directly apply trust property for that purpose,[57] or to take a charge or lien to satisfy an expense that has already been incurred.[58] Similarly, the statutory provisions permitting a trustee to pay trust money into court,[59] or impound a beneficiary's interest,[60] are commonly referred to as rights even though they fall under this definition of dealing with trust property.

Therefore, an attempt to rely on a first principles analysis to determine the difference between a trustee's rights and powers faces two difficulties. First, there is no settled meaning about what each of those terms mean. Second, and more fundamentally, the common definitions attributed to those terms do not fully explain the conventional labelling scheme that has been adopted in Australian trusts law.

C *Hypothesis Two – Applicability of Discretionary Power Principles*

A trustee has a number of obligations that they have to comply with when exercising a discretionary power. These include the duties to exercise the powers of the trust in good faith,[61] to act upon a proper and genuine

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In the seminal case of *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties*, Hope JA explained that 'an absolute owner in fee simple does not hold two estates, a legal estate and an equitable estate. He holds only the legal estate, with all the rights and incidents that attach to that estate. If he were to execute a declaration that he held the land in trust for himself absolutely, the declaration would be of no effect; it would give him no separate equitable rights': [1980] 1 NSWLR 510, 519 ('*DKLR Holdings*'). It follows that the reference to rights by Higgins J must refer to the rights of some other party to that property. Although there are some suggestions that a trust does not need to have any property attached to it (see, eg, *Giumelli v Giumelli* (1999) 196 CLR 101, 112 [4] (Gleeson CJ, McHugh, Gummow and Callinan JJ), this is limited to constructive trusts where a defaulting fiduciary is required to account as if they were a trustee: *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 290 [47] (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

57 *Chief Commissioner of Stamp Duties for New South Wales v Buckle* (1998) 192 CLR 226, 245 [47] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

58 *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 367 (Stephen, Mason, Aickin and Wilson JJ).

59 *Trustee Act 1925* (ACT) s 95; *Trustee Act 1925* (NSW) s 95; *Trustee Act 1980* (NT) s 44; *Trusts Act 1973* (Qld) s 102; *Trustee Act 1936* (SA) s 47; *Trustee Act 1898* (Tas) s 69; *Trustee Act 1958* (Vic) s 69; *Trustees Act 1962* (WA) s 99.

60 *Trustee Act 1925* (ACT) s 86(1); *Trustee Act 1925* (NSW) s 86(1); *Trustee Act 1980* (NT) s 50; *Trusts Act 1973* (Qld) s 77; *Trustee Act 1936* (SA) s 57; *Trustee Act 1898* (Tas) s 53; *Trustee Act 1958* (Vic) s 68; *Trustees Act 1962* (WA) s 76.

61 *Karger v Paul* [1984] VR 161, 164 (McGarvie J).

consideration as to whether to exercise that power,[62] and to exercise that power for the purpose for which it was conferred.[63] The weight of authorities discusses these obligations specifically in relation to a trustee's power or discretion, and not their rights.[64] One can reason by exclusion that these obligations do not apply to limit the trustees in exercising their rights. Therefore, it might be possible to distinguish between a trustee's rights and powers on the basis that only the latter are coupled with these obligations.

However, this approach categorises the functions of trustees based on the different legal consequences that attach to rights and powers. This is circular because the definition is dependent on the consequences that apply to each function, yet there is no convincing explanation as to why these consequences should apply to some functions of a trustee and not others. The clearest explanation as to why a trustee's powers are bundled with these obligations is that they are conferred on the trustee in their fiduciary capacity.[65] However, it is unclear why this is not equally true of the rights conferred on a trustee, which are also intimately and uniquely connected with their office of trusteeship. As I argue in greater detail in Part IV(B), these limitations can and should also apply to the rights of a trustee, and not just their discretionary powers. If that argument is accepted, it becomes unconvincing to delineate rights and powers based on the latter being limited in some way as a result of the trustee's fiduciary position.

D *Hypothesis Three - Benefit to the Trustees or Beneficiaries*

An alternative way of distinguishing between rights and powers is by considering whether it operates to benefit the trustee, or the beneficiary. In this context, I use the term 'benefit' in its non-technical sense, as opposed to the concept of a beneficial interest in trust property.[66] As per this definition, one would classify the rights of a trustee as elements of trusteeship that act to their benefit. On the other hand, the powers of a trustee would be granted to allow them to manage and administer the trust in the interests of the beneficiaries. This position accords with the ordinary

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62 *Partridge v The Equity Trustees Executors and Agency Co Ltd* (1947) 75 CLR 149, 164.

63 *Re Paulings Setttlement Trusts [No 1]* [1964] Ch 303 334-5 (Willmer LJ).

64 *Karger v Paul* [1984] VR 161, 163-166 (McGarvie J); *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 427 (Mahoney JA); *Tonkin v Western Mining Corporation Ltd* [1998] WASCA 101; *A-G (Cth) v Breckler* (1999) 197 CLR 83, 115 [58] (Kirby J); *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* [2001] NSWSC 405, [76] (Palmer J); *Fitzwood Pty Ltd v Unique Goal Pty Ltd* (2001) 188 ALR 566, 606-7 [152] (Finkelstein J); *Travel Compensation Fund v Fry* [2002] NSWSC 104, [204] (Austin J); *Tambree v Travel Compensation Fund* [2004] NSWCA 24, [75] (Sheller JA); *Birdsall v Motor Trades Association of Australia Superannuation Funds Pty Ltd* (2015) 89 NSWLR 412, 414 [8] (Basten JA); *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck* (2016) 334 ALR 692, 719 [136] (Bathurst CJ).

65 *Whishaw v Stephens* [1970] AC 508, 518 (Lord Reid).

66 *DKLR Holdings* [1980] 1 NSWLR 510, 519 (Hope JA).

connotations of the words, and also finds some support in both case law and academic commentary.[67]

The difficulty with this analysis is that traditionally, 'rights' have been designed to more fairly allocate the risks and burdens of trusteeship, as opposed to simply benefitting trustees. Historically, trustees were placed in an unenviable position of assuming all the liabilities and burdens of trusteeship, without any form of relief.[68] The traditional rationale for this is that the role of trustee was seen as 'honorary', and hence not a task where compensation ought to be given.[69] Therefore the default position was that trustees were in the invidious position of suffering all the burdens of trusteeship, while receiving nothing in return. While the rise of professional trustees has put an end to this notion, there are still difficulties with allowing trustees to benefit from their position, because otherwise this would create a potential conflict between their duty as a trustee, and their personal interests.[70]

Against this background, a number of statutory and general law 'rights' were granted to trustees. For example, the statutory right to obtain the advice of the court on the proper administration of the trust was part of a package of reforms that was introduced in response to a proposal that fraudulent breaches of trust be criminally punished.[71] The overarching concern of Lord St Leonards, the sponsor of the bill, was that if such a change was introduced without any accompanying protection for honest trustees, then 'the utmost difficulty would be experienced in getting men of character and station to act in the capacity of trustees'.[72] This was confirmed by the High Court in the *Macedonian Orthodox Church* case, where the plurality rejected an argument that the judicial advice provisions were only directed to the personal protection of the trustee. Rather, the High Court also found that the judicial advice provisions also provide for the 'no less important purpose of protecting the interests of the trust'.[73] This is unsurprising given that the office of trustee exists for the benefit of the beneficiary,[74] which suggests that classifying aspects of trusteeship based on whether they operate for the benefit of the trustee or the trust itself

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67 See, eg, *Mercanti v Mercanti* (2016) 50 WAR 495, 575-6 [397]-[398] (Newnes and Murphy JJA) ('*Mercanti*'). In John Dyson Heydon and Patricia L Loughlan, *Cases and Materials on Equity and Trusts* (LexisNexis Butterworths, 7th ed, 2007), it is stated that 'the trustee also enjoys some more specific rights which protect the trustee from personal loss': 842. In contrast, powers 'enable the trustee to act without breach of trust': ibid. The conferral of a protective aspect, in contrast to the bounds of permissible activities, makes clear that the learned authors draw the distinction on the basis of some benefit being granted to the trustee. See also Peter Cane, 'Rights in Private Law' in Nolan and Robertson (eds) (n 2) 35, 37, where it is suggested that one possible purpose of rights is to 'protect individuals' interests'.

68 See, eg, *Re Johnson* (1880) 15 Ch D 548, 552 (Jessel MR).

69 *Ayliffe v Murray* (1740) 2 Atk 58, 60; 26 ER 433, 434 (Hardwicke LC).

70 *El Sayed v El Hawach* (2015) 88 NSWLR 214, 226-7 [66] (The Court).

71 *Law of Property Amendment Act 1859* (UK) 22 & 23 Vict, c 35, s 30.

72 United Kingdom, *Parliamentary Debates*, House of Lords, 11 June 1857, vol 145, col 1552.

73 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Peter the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66, 94 [72] (Gummow ACJ, Kirby, Hayne and Heydon JJ) ('*Macedonian Orthodox Church*').

74 *Letterstedt v Broers* [1884] 9 App Case 371, 386 (Lord Blackburn).

is unsustainable. Similarly, authorities rationalising the right of indemnity have focussed on the perspective of the beneficiary, and not the trustee. *Hardon v Belilios* explained that the 'plainest principles of justice require that the cestui que trust [the beneficiary] who gets all the benefit of the property should bear its burden'.[75] This justification has been repeated a number of times,[76] and in some cases has been described as an example of limiting the potential for the beneficiary's unjust enrichment.[77] Critically, the authorities have focussed on the unfairness of the beneficiary being able to have property managed in their own interests without bearing any burdens of the cost of doing so. The right of trustees to be indemnified for expenses incurred in managing the trust was not justified on the basis that the trustee deserved a benefit from their role.

On the other hand, the reasoning that suggests that the 'powers' of a trustee may be granted for the purpose of properly administering the trust may equally be applied to every aspect of trusteeship. In *Mercanti v Mercanti*, the Western Australia Court of Appeal considered whether the appointment of a trustee pursuant to a trust deed was a fraud on the power.[78] The majority began by considering the relevant provisions of the trust clause to determine its proper scope. In doing so, they made the observation that a 'power of this kind conferred in a trust instrument has generally been construed as having been conferred by the settlor not for the purpose of advancing the personal interest of the appointer … but rather for the due execution of the trusts'.[79] While the case cites a number of previous decisions where a power of appointment was specifically construed to conform with this purpose,[80] there is no reason why other kinds of clauses in a trust instrument should not be construed in a similar way. While the majority acknowledged that a particular trust instrument needs to be construed based on its terms,[81] they also acknowledged that the 'office of trustee only exists for the benefit of the beneficiaries'.[82] Taken at face value, this statement suggests that it is not possible to draw a broad distinction between aspects of trusteeship that exist to protect the interests of the beneficiary, and those that apply to the trustee. However more importantly, this principle potentially forms part of the context that the court considers when construing any clause in the trust instrument.

When read in this light, it follows that the rights of a trustee were not granted to confer a benefit on trustees. Rather, their true purpose was to ameliorate the substantial burdens placed on a trustee that they would not otherwise suffer. As a matter of logic, removing a detriment could be

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75 *Hardon v Belilios* [1901] AC 118, 123 (Lord Lindley).

76 See, eg, *Mahoney v McManus* (1981) 180 CLR 370, 388 (Brennan J); *J W Broomhead (Vic) Pty Ltd v J W Broomhead Pty Ltd* [1985] VR 891, 936 (McGarvie J); *Paul A Davies (Australia) Pty Ltd v Davies* [1983] 1 NSWLR 440, 450 (Hutley JA).

77 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 256-257 (Deane J).

78 *Mercanti* (2016) 50 WAR 495, 574 [392] (Newnes and Murphy JJA).

79 Ibid 576 [397].

80 Ibid 576 [397] fns 69-74.

81 Ibid 576 [398].

82 Ibid 576 [397].

characterised as being equal to the conferral of a benefit. However, the key point is that these rights were not conferred to benefit a trustee. Rather, they were done to relieve them of a burden to ensure that trusts are managed in a proper and fair manner. Put this way, the rights of a trustee can be seen as just another aspect that allows them to properly administer the trust. Any 'benefit' granted to them is incidental, and certainly not the main justification for conferring those rights.

III A Unified Concept of Rights and Powers

In Part II, I examined a number of different distinctions that may exist between a trustee's rights and powers. Ultimately, I concluded that none of them are particularly convincing. In this part of the article, I make two arguments in support of my central thesis – which is that these terms should not be understood as conveying a technical distinction between different functions of a trustee. In other words, there is no reason in principle why these should be treated as two distinct concepts. Of course, the language of referring to the rights and powers of a trustee is entrenched and unlikely to change. However, these terms should only be understood as labels of convenience and not conveying any conceptual difference.[83]

A *Source and Development*

The first reason is that both a trustee's rights and powers find their origin from the same sources – namely, the trust instrument, as supplemented by both the general law and statute. Fixating on whether they are exercising a right or power distracts from the ultimate question – what is a trustee lawfully permitted to do in their capacity as trustee?

When determining whether a trustee is authorised by the trust instrument to act in a certain way (either by exercising a power, or asserting a right), courts have approached the question as simply being one of construction.[84] When seen this way, the question of classifying a trustee's actions as a power or right, or whether that distinction exists in the first place, becomes immaterial. Instead the issue is what the trust instrument actually authorises the trustee to do. A similar consideration arises with statutory provisions that empower a trustee to act in certain ways. In these cases, the approach has been simply one of ordinary statutory construction. By way of example, the High Court in *Macedonian Orthodox Church* considered the operation of the judicial advice provisions.[85] In short, the

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83 Contrast the statements of Lord Justice Millett regarding the terminology of 'equitable compensation' being equated with 'common law damages masquerading under a fancy name': Peter J Millett, 'Equity's Place in the Law of Commerce' (1998) 114 *Law Quarterly Review* 214, 225. Drawing on a similar theme, my argument is that the rights and powers of a trustee can continue to be named as such so long as it is understood that there is no conceptual difference between them.

84 See, eg, *Mercanti* (2016) 50 WAR 495, 576 [398] (Newnes and Murphy JJA); *Trim Perfect Australia Pty Ltd (in liq) v Albrook Constructions Pty Ltd* [2006] NSWSC 153, [23]-[24] (Austin J); *Wright v Stevens* [2018] NSWSC 548, [125] (Hallen J).

85 *Macedonian Orthodox Church* (2008) 237 CLR 66.

case considered orders made by Palmer J in the Supreme Court of New South Wales following a judicial advice application.[86] The Court of Appeal overturned these orders on the basis that, inter alia, Palmer J failed to consider material considerations when making these orders.[87]

The High Court is decision is significant because it confirmed that to determine the functions of a trustee, the question is ultimately one of construction. This is manifested in two ways. First, the substantive portion of the plurality judgment begins with a detailed overview of the relevant provisions of the *Trustees Act 1925* (NSW).[88] Critically, this overview is accompanied by a number of statements that emphasis the primacy of the statutory provision when determining the scope of the trustee's ability to seek judicial advice, and the jurisdiction of the court to do so.[89] Second, the High Court was critical of any attempt to depart from these principles. For example, one of the grounds of appeal raised in the High Court was that Palmer J considered the applicant's financial position to sustain legal proceedings when that fact had not been proven.[90] However, the plurality held that a requirement that any fact relied upon in a judicial advice application must be proven found 'no support in the language of the Act'.[91] Equally, the High Court was critical of the Court of Appeal's conclusion that judicial advice proceedings were an inappropriate vehicle when it pre-empted future issues that may arise in litigation on the basis that it was 'inconsistent with the statutory language'.[92]

This analysis may seem trite. Observing that the functions of a trustee find their source in either the trust instrument, statute or the general law is not a novel or unique conclusion. Determining the scope of these functions with reference to orthodox principles of interpretation is not a radical conclusion either. However, the above analysis suggests that it will be difficult to find a simple theme that unites the 'rights' on the one hand, and the 'powers' on the other, of a trustee. This is because the High Court's decision in the *Macedonian Church Case* suggests that the scope of each function ultimately depends on a careful construction of the relevant instrument. It follows that it may be difficult to develop an overarching

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86 *Macedonian Orthodox Church* (2008) 237 CLR 66, 72 [5] (Gummow ACJ, Kirby, Hayne and Heydon JJ), citing *Re Application of Macedonian Orthodox Community Church St Petka Inc [No 3]* [2006] NSWSC 1247; *Re Application of Macedonian Orthodox Community Church St Petka Inc [No 4]* [2007] NSWSC 254.

87 *Macedonian Orthodox Church* (2008) 237 CLR 66, 79 [25] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

88 Ibid 81-95 [33]-[76] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

89 See, eg, statements that 'as this Court has often emphasised, close attention must be paid to the provisions which found the jurisdiction which is invoked': 85-6 [44]; 'the ultimate duty of the judges below was to be derived from the applicable legislation of the Parliament of New South Wales': 88 [53]; '[i]t is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words': 89 [55], quoting *Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404, 421.

90 *Macedonian Orthodox Church* (2008) 237 CLR 66, 95 [75] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

91 Ibid 96 [81] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

92 Ibid 101 [103] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

taxonomy because the characteristics of a trustee's function depend so heavily on the particular instrument that authorises it.

This position is analogous to comments made about the terminology of contingent conditions in contract law. There has been persistent (but not necessarily accepted) High Court dicta questioning the utility of the terms 'condition precedent' and 'condition subsequent'.[93] For these judges, the effect of a clause is simply a consequence of its proper construction, with the label given to it leading to confusion rather than clarity. Similarly, my position is that the functions of a trustee, whether they are conventionally called rights or powers, flow from a proper construction of the trust instrument and relevant trustee legislation, coupled with attention to the relevant case law. As a matter of principle, they should not be treated as distinct legal categories because they ultimately arise from the same legal sources and process of analysis.

B *Piecemeal Historical Development*

The second reason is that when one traces the historical development of common incidents of trusteeship, it becomes clear that there is no common thread that unites the rights and powers of a trustee and distinguishes them from each other. Rather, each right or power developed in a piecemeal manner in isolation from others. The only theme is that they developed on the basis that they were deemed beneficial to assist in the administration of the trust. However, this theme is far too general to form the basis of a useful taxonomy. It follows that any attempt to find a unifying theme ignores the unique history of various aspects of trusteeship. To support this argument, I consider the history of four functions of trusteeship: compounding debts; leasing property; obtaining judicial advice; and paying money into court. I chose these four examples as they are relatively diverse. After examining the history of these abilities, it becomes clear that they developed in response to unique temporal concerns. It follows that any attempt to neatly categories trustee functions as 'rights' or 'powers' ignores that their development was piecemeal and ad hoc.

1 *Power to Compound Debts*

Legislation in every jurisdiction permits a trustee to compound a debt, which permits them to reach an alternative arrangement with a debtor in satisfaction of the original debt.[94] The ability to do so is longstanding at general law, and predated statutory intervention by almost 200 years. The earliest reported case that considered this issue is *Griffith v Jones* decided

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93 *Meehan v Jones* (1982) 149 CLR 571, 592 (Mason J); *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537, 541 (Gibbs CJ), 556 (Wilson J). The difficulties with these terms were most notably explained in Samuel J Stoljar, 'The Contractual Concept of Condition' (1953) 69 *Law Quarterly Review* 485.

94 *Trustee Act 1925* (ACT) s 49; *Trustee Act 1925* (NSW) s 49; *Trustee Act 1980* (NT) s 21; *Trusts Act 1973* (Qld) s 44; *Trustee Act 1936* (SA) s 28; *Trustee Act 1898* (Tas) s 24; *Trustee Act 1958* (Vic) s 19; *Trustees Act 1962* (WA) s 42. These provisions are not identical. For an outline of how they differ, see Heydon and Leeming (n 9) 483-4 [20-46].

in 1687.[95] In that case, it was held that the executor of an estate would be justified in compounding any debt 'if they should think fit' in circumstances where 'the Debtors [are] poor, but propose to pay as far as they are able'.[96] The judgment does not disclose whether there were any limitations on this principle, or on what basis it was found that trustees had the ability to compound debts in this manner.[97] The principle began to more closely resemble its modern formulation in *Blue v Marshall*, decided in 1735.[98] In that case, rent in arrears was owed to the trust. However, the tenant had become insolvent, and as a result the trustee released them from that debt in exchange for them giving up possession of the property.[99] Lord Chancellor Talbot held that this was permissible. His Lordship began by drawing a distinction between trust property actually received by the trustee, and a debt owed to them in that capacity. In the former case, a trustee is required to strictly account for any property that came into their hands. However, the arrears in rent in this case 'were neither received by them', and there was a chance that the trustee 'could never have gotten them'.[100] It appears that Lord Chancellor Talbot reasoned from this premise to relax the usually strict rules of accounting that apply to a trustee.[101] In particular, his Lordship described the compounding in this case was 'prudent', because securing the tenant's release of possession prevented the trustee from having to incur unnecessary expenses to eject the tenant. Later cases confirmed this understanding that the power was based on the principles of good management of the trust property.[102]

It follows from this analysis that the ability to compound debts was based on the common-sense observation that where a debtor of a trust is insolvent, the trust may be best managed by compounding the debt to reach some kind of arrangement with the debtor. This was found even in the absence of an express clause permitting the trustee to compound debts. Against this background the *Conveyancing and Law of Property Act 1881* was introduced.[103] Section 37(2) of the Act gives trustees the power to compromise and compound claims in a number of circumstances, so long as it seems 'expedient' and they act in 'good faith'. The long title of the Act explains that its purpose included vesting in trustees' powers that are commonly conferred on them by the trust instrument. Given that this power was commonly implied by the courts, it follows that the true effect of this

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95 (1687) 2 Jac 353; 21 ER 697.

96 (1687) 2 Jac 353, 353; 21 ER 697, 697.

97 This may be a product of nominate law reports of the time being of a 'variable quality', and hence neglecting to report these aspects of the judgment: see Justice Steven Rares, 'The Future of Law Reporting in Australia Forum – Introductory Remarks' (Speech delivered at the Future of Law Reporting in Australia Forum, Brisbane, 2 August 2012) [7].

98 (1735) 3 P Wms 381; 24 ER 1110.

99 (1735) 3 P Wms 381, 381-2; 24 ER 1110, 1110.

100 (1735) 3 P Wms 381, 383; 24 ER 1110, 1111.

101 For a history of a trustee's accounting obligations, and in particular the strictness of those requirements, see Matthew Conaglen, 'Equitable Compensation for Breach of Trust: Off *Target*' (2016) 40 *Melbourne University Law Review* 11.

102 See, eg, *Forshaw v Higgins* (1857) 8 De G M & G 827; 44 ER 609.

103 *Conveyancing and Law of Property Act 1881* (UK) 44 & 45 Vict 1, c 41.

Act was to clarify that trustees had this power. This provision was then carried through in future legislation.[104]

Therefore, even though this power is now sourced from statutory provisions, it finds its historical basis in the general law. The power was rationalised on the basis that the trust can sometimes be best managed by compounding claims against it, which in turn would allow at least part of the debt to be recovered and prevent unnecessary expense in commencing a suit. Legislation then sought to codify that power and provide certainty to trustees. Therefore, this aspect of trusteeship should be understood as being on based the observation that sometimes, compounding a debt or claim is in the best interests of the management of the trust.

2 *Power to Lease*

There are now statutory provisions in every jurisdiction (except Tasmania and the Northern Territory) that confer a limited power to lease on trustees.[105] However, the history of these provisions is slightly more obscure. Early cases appear to assume, without explicitly stating, that trustees of real property have the power to grant leases over that property.[106] This was hardly surprising. From the middle of the 18th century until the 1960s, almost all agricultural activities were undertaken by tenants, as opposed to the landowners themselves.[107] In addition, a large proportion of prime agricultural land was held on trust in estates.[108] In combination, giving trustees the power to lease land was necessary to ensure that it was properly utilised. A failure to do so could hardly be regarded as an example of 'provident management'.[109]

In light of this, early cases focussed on the propriety of the length of any lease that had been granted. As an extreme example, in *Attorney General v Green*,[110] Lord Chancellor Eldon considered the case of trust property that was leased for 999 years at a rent extremely below its actual value. There was no difficulty in concluding that granting a lease of this length, and at such a low rent, was not a proper management of the trust property. Four years later, in *Attorney General v Owen*,[111] his Lordship considered a case where farmland was leased for 99 years. Again, it was

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104 *Trustee Act 1893* (UK) 56 & 57 Vict 1, c 53, s 21; *Trustee Act 1925* (UK) 15 & 16 Geo 5, c 19, s 21.

105 *Trustee Act 1925* (ACT) s 36; *Trustee Act 1925* (NSW) s 36; *Trusts Act 1973* (Qld) s 32(1)(d); *Trustee Act 1936* (SA) s 25C; *Trustees Act 1962* (WA) s 27(1)(d). In Victoria, this power is conferred through a suite of statutory provisions that operate together, including: *Property Law Act 1958* (Vic) ss 35(1), 40; *Administration and Probate Act 1958* (Vic); *Settled Land Act 1958* (Vic) ss 41-43.

106 See, eg, *A-G v Owen* (1805) 10 Ves 555; 32 ER 960; *Re Shaw's Trusts* (1871) 12 LR Eq 124; *Earl of Egmont v Smith* (1877) 6 Ch D 469.

107 Avner Offer, 'Farm Tenure and Land Values in England, c 1750-1950' (1991) 44 *Economic History Review* 1, 1.

108 Estimates range between one half to two thirds: see John C Morton, *A Cyclopedia of Agriculture* (Blackie and Son, 1855) vol 2, 193.

109 *A-G v Owen* (1805) 10 Ves 555, 559; 32 ER 960, 961 (Lord Chancellor Eldon).

110 (1801) 6 Ves 452; 31 ER 1140.

111 (1805) 10 Ves 555; 32 ER 960.

held that this lease was not a proper use of trust property. However, his Lordship declined to lay down a general rule for when a lease could be said to have been properly granted.[112] This question as to whether there was a limit on the length of lease granted by a trustee was further complicated by the decision in *Wood v Patteson*,[113] which suggested that 'if the trustees ... have the power of leasing for ten years, I see no reasons why they should not have the power to lease for sixty'.[114] Therefore, trusts law had reached an impasse – on the one hand, leasing trust property was properly recognised as 'almost essential to the beneficial management' of the trust.[115] However on the other hand, there was uncertainty as to how long a trustee could permissibly lease trust property for. The Australian trustee legislation was implemented against this background. In particular, the earliest provisions from New South Wales were implemented in 1925 to clarify and extend the time that a lease could permissibly be granted to three or five years, depending on whether the trustee was empowered to manage the estate.[116]

Understood in this context, the statutory provisions permitting a trustee to lease trust property take on a different complexion. They did not simply grant a trustee an additional power to administer trust property. That power was already well accepted, likely as a necessary consequence of the economic position of England at the time. Rather, the statutory provisions provided further certainty for trustees about the extent of their powers. They did so by codifying and extending the scope of a well-accepted power.[117] The power to lease, as found in general law, was assumed to exist on the basis that it was necessary to ensure proper management of the trust.

3 *Right to Seek Judicial Advice*

Statutory provisions permitting a trustee to approach the court for judicial advice were designed to allow for proper management of a trust by alleviating the burden placed on trustees. The ability to seek the court's advice aimed to remove the disincentives that dissuaded suitable individuals from acting as a trustee.[118] The action finds its statutory basis in the *Law of Property Amendment Act 1859* (UK),[119] more commonly known by the name of its sponsor as Lord St Leonards' Act. However, much like the statutory provisions on compounding debts and leasing trust property, it is arguable that the Act did not confer substantive rights on a trustee above and beyond the general law. In *Application of Macedonian*

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112 (1805) 10 Ves 555, 561, 559; 32 ER 960, 962.
113 (1847) 10 Beav 541; 50 ER 690.
114 (1847) 10 Beav 541, 544; 50 ER 690, 691 (Lord Langdale MR), quoted in *Re Shaw's Trusts* (1871) 12 LR Eq 124, 126 (Sir John Wickens VC).
115 *Umphelby v Grey* (1899) 5 Arg LR 66, 70 (A'Beckett J).
116 New South Wales, *Parliamentary Debates*, Legislative Council, 24 September 1924, 2186 (F S Boyce).
117 Ibid.
118 United Kingdom, *Parliamentary Debates*, House of Lords, 11 June 1857, vol 145, col 1552.
119 22 & 23 Vict, c 35, s 30.

Orthodox Community Church St Petka Inc [No 2], Palmer J made the following observation regarding the procedure of the Chancery courts:[120]

> Formerly, under the old Chancery practice, if a trustee wished to obtain the direction or opinion of the court on a matter of administration or management or as to a question of construction of the trust instrument, the trustee had to commence an administration suit. The trustee would raise on the pleadings in the suit the particular point upon which the court's advice was sought. Having obtained the court's direction or advice on that point, the trustee would then obtain a stay of all further proceedings in the administration suit. To commence a general administration suit was, however, often a cumbersome and expensive exercise as all persons interested in the estate had to be brought before the court, accounts had to be taken and enquiries had to be ordered, none of which was necessary if all that was in question was a point of construction of the trust instrument or what should be done in the management or administration of the trust assets in a particular situation.

In other words, there was a pre-existing mechanism that permitted trustees to seek advice on the administration of a trust before the institution of Lord St Leonards' Act. This context is critical because it helps clarify the true effect of that Act. I submit that it was not intended to confer a new, additional right on a trustee. Rather, it was implemented to simplify the pre-existing mechanism that a trustee had to rely upon to receive judicial guidance on the administration of a trust. This purpose is made clear in the first reading speech of the Act, where Lord St Leonards himself stated that implementing this 'summary right by petition' would 'be a great benefit' by substituting a cheap and simple process of determining questions'.[121]

4 *Payment into Court*

The final example I will consider concerns the provisions allowing a trustee to pay money into court. The trustee legislation in each state and territory provides for this mechanism.[122] The main purpose of the provision as currently instituted is to allow a trustee to retire from their obligations with respect to the trust (or the part of the trust that is deposited with the court) in limited circumstances. These circumstances include where there is doubt about who is entitled to the trust property,[123] or where a discharge is impossible. In line with previous examples, these statutory provisions were based on earlier attempts to improve the administration of trust assets.

The provisions in the Australian trustee legislation were based on the *Trustees Act 1893* (UK),[124] which in turn was based on legislation first

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120 (2005) 63 NSWLR 441, 445 [20]. This proceeding was related to the High Court appeal in *Macedonian Orthodox Church* (2008) 237 CLR 66, but was not the judgment under appeal in that case.

121 United Kingdom, *Parliamentary Debates*, House of Lords, 11 June 1857, vol 145, col 1557.

122 *Trustee Act 1925* (ACT) s 95; *Trustee Act 1925* (NSW) s 95; *Trustee Act 1980* (NT) s 44; *Trusts Act 1973* (Qld) s 102; *Trustee Act 1936* (SA) s 47; *Trustee Act 1898* (Tas) s 48; *Trustee Act 1958* (Vic) s 69; *Trustees Act 1962* (WA) s 99.

123 *Lake v Bayliss* [1974] 1 WLR 1073, 1077 (Walton J); *Harmer v Commissioner of Taxation* (1991) 173 CLR 264, 272 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ).

124 56 & 57 Vict, c 53.

introduced in 1847. That Act, the *Trustees Relief Act*,[125] provided that a trustee, 'on filing an affidavit', may 'pay ... with the Privity of the Accountant General of the High Court of Chancery, into the Bank of the England'.[126] However, from at least 1725, the Court of Chancery already had the power to take custody of property after a suit.[127] Therefore the Act did not grant trustees with a newfound ability to dispense with trust property for safekeeping. The ability to do so was long standing, as was recognised by Lord Chancellor Eldon, who spoke in support of the Act.[128] Rather, the Act was designed to minimise the expenses incurred by a trustee who sought to pay money into court by giving them a statutory right to do so. Before the introduction of the statutory scheme, a trustee who wanted to pay money into court was required to bring a suit seeking appropriate relief of the court, namely, an order that such a payment be made.[129] However, bringing such a suit was costly and time intensive. On that basis, the right to pay money into court was arguably more so a procedural reform to promote convenience, rather than the conferral of a novel statutory right on trustees. It was driven by a concern that trust funds were being squandered on unnecessary suits brought before the Chancery in pursuit of a remedy that could easily be replicated by statute.

Given that this analysis is limited to only four examples, I am hesitant to draw any firm conclusions. However, a number of observations can be made from this study. First, these incidents of trusteeship are commonly justified on the basis that they promote good administration of the trust. For example, the developments that I have outlined have been justified on the basis that they are 'prudent',[130] 'provident',[131] or promote efficiency.[132] Far from there being any apparent doctrinal basis for distinguishing a trustee's rights in comparison to their powers, they appear to promote a common goal. Second, although statutory intervention is now common-place, in these examples the statutes merely sought to codify and streamline pre-existing aspects of trusteeship that existed at general law. As a result of this, the statutory provisions that I have examined were implemented against the background of the general law at the time. The uniqueness of these historical contexts makes it even more difficult to find a basis for a taxonomy. Finally, the historical cases and legislation that developed these principles conspicuously lack reference to the terminology of 'rights' or 'powers'. This suggests that the terminology of 'rights' and 'powers' of a trustee should only be seen as labels that crystallised as a convention over time, and not as denoting any conceptual differences.

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125 *Trustees Relief Act 1847* (UK) 10 & 11 Vict, c 68.

126 Ibid s 1.

127 *Rules and Orders of the High Court of Chancery, for Regulating the Practice of the Said Court: As Publish'd from the 30th June 1625, to the Present Time* (John Worrall, 4th ed, 1739) 213-14.

128 United Kingdom, *Parliamentary Debates*, House of Lords, 1 July 1847, vol 93, col 1087-8.

129 Examples of this include *Ex parte Clayton; Re Starkie* (1826) 1 Russ 476; 38 ER 184 and *Re Eagle* (1847) 2 Ph 201; 41 ER 919.

130 *Blue v Marshall* (1735) 3 P Wms 381, 383; 24 ER 1110, 1111 (Talbot LC).

131 *A-G v Owen* (1805) 10 Ves 555, 559; 32 ER 960, 961 (Lord Chancellor Eldon).

132 United Kingdom, *Parliamentary Debates*, House of Lords, 11 June 1857, vol 145, col 1557.

IV Implications of Removing this Distinction

The distinction between the rights and powers of a trustee has been described as a question of considerable 'semantic and jurisprudential complexity'.[133] However, I submit that the question is more than one of just semantics. In this section, I outline two consequences that follow if the distinction between a trustee's rights and powers is abandoned. The first is the impact that this will have on questions of statutory construction, and the second is the broader application of discretionary power principles.[134]

A *Questions of Construction*

A number of statutes refer to the 'powers' of a trustee. Determining the precise scope of a trustee's powers, and whether they are different from a trustee's rights, can assist in construing the meaning of this term. There is a well-accepted presumption of construction that when technical legal terms are used in legislation, they should be given that technical meaning.[135] Before discussing this principle in more detail, and whether it is applicable, I will outline two examples of where this question might arise.[136]

The first example is section 197 of the *Corporations Act 2001* (Cth), which outlines when a director will be personally liable for debts and obligations that a corporation incurs when acting as a trustee. The position is that the director (as opposed to the corporation) is responsible for any such liability if the corporation cannot discharge it, and the corporation is not entitled to be fully indemnified 'solely' because of one or more of the following:[137]

(i) a breach of trust by the corporation;
(ii) the corporation's acting outside the *scope of its powers as trustee*;
(iii) a term of the trust denying, or limiting, the corporation's right to be indemnified against the liability.

The relevant question for this article is what is meant by the corporation's 'powers as trustees' in subsection 197(1)(b)(ii). This is important because the subsection is phrased as being exclusive – that is, a director is only liable if the corporation cannot be indemnified because one of the conditions have been met. If the phrase is construed narrowly, and only refers to the *powers* of a trustee in the strict sense, then it follows that the subsection would not be satisfied if the trustee corporation instead incurred the liability by exercising a *right* in such a way that it was not

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133 D'Angelo (n 1) 24 [6.38].
134 In the sense described in *Karger v Paul* [1984] VR 161 especially at 163-166 (McGarvie J).
135 See Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 160-3 [4.13]-[4.14] and the authorities cited therein.
136 For a further discussion of the complex relationship between trusts and statutes, see Robert French, 'Trusts and Statutes' (2015) 39(2) *Melbourne University Law Review* 629.
137 *Corporations Act 2001* (Cth) s 197(1)(b) (emphasis added).

entitled to be indemnified. To my knowledge, no case has ever considered this issue.

The most obvious candidate for when this might arise is the trustee's ability to approach the court to seek advice.[138] Obviously, making an application for judicial advice involves cost that must be borne. The trustee may be indemnified out of trust funds for these costs.[139] However, there are a number of instances when an indemnity will be refused. These include situations where costs have been unreasonably incurred during the course of proceedings,[140] when applications have been made in a piecemeal manner (instead of all at once),[141] or when litigation was commenced unreasonably.[142] If a corporate trustee approaches the court seeking judicial advice on the performance of a trust, but their right to an indemnity is refused because of one of these discretionary factors, will the director be personally liable for those costs? As I outlined in Part II(A), the ability to approach the court is traditionally understood as a right. The issue of construction is whether it is considered one of the powers of a trustee for the purposes of section 197(1)(b)(ii). This is a threshold question that must be considered before the provision applies, because it may be unnecessary to determine whether the trustee acted beyond the 'scope' of their 'powers' if they were not exercising a power in the first place.

A second example is the 'best interests' covenant in section 52(2)(c) in the *Superannuation Industry (Supervision) Act 1993* (Cth). That provision implies a non-derogable covenant into the governing rules of a superannuation trust that requires the trustee to 'perform the trustee's duties and exercise the trustee's powers in the best interests of the beneficiaries'. Similar issues of construction arise – namely, is the reference to 'powers' technical, such that the best interests obligation does not apply when a trustee is exercising their rights. One practical example of this issue is whether a trustee charging fees as permitted under the trust instrument is exercising a right or a power. If it is the latter, and the best interests obligation does apply, there are legal difficulties as to whether the trustee can actually charge those fees. It is difficult to see how charging the members of a superannuation fund fees can ever be in their best interests.[143] One potential response is that the charging of fees by a superannuation fund is a right, not a power, and that the provision in section 52(2)(c) should be interpreted strictly such that it only applies to powers, not rights. However, this requires there to be a clearly understood distinction between rights and

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138 See *Trustee Act 1925* (ACT) s 63; *Trustee Act 1925* (NSW) s 63; *Trusts Act 1973* (Qld) s 96; *Trustee Act 1936* (SA) s 91; *Trustees Act 1962* (WA) s 92.

139 *Gleeson v Fitzpatrick* (1920) 29 CLR 29, 35 (Knox CJ).

140 *Re Price; Price v Church of England Property Trust Diocese of Goulburn* (1935) 35 SR (NSW) 444, 461 (Long Innes CJ in Eq).

141 *Trimble v Kirkland* (1913) 13 SR (NSW) 417, 421 (Simpson CJ).

142 *Dixon v Williams* (1875) 13 SCR (NSW) Eq 7.

143 A recent paper by Nuncio D'Angelo outlines these issues, and presents a number of novel arguments as to how superannuation fees are entirely compatible with this obligation: see D'Angelo (n 1) 24 [6.36]ff. See also Joseph C Campbell, 'Some Aspects of the Civil Liability Arising from Breach of Duty by a Superannuation Trustee' (2017) 44 *Australian Bar Review* 24, 43-4 [3.2.6.1].

powers that informs the interpretation of the Act, and that the ability to charge fees can be classified as one or the other. Again, I do not attempt to resolve this question. I merely flag it to illustrate that the classification of trustee rights and powers has implications beyond academic and taxonomical interest.

Resolving these constructional issues (and any other similar ones that arise) will depend on the specific words and context of the statute in question. However, there is a well-accepted presumption that when words have been judicially construed, they should bear the meaning that has already been given to them by the courts. The Full Federal Court in its recent decision of *WorkPac Pty Ltd v Skene* comprehensively examined the authorities on this point and implicitly devised a two-step process to determine whether this presumption is applicable:[144]

- First, the word or phrase needs to be 'judicially construed' such that it has an 'established legal concept'.[145]
- Second, consideration needs to be given as to whether the presumption has been displaced. Whilst this depends on the circumstances of the particular case, the key issue is whether it is 'artificial' or 'unpersuasive' to conclude that Parliament was conscious of the interpretation such that it should not apply.[146]

In terms of the threshold test as to whether the presumption should apply in the first place, there are compelling arguments that suggest it should not be applicable here. There are a number of authorities that have stated that it is necessary for the term to have an 'established',[147] 'settled'[148] or 'well known'[149] meaning. As a matter of principle, the presumption arises because Parliament is taken to know the state of the law when enacting a statute, and thus the express use of a judicially construed phrase is taken to be an endorsement of existing authority.[150] Logically, Parliament cannot be taken to have endorsed a pre-existing authority when no such authority exists. This limitation is relevant here because to my knowledge, there is no case in Australia that has considered the issue of what, if any, differences there are between a trustee's rights and powers. To the contrary, there is recent academic commentary that has posited that this is still an unresolved question.[151] This would seemingly preclude a court from relying upon this presumption when construing a statute that refers to the rights or powers of a trustee.

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144 [2018] FCAFC 131. To clarify, the Full Court did not specifically set out this two-step test. This is my attempt to synthesis the discussion of these authorities.

145 *WorkPac Pty Ltd v Skene* [2018] FCAFC 131, [107], [110] (The Court).

146 Ibid [108].

147 Ibid [10].

148 *Baini v The Queen* (2012) 246 CLR 469, 484 [42] (Gageler J); *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 325 [8] (Gleeson CJ).

149 *Hewlett Packard Australia Pty Ltd v GE Capital Finance Pty Ltd* (2003) 135 FCR 206, 260 [171] (Allsop J).

150 *WorkPac Pty Ltd v Skene* [2018] FCAFC 131, [107] (The Court).

151 See D'Angelo (n 1) 43-4 [6.38].

However, difficulties arise even if a lower threshold to invoke the presumption is adopted. An alternative reading of the case law is that the meaning of a word can be 'settled' or 'well known' when there is a consistent and uniform usage, even when there is no judicial exegesis of the point. For example, Professor Joseph Campbell has noted that 'if trust lawyer's language was being used … then the trustee, in obtaining indemnity, would be exercising the trustee's *right*, not a trustee's power'.[152] However, I submit that even this lower threshold would arguably not be met. Whilst there is some consistency in the labelling of aspects of trusteeship, there are still a number of cases that refer to them inconsistently. For example, some cases have described a trustee's indemnity as a 'power' that they possess,[153] whereas the prevailing view is that it is a right. Examples exist with other incidents of trusteeship. This inconsistency makes it difficult to assert that that there is a 'settled' conventional meaning, especially in the absence of any clear statement of principle as to how this taxonomy arises.

In any case, it is arguable that the presumption should be displaced when used in relation to trustee's rights and powers because of the artificiality of the terminology. As I have previously outlined,[154] there is no apparent principle that distinguishes a trustee's rights and powers. Instead, the terms are mainly ones of convention, and even then there is inconsistency. The difficulty with relying on this terminology is that it does not provide a taxonomic system that allows for the classification of other, non-conventional aspects of trusteeship. There is authority to the effect that the 'irreducible core' of obligations imposed on a trustee are the duties to perform the trust 'honestly and in good faith' and for the benefit of the beneficiaries.[155] It follows that outside of this relatively narrow set of obligations, a trustee can be granted a broad arrange of abilities in the trust instrument. Examples of novel arrangements include provisions permitting a trustee to divide and distribute assets of one trust fund to other funds;[156] an ability to lend trust funds to any person (including the trustee in their personal capacity), with or without interest;[157] or clauses permitting a trustee to be remunerated for their efforts (above and beyond merely being reimbursed for expenses incurred).[158]

Therefore, even if it is accepted that the terminology of whether a trustee is exercising a right or power is judicially settled by virtue of there being some convention, there is a good reason to reject relying on this

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152 Campbell (n 143) 43-4 [3.2.6.1] (emphasis in the original).

153 See, eg, *Royal Melbourne Hospital v Equity Trustees Ltd* (2007) 18 VR 469, 526 [301] (Bell AJA); *JA Pty Ltd v Jonco Holdings Pty Ltd* (2000) 33 ACSR 691, 710 [71] (Santow J); *Federal Commissioner of Taxation v Bruton Holdings Pty Ltd* (2008) 173 FCR 472, 494 [61] (The Court).

154 See Part II above.

155 Heydon and Leeming (n 9) 334 [16-20] quoted in *Rinehart v Walker* (2012) 95 NSWLR 221, 252 [139]-[140] (Bathurst CJ).

156 *Wright v Stevens* [2018] NSWSC 548, [72] (Hallen J).

157 *Elovalis v Anastasios Vasilios Elovalis as Trustee of Mike's Gardening Trust* [2006] WASC 291, [5] (Master Sanderson).

158 *GDR v EKR* [2012] NSWSC 1543, [32] (White J).

definition because it quickly becomes unworkable when a novel situation arises. By definition, a conventional usage cannot exist for a novel provision in a trust instrument. Without some principle underlying this taxonomy, it becomes useless when trying to apply this definition to new circumstances. Put another way, it is unpersuasive to conclude that Parliament intended to pick up and utilise such a narrow provision from the general law when it is of limited utility when construing and applying the relevant statutory provision. Furthermore, there is an inherent contradiction in assuming that Parliament intended to refer to the common (yet narrow) set of aspects of trusteeship that have accepted terms, when terminology as broad as 'rights' or 'powers' is being used.

B *Application of the Discretionary Power Principles*

It is well accepted that when trustees are granted a discretionary power, there are limitations on how they exercise it. Chief amongst these are the duties to exercise the powers of the trust in good faith,[159] to act upon a proper and genuine consideration as to whether to exercise that power,[160] and to exercise that power for the purpose for which it was conferred.[161] The weight of authorities discusses these obligations as constraining the exercise of a trustee's power or discretion, and not their rights.[162] It seems then that either these obligations do not attach themselves to the exercise of a trustee's rights, or that no case has ever had to consider this issue. However, as I have outlined, there is no clear distinction between the so-called rights and powers of a trustee. As a result, these principles of good faith, proper purpose and genuine consideration should equally apply to every act that a trustee undertakes in that capacity, whether or not it is conventionally described as the exercise of a right or power.

This conclusion is fortified when one considers the basis of these obligations. In *Whishaw v Stephens* (commonly known as *Re Gulbenkian's Settlement*),[163] the Appeal Court considered a clause in a trust instrument that permitted the trustee to pay money to a specified class of beneficiaries. The issue in the case was whether this specified class of beneficiaries was uncertain. Lord Reid conceptualised the issue as one requiring the Court to consider whether the clause required the trustee to act in a manner that was impossible, even with the assistance of the court.[164] The antecedent question then, is what duties are imposed on the

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159 *Karger v Paul* [1984] VR 161, 164 (McGarvie J).

160 *Partridge v The Equity Trustees Executors and Agency Co Ltd* (1947) 75 CLR 149, 164.

161 *Re Paulings Setttlement Trusts [No 1]* [1964] Ch 303 334-5 (Willmer LJ).

162 See, eg, *Karger v Paul* [1984] VR 161, 163-166 (McGarvie J); *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 427-8 (Mahoney JA); *Partridge v Equity Trustees Executors and Agency Co Ltd* (1947) 75 CLR 149, 164 (Starke, Dixon and Williams JJ); *Mercanti* (n 66) 541 [228] (Buss P); *Re Hay's Settlement Trusts; Greig v McGregor* [1982] 1 WLR 202, 209 (Megarry V-C).

163 [1970] AC 508.

164 Ibid 518.

trustee. His Lordship noted that the relevant discretion contained in the clause:[165]

> *is a power given not to the individuals who happen also to be trustees but to the trustees as such so that new trustees duly assumed or appointed can exercise it. In my view it must follow that the trustees are to act in their fiduciary capacity*. They are given an absolute discretion. So if they decide in good faith at appropriate times to give none of the income to any of the beneficiaries the court cannot pronounce their reasons to be bad. And similarly if they decide to give some or all of the income to a particular beneficiary the court will not review their decision. ... But their 'absolute discretion' must, I think, be subject to two conditions. It may be true that when a mere power is given to an individual he is under no duty to exercise it or even to consider whether he should exercise it. But when a power is given to trustees as such, it appears to me that the situation must be different. *A settler or testator who entrusts a power to his trustees must be relying on them in their fiduciary capacity so they cannot simply push aside the power and refuse to consider whether it ought in their judgment to be exercised*.

This quoted passage outlines those core duties placed on a trustee when exercising their power – namely, that they must exercise the power in good faith and with proper consideration. Critically, it appears that these duties follow because they are granted to the trustees in their capacity as trustees, as opposed to 'individuals who happen also to be trustees'.[166] This reasoning is equally applicable to what are commonly called the rights of a trustee. These abilities attach themselves to the office itself, and therefore if there is a new trustee appointed, they will inherit both the powers and rights of that position.[167] This conclusion also follows when one considers the nature of these rights. They clearly attach themselves to the office of trustee itself, as they allow a trustee to reimburse themselves for expenses incurred in the exercise of the trust, allow trust property to be dealt with in a certain way,[168] or allow advice to be sought as to how the trust should be administered (just to name a few). On that basis, and in line with the reasoning quoted above from *Whishaw v Stephens*, it follows that prima facie the trustees should be required to act in their fiduciary capacity when considering the exercise of their rights.

Furthermore, there is no reason in principle why those fiduciary duties would be inapplicable when exercising their rights. One potential argument would be that many trustee rights, such as the right of indemnity, are beneficial to a trustee. This creates a seemingly irresolvable conflict with the fundamental duty of a fiduciary to act solely for the interests of their beneficiary.[169] It follows that, arguably, a trustee's fiduciary obligations do

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165 Ibid (emphasis added).

166 Ibid.

167 *Trustee Act 1925* (ACT) s 6(9); *Trustee Act 1925* (NSW) s 6(8); *Trustee Act 1980* (NT) s 11(3); *Trusts Act 1973* (Qld) s 12(6); *Trustee Act 1936* (SA) s 14(3); *Trustee Act 1898* (Tas) s 13(3); *Trustee Act 1958* (Vic) s 41(7); *Trustees Act 1962* (WA) s 7(6).

168 For example, the right permitting trustee to pay money into court.

169 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 196 [70] (McHugh, Gummow, Hayne and Callinan JJ).

not extend so far as to apply when a trustee is exercising their rights. However, there are three responses to this. First, as posited earlier, it is arguable that many of the rights of a trustee also operate to the benefit of the beneficiaries of a trust.[170] In particular, many of the rights of a trustee were conferred with the ultimate goal of promoting good administration of trusts more broadly. The second response is an alternative to the first – namely, that a trustee's rights do not actively benefit a trustee; rather, they merely eradicate any loss that they may suffer. Fiduciary obligations do not go so far as to require a fiduciary to sacrifice their own self interests in pursuit of their beneficiary's interests. It is true that as a general principle, a fiduciary undertakes to act in the interest of their beneficiary.[171] However, the content of any high level statements must be determined by analysing the specific rules that attach to fiduciaries.[172] In particular, the High Court has held that fiduciary obligations are proscriptive, rather than prescriptive.[173] This has informed the reticence to impose a requirement that a fiduciary take active steps to further the interests of their beneficiaries, even if it comes at their own detriment.[174] They are only prohibited from carrying out certain acts. This framework can be used to justify certain aspects of a trustee's rights. For example, the right of indemnity recognises that a fiduciary generally has no obligation to spend money from their own pocket to benefit a beneficiary. Rather, it is analogous to allowances made for the care and skill exercised by a noncustodial fiduciary.[175] Furthermore, the right of a trustee to approach the court for judicial directions can be conceptualised as recognising that a trustee is not obliged to risk liability in the selfless pursuit of a beneficiary's interests. Understood this way, the rights of a trustee do not conflict with their fiduciary position because they do not per se provide a personal benefit to them. Rather, they merely ameliorate harm that they would otherwise suffer.

The final argument is that even if some aspects of trusteeship are plainly beneficial to a trustee, this can still sit alongside their general fiduciary obligations. It is well accepted that a beneficiary can excuse or authorise

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170 See above at Part II(B).

171 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 196 [70] (McHugh, Gummow, Hayne and Callinan JJ).

172 See John Dyson Heydon, Mark J Leeming and Peter G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 148 [5-015], quoting *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 198-9 [77] (McHugh, Gummow, Hayne and Callinan JJ); *Re Goldcorp Exchange Ltd (in rec)* [1995] 1 AC 74, 98 (Lord Mustill, for the Court); *University of Nottingham v Fishel* [2001] 11 RPC 22, 396 [88] (Elias J); *Coomber v Coomber* [1911] 1 Ch 723, 728-9 (Fletcher Moulton LJ).

173 *Breen v Williams* (1996) 187 CLR 71, 93-4 (Dawson and Toohey JJ), 113 (Gaudron and McHugh JJ). The utility of strictly maintaining this distinction has been questioned: see Heydon, Leeming and Turner (n 172) 210 [5-380]ff; Justice Fabian Gleeson, 'Proscriptive and Prescriptive Duties: Is the Distinction Helpful and Sustainable, and if so, What are the Practical Consequences' (Paper presented at Supreme Court Corporate and Commercial Law Conference, Sydney, 15 November 2017).

174 See *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 197-8 [74] (McHugh, Gummow, Hayne and Callinan JJ), where the plurality rejected an argument that positive steps must be taken by a fiduciary.

175 See the discussion on just allowances in Heydon, Leeming and Turner (n 172) 190-7 [5-280].

acts that would otherwise be in breach of a fiduciary's obligations.[176] However, if this authorisation is given prospectively, it must be construed narrowly.[177] This means that any fiduciary can retain that character and their equitable obligations whilst still being permitted to act in their interests in some instances. It is only within the narrow field of authorisation that they are permitted to pursue their own interests. This means that when authorisation to act in breach of a fiduciary exists, the entire corpus of fiduciary obligations is not displaced. This explains why a trustee acting dishonestly, or in bad faith, is not able to rely on an exculpatory clause in a trust instrument.[178] It follows from this that authorisation to act in breach of certain duties will not allow a fiduciary to contravene every single duty. Thus even if the rights of a trustee do conflict with a fiduciary's overall obligation to act in their beneficiary's interests, this does not detract from the overall fiduciary character of a trustee.

What follows from this analysis is that the principles outlined previously should equally apply to a trustee when exercising their rights, as well as when exercising discretionary powers. Whilst this seems like a radical proposition, much of the existing case law on the exercise of a trustee's rights can be reconciled with this proposition. There is a wealth of case law outlining limitations on when and how a trustee can exercise their rights. I submit that these limitations can readily be understood through the lens of the principles outlined in cases such as *Karger v Paul*, which limit how a trustee is able to exercise their powers.[179] For the purposes of this section, I will consider three incidents of trusteeship that are commonly understood to be rights: the right to indemnity, the right to pay money into court and the right to seek judicial advice on the administration of a trust.

The limitations on the right of indemnity are well settled. In short, the major limitation is that a trustee is only permitted to indemnify themselves from trust assets when they incur a liability from carrying out *authorised* acts.[180] In addition, any expenses must be properly incurred.[181] However, these limitations can also be understood through the lens of cases that limit how a trustee must exercise their powers. The most basic requirement is that a trustee must exercise their discretion for a proper purpose and in good faith. The right of indemnity is clearly circumscribed by this limit, because there are well defined circumstances in which a trustee can claim reimbursement. For example, a trustee will be denied reimbursement when they carry out an unauthorised act. This means the trust will be in no worse position because of that act, in much the same way that a trustee acting

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176 *Maguire v Makaronis* (1997) 188 CLR 449, 466-7 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

177 *Reader v Fried* [2001] VSC 495, [14] (Pagone J); *Leerac Pty Ltd v Fay* [2008] NSWSC 1082, [13] (Brereton J).

178 *Fitzwood Pty Ltd v Unique Goal Pty* (2001) 188 ALR 566, 606-7 [152] (Finkelstein J).

179 *Karger v Paul* [1984] VR 161, 163-166 (McGarvie J).

180 *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 371 (Stephen, Mason, Aickin and Wilson JJ).

181 *Nolan v Collie* (2003) 7 VR 287, 306-7 [51] (Ormiston JA).

improperly will be required to compensate the trust to put it in the same position but for that breach.

Second, a trustee is only permitted to pay money into court in limited circumstances. These include situations where there is doubt about the identity of the beneficiaries,[182] there are conflicting claims to the trust assets amongst beneficiaries or potential beneficiaries,[183] or where a discharge is impossible. These all serve the overriding purpose of giving the trustee the ability to retire from the burdens of trusteeship, but only where it is impossible for them to retire and appoint new trustees.[184] This is analogous to the position that a trustee can only exercise a power for the purpose for which it was granted. As a result, a trustee will not be permitted to pay money into court for an ulterior purpose, such as to avoid personal liability.[185] Furthermore, in the same way that a trustee will be required to compensate the trust for any loss when they act for an improper purpose, a trustee who brings an application to pay money into court that is refused on the basis that it is for an improper purpose may be required to pay the costs of any such application.[186]

Third, a trustee will not be permitted to recover their costs for a judicial advice application where they have litigated unreasonably,[187] incurred unnecessary expenses,[188] or made applications across a number of proceedings when they could and should have been consolidated into one.[189] This is perhaps the most difficult to fit into the framework of the exercise of trustee powers. In the *Macedonian Church Case*, the High Court held that an application for judicial advice is not restricted to non-adversarial proceedings.[190] This had been described as a significant limitation on the court's jurisdiction in this area.[191] Removing this impediment makes it more difficult to argue that an application was made for an improper purpose, because that decision has broadened the circumstances in which it is appropriate to bring an application. It is equally difficult to argue that denying costs to trustees who incur additional costs when making an application is an application of discretionary power principles. This is certainly not a breach of good faith, because mere carelessness is insufficient to support a finding that a trustee was exercising a power mala fides.[192] Rather, the better view is that the discretion given to trustees to approach the court for advice is circumscribed by the

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182 *Lake v Bayliss* [1974] 1 WLR 1073, 1077 (Walton J).

183 *Harmer v Commissioner of Taxation* (1991) 173 CLR 264, 272 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ).

184 Westlaw Australia (n 10) [17.800].

185 See, eg, *Re Leake's Trusts* (1863) 32 Beav 135.

186 *Re Cull's Trusts* (1875) LR 20 Eq 561, 564 (Jessel MR).

187 *Dixon v Williams* (1875) 13 SCR (NSW) Eq 7.

188 *Re Price; Price v Church of England Property Trust Diocese of Goulburn* (1935) 35 SR (NSW) 444, 461 (Long Innes CJ in Eq).

189 *Trimble v Kirkland* (1913) 13 SR (NSW) 417, 421 (Simpson CJ).

190 *Macedonian Orthodox Church* (2008) 237 CLR 66, 104-5 [112]-[116] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

191 Gino E Dal Pont, '1984-2014: The Life of the (Non-Constructive) Trust in the High Court' (2015) 36(1) *Adelaide Law Review* 179, 190.

192 *Jones v Gordon* (1877) 2 App Cas 616, 628-9 (Lord Blackburn).

requirement that they do so reasonably, and with minimal cost to the trust. Put this way, a trustee will be permitted to exercise their discretion to approach the court for advice so long as they do so in a cost effective and reasonable manner. A failure to do so will leave them liable for costs, in the same way that a trustee acting ultra vires will be required to compensate the trust for any loss suffered.

Whilst conceptualising the exercise of a trustee's rights as a discretionary power largely conforms with existing case law, there are some practical consequences of this approach. If a trustee improperly exercises their discretion, then a beneficiary can seek the intervention of the court compelling them to consider the position correctly.[193] If this approach is applied to what are traditionally referred to as rights, then a trustee can also be compelled to consider whether they ought to seek judicial advice, or pay money into court for instance. Of course, there are some circumstances where this may not arise – it is unlikely that a trustee would voluntarily choose to not exercise their right of indemnity, yet a beneficiary would then seek court intervention requiring them to do so. However, on a principled level, this approach provides an overarching framework for controlling the exercise of a trustee's rights.

V Conclusion

I am surprised that there is no existing academic commentary that has considered the differences between a trustee's rights and powers. This question could have significant legal implications. In particular, it may be necessary to understand the scope of the word 'rights' or 'powers' when engaging in statutory interpretation, and it may also affect how trustees are constrained in choosing to exercise a discretion.

In answering this question, this article does not necessarily argue that the language we use to describe the functions of a trustee should change. The phrase 'trustee's right to indemnity' is entrenched alongside a number of other similar labels, and hence is unlikely to change. However, care must be taken so that these labels are not given more weight than they deserve. If the names of trustee functions have legal implications, and are not just labels of convenience, it is necessary to question what those labels mean, and whether they are appropriate. In my view, the prevailing use of these labels is an example of form prevailing over substance. Trustees should be seen as having a sphere of permissible activities, with the boundaries of that set being determined by general law, statute, and the particular trust arrangement. There is no convincing reason why some of these abilities are considered rights, and others powers. To the contrary, there are principled reasons why they should be understood as being one and the same.

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[193] *Re Manisty's Settlement* [1974] Ch 17, 27-8 (Templeman J). See also Justice Richard W White, 'Trusts – An Australian Perspective' (Paper presented at the Higher Courts Seminar, New Zealand, 21 and 24 May 2010) 15 [40].