CRITIQUE AND COMMENT

JUDICIAL ADVICE TO TRUSTEES: ITS ORIGINS, PURPOSES AND NATURE

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The rather strange practice of equity courts providing advice to trustees has a long history. To understand how it evolved, it is necessary to trace its origins and the later development of procedures arising out of the general administration action. It is necessary to identify its purposes in order to understand both the breadth of the power to advise and its limits. Equity's broader supervisory jurisdiction over trusts may be explicable by reference to history. There may be questions whether orders by way of judicial advice involve judicial power or are to be regarded as historical anomalies.

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I INTRODUCTION

I am honoured to present this lecture, which is given annually in recognition of the significant contribution made by Professor Harold Ford to legal education and scholarship in Australia, particularly in the areas of corporate law and trusts law. In the foreword to the book of essays which was published

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in Professor Ford's honour around the time of his 80th birthday, my former colleague Justice Kenneth Hayne said of Professor Ford:

> All of his work has been marked by the restless questioning and intellectual rigour of the scholar. … [I]t has been the measured, incisive, and above all deeply considered, contribution to the fundamental consideration of principle which has marked his work. Few in Australia have made the contribution to legal scholarship that he has made over so many years.[1]

My discussion this evening concerns what some might think is a rather curious practice whereby judges give advice to a trustee on matters concerning the administration of trust estates or the interpretation of trust instruments. This does not sound like the work in which courts are usually engaged, but it has a long history.

II Origins

The origins of this jurisdiction appear to be the adoption, at least from the early 14th century, of 'the feoffment to uses, [the] ancestor of the modern trust', with respect to land.[2] The use was adopted in particular to evade the common law rule which prohibited devises of freehold land:

> The holder of freehold land — the feoffor — would [by this means] convey land during his lifetime to feoffees to uses. They in turn held it for the benefit of the feoffor, or … a third party — the cestui que use — under instructions to convey the land to persons to be named in the feoffor's will.[3]

The common law courts recognised only ownership of property. They would 'neither enforce nor interpret [a] use', except in special circumstances.[4] There therefore came to be widespread adoption of uses with respect to land. By the time Chancery's jurisdiction over uses was established, the 'greater part of the lands in England' are said to have been 'held by feoffees in trust'.[5] However,

[1] Justice Kenneth Hayne, 'Foreword' in Ian Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford* (LexisNexis Butterworths, 2002) vii, vii.

[2] RH Helmholz, 'The Early Enforcement of Uses' (1979) 79(8) *Columbia Law Review* 1503, 1503.

[3] Ibid.

[4] Ibid.

[5] George Spence, *The Equitable Jurisdiction of the Court of Chancery* (V and R Stevens and GS Norton, 1846) vol 1, 443.

this was not until the middle of the 15th century.[6] A question which then arises is how uses could have existed in the interim without judicial support. The answer suggested by one legal historian is that they were enforced by the ecclesiastical courts, as Maitland himself had said.[7] They were considered to fall within the Church's probate jurisdiction. But there were limits to the extent to which ecclesiastical courts would enforce provisions for a testator's estate. As a result, the parties turned to the Chancery courts which began to entertain applications for the enforcement of uses as a matter of conscience.[8]

By the 19th century, the supervisory jurisdiction of the courts was well established and suits for the administration of trusts were commonplace.[9] At this time, Story noted, but did not identify the origins of, the practice of executors or administrators applying 'for aid and relief in the administration of estates' when they 'cannot safely administer the estate, except under the direction of a Court of Equity'.[10] Lord Redesdale LC said that the 'jurisdiction of Courts of Equity in the administration of assets is founded on the principle, that it is the duty of the Court to enforce the execution of trusts'.[11] Lord Eldon LC likewise said that 'the execution of a trust shall be under the controul of the Court'.[12] Such was the control of the equity courts by the mid-19th century that, if a beneficiary asked for general administration, it would be ordered as a matter of course and '[t]he court would order that the trust … be specifically performed under its supervision'.[13]

III The Administration Action

In 1862, a commentator observed that the jurisdiction of the Court of Chancery over trusts

> has always, both in principle and in fact, implied, and been accompanied by, an administrative practice and procedure … which seems to flow, at once and of

[6] Ibid 443–4.

[7] Helmholz (n 2) 1504. See also FW Maitland, 'The Origin of Uses' (1894) 8(3) *Harvard Law Review* 127, 130.

[8] Spence (n 5) vol 1, 443–4; Thomas Henry Haddan, *Outlines of the Administrative Jurisdiction of the Court of Chancery* (William Maxwell, 1862) 4–5.

[9] Peter W Young, Clyde Croft and Megan Louise Smith, *On Equity* (Lawbook, 2009) 912.

[10] Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (Hilliard, Gray & Co, 1836) vol 1, 514 (§ 543).

[11] *Adair v Shaw* (1803) 1 Sch & Lef 243, 262.

[12] *Morice v Bishop of Durham* (1805) 10 Ves Jr 522; 32 ER 947, 954.

[13] *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623, 633 (Young J).

> necessity, from any assumption at all by the Court, of a power to establish or enforce the fiduciary obligation.[14]

The administrative jurisdiction of which this author speaks is defined as 'that branch of the jurisdiction which has to adjust and execute doubtful or recognised rights, rather than to decide between directly hostile litigants'.[15]

By this time, however, the administration action had become a cumbersome and expensive exercise which required all interested persons to be brought before the court and the taking of accounts and enquiries. Charles Dickens' description of the suit *Jarndyce v Jarndyce* is indicative of how it had come to be viewed.[16] His description in *Bleak House* was true for 1827, the year the book was ostensibly set;[17] but by the time it was published in 1852–3,[18] there had been substantial reforms.[19]

Moreover, much of what was involved in the supervised performance of a trust by the court was unnecessary where all that was in question was the construction of the trust instrument or what should be done in the management and administration of the trust assets in the particular circumstances. But, to obtain practical advice of this kind, a trustee would have to commence an administration suit, raise the particular point in the pleadings, obtain a direction or advice on it and then stay further proceedings in the action.[20]

IV *Lord St Leonards' Act* and Court Procedures

There was no alternative process by which a trustee could seek judicial advice on specific questions until Lord St Leonards, who had been appointed Lord Chancellor in 1852,[21] proposed a statute which permitted trustees to file an application for the 'opinion, advice or direction' of a judge on isolated ques-

[14] Haddan (n 8) 4–5.

[15] Ibid 1.

[16] See generally Charles Dickens, *Bleak House* (Penguin Books, 2003).

[17] William S Holdsworth, *Charles Dickens as a Legal Historian* (Yale University Press, 1929) 79.

[18] Ibid.

[19] MJ Leeming, 'Five Judicature Fallacies' in JT Gleeson, JA Watson and RCA Higgins (eds), *Historical Foundations of Australian Law* (Federation Press, 2013) vol 1, 169, 171. See also ibid.

[20] *Re Medland; Eland v Medland* (1889) 41 Ch D 476, 492 (Fry LJ).

[21] United Kingdom, *The London Gazette*, No 21296, 27 February 1852, 633–4.

tions relating to the administration of trusts.[22] Section 30 of the *Law of Property Amendment Act 1859*, 22 & 23 Vict, c 35 ('*Lord St Leonards' Act*') provided an indemnity to a trustee who acted on that advice. The statutory indemnity provided by the Act was conceived of because it was recognised that the burdens of a trustee could be onerous and the office was usually gratuitous.[23]

Parts of the *Lord St Leonards' Act* were later repealed[24] after new procedures were provided for by the *Rules of the Supreme Court 1883* (UK) which enabled questions to be determined with even 'greater facility and economy'.[25] The purpose of the new ord 55 r 3 remained the same[26] — to provide an alternative to a general administration suit.[27] English cases decided following the making of the rule made it clear that the jurisdiction conferred by the rule related to questions that could have been determined in an administration action.[28]

The Australian colonies followed suit — both with respect to enacting s 30 of the *Lord St Leonards' Act* and introducing rules of court. Some states and territories later passed legislation which extended the jurisdiction of the courts in relation to the directions which might be given. The current position is not uniform. While Victoria, Tasmania and the Northern Territory have followed the English approach of retaining only rules derived from ord 55 r 3,[29] in New South Wales, the Australian Capital Territory, South Australia and Western Australia, there are both statutory procedures for seeking a judicial opinion, advice or directions, and procedures under court rules for seeking the determination of questions which could have

[22] *Law of Property Amendment Act 1859*, 22 & 23 Vict, c 35, s 30. See United Kingdom, *Parliamentary Debates*, House of Lords, 11 June 1857, vol 145, col 1557; Lord St Leonards, *A Handy Book on Property Law* (William Blackwood and Sons, 8th ed, 1869) 91, 287.

[23] *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66, 93 [69] (Gummow ACJ, Kirby, Hayne and Heydon JJ) ('*Macedonian Orthodox Church*').

[24] *Trustee Act 1893*, 56 & 57 Vict, c 53, s 51.

[25] Arthur Underhill, *A Practical and Concise Manual of the Law Relating to Private Trusts and Trustees* (Butterworths, 3rd ed, 1888) 409.

[26] *Rules of the Supreme Court 1883* (UK) ord 55 r 3.

[27] *Re Davies; Davies v Davies* (1888) 38 Ch D 210, 212 (North J); *Re Wenham; Hunt v Wenham* [1892] 3 Ch 59, 60–1 (North J).

[28] See, eg, *Re Royle; Royle v Hayes* (1889) 43 Ch D 18, 22 (Fry LJ).

[29] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 54.02; *Supreme Court Rules 2000* (Tas) r 604; *Supreme Court Rules 1987* (NT) r 54.02.

been determined in administration proceedings.[30] Queensland has only a statutory procedure.[31]

Generally speaking, there may not be much of a difference in practice. In *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* ('*Macedonian Orthodox Church*'),[32] which was decided by the High Court in 2008, it was said of the dual system retained in New South Wales that 'the judicial advice facility and the originating summons facility were treated as serving the same function'[33] and that principles derived from one may be useful to the exercise of powers under the other.[34]

V The Purposes of the Advisory Jurisdiction

The statutory provisions and court procedures relating to advice given by the courts to trustees have as their aim efficiency in the administration of the estate and reduction of costs. It was said in *Macedonian Orthodox Church* that there are two purposes of the power or jurisdiction exercised by the courts in this regard.[35] The first accords with the purpose of a general administration suit, namely the protection of the trust and its interests. This has always been the concern of courts of equity. The second is the protection of the trustee. It recognises 'the fact that a trustee is [usually] entitled to an indemnity for all costs and expenses properly incurred'.[36]

It has also been said that an essential aim of the supervisory jurisdiction of the courts is that trusts be performed, because the courts early recognised the importance of trusts.[37]

The principal two purposes referred to are interconnected. The interests of the trust are protected by removing the concern of a trustee about his or her

[30] *Court Procedure Rules 2006* (ACT) r 2700; *Trustee Act 1925* (ACT) s 63; *Trustee Act 1925* (NSW) s 63; *Uniform Civil Procedure Rules 2005* (NSW) r 54.3; *Supreme Court Civil Rules 2006* (SA) r 206; *Trustee Act 1936* (SA) s 91; *Rules of the Supreme Court 1971* (WA) ord 58 r 2; *Trustees Act 1962* (WA) s 92.

[31] *Trusts Act* 1973 (Qld) s 96.

[32] *Macedonian Orthodox Church* (n 23).

[33] Ibid 85 [43] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

[34] Ibid 85–6 [44] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

[35] Ibid 128 [196] (Kiefel J).

[36] Ibid 93–4 [71] (Gummow ACJ, Kirby, Hayne and Heydon JJ) (emphasis omitted).

[37] Daniel Clarry, *The Supervisory Jurisdiction over Trust Administration* (Oxford University Press, 2018) 3–4 [1.02]–[1.03], 96 [4.06].

exposure beyond his or her indemnity. It was explained in *Macedonian Orthodox Church* that judicial advice, there about litigation, protects both the trustee and the trust by ensuring that 'the interests of the trust will not be subordinated to the trustee's fear of personal liability for costs'.[38]

It follows from these purposes 'that a trustee who is sued should take no step in defence of the suit without first [seeking] judicial advice about whether it is proper to defend the proceedings'.[39] *Re Beddoe; Downes v Cottam* is authority for the view that an application can, and should be, brought to the court to authorise the commencement or defence of an action.[40] The warning of Lindley LJ in that case, that a trustee who fails to seek the sanction of the court before doing so may not be protected,[41] has become 'influential'.[42]

The High Court has emphasised the importance of a trustee in doubt seeking judicial direction as to the correct course of action. In *Partridge v Equity Trustees Executors & Agency Co Ltd*, the executor and trustee of a testator's estate failed to insist upon payment of instalments due from a debtor company which later went into liquidation with the result that the debt was lost to the estate.[43] The Court held that the trustee should not be relieved of liability under a provision of the *Trustee Act 1928* (Vic), which permitted the Court to excuse a trustee, inter alia, from omitting to seek directions from the court and relieve him wholly or partly from liability where he had 'acted honestly and reasonably'.[44] The Court held that, as such a large amount was at stake, it could not be said that the trustee acted reasonably in failing to seek directions from the court.[45]

VI Nature and Limits to the Advice

In *Marley v Mutual Security Merchant Bank & Trust Co Ltd* ('*Marley*'), a case involving the estate of the late, great, reggae artist Bob Marley, the Privy Council pointed out that in exercising its jurisdiction to give advice to trustees the Court is engaged in determining what is 'in the best interests of

[38] *Macedonian Orthodox Church* (n 23) 94 [71] (Gummow ACJ, Kirby, Hayne and Heydon JJ); see also at 128 [196] (Kiefel J).

[39] Ibid 94 [74] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

[40] [1893] 1 Ch 547, 557 (Lindley LJ).

[41] Ibid.

[42] *Macedonian Orthodox Church* (n 23) 87 [48] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

[43] (1947) 75 CLR 149.

[44] *Trustee Act 1928* (Vic) s 61.

[45] Ibid 165 (Williams J for the Court).

the trust estate'.[46] It is not engaged in determining the rights of adversarial parties. It will be recalled that the same observation was made with respect to the powers of the Court of Chancery in administration suits. It accords with what was said in *Macedonian Orthodox Church*.[47] Rather, proceedings for judicial advice operate 'as "an exception to the Court's ordinary function of deciding disputes between competing litigants"'.[48] They afford a facility for private advice for the personal protection of the trustee.

Judicial advice about whether to commence or defend proceedings is not to be confused with deciding the issues which are in contest in proceedings between the trustee and others relating to the trust. The issue for a judge with respect to the former question is whether it would be proper for a trustee to commence or defend the proceedings. Judicial advice proceedings are not a trial of the issues in question.[49]

In *Macedonian Orthodox Church*, the appellant applied for judicial advice under s 63 of the *Trustee Act 1925* (NSW) as to whether it would be justified in defending proceedings brought against it seeking its removal as trustee on the bases that it had contravened the doctrine and law of the Church in dismissing the second respondent as parish priest, and had acted in breach of trust in various ways.[50] The judge at first instance answered the questions affirmatively.[51] The New South Wales Court of Appeal reversed that decision on the basis that it was generally inappropriate for the Court to give judicial advice respecting adversarial proceedings.[52] On appeal, the High Court restored the orders of the primary judge.

A number of points were made in the joint judgment about the nature and extent of the advice which might be given. It was said that there is no limitation in relation to the power of the court to give advice. It is certainly not limited to non-adversarial proceedings.[53] The only jurisdictional bar is that an 'applicant must point to the existence of a question respecting the management or administration of the trust property or a question respecting

[46] [1991] 3 All ER 198, 201 (Lord Oliver for the Court) ('*Marley*').

[47] *Macedonian Orthodox Church* (n 23) 128 [196] (Kiefel J).

[48] Ibid 91 [64] (Gummow ACJ, Kirby, Hayne and Heydon JJ), quoting *Application of Macedonian Orthodox Community Church St Petka Inc [No 2]* (2005) 63 NSWLR 441, 445 [23] (Palmer J).

[49] *Macedonian Orthodox Church* (n 23) 94 [74] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

[50] Ibid 74–8 [10]–[24] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

[51] Ibid.

[52] Ibid 79–80 [26]–[29] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

[53] Ibid 89–90 [56]–[60] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

the interpretation of the trust instrument'.[54] The summary character of the procedure indicates a wider, rather than a narrower, operation for the legislative provision, but this will tend to vary according to the terms of the trust involved.[55]

Judicial advice is not limited to questions about whether proceedings should be brought or defended. The questions about which advice may be sought are limited only to those which might arise in a general administration suit. In practice, advice is commonly sought with respect to questions involving the administration of a trust estate, for example whether an asset should be sold, or as to the interpretation of the terms of the trust, including as to the trustee's powers.

Although the power to give advice is wide, it is nevertheless limited to its purposes,[56] namely to protect the trust estate and the trustee. An application for judicial advice is not a vehicle for the attainment of other purposes. The recent decision of *Federal Commissioner of Taxation v Thomas* ('*Thomas*') confirms this limitation.[57] In the earlier proceedings of that case, the trustee had sought directions as to the construction of resolutions concerning the distribution of income from the trust.[58] The construction which might be given had taxation implications for the beneficiaries. The Commissioner of Taxation (the 'Commissioner') was given notice of the proceedings, but he took the view that he was neither a necessary nor an appropriate party to the application.[59]

The primary judge gave reasons on the questions of construction but, instead of making orders in terms that the trustee could act on the basis of that construction, the judge was persuaded to make declarations to the effect that the resolutions were effective to confer certain interests and that income had been distributed by the trustee in accordance with those resolutions.[60] The declarations were necessarily based upon, and carried into effect, a view of the operation of the taxation legislation.

On the Commissioner's appeal to the High Court, the trustee relied upon the decision in *Executor Trustee & Agency Co of South Australia Ltd v Deputy*

[54] Ibid 89–90 [58] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

[55] Ibid 90–1 [61]–[63], 92–3 [67]–[68] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

[56] Ibid 128 [196] (Kiefel J).

[57] (2018) 92 ALJR 746 ('*Thomas*').

[58] Ibid 749 [1]–[5] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

[59] Ibid 753 [36] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ); *Thomas Nominees Pty Ltd v Thomas* (2010) 80 ATR 828, 831 [11] (Applegarth J).

[60] *Thomas* (n 57) 754 [38]–[40] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

Federal Commissioner of Taxes (SA) ('*Executor Trustee*')[61] as binding the Commissioner to the declarations.[62] In that case, the orders of the Court, made on the trustee's application for directions, defined the interests of the beneficiaries in land the subject of the trust. The orders were made in proceedings to which the beneficiaries were parties. In later proceedings between the trustee and the Commissioner, it was held that the Commissioner was obliged to act on the basis of the interests as declared by the Court.[63]

The trustee's argument in *Thomas* that the Commissioner was likewise bound was rejected. It was explained that *Executor Trustee* 'is authority [only] for the proposition that the general law rights of trustee and beneficiary inter se … are defined [also] as against the Commissioner'.[64] More relevantly for present purposes, it was pointed out that decisions made under the judicial directions power cannot bind the Commissioner in the application of taxation laws.[65] That is because it is no part of such an application for the court to decide how taxing Acts operate.[66] The function of the judge is to provide advice respecting the management and administration of the trust in order to protect the trustee.[67]

The decision in *Thomas* points up a number of issues concerning the nature of judicial advice of this kind.

It will rarely be appropriate to make a declaration, because the rights of parties will not be a matter upon which advice is to be sought. The advice is in the nature of private advice to the trustee. This follows from it being a purpose of the advice given to provide personal protection to the trustee[68] and also from the nature of the jurisdiction, which is supervisory and administrative. These features may be seen from the terms of the advice given, which is usually that it would be appropriate for the trustee to do something or that she or he would be justified in taking a proposed course of action. Consistently with its historical origins, the advice is concerned not with purely

[61] (1939) 62 CLR 545 ('*Executor Trustee*').

[62] *Thomas* (n 57) 749 [5], 755 [46] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

[63] *Executor Trustee* (n 61) 561–3.

[64] *Thomas* (n 57) 756 [54] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

[65] Ibid 756–7 [55] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

[66] Ibid 757 [57] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

[67] Ibid.

[68] *Macedonian Orthodox Church* (n 23) 91 [64] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

legalistic matters, but with the propriety of a course of action, one which accords with good conscience.[69]

The advice is not given in proceedings *inter partes*. The proceeding is brought ex parte by the trustee for advice to be given to the trustee. Two consequences follow from this. The first is that the trustee is under the same duty as any applicant ex parte to the court to make full disclosure of all relevant matters, including the limits of the trustee's powers. The second is that even if persons who might be interested in the advice, or indeed whether it should be given, are given notice of the application, they are not strictly 'parties' to the proceedings,[70] unless the statute or rule provides otherwise. In *Marley*, Lord Oliver said that the Court would of course be interested to hear whether any objections had substance, but the Court was not obliged to give them particular weight.[71]

VII Jurisdiction and Judicial Power

Macedonian Orthodox Church left open the question whether, and to what extent, the inherent jurisdiction of a court of equity may explain the jurisdiction to give judicial advice. It was not necessary to the decision in that case, which concerned an application under the *Trustee Act 1925* (NSW). It may be observed that the American Law Institute's *Restatement (Third) of Trusts* clearly views the power to give advice as inhering in the equitable powers of courts having jurisdiction over trusts.[72]

It is pointed out that although general administration of trusts is rarely sought today, it provides 'essential evidence for the historical basis and theoretical nature of the supervisory jurisdiction over trust administration'.[73] This may be taken to imply that the jurisdiction is extant, even if it is not utilised, and that might be so regardless of the statutes or rules of court which provide a more expeditious procedure. The general administration suit may have been the reason for the development of these procedures, but they did not remove or supplant the jurisdiction of the courts with respect to the administration of trusts.

[69] *Marley* (n 46) 201 (Lord Oliver for the Court). See also Clarry (n 37) 103–4 [4.20].

[70] *Macedonian Orthodox Church* (n 23) 92 [65] (Gummow ACJ, Kirby, Hayne and Heydon JJ).

[71] *Marley* (n 46) 201 (Lord Oliver for the Court).

[72] American Law Institute, *Restatement (Third) of Trusts* (2007) § 71.

[73] Clarry (n 37) 93 [4.02].

Of course, what is necessary for jurisdiction may not be 'sufficient to enliven the judicial power' of the Commonwealth.[74] '"Jurisdiction" in the sense of [a court's] authority' to decide and '"judicial power" are different concepts'.[75] Questions concerning whether it is an exercise of judicial power by ch III courts to give advice of this kind have rarely arisen.

It might be thought that it most closely resembles an advisory opinion. In some recent decisions it has been pointed out,[76] by reference to *Mellifont v Attorney-General (Qld)* ('*Mellifont*'),[77] that the advisory opinion which was said in *Re Judiciary and Navigation Acts* not to involve the exercise of judicial power[78] was purely academic and responsive to an abstract question.[79] It should also be observed that, in *Mellifont*, the Court went on to explain that the opinion in *Re Judiciary and Navigation Acts* was 'hypothetical in … that it was unrelated to any … controversy between [the] parties'.[80] The same might also be said of advice to trustees. Perhaps the real point is that advising the executive is rather different from providing advice to trustees in order that a trust be carried into effect.

In *R v Davison* ('*Davison*'), Dixon CJ and McTiernan J acknowledged that many of the various elements upon which the definitions of judicial power insist are not present in the case of many orders made by Courts of Chancery, including those made in the administration of trusts.[81] Orders in the nature of judicial advice do not determine rights, there is no question of a 'power to give a binding and authoritative decision',[82] and the parties do not submit a *lis* for adjudication. It might also be thought that Griffith CJ's definition of judicial power in *Huddart, Parker & Co Pty Ltd v Moorehead*, with its

[74] *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339, 349 [24] (French CJ, Kiefel, Bell and Keane JJ) ('*CGU Insurance*'), discussing *Ah Yick v Lehmert* (1905) 2 CLR 593.

[75] *CGU Insurance* (n 74) 350 [25] (French CJ, Kiefel, Bell and Keane JJ) (citations omitted). See also *Palmer v Ayres* (2017) 259 CLR 478, 490 [24] (Kiefel, Keane, Nettle and Gordon JJ).

[76] See, eg, *Hunter Development Corporation v Save Our Rail NSW Inc [No 2]* (2016) 93 NSWLR 704, 712 [29] (Beazley P, Macfarlan JA agreeing at 721 [81], Meagher JA agreeing at 721 [82]); *Letten v Templeton* (2014) 102 ACSR 425, 429–31 [16]–[20] (Davies J). See also *Hodges v Waters [No 7]* (2015) 232 FCR 97, 108 [48] (Perram J).

[77] (1991) 173 CLR 289 ('*Mellifont*').

[78] (1921) 29 CLR 257, 267 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

[79] *Mellifont* (n 77) 305 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ), discussing *Re Judiciary and Navigation Acts* (n 78).

[80] *Mellifont* (n 77) 305 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

[81] (1954) 90 CLR 353, 368–9 ('*Davison*').

[82] *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ) ('*Huddart, Parker & Co*').

emphasis on the determination of disputes between parties,[83] was coloured by the common law idea of a cause of action, as later was *Re Judiciary and Navigation Acts*.[84] Such a notion is not truly referrable to many proceedings in equity, and equity's concern to provide a remedy to meet the circumstances of a case falling within its jurisdiction.

In *Davison*, their Honours said that, despite lacking what is said to be necessary to judicial power, it has 'long fallen to the courts of justice' to make many orders, an example of which is the grant of probate of a will.[85] It was said that this is clearly 'a judicial function and could not be excluded from the judicial power of a country governed by English law'.[86] It may therefore be inferred that their Honours regarded orders by way of advice to trustees as the exercise of judicial power.[87]

It is perhaps less clear whether that conclusion is based upon a view of judicial power as an historical anomaly or exception. In the course of the discussion which followed in *Davison* as to the distinction between legislative and judicial power, their Honours referred, seemingly with approval,[88] to the thesis of Roscoe Pound.[89] The thesis is that in all cases of judicial power, it is preferable to place more reliance on history than upon juristic analysis.

[83] Ibid.

[84] *Re Judiciary and Navigation Acts* (n 78) 266 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ), 276 (Higgins J).

[85] *Davison* (n 81) 368 (Dixon CJ and McTiernan J).

[86] Ibid.

[87] See *Minister for Immigration and Multicultural and Indigeous Affairs v B* (2004) 219 CLR 365, 378 [8] (Gleeson CJ and McHugh J).

[88] *Davison* (n 81) 369 (Dixon CJ and McTiernan J).

[89] Roscoe Pound, 'The Rule-Making Power of the Courts' (1926) 12(9) *American Bar Association Journal* 599.