Rights Appropriated to a Scheme: Understanding Four Key Features of the Trust

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Abstract

This thesis argues that four important features of the English trust can be sourced in the law's commitment to upholding the integrity of a scheme. The thesis advances a scheme-based analysis of these four features, which are (i) the immunity of the trust assets from the personal creditors of the trustee, (ii) trustee indemnities, (iii) personal and proprietary claims against recipients of misapplied trust assets and (iv) standing to initiate personal and proprietary claims to reconstitute the trust fund. In the view of this thesis, the trust can be understood as entailing a right appropriated to a scheme. In grounding the scheme-based analysis of these four important features of the English trust, the thesis argues against a beneficial ownership and rights against rights analyses of these features.

Part I defines a scheme and shows how the scheme-based analysis builds on a rich tradition in the existing scholarship. Part I also illustrates the practical difference between an integrity of the scheme analysis and one centred on upholding individual rights. Part II then addresses the four key features. Part III draws the threads of the thesis together, as well as suggesting avenues for future research.

It will be argued that benefits of the scheme-based analysis include its ability to show coherence across the different instances of the trust, which include trusts without beneficiaries, such as the charitable purpose trust. Not only does the scheme-based analysis show the link between the different examples of the trust, but also of similarly structured arrangements beyond the law of trusts, such as the deceased estate. It will also be argued that the scheme-based analysis better accounts for the operation of the standard fixed trust, than the rival analyses and so is a valuable tool for analysis, even in a jurisdiction that does not recognise purpose trusts.

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PART I: INTRODUCING THE SCHEME-BASED ANALYSIS

CHAPTER I: INTRODUCTION, RESEARCH QUESTION AND METHODOLOGY

I. The core thesis claims, rival analyses and core distinctions

This chapter begins by explaining what the core contribution of this thesis entails: seeing the express trust as a scheme and sourcing four key features of the express trust in the law's commitment to upholding the integrity of that scheme (I.A). It describes two rival analyses for understanding some of those key features: a beneficial ownership and a rights against rights analysis (I.B). The chapter proceeds to explain how the scheme-based analysis of the trust can be understood as progressing through different levels of analysis (II.A), shows how the trust is only one arrangement in the law which entails rights subject to a scheme (II.B) and explains how the scheme-based analysis of the express trust builds on existing scholarship (II.C), including fiduciary analyses of the trust (III). The chapter concludes by providing an overview of the chapters in the thesis (IV).

A. Outlining the scheme-based analysis and the thesis' goal and scope

The trust is best understood as entailing a right appropriated to a scheme. When seen in this light, the trust is part of a broader category: a law of schemes. The goal of this thesis is to show how important features of the trust can only be properly understood, when the trust is seen as one example of a scheme. Express trusts, constructive trusts and resulting trusts, the administration of insolvent estates and the administration of deceased persons' estates all

entail rights appropriated to a scheme.[1] A failure of some existing scholarship has been in its inability to identify this structural unity between such arrangements. This thesis will argue in favour of a scheme-based analysis of certain important features of the express trust, rather than analyses which invoke beneficial ownership or rights against rights to understand these features.[2]

The notion of a "scheme" is an original contribution the thesis is advancing. It is not derived from legislation or judicial dicta.[3] It is an analytical construct of this thesis, which provides a compelling way of understanding the essential structure of the trust and therefore the operation of some of its key features.

A scheme is an all-encompassing set of terms. Rights are vested in a party – the trustee – who is under a duty to deploy the rights in question in accordance with an all-encompassing set of terms.[4] By "all-encompassing", it is meant that the terms of the trust govern all the claim-rights, powers and immunities entailed by the right held on trust and all its uses. The terms therefore leave the holder with no residual domain of unfettered use in which they may determine for themselves how the right is to be deployed. Those terms exhaust the purposes for which the right may be exercised, so that the holder has no independent sphere of authority outside the terms of the scheme.[5] It is the fact that a trust

[1] This is not intended as an exhaustive list of schemes; there may be others (see discussion in Chapter VIII.II).
[2] Discussed below in I.B.
[3] The term "scheme" carries an established meaning in charity law, denoting a scheme made by the court or Charity Commission to apply charitable property cy-près or otherwise regulate a charity, whether trust or corporate form: Charities Act 2011, pt 6, esp s 67. It is likewise the standard term for occupational and personal pension trusts: Pension Schemes Act 1993, s 1. My use of "scheme" is a distinct, stipulative concept encompassing all trusts and other similar legal structures and should not be conflated with either established sense.
[4] By "terms" this thesis is referring to the provisions of the governing instrument of the trust, such as a trust deed, or the provisions of the trust imposed by operation of law, rather than the wider set of duties that might bind a trustee and are imposed by the general law.
[5] Where a trustee is also a beneficiary, they are entitled to benefit from the trust assets, but that entitlement is rooted through the terms of the scheme and is regulated by it. See analysis in Chapter IV where it is argued that

entails a right appropriated to an all-encompassing set of terms that distinguishes the trust from more limited encumbrances, such as those constituted by a restrictive covenant, lease or easement.[6] As will be argued in Chapter II, the all-encompassing criterion therefore provides a practical means for distinguishing cases where a trust does arise, from those where it does not.[7]

It is of course not possible to provide a comprehensive account of the law of schemes in this thesis, nor to show how the scheme-based analysis can apply to all the rules governing the operation of trusts. The thesis is therefore primarily concerned with how the scheme-based analysis applies to, and enhances our understanding of, a particular institution recognised by current English law, namely the express trust and some of its key features. The scheme-based analysis can also elucidate our understanding of the other institutions listed above (including deceased estates and bankruptcies) and the fact it can do this itself enables us to form a better understanding of express trusts.

This thesis is centrally concerned with four key features of the common law express trust. However, limited reference to non-trust institutions that can also be understood on a scheme-based analysis is methodologically helpful.[8] The claim advanced is that those key features are best understood by situating the express trust within a broader class of legal arrangements in

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the Hudson and Mitchell view that the trustee's right of indemnity is just a liberty to use the trust assets for their own benefit is problematic: Jessica Hudson and Charles Mitchell, 'Trustee Recoupment: A Power Analysis' (2021) 35 Trust Law Int 3. The indemnity is not a result of limits on the duty of the trustee, but is rather an integral part of the scheme subject to which the trustee holds rights.

[6] See analysis in Chapter II; focussing on the all-encompassing set of terms as a means of distinguishing the trust from more limited restrictions is supported by eg Robert Chambers, 'Restrictions on the Use of Money' in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart Publishing 2004) 77 (Chambers, Quistclose), discussed in detail in Chapter II, section II.

[7] See Chapter II, section II and analysis of eg *Twinsectra Ltd v Yardley* [2002] 2 AC 164 (*Twinsectra*) and *Re Lehman Brothers International (Europe)* [2010] EWHC 2914 (Ch) (*Lehman*).

[8] See eg analysis in later chapters showing that proprietary claims (Chapter V) and personal claims (Chapter VI) may be initiated against recipients of misapplied deceased estate assets.

which rights are held subject to a scheme. Reference to non-trust schemes – such as the administration of a deceased estate – serves a strictly analytical function: they operate as controlled comparators that corroborate the account developed from the express trust itself. This does not expand the scope of the project beyond the express trust. Rather, exploring some of the express trust's key features remains the primary object of analysis and the site at which the theory is developed and defended. Non-trust schemes are invoked only insofar as they illuminate the trust's essential structure or expose the limitations of rival accounts. An exhaustive theory of schemes is neither attempted nor required in this thesis. The thesis instead proceeds by developing the concept of the scheme through the express trust and using a small number of adjacent institutions as test cases to demonstrate its explanatory power.[9]

The most basic requirements of an express trust are shortly stated. Every express trust necessarily involves there being (1) a trustee who holds a specific right[10], (2) where that trustee must owe a duty to use the right in particular ways specified by the settlor and by the general law[11], (3) where the court exercises a supervisory jurisdiction over the administration of the trust[12], and (4) where there is at least one person other than the trustee that has standing to enforce the duty[13], if necessary by petitioning the court to exercise its supervisory jurisdiction.[14] There are also some further key features that apply to all trusts. On this basis,

[9] The methodology of looking to different areas of law to better understand the trust has support in the existing literature: eg Mitchell in his comparison between the trust and deceased estate (Charles Mitchell, 'Commissioner of Stamp Duties (Queensland) v Livingston (1964): Rights of Estate Beneficiaries and Trust Beneficiaries Compared' in Brian Sloan (ed), *Landmark Cases in Succession Law* (Hart Publishing 2019) (Mitchell, Livingston)), Douglas in his focus on the trust *estate*, a concept also seen with deceased estates and bankrupt estates (Simon Douglas, 'Trusts, Estates, and Personhood' in Irit Samet, Simone Degeling and Jessica Hudson (eds), *Philosophical Foundations of the Law of Express Trusts* (Oxford University Press 2024) (Douglas)) and Ho and Mitchell in their analysis of knowing receipt claims (Lusina Ho and Charles Mitchell, 'Knowing Receipt, Equitable Proprietary Rights, and Duties of Due Administration' (2026) 89 MLR 278 (Ho and Mitchell)).

[10] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC); see discussion in Chapter II.I.ii.

[11] *Target Holdings Ltd v Redferns* [1996] AC 421 (HL) 434; *Armitage v Nurse* [1998] Ch 241 (CA) 253.

[12] *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709 [51].

[13] *Morice v Bishop of Durham* (1804) 9 Ves 399,32 ER 656; affd (1805) 10 Ves 522, 32 ER 947 (*Morice*).

[14] According to some judges (see eg *Re Endacott* [1960] Ch 232 (CA) 245–46) there is a general rule requiring trusts to have at least one beneficiary, but that since various purpose trusts are also accepted to be express trusts as a matter of English law, this is not a rule that holds good for all trusts.

they form part of the characteristics of an express trust. There are at least four features which apply to all trusts in English law, whether that trust has ascertainable beneficiaries or not and whether that trust was created expressly or by operation of law:

i. The rights held on trust are unavailable to meet the claims of the trustee's personal creditors and will not form part of the trustee's estate for bankruptcy and insolvency purposes[15];
ii. All trusts entail indemnities in favour of the trustee, whether the trustee is express or constructive.[16] The trustee is entitled to draw on the trust fund to pay any expenses incurred in discharge of their duties; a constructive trustee may plausibly incur expenditure in safeguarding the misapplied trust property, until it is appropriate to return it;
iii. Personal[17] and proprietary claims[18] may be initiated against recipients of misapplied trust assets or their traceable proceeds[19];
iv. Standing is given to at least one party (who need not necessarily benefit from the trustee's duty of performance[20]) to initiate personal and proprietary claims to reconstitute the trust fund against both the original trustee and some third-party recipients of misapplied trust assets.[21]

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[15] *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20, (2019) 268 CLR 524 (*Carter Holt*) [25]; Insolvency Act 1986, s 283(3)(a), exempting from a bankrupt's estate, *inter alia*, 'property held by the bankrupt on trust for any other person'.
[16] *Worrall v Harford* (1802) 8 Ves 4, 32 ER 250 (*Worrall*); *Jennings v Mather* [1901] 1 QB 108 (QBD) (*Jennings*); *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7, [2019] AC 271 (*Investec I*) [59](v).
[17] See eg *Byers v Saudi National Bank* [2023] UKSC 51, [2024] 2 WLR 237 (*Byers*).
[18] See eg *Relfo Ltd (in liq) v Varsani* [2014] EWCA Civ 360, [2015] 1 BCLC 14 (*Relfo*).
[19] See eg *Foskett v McKeown* [2001] 1 AC 102 (*Foskett*).
[20] eg a trustee can initiate these claims: Jessica Hudson, *Assuring the Express Trust: The So-Called 'Beneficiary's Proprietary Claim'* (PhD Thesis, University of New South Wales, (Hudson, PhD) ch 7. See eg *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072 (PC) 1074; *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91 [32], [76]-[77]; *Young v Murphy* [1996] 1 VR 279; *Eden Refuge Trust v Hohepa* [2012] NZCA 124; *Shovlin v Site Civils and Surfacing Ltd* [2024] EWCA Civ 585 (where the claim failed on the facts).
[21] See eg *Morice* (n 13).

Although the precise content of the rules might vary in detail[22], these four features also apply to the administration of deceased estates[23] and the estate of a bankrupt person.[24] The goal of the thesis is not to explore the precise similarities and differences between the way in which these four features apply to express trusts on the one hand and deceased estates and bankruptcies on the other.[25] However, the fact these features apply to deceased estates and bankruptcies, favours a scheme-based analysis of such features in the context of the express trust and highlights a unity between these arrangements which is lost on a beneficial ownership and rights against rights analyses.

The thesis argues that four key features of the trust in English law are explained by the fact that the trust involves a distinct mode of right-holding, where authority over the right is governed by a scheme whose integrity the law is committed to upholding. To make good on this thesis' claim that the scheme-based analysis is a valuable tool for elucidating some of the rules governing trusts law, the main body of the work done in the thesis is to subject each of the "four features" to a scheme-based analysis with a view to demonstrating that this approach is at least as good as, if not better than, two other types of analytical approach which can be found in the literature.

[22] For example, as discussed in Chapter VI, Section I, it seems that English law allows strict liability personal claims to be initiated against recipients of misapplied deceased estate assets (*Re Diplock* [1948] Ch 465 (CA)), but not against recipients of misapplied trust assets.
[23] For discussion see eg Mitchell, Livingston (n 9).
[24] For example, *Trustee of the Property of FC Jones & Sons v Jones* [1997] Ch 159 (CA) is a case concerned with a claim against a recipient of misapplied assets appropriated to the bankruptcy scheme.
[25] See further analysis in II.B below.

Focus on these features is made for four reasons. First, these features have given rise to judicial[26] and scholarly debates[27] as to how they can be explained. Second, given they apply to all trusts (whether that trust has a beneficiary or not), they provide an immediate challenge to accounts attempting to ground those features in the rights of an individual, endowed with beneficial ownership.[28] Third, some of the features selected for analysis in this thesis – especially those relating to third-party and insolvency effects – are seen, on some views,[29] as evidence that it is only possible to explain the trust's features by focussing on the special nature of the rights of the beneficiary. By focussing on the four features selected, the thesis takes such analyses at their strongest and argues against them. Fourth, and perhaps most importantly, these features do not apply where – for example – A simply owes B a standard contractual duty to pay B £10.[30] However, those features do apply where A holds a specific bank account (credited with £10) on trust for B, or for a charitable purpose. The scheme-based analysis, in accounting for these features of the trust, therefore, aims to provide an explanation for why the trust is given different legal effect to a standard contract.

The thesis is *not* making any claim about which features are the most important features of the trust. For reasons of time and space, it is only possible to focus on some of the features of the trust. The thesis does not therefore preclude the possibility that there may be other features – beyond those listed here – that apply to all trusts and which do not apply to a standard contractual obligation.[31] When the thesis refers to the four key features of the trust,

[26] eg *Byers* (n 17) in the context of knowing receipt.
[27] eg Dagan and Samet on the shielding effect of the trust: Hanoch Dagan and Irit Samet, 'The Beneficiary's Ownership Rights in the Trust Res in a Liberal Property Regime' (2023) 86 MLR 701 (Dagan and Samet, MLR).
[28] See discussion in section I.B below.
[29] See the analysis in section I.B below of the beneficial ownership analysis and the rights against rights analysis.
[30] Charles Mitchell, Ben McFarlane and Jessica Hudson, *Hayton, McFarlane and Mitchell: Text, Cases and Materials on Equity and Trusts* (15th edn, Sweet & Maxwell 2022) (Hayton, McFarlane and Mitchell) ch 12.
[31] For example, the possibility of supervision and administration of the trust by the court is another important feature of the trust: *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709 (*Schmidt*) [36]; Daniel

it is referring to the four features listed at the start of this chapter. These key features are also features of several other arrangements, such as deceased estates, bankruptcies and partnerships.[32] The thesis does not re-label the trust: it locates the trust within its broader legal category to better understand the explanation for the trust's four key features. The thesis is therefore both classificatory (the trust belongs to a category of rights appropriated to a scheme) and explanatory (it is the law's commitment to the integrity of the scheme that explains the existence of the trust's four key features).[33]

The thesis addresses the following research question:

> Is it plausible to understand the four key features of the trust as justified by the fact that it involves a distinct mode of right-holding, where authority over the right is governed by a scheme whose integrity the law is committed to upholding?

The goal of the thesis is to defend an affirmative answer to that question. The fact that trusts with no beneficiaries are recognised and enforced in English law, as with charitable purpose trusts, supports this thesis. The four key features apply to the charitable purpose trust, as much as to trusts with beneficiaries.

Where a trust has a beneficiary, the beneficiary clearly has claims and powers, which together might amount to an interest that is capable of – for example – assignment[34], where B1 may transfer their beneficial interest to B2, so that T must now perform in favour of B2,

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Clarry, *The Supervisory Jurisdiction Over Trust Administration* (1st edn, OUP 2018) (Clarry); – see further discussion below in section II.C.ii and in Chapter VIII; Charles Mitchell, David J Hayton and Paul Matthews, *Underhill and Hayton Law of Trusts and Trustees* (20th edn, LexisNexis 2022), Chapter 1.

[32] See discussion of these arrangements in section II.B, below.

[33] For analysis of how the scheme-based analysis is both classificatory and justificatory, see section II.A, below.

[34] An assignment of such an interest under a trust is subject to section 53(1)(c) Law of Property Act 1925.

rather than B1.[35] Furthermore, where a trust has beneficiaries, the trustees will consider the interests of beneficiaries in their decision-making process.[36] It is also important to recognise that the beneficiary has powers, which other parties involved with the trust – such as trustees – do not. For example, a beneficiary may consent to an unauthorised investment[37], thereby adopting that investment and bringing it within the trust. A beneficiary may even, in limited circumstances – where the rule in *Saunders v Vautier*[38] applies – claim the underlying assets of the trust and bring the trust to an end. However, as will be argued in Chapter III, Section II.IV.iv, these powers of a beneficiary to assign their interest, to consent to a breach of trust and to bring the trust to an end are not inconsistent with the core thesis claim that four key features of the trust can be rooted in the law's commitment to upholding the integrity of a scheme.

The thesis will also consider alternative explanations that are given for at least some of the four key features of the trust, centred on beneficial ownership and rights against rights.[39] The thesis will also sometimes consider related explanations for particular features of the trust, such as the unjust enrichment model for understanding tracing rules.[40]

There is a trend in recent analyses of the trust to move away from the individual rights of a beneficiary to understand the trust's key features. For example, Ho and Mitchell[41] and Mitchell and Hudson[42] have recently emphasised the importance of the duty of due

[35] eg as in *Grey v IRC* [1960] AC 1 (HL).
[36] *Cowan v Scargill* [1985] Ch 270 (Ch D) 286.
[37] *Wright v Morgan* [1926] AC 788, 799; Ying Khai Liew and Charles Mitchell, 'Beneficiaries' Consent to Trustees' Unauthorised Acts' in Paul S Davies, Simon Douglas and James Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 81.
[38] (1841) 4 Beav 115, 49 ER 282; affd (1841) Cr & Ph 240, 41 ER 482 (*Saunders*).
[39] See analysis in section I.B.
[40] See Chapter V.
[41] Ho and Mitchell (n 9)
[42] Jessica Hudson and Charles Mitchell, 'Standing in Trusts Law, the Beneficiary Principle and the Juridical Nature of Trustee Duties' (2026) 142 LQR 208.

administration of the trustee, namely the obligation to manage and apply the trust fund in accordance with the terms of the trust[43], the centrality of which has been highlighted consistently by the courts.[44] As in the case of a charitable trust, that duty of due administration does not necessarily need to correlate to a claim-right held by a beneficiary.

B. Grounding the key features of the trust: rival analyses

In seeking to explain the four key features of the trust, especially those related to insolvency and third-party effects, there are two main rivals to the scheme-based analysis. They both locate those features (at least where the trust has a beneficiary) in the beneficiary's individual position.

[43] The duty of due administration could be given a wide or narrow definition. A wider definition would say that the duty of due administration includes not only the duty to act in accordance with the terms of the governing instrument (or the terms of the trust arising by operation of law), but also the duty to act with skill and care (Trustee Act 2000, s 1 and Sch 1, para 7; *Bartlett v Barclays Bank Trust Co* [1980] Ch 515 (Ch D) 534 (Brightman J)), to act in good faith (*Klug v Klug* [1918] 2 Ch 67), to consider all relevant considerations to the exclusion of irrelevant ones (*Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108) and other duties imposed by the general law, rather than the terms of the trust instrument. A narrow definition of the duty of due administration would say it refers to the duty to act in accordance with the terms of the governing instrument (as well as those implied by statute – for example, even if the terms of the trust deed do not expressly give the trustee an indemnity, the trustee will nevertheless have such an indemnity by operation of statute – Trustee Act 2000, s 31(1).). In the context of this thesis, the duty of due administration refers to the duty to act in accordance with the terms of the trust instrument, rather than including all the duties imposed by the general law. For the purposes of this thesis, the definition given is therefore a narrow one. This choice of a narrow definition has been made for two reasons. First, because the classic example of an unauthorised disposition of trust property (which plays an important role in this thesis) is a disposition that breaches the terms of the trust instrument. Second, it is not clear that the duties imposed by the general law apply equally to all trustees, whereas a duty to act in accordance with the terms of the trust instrument, or the terms of the trust arising by operation of law, does apply to all trustees: *Armitage v. Nurse* [1998] Ch 241 (CA).

[44] *Re Brogden* (1888) 38 ChD 546, 571; *Harries v Church Commissioners* [1992] 1 WLR 1241 (Ch D) 1246; *Spellson v George* (1987) 11 NSWLR 300, 315–16 (Powell J), approved in *Schmidt* (n 12) [59]-[60]; McFarlane has also recently emphasised the importance of looking at the position of the trustee: see Ben McFarlane, 'Trusts, Property, and Rights' in Irit Samet, Simone Degeling and Jessica Hudson (eds), *Philosophical Foundations of the Law of Express Trusts* (Oxford University Press 2023) (McFarlane, Express Trusts); Ben McFarlane, 'The Nature of Equitable Property Revisited' (2026) 79 CLP. (McFarlane, CLP).

i. Equitable ownership

The equitable ownership analysis begins from the premise that, although the trustee is vested with the title to the trust assets, the trustee's authority over those assets is constrained.[45] The account then seeks to identify the true owner of the trust property elsewhere. The beneficiary is characterised as the equitable owner of the assets, while the trustee is treated as holding title in a representative or managerial capacity.[46] This approach arguably provides an intuitive explanation for some of the trust's most familiar incidents. If the beneficiary is the real owner, it is unsurprising that the trust assets are protected from the trustee's personal creditors and that third parties who interfere with those assets may be subject to personal and proprietary claims.[47] As Lord Briggs has observed extra-judicially[48], the analysis also arguably accords with a lay understanding of ownership, under which the person entitled to enjoy the economic benefit of a resource is regarded as its owner. Likewise, Dagan and Samet[49] defend the trust as a form of divided ownership in which the beneficiary is the residual owner of the trust property.

The Justices in *Byers v Saudi National Bank*[50] favoured understanding a key feature of the trust – personal claims against recipients – as based on the equitable proprietary rights of the beneficiary.[51] A view with support in the appellate courts is to think of the trust, at least in cases involving beneficiaries, as defined by the equitable ownership of the beneficiary. In *Foskett v McKeown*[52], Lord Browne-Wilkinson averred that the ability to trace

[45] James Penner, 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust' (2014) 27 Can J L & Juris 473 (Penner), 474–79; Paul Jaffey, 'Explaining the Trust' (2015) 131 LQR 377, 379–384.
[46] Dagan and Samet (n 27).
[47] Dagan and Samet (n 27) 717–21; Penner (n 45) 483–490.
[48] Michael Briggs, 'Equitable Ownership' [2026] CLJ 1 (Briggs, CLJ).
[49] Dagan and Samet (n 27).
[50] *Byers* (n 17).
[51] *Byers* (n 17) [42], [97] (Lord Briggs); [148], [155]-[159], [172] (Lord Burrows).
[52] *Foskett* (n 19).

into substitutes of misapplied trust assets is sourced in the "hard-nosed property rights"[53] of the claimant beneficiary and Lord Millett attributed it to their "continuing beneficial interest"[54]. In *Shell UK Ltd v Total UK Ltd*[55], the Court of Appeal described the beneficiary of the trust as the "real owner"[56] of the trust property and said that, on that basis, it would be "legalistic"[57] to deny them a claim for their consequential economic losses after the trust property was damaged through the negligence of a third party. There is a sense in which these appellate decisions (*Byers*, *Foskett* and *Shell*) are animated by the analysis adopted by Lord Diplock in *Ayerst (Inspector of Taxes) v C&K (Construction) Ltd*[58], that the trust entails a split between legal and equitable ownership.[59]

Unlike the rights against rights analysis (discussed in section III.B below), the equitable ownership analysis seems to be providing a general definition of the trust, as involving a split between legal and equitable ownership.[60] For this reason, its exponents are forced to relegate the charitable purpose trust to a residual category, a creature of public law and something different from the standard trust.[61] However, charitable trusts are not peripheral anomalies. The four key features set out at the start of this chapter are present in the charitable trust and they are the clearest demonstration that the trust cannot be explained

[53] *Foskett* (n 19) 108.
[54] *Foskett* (n 19) 127.
[55] [2010] EWCA Civ 180, [2011] QB 86 (*Shell*).
[56] *Shell* (n 55) [132].
[57] *Shell* (n 55) [132].
[58] [1976] AC 167 (HL) (*Ayerst*) 177-178.
[59] *Ayerst* (n 58) 177.
[60] Andrew Burrows, 'We Do This At Common Law But That In Equity' (2002) 22 *Oxford Journal of Legal Studies* 1; Andrew Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 176–179.
[61] Paul Matthews, "The Comparative Importance of the Rule in *Saunders v Vautier*" (2006) 122 LQR 266, 275; Paul Matthews, "From Obligation to Property and Back Again? The Future of Non Charitable Purpose Trusts" in David Hayton (ed) Extending the Boundaries of Trusts and Other Ring-Fenced Funds (Kluwer Law International, 2002), 231.

in beneficiary-centred terms. For example, personal and proprietary claims can be initiated against recipients of misapplied charitable purpose trust assets.[62]

There is the possibility that the four key features may have one justification in cases of trusts with beneficiaries and a different justification for trusts without beneficiaries, such as the charitable purpose trust. Two points can be made. First, if there is one justification for the key features, then it cannot be the protection of equitable proprietary rights, given the presence of these features despite the absence of any party endowed with equitable proprietary rights. Second, even for trusts with beneficiaries, focussing on the individual position of the beneficiary in grounding these features is problematic and arguably does not cohere with many of the rules of English trust law.[63] For example, it does not align with the effect of personal and proprietary claims that may be initiated against both the defaulting original trustee and third-party recipients of misapplied trust assets, where the remedy is not to pay any individual beneficiary or compensate them for consequential economic losses, but rather to reconstitute the trust fund.[64] Furthermore, it does not match the identity of the parties that can initiate these claims, which include trustees, who need not have any equitable proprietary rights.[65]

Furthermore, there are several other arrangements in the law that are also characterised by the existence of personal and proprietary claims against recipients and where no party involved enjoys equitable proprietary rights. For example, as Mitchell has

[62] *A-G v Earl of Chesterfield* (1854) 18 Beav 596; 52 ER 234; *A-G v Christ's Hospital* (1834) 3 My & K 344, 40 ER 131; *A-G v Hall* (1853) 16 Beav 388, 51 ER 826; Ho and Mitchell (n 9).
[63] For a detailed analysis of the problems entailed by focussing on the individual position of a beneficiary in understanding some of the key features see eg Chapter III (personal claims against the original defaulting trustee) Chapter VI (personal claims against recipients).
[64] Lusina Ho and Richard Nolan, 'The Performance Interest in the Law of Trusts' (2020) 136 LQR 402 (Ho and Nolan).
[65] See Hudson, PhD (n 20) and authorities cited in that same footnote.

highlighted in his analysis of *Commissioner of Stamp Duties (Queensland) v Livingston*[66], estate creditors and beneficiaries of a deceased estate in administration have many of the same claims – including claims against recipients[67] – as beneficiaries of a trust, despite not enjoying equitable proprietary rights.[68] As has been confirmed in later cases[69], no party – whether estate creditor, specific, pecuniary or residuary legatee – enjoys a beneficial interest in the unadministered estate of the deceased. However, the availability to these parties of similar claims against recipients as with the trust shows that these claims can work without the existence of equitable proprietary rights.

Furthermore, many of the leading cases on knowing receipt are concerned with the misapplication of company assets.[70] However, the company is vested with the rights that have been misapplied by its agents. The company does not enjoy equitable proprietary rights in its own assets. It is simply vested with the rights, that are administered by its agents, such as company directors. Ho and Mitchell have also highlighted the problems in understanding knowing receipt claims as ancillary to equitable proprietary rights, including in the company context.[71]

[66] [1965] AC 694 (PC).
[67] *Re Rothko* 43 NY 2d 305; 372 NE 2d 291 (1977).
[68] Mitchell, *Livingston* (n 9).
[69] eg *Re Leigh's Will Trusts* [1970] Ch 277 (Ch D) 281–82 (Buckley J).
[70] eg *Re Lands Allotment Co* [1894] 1 Ch 616 (CA); *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 (Ch D) 1574-1577; *Belmont Finance Corpn v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 (CA); *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 (CA); *Agip (Africa) Ltd v Jackson* [1991] Ch 547 (CA); *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); see discussion in Chapter VI, section II.
[71] Ho and Mitchell (n 9)

ii. Rights against rights

McFarlane and Stevens argue that it is misleading to describe the beneficiary as endowed with property rights.[72] The interest of a beneficiary is not a weaker counterpart to a common law property right. They describe the common, not to say orthodox, view that an equitable interest is a weaker form of a common law property right because it is subject to a wider range of defences, for example good faith purchase for value of a legal estate without notice. Judges describe the beneficiary's interest as good against the world at large, except recipients in good faith who provide value.[73]

However, for McFarlane and Stevens, this understanding of a beneficial interest fails to capture the "genius of equity", which "transcended" rather than replicated the divide between rights *in rem* and rights *in personam*.[74] Their argument resides in the core distinction between successor and trespassory liability.[75] McFarlane and Stevens discuss the following two situations:

Example 1: T is vested with legal title to a bike on trust for B. T – in breach of trust – transfers that legal title to C.

C is a successor in title to T. This means that C is *prima facie* bound by B's pre-existing beneficial interest. C received a right from T and T held that right on trust for B. C

[72] Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 J Eq 1 (McFarlane and Stevens) 3–6.
[73] *Byers* (n 17) [18]
[74] McFarlane and Stevens (n 72) 1–2.
[75] James Penner, 'Duty and Liability in Respect of Funds' in John Lowry and Loukas Mistelis (eds) *Commercial Law: Perspectives and Practice* (Butterworths 2006) 207–225.

receives a right that was encumbered by a right in favour of B. Unless C can invoke a defence, C's right will also be encumbered by B's right.

Example 2: X negligently destroys a car, title to which T held on trust for B.

X is not a successor in title to T. X neither received the legal title to the car, nor a right that depended on that right. B has no direct claim against X.[76] For these reasons, it is misleading – according to McFarlane and Stevens – to describe the beneficiary's interest as good against the world at large except good faith purchasers for value: the interest does not bind X.

For McFarlane and Stevens, there are (at least) three species of right: legal property rights, personal rights and rights against a right. The beneficiary's interest under a trust is a right against a right. A right against a right is characterised by A being under a duty to B that relates to a specific right vested in A. In the case of the trust, A is vested with a right that they hold on trust for B. A owes B a duty to use a specific right for B's benefit. A legal property right does impose a *prima facie* duty on the world at large not to interfere with the thing to which the right relates[77]: a legal property right is therefore characterised by its universal exigibility. A right against a right does not have the feature of universal exigibility, but rather persistence.[78] This is why, in Example 1, a beneficial interest under a trust may *prima facie* be asserted against C, because C received a right that was encumbered by B's right.

[76] cf *Shell* (n 55); discussed in Chapter VI, Section I.
[77] *Hunter v Canary Wharf Ltd* [1997] AC 655, 702–3 (Lord Hoffmann).
[78] McFarlane and Stevens (n 72) 1–2.

The rights against rights analysis provides a rival theory to the scheme-based analysis, when the focus is on trusts with beneficiaries. McFarlane and Stevens justify some of the key features of the trust with beneficiaries – such as claims against recipients[79] – in the individual position of the beneficiary, whereas – in the view of this thesis – it is the integrity of the scheme that provides that relevant justification. As will be seen in this thesis, this difference between the rights against rights analysis and the scheme-based analysis has some consequences in practice.[80]

C. Criteria for success and the nature of this project

The thesis argues that a scheme-based analysis of four key features of the trust is equally if not more plausible than each of a beneficial ownership or rights against rights analysis of such features. There are at least three criteria with reference to which it is possible to gauge the merits of a theory attempting to explain the nature of the trust and some of its key features and on each criterion the thesis argues the scheme-based analysis is just as plausible if not superior than the rival analyses: 1. The scheme-based analysis provides a better fit with the primary materials, in terms of the scope of the rules, as the scheme-based analysis can show why these four features apply to both trusts with and without beneficiaries, in a way that the rival analyses cannot; 2. Fit with the content and consequences of the rules: the scheme-based analysis can explain, for example, not only when a claim can be initiated against a trustee and/or third party, but also its effect, which is to reconstitute the trust fund, rather than compensating any individual for any consequential losses they may have incurred.[81] On the rival analyses, it would flow naturally that such losses may be recovered. But that is not the

[79] McFarlane and Stevens (n 72) 5.
[80] This argument is developed in eg Chapters III and VI, for example in relation to the question whether a beneficiary is able to recover their consequential economic losses (see eg Chapter III.II).
[81] See analysis in Chapter III, Section I.II.i.

law[82] and the scheme-based analysis provides a structure for analysis that naturally leads to the conclusion that the remedy for breach of trust is reconstitution of the trust fund; 3. Simplicity as a virtue[83]: Occam's Razor is understood as a criterion against which the strength of a theory can be measured. Occam's Razor is the principle that, among competing explanations, one should prefer the one that posits fewer entities, assumptions, or independent explanatory elements.[84] It is a virtue of a theory because unnecessary posits add complexity without adding explanatory power and a criterion of success because a theory that accounts for the same data with fewer moving parts is more likely to capture the real structure of the phenomenon and is easier to test, apply, and falsify than a rival that needs a proliferation of ad hoc supplements to achieve the same result. A beneficial ownership account of the trust, which sees the trust as entailing a split between legal and beneficial ownership, can only (at best) explain trusts with beneficiaries. But a further explanation would be needed, that does not rest on beneficial ownership, to explain why those same features apply to trusts without beneficiaries. A similar criticism can be made of attempts to ground those features in the rights against rights of a beneficiary.

This thesis is not concerned with the question of what might normatively justify legal systems allowing the creation of schemes. However, as explained by Hudson and Mitchell[85], it is necessary to know one's object of justification, before attempting a possible justification for that object. In providing a clear understanding of what a trust entails and what explains some of its key features, a future project can ask what normative justifications the law might

[82] See analysis in Chapter III, Section I.II.i.
[83] See eg Elliott Sober, *Simplicity* (Clarendon Press 1975).
[84] For a detailed analysis see eg Elliott Sober, *Ockham's Razors: A User's Manual* (Cambridge University Press 2015).
[85] Jessica Hudson and Charles Mitchell, 'Justificanda' in Simone Degeling, Jessica Hudson and Irit Samet (eds), *Philosophical Foundations of the Law of Express Trusts* (OUP 2023) ch 1.

have for allowing schemes to operate.[86] It is interesting to note that Ho and Harding, in a recent analysis[87], have begun to offer a justification for the trust that does not rest on the position of any individual party, but rather on the commitment of the law to an enduring structure governing the administration of specific rights.

Ho and Harding advance a "commitment theory" of express trusts, arguing that the trust's value lies not merely in expanding the range of available property arrangements but in providing a distinctive institutional modality for *stewardship commitments*.[88] On their account, the express trust uniquely enables commitments that are altruistic, dynamic and unwavering:[89] disponers bind themselves to a governance regime that no single party — settlor, trustee, or beneficiary — can unilaterally override,[90] in contrast to the mutually self-interested logic of contract,[91] the terminable character of ordinary fiduciary relationships,[92] and the shareholder-controlled nature of corporations.[93] Locating this account within a broadly Razian liberal framework centred on personal autonomy,[94] they contend that facilitative private law is valuable insofar as it furnishes an adequate range of distinct commitment types, of which enduring stewardship is one.[95]

[86] See analysis in Chapter VIII.
[87] Lusina Ho and Matthew Harding, 'A Commitment Theory of Express Trusts' (2025) 141 LQR 247 (Ho and Harding).
[88] Ho and Harding (n 87), 247–248.
[89] Ho and Harding (n 87) 249.
[90] Ho and Harding (n 87) 248.
[91] Ho and Harding (n 87) 253–254.
[92] Ho and Harding (n 87) 255.
[93] Ho and Harding (n 87) 257–258.
[94] Ho and Harding (n 87) 252.
[95] Ho and Harding (n 87) 252–253.

D. The core distinction between an integrity of the scheme analysis and an individual rights analysis

There is a set of rules and claims which is best understood as concerned with the personal interests or position of individual parties.[96] For example, where A enjoys outright legal ownership of a bicycle and D negligently damages or destroys it, A's remedy is best understood as calculated to protect A's individual interest.[97] It therefore makes sense – on this view – for A to be compensated for reasonably foreseeable consequential economic losses they have suffered as a result of the bicycle's destruction.[98] In contrast, it will be argued in Chapter III that there is another set of rules and claims, including those applying to all trusts, which is best understood as grounded not in the individual interests of individual parties, but rather in the integrity of a scheme. The example of the charitable purpose trust is particularly illustrative, as the four key features apply and yet there are no beneficiaries. The charitable purpose trust is a clear example that, in at least some trusts, individual interests do not provide the explanation for the key features.

Ho and Nolan[99] provide support for the argument that trust law remedies are calibrated towards upholding the due administration of the trust, rather than to compensate for individual losses. They argue that the central organising principle of the law of trusts is not the compensation of individual beneficiaries for loss, but the vindication of what they term the "performance interest"[100]: the interest in the due execution of the trust according to its terms. They show that it is axiomatic that a trust must be performed and that the court will,

[96] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32 [9] (Lord Bingham); Stephen A Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (OUP 2019) 223, 227–28.
[97] For discussion of the idea of beneficial ownership: *LA Micro Group (UK) Ltd v LA Micro Group Inc* [2024] UKSC 42, [2025] AC 1442 [20] (Lord Briggs).
[98] *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27 (CA).
[99] Ho and Nolan (n 64).
[100] Ho and Nolan (n 64), 402.

if necessary, secure that performance or even execute the trust itself.[101] This explains both the structure of the trustees' obligations and the distinctive remedial regime of trusts. In particular, the beneficiary's core right is not to compensation for loss, but to have the trust duly administered[102]; and where assets are misapplied, the trustee's primary liability is to restore the trust fund to the position it ought to have occupied.[103]

The law's concern is therefore not with loss suffered by individuals, but with ensuring that the trust fund is maintained and administered in accordance with the terms governing it. Ho and Nolan's analysis supports the present thesis' claim that the four key features of the trust are best understood by reference to the integrity of a scheme. Ho and Nolan's "performance interest" can be seen as reflecting a commitment by the legal system to uphold an all-encompassing set of terms governing the use of specific assets. Their account shows that a wide range of doctrinal rules – including the court's supervisory jurisdiction[104], substitution of trustees[105], and the accounting-based remedies for breach[106] – are all explicable as mechanisms to secure conformity with those terms. Their analysis also demonstrates that even where the trust has a beneficiary, the remedies aim to reconstitute the trust fund rather than compensate any person for consequential loss. Their analysis is also illuminating in the case of non-beneficiary trusts, such as charitable purpose trusts, where the same performance-oriented structure operates in the absence of any individual interest-holder. Ho and Nolan's work therefore provides support for the proposition that the law of trusts is

[101] *Morice* (n 13); *McPhail v Doulton* [1971] AC 424 (HL) 440 (Lord Hodson).
[102] For as long as the beneficiary decides to have the scheme structure on foot, their right is to due administration of that structure. To have an arrangement (namely outright beneficial ownership of an asset) where their individual interests and consequential losses are relevant, the beneficiary must first end the scheme using their power in *Saunders v Vautier*.
[103] See analysis in Chapter III, Section I.
[104] *Morice* (n 13); *Schmidt* (n 12).
[105] *Letterstedt v Broers* (1884) 9 App Cas 371 (PC) 386–87.
[106] *Target Holdings Ltd v Redferns* [1996] AC 421 (HL) 434 (*Target*).

organised around the preservation and enforcement of a scheme of administration, rather than the protection of personal interests as such.

E. The core distinction between beneficial and non-beneficial right-holding

In the view of this thesis, rights can be vested in one of two mutually exclusive ways in English law: beneficially or non-beneficially.

When a right is vested beneficially, the starting point is its holder can bring to bear their unfettered preferences in the deployment made of the totality of the jural relations entailed, as well as any *a priori* liberties relating thereto.[107] A's liberty to use a chattel is not entailed by the title with which they are vested. A has a liberty against everyone in the world, other than a party vested with a legal property right, to use any chattel as they wish. When A is vested with a legal title to the chattel, one of the jural relations thereby entailed is a claim-right against each person in the world at large that they stay off the object to which A's title relates. However, the liberty to engage in an open-ended set of use-privileges[108] is not entailed by the title. Rather, the title entails a claim-right that gives legal protection to one's *a priori* liberties.[109]

[107] JW Harris, *Property and Justice* (OUP 1996) (Harris).
[108] Harris (n 107), 28.
[109] Ben McFarlane and Simon Douglas, 'Property, Analogy and Variety' (2022) 42 *Oxford Journal of Legal Studies* 161; Ben McFarlane and Simon Douglas, 'Defining Property Rights' in James Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013) 219.

When a right is vested beneficially, the starting point is that the holder of the right is free to set the agenda[110], in accordance with their unfettered preferences.[111] The right-holder can do what they want, compatibly with property-independent prohibitions that apply to all[112] and with any property-specific obligations.[113] Such constraints do not alter the fundamental structure of the right-holding. They operate as limits on an otherwise free domain of use. The right-holder remains, as a starting point, the person who sets the agenda for the deployment of the right. Subject to specific prohibitions imposed by law, the use of the right is left to the right-holder's own preferences.

In the view of this thesis, when a right is vested non-beneficially, it has been appropriated to a scheme. When a right is vested non-beneficially, it is held in accordance with an all-encompassing set of terms.[114] The trustee is in this position: in each use the trustee makes of the trust assets, they are under an obligation to act in accordance with the terms of the trust.[115] The trustee thus lacks the agenda-setting power of a beneficial owner. "Beneficial ownership" can be used in a general sense to identify a party who is free to set the agenda with an asset, as is the case of a party with full legal ownership who is not subject to a trust – this makes clear that a party can be a beneficial owner without there being any trust.[116]

[110] Larissa Katz (2008) 'Exclusion and Exclusivity in Property Law', 58 University of Toronto Law Journal 275 (Katz). Katz uses the language of setting the agenda with a "resource".
[111] See further the analysis in Chapter II, which argues that a right subject to a lease, easement, contractual licence or security interest is held beneficially, albeit subject to restrictions, because the encumbrance is not all-encompassing.
[112] Harris (n 107) 248.
[113] Tony Honoré, 'Ownership' in *Oxford Essays in Jurisprudence* (ed Guest, 1961), republished in Making Law Bind (1987), 161, 174.
[114] See the definition of "all-encompassing" above.
[115] *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 (*AIB*) [51] (Lord Toulson).
[116] See Lord Briggs in *Frenkel v LA Micro Group (UK) Ltd; LA Micro Group Inc v LA Micro Group (UK) Ltd* [2024] UKSC 42, [2025] AC 1442 [20].

The thesis is not using the language of the trust preventing the right-holder from bringing to bear their unfettered preferences interchangeably with the duty to act in accordance with an all-encompassing set of terms (the core scheme duty, discussed in Section II.A, below). Holding a right subject to a duty to act in accordance with an all-encompassing set of terms necessarily also means that the right-holder is under a duty not to bring to bear their unfettered preferences. However, being under a duty to act in accordance with an all-encompassing set of terms has a positive dimension eg an express trustee must positively advance the aims of the scheme (including appropriately investing the trust property[117]), a constructive trustee must positively return the misapplied trust assets[118] and a bare trustee – as explained by Matthews[119] – has only one active duty, which is to convey the trust property as and when directed by the beneficiary under the rule in *Saunders v Vautier* and owes no other obligation to comply with any further directions the beneficiary might give.[120] By just sitting on the trust assets and doing nothing, the trustee cannot really be said to be bringing to bear their unfettered preferences, but they are not acting in accordance with their positive duty to use the trust assets in accordance with the terms of the scheme. It is therefore helpful to understand the duty to act in accordance with an all-encompassing set of terms as entailing a positive dimension ie that the trustee must positively do something on the satisfaction of particular conditions (eg in a bare trust, when the beneficiary tells the trustee to convey the trust assets to them).

The core scheme duty therefore entails *both* a duty not to bring to bear one's unfettered preferences in relation to a specific right *and* a duty to positively use that right in accordance with an all-encompassing set of terms. In English law, trusts are not recognised

[117] Trustee Act 2000 ss.4 and 5
[118] *Byers* (n 17) [42]; see analysis in Chapter VI, Section II.
[119] Paul Matthews, 'All About Bare Trusts: Part 1' [2005] 5 PCB 266; Paul Matthews, 'All About Bare Trusts: Part 2' [2005] 6 PCB 336.
[120] *Re Brockbank* [1948] Ch 206 (Ch D); *Re George Whichelow Ltd* [1954] 1 WLR 5 (Ch D).

and enforced that simply involve the trustee being under a duty to do nothing with the trust property.[121] Being under a duty simply not to bring to bear one's unfettered preferences does not give rise to a trust. Something more is needed: a positive duty to act in accordance with an all-encompassing set of terms.

It is the core distinction between beneficial and non-beneficial right-holding which provides the unity – at a general level – between the trust and several other arrangements in the law, including the deceased estate and bankruptcies. All these arrangements entail the non-beneficial holding of rights and are therefore susceptible to a scheme-based analysis. One advantage of the scheme-based analysis is it identifies precisely in what non-beneficial right-holding consists. In Chapter II, it will be argued that non-beneficial right-holding means having a duty to act in accordance with the terms of a scheme, not that the right-holder cannot benefit from the right[122]; rather, the right-holder may be able to benefit from the right, but only if those benefits are routed through the terms of the scheme.

This understanding of non-beneficial right-holding resists the often-found idea that the trustee holds a right and is under a duty not to use that right for their own benefit.[123] It also criticises the idea that what defines the essence of the trust is the trustee holding rights and being under a duty to deploy those rights in the interests of beneficiaries. It is not the interests of any beneficiaries that furnish the essence of the trust: rather, it is the law's commitment to the integrity of a scheme. The duty of the trustee is to discharge the terms of a scheme, not to act in the interests of any particular individual.[124] The operation of a

[121] *Brown v Burdett* (1882) 21 Ch D 667 (Ch D).
[122] See eg analysis of the vendor-purchaser constructive trust in Chapter II.II.B.
[123] Robert Stevens, *The Laws of Restitution* (Oxford University Press 2023) 223; McFarlane and Stevens (n 72).
[124] Charles Mitchell, 'Good Faith, Self-Denial and Mandatory Trustee Duties' (2018) 32 TLI 92 (Mitchell, Duties).

discretionary trust illustrates these points.[125] Consider an example where T holds on a discretionary trust for themselves and five other objects. T – as trustee – may be entitled to exhaust the value of the trust fund in their favour, if, for example, T is impecunious and the other objects win the lottery. Furthermore, a payment by T in favour of B2, one of the objects, is clearly not in the interests of B3, but is not for that reason unlawful. It is also important to note that, even in a fixed trust with a sole beneficiary, if a beneficiary is dissatisfied with the terms of a trust, they cannot simply dictate that the trustee administer the fund in accordance with an alternative set of terms.[126] The beneficiary must first collapse the existing trust and set up a new scheme of administration.

In the view of this thesis, the distinction between beneficial and non-beneficial right-holding is the distinction between agenda-setting and scheme-governed authority. A trustee's use of the trust assets is governed by the terms of the trust (as well as other duties imposed by the general law) and equity will do its best to ensure that the limits on the trustee's authority are respected. Hudson develops a general account of equity as a "gloss on authority"[127], distinguishing between the existence of a legal power and the lawfulness of its exercise.[128] Power-generating rules confer on a right-holder the ability to effect changes in legal relations by manifesting an intention (for example, a trustee's power as title-holder to transfer property).[129] By contrast, equitable rules do not define or limit that power; rather, they operate as power-controlling rules which condition the *authority* with which that power is exercised.[130] Authority depends on compliance with the terms according to which the power

[125] Mitchell, Duties (n 124).
[126] *Re Brockbank* [1948] Ch 206 (Ch D).
[127] Jessica Hudson, 'Equity's Gloss on Authority' in Ben McFarlane and Steven Elliott (eds) *Equity Today: 150 Years after the Judicature Reforms* (Hart, 2023) (Hudson).
[128] Hudson (n 127) 28–29.
[129] Hudson (n 127) 30–31.
[130] Hudson (n 127) 29, 39.

is held which may derive from the trust instrument, statute, or general law.[131] Crucially, these terms do not function as validity conditions: a trustee may effectively exercise a power (for example, by transferring title in accordance with property law rules) while acting *contrary* to those terms.[132] Equity responds not by denying the existence of the power, but by treating the exercise as unauthorised and supplying personal and proprietary remedies to reverse or neutralise its effects.[133]

Hudson's framework shows that a trustee does not lack power over the asset; rather, the trustee's authority to deploy that power is structured and constrained by an all-encompassing set of terms which express the mandate of the arrangement.[134] The trustee is therefore not an agenda-setter, but a scheme-governed actor: the exercise of the right must conform to the terms of the scheme. Equity's role is to secure the integrity of that scheme by ensuring – so far as possible – that departures from those terms are corrected. In this way, Hudson's "gloss on authority" maps neatly onto the idea that non-beneficial right-holding consists in the displacement of unfettered preferences in favour of scheme-governed use, with equity functioning as the mechanism that vindicates the scheme's normative priority over the holder's personal agenda.

Swadling's scholarship also supports this thesis' project. He argues that the common law trust does not involve a division of ownership, because English law does not recognise ownership as a right at all, instead recognising only rights and different ways of holding them.[135] English law deals with rights, not "ownership" and the trust entails a particular mode of holding rights. Swadling argues that English law recognises five distinct ways in which

[131] Hudson (n 127) 36–37.
[132] Hudson (n 127) 38–39.
[133] Hudson (n 127) 41–43; *Rolled Steel Products Ltd v British Steel Corp* [1986] Ch 246 (CA) 303.
[134] Hudson (n 127), 36–37.
[135] William Swadling, 'Trusts and Ownership: A Common Law Perspective' (2016) 24 European Review of Private Law 951 (Swadling), 952.

rights can be held: i. outright/beneficially/absolutely; ii. as security[136]; iii. as the executor/administrator of a deceased estate; iv. as administrator of an insolvent estate and v. as trustee.[137]

For Swadling, the trust does not entail ownership being divided between the trustee and beneficiary. The trustee holds all the rights, but must exercise them subject to obligations. The beneficiary does not have an equitable equivalent of the trustee's right.[138] Instead, they have a right to call the trustee to account and to enforce the proper administration of the trust.[139] Swadling argues that English law has no concept of ownership as a right.[140] Ownership only means the relationship that exists between a person and a right. To own a right is to hold it beneficially. A trustee holds the right, but does not own it, because they are not vested with that right beneficially.[141] Therefore, the trust entails the non-beneficial holding of rights. If a civilian jurisdiction says that trust property is owned by no one[142], this really means that the right is not vested beneficially in the trustee.[143]

Swadling also seeks to explain several trust doctrines by reference to the mode in which rights are held. For example, trust assets are excluded from the trustee's insolvency because the trustee does not hold the rights beneficially; they fall outside the statutory scheme for distribution among the trustee's creditors.[144] Similarly, trustee accountability, tracing, and certain forms of third-party liability arise because rights are held on trust and must therefore be administered for the relevant beneficiaries or purposes.[145] On this view,

[136] Swadling (n 135) 953.
[137] Swadling (n 135).
[138] Swadling (n 135) 964.
[139] Swadling (n 135) 966–967.
[140] Swadling (n 135) 959.
[141] Swadling (n 135) 970.
[142] Czech Civil Code, art 1448(3).
[143] Swadling (n 135) 970.
[144] Swadling (n 135) 956, 971–972.
[145] Swadling (n 135) 956, 958.

these doctrines do not presuppose any division of ownership between trustee and beneficiary. Rather, they are consequences of the non-beneficial holding of rights itself.

Swadling's project provides support for this thesis. His focus on the status of the right-holder aligns with the scheme-based analysis. Swadling's identification of a structural fact (the mode of holding rights) and his derivation of doctrinal consequences therefrom mirrors this thesis' argument that the four key features are sourced in the law's integrity commitment.

This thesis however argues against Swadling's view that five categories are necessary.[146] An executor, a trustee in bankruptcy and trustee all hold rights non-beneficially. Swadling lists different ways in which rights can be held, but does not provide a unifying explanation. The category of rights appropriated to a scheme discharges that function. Furthermore, Swadling describes consequences of rights being held on trust (eg tracing and third-party claims) but does not explain *why* the law decides that these consequences exist. This is where the integrity commitment is crucial. It provides a *justification* for the four key features. Swadling offers a taxonomy of right-holding. This thesis aims to provide a fully articulated process and architecture: from the reconstitution of authority over a right, an integrity commitment ensues, which is operationalised through doctrine.

[146] See also discussion of security rights in Chapter II, section III.

II. The levels analysis, the wider category of rights appropriated to a scheme and methodology

A. The levels analysis

The scheme-based analysis can be understood as composed of three distinct stages and the levels analysis simply separates them so that each can be examined on its own terms.

Level 1 is a claim about structure. A right is appropriated to a scheme when its holder comes under a kind of duty which means that right is held non-beneficially rather than beneficially.[147] This is a descriptive claim about how the right is held.

Level 2 is a claim about the legal system's response to that structure. Having recognised that a right may be held in this way, English law commits itself, in a qualified manner, to upholding the integrity of the scheme: an appropriation with no consequences would be no appropriation. This is a claim about what the legal system does, not about what it ought to do.[148]

Level 3 is a claim about doctrine: the particular rules through which the integrity commitment is given operational effect and balanced against the law's other commitments, such as the protection of good faith purchasers.[149] The four key features of the trust examined in Part II are Level 3 rules.

The relationship between the levels is one of dependence, not hierarchy. Level 2 presupposes Level 1, and Level 3 presupposes Level 2; but no level is more important than

[147] See analysis in I.E above.
[148] See analysis in I.C above.
[149] See analysis in Chapter III, Section II.

another. They answer three different questions: what has happened to the right (Level 1); what does the law make of that (Level 2); and precisely how (Level 3).

Separating these questions does three things. First, it distinguishes the constant from the contingent. Wherever a legal system recognises schemes, Levels 1 and 2 are present; the content of Level 3 varies across jurisdictions and over time within jurisdictions. Secondly, it allows rival accounts to be located. The equitable ownership analysis seeks to explain Level 3 rules by positing a Level 1 fact: the beneficiary's ownership. Thirdly, it resolves a potential ambiguity in the notion of a scheme. The scheme is descriptive at Level 1; the law's commitment to it at Level 2 is an internal commitment of the legal system; and that commitment explains, rather than restates, the doctrine at Level 3.

One qualification is necessary. The language of levels is a label of convenience. It is not claimed that this is the only, or the best, way in which these points could be expressed; the same analysis could be presented as three questions or three stages and nothing in the argument turns on the word. The terminology is used throughout the thesis as a way of signalling which kind of claim is being made at different points of the discussion.

Level 1: Appropriation

There are various events in English law that will re-define the authority over a right. The reconstitution can be voluntary (as with express trusts)[150] or imposed by the law on the occurrence of particular events (eg constructive trusts[151], bankruptcies[152] and automatic resulting trusts[153]).

[150] eg as in *Paul v Constance* [1977] 1 WLR 527 (CA).
[151] eg as with specifically enforceable contracts relating to land, discussed in Chapter II, section II.B.
[152] Insolvency Act 1986, s 306(1)–(2).
[153] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) (*Westdeutsche*) 705–706.

A right is appropriated to a scheme when A is under what this thesis will call the "core scheme duty": a duty not to bring to bear one's unfettered preferences in relation to a specific right held by A and to use that right in accordance with an all-encompassing set of terms. Agnew and McFarlane helpfully talk of there being a "core trust duty"[154], which this thesis understands to mean a duty not to bring to bear one's unfettered preferences and a duty to use a right in accordance with an all-encompassing set of terms.

Given that the core scheme duty applies not only to trustees, but also to – for example – executors, trustees in bankruptcy and partners, this thesis prefers to refer to the "core scheme duty", rather than the "core trust duty". It is the existence of that core scheme duty that gives rise to the existence of the scheme. It is therefore essential to understand that for the scheme to arise, A must owe a particular obligation: the core scheme duty. Once that duty is shown to exist, a scheme arises and the four key features of the trust should be understood as sourced in the law's commitment to upholding the integrity of that scheme.

The core scheme duty is not merely a duty; it is a special type of duty in the sense that it also has the effect of reconstituting the authority over a right.[155] Before that duty arose, the right was held beneficially (agenda-setting authority). After the duty, the right is held non-beneficially (scheme-governed authority). The duty does not merely regulate behaviour. It changes the legal character of the right-holding itself. Some discussions note that the trustee has duties in relation to a specific right.[156] This thesis goes further: it shows that the presence of a particular duty explains what kind of right-holding exists. The present thesis

[154] Sinéad Agnew and Ben McFarlane, 'The Paradox of the Equitable Proprietary Claim' in Ben McFarlane and Sinéad Agnew (eds), *Modern Studies in Property Law: Volume 10* (Hart 2019) (Agnew and McFarlane) 317.
[155] See discussion in section I.E above.
[156] eg McFarlane and Stevens (n 72).

identifies a category of duties that do not merely relate to rights but generate a distinct mode of right-holding.

The traditional rules of the law of trusts – such as case law on certainty of intention[157] – are applicable on the scheme-based analysis.[158] The cases establishing whether an express trust has been created can be understood as answering the question whether T is under a legally binding duty to use a specific right other than in accordance with their unfettered preferences and in accordance with an all-encompassing set of terms.[159] The existence of a scheme depends on primary facts which impose the core scheme duty.

Level 2: The legal system takes the reconstitution of authority seriously and a qualified institutional commitment to the integrity of the scheme ensues

For the law's recognition of the possibility of rights being appropriated to a scheme to be meaningful, the law will not continue treating A (the party in whom the right appropriated to the scheme is vested) in the same way as if A were vested with the right beneficially. For the legal system to be internally coherent, the appropriation must have some consequences. The legal system takes the appropriation seriously by making a qualified institutional commitment to the integrity of the scheme.

In determining how the law will give effect to its integrity commitment, there are choices to be made. For example, it could be said that an apparent transaction made by T in breach of trust is void, so that no rights pass to the transferee.[160] That would be one way of

[157] eg *Byrnes v Kendle* [2011] HCA 26 (2011) 243 CLR 253 (*Byrnes v Kendle*); discussed in Chapter II, section I.iv.
[158] An argument developed in Chapter II.I.
[159] eg *Lambe v Eames* (1871) LR 6 Ch App 597 (CA in Ch).
[160] See analysis in Chapter III, Section II.

protecting the integrity of a scheme. However, as noted when discussing Hudson's analysis above, English law has chosen a different route, compatible with the nature of equity as a supplementary body of rules[161], which can nonetheless still be seen as protecting the integrity of a scheme, notably through reconstitution of the trust fund, rather than through compensation paid to beneficiaries.[162]

Level 3: Giving operational effect to the integrity commitment

Once it is shown that the core scheme duty has arisen, then a scheme arises and the four key features are plausibly understood as the law giving operational effect to its integrity commitment. Different jurisdictions operationalise integrity differently. Integrity does not dictate a single doctrinal solution. Doctrine is contingent, but not random. Doctrine is constrained by Level 2 and other legal commitments, such as the protection of good faith purchasers, as well as potentially the autonomy of certain parties, such as the beneficiary, which might be a reason – as suggested in Chapter III, Part II.IV.iv – why English law allows beneficiaries, in certain circumstances, to collapse the trust and claim its underlying assets. The legal system decides at Level 3 what tools it will apply to give effect to its qualified institutional integrity commitment and how to balance that commitment alongside other commitments.

Some legal systems may have a rich tapestry of rules. Other legal systems may provide more limited tools to uphold the integrity of the scheme. For example, in the Japanese and Chinese laws of trusts, it is only possible to initiate claims against the first recipient of misapplied trust assets – it is not possible to go after more remote recipients.[163]

[161] See analysis in Chapter III, Section II.
[162] See further Hudson (n 127) and Ho and Nolan (n 64).
[163] James C Fisher, 'Trusts and Legal Transplants: Lessons from Japan' in Ben McFarlane and Sinéad Agnew (eds), *Modern Studies in Property Law, Volume 10* (Hart Publishing 2019).

Also, it is the trustee who rescinds the transaction with the third-party; the beneficiary has no direct claim against the first recipient.[164] In English law, it is possible to retrieve the specific misapplied rights (or their traceable proceeds) from not only the initial recipient, but later recipients as well[165] and also to initiate personal claims to reconstitute the trust fund against the initial and remote recipients.[166] Unlike with Japanese law, these claims can be initiated by parties other than the trustee.[167]

Doctrine can change. If the legal system allows rights to be appropriated to a scheme, the legal system will always show some commitment to its integrity. However, at level 3, the precise content and calibration of the rules can change. The legislature or the courts could decide that the trustee's duty not to misapply the trust property is no longer strict liability[168] and so that the trustee only breaches that duty if they are negligent. The law could decide to disable[169] the trustee from making transfers in breach of trust. The law could decide to remove the strict liability claim available against recipients of misapplied deceased estate assets[170] or to keep that claim and extend it so it can be used against recipients of misapplied trust assets.[171] Indeed, even the four key features of the English trust could be moulded or cease to be recognised and there might still be a scheme. All depends on the extent of a jurisdiction's integrity commitment.

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[164] Japan: Trust Act (Act No 108 of 15 December 2006, as amended by Act No 53 of 2011), art 27; see also Masayuki Tamaruya, 'The Transformation of Japanese Trust Law and Practice: Historical Contexts and Future Challenges' (University of Tokyo Business Law Working Paper Series No 2021-E-02, May 2021) 22–23. China: Trust Law of the People's Republic of China (adopted by the National People's Congress, 28 April 2001, in force 1 October 2001), arts 22, 49; see also Hui Jing, 'Third-Party and Bankruptcy Effects under Chinese Trust Law: Comparisons with English Trust Law' (2024) 19 Asian Journal of Comparative Law 216, 224–26; Siyi Lin and Hui Jing, 'Knowing Receipt in Chinese Trust Law' (Journal of Equity, forthcoming).
[165] See analysis in Chapter V.
[166] *Relfo v Varsani* (n 18).
[167] eg *Foskett* (n 19).
[168] *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 [80].
[169] For discussion of the language of disability see eg Jessica Hudson, "One Thicket in Fraud on a Power" (2019) 39 OJLS 577.
[170] *Diplock* (n 22).
[171] See discussion in Chapter VI, Section III.

It is important to underscore that the precise content of the Level 3 rules – the content of the law of trusts of a particular jurisdiction – will depend not only on the extent of that jurisdiction's commitment to the integrity of the scheme, but also on how that commitment is balanced alongside other commitments and ideals. For example, as will be discussed in Chapter III, Part II.IV.iv, most states in the United States do not allow beneficiaries to collapse the trust, whereas in English law, under the rule in *Saunders v Vautier*[172], beneficiaries are given such a power in certain circumstances. Those states in the United States that do not give beneficiaries such a power might be seen to be more committed to the autonomy of the settlor, rather than the autonomy of the beneficiaries, whereas the reverse seems to be true in English law.

Levels analysis: structural and explanatory

The levels analysis illustrates that the scheme-based analysis provides a structural and explanatory architecture, not a re-description of trust law. The scheme-based analysis is both explanatory and classificatory: the trust can be understood as belonging to a wider category of rights appropriated to a scheme. The scheme-based analysis aims to explain existing doctrine (namely the four features), as sourced in the law's commitment to the integrity of the scheme. Any apparent ambiguity in the notion of a "scheme" – whether it is descriptive or explanatory – is resolved by the levels analysis. The scheme is, at Level 1, a descriptive structural fact about the holding (beneficial or non-beneficial) of rights. The law's commitment to its integrity is, at Level 2, an explanatory stance. Doctrine (Level 3) operationalises that stance by producing a concrete body of rules that both gives effect to that

[172] *Saunders* (n 38).

qualified integrity commitment, whilst balancing that commitment alongside other commitments and ideals.

The Level 2 integrity commitment does not restate doctrine. It explains *why* doctrine has the content it does. The four key features follow from a deeper structural commitment: once authority over a right is recognised as scheme-governed rather than beneficially-held, the legal system must maintain that distinction in its doctrinal operations. Legal systems do not merely enforce obligations. They maintain structured forms of authority, including trusteeship. Level 2 captures the legal system's commitment to maintaining that form. Doctrine (Level 3) is how it does so. Lionel Smith's scholarship[173] supports the distinction between Level 2 (explanatory basis) and Level 3 (doctrine) by explicitly recognising that legal rules are underpinned by higher-order "justificatory principles."[174] His work shows that doctrinal rules governing trustees and other power-holders are not self-standing, but are expressions of more general principles and commitments.

B. Beyond trusts

Consider a situation where A is appointed as B's executor. On B's death, A is vested with B's rights. A is vested with those rights non-beneficially. A is under a duty to follow an all-encompassing set of terms in the use made of the rights in question. A is fastened with a duty to pay B's creditors first, alongside the tax authorities[175]; only after having paid B's creditors may A convey B's assets to B's legatees; B's residuary legatee will receive whatever is left after all B's creditors have been paid and pecuniary and specific legacies satisfied.[176] In

[173] Lionel Smith, *The Law of Loyalty* (Oxford: Oxford University Press, 2023) (*Loyalty*).
[174] *Loyalty* (n 173), Chapter 1.
[175] Administration of Estates Act 1925, ss 32, 34(3) and sch 1, Pt II; Administration of Insolvent Estates of Deceased Persons Order 1986 (SI 1986/1999), art 4; Insolvency Act 1986, s 386 and sch 6; Finance Act 2020, s 98 and sch 12; Trustee Act 1925, s 27.
[176] *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 (PC) (*Livingston*) 707.

Commissioner of Stamp Duties (Queensland) v Livingston[177], the Privy Council was asked to consider the nature of Mrs Coulson's interest in the unadministered estate. She was the residuary legatee and Viscount Radcliffe found that during the period of administration, she did not enjoy a beneficial interest in the assets of the deceased estate. [178]

Viscount Radcliffe was correct in his advice to highlight that Mrs Coulson's interest was subject to the priority claims of the estate creditors, as well as the pecuniary and specific legatees. However, the rights of a beneficiary of a trust are also residual, in the specific sense that they take subject to the priority claims of the trustee and the trust creditors.[179] The residuarity of Mrs Coulson's interest is therefore an insufficient basis to distinguish her rights from those of a beneficiary of a trust.[180] Indeed, *Livingston* is an example – alongside *Commissioner of State Revenue v Rojoda Pty Ltd*[181] (discussed below) – of why it is important for judges to draw the general link to the category of schemes in adjudicating upon concrete issues in litigation, such as whether Mrs Coulson's right counted as a "beneficial interest" for the purposes of the Stamp Duties Act 1920 (Queensland), section 3(1).

Consider a situation where A is appointed as B's trustee in bankruptcy. A is vested with B's rights. A is under a duty to distribute those rights in accordance with an all-encompassing set of terms. A does not set the agenda in relation to those rights. They must simply follow the terms established in the bankruptcy scheme.[182]

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[177] *Livingston* (n 176).
[178] *Livingston* (n 176) 707–708.
[179] *Worrall* (n 16) 8.
[180] See further Giuseppe Jafari, *Rights Appropriated to a Scheme: Trusts, Partnerships and Deceased Estates Compared* (University of Oxford, M Phil thesis, 2021) (Jafari, MPhil), chapter IV.II.
[181] [2020] HCA 7, (2020) 268 CLR 281 (*Rojoda*).
[182] Insolvency Act 1986, ss 305–314

Consider a situation where A, B and C are vested with freehold title to land that has been devoted to the terms of their partnership deed. A partnership illustrates well the point that non-beneficial right-holding should not be understood as A being vested with a right and A being under a duty not to use that right for their own benefit. Rather, when vested with a right non-beneficially, A cannot bring to bear their unfettered preferences or discretions. This is a different notion from A not being allowed to benefit from the right. A can benefit from the right when vested with it non-beneficially[183]; the important aspect is that those benefits are routed through the terms of the scheme.[184] In *Lipkin Gorman v Karpnale Ltd*[185], the errant partner breached the terms of the scheme by bringing to bear their unfettered preferences. The terms of the partnership scheme did not authorise the partner to use the legal title with which they were vested to gamble.[186] Cass had misappropriated the funds and acted without lawful authority.

The context in which the appropriation occurs may justify the detailed rules differing amongst the different examples of schemes. For instance, the context of a partnership, which means the partners are also agents,[187] may justify the specific indemnity rules differing from those of the standard fixed trust. A trust creditor of a standard trust is only able to benefit from a trustee's right of indemnity where the debt incurred by the trustee was authorised under the terms of the trust.[188] With a partnership, a partnership creditor is afforded stronger support, as an indemnity arises in favour of the partner both where the debt they incur was

[183] See discussion in eg Mitchell, Duties (n 124).
[184] Partnership Act 1890, s 20(1) and s 24(1).
[185] [1991] 2 AC 548 (HL) (*Lipkin Gorman*)
[186] *Lipkin Gorman* (n 185), 572–573.
[187] Partnership Act 1890, s 5.
[188] *Hardoon v Belilios* [1901] AC 118 (PC); *Re Johnson, Shearman v Johnson* (1880) 15 Ch D 548 (Ch D).

authorised under the terms of the partnership deed and also where they had ostensible authority under the partnership scheme to incur the debt.[189]

However, it is also important to emphasise that courts should be slow before drawing categorical differences between the standard trust and the partnership.[190] In *Rojoda*, the High Court of Australia was asked to consider whether a transfer of assets from a partnership to a standard fixed trust entailed the creation of "new" interests, attracting fiscal consequences. The High Court of Australia said that the interest of a beneficiary under a fixed trust is importantly different from that of a partner, because the latter's interest is subject to the priority claims of the partnership creditors as well as the priority claims of the partners.[191] However, as explained by Televantos, the interest of a fixed trust beneficiary is also subject to the priority claims of the trustee and the trust creditors, which means that the reason given by the court for distinguishing between the partnership and the trust was not compelling.[192] Both *Rojoda* and *Livingston* show the practical importance of seeing the general link between the trust, deceased estate and partnerships.[193]

At more than one juncture in this thesis, it will be argued that courts and scholars have drawn the wrong analogy in understanding the trust. For example, in Chapter VI, Section I, it will be argued that the Court of Appeal in *Shell UK Ltd v Total UK Ltd*,[194] instead of drawing the analogy between the claimant and other parties that might benefit under a scheme structure – such as the legatees of a deceased estate – drew the inappropriate analogy to the

[189] Partnership Act 1890, s 5.
[190] See further Jafari, MPhil (n 180), Chapter IV.I.
[191] *Rojoda* (n 181) [33].
[192] Andreas Televantos, 'The Nature of Partnership Property and Fixed Trusts' (*Oxford Property Law Blog*, 4 December 2020); Andreas Televantos, 'The Nature of Partnership Property and Equitable Interests' (2023) 139 LQR 26.
[193] Jafari, MPhil (n 180).
[194] [2010] EWCA Civ 180, [2011] QB 86 (CA).

position of an owner of assets. In Chapter VI, Section III, Birks' attempt to understand the strict liability personal claim available against recipients of misapplied deceased estate assets will be criticised. For Birks, it is wrong that such a claim is not available to the beneficiary of a trust, because for Birks the beneficiary of a trust (where trust assets are misapplied) is in an analogous position to that of an outright legal owner who makes a mistaken payment.[195] For Birks, there is therefore an inconsistency between common law and equity.[196] For Birks, there is also an inconsistency within equity[197], because such strict liability personal claims are available to legatees of an unadministered estate.[198] However, in the view of this thesis, Birks was drawing the wrong analogies. The better link is not between the position of a beneficiary of a trust and an outright legal owner, but between the trust and the wider category of rights appropriated to a scheme. There is no inconsistency between treating the beneficiary differently from an outright legal owner, but this thesis accepts that there may be an inconsistency in allowing strict liability claims in the deceased estate context, but not in the trust context. The argument for allowing strict liability personal claims in the trust context, therefore, is not that beneficiaries are owners of the trust assets, but rather that both the trust and deceased estate involve schemes whose integrity the law is committed to upholding.

[195] Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 UWAL Rev 1 (Birks, Taxonomy) 69–70.
[196] Birks, Taxonomy (n 195) 71.
[197] Birks, Taxonomy (n 195) 71–72.
[198] *Ministry of Health v Simpson* [1951] AC 251 (HL).

C. Methodological commitments and foundations in existing scholarship

i. Focus on form, rather than function; focus on legal architecture, rather than economic or other analysis

Gretton rightly notes that the trust is functionally protean.[199] The trust can be used for a wide number of goals. As Lepaulle colourfully put it:[200]

> If one were to ask what the trust is for, we could just about reply: "everything"! The trust is more indispensable than tea to English life or baseball to American life.

The aim of this thesis is to explain the form of legal institutions: the essential form of the trust is plausibly understood as entailing rights appropriated to a scheme. The focus on form, rather than function, means that this thesis shares the methodology of authors such as McFarlane and Stevens, who seek to carefully delineate the precise structure of a legal concept, such as equitable property.[201] There may be benefits in studying the trust from an economic, moral or other non-doctrinal perspective. However, without a clear understanding of the trust's juridical nature, those other inquiries may fall into error. For example, erroneously conceptualising the trust as entailing a split between legal and beneficial ownership can lead scholars to misunderstand the moral value it serves.[202]

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[199] Gretton 'Trusts without equity' (2000) 49 ICLQ 599.
[200] Alexandra Popovici and Lionel D Smith, 'Lepaulle Appropriated' in Remus Valsan (ed), *Trusts and Patrimonies* (Edinburgh University Press 2015) 13 (Lepaulle) 20. The authors provide a translation of the first chapter of Lepaulle's 'traité théorique et pratique des trusts en droit interne, en droit fiscale et en droit international' which was published by Rousseau et cie in Paris in 1932.
[201] See also William Swadling, 'In Defence of Formalism' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart 2019) 95.
[202] Dagan and Samet, MLR (n 27).

Dagan and Samet's account[203] – which argues the trust is defined by the beneficiary's property rights in the trust assets[204] – proceeds in the wrong order. Rather than first identifying the juridical structure of the trust, they begin from an external, autonomy-based theory of property[205] and then fit the trust within it, thereby concluding that it instantiates a form of "divided ownership".[206] This move renders the classification of the trust dependent on a contested conception of property, rather than on the internal structure of the institution itself. As a result, their analysis risks misdescribing the trust's essential form: the trustee's rights do not co-exist with another owner's rights.[207] Rather, they are appropriated to a scheme which constrains their exercise. By recasting this structural feature as co-ownership[208], their account substitutes function for form and thereby obscures the very phenomenon it seeks to explain.

ii. Focus on the position of the trustee and the appropriation of rights to a mission

This thesis argues that the trust's nature is better grasped not by exploring the individual position of a beneficiary, but rather in understanding the position of the trustee and the limits on their authority. In this sense, the thesis builds on an important recent chapter by McFarlane, which highlights the benefits of seeing the trust through the position of the trustee.[209] In a similar vein to McFarlane's recent Current Legal Problems article[210], this

[203] Dagan and Samet, MLR (n 27).
[204] Dagan and Samet, MLR (n 27) 701–703.
[205] Dagan and Samet, MLR (n 27) 707–709.
[206] Dagan and Samet, MLR (n 27) 710–712.
[207] Dagan and Samet, MLR (n 27) 711–712.
[208] Dagan and Samet, MLR (n 27) 710–712.
[209] McFarlane, Express Trusts (n 44).
[210] McFarlane, CLP (n 44).

thesis also emphasises the wider picture. The trust is not as simple as A, B and C: its four key features apply to situations where there is no beneficiary, as with the charitable purpose trust.

Lepaulle provides support for this thesis' argument that the trust's four key features are grounded in upholding the scheme's integrity. He argues the trust is a patrimony – namely a container of rights and liabilities – independent of any legal subject and that patrimony is unified by an affectation ie an appropriation to a specific purpose.[211] Lepaulle defines the trust with reference to two structural elements. First, a distinct patrimony. Second, an affectation.[212] The trust property belongs to no one's patrimony (settlor, trustee or beneficiary). Rather, it forms a separate, autonomous pool of assets, which persists across substitutions and the identity of the patrimony continues through transformations.[213] The trust patrimony is given a mission, which includes precise instructions as to how the property is to be deployed, as well as a deeper guiding principle.[214]

Lepaulle systematically exposes the flaws in two dominant explanations of the trust. First, he rejects the idea that the trust is just a personal obligation owed by the trustee to the beneficiary: trusts can exist without beneficiaries.[215] Second, he rejects the "real rights"/ "split ownership" theory of the trust. It is false to describe the trust as entailing a division of ownership between the trustee and the beneficiary. Trusts can exist with no beneficiaries and the subject-matter of the trust can be personal rights.[216] Lepaulle also says that any theory that attempts to define the trust as a relationship between persons is false.[217]

[211] Lepaulle (n 200) 27–28.
[212] Lepaulle (n 200), 27.
[213] Lepaulle (n 200), 27–28; see too the analysis in Chapter II.C.v below.
[214] Lepaulle (n 200), 28–29.
[215] Lepaulle (n 200), 26.
[216] Lepaulle (n 200), 27.
[217] Lepaulle (n 200), 27.

Lepaulle's account of the trust supports some of the goals of this thesis. His distinction between two ways of holding rights[218] is captured in Level 1 of the levels analysis. Lepaulle also implicitly recognises that the legal system must ensure the success of the appropriation.[219] Furthermore, his insights on duties, the standing of beneficiaries and the third-party effects of the trust are consistent with the argument espoused in this thesis that doctrine is contingent implementation of the law's integrity commitment.[220] Lepaulle's insights can be collected and re-organised around a coherent architecture that works for English law: the scheme-based analysis.

There are also problems with Lepaulle's ideas that are not encountered on the scheme-based analysis. First, he adopts a view that the trust property can be vested in no-one.[221] This is unnecessary and cannot make sense of the position in English law that rights must be vested in some person endowed with legal personality. Second, Lepaulle reifies the trust unnecessarily. Indeed, he even stated that the best way to create a trust by legislation in a civilian system was as a legal person.[222] On the scheme-based analysis, the trust can be understood without seeing it as a legal person.[223] Third, his arguments that the trustee owes duties to the trust are unnecessary. Rather, the law's commitment to the integrity of the scheme is upheld by parties (including the trustees and other parties who do not necessarily benefit from the duty of performance) endowed with standing to ensure the trust's due administration.[224] Fourth, it was arguably misguided of Lepaulle to think the trustee was not

[218] Lepaulle (n 200), 34–35.
[219] Lepaulle (n 200), 36.
[220] Lepaulle (n 200), 36–38.
[221] Lepaulle (n 200), 27–28.
[222] Pierre Lepaulle, 'La notion de 'trust' et ses applications dans les divers systèmes juridiques' in *Actes du congrès international de droit privé tenu à Rome en juillet 1950*, vol 2, *L'unification du droit / Unification of Law* (1951) 197.
[223] See in particular the analysis of trustee indemnities in Chapter IV. For an analysis of features of English law incompatible with the reification of the trust, see Lionel Smith, "Mistaking the Trust" (2010) 40 *Hong Kong Law Journal* 787-804.
[224] See analysis in Chapter VII.

needed for the common law trust to function. Smith criticises Lepaulle for this,[225] showing how he misunderstood the rule that a trust does not fail for want of a trustee.

Properly understood, the maxim does not mean that the trustee is conceptually dispensable. Rather, it reflects the court's refusal to allow the scheme to collapse merely because the designated holder of the rights has not been appointed, has died, or is otherwise unable to act.[226] In such circumstances, the legal system supplies or substitutes a trustee so that the rights and powers appropriated to the scheme remain exercisable and the scheme's integrity is preserved. The rule is therefore institutional and remedial, not ontological: it does not deny the necessity of a trustee, but ensures the continuity of the scheme by preventing a failure in the machinery for the exercise of the relevant rights and powers.

The maxim is a feature of the trustee being the vessel through which an all-encompassing set of terms is administered. The precise identity of the party in whom the rights are vested is unimportant. What matters is that there is a party willing and able to administer those specific rights. For these reasons, trusteeship can be described as entailing a form of depersonalised right-holding.[227] Indeed, a charitable purpose trust could potentially last forever,[228] which emphasises the point that the trustee holds an office, namely a legally constituted position to which a defined package of duties and powers is attached, with those incidents arising from the position itself.[229] The administration of the rights in accordance with the terms of the trust does not end when the current occupant of the office retires. The

[225] Lionel Smith, 'Trust and Patrimony' (2008) 38 *Revue générale de droit* 379.
[226] *Dodkin v Brunt* (1867) LR 6 Eq 580 (Ch).
[227] Ben McFarlane, 'The Trust and its Civilian Analogues' in Lionel Smith (ed), *The Worlds of the Trust* (Cambridge University Press 2013) 512–523.
[228] *Chamberlayne v Brockett* (1872) LR 8 Ch App 206 (CA in Ch).
[229] For discussion of trusteeship being an office, see eg Paul B Miller, 'The Fiduciary Relationship' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (OUP 2014) 63.

fact that trusteeship is an office partly explains the court's inherent jurisdiction to supervise the administration of trusts.[230] The court is the trustee in the final instance. The court stands as the ultimate guardian of the trust's integrity.[231]

Fifth, Lepaulle does not fully generalise his insights. He sees parallels between the trust and analogous institutions[232], but stops short of furnishing a general category.

One way that other civilian authors, such as Gretton and Reid, have attempted to understand the trust is that it entails a dual patrimony.[233] These civilian jurists may have partly been influenced by the writings of Lepaulle, whose work on the trust has formed the basis of civilian understandings of the trust in several jurisdictions, including Mexico[234] and Quebec.[235] Gretton and Reid seek to understand the trust as part of the law of persons. The standard model says that each person is endowed with a single patrimony at birth.[236] A core feature of the classical orthodoxy is that each person can have one and only one patrimony.[237]

However, the trust – on the Reid and Gretton view – constitutes an exception to the one person, one patrimony model. The trustee is endowed with two patrimonies: a trust patrimony and a personal patrimony. In the trust patrimony container, the trustee is vested with the rights they hold on trust and only liabilities that they incur in due administration of

[230] This is another feature of the trust that does not apply to eg a standard contractual duty.
[231] *Schmidt* (n 12) [36]; the court is potentially willing to devise its own scheme of distribution under a discretionary trust, in addition to its powers to replace trustees: *McPhail v Doulton* [1971] AC 424 (HL).
[232] Lepaulle (n 200) 30 – 35.
[233] George Gretton 'Trusts without equity' (2000) 49 ICLQ 599 (Gretton); Kenneth Reid 'Patrimony not Equity: The Trust in Scotland' in R Valsan (ed) *Trusts and Patrimonies* (Edinburgh, Edinburgh University Press, 2015) (Reid).
[234] Roberto Molina Pasquel, 'The Mexican Fideicomiso: The Reception, Evolution and Present Status of the Common Law Trust in a Civil Law Country' (1969) 8 Columbia Journal of Transnational Law 54.
[235] Civil Code of Québec arts 915, 1260-1261.
[236] Nicholas Kasirer, 'Translating Part of France's Legal Heritage: Aubry and Rau on the *Patrimoine'* (2008) 38 *Revue générale de droit* 453 (Kasirer).
[237] Kasirer (n 236).

the trust can be enforced against those rights. In the personal patrimony container, the trustee is vested with rights beneficially and only liabilities they incur in their personal capacity can be enforced against those rights.[238] On the dual patrimony model, the two containers do not overlap and are two distinct universalities of law.

Douglas has recently attempted to understand the trust with reference to the idea of the estate by providing a common law version of the dual patrimony model.[239] He essentially adopts a similar definition of estate to that of patrimony. He sees the trustee as endowed with two estates: a trust estate and a personal estate.[240] The trust estate entails the rights they hold on trust and the liabilities they incur in their capacity as trustee. Their personal estate entails the rights with which they are vested beneficially and debts they incur in their personal capacity.

A strength of the dual patrimony/dual estate theories is their focus on the position of the trustee. On this basis, these models move in a direction favoured by this thesis: focussing on the position of the trustee, rather than the rights of individuals. However, these analyses struggle in understanding the four key features of the trust, because the Gretton/Reid and Douglas analyses are in fact operating at Level 3. They offer observations about particular rules of their respective jurisdictions ("the trustee has two patrimonies", "the trustee has two estates"), but do not provide a justification for *why* those rules exist. They do not provide a clear justification for why the trustee *should* have two separate patrimonies or two separate estates.[241]

[238] Gretton (n 233) 612–13; Reid (n 233) 117.
[239] Douglas (n 9).
[240] Douglas (n 9) 102–104.
[241] Furthermore, as McFarlane has argued (Ben McFarlane, 'The Trust and its Civilian Analogues' in Lionel Smith (ed), *The Worlds of the Trust* (Cambridge University Press, 2013), in each case the dual patrimony/ dual

The Gretton/Reid and Douglas analyses are also difficult to square with the rules in English law on trust creditor claims. The debts that the trustee incurs in due administration of the trust can – in principle – be enforced against the rights with which the trustee is vested beneficially.[242] It is therefore difficult to see how the trustee can be seen as holding two distinct universalities of law.[243]

iii. The focus on the due administration of the trust

Recent scholarship on the trust has moved in the direction of focussing on the due administration of the trust structure, rather than attempting to understand the trust's key features in the position of parties said to have equitable proprietary rights. Hudson and Mitchell[244], Ho and Mitchell[245], Jing[246] and Nolan[247] are examples of scholars working within this trend.

Nolan – for example – argues that the law of trusts is best understood as the law governing the administration of a fund of assets.[248] On this basis, tracing rules – for example – are structured to restore that fund when it has been mismanaged. The trust is therefore not primarily about bilateral Hohfeldian obligations, but rather about the existence of a fund that is subject to rules of administration. Nolan reframes the trust as a defined pool of assets that

estate breaks a particular rule of the legal system (all one's assets are available to meet all of one's debts), so we have to ask why we should allow the rule to be broken.

[242] *Investec I* (n 16) [59]. See further Chapter IV.

[243] Smith, Trust and Patrimony (n 225).

[244] Hudson and Mitchell (n 42).

[245] Ho and Mitchell (n 9).

[246] Hui Jing, 'The Concept of Beneficial Ownership in Express Trust: A Necessity?' (2025) 18 J Equity 131.

[247] Richard Nolan, 'The Administration and Maladministration of Funds in Equity' in Peter Turner (ed.), *Equity and Administration* (CUP 2016), 72 (Nolan, Equity and Administration); Richard Nolan, 'Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures' in Paul Davies and James Penner (ed.), *Equity, Trusts and Commerce* (Hart 2017) (Nolan, Administrative Jurisdiction).

[248] Nolan, Equity and Administration (n 247).

is subject to management rules and asset partitioning.[249] He explicitly deploys organisational theory language[250]: the trust is identified, separated from the general assets of the right-holder and managed under a due administration regime.

Nolan – in a later piece[251] – generalises some of his earlier insights: equity operates through the existence of an administrative jurisdiction over certain structures, including trusts and deceased estates. When courts intervene in the administration of the trust, they are not merely resolving disputes, but supervising the stewardship of funds.[252] The trust is a managed structure that is subject to judicial supervision and administrative control. On this basis, standing is explained as a function of who may invoke the court's administrative jurisdiction. Nolan explains that not only the trust, but also deceased estates, partnerships and bankruptcies entail funds subject to rules of administration.[253] His unifying insight is that equity governs the administration of funds and does not simply adjudicate on bilateral disputes.

iv. Duties: directed or undirected?

There is an unresolved debate as to whether trustee duties are directed — owed to the beneficiary, who holds a correlative claim-right against the trustee — or undirected, meaning

[249] Henry Hansmann and Reinier Kraakman in "The Essential Role of Organizational Law" (2000) 110 Yale LJ 387 define asset partitioning as the legal separation of a distinct pool of assets from the personal assets of owners or managers, coupled with a system of priority rules allocating claims between different classes of creditors. Its central feature is affirmative asset partitioning: eg firm creditors enjoy a prior claim over the assets associated with the enterprise, shielding those assets from the personal creditors of owners and managers. The authors argue that this separation of patrimonies is the essential contribution of organizational law and the defining characteristic of legal entities.
[250] See, eg Hansmann and Mattei, "The Functions of Trust Law: a Comparative and Economic Analysis" (1998) 73 New York University L Rev 434.
[251] Nolan, Administrative Jurisdiction (n 247).
[252] Nolan, Administrative Jurisdiction (n 247), 156–58, 174–175.
[253] Nolan, Equity and Administration (n 247).

owed to no one in particular, such that standing to enforce them is allocated to particular parties for reasons independent of any correlative claim-right.[254]

Lionel Smith takes the view that trustee duties are, in general, directed[255]: a beneficiary can waive the trustee's duties and therefore render the trustee's non-performance of the trust lawful.[256] Undirected duties are, on his account, exceptional, arising only for charitable trusts (and non-charitable purpose trusts, where permitted) where a different standing rule — conferring enforcement powers on the Attorney-General and others — is accordingly required.[257] The fact that a beneficiary – in English law – may waive the performance of the trustee's duties and claim the trust's underlying assets or simply allow the trustee to hold the trust assets beneficially, is – on one view[258] – a reason for treating the trustee's core scheme duty as directed.

Hudson and Mitchell reject Smith's account and argue that trustee duties are, without exception, undirected.[259] For example, even where the terms of the trust require the trustee to act in favour of a single, identified beneficiary, the remedies available on breach are not calibrated to that beneficiary's own consequential or personal loss but to the state of the trust fund: liability is measured by the objective value of the property lost to the fund,[260] expressed as a duty to restore the trust estate to what it would have been had no breach occurred,[261] with

[254] Hudson and Mitchell (n 42) 211, 214–15, 225.
[255] *Loyalty* (n 173) ch 10, 285.
[256] *Loyalty* (n 173) 285–93; Hudson and Mitchell (n 42) 229.
[257] *Loyalty* (n 173) 285–95; Hudson and Mitchell (n 42) 225–26, 229–230.
[258] For example, Hart argues that the ability to waive the enforcement of a duty, is key to understanding to whom that duty is owed: Herbert LA Hart, *Essays on Bentham: Jurisprudence and Political Theory* (OUP 1982) 180– 88.
[259]Hudson and Mitchell (n 42) 226–227.
[260] *Libertarian Investments Ltd v Hall* [2013] HKCFA 93, (2013) 16 HKCFAR 681 [167]–[170] (Lord Millett NPJ).
[261] *Target Holdings Ltd v Redferns* [1996] AC 421 (HL) 434.

claims for loss "extraneous" to the fund failing even where a breach of the duty of care has been established.[262]

It is argued that this thesis does not need to resolve the debate, in order to make out the plausibility of the core thesis claim. Even if one prefers to say that the trustee's duty is directed, the trustee's duty to the beneficiary is not a duty of the same kind that arises between ordinary contracting parties: it is a duty annexed to a specific right, or set of rights, held by the trustee, which the trustee must use in accordance with an all-encompassing set of terms.[263] Correspondingly, if the beneficiary does hold a correlative claim-right on the directed view, the content of that right is not a right to the trustee's performance measured by the beneficiary's own individual economic position: it is a right to due administration of the trust structure as a whole. This is why a breach of trust does not allow the beneficiary to claim for their own consequential economic loss[264]: the beneficiary's claim, whether conceived as directed or undirected, tracks the state of the trust fund and not the beneficiary's personal position.

As will be seen in Chapter III, Section II.IV.iv, it is important to recognise that beneficiaries have powers unavailable to other parties under the trust structure.[265] These factors may well weigh in favour of the view that the trustee's core scheme duty is owed to the beneficiary. However, these points do not detract from this thesis' core claim that four key features of the trust can be understood as sourced in the law's commitment to the integrity of the scheme. For as long as the scheme is up and running and the beneficiary does

[262] *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 680, 688 (Gault J); and see *Agricultural Land Management v Jackson (No 2)* [2014] WASC 102, (2014) 48 WAR 1 [347] (Edelman J).
[263] See analysis in Chapter II.
[264] See analysis in eg Chapter III, Section I and Chapter VI.
[265] eg powers to consent to breaches of trust.

not decide to end the scheme, the four key features can be rooted in the law's integrity commitment, instead of invoking the beneficiary's individual position.

It might be said that the scheme-based analysis fits more naturally with the undirected duty analysis advanced by Mitchell and Hudson than with Smith's directed duty account. By explaining four key features of the trust by reference to the legal system's commitment to preserving the integrity of the trust scheme, rather than by reference to the beneficiary's own juridical position, it removes one of the principal objections to the undirected duty analysis, namely that such an analysis cannot adequately explain why the law affords beneficiaries extensive enforcement powers in ordinary private trusts. On the present account, those enforcement powers need not necessarily be understood as reflecting a correlative claim-right against the trustee, but rather as Level 3 standing rules calibrated to secure the law's Level 2 commitment to the integrity of the scheme. Moreover, because the scheme-based analysis identifies the same underlying juridical structure across all trusts, whether private, charitable or purpose trusts, it naturally aligns with an account under which the trustee's core duty has the same juridical character in every case, rather than changing depending upon whether there is a beneficiary capable of holding a correlative right. Even so, the analysis developed in this thesis retains independent explanatory value for those who prefer Smith's directed duty analysis, because it demonstrates that the content of the trustee's core duty and the operation of the trust's principal doctrinal features are best understood by reference to the integrity of the trust scheme rather than the beneficiary's individual economic position. Therefore, the thesis' core claim that the four key features are rooted in the integrity of the scheme does not depend on the whether the trustee's core scheme duty is directed or undirected. Full exploration of that issue can occur in future research.[266]

[266] See analysis in Chapter VIII.

v. Lord Briggs' analysis in *Halabi*; the trust as an institutional and ongoing structure

Lord Briggs' words in *Equity Trust (Jersey) Ltd v Halabi*[267] provide a vocabulary which aligns with a scheme-based analysis:

> While a trust does not, even in Jersey, have a separate legal personality of its own, it is in my view relevantly to be regarded as a form of *continuing institution or scheme* under which a fluctuating body of assets (the fund) is administered by fiduciaries who may change over time, for the benefit of beneficiaries who may likewise change, subject to a set of rules contained in the trust deed and the general law, which may also change, by amendment of the trust deed, by judicial variation, by legislation or even by the "export" of the trust into a different legal jurisdiction. Despite all these potential changes, *the trust itself has an enduring character which is not dependent upon separate legal personality*, any more than is a partnership or unincorporated association.

The Privy Council was asked to consider the position of successive trustees of a trust whose fund had become insufficient to satisfy all their indemnities and in particular the nature and priority of each trustee's equitable lien arising from their right of indemnity.[268] The central issue was whether liabilities incurred by different trustees ranked in priority according to the order in which the trustees were appointed, or whether they should be satisfied *pari passu*. The majority held that each trustee has a proprietary interest in the trust

[267] [2022] UKPC 36; [2023] AC 877 (*Investec II*) (emphasis added).
[268] *Investec II* (n 267) [2].

assets by virtue of their right of indemnity, but those interests do not rank by date of appointment; instead, where the fund is deficient, the claims of successive trustees are to be satisfied *pari passu*, reflecting the non-competitive[269], collective character of trusteeship and rejecting any analogy with priority rules between competing secured creditors.[270]

Lord Briggs makes several important observations in the passage set out above. He decouples the trust from any fixed set of persons and from any fixed set of assets. His concern is not with a bundle of bilateral relations, but rather with a structured arrangement of rights appropriated to a scheme. Lord Briggs implicitly rejects a purely Hohfeldian or correlational account of the trust. The trust is not exhausted by A owing duties to B. Rather, the position of the beneficiary is a *derivative* manifestation of a more fundamental juridical fact: the existence of an enduring scheme to which a fund has been appropriated. Lord Briggs' analysis of the persistence of the trust – despite turnover of the parties to the structure, or changes to the rights held on trust – suggests that the identity conditions of the trust lie at the level of the scheme, not at the level of specific individuals or specific rights.

Lord Briggs' "enduring character" analysis aligns with the Level 2 integrity commitment. Given that the law recognises a structure that persists through change of the parties to that structure and that persistence is not grounded in separate legal personality, Lord Briggs's view is consistent with seeing that persistence as explained by a legal commitment to the integrity of an ongoing scheme. The identity of the trust lies not in fixed content, but rather in the continuity of a rule-governed structure. Lord Briggs' analogy with partnerships and unincorporated associations provides further support for this thesis'

[269] *Investec II* (n 267) [254].
[270] *Investec II* (n 267) [249].

rejection of purely relational accounts of the trust. Lord Briggs shows that the law already recognises non-personified institutions, with continuity independent of members. He shows that the trust belongs to a broader category of institutional legal forms without personality, that are unified not purely by relationships, but rather by a scheme determining the administration and allocation of assets over time. A clear implication of Lord Briggs' observations is that the law tracks the continuity of a structure, not a continuity of persons or of individual rights. The ontology of the trust is therefore structural, not relational. Lord Briggs' analysis was not an abstract ontological excursus, but a response to a concrete priority dispute, in which the recognition of the trust as a continuing, rule-governed structure grounded the conclusion that trustees participate in a common enterprise and should share *pari passu* rather than as competing right-holders.

Lord Briggs' analysis suggests that the law's concern is with diachronic integrity, not Hohfeldian synchronic correlation. Synchronic correlation refers to analysing a legal arrangement at a single moment in time by mapping how rights and duties line up between persons. Diachronic integrity refers to how a legal structure is maintained coherently across time, despite changes. This thesis argues – in alignment with the spirit of Lord Briggs' analysis – that the law of trusts is not primarily about who owes what to whom now, but about preserving the integrity of a scheme over time.

Synchronic correlation is evidenced in classic Hohfeldian models, where the trustee owes duties to the beneficiary (B) and C (a third-party) may also have duties to B. Everything is person-focused, moment-focused and bilateral. This model asks: at time t, what is the

configuration of rights and duties between A, B and C? This is the framework often assumed in the beneficial ownership and rights-against-rights analyses.[271]

Diachronic integrity, meanwhile, shifts perspective. Instead of freezing time in this way, the law tracks the scheme. Trustees come and go; beneficiaries change; assets are substituted, mixed, dissipated, reconstituted; rules are amended. And yet: the law still says "this is the same trust". What persists is the scheme and the law's commitment to maintaining its integrity. The law is not primarily concerned with trying to preserve a snapshot of entitlements. Rather, its goal is to preserve the continuity of a structure. Therefore, when something goes awry in the administration of the trust (misapplication, breach etc), the law does not ask "whose rights against whom have been violated"? Rather, it asks "how can the law restore or maintain the integrity of the scheme across time"? Integrity denotes that the legal system treats the scheme as a unit of normative consistency across time, ensuring that rights continue to be deployed in accordance with the terms to which they have been appropriated. Synchronic correlation treats legal phenomena as static alignments of positions, rather than as parts of an ongoing scheme whose integrity unfolds over time.[272]

[271] See analysis of these models in section III below.
[272] In a similar vein, Penner criticises Hohfeld's analysis of property: James Penner, *Property Rights: A Re-examination* (OUP 2020). Penner says that the property right is the same even if the specific legal relations change, as when A transfers a property right to B.

III. The fiduciary model: links with the scheme-based analysis

A. The fiduciary model as complementary, rather than antagonistic to the scheme-based analysis

It may be said that the situation identified in this thesis – where the holder of specific rights or powers is not at liberty to act on their unfettered preferences – is already captured by the traditional language of fiduciary law. In that sense, the trustee's position might be described as one of a fiduciary and the expression "fiduciary power" is commonly used to denote powers that must not be exercised in one's unfettered self-interest.[273]

This thesis accepts that there is a significant overlap at this level. Fiduciary law is centrally concerned with constraining the exercise of powers[274], typically through rules such as no-conflict and no-profit[275] and more broadly through the idea that certain powers must not be exercised in pursuit of the holder's own unfettered preferences. In this respect, fiduciary doctrine supplies part of the legal machinery by which such constraints are enforced.[276]

However, the thesis addresses a different question. The trust is not merely a situation in which conduct is constrained. It is a juridical structure in which specific rights are vested in a party in a non-beneficial capacity. By contrast, fiduciary language extends to many situations which do not involve the holding of such rights at all, but at most practical or

[273] *Klug v Klug* [1918] 2 Ch 67, 77–78 (Ch D); *Re Skeats' Settlement* (1889) 42 Ch D 522 (Ch D) 526–27; *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch D).
[274] *Grand View Private Trust Co Ltd v Wong* [2022] UKPC 47, [1]; *Bishopsgate Investment Management Ltd v Maxwell (No 2)* [1994] 1 All ER 261 (CA) 265 (Hoffmann LJ).
[275] See eg *Keech v Sandford* (1726) Sel Cas t King 61, 25 ER 223 (*Keech*); *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n (HL); *Boardman v Phipps* [1967] 2 AC 46 (HL). On the theoretical basis of the rules see eg Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing 2010) ch 2.
[276] *Keech* (n 275); *Bray v Ford* [1896] AC 44 (HL) 51–52 (Lord Herschell); *Boardman v Phipps* [1967] 2 AC 46 (HL) 123–24 (Lord Upjohn); *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 18 (Millett LJ).

situational powers – such as those exercised by parents[277] or others in positions of authority. The fact that a person must not act on their unfettered preferences in those contexts does not entail the existence of a structured fund of rights, nor the proprietary and third-party effects characteristic of the trust. Fiduciary situations may arise without there being a scheme, as with parents[278] and doctors.[279] The category of schemes is focussed on situations where a specific right[280] has been appropriated to an all-encompassing set of terms. The scheme-based analysis explains why the key features associated with the trust are limited to situations where a party holds specific rights.

For these reasons, simply characterising the trustee as a fiduciary does not, on its own, explain the *key features of the trust* identified at the outset of this chapter. It identifies a constraint, but does not explain the juridical structure from which those features arise. This is reflected in the fact that fiduciary analysis has not historically been used to ground the four key features of the trust (especially those relating to insolvency and third-party effect), which have instead been explained through concepts such as beneficial ownership or rights against rights.

It is, of course, open to describe the trust as involving the *fiduciary holding of rights*. On that view, the scheme-based analysis advanced in this thesis may be understood as giving further content to that idea. Even if fiduciary language is adopted, something further is required. It remains necessary to explain how the displacement of unfettered preferences in relation to specific rights gives rise to a structured arrangement capable of generating the trust's distinctive features. The contribution of this thesis is to supply that missing step.

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[277] *Frame v Smith* [1987] 2 SCR 99 (*Frame*), 136–37 (Wilson J); *M(K) v M(H)* [1992] 3 SCR 6 (*M(K)*), 64–65 (La Forest J).
[278] *Frame* (n 277); *M(K)* (n 277).
[279] *McInerny v Macdonald* [1992] 2 SCR 138; cf *Norberg v Wynrib* [1992] 2 SCR 226 272.
[280] See analysis of the certainty of subject-matter requirement in Chapter II.I.ii.

Where rights are held non-beneficially, they are appropriated to a *scheme* and it is the law's commitment to its integrity which explains the trust's four key features.

B. Lionel Smith's analysis in *The Law of Loyalty*

Smith opens *The Law of Loyalty*[281] by identifying a foundational puzzle that has driven his work[282]: how the common law can impose obligations on individuals to act in the interests of others, when the core domains of private law – contract, tort, and unjust enrichment – do not naturally accommodate such other-regarding duties. Motivated by Sir Anthony Mason's observation that "[t]he fiduciary relationship is a concept in search of a principle"[283] Smith frames this not as a defect but as an intellectual challenge and his book is presented as a response. He aims to provide a unifying structure that explains fiduciary relationships and the obligations they generate. His work operates at the level of underlying principles: it aims to organise and rationalise the law by identifying the justificatory framework that makes sense of fiduciary obligations as a coherent category.

His answer to Mason is to extract a unifying category: situations where a person is acting for others. Smith's key move is to unify a wide range of legal relationships under a single structure: relationships of administration.[284] Trustees, directors, agents and executors are all treated together, because they exercise other-regarding powers. Smith extends his framework across private and public law.[285] The same principles apply to both, but in private law, the duties of the powerholder are directed, whereas in public law those duties are undirected.[286] Fiduciary law is part of a broader phenomenon: fiduciary duties are best

[281] *Loyalty* (n 173).
[282] *Loyalty* (n 173), Preface.
[283] Sir Anthony Mason, 'Themes and Prospects' in Paul D Finn (ed), *Essays in Equity* (Law Book Co 1985) 242, 246.
[284] *Loyalty* (n 173), Chapter 1.
[285] *Loyalty* (n 173).
[286] *Loyalty* (n 173), 432.

understood as a doctrinal manifestation of the requirement of loyally exercising powers in an other-regarding way. The trust is a paradigm case of administration, but is not conceptually unique in the law.

In some respects, Smith's scholarship supports this thesis. He shifts focus to the position of the right/powerholder. His insight that the central legal question is how powers are held and exercised aligns with this thesis' rejection of beneficiary-centric models. There are also difficulties in Smith's analysis. Problems ensue in attempting to unite those arrangements which this thesis contends belongs to the category of rights appropriated to a scheme, with parent-child, teacher-student and doctor-patient relationships. For Smith, a trustee and a parent both exercise powers in an other-regarding sense. However, it is problematic – as is argued by (for example) Lepaulle, Swadling and Mitchell and Hudson – to identify the essence of the trust as entailing a relationship between two parties.[287]

Furthermore, across a series of arrangements that Smith endeavours to unite under his model of loyalty, who is this "other" for whom the fiduciary acts? It appears strained to unite the fixed trust with beneficiaries and charitable purpose trusts in the holding of rights in an other-regarding sense. Furthermore, this thesis is squarely concerned with the way in which legal rights and legal powers are held. Smith's model deals with areas that cannot be meaningfully understood as the holding of legal rights and legal powers, but involve at most practical or situational powers[288], such as those exercised by parents or teachers.

In understanding the trust, the "other", in Smith's "other-regarding" formulation, is best understood as the scheme, not some individual in whose interests the trustee must act. Smith's "other-regarding" formulation aligns with a purely relational model of the trust,

[287] See discussion above in section II.C.
[288] *Loyalty* (n 173), Chapter 7.

where its core is defined by acting in the interests of another person. It is arguably a mistake to see the trust in those terms and this potentially has practical consequences, such as leading to the prospect of a beneficiary claiming for recovery of their consequential economic losses against the trustee and third parties. Properly understood, the trustee's loyalty is to the scheme, not to any individual as such. This argument is supported by Swadling's analysis[289] that the trust is understood by examining the trustee's *relationship with the right* they hold: namely, non-beneficial right-holding.

Smith is correct to highlight that a trustee and other administrators must not bring to bear their unfettered preferences in the use made of rights and powers.[290] However, on its own, simply highlighting the duty of the trustee not to bring to bear those unfettered preferences does not explain why the trust entails the four key features identified at the start of this chapter. This emphasises the point that simply describing the trustee as a fiduciary, or an administrator, does not give us a justification for why the trust has the unique features it does and this helps to explain the popularity of the beneficial ownership and rights against rights theories. The further move made by this thesis is to claim that the displacement of unfettered preferences gives birth to a scheme and it is the law's commitment to that scheme which grounds those four key features of the law of trusts. On this view, the relevant form of "loyalty" is not merely loyalty in decision-making, but the law's loyalty to the scheme itself.

On this basis, Smith's model is not a rival to the scheme-based analysis, concerning the justification for the trust's key features, because his monograph does not address those key features as the goal of his analysis. This thesis is, on the other hand, squarely concerned with

[289] See analysis above at section I.B.
[290] *Loyalty* (n 173), 3.

providing a better or equally plausible account for those key features than the existing literature.

IV. Thesis structure in outline

The thesis is divided into three parts.

Part I explains what constitutes a scheme and introduces how the law gives effect to its integrity. Part I is composed of three chapters, including the present one. Chapter II focusses on expounding the tests for understanding when a scheme has arisen and showing how these tests can help in understanding when a trust has arisen. Chapter III's aim is to show what an integrity of the scheme analysis looks like in practice and aims to establish the law's qualified commitment to the integrity of the scheme. It distinguishes a scheme-based analysis of personal claims against the original defaulting trustee from an individual rights model and discusses the practical implications of this divergence.[291] Chapter III also addresses some potential objections to an integrity of the scheme analysis for the trust's four key features.

Part II is composed of four chapters and shows how the scheme-based analysis of the trust can shed important light on the four key features identified at the start of this chapter. Chapter IV focusses on the trust's insolvency effect as well as looking at how indemnity rules might be helpfully explained on the scheme-based analysis. Chapter V turns to specific claims that can be made to misapplied trust assets and their traceable proceeds. Chapter VI looks at several personal claims that may be initiated against third parties, whereas Chapter VII, the final substantive chapter, explores issues of standing.

[291] See Chapter III, Section II.

Part III concludes, drawing together the threads of the thesis as well as suggesting avenues for future research.

Conclusion

This chapter has introduced the aim of the thesis and described how the scheme-based analysis of four key features of the trust draws on a rich tradition of trust law scholarship. It has also distinguished the scheme-based analysis from some other explanations for those four key features of the trust. The next chapter examines the tests for determining when a scheme has arisen and shows how the scheme-based analysis can be used to help judges determine whether a trust has arisen or not.

CHAPTER II:

WHEN A SCHEME ARISES

Introduction

The previous chapter introduced the aims of the thesis and the scholarship on which the thesis builds. This chapter expounds the tests for understanding when a scheme has arisen. Section I explains the essential conditions that must be satisfied for a scheme to arise. Section II shows – through analysis of several important cases – the dividing line between a trust and an arrangement which is not a trust. Section III considers examples of rights vested beneficially, subject to encumbrances. For instance, freehold title vested beneficially, subject to a lease, an easement or a contractual licence. In such cases, there are limits on the use that the freehold owner may make of the land, but those limits do not mean that a scheme is in place, because the encumbrance is not all-encompassing in nature.

I. When a scheme arises: the essential conditions

i. Overview: a specific right subject to a specific type of duty

For a scheme to arise, there must be (i) a specific right that is held (ii) subject to a specific type of duty. These two conditions map onto the law of certainty of subject-matter and – in the case of express trusts – that of certainty of intention. The only necessary conditions for a scheme to arise are that A holds a right and is under a duty, in each use made of the right in question, to act in accordance with an all-encompassing set of terms.

The trust therefore entails a right appropriated – in the totality of the jural relations to which that right gives rise – to a scheme. The language of jural relations is that of Hohfeld.[1] A right entails a bundle of different legal relations, including claim-rights, powers and immunities.[2] The trustee's duty is to deploy the totality of the jural relations entailed by a specific right and any *a priori* liberties relating thereto[3] in accordance with the terms of the trust. The trustee therefore administers a right. The trustee can only lawfully use the right if that is permitted under the terms of the trust.[4] For example, as Lord Toulson explains in *AIB Group (UK) plc v Mark Redler & Co Solicitors*[5] the trustee must preserve the assets of the trust, unless and until they are authorised to transfer them. In employing the trust property, the trustee must draw their authority from the terms of the trust deed and from the general law of trusts.[6] The thesis therefore employs the language of a scheme constituting an all-encompassing set of terms. This language emphasises that the trustee administers a right, rather than setting their own agenda[7] subject to limited restrictions.

[1] Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-4) 23 Yale LJ 16 (Hohfeld).
[2] See eg Ted M Sichelman, 'Very Tight "Bundles of Sticks": Hohfeld's Complex Jural Relations' in Shyamkrishna Balganesh, Ted M Sichelman and Henry E Smith (eds), *Wesley Hohfeld A Century Later: Edited Work, Select Personal Papers, and Original Commentaries* (CUP 2022). Liberties to use an asset are not strictly entailed by the right itself: see Chapter I.I.B.
[3] See Chapter I.I.A.
[4] Jessica Hudson, 'Equity's Gloss on Authority' in B McFarlane and S Elliott (eds) *Equity Today: 150 Years after the Judicature Reforms* (Hart, 2023) (Hudson).
[5] *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 (*AIB*), [51].
[6] eg a trust deed need not have an express power of indemnity, but the trustee will still have it from the general law of trusts: Trustee Act 2000, s 31(1).
[7] Larissa Katz, 'Exclusion and Exclusivity in Property Law' (2008) 58 UTLJ 275 (Katz) 278.

ii. Subject-matter certainty

The subject-matter of appropriation is specific rights or powers.[8] For example, if A and B form a general plan to acquire freehold title to land, there may not be, at that point, any specific rights appropriated to a scheme. If B refrains from bidding for title to that land, on the strength of the agreement made with A that A will acquire the title to the land and hold it on trust for A and B, then A may be compelled – once A acquires the freehold title – to use that right in accordance with the plan A and B had stipulated at the earlier point in time.[9] A court may find that A holds the freehold title on a constructive trust in favour of A and B.[10]

The leading authorities on certainty of subject-matter are best understood as insisting that a trust can only arise where the alleged subject-matter consists of *identified or identifiable rights*. Thus, in *Re London Wine Co (Shippers) Ltd*[11], purchasers who had paid for wine could not establish a trust because no specific bottles had been appropriated to their contracts. The same logic underpins *Re Goldcorp Exchange Ltd*[12], where the Privy Council emphasised that, absent segregation or earmarking, customers had merely personal claims; the bullion remained part of the company's general stock, such that no specific assets – and therefore no specific rights – had been appropriated to any individual customer. These cases are not simply evidential rules about uncertainty; they reflect a deeper legal requirement that the subject-matter of a trust must consist in *definite rights capable of being held non-beneficially*[13], rather than a vague expectation in an unascertained fund. What fails in *London*

[8] Ben McFarlane and Robert Stevens, "The Nature of Equitable Property" (2010) 4 J Eq 1 10–15.
[9] *Pallant v Morgan* [1953] Ch 43 (*Pallant v Morgan*); *Holiday Inns Inc v Broadhead* (Ch D, 19 December 1969); *Banner Homes Group Plc v Luff Developments Ltd* [2000] Ch 372 (CA).
[10] As in *Pallant v Morgan* (n 9) itself.
[11] [1986] PCC 121.
[12] [1995] 1 AC 74 (PC).
[13] In Chapter I.IV, it was suggested that the scheme-based analysis is squarely concerned with specific rights held subject to a duty of due administration, whereas fiduciary arrangements can arise in situations that do not meet the certainty of subject-matter requirement for trusts.

Wine and *Re Goldcorp* is the absence of any event by which specific rights are appropriated to a scheme.

By contrast, where assets are segregated or otherwise identified – whether physically or conceptually – the law recognises that specific rights have been carved out and can be held on the terms of the scheme.

In *Hunter v Moss*[14], the Court of Appeal held a valid trust could exist over an unsegregated portion of a homogeneous mass – here, 50 shares out of a holding of 950 identical shares in a single class – because the subject matter of the trust was conceptually certain. The key move, properly understood through the analysis offered by Goode[15], is not that specific shares were identified within a larger pool of fungible assets, but rather that the holder of 950 shares does not hold 950 separate rights: the shareholding constitutes a single chose in action against the company, with the number of shares determining only the extent of that chose. On this view, the trust was declared over a quantified fractional interest – 1/19th – of one identified right, rather than over a subset of multiple discrete assets. Conceptual certainty is therefore readily satisfied: the beneficiary's entitlement is defined by reference to a determinate proportion of a single, clearly identified chose in action. Even absent physical segregation, the law recognises that a specific interest can be carved out of an asset where the portion is conceptually identified.

[14] [1994] 1 WLR 452 (*Hunter*).
[15] Roy Goode, 'Are Intangible Assets Fungibles?' [2003] LMCLQ 309.

iii. Primary facts capable of generating the core scheme duty and thereby reconstituting authority over a specific right

The question whether a scheme has been created is answered by identifying a sequence of steps, each of which must be established.

The first step is to identify primary facts, such as words spoken, documents signed or other conduct of the parties. The second step is to determine whether those primary facts generate the core scheme duty. This step is critical. As will be seen in the analysis in section II.A below, not every obligation affecting a right-holder will suffice to create a trust. A standard contractual obligation, for example, may restrict the use of a right without displacing the right-holder's underlying entitlement to determine the purposes for which the right is used. The question is not merely whether the right-holder is subject to duties, but whether those duties require that every use of the right and in the totality of its jural relations – be justified by reference to a scheme. By contrast, where the primary facts generate only a duty to account in value, or to perform a contractual obligation, without governing the entirety of the right's use, the core scheme duty does not arise.

In *First City Monument Bank Plc v Zumax Nigeria Ltd*[16], funds were transferred through correspondent banking arrangements with instructions that they be credited to Zumax. The claimant argued that these funds were held on trust. The Court of Appeal rejected this argument. It held that, notwithstanding the purpose of the transfers and the identification of Zumax as the ultimate recipient, the arrangements did not exclude the bank's

[16] [2019] EWCA Civ 294 (*Zumax*).

freedom to deal with the funds in the ordinary course of banking. The bank did not become a trustee; rather, it incurred only a personal obligation to credit or account to Zumax.[17]

The primary facts establish the duty and the scheme is the legal consequence of the duty. If the right-holder is legally bound to deploy the right exclusively by reference to external terms, then by definition no decision they render about the right's deployment is theirs to make in the agenda-setting sense[18]; the seat of decisional authority over the right has therefore moved from the right-holder to the terms; and that movement is what "reconstitution of authority" denotes. This sequence provides a general framework capable of application across the diverse contexts considered in this chapter.[19]

In English law, a right can be appropriated to a scheme, either through the volitional exercise of a power[20], as with express trusts, or on the occurrence of other specific events. For example, on the bankruptcy of an individual, their rights may be vested in their trustee in bankruptcy,[21] who holds specific rights in accordance with the terms defined by legislation.[22] Furthermore, a scheme can arise through judicially-developed precedents, as in the case of constructive trusts arising on the receipt of rights *sub conditione*[23], or on receipt of a bribe[24], or in cases of unlawful killing.[25]

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[17] *Zumax* (n 16) [25].
[18] Katz (n 7) 278.
[19] eg express trusts (section I.iv) and vendor-purchaser constructive trusts (section II.B).
[20] *Knight v Knight* (1840) 3 Beav 148, 49 ER 58; *Paul v Constance* [1977] 1 WLR 527 (CA).
[21] Insolvency Act 1986, s 307(1).
[22] Insolvency Act 1986 eg s 306, s 107, s 339.
[23] *Lloyd v Dugdale* [2001] EWCA Civ 1754, [2002] 2 P & CR 13; *Ashburn Anstalt v Arnold* [1989] Ch 1; *Lyus v Prowsa Developments Ltd* [1982] 1 WLR 1044 (Ch D); *Binions v Evans* [1972] Ch 359 (CA); Ben McFarlane, "Constructive Trusts Arising on Receipt of Property Sub Conditione" (2004) 120 LQR 667.
[24] *Attorney General for Hong Kong v Reid* [1994] 1 AC 324 (PC); approved in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250.
[25] *Schobelt v Barber* (1966) 60 DLR (2nd) 519; *Re Pechar* [1969] NZLR 574; *Rasmanis v Jurewitsch* [1970] NSWLR 650; *Beresford v Royal Insurance Co Ltd* [1938] AC 586 (HL) 600. See further Gareth Jones, "Stripping a Criminal of the Profits of Crime" (2000) 1 Theoretical Inquiries in Law 59.

II. The dividing line between trusts and non-trusts

Conceptualising the trust as a scheme assists in demarcating the line between cases where there is a trust and cases instead where someone holds a right beneficially, even if subject to restrictions.

A. *Quistclose* cases and *re Lehman Brothers*: the importance of the trust entailing a right appropriated to an *all-encompassing* set of terms

i. *Quistclose* cases

The analysis favoured in section I above aligns with some of the judgments in the leading *Quistclose* cases, as well as showing where the analysis in those cases can be improved.[26] The question in the *Quistclose* cases is often whether the borrower of funds holds specific rights on trust. One possibility is that the borrower is vested with the rights beneficially, subject to contractual duties.[27] However, where the obligations imposed by the contract are so restrictive, to amount to a party holding a right in accordance with an all-encompassing set of terms, then a trust has arisen. A contractual agreement may therefore be the source of rights appropriated to a scheme, where the duties imposed on the right-holder are sufficiently restrictive to amount to that right having been devoted to an all-encompassing set of terms.

[26] The *Quistclose* trust is named after the leading case of *Barclays Bank v Quistclose Investments Ltd* [1970] AC 567 (HL).
[27] Robert Chambers, *Resulting Trusts* (Oxford University Press, 1997), ch 3.

Bryan helpfully reminds us that although trusts may arise from contracts, the question of trust formation requires a distinct equitable inquiry.[28]

Lord Millett in *Twinsectra* deploys the test of asking whether the borrower enjoys free use of the assets. If not, according to his Lordship, they hold the rights on trust. Lord Millett's analysis is supported by Briggs LJ, in *Bellis v Challinor*[29]:

> *Quistclose*-type trusts are a species of … trust which arise where property (usually money) is transferred on terms which do not leave it at the free disposal of the transferee. That restriction upon its use is usually created by an arrangement that the money should be used exclusively for a stated purpose or purposes.

Twinsectra transferred £1 million to a solicitor, Mr Sims, under an express undertaking that the money would only be used for Mr Yardley's acquisition of property, but Mr Sims then passed the money to another solicitor, Mr Leach, who allowed Mr Yardley to use a substantial part of it for unauthorised purposes, leading Twinsectra to sue Mr Leach for dishonest assistance in Mr Sims' breach of trust. Lord Millett found that the terms in *Twinsectra* – given they imposed an obligation on Mr Sims to use specific rights exclusively in accordance with a stipulated purpose – gave rise to a trust.[30]

There is a link between Lord Millett's reasoning in *Twinsectra* and the scheme-based analysis. On the scheme-based analysis, a trust arises whenever a specific right is held in

[28] Michael Bryan, 'The Inferred Trust: An Unhappy Marriage of Contract and Trust?' (2016) 69 CLP 377.
[29] *Bellis v Challinor* [2015] EWCA Civ 59, [56] (Briggs LJ) (*Bellis v Challinor)*.
[30] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 (Twinsectra) [75] (Lord Millett).

accordance with an all-encompassing set of terms. If this is the case, the assets are not at the free use of its holder.

However, as Chambers has argued, care must be taken in the language of free use.[31] Chambers interprets *Twinsectra* as a case where the restriction on the use of the loan money (to be used only for the acquisition of property) did not *necessarily* eliminate the borrower's outright ownership: given that the permitted use was for the borrower's own benefit and relatively broad, Chambers argues it was plausible that the borrower enjoyed outright ownership, subject to a restriction, rather than holding the money on trust.[32] He is therefore critical of the House of Lords – especially Lord Millett's analysis – for too readily concluding that the lender enjoyed a beneficial interest via a resulting trust.[33] Chambers does not unequivocally endorse the existence of a trust in *Twinsectra*; instead, he treats the case as one where multiple legal characterisations were possible[34] and suggests that the House of Lords may well have been wrong (or at least too rigid) in insisting on a trust analysis rather than recognising a more limited restriction on the use of the borrowed funds.[35]

Chambers' central contribution is to destabilise the assumption in *Twinsectra* that a restriction on the use of money *necessarily* entails a trust. His analysis shows that a payment subject to a purpose condition could be interpreted as giving rise to one of a range of different possibilities: an express trust, a resulting trust, or no trust at all, with merely contractual or fiduciary constraints on use.[36] In particular, he insists that not all restrictions negate outright beneficial ownership: some are too weak, or too consistent with ordinary ownership (as with

[31] Robert Chambers, 'Restrictions on the Use of Money' in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart Publishing 2004) 77.
[32] Chambers (n 31), 89; 112.
[33] Chambers (n 31), 112–13.
[34] Chambers (n 31), 88–89; 112.
[35] Chambers (n 31), 113.
[36] Chambers (n 31), 78–97.

restrictive covenants over land) to justify the imposition of a trust.[37] The critical variables include the intensity of the restrictions.[38] Chambers identifies a problem: "restriction of use" is an under-determinate criterion which cannot, by itself, mark the boundary between trusts and non-trusts.[39] The scheme-based analysis supplies the missing principle of demarcation.

On the scheme-based analysis, what matters is not the mere *existence* of constraints, but their *extent*: whether the right is held under an all-encompassing set of terms that displaces the holder's unfettered choice and reconstitutes their authority over the asset. Chambers' examples map neatly onto this distinction. Chambers invokes the lease restricting use of premises to retail purposes only, local planning regulations restricting land to single-family residential use and a corporate constitution restricting the use of assets to specific business purposes, all of which limit use without displacing beneficial ownership[40]; he further invokes *Re Ellenborough Park*[41] as a case where an owner who covenanted to maintain land as an ornamental pleasure ground and not to build on it was nonetheless held to retain beneficial ownership, Lord Evershed MR finding nothing repugnant to outright ownership in such a restriction[42]; and he adds the example of a loan to a business to be used only for business purposes and a condition that money not be used to purchase land, as instances where the restriction is too minor or too permissive to negate outright beneficial ownership.[43]

Cases of purely contractual or limited-purpose restrictions (restrictions that leave a meaningful domain of discretionary use) are those in which the right is *not* appropriated to a scheme, but remains beneficially held subject to limited restrictions. By contrast, those cases

[37] Chambers (n 31), 87–90.
[38] Chambers (n 31), 110–112.
[39] Chambers (n 31), 87–88, 110–113.
[40] Chambers (n 31), 88.
[41] [1956] Ch 131 (CA) (*Ellenborough Park*) 134; see analysis of easements in section III below.
[42] *Ellenborough Park* (n 41) 176.
[43] *Ellenborough Park* (n 41) 89–90.

where the restriction eliminates any independent domain of choice – so that the asset must be applied exclusively in accordance with stipulated terms or returned – are those in which the right has been appropriated to a scheme and is therefore held non-beneficially.

In this way, Chambers' critique of *Twinsectra* becomes a resource for this thesis: it shows why "free use" is too crude a test, whereas the scheme-based analysis explains which restrictions cross the threshold into a trust by effecting a reconstitution of authority over the right. *Zumax* illustrates these points.[44] Even where funds are transferred with an identified purpose ("for further credit to Zumax"), no trust arises unless the arrangements subject the recipient's disposal of the funds to an all-encompassing set of terms. The Court of Appeal held that the bank's obligation was merely to credit the customer, not to hold the funds on trust, because the structure left the bank with ordinary dispositive freedom over the right received, rather than scheme-governed authority.

The scheme-based analysis therefore provides a lens to account for and improve the reasoning in the leading *Quistclose* cases. Although Lord Millett is right that a trust cannot arise if a right is at the free use of its holder, the fact that a right is not at the free use of the holder is *not* enough – *per se* – for a trust to arise. Lord Millett's reasoning in *Twinsectra* is best understood as an attempt to identify whether the recipient retains agenda-setting authority over the right. Where the money is to be used exclusively for a stated purpose, the recipient is no longer entitled to determine for themselves the purposes for which the right is deployed. The right is no longer a site of personal decision-making, but a vehicle for the implementation of a defined scheme.

[44] *Zumax* (n 16) is discussed in section I.iii above.

Ho and Smart resist Chambers' reduction of the arrangement in *Twinsectra* to a mere contractual restriction and instead favour the view that arrangements such as those in *Twinsectra* do indeed give rise to a trust.[45] They argue that in the *Quistclose* cases something more than a contractual right to restrain misuse is at work.[46] Chambers' model, by treating the borrower as outright beneficial owner subject only to a negative equity, cannot satisfactorily explain why the fund is insulated from the borrower's insolvency, nor why the arrangement produces the key features entailed by the trust.

What Ho and Smart expose is precisely the *under-inclusiveness* of a purely restriction-based analysis: not all constraints on use generate the distinctive legal consequences associated with trusts and identified at the outset of Chapter I. But where they revert to orthodoxy (ie reaffirming that arrangements such as those in *Twinsectra* give rise to trusts), the scheme-based analysis goes one step further by explaining *why* those key features arise. The decisive factor is not simply segregation or proprietary language[47], but the fact that the right has been appropriated to an all-encompassing set of terms. The features emphasised by Ho and Smart – segregation, insulation from creditors, availability of tracing and so forth[48] – are best understood not as independent criteria, but as *manifestations* of that deeper structural fact. In this way, their critique of Chambers shows that a purely contractual restriction is insufficient and the scheme-based analysis explains that insufficiency by identifying the missing element—namely, the existence of an all-encompassing set of terms that governs the use of the right and renders the holding non-beneficial.

[45] Lusina Ho and Philip Smart, 'Re-interpreting the Quistclose Trust: A Critique of Chambers' Analysis' (2001) 21(2) OJLS 267 (Ho and Smart), 267–268.
[46] Ho and Smart (n 45) 274–275.
[47] Ho and Smart (n 45).
[48] Ho and Smart (n 45) 275–277.

ii. *re Lehman Brothers*

In *Re Lehman Brothers International (Europe)*[49], one question for Briggs J was whether rights were held on trust. If they were, then the claimants would enjoy insolvency protection: the rights subject to the trust would not form part of the insolvent party's general assets, to be distributed amongst the general class of creditors. *Lehman Brothers* engages both the certainty of subject-matter and certainty of intention requirements.[50] In *re Lehman Brothers*, Briggs J, as well as the Court of Appeal, considered that a trust had arisen. This was despite the purported trustee (LBIE) having been identified by Briggs J as free to deal with the assets in the ordinary course of business.[51] Commercially there was no need for anything more than a personal obligation on LBIE to account for the value of the securities and their fruits.[52]

Stevens has argued that for these reasons, this freedom to deal with the assets should have been "fatal" to the finding of a trust.[53] If the holder of the right is free to bring to bear their unfettered preferences, this is inconsistent with the finding of a trust. If the right-holder retains the ability to determine for themselves how the right is to be used – subject only to an obligation to account – then authority over the right has not been reconstituted. The right remains beneficially held. Therefore, *re Lehman Bros* is – in the view of this thesis – wrongly decided.

Briggs J began from the premise that any beneficial interest in the affiliates necessarily required a trustee-beneficiary relationship between LBIE and the affiliates.[54] He

[49] *Re Lehman Brothers International (Europe)* [2009] EWHC 3228 (Ch), [2010] 2 BCLC 301 (*Lehman*) [225]. The decision of Briggs J was affirmed by the Court of Appeal: [2011] EWCA Civ 1544; [2012] 2 BCLC 151.
[50] Robert Stevens, 'Floating Trusts' in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart 2017) 113 (Stevens).
[51] *Lehman* (n 49) [275].
[52] *Lehman* (n 49) [275] – [276].
[53] Stevens (n 50) 120.
[54] *Lehman* (n 49) [27], [224].

then asked whether, objectively, the parties intended the affiliates to acquire proprietary interests in the securities.[55] He accepted that labels such as "trust", "custody", "ownership" and "title" were persuasive but not conclusive.[56] However, once he found that the Rascals arrangements proceeded on the mutual assumption that affiliates first acquired a proprietary interest, he treated a trust as the legal consequence of that intended proprietary interest.[57] The difficulty is therefore not that Briggs J treated the parties' labels as conclusive. He did not. The difficulty is that his analysis moved too quickly from an objectively manifested intention to confer proprietary interests to the conclusion that a trust arose. On the scheme-based analysis, the prior question is whether a specific right has been appropriated to an all-encompassing set of terms. Briggs J instead treated the trust largely as the legal vehicle required to give effect to the parties' intended proprietary allocation. His judgment illustrates the problems with a beneficial ownership model of the trust[58], where the existence of a party's beneficial interest is viewed as decisive in determining whether a trust has arisen. The better approach is to focus on the position of the right-holder[59] and whether they are subject to an all-encompassing set of terms.

More broadly, it is important that judges be guided by objective criteria in determining whether a trust has arisen. It should only be where the intentions of the parties align with those criteria, that a trust has arisen. If the parties say they have created a trust, when in fact the duties of the right-holder do not amount to the obligation of deploying a specific right in accordance with an all-encompassing set of terms, then no trust – in the view

[55] *Lehman* (n 49) [225(v)–(vi)], [249].
[56] *Lehman* (n 49) [225(vi)], [249].
[57] *Lehman* (n 49) [297]–[306].
[58] Analysed in Chapter I.I.B.i.
[59] Ben McFarlane, 'Trusts, Property, and Rights' in Irit Samet, Simone Degeling and Jessica Hudson (eds), *Philosophical Foundations of the Law of Express Trusts* (Oxford University Press 2023); Ben McFarlane, 'The Nature of Equitable Property Revisited' (2026) 79 CLP (McFarlane, CLP).

of this thesis – has arisen. It is instructive to compare *re Lehman Bros* to *Byrnes v Kendle*[60]. In the latter, S said they had not set up a trust, because they did not have an intention to create a trust. However, where someone is holding a right subject to an all-encompassing set of terms, a trust will arise, irrespective of the labels or intentions of the parties.

A similar idea justifies the reasoning and decision in *Street v Mountford*.[61] Mr Street had granted Mrs Mountford a right to exclusive possession of land for a certain term. Nonetheless, the agreement referred to Mr Street as a licensor and Mrs Mountford as a licensee and the agreement stated it was to take effect as a licence. However, given that what Mr Street had conferred on Mrs Mountford aligned with the necessary and sufficient conditions for a lease, then one arose, irrespective of the labelling of the parties. It is necessary to ask whether what the parties have created corresponds to objective (party-independent) criteria as to what a lease entails.

iii. Lionel Smith's analysis

It is helpful to conclude the discussion in this section of the chapter with an assessment of Lionel Smith's recent analysis of the *Quistclose* cases and *Lehman Brothers*.[62] Smith examines a recurring but under-theorised feature of modern trust drafting: clauses that confer on a trustee a power to appropriate the trust property to itself, thereby converting the trust relationship into a debtor-creditor relationship. Smith traces the phenomenon through a sequence of decisions that, on his account, have been drawn towards recognising such arrangements as trusts without confronting what this recognition entails. In *Space Investments Ltd v Canadian Imperial Bank*

[60] *Byrnes v Kendle* [2011] HCA 26, (2011) 243 CLR 253.
[61] *Street v Mountford* [1985] AC 809 (HL) (*Street*); see too the distinction between a floating charge and a fixed charge: *National Westminster Bank plc v Spectrum Plus Limited* [2005] UKHL 41, [2005] 2 AC 680.
[62] Lionel Smith, 'Black Magic Trusts' (2026) 45 ETJ 267.

of Commerce Trust Co (Bahamas) Ltd,[63] the Privy Council held that a bank-trustee's contractual power to deposit trust moneys with itself as banker left the beneficiaries as unsecured creditors upon the bank's insolvency, a result Smith reads as effecting the wholesale termination of the trust.[64] Smith finds the same structure in the trust identified in *Barclays Bank Ltd v Quistclose Investments Ltd*[65], arguing that a power in the recipient of an advance to apply the funds for its own purposes is difficult to reconcile with a fiduciary constraint and that on the logic of *Twinsectra* such a power is more consonant with treating the arrangement, from inception, as a loan governed by contract rather than a trust defeasible by the exercise of a power.[66] He extends the analysis to the authorised commingling of trust money with a trustee's own funds, as in *Air Canada v M & L Travel Ltd*,[67] contending that the Supreme Court of Canada's reliance on the parties' use of the word "trust" obscured the practical reality that an unrestricted authority to mix implies an authority to draw on the mixed fund for the trustee's own purposes, which is inconsistent with any obligation to preserve identifiable trust property for the beneficiary.[68] A parallel difficulty, Smith argues, infects the "mixed fund" trusts of intermediated securities recognised since *Hunter v Moss*[69] and *White v Shortall*[70] and is thrown into particularly sharp relief by the Lehman Brothers litigation, where *Lomas v RAB Market Cycles (Master Fund) Ltd*[71] and *re Lehman Bros*[72] upheld trusts over securities notwithstanding contractual "rights of use" permitting the custodian to treat the securities as its own, leaving only a personal claim to equivalent securities.[73]

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[63]*Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072 (PC).
[64]Smith, Black Magic Trusts (n 62) pt II.
[65]*Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL).
[66]Smith, Black Magic Trusts (n 62) pt III.
[67]*Air Canada v M & L Travel Ltd* [1993] 3 SCR 787.
[68]Smith, Black Magic Trusts (n 62) pt IV(a).
[69]*Hunter* (n 14).
[70]*White v Shortall* [2006] NSWSC 1379.
[71]*Lomas v RAB Market Cycles (Master Fund) Ltd* [2009] EWHC 2545 (Ch).
[72]*Pearson v Lehman Brothers Finance SA* [2010] EWHC 2914 (Ch); affd [2012] 2 BCLC 151 (CA).
[73]Smith, Black Magic Trusts (n 62) pt IV(b).

Smith's principal doctrinal move is to bring the Privy Council's reasoning in *Webb v Webb*[74] to bear on all of these arrangements: because Mr Webb's non-fiduciary power to appoint the trust property to himself meant that his purported trusteeship was, from the outset, indistinguishable from outright ownership, there had never been a trust at all.[75] Applying that logic, Smith concludes that wherever a purported trustee holds an open-ended, non-fiduciary power to appropriate the trust property for its own benefit, the arrangement lacks the definitional core of the common law trust — an obligation binding the trustee to hold the property solely for the beneficiaries' benefit — and should therefore be characterised, from its inception, as a loan rather than a trust, regardless of the parties' chosen vocabulary.[76] He adds a subsidiary point, that even on the contrary view, any subsequent reconstitution of the fund out of the trustee's own assets constitutes a fresh settlement rather than a continuation of an original trust, with attendant consequences for insolvency law.[77] Smith's overarching diagnosis is that courts adjudicating these commercial disputes have allowed the parties' use of the language of trusteeship to substitute for an inquiry into whether the purported trustee is genuinely subject to the obligation that alone can justify the finding of a trust.[78]

Whatever view one takes of Smith's ultimate conclusion, the article performs a valuable diagnostic service. Smith is right that the courts responsible for the decisions he surveys have, almost without exception, permitted the parties' own characterisation of their arrangement to substitute for a reasoned account of what a trust actually is: the recurring appeal in these judgments to the presence of the word "trust" in the instrument, or to the fact that assets were said to "belong" to the beneficiary, is treated as doing analytical work that only a clear

[74] *Webb v Webb* [2020] UKPC 22.
[75] Smith, Black Magic Trusts (n 62) pt V(a).
[76] Smith, Black Magic Trusts (n 62).
[77] Smith, Black Magic Trusts (n 62) pt V(b).
[78] Smith, Black Magic Trusts (n 62) pt VI.

definition of the institution could properly do.[79] Smith is also correct to identify the specific tension, unaddressed or under-addressed in each case, between an authority to mix or appropriate trust property and the survival of any obligation capable of binding third parties: his observation that Iacobucci J's reasoning in *Air Canada v M & L Travel* gives no account of whether, or how, the agent was required to track a notional "trust balance" within a commingled operating account exposes a real gap in that court's analysis, since the alternative – those funds simply formed part of the general cash flow of the business – collapses the supposed trust into a debt in substance while preserving it in name.[80] His treatment of the Lehman Brothers litigation is similarly incisive: the observation that Briggs J, in *re Lehman Bros*, treated the custodian's plenary authority to use client securities for its own account as going only to certainty of subject matter, while resolving certainty of intention by reference to a later arrangement that presupposed, mistakenly, that a trust already existed, identifies a genuine circularity that the judgment does not resolve.[81] Smith's use of *Webb v Webb* to test these commercial arrangements is, moreover, a strong methodological contribution in its own right, since it shows that a principle developed in the family-property context — that a non-fiduciary power to appoint trust assets to oneself is indistinguishable from ownership — has been overlooked by commercial judges confronting materially identical clauses under different labels.[82] To that extent, this thesis endorses both Smith's critique of the courts' inattention to definitional rigour and his identification of the doctrinal difficulties latent in each of the decisions he examines.

Where this thesis parts company with Smith is in the account of the trust obligation that does the definitional work in his argument. Smith's test for whether an arrangement is a trust

[79] Smith, Black Magic Trusts (n 62).
[80] Smith, Black Magic Trusts (n 62) pt IV(a).
[81] Smith, Black Magic Trusts (n 62) pt IV(b), pt V(a).
[82] Smith, Black Magic Trusts (n 62) pt V(a).

is essentially negative: a trustee holds property on trust only if the trustee is under an obligation not to derive any benefit from that property for itself, such that any open-ended, non-fiduciary power to appropriate the property for the trustee's own benefit is, *ipso facto*, incompatible with a trust and, in the commercial cases considered, reveals the arrangement to have been a loan from the outset.[83] On this view, A (the trustee) owes B (the beneficiary) a duty framed in essentially exclusionary terms: A must not benefit from the right A holds.

This thesis argues instead that the touchstone of the common law trust is not the trustee's abstention from benefit as such, but the trustee's administration of the right in accordance with an all-encompassing set of terms. On the scheme-based analysis, a trustee may derive a benefit from the trust property without thereby forfeiting trustee status, provided that the benefit is itself authorised and channelled through the terms of the scheme, as is uncontroversially true of a remuneration clause, or of a trustee who is also an object of the trust's dispositive provisions, because in such cases the trustee's receipt of the benefit is itself an incident of due administration of the scheme, not an appropriation extraneous to it.[84]

What distinguishes the arrangements that Smith rightly condemns is not, on this account, the mere presence of a power permitting benefit to the trustee, but the unconstrained and extra-schematic character of that power: in *Webb v Webb*, as in *Space Investments*, and in *re Lehman Bros*, the power in question was not one further term integrated into a scheme that continued, notwithstanding its exercise, to govern the parties' relationship; it was a power to step outside the scheme altogether — and it is that feature, not the presence of benefit *per se*, which is properly incompatible with trusteeship.[85] This reframing carries an analytical advantage: it explains why routine remuneration clauses, or the ability of the trustee to also be

[83]Smith, Black Magic Trusts (n 62).
[84]See Paul Matthews and others, *Underhill and Hayton: Law Relating to Trusts and Trustees* (20th edn, LexisNexis 2022) art 1, noting that a trustee may also be one of the beneficiaries.
[85]Smith Black Magic Trusts (n 62) pt V(a).

a beneficiary of the trust they are administering, have never been thought to imperil the existence of a trust, without requiring, as Smith's formulation arguably does, that such arrangements be treated as marginal exceptions grafted onto an otherwise exclusionary rule. It also reframes the "black magic" trust cases themselves: on the scheme-based analysis, the vice in the "rights of use" in *Space Investments* and *re Lehamn Bros* was not that the trustee could benefit, but that the power exercisable by the trustee was not itself a term through which the scheme continued to structure the parties' relationship: it was a power to terminate the scheme's own claim to govern the property, which is a different, and more precise, objection than the claim that any trustee benefit is as such destructive of trusteeship.

B. Vendor-purchaser constructive trusts: a trustee may benefit from their position as trustee

Where A is under a legally binding contractual duty to transfer their legal estate to B, A might be found to hold that legal estate on trust for B.[86] However, the nature of this trust has caused controversy.[87] McFarlane, Hopkins and Nield describe this trust as "somewhat unusual"[88], because the "usual position, applying as a default, for example in an express trust, is that A, as trustee, is under a duty to B not to use the property for A's own benefit" whereas with the vendor-purchaser constructive trust ("VPCT"), "[although] A holds on trust, he or she is entitled to make some use of the property for his or her own benefit, at least until the purchase price is paid".[89]

[86] *Lysaght v Edwards* (1876) 2 Ch D 499 (Ch D); *LA Micro Group (UK) Ltd v LA Micro Group Inc* [2024] UKSC 42, [2025] AC 1442; though there is some doubt as to which stage of the sale process the trust itself comes into existence.
[87] William Swadling, 'The Vendor-Purchaser Constructive Trust' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005); Robert Chambers, 'The Importance of Specific Performance' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005); Peter Turner, 'Understanding the Constructive Trust between Vendor and Purchaser' (2012) 128 LQR 582 (Turner).
[88] Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Land Law: Text, Cases, and Materials* (6th edn, Oxford University Press 2024), 274 (McFarlane, Hopkins and Nield).
[89] McFarlane, Hopkins and Nield (n 88).

Lord Walker states in *Jerome v Kelly*[90] that:

> It would therefore be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income. The provisional assumptions may be falsified by events, such as rescission of the contract (either under a contractual term or on breach). If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full.

However, once the trust is understood as a scheme, the vendor-purchaser constructive trust should not be viewed as unusual. Part of the problem is thinking, like McFarlane, Hopkins and Nield, that the usual position is that a trustee, A, owes a duty to B not to use a right for A's own benefit. Once the trust is understood as a party holding a right in accordance with an all-encompassing set of terms, it is not unusual that the trustee be allowed to benefit from the property, for example by living on the land and receiving the rental profits, as long as these benefits are routed through the terms of the scheme.

[90] [2004] UKHL 25, [2004] 1 WLR 1409 (*Jerome*), [32].

The passage from Lord Walker in *Jerome v Kelly* also illustrates the dangers of the equitable ownership model.[91] His Lordship conceptualises the true trust as a situation where A is vested with legal title that they must use for the exclusive benefit of B, who enjoys beneficial ownership. For Lord Walker, whether a trust exists in the sale context depends on whether the beneficial ownership has passed from A to B. These views are problematic[92] and greater clarity would be achieved in seeing the trust as a right appropriated to a scheme. At what point in the sale process the trust arises will therefore depend on when A holds a right in accordance with an all-encompassing set of terms and it is arguably appropriate to say that in virtue of the sale contract, A no longer has agenda-setting use (in the sense understood previously[93]) of the assets.[94] The primary facts — entry into a specifically enforceable contract for sale — might arguably trigger the imposition of the core scheme duty on the vendor.

Turner's analysis[95] suggests that the content of the vendor-purchaser constructive trust is not fixed at the moment of the contract, but rather the content changes as the different steps in the sale process are met. For Turner, the VPCT is an aggregate of distinct equities, which intensify at different stages of the transaction. On Turner's account, the purchaser's interest is not a single monolithic beneficial ownership, but a composite of, among other things, an equitable interest enforceable against third parties[96], a right that the vendor take due care to preserve the land[97], an equity to rents and profits after the time fixed for

[91] Discussed in Chapter I.I.B.i.
[92] His Lordship's analysis also seems difficult to reconcile with *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL), where Lord Browne-Wilkinson explains that an outright legal owner does not have separate legal and equitable title to an asset: 705–706.
[93] eg in Chapter I.I.E and in Chapter II.II.A above.
[94] See eg analysis in section II above and in Chapter I.I.E.
[95] Turner (n 87).
[96] *Jerome* (n 90) [29]; *IRC v Angus* (1889) 23 QBD 579 CA 595.
[97] *Englewood Properties Ltd v Patel* [2005] EWHC 188 (Ch), [2005] 1 WLR 1961 [54], [58].

completion[98] and a lien for repayment of purchase money if the contract fails.[99] These equities do not all arise at the same time. Some arise on the formation of the specifically enforceable contract, because equity then keeps the land available for performance of the contract; others arise only later, for example when purchase money is paid, when the agreed time for completion arrives, or when the purchaser becomes entitled to the economic benefit of the land. Turner therefore explains *Jerome v Kelly* not as denying the existence of any trust before completion, but as correctly resisting the idea that the purchaser immediately becomes a full beneficial owner under the trust at the time of contract. In that limited sense, the trust may arise immediately; but it is initially a thin, performance-protecting trust, not yet a structure under which the purchaser is a full beneficial owner.

On the scheme-based analysis, the relevant question is not whether the vendor continues to enjoy benefits from the land, but whether the vendor remains entitled to determine, as a starting point, the purposes for which the right is used. Once a specifically enforceable contract for sale has been concluded, that entitlement is (arguably) fundamentally altered. The vendor is no longer free to deploy the right in accordance with their own agenda.[100] The right must be held and managed in a manner consistent with the contractual scheme, including the obligation to convey the property to the purchaser. At that point, authority over the right has been reconstituted.[101] The vendor continues to enjoy certain uses of the land – such as possession[102] or receipt of rents[103] – but those uses and benefits are no longer expressions of unfettered preferences. They are permitted only insofar as they are consistent

[98] *Brooke v Champernowne* (1837) 4 Cl & Fin 689 611; 7 ER 224 232.
[99] *Rose v Watson* (1864) 10 HL Cas 672, 678, 683–84; 11 ER 1187, 1190, 1192.
[100] Katz (n 7).
[101] See discussion eg in Chapter I.I.E.
[102] *Lysaght v Edwards* (1876) 2 Ch D 499 (Ch D) 506.
[103] *Englewood Properties Ltd v Patel* [2005] EWHC 188 (Ch), [2005] 1 WLR 1961 [47]; *Paine v Meller* (1801) 6 Ves 349; 31 ER 1088.

with the scheme defined by the contract and the availability of specific performance. The VPCT is therefore not an anomalous departure from the "true" trust. The appearance of anomaly arises only if one begins from the mistaken premise that trusts are defined by the exclusion of benefit and the existence of full beneficial ownership in a beneficiary.

III. Leases, easements, contractual licences and holding rights as security

The presence of the easement[104] constitutes only a limited restriction on A's ability to generally bring to bear their unfettered preferences *vis-à-vis* the totality of the jural relations entailed by the freehold, in addition to the *a priori* liberties relating thereto.[105] The notion that the easement constitutes a limited restriction on the beneficial holding of rights, is supported by the Roman law *dictum* that a servitude represents a "*ius in res aliena*" – a right over a thing that belongs to another.[106] A – who is vested with registered freehold title beneficially – remains the absolute beneficial owner. They set the agenda and continue to bring to bear their unfettered preferences, subject to the limited restriction of allowing B to enjoy their circumscribed ability to make use of A's land.

Substantive doctrinal requirements relating to the valid creation of easements support the proposition that an easement is a limited encumbrance on a right vested beneficially.

First, the easement may not oust the enjoyment of the servient tenement by its proprietor.[107] This is a reason why exclusive parking rights, that cover the entire surface of

[104] See earlier discussion in this chapter of the easement and the analysis of Chambers in section II.A above.
[105] See the earlier discussion of jural relations in section I.i. above and in Chapter I.I.B.
[106] George Mousourakis, *The Historical and Institutional Context of Roman Law* (1st edn, Routledge 2003) 122.
[107] *Moncrieff v Jamieson* [2007] UKHL 42, [2007] 1 WLR 2620 (*Moncrieff*); *Batchelor v Marlow* [2001] EWCA Civ 1051, [2003] 1 WLR 764 (*Batchelor v Marlow*); *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278 (Ch D).

A's land, may be problematic.[108] After all, it is difficult to see how A may meaningfully set the agenda with a right, if the totality of the physical surface *vis-à-vis* which that right relates, has been overwhelmed by an easement in favour of B.[109] The test favoured in *Batchelor v Marlow*, namely whether the servient tenement proprietor retains reasonable user and enjoyment of the land[110], strengthens the support the law affords to the beneficial holding of rights, by avoiding easements that would significantly impair A's ability to set the agenda.[111]

Second, an easement must accommodate the dominant tenement. In *Regency Villas Ltd v Diamond Resorts Ltd*, [112] the majority held that the composite right to use various sporting and leisure facilities on A's land constituted a valid easement. A reason for preferring the dissent of Lord Carnwath in that case is that, if such an easement exists, A will struggle to meaningfully set the agenda in relation to A's land. After all, A (and any successors in title to A) cannot deploy the land in any way that would prevent B (and any successors in title to B) from using A's land, in particular ways, as a sporting and leisure facility.

Consider where A is vested with registered freehold title to land beneficially and A exercises a power to create a registered lease of fifty years' duration in favour of B. A continues to be generally entitled to set the agenda with that freehold. What A has lost – for the duration of the lease – is the ability to possess the land, because B has acquired a right to

[108] *Copeland v Greenhalf* [1952] Ch 488 (Ch D); Lu Xu, 'Easement of Car Parking: The Ouster Principle Is Out but Problems May Aggravate' (2012) 76 *Conveyancer & Property Lawyer* 291.
[109] cf Michael Haley, 'Parking Rights and Conceptual Wrongs: The Ouster Principle Revisited' [2022] *Conveyancer & Property Lawyer* 9–29.
[110] *Batchelor v Marlow* (n 107).
[111] That test is preferable to the *Moncrieff* (n 107) view, according to which the test is whether the servitude leaves the servient owner with possession and control of the land. In *Stenner v Teignbridge* [2025] UKUT 204 (an appeal to the Supreme Court is pending), the *Batchelor* test was applied as the prior Court of Appeal decision was binding, whereas *Moncrieff* is a decision on Scots law.
[112] [2019] AC 553.

exclusive possession for fifty years. The existence of a lease means that there are two parties vested with a legal estate and therefore two parties that enjoy ownership-type interests.[113] Lord Templeman in *Street v Mountford*[114] describes the holder of the lease as an owner, albeit subject to certain restrictions (for example the inability of the lessee to permanently change the physical structure of the land) and for a limited period of time (ie a lease is a *term* of years absolute).[115] Therefore, a lease, unlike an easement, is not a *ius in res aliena*. Rather, the land to which the lease relates is B's land, as well as still being A's land. This is an example where there are two owners, without them being co-owners. The freehold and the lease are understood as ownership interests in land.[116] Another situation where two parties have ownership interests without being co-owners is where A has registered freehold title and X comes onto the land as a squatter: both A and X have estates in the land.[117]

A lease entails a situation where A creates a legal property right from another legal property right. This example is different from that where the registered freehold title is vested in a trustee. A landlord can be vested with their freehold on trust. However, the creation of a lease need not also entail the creation of a trust. The trust is "engrafted" onto the title[118]. In the example of the landlord being vested with their freehold beneficially, the starting point is they bring to bear their unfettered preferences, subject to the restriction of not being able to possess the land to which the freehold relates, for the duration of the lease. Therefore, the creation of a lease does not entail a scheme, in the sense of the term used in this thesis,

[113] JW Harris, *Property and Justice* (OUP 1996) (Harris) 72 – 3.
[114] *Street* (n 61), 816.
[115] Law of Property Act 1925, s 1(1)(b).
[116] Harris (n 113), 72 – 73.
[117] *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 (HL) 435–38 (Lord Browne-Wilkinson); Amy Goymour and Robin Hickey, 'The Continuing Relevance of Relativity of Title Under the Land Registration Act 2002' in Amy Goymour, Martin Dixon and Stephen Watterson (eds), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (Hart Publishing 2018) 123.
[118] *Re Transphere Pty Ltd* (1986) 5 NSWLR 309, 311 (McLelland J); William Swadling, 'Property: General Principles' in Andrew Burrows (ed), *English Private Law* (3rd edn, OUP 2013) [4.150].

because the freehold proprietor retains the ability to exert those unfettered preferences. It is true that the extent of their ability to set the agenda in relation to the land over which the freehold relates has been curtailed by the existence of the lease. However, there still exists an open-ended set of uses that A can make of the freehold. The starting point remains that A can do with the freehold as they wish, unless inconsistent with the tenant's lease.

The *numerus clausus* principle says that parties may only create property rights from a closed list. One of its justifications is that it supports the ability of successors in title to A to meaningfully set the agenda.[119] The property rights on the closed list, if created, constitute limited restrictions on the freeholder and leaseholder's ability to set the agenda. A *numerus apertus* legal system could potentially entail burdening a freehold with an unlimited number of exotic property rights.[120] In such a scenario, no party could be described as beneficially vested with a right, having lost the ability to meaningfully set the agenda.

In conclusion, consider a situation where A is beneficially vested with freehold title to land. They create a contractual licence[121] in B's favour, whereby B is permitted on weekends to deliver classes on A's four tennis courts. A is therefore under a contractual duty to allow B to use the tennis courts on the weekend. However, this contractual duty constitutes only a limited restriction on A's beneficial right-holding. A continues to bring to bear their unfettered preferences in the use of the freehold. A enjoys an open-ended set of potential transactions they could carry out in relation to the freehold title. A can do whatever they like

[119] Ernesto Vargas Weil, *Stability and Change in Property Law* (Hart Publishing 2025), ch 5.
[120] *Keppell v Bailey* (1834) 2 My & K 517, 39 ER 1042; Ben McFarlane, '*Keppell v Bailey* (1834); *Hill v Tupper* (1863)' in Gravells (ed) *Landmark Cases in Land Law*, ch 1.
[121] For examples see eg *Verrall v Great Yarmouth Borough Council* [1981] QB 202 (CA) and *King v David Allen and Sons, Billposting, Ltd* [1916] 2 AC 54 (HL).

with the freehold, unless inconsistent with the limited encumbrance constituted by the contractual licence.

A similar analysis applies to the equitable charge.[122] Consider a situation where B agrees to loan A £1,000 and acquires a security interest over A's car. A retains the ability to set the agenda in relation to the car, subject to the limited restrictions imposed by the terms of the equitable charge. Even where A fails to repay on time, A keeps any surplus from the proceeds of sale.[123] The thesis here departs from Swadling[124], who says holding a right as security is a different way of holding a right than outright ownership. In the view of this thesis, holding a right as security is a form of beneficial right-holding.

Conclusion

In conclusion, it is important to note that not every arrangement that satisfies the conceptual test for a scheme will be recognised or enforced by the law. The legal consequences that follow from the existence of a scheme are significant (as identified at the outset of Chapter I) and the courts may justifiably confine recognition and enforcement to schemes that satisfy broader doctrinal and policy constraints, such as the beneficiary principle[125] and a rule against trusts that sterilise property.[126] This thesis does not aim to examine which schemes fall outside that boundary of schemes English law recognises and enforces. Instead, the remainder of the thesis examines schemes that are legally recognised by the English law of

[122] See further *Tailby v Official Receiver* (1888) 13 App Cas 523 (HL), especially 546–47 (Lord Macnaghten); Sarah Worthington, *Proprietary Interests in Commercial Transactions* (OUP 1996) 77–79.
[123] *National Provincial and Union Bank of England v Charnley* [1924] 1 KB 431 (CA) 449; *Illingworth v Houldsworth* [1904] AC 355 (HL), 358.
[124] William Swadling, 'Trusts and Ownership: A Common Law Perspective' (2016) 24 European Review of Private Law 951; See Chapter I.I.B.
[125] *Re Astor's Settlement Trusts* [1952] Ch 534 (Ch D); *Re Endacott* [1960] Ch 232 (CA).
[126] As in eg *Brown v Burdett* (1882) 21 Ch D 667 (Ch D).

trusts and examines how the scheme-based analysis can illuminate the specific rules and doctrines that govern them, drawing on examples of non-trust schemes where appropriate.[127]

The next chapter begins its analysis by showing how focussing on the integrity of the scheme is different from focussing on individual rights and how practical implications follow depending on whether one adopts an integrity of the scheme analysis, as opposed to an individual-rights focussed analysis. The next chapter also assesses some potential objections to an integrity of the scheme analysis, before Part II of this thesis proceeds to examine the four key features outlined at the outset of Chapter I.

[127] For analysis of how the thesis makes limited use of non-trust scheme examples, see discussion in Chapter I.II.B.

Chapter III: The Integrity of the Scheme

The previous chapter provided the framework for understanding when a scheme has and has not arisen. Section I of this chapter illustrates in practice how an integrity of the scheme analysis differs from one attempting to explain key features of the trust in the individual rights of a beneficiary. Section II of this chapter addresses potential objections to an integrity of the scheme analysis.

Section I: The integrity of the scheme analysis and the way it differs in practice from an individual rights analysis

Protecting the integrity of a scheme is a different task from protecting the position of individual parties.

I. The difference between an integrity of the scheme analysis and an individual rights focus

It was seen in Chapter I.III that the rival analyses of beneficial ownership and rights against rights endeavour to understand key features of the trust in the individual position of the beneficiary. It was also argued in Chapter I.III that a significant limitation of these analyses is their inability to explain why some of those same features apply to situations where there are no individuals endowed with equitable proprietary rights or rights against rights, notably with the charitable purpose trust. The operation of discretionary trusts and non-trust administrative

regimes[1] (such as deceased estates) also cast some doubt on these rival analyses. For example, deceased estates undermine the idea that the ability to bring a claim against a third-party is *proof* of a party having beneficial ownership.

Section I of this chapter focusses on the personal claims that may be initiated against a defaulting trustee, who transfers trust assets without authority under the terms of the trust. This is an example where it makes a practical difference – as will be seen in the analysis in Section I.II below – how one endeavours to explain the nature and aim of such a claim. On a scheme-based analysis, in each case a claim is brought to reconstitute a fund, without the claimant initiating the claim pointing to any personal loss of theirs that the reconstitution vindicates. On that view, the claim protects the integrity of the scheme, rather than aiming to compensate an individual.

For example, an object of a discretionary trust has an interest that lacks "the necessary quality of definable extent" required for a beneficial interest.[2] Yet where a trustee misapplies trust property, the object may still compel repayment by the trustee of the full amount into the trust fund.[3] A compelling explanation for this is that what is being restored is not measured by the loss inflicted on the object, but on the loss inflicted to the trust fund: a trustee in breach must restore to the trust fund "what ought to have been there".[4] On a scheme-based analysis, the object's ability to initiate the personal claim against the wrongdoing trustee is unremarkable: the object's standing to sue protects the scheme as an ongoing enterprise.[5]

[1] See analysis in Chapter I.II.B.
[2] *Gartside v IRC* [1968] AC 553 (HL) 618 (Lord Wilberforce).
[3] Simon Douglas, 'Trusts, Estates, and Personhood' in Irit Samet, Simone Degeling and Jessica Hudson (eds), *Philosophical Foundations of the Law of Express Trusts* (Oxford University Press 2024) (Douglas, Estate) 107–08, discussing *Joel v Mills* (1857) 3 K & J 458, 474; 69 ER 1189, 1196–97.
[4] *Target Holdings Ltd v Redferns* [1996] AC 421 (HL) (*Target*) 434 (Lord Browne-Wilkinson).
[5] Douglas, Estate (n 3) 108–09, drawing the same conclusion in relation to a beneficiary's standing to bring a tracing claim against a third-party recipient of trust property.

Charitable trusts illustrate the point that personal claims against a defaulting trustee cannot be explained on an individual-rights analysis (at least not in all cases), because here there is no beneficiary at all. A charitable trustee's duties and powers differ little from an ordinary trustee's.[6] Where charity trustees misapply the fund, proceedings to compel the trustee to pay cannot be rationalised as vindicating any person's beneficial interest, since none exists; they can only be understood as protecting the scheme itself. The personal claim against the trustee restores the trust fund and who may bring the claim is a question of standing[7], not a reflection of who holds a beneficial interest in the trust fund.

The same structure of protecting the scheme's integrity – rather than compensating for individual losses – recurs outside the law of trusts, where the administrator of the particular scheme, such as an executor of a deceased estate, misapplied scheme assets.[8] As seen in Chapter I.II.B, a residuary legatee has, on the authority of *Commissioner of Stamp Duties (Queensland) v Livingston*[9], no beneficial interest in any asset of the unadministered estate.[10] Devastavit — literally "he has wasted" — denotes the wrong of maladministration committed by a personal representative, whether executor or administrator, of a deceased person's estate.[11] It is a personal claim against the defaulting representative, who must make good the resulting loss from their own resources, "as far as they had, or might have had, assets of the deceased".[12] Simon Douglas traces the wrong's dual common law and equitable ancestry, a divergence not resolved until the Judicature Act 1873.[13]

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[6] Douglas, Estate (n 3) 92.
[7] See analysis in Chapter VII.
[8] Simon Douglas, 'Wasting Away: Devastavit and the Judicature Act 1873' in Ben McFarlane and Steven Elliott (eds), *Equity Today: 150 Years after the Judicature Reforms* (Hart 2023) 259 (Douglas, Devastavit).
[9] [1965] AC 694 (PC) (*Livingston*).
[10] *Livingston* (n 9), 710–11 (Viscount Radcliffe), following *Lord Sudeley v Attorney General* [1897] AC 11 (HL) and *Dr Barnardo's Homes National Inc Assoc v Special Commissioners of Income Tax* [1921] 2 AC 1 (HL).
[11] Douglas, Devastavit (n 8).
[12] Douglas, Devastavit (n 8), quoting Matthew Bacon, *A New Abridgement of the Law* (A Strahan 1832) 510.
[13] Douglas, Devastavit (n 8) 259–260.

At common law, devastavit developed within creditor enforcement actions: once a personal representative had received sufficient assets from the estate to discharge a debt, they became strictly liable for its payment and it was no defence that the assets were subsequently lost through robbery, accident, or a good-faith transfer to a co-executor.[14] In the Chancery Court, by contrast, devastavit emerged through administration proceedings brought by legatees as well as creditors and encompassed a far wider notion of loss — including failure to invest, retention of wasting assets and delay in realising the estate — for which negligence or bad faith, rather than strict liability, had to be shown.[15]

Douglas argues that section 25(11) of the Judicature Act 1873 resolved this divergence, so that, following *Job v Job*[16], fault became a universal requirement wherever devastavit is alleged, whether at law or in equity.[17] Modern devastavit accordingly comprises breach of either the duty to preserve the estate's value or the duty to distribute it correctly, pursued either as a common law debt claim or, more commonly, as an administration claim under CPR Part 64.[18] Douglas emphasises that devastavit's hybrid pedigree leaves it with a distinctive scope: unlike breach of trust, which lies only at the suit of beneficiaries, devastavit may be alleged by creditors and legatees alike.[19]

A further, non-trust analogue is the administration of a bankrupt's estate: the trustee in bankruptcy administers the bankrupt's property for the general body of creditors,[20] yet no individual creditor holds a right to any specific asset within that estate[21]; the duty entails due

[14] Douglas, Devastavit (n 8) 260–62, discussing *Crosse v Smith* (1806) 7 East 246, 103 ER 94.
[15] Douglas, Devastavit (n 8) 262–68, discussing *Dornford v Dornford* (1806) 12 Ves 127, 33 ER 49 and *Re Stevens* [1898] 1 Ch 162 (CA).
[16] (1877) 6 Ch D 562 (Ch D) (*Job v Job*).
[17] Douglas, Devastavit (n 8) 268–269.
[18] Douglas, Devastavit (n 8) 269–274.
[19] Douglas, Devastavit (n 8) 272–273.
[20] Insolvency Act 1986, s 306(2); see Douglas, Estate (n 3) 94.
[21] *Ayerst (Inspector of Taxes) v C&K (Construction) Ltd* [1976] AC 167 (HL) 178.

administration of the collective fund, not the satisfaction of any one creditor's individual position.

Taken together, these examples illustrate the difficulty (at least in cases where the claimant is not endowed with a beneficial interest in the misapplied assets) with the rival analyses of beneficial ownership and rights against rights in explaining the nature and aim of the personal claim initiated against a party that transfers assets in breach of their duty of due administration.[22] In several such contexts, there is no party endowed with equitable ownership of, or a beneficial interest in, the assets of administration. On a scheme-based analysis, such personal claims aim to restore the trust fund and to ensure that the scheme can be administered in accordance with its terms. As will be seen in the analysis that follows, it may also make a practical difference which analysis is adopted to explain these claims and it will also be further argued that a scheme-based analysis is preferable even where there is a beneficiary with a recognised beneficial interest.

II. Personal claims against the trustee for consequential economic losses

The difference between a scheme-based and an individual-rights oriented analysis can be seen in looking at the question of whether a beneficiary can recover their consequential economic losses following an unauthorised disposition of trust assets by the trustee.

i. The legal position

Consider where a beneficiary of a trust harnesses their position as beneficiary to enter a series of contracts with third parties. In breach of trust, the trustee then conveys title to the trust

[22] The definition adopted of a duty of due administration, for the purposes of this thesis, is given in the introduction to Chapter I.

property to a good faith purchaser for value. The beneficiary sustains a series of consequential economic losses as a result of being unable to perform their contracts with the third parties. In the view of this thesis, a beneficiary should not be able to recoup these losses from their trustee. These losses are not concerned with the integrity of the scheme. The problem with the trustee's conduct is not the consequential economic losses inflicted on the beneficiary, but rather in the fact that rights were transferred in an unauthorised transaction. The trustee's liability is best understood as one of restoring the trust fund to the position it would have been in but for the unauthorised disposal. The proposition that a beneficiary's consequential economic losses are irrelevant in the calculation of a trustee's personal liability is supported by the commitment in the authorities to the reconstitution of the trust estate.[23] Douglas' analysis also helpfully emphasises that the nature of the remedy against the defaulting trustee is not rooted in any beneficiary's interest, but rather in the law's concern with the integrity of the trust structure.[24]

The decision of the High Court of Australia in *Elder's Trustee and Executor Co Ltd v Higgins*[25] is a clear illustration of the court's focus on reconstituting the trust fund, rather than being concerned with the individual losses suffered by individual beneficiaries. The case concerned a pastoral trust in which the testator's grazing business was conducted across two interlocked properties, one of which — "Burnt Oak" — was held by the testator and his two sisters as tenants in common, subject to an option permitting the testator and after his death his trustee, to purchase the sisters' two-thirds interest for a fixed price of £4,278 11s 0d.[26] Between

[23] *Re Dawson* [1966] 2 NSWLR 211; *New Cap Reinsurance Corp Ltd v General Cologne Re Australia Ltd* [2004] NSWSC 781; 7 ITELR 295 [55] (equitable compensation looks to what is required to restore the trust fund). This prevents the beneficiary who brought the claim from benefiting alone from any recovery: *Patel v Brent LBC (No 2)* [2003] EWHC 3081 (Ch), [2004] WTLR 577 [32]; *Caffrey v Darby* (1801) 6 Ves 488, 31 ER 1159; *Clough v Bond* (1838) 3 My & Cr 490, 40 ER 1016; *Target* (n 4) 435; *Crociani v Crociani* [2017] JRC 146 [676]; see too *Brudenell-Bruce v Moore* [2014] EWHC 3679 (Ch), [2015] WTLR 373 [245]–[248].
[24] Douglas, Estate (n 3), 107 – 108.
[25] (1963) 113 CLR 426 (*Elder's Trustee*) (Dixon CJ, McTiernan, Windeyer and Owen JJ).
[26] *Elder's Trustee* (n 25) 430–31 (Dixon CJ, McTiernan and Windeyer JJ).

December 1944 and January 1945, the trustee allowed that option to lapse: rather than exercising it for the benefit of the estate, it arranged for the testator's widow to purchase one sister's interest personally and permitted the option over the second sister's interest to expire unrenewed after she declined, at the last moment, to grant a further option.[27] The consequence, crystallising only when the second sister's estate later forced a partition and sale in 1951, was that the trust lost the opportunity to acquire land essential to the pastoral business at a price far below its subsequent market value.[28]

The majority (Dixon CJ, McTiernan and Windeyer JJ) held that the trustee's inaction constituted a breach of the general duty to administer the trust with due diligence, care and prudence, a duty that could not be displaced merely by characterising the omission as an exercise of discretion.[29] Owen J dissented on this point, considering the decision not to exercise the option one that a prudent trustee could properly have reached given the uncertain state of a business still being conducted in the final, precarious months of the Second World War.[30]

The point of present significance, however, is one on which the Court was unanimous and which arose independently of the merits of the liability question: the form of order made by Mayo J at first instance could not stand because it directed that any sum found due on the taking of accounts be paid to the plaintiff beneficiaries personally, rather than restored to the testator's estate.[31] The majority described this feature of the order as reflecting a misconceived understanding of the relief available for breach of trust, observing that "the ordinary order

[27] *Elder's Trustee* (n 25) 438–443.
[28] *Elder's Trustee* (n 25) 444–445.
[29] *Elder's Trustee* (n 25) 448–49, applying *Speight v Gaunt* (1883) 22 ChD 727 and *Learoyd v Whiteley* (1886) 33 ChD 347; (1887) 12 App Cas 727 (HL).
[30] *Elder's Trustee* (n 25) 454–68 (Owen J).
[31] *Elder's Trustee* (n 25) 447–48 (Dixon CJ, McTiernan and Windeyer JJ).

would be that any resulting loss be made good to the estate, not to the beneficiaries."[32] Owen J, dissenting on liability, agreed entirely on this procedural point: even had the breaches and the resulting loss been capable of ascertainment from Mayo J's judgment, the plaintiffs were not entitled to sign judgment for that amount, since, as he put it, "it would have to be made good to the estate and not directly to the plaintiffs."[33]

This is not a mere pleading technicality. It reflects the Court's clear statement of principle that a trustee's liability for breach of trust is measured by reference to the loss suffered by the trust estate, and not by reference to the loss sustained by any individual beneficiary.[34] As the majority put it in fixing the appropriate relief, the liability of a trustee for breach of trust "is measured by the loss or depreciation which his act or omission has caused to the trust estate" and the trustee must make good any depreciation and damage which the estate — as opposed to any particular beneficiary — has suffered.[35] The inquiry directed on remitter was accordingly framed not as an assessment of what each plaintiff had individually lost, but as a notional valuation exercise conducted at the level of the trust assets: the value, at the date the corpus vested in possession, of the two one-third shares in Burnt Oak that the trustee ought to have acquired, less the option price, adjusted for interest.[36]

Elder's Trustee therefore stands as clear authority for the proposition that a beneficiary's standing to complain of breach of trust does not convert the remedy into one measured by, or payable to satisfy, that beneficiary's personal loss.[37]

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[32] *Elder's Trustee* (n 25) 447.
[33] *Elder's Trustee* (n 25) 454.
[34] *Elder's Trustee* (n 25) 453.
[35] *Elder's Trustee* (n 25) 453.
[36] *Elder's Trustee* (n 25) 453.
[37] See also Owen J's independent agreement on this point notwithstanding his dissent on liability: (1963) 113 CLR 426, 454.

A further reason for supporting the approach taken in *Elder's Trustees* is that given a trust can have an open-ended class of beneficiaries, the problem of indeterminate liability (for the consequential loss of a large number of individual beneficiaries) arises through one breach of duty. This is actually a symptom of the principled point: the reason indeterminate liability looms is because the question is being mis-asked as "what loss did this beneficiary suffer?" rather than "what does the scheme require"?[38]

Samuel Williams' doctoral thesis on the court orders available against express trustees[39] provides further support for the proposition that English trusts law is not, at its core, concerned with compensating an individual beneficiary for the consequential economic losses a breach of trust causes to that beneficiary personally, as distinct from the diminution the breach causes to the trust estate itself. Williams' taxonomy of the orders available against a trustee turns on two variables: to whom the trustee must pay money and how the sum owed is measured.[40] A "surcharging order" requires the trustee to pay money into the trust estate itself, the body of subject-matter held on the relevant trust, with liability measured by the extent to which the breach has wrongfully caused that estate to diminish in value.[41] A "personal loss order", by contrast, requires the trustee to pay money to a person, with liability measured by the extent to

[38] It might be said that, by accepting a position as trustee, the trustee necessarily assumes responsibility to all beneficiaries/objects who might suffer economic loss as a result of a misdirection of the trust assets. However, that liability would be tortious in nature and assumption of responsibility is usually limited to having a duty of care (*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL); *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL); *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 (HL); *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 18) so the beneficiaries would likely need to show carelessness on the part of the trustee to claim for those consequential economic losses.

[39] Samuel Williams, *'Court Orders Against Express Trustees'* (DPhil thesis, University of Oxford, Trinity Term 2019) (Williams, DPhil).

[40] Williams, DPhil (n 39) 24, distinguishing the five orders by reference to the identity of the payee (the trust estate or a person) and the measure of liability.

[41] Williams, DPhil (n 39) 24: 'Surcharging Order: a court order obligating a trustee to pay money into a trust estate, where the quantum of liability is the extent to which the trustee has wrongfully caused that trust estate to diminish in value.' Williams defines a 'trust estate' simply as a collection of subject-matter held on trust by a trustee or trustees on the same terms: 24.

which the breach has wrongfully caused a loss to that person all things considered, meaning that everything the person did or would have done with the money is relevant, not merely what the trust estate itself lost.[42] The distinction matters because the orthodox authorities on which Williams builds his account of the surcharging order describe the basic right of a beneficiary not as an entitlement to compensation for whatever loss the beneficiary personally happens to suffer, but as the right to have the trust duly administered.[43] The remedial response to breach is correspondingly scheme-focused rather than person-focused. Lord Toulson's description of the purpose of a restitutionary order in *AIB Group (UK) Plc v Mark Redler & Co Solicitors* (to be discussed in Section III below), a term Williams glosses as referring to an order requiring payment into the trust estate, as being to replace a loss to the trust fund[44] and Lord Reed's insistence in *AIB* that he was not departing from the orthodox view that the equitable obligation arising from breach of trust is to restore the fund to the position it would have been in but for the breach,[45] together locate the trustee's basic remedial obligation in the state of the estate, not in the beneficiary's own downstream financial position.

Even where the trust has ended and compensation is paid directly to an absolutely entitled beneficiary, the closest the ordinary law comes to a personal payment out of the trust, Williams shows this does not convert the remedy into a personal loss order concerned with the beneficiary's consequential loss. His close reading of *AIB* shows that Lord Reed's controlling reasoning confines recovery to the beneficiary's entitlement under the trust, that is, the value of what the beneficiary was due to receive from the estate,[46] which would, on the facts

[42] Williams, DPhil (n 39) 39: 'Personal Loss Order: a court order obligating a trustee to pay money to a person, where the quantum of liability is the extent to which the trustee has wrongfully caused a loss to that person all things considered.'
[43] Williams, DPhil (n 39) 88, quoting *Target* (n 4) 434 (Lord Browne-Wilkinson).
[44] Williams, DPhil (n 39) 85, quoting *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 (*AIB*) [65] (Lord Toulson), and glossing 'restitutionary' accordingly at the same page.
[45] Williams, DPhil (n 39) 86, quoting *AIB* (n 44) [116] (Lord Reed).
[46] Williams, DPhil (n 39) 271–72, quoting *AIB* (n 44) [90]–[91], [108] (Lord Reed).

(described below in Section III), have excluded any further sum the beneficiary could have made by deploying the misapplied money profitably: a hypothetical fifty thousand pounds of foregone profit would have fallen outside recovery on that approach, even though such a sum would plausibly have been recoverable had the order truly been a personal loss order.[47] The payment in *AIB* is accordingly better understood as one measured by the diminution in the beneficiary's entitlement under the trust, rather than as compensation for the beneficiary's separate economic position.

Williams' normative discussion reinforces his doctrinal analysis. He discusses, without being ultimately persuaded that it defeats every use of a personal loss order, the argument advanced by Glister and Penner that a trustee only assumes responsibility for the management of the trust assets, not for the further risk of what mismanagement of those assets might do to the beneficiary's wider economic position.[48] Williams' own diagnosis of why personal loss orders threaten extensive and unforeseeable liability is that they, uniquely among the five orders he considers in his doctorate[49], focus on losses wrongfully caused to a person all things considered, whereas the other orders focus in some way on the trust estate.[50] Tellingly, the only rule Williams is prepared to defend confines recovery for a beneficiary's personal loss to cases

[47] Williams, DPhil (n 39) 273.

[48] Williams, DPhil (n 39) 279, quoting Jamie Glister, 'Breach of Trust and Consequential Loss' (2014) 8 *Journal of Equity* 235, 255–6. See also, to similar effect, James Penner, 'The Beneficiary's Performance Interest in a Trust' in Richard Nolan, Kelvin Low and Tang Hang Wu (eds), *Trusts and Modern Wealth Management* (CUP 2018) 285.

[49] Williams also identifies three further orders within his five-order taxonomy of trustee liability (Williams, DPhil (n 39) 27). The Subject-Matter Distribution Order obligates a trustee to transfer subject-matter *from the trust estate itself* to a person to whom the trustee has wrongfully failed to distribute it; unlike the other orders, it does not depend on constructing counterfactuals to identify a wrongfully caused loss, but simply asks whether a distributive duty was breached and whether the relevant subject-matter remains in the trust estate (Williams, DPhil (n 39) 28–30). The Lesser Receipt Order obligates a trustee to pay money to a person, quantified by the extent to which the trustee has wrongfully caused that person to receive less valuable subject-matter from the trust estate than they ought to have received (31, 35–36). The Falsification Order obligates a trustee to pay money equal to the value of any subject-matter wrongfully transferred away in breach of duty; because it is not a counterfactual loss order, it requires no comparison between breach and non-breach scenarios, and — Williams argues — is not in fact available as a matter of English law, unlike the other four orders he considers (37–38).

[50] Williams, DPhil (n 39) 300–301.

where the settlor has specifically communicated an intention to benefit that person and the loss was reasonably foreseeable at the date of declaration, treating personal compensation as a narrow, purpose-specific exception rather than an expression of the trustee's basic obligation.[51] That basic obligation, on the authority Williams marshals, runs to the proper administration and restoration of the trust estate itself.

Conversely, it is not clear that an equitable ownership or a rights against rights analyses can explain why the beneficiary should not be able to recover their consequential economic losses against the express trustee. These analyses therefore provide a less compelling fit for the rules of English trust law on the liability of the trustee in breach of trust, than the scheme-based analysis favoured in this thesis.

ii. Rival analyses

A. Equitable ownership

On an equitable ownership analysis[52], the claimant beneficiary is – as argued by the Court of Appeal in *Shell UK Ltd v Total UK Ltd*[53] – the "real owner" of the trust assets. On this basis, where the trustee misapplies the trust assets, it seems difficult to resist the beneficiary's claim that the trustee is liable not only to restore the value of the trust fund, but also to compensate the beneficiary for any consequential economic losses they have incurred. The trustee has interfered with the beneficiary's equitable proprietary right in making the misapplication, even if only an innocent misapplication.

[51] Williams, DPhil (n 39) 302–4.
[52] See analysis in Chapter I.I.B.i.
[53] [2010] EWCA Civ 180, [2011] QB 86 [132]; see analysis in Chapter VI, Section I.

As will be seen in the analysis of these cases in Section III below, there is a certain irony to *Target/AIB* as the cases aim to limit the liability of the trustee in particular circumstances, especially where it is felt that the beneficiary is using the trust to escape a limit to contractual or tortious liability. However, the reasoning in *Target/AIB*, which draws analogies to claims in contract and tort, may in fact expose trustees to a new liability for the consequential economic losses of their beneficiaries.

B. Rights against rights

For McFarlane and Stevens, the claimant beneficiary's right against a right provides the basis for understanding the key features of the trust.[54]

However, the issue of consequential economic losses is a reason for arguing that understanding the key features of a trust with beneficiaries in the individual position of the beneficiary is not only unnecessary – given the potential of the integrity of the scheme analysis – but also misunderstands why those features operate even in the context of trusts with beneficiaries.

It is not obvious on the McFarlane and Stevens analysis why the beneficiary should not be able to claim for consequential economic losses caused by the trustee misdirecting the trust assets. They do not ask this question in any of their co-authored articles and it may be that they do not think that these claims are problematic. However, given the dangers of open-ended liability through one breach of the trustee's duty of due administration, it is likely that claims for consequential economic losses is a feature they would want to avoid. For example,

[54] See analysis in Chapter I.I.B.ii.

McFarlane and Televantos argue that the effects of the trust should be carefully calibrated to avoid indeterminate liability for third parties and the same could be said of the liability of trustees.[55]

An analysis of trusts with beneficiaries that roots the claims against the trustee and against third parties in the individual position of the beneficiary struggles to shield these defendants from an indeterminate range of consequential economic losses sustained by an indeterminate range of beneficiaries. The equitable ownership and rights against rights analyses might have to invoke policy reasons for denying these claims. However, that already shows a problem with the analysis. It should be the model for the trust that explains why these consequential economic losses are not recoverable, not external policy-based factors that must be invoked to tame the implications of the theory. Indeed, Stevens is critical of policy-based reasoning[56] and it is therefore difficult to understand what he would say in response to the beneficiary claiming for consequential economic losses against the trustee.

In the analysis in section I.I above, it was argued that remedies against the defaulting trustee can be shown to be focussed on restoring the fund and not focussed on compensating individuals. This emphasises the problems with the equitable ownership and rights against rights analyses: they provide a picture of the trust that is difficult to align with the broader treatment of parties that hold specific rights subject to duties of due administration.[57] Once the beneficiary is made the remedial centre of gravity, consequential loss claims become difficult to resist. Once the scheme is made the centre of gravity, they become easy to

[55] Ben McFarlane and Andreas Televantos, 'Third Party Effects in Private Law: Form and Function' in Paul B Miller and John Oberdiek (eds), *Oxford Studies in Private Law Theory: Volume I* (Oxford University Press 2020) (McFarlane and Televantos, Effects).
[56] Robert Stevens, *Torts and Rights* (OUP 2007).
[57] See eg *Freeman v Fairlie* (1817) 3 Mer 29, 36 ER 12.

exclude. Looking to other types of schemes, such as the deceased estate, as Mitchell[58] and Douglas[59] do, shows how the liability of the trustee can be justified even without there being parties endowed with equitable proprietary rights initiating the claims.

III. *Target* and *AIB*

It will now be argued that the scheme-based analysis helps to make sense of some of the criticisms that have been levelled against the controversial decisions in *Target* and in *AIB*.

A. Facts, context and decision

In *Target*, the claimant, a lender had deposited funds with the defendant solicitor. Those funds were held by the solicitor on trust for the claimant.[60] The defendant solicitor was given clear instructions as to when those funds were to be released to the borrower: after the claimant had obtained a first legal charge.[61] In breach of trust, the solicitors released the funds prior to that first legal charge having been obtained.[62] The borrower defaulted on the loan and the claimant enforced their security.[63] However, as the security was worth less than anticipated, the claimant lender sought to recover their losses from the solicitor for their breach of trust.[64]

[58] Charles Mitchell, "Stewardship of Property and Liability to Account" [2014] Conv 215 (Mitchell, Stewardship).
[59] Douglas, Estate (n 3).
[60] *Target* (n 4) 421.
[61] *Target* (n 4) 429.
[62] *Target* (n 4) 429–430.
[63] *Target* (n 4) 430.
[64] *Target* (n 4).

Lord Browne-Wilkinson rejected the claimant lender's argument that they could recoup the entire sum paid away in breach of trust, minus the amount that the lender had obtained from the enforcement of their security.[65] His Lordship emphasised that despite the funds having been paid to the borrower before a first legal charge had been obtained, that breach of trust was later cured and a first legal charge was obtained in favour of the lender.[66]

Lord Browne-Wilkinson was also emphatic in stating that a beneficiary could not recover losses from the trustee that were not caused – in a "but for" sense – by the breach of trust.[67] If the defendant can show that the loss would have been suffered even if there had been no breach, then the defendant is not liable for such loss.[68] His Lordship noted that the principles relevant to the calculation of damages are similar (though not identical) across common law and equity.[69]

In the High Court of Australia, a similar set of facts was scrutinised in *Youyang Pty Ltd v Minter Ellison Morris Fletcher*[70], except that the solicitor had not cured the breach by obtaining a first legal charge. On that set of facts, the court found that the beneficiary could recover the entire sum paid away in breach of trust, minus the sum recovered by the enforcement of the security. This was the case even if the claimant beneficiary would have suffered the same loss had the trustee not made the transfer in breach of trust.[71]

[65] *Target* (n 4) 440.
[66] *Target* (n 4).
[67] *Target* (n 4) 434.
[68] *Target* (n 4) 439–440.
[69] *Target* (n 4) 432.
[70] [2003] HCA 15, (2003) 212 CLR 484 (*Youyang*).
[71] *Youyang* (n 70), [48].

The result and reasoning in *Youyang* encouraged the claimant lender in *AIB Group (UK) Plc v Mark Redler & Co Solicitors* to make the same argument. The facts of *AIB* were materially identical to those of *Target Holdings*, with the difference that the defendants had not put things right by the time that proceedings were issued.[72] The claimant sought to distinguish *Target Holdings* on the ground that the breach of trust had not been "cured" by the defendants; it also argued that the cases were distinct because in *AIB* the transaction in respect of which the lender had advanced its money had never relevantly been "completed".[73] The Supreme Court rejected both of these arguments.[74] It found that a beneficiary could not recover losses that were not caused by the breach of trust.[75] Indeed, Lord Toulson averred that anything else would be "penal".[76]

B. Reception

The Supreme Court itself in *AIB* recognised that *Target Holdings* and its insistence on a but-for causation test in the calculation of personal claims against the defaulting trustee had not received universal support.[77]

A chief adversary of the approach espoused by Lord Browne-Wilkinson was Lord Millett.[78] For Lord Millett, the judgment in *Target* is inconsistent with the principles of accounting. Lord Millett's argument runs as follows. A beneficiary is entitled to an account. This is not a remedy, but rather the enforcement of a primary duty of the trustee to show what

[72] *AIB* (n 44) [8].
[73] *AIB* (n 44) [19], [35].
[74] *AIB* (n 44) [72]-[74].
[75] *AIB* (n 44) [62], [64], [66].
[76] *AIB* (n 44), [64].
[77] *AIB* (n 44) [50].
[78] Sir Peter Millett "Equity's Place in The Law of Commerce" (1998) 114 LQR 214.

they have been doing with the trust property.[79] In asking for an account of the trustee's dealings with the trust property, the beneficiary discovers that the trustee has made an unauthorised conveyance. They are entitled to ask for that disbursement to be falsified and to be struck from the record. The trust account will therefore show that the unauthorised disbursement remains in the trust fund, meaning that the trustee must find that missing sum from their own personal assets. Therefore, Lord Millett criticised Lord Browne-Wilkinson for having failed to follow the logic of the accounting procedure.

Charles Mitchell – building on the ideas of Elliott[80] – also criticises *Target*, as well as the Court of Appeal's decision in *AIB*.[81] For Mitchell, Lord Browne-Wilkinson introduced an inapt causation requirement into the calculation of compensatory claims against the trustee.[82] The personal claim against the trustee should not be understood as a remedy for the breach of a primary duty.[83] Rather, the action against the trustee should be understood as the beneficiary enforcing the continuing primary duty of the trustee to preserve the assets of the trust, unless they have obtained a proper discharge.[84] Given the breach of trust, the trustee has not obtained a proper discharge from their continuing duty to have the original assets.[85] For these reasons, it is inapposite to talk of causation, because the beneficiary is not claiming for a loss caused by a breach of trust, but is rather enforcing a continuing primary duty.[86] Mitchell encouraged the Supreme Court in *AIB* to remove the causation requirement introduced by Lord Browne-Wilkinson.[87]

[79] *Libertarian Investments Ltd v Hall* [2013] HKCFA 93, [2014] 1 HKC 368.
[80] The fullest version of Elliott's work is contained in his Oxford DPhil thesis: Steven Elliott, *Compensation Claims against Trustees* (University of Oxford, 2002).
[81] Mitchell, Stewardship (n 58).
[82] Mitchell, Stewardship (n 58) 227.
[83] Mitchell, Stewardship (n 58) 224.
[84] Mitchell, Stewardship (n 58) 220, 223–224.
[85] Mitchell, Stewardship (n 58) 220.
[86] Mitchell, Stewardship (n 58) 216, 224.
[87] Mitchell, Stewardship (n 58) 227.

Elliott and Mitchell distinguish between substitutive performance claims and reparation claims.[88] The former do not entail the allegation of a breach of duty. Rather, the trustee's continuing duty to preserve the original trust assets, in the absence of a proper discharge, is performed substitutively ie through the payment by the trustee of a personal sum of money that represents the value of the original trust assets.

Leading treatises on the area, such as *Hayton, Mitchell and McFarlane*[89] have confined the scope of *Target* and *AIB* to particular types of trusts and situations: they say that the basic falsification rules are disapplied where the trust has been exhausted and the fund has become absolutely vested in possession and/or where money has been paid out of a bare trust arising as an incident of a wider commercial transaction.[90] They also argue that the scope of the *Target*/*AIB* approach is unclear.[91] The authors continue to adopt the traditional accounting and falsification techniques to other trust structures, such as family trusts.[92]

Judges have been reluctant to apply the holdings in *Target* and *AIB* beyond the context of commercial trusts where the fund has been exhausted. Indeed, in assessing Court of Appeal judgments that came after *AIB* – such as *Main v Giambrone & Law*[93] – Samuel Williams has spoken of "disobedience".[94] The courts are – in Williams' view – cold to the

[88] Steven Elliott and Charles Mitchell, "Remedies for Dishonest Assistance" (2004) 67 MLR 14, 23–25.
[89] Charles Mitchell, Ben McFarlane and Jessica Hudson, *Hayton, McFarlane and Mitchell: Text, Cases and Materials on Equity and Trusts* (15th edn, Sweet & Maxwell 2022) (Hayton, McFarlane and Mitchell).
[90] Hayton, McFarlane and Mitchell (n 89) 13–018–13–024.
[91] Hayton, McFarlane and Mitchell (n 89) 13–087–13–089.
[92] Hayton, McFarlane and Mitchell (n 89) 13–009–13–017; see also para 13–018, treating *Target* (n 4) as a disapplication of the ordinary rules rather than a replacement of them.
[93] [2017] EWCA Civ 1193 (*Main*).
[94] Samuel Williams "Equitable Compensation, Trustees, and Disobedience in the Court of Appeal" [2021] Conv. 13 (Williams, Disobedience).

logic of *AIB* and have failed to follow clear Supreme Court instructions, by drawing artificial distinctions with *AIB* so as to apply a different rule.[95]

In *Main v Giambrone*, a large group of UK and Irish purchasers paid substantial deposits for off-plan holiday properties in a Calabrian development marketed as "Jewel of the Sea," instructing the defendant solicitors to act on their behalf in conducting due diligence and safeguarding the transaction. The solicitors undertook, *inter alia*, to verify the development, ensure the provision of compliant guarantees under Italian Legislative Decree 122/2005 and to hold the purchasers' deposits pending satisfaction of those conditions. In breach of those undertakings, the solicitors released the deposits – most of which were diverted as undisclosed commission – despite the absence of compliant guarantees. The development subsequently collapsed amid planning irregularities and allegations of criminality, leaving the purchasers unable to recover their deposits.

The Court of Appeal upheld the trial judge's finding that the solicitors had committed multiple breaches of duty, including breach of trust in misapplying client monies and confirmed that equitable compensation was recoverable in the amount of the lost deposits.[96] Critically, the Court characterised the solicitors' obligation as custodial: they were required to retain the funds unless and until the specified conditions were satisfied, such that their wrongful release directly caused the loss, distinguishing *Target* and *AIB* and justifying full reconstitution of the fund.[97] The Court of Appeal distinguished *Target* and *AIB* by focusing on the *content of the solicitors' obligation*: unlike those cases, where the trust was

[95] Williams, Disobedience (n 94) 21–22 (describing the Court of Appeal's "reluctance" to apply *Target* and *AIB* and its use of "avoidance tactics"), 28–29 (criticising *Giambrone* for distinguishing *Target* and *AIB* on unsound grounds), 31–32 (concluding that these tactics are tantamount to "a direct refusal to apply clear House of Lords and Supreme Court authority").
[96] *Main* (n 93) [37].
[97] *Main* (n 93) [62]–[63].

instrumental to a broader transactional objective which was ultimately achieved, the solicitors in *Main* undertook a *purely custodial obligation* to hold the purchasers' deposits unless and until specified conditions (compliant guarantees) were satisfied.[98] The breach therefore consisted in the wrongful dissipation of a fund that ought to have been preserved, such that the loss was the disappearance of the very asset entrusted to the solicitors, rather than a consequence of entering into a wider transaction.[99]

According to Williams, the Court of Appeal's reasoning rests on an artificial distinction between "custodial" and "active" duties which cannot be reconciled with *Target* and *AIB*.[100] On Williams' account, those authorities clearly require a counterfactual inquiry into what would have happened *but for* the breach, whereas *Main* avoids that inquiry by constructing the counterfactual as one in which the trustee simply retains the funds, without asking whether the relevant condition (here, a compliant guarantee) would in fact have been satisfied.[101] This, he argues, is doctrinally unsound: the distinction between custodial and active duties does not justify a differing approach to constructing counterfactuals.[102] The result is that *Main* effectively awards what is, in substance, full reconstitution of the fund while purporting to apply a counterfactual test.[103] For Williams, this amounts to a failure to follow binding authority: the Court of Appeal's unsound distinctions and avoidance techniques are best understood as equivalent to a direct refusal to apply clear House of Lords and Supreme Court authority[104], thereby undermining the causation-based framework established in *Target* and *AIB*.[105]

[98] *Main* (n 93) [60]–[62].
[99] *Main* (n 93) [63]–[64].
[100] Williams, Disobedience (n 94) 27.
[101] Williams, Disobedience (n 94) 28.
[102] Williams, Disobedience (n 94) 28–29.
[103] Williams, Disobedience (n 94) 29.
[104] Williams, Disobedience (n 94) 13–14.
[105] Williams, Disobedience (n 94) 29.

IV. Personal claims against the trustee: a scheme-based analysis

As seen in the analysis in Section I.I above, both cases[106] and commentators[107] talk about loss to the trust estate. In the view of this thesis, the scheme-based analysis is helpful in making sense of what "loss to the trust estate" means. The scheme-based analysis explains that "loss to the trust estate" does not denote loss suffered by a particular beneficiary. Rather, it denotes a deficiency in the fund appropriated to the scheme. The trust estate constitutes the pool of rights that have been appropriated to a scheme. When assets are transferred away in breach of trust, the scheme is deprived of resources that ought to remain available for administration in accordance with its terms. The loss therefore consists in the estate no longer containing the rights that the scheme requires it to contain. Describing the matter as "loss to the trust estate" is thus a way of identifying the fact that the integrity of the scheme has been undermined, rather than injury to the personal position of any individual beneficiary or participant in the scheme structure.

The reasoning in *AIB* does in fact lend some support to the scheme-based analysis of the trust, notwithstanding the court's occasional analogies to contractual and tortious damages. The foundational proposition from which both Lord Toulson and Lord Reed proceed is not one about individual loss: it is that "[t]he basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law."[108] This is a statement about the integrity of administration, not about the personal financial position of the claimant. Consistently with this, Lord Reed characterises equitable compensation as aiming to "provide the pecuniary equivalent of

[106] eg *Re Dawson New South Wales Supreme Court* [1966] 2 NSWR 211.
[107] eg Douglas, Estate (n 3).
[108] *AIB* (n 44) [64].

performance of the trust,"[109] framing the remedial baseline by reference to what the trust terms required, rather than by reference to what the claimant would have enjoyed absent the breach. The causation inquiry confirms this reading: Lord Toulson holds that "proper performance of the obligations of which the trust formed part would have resulted in the solicitors paying to Barclays the full amount required to redeem the Barclays mortgage,"[110] so that the counterfactual against which loss is measured is defined by the scheme's own demands. The award of £273,777.42 was not, at bottom, compensation for a personal loss suffered by AIB as lender; it was, as Lord Reed explains, "the pecuniary value of the difference between a first ranking security and one which was postponed to Barclays,"[111] that is, the precise monetary equivalent of the shortfall between what the trust scheme required and what was actually delivered.

The court's rejection of full reconstitution of the £3.3m fund can be explained on a scheme-based analysis: Lord Toulson reasons that to characterise that sum as lost "when most of that sum would have been lost if the solicitors had applied the trust fund in the way that the bank had instructed them to do, is to adopt an artificial and unrealistic view of the facts,"[112] thereby confirming that the reference point throughout is what scheme-compliant performance would have produced, not the claimant's position in the abstract. Significantly, Lord Reed expressly resists the assimilation of these principles to common law damages, insisting that "structural similarities do not … entail that the relevant rules are identical" and that "isomorphism is not the same as equality,"[113] before locating the difference in the nature of the obligation itself: "a trust imposes different obligations from a contractual or tortious

[109] *AIB* (n 44) [93].
[110] *AIB* (n 44) [73].
[111] *AIB* (n 44) [141].
[112] *AIB* (n 44) [65].
[113] *AIB* (n 44) [137].

relationship, in the setting of a different kind of relationship."[114] It is the trust scheme that calibrates the remedy and supplies the normative baseline against which breach and loss are assessed. The individual beneficiary's claim is derivative of, and bounded by, that prior institutional question.

Although the reasoning in *AIB* can be reconciled with a scheme-based analysis, there is also an issue – in the view of this thesis – with the analysis in *Target* and *AIB*. It occasionally attempts to draw a parallel between on the one hand the claims that might be initiated by the victim of a tort or a claim in contract, and, on the other hand, claims that may be initiated against a trustee in breach of trust. For example, in *AIB*, Lord Reed avers[115]:

> [T]he aim of equitable compensation is to compensate: that is to say, to provide a monetary equivalent of what has been lost as a result of a breach of duty. At that level of generality, it has the same aim as most awards of damages for tort or breach of contract.

The concern with claims in tort and claims in contract is with the individual position of the aggrieved party.[116] It therefore makes sense – for example – that the victim of a tort or a party whose contract has not been performed should in principle be able to claim for their consequential economic losses. However, when a right has been appropriated to a scheme, the orienting ideal for the court's analysis should be with its integrity. The parallel to claims in tort and contract therefore risks misleading. There was of course a contract between claimant and defendant in both *Target* and *AIB*. Any claims for consequential economic

[114] *AIB* (n 44).
[115] *AIB* (n 44) [136].
[116] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32 [9] (Lord Bingham); Stephen A Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (OUP 2019) 223, 227–28.

losses should therefore be rooted in the existence of the contract, rather than the presence of a scheme.[117] In that sense, Lord Reed was correct to say[118]:

> [W]here a trust is part of the machinery for the performance of a contract, that fact will be relevant in considering what loss has been suffered by reason of a breach of the trust.

In the view of this thesis, the integrity of the scheme, which provides an important link between the different examples of the trust, was overshadowed in *Target* and *AIB* by a dubious parallel drawn between the beneficiary's claim on the one hand and claims in tort and contract on the other. The *Target/AIB* causation rules are arguably principled. However, it is important to understand that the counterfactual inquiry should be directed to determining the loss caused to the trust fund by the breach of trust, rather than loss to an individual. The problem with *Target*/*AIB* is not so much then with the rules themselves, but for some of the reasons given for them.

Ho and Nolan's[119] scholarship supports this thesis' analysis of *Target*/*AIB*. On their account, the orthodox mechanism for breach of trust is the taking of an account, which compares the actual state of the fund with the counterfactual state it would have been in had the trust been properly performed, with the aim of restoring the fund to that position.[120] Ho

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[117] Claims for breach of contract are subject to the *SAAMCO* limit. The *SAAMCO* scope of duty principle – established in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL) – limits damages for breach of contract to losses falling within the scope of the defendant's assumed responsibility, such that a defendant is liable only for the consequences of the information or advice being wrong and not for all losses flowing from the transaction more generally. Part of the context of *Target* and *AIB* is lenders wanting to escape those limits.
[118] *AIB* (n 44) [137].
[119] Lusina Ho and Richard Nolan, "The Performance Interest in the Law of Trusts" (2020) 136 LQR 402 (Ho and Nolan); see analysis in Chapter I.I.A.
[120] Ho and Nolan (n 119) 411–412.

and Nolan argue that *Target* and *AIB* reached results that are broadly consistent with orthodox trust principles, but that the reasoning in those cases is misleading because it imports a compensatory based framework drawn from contract and tort.[121] Their central claim is that the same outcomes could – and should – have been reached through orthodox accounting focused on whether, and to what extent, the trust fund had been reconstituted, rather than by asking whether the claimant suffered loss that would not have occurred "but for" the breach.[122] In this way, Ho and Nolan reinforce the thesis's point: the real problem with *Target* and *AIB* is not necessarily their results or even their causation limits, but the justificatory move that recasts breach of trust in the image of contract and tort, thereby obscuring the underlying commitment of equity to the integrity of the scheme and restoration of the trust fund itself, for due administration in accordance with the terms of that scheme.[123]

In occasionally focussing on the individual position of the claimant beneficiary and in drawing parallels to tort and contract, *Target* and *AIB* risk producing a model which fails to achieve unity across the law of trusts and non-trust scheme examples. Where a claim is initiated against the trustee of a charitable purpose trust, the personal claim is not calibrated towards compensating the individual position of the claimant. Rather, the goal is to reconstitute the trust fund.[124]

As is argued by Mitchell[125], the appropriate parallel is between claims against a defaulting trustee and claims against other parties that hold specific rights and powers subject to duties of due administration, for example the personal claims that may be initiated against

[121] Ho and Nolan (n 119) 413–414.
[122] Ho and Nolan (n 119) 414–415.
[123] Ho and Nolan (n 119) 413–14, 425–426.
[124] See eg *British America Elevator Co Ltd v Bank of British North America* [1919] AC 658 (PC) 666,
[125] Mitchell, Stewardship (n 58).

a defaulting executor[126], partner[127] or company director.[128] Trustees, executors, partners and company directors are accounting parties: they hold specific rights or powers in accordance with an all-encompassing set of terms. It is that stewardship of a scheme which is the appropriate parallel to draw, not between claims for breach of trust and claims for breach of contract or tort claims.

Section II: Addressing objections to an integrity of the scheme analysis

The aim of Section II of this chapter is to address potential objections that might be raised to an integrity of the scheme analysis of the trust's four key features. These objections go beyond the specific question examined in Section I as to claims against a trustee following a breach of trust. They argue that other aspects of the current law are inconsistent with a scheme-based analysis. The objections are: (a) why does the law not protect the integrity of the scheme by saying that a transfer in breach is invalid?; (b) why does the law not protect the integrity of the scheme by saying that third party recipients do acquire a right, despite the breach of trust, but are *always* under a duty to restore the assets (or their monetary value) to the scheme?; (c) why does the law sometimes allow beneficiaries to change the terms of the scheme, by giving their consent to a disposition in breach of trust and why does the law allow beneficiaries to bring the scheme to an end, by exercising their powers under the rule in *Saunders v Vautier*[129]?

[126] Mitchell, Stewardship (n 58) gives as examples: *Piety v Stace* (1799) 4 Ves 620, 622; 31 ER 319, 320; *Freeman v Fairlie* (1817) 3 Mer 29, 43–44; 36 ER 12, 17–18; *Wroe v Seed* (1863) 4 Giff 425, 428–29; 66 ER 773, 774–75; Administration of Estates Act 1925, s 21.
[127] Mitchell, Stewardship (n 58) gives as examples: *London Financial Association v Kelk* (1884) 26 Ch D 107 (Ch D) 151; *Platt v Butcher* (Bristol County Court, 11 November 2005)
[128] The examples given by Mitchell, Stewardship (n 58) include: *Re Lands Allotment Co* [1894] 1 Ch 616 (CA) 638; *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 (CA) 405; *DEG-Deutsche Investitions und Entwicklungsgesellschaft mbH v Koshy* [2003] EWCA Civ 1048, [2004] 1 BCLC 131 [83]; *Revenue and Customs Commissioners v Holland* [2010] UKSC 51, [2011] Bus LR 111 [56]; *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2011] Bus LR 1126 [34].
[129] (1841) 4 Beav 115, 49 ER 282 (*Saunders*).

The answer to these objections is that the law's commitment to upholding the integrity of a scheme is qualified, not absolute. There are, for example, several rules which protect the interests of third parties that receive assets in breach of trust.[130] The law does its best to ensure that specific rights are used compatibly with the scheme, consistently with other demands. Part of the function of the law of trusts is to devise a set of rules that strikes a balance between upholding the integrity of the scheme on the one hand and other goals of the legal system on the other. This chapter begins its analysis by examining this balance and the way in which it has been shaped by equity's nature as a supplementary body of rules. It matters that the trust is a scheme given effect to in equity. Equity's supplementary nature is itself one of the factors that qualifies the extent of the law's integrity commitment and the way in which that integrity commitment is operationalised. However, equity has several tools in its armoury[131] which ensure that it need not make a stark choice between protecting the integrity of the scheme and other goals.

Both historical reasons (equity having developed as a supplementary body of rules[132]) and practical concerns (eg a need to protect third parties) explain and justify the present-day position that transfers in breach of trust are not void. The analysis in Section I.I first explains that the trustee has a power to transfer trust assets in breach of trust, before assessing the historical and practical reasons which justify that position, as well as highlighting goals – beyond the integrity of the scheme – to which the legal system is committed.

[130] See eg the good faith purchaser for value defence, discussed below.
[131] See for example the possibility of personal claims against the defaulting trustee (discussed in Section I).
[132] FW Maitland, 'Lecture II' in AH Chaytor and WJ Whittaker (eds), *Equity: Also The Forms of Action at Common Law* (CUP 1909) 18–19; Ben McFarlane, "Equity and the Justification of Private Rights" in Michael Crawford and others (eds) Justifying Private Rights (Hart Publishing, 2020).

I. The trustee has a power to commit a wrong

As noted in the discussion in Chapter I.I.B, when discussing Hudson's analysis, the trustee is *not* disabled from transferring rights in breach of trust.[133] Where the trustee complies with the rules determining what is necessary for a conveyance of the right in question, then the transfer takes place, irrespective of whether unauthorised by the terms of the trust.[134] The trustee has a right (a power) to carry out an act which involves a wrong (breach of their duty as trustee).[135]

The same transfer rules apply irrespective of whether A is vested with a right beneficially or non-beneficially. When A is vested with a legal right, common law[136] and statutory rules[137] determine what is necessary for that right to be conveyed to C. Where A is vested with title to shares, one of the conditions necessary for A to transfer their title to the shares to C, is that C is registered with title. Unless registration occurs in favour of C, then A continues to be vested with the title to the shares.[138] With land, registration is often one of the necessary conditions that must be satisfied for a right to be transferred from A to C. As pointed out by Lady Hale in *Scott v Southern Pacific Mortgages*[139], the legal estate in registered land will only vest in the purchaser when they register the transaction with the land registry.[140]

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[133] Jessica Hudson, 'Equity's Gloss on Authority' in Ben McFarlane and Steven Elliott (eds) *Equity Today: 150 Years after the Judicature Reforms* (Hart, 2023) (Hudson).
[134] *Rolled Steel Products Ltd v British Steel Corp* [1986] Ch 246 (CA) 303.
[135] Matthew Kramer, Nigel Simmonds and Hillel Steiner, *A Debate Over Rights: Philosophical Enquiries* (OUP 1998) ch 1.
[136] *Cochrane v Moore* (1890) 25 QBD 57 (CA) – on how delivery of possession can transfer title to chattels.
[137] Land Registration Act 2002 on the rules for the transfer of title to land.
[138] Companies Act 2006, s 770.
[139] [2014] UKSC 52, [113].
[140] Section 27 Land Registration Act 2002.

All personal claims initiated in knowing receipt presuppose that the recipient has received a right from the express trustee or a constructive trustee. It is the fact that the transfer constituted a breach of trust which may expose the recipient to a personal claim. Receipt is part of the gist of the action. As emphasised by the Court of Appeal in *Byers*, it is not sufficient that D benefits from the breach of trust: D must receive a right.[141]

In *Ali v Dinc*[142], Sarah Worthington QC, sitting as a Deputy High Court Judge, explained that there is an important difference in legal principle between situations where B claims that C never receives a right from A and situations where B claims that C received a right from A, encumbered by B's interest. She noted that in the latter, the fact of the encumbrance may reduce the value of C's right to nil. From a commercial perspective, it might not make much of a difference to C whether they do not receive the right or receive it but subject to a fully encompassing encumbrance. However, this does not detract from the point that, in the latter group of cases, C successfully received a right from A.[143]

The judge criticised the analysis of Lewison LJ in *Mortgage Express v Lambert*[144], who had taken – in her view – an over-expansive reading of section 26 of the Land Registration Act 2002.[145] The provision provides that "a person's right to exercise owner's powers in relation to a registered estate or charge is to be taken to be free from any limitation affecting the validity of a disposition" and that the section "has effect only for the purpose of preventing the title of a disponee being questioned (and so does not affect the lawfulness of a

[141] *Byers v Samba Financial Group* [2022] EWCA Civ 43, [2022] 4 WLR 22 [22].
[142] [2020] EWHC 3055 (Ch) [169]–[170].
[143] This links to the methodological point – described in Chapter I.II.C.i – that this thesis' focus is on the form of legal institutions, rather than wider economic or moral considerations.
[144] [2016] EWCA Civ 555, [2017] Ch 93 (*Lambert*); *Lambert* was about a power to rescind a sale. It was not therefore a scheme case. The point about s 26 is not therefore limited to the scheme context.
[145] See generally, Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (Hart Publishing 2018).

disposition)". Section 26 therefore draws the same distinction between validity and lawfulness[146] relevant to claims following a breach of trust: a transfer in breach of trust is valid (it successfully vests title in the recipient) but is unlawful (it entails a breach of duty).

Lewison LJ averred that in a priority dispute between B and C, C could invoke section 26 to take free from B's prior equitable interest, because section 26 provides that the validity of the title of the disponee cannot be disputed.[147] However, this is to arguably collapse the distinction the judge in *Ali v Dinc* espouses. Section 26 ensures that C does receive title from A, irrespective of any underlying mistake that may have resulted in A's initial registration. However, the question of whether C takes free from an encumbrance is a separate question, and is governed by sections 29 and 30 of the Land Registration Act 2002, rather than section 26.[148]

II. Historical and conceptual nature of equity: why a transfer in breach of trust is not void

The historical and conceptual starting point is that equity does not negate the common law's rules as to the validity of legal acts; rather, it operates as a supplementary or "meta-law" system[149] which regulates the *exercise* of legal powers and rights. As Hudson explains[150], equity developed as a body of rules concerned not with whether a legal power exists or has been validly exercised, but with whether its exercise is lawful and with providing responses where that exercise is unlawful. This distinction between *power* and *authority* is crucial: the common law determines whether a transfer is effective to pass title. Equity operates as a

[146] See discussion of Hudson (n 133) in Chapter I.I.A.
[147] *Lambert* (n 144) [27]–[28].
[148] Andreas Televantos, 'Unconscionable Bargains, Overreaching and Overriding Interests' [2016] CLJ 458.
[149] Henry Smith, 'Equity as Meta-Law' (2021) 130 Yale L J 1050 (Henry Smith).
[150] Hudson (n 133); see analysis in Chapter I.I.A.

"gloss on authority"[151], leaving intact the legal consequences of an act while conditioning the circumstances in which those consequences may be relied upon. For example, where a trustee validly transfers trust property to a purchaser, the legal title passes according to ordinary legal rules, but equity may prevent the trustee from relying on that transfer by keeping the proceeds of sale for their own purposes and may require them to account for those proceeds to those with standing to uphold the terms of the trust. In *Keech v Sandford*[152], the renewed lease vested validly in the trustee at law, but equity nevertheless required the trustee to hold the lease for the beneficiary, thereby leaving the legal consequences of the transaction intact while conditioning the trustee's ability to rely upon them for their own benefit.

The historical roots of equity and its conceptual nature explain why a transfer in breach of trust is not void. The trustee's legal power to transfer title derives from the general law of property and is unaffected by the equitable obligation of due administration under which that power is held. As Hudson emphasises[153], equitable rules do not negate or deny the legal consequence(s) of the trustee's exercise of power[154]; rather, they may render the exercise unauthorised or unlawful, thereby triggering equitable responses such as personal and proprietary claims against the original trustee or third-party recipients.[155] Equity's role is to control how a right-holder exercises pre-existing legal entitlements, not to deny the existence of those entitlements.[156] Thus, even where a trustee acts in breach of trust, the transfer is legally effective to pass title to the transferee[157]; equity responds *after the event* by potentially exposing recipients to personal and proprietary claims.[158]

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[151] Hudson (n 133).
[152] (1726) Sel Cas t King 61, 25 ER 223.
[153] Hudson (n 133).
[154] Hudson (n 133) 33.
[155] Hudson (n 133) 41–42.
[156] Hudson (n 133) 39.
[157] Hudson (n 133) 43.
[158] Hudson (n 133) 41–42; for analysis of proprietary claims, see Chapter V; for analysis personal claims against recipients, see Chapter VI, Sections II and III.

Hudson's chapter captures a deep structural point: equity preserves the certainty and stability of power-generating rules (such as those governing transfer of property), while simultaneously providing a mechanism to prevent and respond to their abuse. This dual function reflects equity's supplementary character. The validity of a transfer in breach of trust is therefore not an anomaly but a direct implication of equity's historical and conceptual nature: it acts not by invalidating legal acts, but by supplementing them with a regime of conscience-based control[159] and remedial response.[160] Hudson's analysis supports Maitland's point that equity came to fulfil, not to destroy the common law.[161] As Harding has further argued[162], the fact individuals know that equity will intervene to dissuade the unconscionable exercise of common law rights and powers increases a citizen's disposition to follow those common law rules which create those rights and powers in the first place. Equity can therefore have a salutary effect on the rule of law.

Given the presence of equity, the common law can proceed to furnish a clear and predictable system of rules, whereas – as argued by Henry Smith[163] – equity can oversee the assertion of the rights arising under those rules, through *ex post facto*, general principles, rather than *ex ante* bright-line rules. Without equity, the common law could be less confident in its production of such clear and predictable standards, as the danger could be the unconscionable exploitation of the rights arising under those rules.

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[159] Irit Samet, *Equity: Conscience Goes to Market* (Oxford University Press, 2018); Patrick Keane, "The 2009 WA Lee Lecture in Equity: The Conscience of Equity" (2010) 84 ALJ 92; Dennis Klinck, "The Unexamined "Conscience" of Canadian Equity" (2001) 46 McGill Law Journal 571; James Penner, "Equity, Justice and Conscience", in Dennis Klimchuk and others (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020), Ch 3.

[160] As with the personal claims against the defaulting trustee analysed in Section I of this chapter and the personal claims against recipients analysed in Chapter VI.

[161] F W Maitland, *Equity: A Course of Lectures* (A H Chaytor and W J Whittaker eds, 2nd edn, Cambridge University Press 1936) 18.

[162] Matthew Harding, "Equity and Institutions" in Dennis Klimchuk and others (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020), Ch. 16.

[163] Henry Smith (n 149).

This understanding of the relationship between common law and equity has recently been impliedly challenged by Lord Briggs in *Guest v Guest.*[164] The Supreme Court had to determine the aim of the remedy in proprietary estoppel, by deciding how the court should give effect to the *prima facie* equity by estoppel arising in favour of B.[165] For Lord Briggs in the majority, the starting point is that the court should give effect to the expectation interest[166] and this can only be departed from in limited circumstances, including the case where such a remedy would be out of all proportion to the detriment B has suffered.[167] His Lordship describes equity as a jurisdiction that intervenes to restrain the application of the common law rules, when they would be liable to produce injustice.[168]

In Lord Briggs' view, the court should order that the promisor specifically perform the assurance[169], in situations where the formality rules relating to the valid creation of contractual obligations relating to the acquisition of interests in land – as enshrined in section 2 Law of Property (Miscellaneous Provisions) Act 1989 – are liable to produce injustice.[170] However, this image of the relationship between common law and equity differs from that favoured in this thesis, which emphasises how equity may intervene to restrain the assertion of *rights* arising under the common law rules, rather than restraining the application of the common law rules themselves.[171]

In sum, it is significant that the trust involves a scheme recognised in equity. The distinctive nature of equity – as a body of supplementary rules – makes a difference to how

[164] [2022] UKSC 27, [2023] AC 1 (*Guest*).
[165] *Guest* (n 164) [64]–[68].
[166] *Guest* (n 164) [68].
[167] *Guest* (n 164) [73].
[168] *Guest* (n 164) [4].
[169] *Guest* (n 164) [69].
[170] *Guest* (n 164) [70].
[171] Ben McFarlane and Robert Stevens, 'What's Special About Equity? Rights About Rights' in D Klimchuk and others (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020).

the scheme-based analysis applies to trusts: equity does not deny the common law rules, but rather restrains the exercise of the rights arising under those rules. This model of equity is consistent with the analysis in Section I.I of this chapter, as it offers historical and conceptual reasons why transfers of trust assets in breach of trust are valid and yet may subject the recipient to particular duties, such as a duty to return the misapplied trust asset for due administration.[172]

III. Practical reasons why a transfer in breach of trust is not void

Historically, equity did not deny the validity of a conveyance that was in accordance with the transfer rules at common law, even if there was a breach of trust. However, since the fusion of the administration of common law and equity[173], it might be possible to argue for a reform to that position, that unless a transfer of rights is compatible with the terms of the trust, the recipient never receives title. The surest way for upholding the integrity of the scheme might be to find that only transfers authorised by its terms will vest title in the recipient. For several reasons, this would be inconvenient for third parties.

First, it might be difficult for the existence of a scheme to be discovered and its terms to be understood by the third party. As emphasised by McFarlane and Televantos[174], trusts can arise entirely informally[175] and as argued by Dagan and Samet the settlor is given significant autonomy in shaping its terms.[176] A third party, dealing in good faith with the

[172] Core restorative duty of the knowing recipient*:* eg *Re Holmes* [2004] EWHC 2020 (Admin).
[173] Judicature Acts 1873–1875.
[174] McFarlane and Televantos, Effects (n 55).
[175] See too Frederic William Maitland, 'Trust and Corporation' in David Runciman and Magnus Ryan (eds), *Maitland: State, Trust and Corporation* (CUP 2003) 75.
[176] Hanoch Dagan and Irit Samet, 'Express Trust: The Dark Horse of the Liberal Property Regime' in Simone Degeling, Jessica Hudson and Irit Samet (eds), *Philosophical Foundations of the Law of Express Trusts* (Oxford University Press 2023) 139.

trustee, may have paid a significant sum on the strength of the right they thought they would receive. It is the limited third-party effects of the trust that justify the informality with which it may be created, as well as the freedom given to the settlor in deciding its content.

Second, whether a transfer is authorised by the terms of the trust may be a complex matter, requiring significant time and investment in reading the terms of the trust deed. Were transfers of trust assets to be valid only if authorised under its terms, the same concern expressed by Merrill and Smith with a *numerus apertus* principle might ensue.[177] Merrill and Smith argue that one of the virtues of a closed list of property rights is that it reduces the time and effort a prospective purchaser must invest in deciding whether to acquire specific rights. Were transfers in breach of trust to be void, a prospective purchaser would be encumbered by the time-consuming task of understanding the precise terms of the trust deed. Indeed, a transfer may be in breach of trust, even if on its face it is in accordance with the terms of the trust – for example, where the transfer is made for an improper purpose. Requiring third parties to inquire into the precise terms of the trust, as well as gauging the subjective intentions of the trustee (relevant – for example – in determining whether the trustee has acted for a proper purpose[178]), would be prohibitive.

Furthermore, it is not in the interests of beneficiaries for the market's confidence in dealing with trustees to be impaired by the danger that title will not vest, unless the conveyance is in perfect compliance with the terms of the trust.[179] The ability of third parties to take free from the terms of the trust in some cases encourages the market to deal with

[177] Thomas W Merrill and Henry E Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 Yale LJ 1.
[178] *Grand View v Wong* [2022] UKPC 47.
[179] Henry Hansmann and Ugo Mattei, 'The Functions of Trust Law: A Comparative Legal and Economic Analysis' (1998) 73 NYU L Rev 434, 469–471.

trustees, which accrues to the benefit of all trusts. There are therefore practical reasons for the transfer in breach not being void, as well as the historical and conceptual ones sourced in the nature of equity.

It should also be noted that the same analysis applies to several of the non-trust schemes discussed in Chapter I.II.B. For example, if an executor makes a disposition without authority under the terms of the scheme, the disposition is not void, but there is potential for claims against third parties, as seen in eg *re Diplock*[180], discussed in Chapter VI, Section III.[181]

IV. Striking the balance: the integrity of the scheme weighed against other demands and values

The analysis so far has seen why there is no general rule that the purported transfer in breach of trust is void. However, the law must then decide if there are any consequences for C in relation to receipt of a right in breach of trust, for example whether C owes any duties as a result or, in the language of *Ali v Dinc*, whether C's title is encumbered. As will be seen below, there may be good reasons for allowing C not only to acquire the right, but to acquire it free from any duties: those reasons will be considered in this section. It is worth noting that in cases where there is a breach by the trustee, the aim of protecting the integrity of the scheme still has effect, in determining the nature of the claim against the trustee; it is just that this aim is trumped by other reasons when considering the position of the third-party recipient.

[180] [1948] Ch 465 (CA).
[181] There are some cases where a transfer is void eg s 127 Insolvency Act, as discussed in *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424 (*Akers*), although even there a court has a power to uphold the transaction *Re Gray's Inn Construction Co Ltd* [1980] 1 WLR 711 (CA).

The following examples involve situations where C not only receives the right from the trustee, but C is free from any need to respect the integrity of the scheme.

i. Good faith purchaser for value of a common law right

Perhaps the most obvious example of the law allowing a countervailing demand to take priority over the integrity of the scheme is the position of good faith purchasers of a common law right for value. Indeed, it is not uncommon to read judges describing the beneficiary's interest as good against the whole world, other than the good faith purchaser for value.[182]

Where the third party has given value in return for a common law right[183] transferred in breach of trust, without knowledge (actual, constructive or imputed), then they take free from the terms of the trust.[184] As Agnew and McFarlane explain, the recipient enjoys an immunity from ever being subjected to the "core trust duty"[185]. The effect of the good faith purchase defence is that the recipient's title is cleared from the terms of the trust and the beneficiary's equitable interest is overridden.[186]

In Pilcher v Rawlins[187], trustees had advanced trust money on mortgage, but the surviving trustee, acting fraudulently with the mortgagor, procured a reconveyance of part of

[182] *Byers v Saudi National Bank* [2023] UKSC 51, [2024] AC 1191 (*Byers*) [8]; Ben McFarlane and Robert Stevens, "The Nature of Equitable Property" (2010) 4 J Eq 1 2.
[183] The defence does not apply if the recipient paid for an equitable right: *Cave v Cave* (1880) 15 Ch D 639 (Ch D); Ben McFarlane and Andreas Televantos argue that the protection should also apply where the subject matter of the trust is an equitable right and the trustee transfers that equitable right to C: Ben McFarlane and Andreas Televantos, 'As Complex as ABC? Bona Fide Purchasers of Equitable Interests' in Paul Davies and Tan Cheng-Han (ed) *Intermediaries in Commercial Law* (Hart, 2023). However, the conventional view remains that C needs to acquire a common law right for the defence to work.
[184] *Pilcher v Rawlins* (1872) LR 7 Ch App 259 (CA in Ch) (*Pilcher*).
[185] Sinéad Agnew and Ben McFarlane, 'The Paradox of the Equitable Proprietary Claim' in Ben McFarlane and Sinéad Agnew (eds), *Modern Studies in Property Law: Volume 10* (Hart 2019).
[186] *Byers* (n 182) [84].
[187] *Pilcher* (n 184).

the mortgaged land and enabled it to be re-mortgaged to third parties who took the legal estate without notice of the prior trust interests. When the beneficiaries sought to assert their prior equitable claim, the Court of Appeal held that the later mortgagees, having acquired the legal estate for value without notice, were entitled to retain it, notwithstanding that it had been obtained through a breach of trust. The decision makes clear that equity will not intervene against such a purchaser: once the plea is established, the court "has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate".[188]

The case illustrates that the integrity of the scheme – here, the proper application of trust property in accordance with its terms – can partly be defeated by a competing legal policy: the protection of purchasers of the legal estate acting in good faith. Even if the trustee's act was a breach of the trust, the purchaser does not come under duties to the beneficiaries, not because the scheme has ceased to exist, but because the purchaser's position is insulated from equitable control.

The precise rationale for this immunity has never been settled and the doctrine's own history discloses at least three distinct accounts of why a purchaser's conscience, rather than the prior terms of the scheme, should be decisive. In *Bassett v Nosworthy*, Finch LK grounded the plea in equity's general reluctance to disturb settled possession, holding that a court of equity would not "disarm a Purchaser, but assist him,"[189] a rule he treated as of a piece with the common law's protection of the party in possession against stale or unasserted claims. On this account, the plea owed little to anything specific about trusts; it reflected a broader jurisdictional policy against unsettling possession absent some vitiating circumstance. A different, and ultimately more durable, rationalisation cast the purchaser's liability in the

[188] *Pilcher* (n 184), 269; David Fox, 'Purchase for Value Without Notice' in Paul S Davies, Simon Douglas and James Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 63.
[189] *Bassett v Nosworthy* (1673) Rep t Finch 102, 103–04; 23 ER 55, 56.

language of fraud. Francis Bacon explained that Chancery looked further than the common law "to the corrupt Conscience of him that will deale in the Land, knowing it in equity [to be] anothers," so that "consideration, or no consideration, is the issue at the Common Law, but notice or no notice is an issue in the Chancery."[190] By the time Lord Henley LC gave the doctrine its most celebrated description, in *Stanhope v Earl Verney*, as the "polar star of equity,"[191] the plea had already begun the long transition, traced by Fox, from a fraud-based standard turning on the individual purchaser's conscience to a considerably more impersonal rule of conveyancing priority — a transition largely completed by the reformulation of notice in the Conveyancing Act 1882 and consolidated in the Law of Property Act 1925.[192]

Fox's account matters for present purposes because it shows that the content of the *bona fide* purchase defence has been continuously renegotiated across four centuries precisely because the question it answers — how far the enforcement of a trust may be allowed to unsettle a purchaser who has dealt honestly and diligently with the trustee — cannot be derived from the concept of the trust itself.[193] The doctrine is better understood as the product of a standing policy choice about the point at which scheme integrity must give way to a value external to the scheme: the security of purchasers and the corresponding interest in the free alienability of property.[194] Nair and Samet make substantially the same point from a more overtly normative angle. They observe that equity's solution to what they term "FO–P conflicts" — disputes between a first "owner" (here, the beneficiary) and a purchaser — inverts the common law's default position: the common law entrenches the first owner's title, subject only to narrow, transaction-specific exceptions, whereas equity begins from the opposite baseline and protects

[190] Francis Bacon, *The Learned Reading of Sir Francis Bacon upon the Statute of Uses* (Walbancke and Chapman 1642) 13, quoted in David Fox, 'Purchase for Value Without Notice' in Paul S Davies, Simon Douglas and James Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) (Fox) 63.
[191] *Stanhope v Earl Verney* (1761) 2 Eden 81, 85; 28 ER 826, 828.
[192] Fox (n 190) 73–74, discussing the Conveyancing Act 1882, s 3(1) and the Law of Property Act 1925, s 199(1); see also *Bailey v Barnes* [1894] 1 Ch 25 (CA) 35 (Lindley LJ).
[193] Fox (n 190) 73–75.
[194] Fox (n 190) 65–66, 73–75.

the purchaser unless the beneficiary can show that his conscience was affected.[195] This inversion, they insist, is not "a straightforward use of the usual building blocks of property law";[196] it reflects considerations of justice and efficiency that are distinctive to the trust relationship. On the justice side, the beneficiary's interest arises under an institution that is (often) private: because a trust is neither publicly registered nor subject to any *numerus clausus* limiting its possible incidents, a purchaser dealing with an ostensible legal owner cannot ordinarily be expected to anticipate the existence of an equitable interest of which they have not been given notice.[197] It is, on this account, precisely because the beneficiary enjoys the benefit of that secrecy that it is their claim, and not the purchaser's, which must yield.[198] On the efficiency side, Nair and Samet locate the party best placed to guard against the risk of an unauthorised disposition not in the beneficiary, who is typically remote from the day-to-day administration of the trust, but in the settlor, who selects the trustee in the first place; a rule favouring the purchaser sharpens the settlor's incentive to choose trustees with care, while equity's insistence on a genuinely, rather than nominally, clean conscience forecloses the risk that a purchaser would otherwise invest only the bare minimum needed to satisfy a formal good faith proxy.[199]

These observations are not problematic on the scheme-based analysis. As Lord Mance's analysis in *Akers v Samba Financial Group* makes clear, the beneficiary's rights are not extinguished by the purchaser's acquisition of the legal title; they are overridden by a rule of law external to the trust that operates, in certain circumstances, to limit their reach.[200] The *bona*

[195] Aruna Nair and Irit Samet, 'What Can "Equity's Darling" Tell Us about Equity?' in Dennis Klimchuk, Irit Samet and Henry E Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press 2020) (Nair and Samet) 276–77, 281.
[196] Nair and Samet (n 195) 264–65.
[197] Nair and Samet (n 195) 282.
[198] Nair and Samet (n 195) 284–85.
[199] Nair and Samet (n 195) 287–89, discussing Alan Schwartz and Robert E Scott, 'Rethinking the Laws of Good Faith Purchase' (2011) 111 *Columbia Law Review* 1332.
[200] *Akers* (n 181) [51] (Lord Mance); see also Nair and Samet (n 195) 278.

fide purchase defence marks the point at which the law has chosen, for reasons of interpersonal morality and market efficiency independent of the trust's own internal logic, to subordinate the goal of ensuring that the scheme is administered according to its terms to the competing goal of protecting those who deal in good conscience with the legal title to its assets.

ii. Overreaching

Overreaching describes the process by which a purchaser or other transferee of trust property takes free of the beneficiaries' equitable interests, those interests attaching instead to the proceeds of the disposition.[201] The doctrine long predates, and is not confined to, the 1925 legislation: as Cotton LJ observed in *Re Harwood* of a mortgagee's power of sale, the mortgagee "transfers the legal estate not by means of a power but by virtue of his legal ownership", exercising an authority "to defeat the equity of redemption".[202] The same principle applies to trustees exercising a power of disposition over trust property.

Overreaching is, on Harpum's analysis, the necessary concomitant of the exercise of a power of disposition: an *intra vires* transaction overreaches, but an *ultra vires* one does not.[203] The consequences of exceeding the scheme's authorised powers can be severe even for an innocent third-party. In *Weston v Henshaw*, a life tenant's mortgage of settled land, though he appeared on the face of the title to be absolute owner, was *ultra vires* and therefore held void even against a mortgagee who took without notice of the settlement.[204] The result was, in Harpum's words, one where "the logic is faultless, the result unfortunate" — but it shows that

[201] Charles Harpum, 'Overreaching, Trustees' Powers and the Reform of the 1925 Legislation' (1990) 49 CLJ 277 (Harpum), 277.
[202] *Re Harwood* (1887) 40 Ch D 470 (CA) 472 (Cotton LJ); Harpum (n 201) 281.
[203] Harpum (n 201) 277, 295.
[204] *Weston v Henshaw* [1950] Ch 510 (Ch D).

the strength of the third party's title depends on the trustee's compliance with the scheme, not on the third party's own good faith.[205]

Where the scheme is properly engaged, however, overreaching operates without regard to the third party's knowledge, or the beneficiaries' presence on the property. In *City of London Building Society v Flegg*, the House of Lords held that a mortgage granted by two registered proprietors, made within their statutory powers as trustees and secured by payment of the advance to both of them, overreached the beneficial interests of the claimants notwithstanding that the claimants were in actual occupation of the property at the time.[206] Lord Oliver treated the point as axiomatic: actual occupation could not "enlarge or add to whatever interest it is that the occupant has … in right of his occupation".[207] The beneficiaries' interests survived only in the sense of being translated onto the proceeds of the mortgage; the trustees' compliance with their statutory dispositive powers and the purchaser's compliance with the requirement that capital moneys be paid to two trustees, sufficed to protect the purchaser's title.[208]

The contrast with *Williams & Glyn's Bank Ltd v Boland*[209] is instructive. There, a single trustee mortgaged the matrimonial home without his wife's concurrence; because the statutory requirement of payment to at least two trustees was not satisfied, no overreaching took place and the wife's beneficial interest, being the interest of a person in actual occupation, bound the mortgagee as an overriding interest. The same result followed in *Hodgson v Marks*[210], where a sole trustee's disposition of registered land held on a bare trust could not overreach the beneficiary's interest, again because the statutory safeguard of a second trustee was absent.

[205] Harpum (n 201) 280.
[206] *City of London Building Society v Flegg* [1988] AC 54 (HL) (*Flegg*).
[207] *Flegg* (n 206) 80 (Lord Oliver).
[208] Harpum (n 201) 291.
[209] [1981] AC 487 (HL).
[210] [1971] Ch 892 (CA).

These authorities, read together with Harpum's analysis, sustain a scheme-based analysis of overreaching. The third-party's freedom from the beneficial interest is not achieved at the expense of the trust; it is the product of the scheme — the trustees' authorised powers and the statutory safeguards attached to their exercise — operating exactly as designed. Where the scheme's conditions are met, as in *Flegg*, the purchaser's title prevails even against occupying beneficiaries. Where they are not, as in *Boland*, *Hodgson*, and *Weston*, the disposition fails to overreach and the beneficiaries' interests persist – in the absence of other relevant defences – precisely because the scheme has not been honoured.

iii. Land registration statutes

It has been suggested in *Byers* that where the recipient for value receives registered title to land in breach of trust, if the registration statute makes clear that the recipient takes free from a pre-existing trust , then the recipient may, depending on the precise wording of the statute, also be protected from a personal claim in knowing receipt, even if they knew of the breach of trust.[211] The recipient in this example is not a good faith purchaser for value. However, they are still capable of taking free from the terms of the trust. This is sourced in the policy of the land registration system and in the fact that it does not wholly replicate the background rules of property law.[212]

For example, in *Chaudhary v Yavuz*[213] – a case concerning an equity by estoppel, rather than a beneficial interest arising under a trust – the purchaser took free from B's equitable interest, as it was not protected by the entry of a notice on the register, nor did it count as an overriding interest, given the lack of actual occupation. The purchaser could take

[211] *Byers* (n 182) [88].
[212] Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, HC 1341, 2018).
[213] [2011] EWCA Civ 1314, [2013] Ch 249 (*Chaudhary*).

free from this interest, even if they knew of its existence. The general rule, outside the land context, is that, unless the recipient is in good faith, they cannot take free from the trust. However, Parliament intended the LRA 2002 to facilitate conveyances of title to land. As pointed out by Lloyd LJ in *Chaudhary*[214] and building on Sir Christopher Slade's observations in *Lloyd v Dugdale*[215], the successful invocation of section 29 is not subject to a good faith requirement. There is a link here, in general terms, to the discussion above of *bona fide* purchase: the protection of the third party does not depend on any intrinsic feature of the trust, but shows how a distinct policy concern (in this case, to do with registered land) can trump the need to protect the integrity of a scheme against a third-party.

Where section 29 allows the recipient to take clear from the burden of the trust, it is not possible – following the logic of *Byers* and building on the arguments of Conaglen and Goymour[216] – for the recipient to be subjected to personal liability in knowing receipt.[217] Where the land registration statute clears title from the terms of the trust, no claim in knowing receipt can succeed.[218] The Supreme Court in *Byers* rejected the argument – advanced by the appellants – that a recipient can be personally liable simply in virtue of them knowing of the breach of trust.[219]

[214] *Chaudhary* (n 213) [67].
[215] [2001] EWCA Civ 1754, [2002] 2 P&CR 13 [50].
[216] Matthew Conaglen and Amy Goymour, 'Knowing Receipt and Registered Land' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) ch 5.
[217] A dishonest assistance claim could still be allowed. Dishonest assistance is not a receipt-based claim: whereas liability in knowing receipt depends on the defendant having received trust property for his own benefit, a dishonest assistant need never receive or deal with trust property at all, since his liability is personal and fault-based, arising from his participation in the trustee's breach of duty rather than from any proprietary dealing: see eg *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC) 386–87 (Lord Nicholls); *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [107]–[108] (Lord Millett).
[218] Comity towards the rules of the *lex situs* is another commitment of the legal system that may compete with the law's integrity commitment. For the *lex situs* point, see analysis of *Byers* in Chapter VI, Section II.
[219] *Byers* (n 182) [16], [36]–[43]; See discussion in Chapter VI, Section II.

iv. The autonomy of the beneficiaries: consent to breaches of trust and the rule in *Saunders v Vautier*

i. Consent to breaches of trust

A trustee who acts outside the powers conferred by the trust instrument does not thereby commit an actionable breach of trust where a beneficiary who is *sui juris* and fully informed has consented to the act.[220] This power of consent takes several distinct forms — instigation, concurrence, acquiescence, adoption, confirmation and release — each of which may shield the trustee from liability by a different doctrinal route.[221] Where all of the beneficiaries are *sui juris*, fully informed, unanimous and together entitled to the whole of the beneficial interest, this power to consent is capable of producing a further effect: the unauthorised act, rather than merely escaping sanction, is treated as though it had been authorised by the trust instrument all along. This was made explicit by Master Matthews in *Pettigrew v Edwards*[222], who held that where beneficiaries give informed consent to a course of action, they license the trustees to do what would otherwise be wrongful, so that no estoppel reasoning is required: there is simply no breach left to complain of. On this view, consent does not merely excuse a departure from the scheme; it can retrospectively alter the content of the trustee's duties, so that the scheme, as it now stands, is taken to have permitted the very thing done.[223] Where a trustee sells trust property, or purchases new property with trust money, in a transaction the trust instrument did not authorise, the beneficiaries — if unanimous, *sui juris*, and absolutely entitled — may elect

[220] *Walker v Symonds* (1818) 3 Swans 1, 36 ER 751; *Re Pauling's Settlement Trusts (No 1)* [1964] Ch 303 (CA); *Pullan v Wilson* [2014] EWHC 126 (Ch), [2014] WTLR 669. See further Ying Khai Liew and Charles Mitchell, 'Beneficiaries' Consent to Trustees' Unauthorised Acts' in Paul S Davies, Simon Douglas and James Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 81 (Liew and Mitchell).
[221] Jennifer Payne, 'Consent' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart 2002), discussed in Liew and Mitchell (n 220) 81.
[222] [2017] EWHC 8 (Ch); [2017] WTLR 675 (*Pettigrew*) [46] noted in Liew and Mitchell (n 220) 82.
[223] *Pettigrew* (n 222) [46]; see further Liew and Mitchell (n 220) 82–83, drawing on James Penner, 'Exemptions' in Birks and Pretto (n 221) 252.

to treat that transaction as though it had been within the trustee's powers, so that the proceeds, or the newly acquired asset, form part of the trust fund on the ordinary terms of the trust.[224]

The same principle was applied by Lord Millett NPJ in *Libertarian Investments Ltd v Hall*[225], where a beneficiary who discovered that trust money had been invested at a profit was held entitled to treat the investment as an authorised disbursement and to trace the property into which it had been converted.[226] The consequence extends to third parties: because overreaching[227] depends on the trustees' exercise of a power to subordinate the beneficiaries' interest to that of a purchaser, an unauthorised sale ordinarily cannot overreach the beneficiaries' equitable interest — but where the beneficiaries subsequently adopt that sale, their adoption retroactively supplies the authority needed for it to overreach their interest exactly as an authorised sale would have done.[228] Jessel MR's account in *Re Hallett's Estate* makes the same point in relation to proceeds of sale: equity draws no distinction, for the purpose of following proceeds, between a rightful and a wrongful disposition once the beneficiary elects to adopt it.[229]

The doctrine is best understood alongside the rule in *Saunders v Vautier* (discussed below), with which it shares a structural feature.[230] Both are mechanisms by which beneficiaries acting collectively — and only collectively, since unanimity and full capacity are indispensable conditions — can bring about departures from the arrangement the settlor originally established, without any alteration having been sanctioned by the settlor or, in the case of adoption, necessarily agreed in advance with the trustee. *Saunders v Vautier* allows the

[224] *Wright v Morgan* [1926] AC 788 (PC) 799; discussed in Liew and Mitchell (n 220) 96.
[225] [2013] HKCFA 93; (2013) 16 HKCFAR 681 (*Libertarian*).
[226] *Libertarian* (n 225) [168]–[169] (Lord Millett NPJ); discussed in Liew and Mitchell (n 220) 97.
[227] See analysis previously in the chapter at Section II.IV.ii.
[228] *State Bank of India v Sood* [1997] Ch 276 (CA) 281 (Peter Gibson LJ); see also David Fox, 'Overreaching' in Birks and Pretto (n 221) 106–07 and Liew and Mitchell (n 220) 97.
[229] *Re Hallett's Estate* (1880) 13 Ch D 696 (CA) 708–09 (Jessel MR), quoted in Liew and Mitchell (n 220) 97–98.
[230] On the structural affinity between the two doctrines, see Liew and Mitchell (n 220) 92–96.

beneficiaries to end the scheme altogether; the adoption doctrine allows them to keep the scheme alive while treating a particular deviation from its terms as though it had never occurred.

To the extent that this power exists, it operates as a genuine qualification on the law's underlying commitment to administering the trust in accordance with the scheme the settlor established. An unauthorised investment or an unauthorised sale is, on ordinary principles, a departure from that scheme and a breach of the trustee's duty to observe its limits. The adoption doctrine does not merely tolerate that departure as a matter of remedial discretion; it permits the beneficiaries to treat the departure as never having occurred, absorbing the unauthorised act into the scheme as though it had been within its terms from the outset. Scheme integrity, on this view, yields to the collective will of those for whom the scheme exists.

That qualification, however, need not be regarded as a weakness in the law, any more than the *bona fide* purchaser for value without notice defence is.[231] Both doctrines qualify the law's integrity commitment in service of intelligible competing values. In the case of the purchaser defence, that value is the security of transactions and the protection of an innocent third-party's reliance. In the case of adoption, the competing value is the autonomy of the beneficiaries themselves. A trust for beneficiaries is constituted for the benefit of its beneficiaries; where they are unanimous, of full capacity and fully informed, their collective judgment that a departure from the settlor's original terms in fact serves their interests better than strict adherence to the original terms might be seen to promote the autonomy of the beneficiaries, in the same way as the rule in *Saunders v Vautier*. A jurisdiction that did not adopt the beneficiary consent defence might be seen to be more committed to the autonomy of

[231] *Pilcher* (n 184); *Midland Bank Trust Co Ltd v Green* [1981] AC 513 (HL). For general discussion, see David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (19th edn, LexisNexis 2016).

the settlor, in the same way that a jurisdiction that did not allow beneficiaries to collapse the trust might be seen to prefer the autonomy of the settlor, over the autonomy of the beneficiaries.

ii. *Saunders v Vautier*

The rule in *Saunders v Vautier* provides that where a beneficiary, or beneficiaries collectively, are of full age and capacity and is solely, or are together, entitled to the whole of the beneficial interest in the trust property, they may require the trustees to transfer that property to them (or as they direct) and thereby bring the trust to an end, regardless of any contrary direction given by the settlor.[232] The rule is not confined to the single, absolutely entitled beneficiary: it extends to beneficiaries entitled concurrently as co-owners[233], to beneficiaries entitled successively acting together[234] and to the objects of a discretionary trust who between them exhaust the beneficial interest.[235] Nor can the settlor exclude the rule by express declaration to the contrary: it is treated as an inherent incident of the beneficiaries' collective position rather than a term the settlor is free to disapply.[236]

The rule is not a necessary feature of the trust concept as such: it is a contingent, jurisdiction-specific choice. Most American jurisdictions, following the Massachusetts decision in *Claflin v Claflin*,[237] refuse to allow beneficiaries to terminate a trust in this fashion, however unanimous, where a "material purpose" of the settlor remains to be carried out;[238] the

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[232] Paul Matthews, 'The Comparative Importance of the Rule in *Saunders v Vautier*' (2006) 122 LQR 266 (Matthews), 267–268.
[233] *Pearson v Lane* (1809) 17 Ves 101, 34 ER 39; *Re Marshall* [1914] 1 Ch 192 (CA); *Re Sandeman's WT* [1937] 1 All ER 368 (Ch D); *Re Weiner's WT* [1956] 2 All ER 482 (Ch D); *Stephenson v Barclays Bank Trust Co Ltd* [1975] 1 WLR 882 (Ch D); *Crowe v Appleby* [1975] 1 WLR 1539 (Ch D) 1543; cf *Lloyds Bank Plc v Duker* [1987] 1 WLR 1324 (Ch D).
[234] *Barton v Briscoe* (1822) Jac 603, 37 ER 972; *Haynes v Haynes* (1866) 35 LJ Ch 303 (Ch); *Re Millner* (1872) LR 14 Eq 245 (Ch); *Anson v Potter* (1879) 13 Ch D 141 (Ch D); *Re Bowes* [1896] 1 Ch 507; *Re White* [1901] 1 Ch 570 (CA); *Berry v Geen* [1938] AC 575 (HL).
[235] *Re Nelson* [1928] Ch 920n (CA); *Re Smith* [1928] Ch 915 (Ch D) (*Re Smith*); *Sir Moses Montefiore Jewish Home v Howell & Co (No 7) Pty Ltd* [1984] 2 NSWLR 406.
[236] *Stokes v Cheek* (1860) 28 Beav 620, 54 ER 504.
[237] 149 Mass 19; 20 NE 454 (1889) (*Claflin*).
[238] *Claflin* (n 237) 456.

Restatement (Third) of Trusts and the Uniform Trust Code confirm that termination in such circumstances requires either the settlor's own consent or a judicial finding that the reasons for termination outweigh that purpose.[239] The rule is accordingly a feature of the trust as recognised in England and in jurisdictions that have followed English law,[240] but it is not a universal incident of the trust as an institution and its absence elsewhere does not disqualify the arrangement in question from being a trust.

On a scheme-based analysis, the availability of the *Saunders v Vautier* power can be classified as a level 3 feature.[241] Because the rule may operate at this level, its presence or absence marks a difference in the degree to which a legal system is committed to the integrity of the scheme. Where the rule applies, the scheme the settlor has created — however carefully sequenced, however deliberately designed to postpone enjoyment or distribute risk between successive interests — can always be dismantled by the beneficiaries acting together, even against the settlor's express wishes. The scheme's persistence is accordingly contingent – in English law – on the beneficiaries' continuing acquiescence in it. In jurisdictions where the rule does not apply, the scheme's persistence is not so contingent: it is designed to remain intact for as long as a material purpose of the settlor remains unsatisfied, whatever the beneficiaries, however unanimous, might prefer. To this extent — and without expressing any view on the desirability of either position — a jurisdiction that withholds the *Saunders v Vautier* power exhibits a stronger commitment to the integrity of the scheme – *mutatis mutandis* – than one which grants it.

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[239] Restatement (Third) of Trusts, s 65 comment d (Tentative Draft No 3, 2001); Uniform Trust Code, s 411(b).
[240] See, eg LJM Cooray, *The Reception in Ceylon of the English Trust* (Lake House Investments 1971) 176–77; Gilbert Kodilinye, *An Introduction to Equity in Nigeria* (Sweet & Maxwell 1975) 133; Donovan Waters, *Law of Trusts in Canada* (2nd edn, Carswell 1984) ch 23; Tony Honoré, *The South African Law of Trusts* (3rd edn, Juta 1985) 90–95; Harold Ford and William Lee, *Principles of the Law of Trusts* (2nd edn, Law Book Co 1990) 1608–12; Paul Matthews and Terry Sowden, *The Jersey Law of Trusts* (3rd edn, Key Haven 1994) para 15.12; Hilary Delany, *Equity and the Law of Trusts in Ireland* (Round Hall Sweet & Maxwell 1996) 366; Gilbert Kodilinye and Trevor Carmichael, *Commonwealth Caribbean Trusts Law* (2nd edn, Cavendish 2002) 265.
[241] The levels analysis is set out in Chapter I.II.A.

The existence of the power in *Saunders v Vautier* in English law, does not – it is argued – undermine the core thesis claim that four key features of the English trust can be understood as sourced in the law's commitment to the integrity of a scheme. For as long as the scheme remains on foot, those four features can be understood as justified by the law's commitment to the scheme's integrity. What the existence of the power also suggests is that the four features – although they can be sourced in the law's integrity commitment – *also* protect the value of the beneficiary's underlying entitlement to have the scheme structure dismantled and to claim the underlying assets of the trust. However, for as long as the beneficiary decides to have the scheme on foot, their right is one to due administration of the trust structure, rather than a right to have their individual position as such protected.[242] This explains why, even in jurisdictions that accept the power in *Saunders v Vautier*, the beneficiary does not claim for their consequential economic losses when initiating a claim against the defaulting trustee[243] or third-party recipient of misapplied trust assets.[244] The power gives the beneficiary an escape-hatch from the scheme structure. However, for as long as the scheme structure remains in place, the four features examined in this thesis can be understood as grounded in an integrity commitment, rather than in vindicating a beneficiary's individual position. However, a consequence of the law's integrity commitment is that the beneficiary's escape-hatch is also protected. For these reasons, it might be said that private trust structures governed by English law, can be understood as scheme plus arrangements: a trust, whatever its content, constitutes a scheme and the law will be qualifiedly committed to its integrity. However, some schemes also give the beneficiaries the possibility to claim its underlying assets. However, the four features discussed in this thesis need not be sourced in that underlying entitlement to the trust assets.

[242] See analysis above in Section I of this chapter.
[243] See analysis above in Section I of this chapter.
[244] See analysis in Chapter VI, Section II.

Three further considerations sharpen this account of the power's place within the scheme-based analysis. First, its conditions are easily avoided by careful drafting. Because the rule requires the entire beneficial interest to be vested in an ascertained and unanimous body of *sui juris* beneficiaries,[245] a settlor need only create a discretionary trust with a wide or rolling class of objects, or include unborn or otherwise unascertained beneficiaries, to place the power permanently out of reach — a state of affairs now sufficiently common that trusts in which the conditions are actually satisfied form the exception rather than the rule.[246] The power is accordingly less a guaranteed incident of the English trust than a default that competent drafting readily avoids.

Second, the power is not a feature of every trust English law recognises. Because it presupposes ascertained beneficiaries holding an equitable proprietary interest in specific property, it has no application to charitable trusts.[247] The rule is therefore not a universal incident even within a single system's trust law and its absence from charitable trusts does not disqualify them as trusts.

Third, the power's rationale need not be sought in beneficial ownership. Matthews has argued that the rule evidences, and is entailed by, the beneficiaries' beneficial ownership of the trust property.[248] The better explanation looks to autonomy: where ascertained persons are the sole intended beneficiaries of the trustees' performance, and are unanimous, *sui juris* and fully informed, insisting that the arrangement continue against their combined wishes fails to respect their autonomy to determine what, in the end, serves them. *Claflin*-type doctrine instead

[245] *Saunders* (n 129); *Re Smith* (n 235).
[246] cf *Re Barton (Deceased); Tod v Barton* [2002] EWHC 264 (Ch) [2002] WTLR 469 and *Hughes v Bourne* [2012] EWHC 2232 (Ch), [2012] WTLR 1333, illustrating the now-exceptional case in which an ascertained and unanimous body of beneficiaries between them hold the whole beneficial interest.
[247] *Morice v Bishop of Durham* (1804) 9 Ves 399, 32 ER 656; affd (1805) 10 Ves 522, 32 ER 947 (Lord Eldon LC). See David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (19th edn, LexisNexis 2016) ch 7.
[248] Paul Matthews, 'The Comparative Importance of the Rule in Saunders v Vautier' (2006) 112 LQR 266.

ascribes more weight to the settlor's autonomy to determine how their bounty is enjoyed than the beneficiaries' present wishes; the divergence is best read as a difference in how each system balances these two autonomy interests, not as a disagreement about beneficial ownership.

On this reading, *Saunders v Vautier* and the beneficiaries' power to adopt an unauthorised transaction are two expressions of one underlying commitment.[249] Both operate only where beneficiaries are unanimous, *sui juris* and together entitled to the whole beneficial interest; both let that collective body override the settlor's design without the settlor's involvement — adoption by ratifying a particular departure while the scheme continues, *Saunders v Vautier* by ending the scheme outright. Each qualifies the law's commitment to the settlor's scheme in service of the same value: the autonomy of those for whose benefit the scheme exists, rather than vindication of their proprietary entitlement as such.

Conclusion

The chapter began in Section I by showing how a scheme-based analysis works differently to an individual rights analysis, in explaining an important feature of the trust: the personal claims available against a defaulting trustee. Section II of the chapter assessed some potential objections to an integrity of the scheme analysis. It was important to deal with these objections in this chapter, before proceeding in Part II of this thesis to showing how a scheme-based analysis can explain the four features of the trust set out in Chapter I.

[249] *Wright v Morgan* [1926] AC 788 (PC) 799 (Viscount Dunedin); *Pettigrew* (n 222) [46] (Master Matthews); cf the discussion of beneficiaries' consent to unauthorised acts above.

Part II: Applying the Scheme-Based Analysis to the Law of Trusts

Chapter IV: Insolvency Protection and Trustee Indemnities

This chapter argues that the trust's insolvency protection and trustee indemnities are features well captured on the scheme-based analysis. It provides unity across the law of trusts, as well as non-trust scheme examples.[1] In showing the strengths of the scheme-based analysis, attention will be paid to the nature of the right of indemnity, contests between the rights of indemnity of current and former trustees of an insolvent fund and the characterisation of claims for private international law purposes. Conversely, the equitable ownership and rights against rights analyses[2] struggle to explain the current rules. This chapter will also examine the dual patrimony/dual estate models[3] and the problems they face in explaining the current rules.

The basic rules relating to insolvency protection and trustee indemnities: an outline

The trust is not a legal person.[4] The rights held on trust are vested in the trustee.[5] The rights held on trust are unavailable to meet the claims of the trustee's personal creditors.[6] Where the trustee incurs a debt in due administration of the trust, they are personally liable; *prima facie*, they expose their personal estate to the claims of the trust creditors.[7] That personal liability can be excluded through express stipulation in the contract that the trustee is acting "as

[1] For analysis non-trust scheme examples and the role they play in the thesis, see Chapter I.II.B.
[2] See analysis of these models in Chapter I.I.B.
[3] See analysis of these models in Chapter I.II.C.ii.
[4] *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7, [2019] AC 271. (*Investec I*) [59](i).
[5] *Investec I* (n 4) [59](i).
[6] *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20, (2019) 268 CLR 524 (*Carter Holt*) [25]; Insolvency Act 1986, s 283(3)(a), exempting from a bankrupt's estate, *inter alia*, 'property held by the bankrupt on trust for any other person'.
[7] *Investec I* (n 4) [59](iii).

trustee only";[8] in English law, it is not enough to exclude the trustee's personal liability that the creditor knows the trustee is acting in due administration of the trust.[9]

On their appointment as trustee, the trustee acquires a right of indemnity.[10] The purpose of the right of indemnity is to give the trustee access to the value of the trust assets to discharge debts incurred in due administration of the trust.[11] The right of indemnity is an umbrella term that captures both the power of exoneration and the power of reimbursement; a power of exoneration gives the trustee access to the value of the trust assets, where the debt to the trust creditor remains outstanding; a power of reimbursement gives the trustee access to the value of the trust assets, where the trustee first discharged the trust debt from their own personal funds.[12] The power of exoneration can only be used to pay trust creditors[13], whereas the power of reimbursement can be used to satisfy the claims of the trustee's general creditors.[14]

Trust creditors have no direct access to the assets held on trust[15]. A trust creditor's access to the trust assets is derivative[16], via subrogation to the trustee's right of indemnity[17]. That derivative access is vulnerable[18], because the trustee may have lost their right of indemnity, through – for example – unrelated breaches of trust; where the trustee incurs an

[8] *Muir v City of Glasgow Bank* (1879) 4 App Cas 337 (HL) 368.
[9] *Investec I* (n 4) [59](iv).
[10] *Equity Trust (Jersey) Ltd v Halabi; Investec Trust (Guernsey) Ltd v Fort Trustees Ltd* [2022] UKPC 36, [2023] AC 877 (*Investec II*) [25](i).
[11] *Investec I* (n 4) [59](v).
[12] *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 245 [47], citing Austin W Scott and William F Fratcher, *The Law of Trusts*, 4th ed (1988), vol 3A 345 §246.
[13] *Re Suco Gold Pty Ltd (In liq)* (1983) 33 SASR 99, approved in *Carter Holt* (n 6).
[14] *Levy v Kum Chah* (1936) 56 CLR 159 173; *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 336-337. See also *Re Enhill Pty Ltd* [1983] 1 VR 561 569.
[15] *Investec I* (n 4) [59](vi).
[16] Lionel Smith, 'Trust and Patrimony' in Remus Vaslan (ed), *Trusts and Patrimonies* (EUP 2015) (Smith, Trust and Patrimony).
[17] *Investec I* (n 4) [59](vi).
[18] *Investec I* (n 4) [59](vii).

authorised trust expenditure of £30,000, but had previously committed a breach of trust for which they are liable for £30,000, then the value of their right of indemnity has been reduced to nil.[19]

The trustee's right of indemnity survives their replacement as trustee; although sometimes described as a lien[20], the right of indemnity is not a lien in the modern sense of an interest that secures a personal obligation, but is rather a "means of payment"[21]. Where the assets of the trust are insufficient to satisfy the indemnity claims of all the current and former trustees, then they share *pari passu* in the insufficient fund.[22] Under Australian law, a current trustee does not owe the former trustee a fiduciary duty not to deal with the trust assets so as to defeat the former trustee's right of indemnity.[23]

As will be shown in Section I of this chapter, each of the beneficial ownership and rights against rights models has some difficulties in explaining these rules. In Section II, the chapter will show that the scheme-based analysis, in contrast, provides a clear justification for the operation of these rules. Section III assesses reform proposals to some of the rules discussed in this chapter.

[19] *Re Johnson* (1880) 15 Ch D 548 (Ch D) 552–53 (Lindley LJ).
[20] *Investec I* (n 4) [59](v); Lynton Tucker, Nicholas Le Poidevin and James Brightwell, *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) para 21-043.
[21] *Investec II* (n 10) [249].
[22] *Investec II* (n 10) [249].
[23] *Naaman v Jaken Properties Australia Pty Ltd* [2025] HCA 1, (2025) 99 ALJR 295 (*Jaken*); this question has not been decided by the English courts.

Section I: Problems with existing models

I. Beneficial ownership and rights against rights

i. Insolvency protection

A feature that applies to all trusts is the rights held on trust are unavailable to meet the claims of the trustee's personal creditors[24]. This also means that if the trustee becomes bankrupt, the rights held on trust will not pass to their trustee in bankruptcy:[25] the rights held on trust do not form part of the trustee's estate for bankruptcy purposes.[26]

Proponents of the equitable ownership model of the trust argue that the insolvency protection afforded to the beneficiary shows that they have a property right in the trust assets. Dagan and Samet[27] contend that the beneficiary has a property right and argue that it is their interest in the trust *res* that explains the "shielding rule"[28] of the trust ie that the trust assets are unavailable to meet the claims of the trustee's personal creditors.

There are considerable problems with this view. McFarlane exposes the flaws in Dagan and Samet's attempt to justify the insolvency protection of the trust in the idea that the beneficiary enjoys proprietary rights in the trust assets.[29] First, Dagan and Samet's view cannot account for the insolvency protection afforded to structures of right-holding where no

[24] *Investec II* (n 10) [59].
[25] *Carter Holt* (n 6) [26]; Insolvency Act 1986, s 283(3)(a).
[26] *Carter Holt* (n 6) [26]; Insolvency Act 1986, s 283(3)(a).
[27] Hanoch Dagan and Irit Samet, 'The Beneficiary's Ownership Rights in the Trust Res in a Liberal Property Regime' (2023) 86 MLR 701 (Dagan and Samet, MLR).
[28] Dagan and Samet, MLR (n 27), 711.
[29] Ben McFarlane, 'The Nature of Equitable Property Revisited' (2026) 79 CLP (McFarlane, CLP).

party is endowed with a beneficial interest. In the law of trusts, the clearest example is the charitable purpose trust.

As McFarlane also highlights[30], the problem with Dagan and Samet's view is wider. There are arrangements beyond the law of trusts[31], where the rights held by A are unavailable to meet the claims of their personal creditors, as with unadministered deceased estates.[32] Those arrangements do not entail any party holding a beneficial interest in the assets of the scheme. As explained by Viscount Radcliffe in *Commissioner of Stamp Duties (Queensland) v Livingston* [33], legatees of an unadministered estate do not enjoy a beneficial interest in its assets and yet – as shown by Charles Mitchell[34] – the same key features (including the shielding effect) applying to the trust with beneficiaries, also extend to the deceased estate.

It is telling that in their argument attempting to establish key features of the trust in the property rights of the beneficiary, Dagan and Samet discuss neither the charitable purpose trust, nor the deceased estate. Dagan and Samet's model is led astray by its focus, not on the position of the trustee[35], but rather on the individual position of the beneficiary in understanding the key features of the trust. Their analysis does not start in the right place. Similar problems are encountered on the rights against rights analysis, as with the beneficial ownership analysis. At most, McFarlane and Stevens can explain the insulation of the trust

[30] McFarlane, CLP (n 29).
[31] See analysis in Chapter I.II.B.
[32] *Farr v Newman* (1792) 4 TR 621, 629; 100 ER 1209, 1213 (*Farr v Newman*).
[33] [1965] AC 694 (PC) 707-708; see analysis in Chapter I.II.B.
[34] Charles Mitchell, '*Commissioner of Stamp Duties (Queensland) v Livingston* (1964): Rights of Estate Beneficiaries and Trust Beneficiaries Compared' in Brian Sloan (ed), *Landmark Cases in Succession Law* (Hart Publishing 2019) (Mitchell, Livingston).
[35] Ben McFarlane, 'Trusts, Property, and Rights' in Irit Samet, Simone Degeling and Jessica Hudson (eds), *Philosophical Foundations of the Law of Express Trusts* (Oxford University Press 2023) (McFarlane, Express Trusts); McFarlane, CLP (n 29); see analysis in Chapter I.II.C.ii.

assets from the personal creditors of the trustee where there is a party endowed with a right against a right.

ii. Indemnities

The beneficial ownership model of the trust provides a poor fit for the indemnity rules. As McFarlane explains, the indemnity should not be understood as a property right of the trustee that encumbers the equitable ownership of the beneficiary:

> [T]his is to have things precisely the wrong way around.[36]

The presence of indemnities is a feature not only of the fixed trust with beneficiaries, but of all trusts[37] and non-trust scheme structures.[38] They are necessary in ensuring the smooth operation of the trust, by – *inter alia* – incentivising parties to become trustees in the first place.[39] If the indemnity is seen as a proprietary encumbrance on the equitable ownership of a beneficiary, it is difficult to understand how that logic can apply to the charitable purpose trust and other instances of schemes where no party can be understood as the equitable owner. As seen in the analysis in Section II.II below, the right of indemnity is better understood as a feature of the office of trusteeship[40] and a consequence of the law's commitment to the integrity of the scheme, rather than as a proprietary encumbrance on the ownership of a beneficiary.

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[36] McFarlane, Express Trusts (n 35) 59.
[37] *White v Williams* [2011] EWHC 494 (for an example of indemnities in favour of the trustees of a charitable purpose trust).
[38] eg Trustee Act 2000, s 31, applied to personal representatives administering the estate of a deceased person by s 35(1).
[39] *Investec II* (n 10) [286].
[40] See analysis in Chapter I.II.C.ii for trusteeship being an office.

This point can be pressed further than the observation that trustee indemnities complicate the model under which a beneficiary is treated as the equitable owner of the trust assets. Even in the simplest case that model is meant to explain — a fixed trust, with B holding a vested, indefeasible equitable interest in identified assets and no complicating features such as multiple beneficiaries or a discretionary structure — B's claim to those assets does not merely compete with T's right of indemnity; it is postponed to it.[41] B cannot compel T, still less T's successors, to hand over the trust fund while any trustee's authorised expenses remain unmet, and, as the Privy Council held in *Equity Trust (Jersey) Ltd v Halabi*[42], the indemnities of successive trustees rank *pari passu* with one another rather than in the order in which they were incurred, precisely so that no trustee's claim is treated as junior to any other.[43] An owner's title is not, in the ordinary case, defeasible by the reimbursement claims of office-holders whom they never appointed and whose expenditure they may not have authorised. The priority accorded to T's indemnity is not evidence of a competition between two property rights — T's and B's — in which T's happens to win; it is a feature of what it means to administer a scheme, whatever its beneficiaries or purposes, under a duty of due administration. T's power to meet her own authorised liabilities out of the fund is logically and temporally prior to any entitlement that beneficiaries or objects have against what remains.

McFarlane and Stevens' joint work is largely silent on the nature and operation of trustee indemnities. This omission is significant because the trustee's indemnity is a feature of all trusts, including trusts with beneficiaries and such trusts are the focus of McFarlane and Stevens' work. The rights against rights analysis suggests that understanding the nature of the

[41] *Investec II* (n 10) [82]–[89]. See too *Re Beddoe* [1893] 1 Ch 547 (CA) 558 (Bowen LJ).
[42] *Investec II* (n 10).
[43] *Investec II* (n 10) [82]–[89].

beneficiary's rights is not the same exercise as understanding the nature of the trust itself. Indeed, as McFarlane has said, it is important to understand the institution of the trust (including the rights of the trustee), to fully grasp the position of the beneficiary.[44]

II. Dual patrimony/dual estate

i. Insolvency protection

The dual patrimony/dual estate model – discussed in Chapter I.II.C.ii – might seem well equipped to account for the insulation of the trust assets from the personal creditors of the trustee. On this account, the trustee administers two distinct patrimonies or estates. The trustee's personal assets belong to one patrimony, while the trust assets belong to another, legally separate patrimony dedicated to the purposes of the trust. If the trust assets form part of a separate estate, it follows naturally that the trustee's personal creditors cannot execute against them, because those assets are not part of the estate to which their claims attach. The separation of patrimonies therefore mirrors the practical outcome produced by English trust law and appears to offer an explanation for the immunity of trust assets from the trustee's creditors.

The explanatory force of the dual patrimony model, however, is more limited than it initially appears. The model attempts to describe *how* the law organises assets, but it does not explain *why* the law chooses to organise them in that manner. The model effectively elevates what is, on the present analysis, a Level 3 doctrinal feature[45] into the primary explanatory principle. It states that trust assets are insulated because they belong to a separate patrimony,

[44] McFarlane, Express Trusts (n 35) 50.
[45] See Chapter I.II.A for the levels analysis.

but this simply relocates the question rather than answering it. Why should the law recognise a separate patrimony in the first place? Why should creditors be confined to one pool of assets rather than another? The dual patrimony model does not identify any deeper normative commitment capable of answering those questions.[46]

This reveals an important limitation of the model. It does not clearly distinguish between doctrine and justification. The existence of a separate patrimony is treated both as the legal rule and as the explanation for that rule. Consequently, the model struggles to explain why the law has adopted this particular doctrinal arrangement rather than some alternative. In effect, the doctrine becomes self-justifying: trust assets are protected because they form a separate patrimony and they form a separate patrimony because the law protects them.

By contrast, the scheme-based analysis maintains a clear distinction between Level 2 and Level 3. On this account, the insulation of trust assets from the trustee's personal creditors is not itself the fundamental organising principle of the law of trusts. Rather, it is one doctrinal mechanism through which the legal system gives effect to its deeper commitment to preserving the integrity of the scheme. Once a right has been appropriated to a scheme, allowing the trustee's personal creditors to satisfy their claims from those assets would divert them from the scheme to which they have been dedicated. The immunity of trust assets from personal creditors is therefore justified because it preserves the integrity of the scheme, rather than because the assets happen to reside in a separate patrimony. The

[46] Also note that originally the patrimony idea was linked to legal personality (Kasirer, 'Translating Part of France's Legal Heritage: Aubry and Rau on the *Patrimoine'* (2008) 38 *Revue générale de droit* 453): hence one person, one patrimony. On that basis, the patrimony model is a model on which the trust has distinct legal personality, which is a poor fit for English law.

doctrinal rule (Level 3) is thus explained by, rather than confused with, the underlying normative commitment (Level 2).

ii. Indemnities

As explained by Lionel Smith, the common law trust does not constitute a separate patrimony.[47] Reid and Gretton's dual patrimony model is helpful insofar as it focusses on the position of the trustee. On their view, the trustee has a private patrimony and a trust patrimony[48] and creditors must in principle claim against the patrimony to which their claim belongs.[49] The beneficiary's right need not be characterised as a privileged proprietary right, because personal creditors of the trustee simply have no claim against the special trust patrimony.[50]

However, this model fits the current English rules on trustee indemnities only imperfectly. If the trust were truly a separate patrimony, trust creditors would claim directly against that patrimony and the trustee's private assets would not ordinarily be exposed to trust liabilities. That is not the position in English law.[51] As seen in the introduction to this chapter, the trustee contracts personally and the creditor's claim is against the trustee; access to the trust fund is mediated through the trustee's right of indemnity. The trust fund is therefore not itself directly available to meet trust debts in the way a true separate patrimony would suggest. Conversely, the trustee's personal assets may be exposed to trust creditors,

[47] Smith, Trust and Patrimony (n 16).
[48] George Gretton, 'Trusts without Equity' and Kenneth Reid 'Patrimony not Equity: The Trust in Scotland' in R Valsan (ed) *Trusts and Patrimonies* (Edinburgh, Edinburgh University Press, 2015) (Reid) 116.
[49] Gretton (n 48) 101; Reid (n 48) 117.
[50] Gretton (n 48) 101; Reid (n 48) 117.
[51] See analysis in the introduction of this chapter.

subject to the trustee's separate right to recoupment or exoneration from the fund. This is the opposite of what the patrimony model would predict.

The scheme-based analysis better captures the mechanics of English law: the indemnity is not evidence that the trust assets form a separate patrimony, but a rule determining when assets appropriated to the trust scheme may properly be applied in discharge of liabilities incurred for that scheme. On this view, the trust fund is protected from the trustee's personal creditors not because it forms a separate patrimony with its own direct creditors, but because those rights are appropriated to the scheme; and the trustee's indemnity marks the circumstances in which application of those rights for payment of liabilities is consistent with the proper administration of that scheme.

Section II: Strengths of the scheme-based analysis

I. Justifying the insulation of trust assets from the personal creditors of the trustee

The immunity of the rights held on trust from being used to meet the claims of the trustee's personal creditors is sourced in the fact that those debts were incurred in pursuit of the trustee's unfettered preferences (or in pursuit of the terms of another scheme). It therefore follows that rights held in a capacity where those unfettered preferences are irrelevant should not meet the debts of the trustee's personal creditors. The law is qualifiedly committed to upholding the integrity of the scheme.[52] Shielding the rights appropriated to the scheme from debts incurred by the trustee in pursuit of their unfettered preferences (or in pursuit of the terms of another

[52] See analysis in Chapter III, Section II.

scheme) is a doctrinal Level 3 manifestation of that commitment.[53] A scheme-based analysis provides unity within the law of trusts and also explains that same shielding effect beyond the law of trusts, as with the deceased estate. Focussing on the position of the right-holder and the nature of their "titularity",[54] ie the capacity in which the right is held, furnishes an explanation that works for the charitable purpose trust, as much as for the trust with beneficiaries. In both examples, the trustee holds a right in accordance with an all-encompassing set of terms. It is that fact that explains the immunity of the trust assets from the claims of the trustee's personal creditors.

This is similar to the reasoning that has long been used to protect the assets of an unadministered deceased estate from the personal creditors of an executor or administrator. In *Farr v Newman*, Grose J explained that estate assets could not be attached by an executor's own creditors because the executor is "only the distributor and dispenser of them for the benefit of the creditors, the legatees and the next of kin of the testator".[55] Yet, as *Livingston* makes clear, none of the estate's creditors, legatees or next of kin has any equitable proprietary interest in the estate assets during administration; each merely has a personal, though transmissible, right against the executor to see that the estate is duly administered.[56] The insulation of the deceased's assets from the personal creditors of the executor recognised in *Farr v Newman* therefore cannot be explained by reference to beneficial ownership vested in someone other than the executor, because no such beneficial ownership exists. It must instead be explained by reference to the character of the executor's title: title held under a duty of due administration.

[53] See discussion of the levels analysis in Chapter I.II.A.
[54] George Gretton, 'Ownership and its Objects' (2007) 71 Rabel Journal of International and Comparative Law 802, 834.
[55] *Farr v Newman* (n 32) 629; 100 ER 1209, 1213 (Grose J).
[56] *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 (PC) 707–708; Mitchell, Livingston (n 34) 266–268.

This same justification – namely the law's commitment to the integrity of the scheme – supplies a link to the analysis of recipient liability which will be developed in Chapter V. There it is argued that a third-party who receives trust property misapplied in breach of trust must return that very asset, subject to relevant defences, such as *bona fide* purchase[57], not because the beneficiary owned that asset before the misapplication, but because the asset was, from the moment it was appropriated to the scheme, subject to the law's integrity commitment: property that the trustee held under a duty of due administration and had no authority to alienate for her own, or anyone else's, private purposes. The insolvency protection discussed above and the proprietary claim against the recipient are accordingly two expressions of a single idea: the law's integrity commitment.[58]

II. Nature of the right of indemnity

A. Incident of the office of trusteeship[59] and the law's commitment to the integrity of the scheme

The trustee's indemnity is best understood as a doctrinal feature of the law's commitment to the integrity of the scheme. An appropriation to a scheme constitutes a re-definition of authority over a right (Level 1). In giving effect to the law's institutional qualified commitment to the integrity of the scheme (Level 2), it is essential that at the Level 3 stage of doctrine and rules[60], the trustee should not be personally ruined or financially disadvantaged in assuming the office of trustee.[61] Without the ability to be indemnified from the trust assets,

[57] See analysis in Chapter III, Section II.IV.i.
[58] A link between insolvency protection and the proprietary claim is also made by Kiefel CJ, Keane and Edelman JJ, in *Carter Holt* (n 6) [27], citing *Gladstone v Hadwen* (1813) 1 M & S 517 526; 105 ER 193 197, ie it would be absurd for rights to vest in bankruptcy "for no other purpose but in order that there may be a bill in equity brought against [the trustee in bankruptcy].
[59] For analysis of the meaning of office, see Chapter I.II.C.ii.
[60] See Chapter I.II.A for an introduction to the levels analysis.
[61] *Jennings v Mather* [1901] 1 KB 1 (CA) 6-7.

it is unlikely that parties would be willing to accept the office of trusteeship and therefore fewer schemes would be successfully administered.

The indemnity is an entitlement that arises on the appointment of the trustee.[62] The rights held on trust are vested in the trustee. The indemnity allows the trustee to use those rights to discharge properly incurred trust liabilities or to access the value of the trust rights to reimburse themselves for trust debts discharged from their personal estate.[63]

Bell, Gegeler and Nettle JJ in their joint judgment in *Carter Holt* say[64]:

> A court of equity will assist the trustee to realise trust assets to satisfy the trustee's right of indemnity, in priority to the beneficiaries' interests, and thus it is said that the trustee has an equitable charge or lien over the trust assets. It is not, however, a charge or lien comparable to a synallagmatic security interest over property of another. *It arises endogenously as an incident of the office of trustee in respect of the trust assets*.

The trustee's indemnity should therefore be understood as a feature of the law's commitment to the integrity of the scheme. A slightly different approach is adopted by Televantos, who understands the indemnity as part and parcel of the trustee's right to due administration.[65]

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[62] *Investec II* (n 10) [206]–[209]. See too Matthew Conaglen, "Trustees Competing over Indemnity Rights" (2024) 48 Melb Univ L Rev 1 6–7.
[63] *Carter Holt* (n 6) [30].
[64] *Carter Holt* (n 6) [83] (emphasis added).
[65] Andreas Televantos, 'Trustees and their Creditors' (2025) 141 LQR 561 (Televantos, 2025).

However, focus on the trustee's right to due administration provides a less compelling fit than a scheme-based analysis for the reasoning in the cases, as the judges do not see the indemnity as an incident of any right to due administration, but rather as what is necessary to maintain the trust's functioning as a "continuing institution or scheme".[66] The reasoning in the cases does not view the indemnity in terms of the trustee having a personal right against someone or a relational claim to due administration. Rather, the courts are reasoning in terms of the institutional continuity of the trust[67], which aligns with the scheme-based analysis. The indemnity is part of how the scheme functions, including across changes in office.

Furthermore, focus on the trustee's right to due administration often seems artificial, especially where the trustee is the sole trustee of a trust that has just been constituted. Against whom does the trustee hold their right to due administration? Where the trustee discharges a trust debt from their personal estate, against whom would the trustee have the right to due administration (ie to have the value of the trust fund available for payment of their claim)? It is not necessary to source the trustee's indemnity in a right to due administration; rather, a better approach would justify the indemnity in the law's institutional commitment to upholding the integrity of the scheme. Without an indemnity, a party would be unlikely to assume the office of trustee and so the purposes of the scheme could not be achieved. This is reflected in the language used by some of the judges in *Carter Holt*, who describe the lien as arising "endogenously as an incident of the office of trustee"[68]. There is no debtor and no underlying primary obligation secured by the lien – only the structured application of a fund. To characterise the indemnity as part of the trustee's right to due administration risks

[66] *Investec II* (n 10) [256]; see further analysis in Chapter I.II.C.v.
[67] See analysis in Chapter I.II.C.v.
[68] *Carter Holt* (n 6) [83].

collapsing it into a personal, relational claim, framing it as competing with a beneficiary's rights and treating it as a question of priority between competing claimants.

Lady Arden in *Investec II* explains the reasons for the law recognising the indemnity in language that promotes the running of the scheme, rather than seeing the indemnity as a feature of a right to due administration[69]:

> There are several reasons for equity granting a trustee a right of indemnity. First, it would be unfair if he did not have such a right. Second, it would discourage persons from acting as trustees if the right was not an integral part of their office. Third, it promotes efficient trust administration. Fourth, and perhaps most importantly, it prevents the beneficiaries of the trust benefitting from the trust fund built up by trustees without ensuring that those trustees are paid first.[70] The trust expenses doctrine is a sort of salvage principle: a "salvor" should be paid if he enables a ship to be saved or the trust to operate. All these reasons are relied on in the authorities.

If rights are appropriated to a scheme (Level 1) and the legal system is committed to sustaining that scheme (Level 2), then the legal system must provide mechanisms ensuring the scheme can function (Level 3). The indemnity is one such mechanism.[71] Lady Arden's observations in *Investec II* support this analysis.

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[69] *Investec II* (n 10) [286].
[70] See eg *Re Johnson* (1880) 15 Ch D 548 (Ch D) 552 (Jessel MR); *Re Evans* (1887) 34 Ch D 597 (CA) 601 (Cotton LJ); *Hardoon v Belilios* [1901] AC 118 (PC) 123 (Lord Lindley); *Carter Holt* (n 6) [133] (Gordon J), citing *Re Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* [2018] FCAFC 40, (2018) 260 FCR 310 (Allsop CJ).
[71] McFarlane, Express Trusts (n 35) 57 – 58.

On Televantos' account, a trustee's indemnity is a feature of their right to due administration of the trust fund. However, this suggests that the indemnity arises from an additional right to due administration, instead of being grounded in the structure of trusteeship itself: a right appropriated to a scheme. As McFarlane says:

> "The 'right' of exoneration … is not an *additional* general right … it is rather a consequence of … the trustee holding that right."[72]

B. The scheme controls matters; the right of indemnity does not give the trustee unfettered free use of the trust property

The courts do not conceptualise the right of indemnity as operating outside of the terms of the trust. Rather, the trust scheme controls how the trustee may access the value of the trust assets to discharge properly incurred trust expenditure. For example, if the trustee has discharged a trust debt from their personal funds first, the trustee is not free to simply sell title to a painting held on trust (which might even have identical value to the trustee's power of reimbursement).[73] If the terms of the trust say that the title to the painting cannot be sold, the trustee must first obtain the permission of the court to sell the painting. The existence of the indemnity does not mean the trust assets are now at the trustee's unfettered free use.[74] This fact has been further strengthened by endorsement in *Carter Holt* of *In re Suco Gold Pty Ltd (In liq)*[75]. Prior to *Carter Holt*, there was a debate as to whether the power of exoneration could be used to pay the trustee's general creditors (as suggested in *Re Enhill Pty Ltd*[76]).

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[72] McFarlane, Express Trusts (n 35) (emphasis in original).
[73] *Jaken* (n 23) [27].
[74] For analysis of the language of "free use" see Chapter II.II.
[75] (1983) 33 SASR 99.
[76] [1983] 1 VR 561.

However, *Carter Holt* explained that the power of exoneration can only be used for the payment of trust creditors.[77]

The position that the indemnity (whether a power of exoneration or a power of reimbursement) is part and parcel of the scheme and the law's commitment to its integrity, stands in contrast to the analysis of Mitchell and Hudson[78], who view the power of reimbursement – to the extent that it exists – as allowing the trustee to use the trust assets as they see fit. On their view, the existence of that power frees the trustee from the terms of the trust and the trustee enjoys the freedom as title-holder to do with the trust assets as they see fit.

Their central claim is that the power of reimbursement is not a proprietary right, charge, lien, or claim against the beneficiaries, but rather a permission inherent in the trustee having title to the trust assets.[79] Because the trustee is already vested with title to the trust property, the trustee does not need to acquire any further right over the trust assets in order to reimburse themselves. Instead, once trust expenses have been properly incurred and paid from the trustee's own funds, the trustee is entitled to exercise the powers they already possess as title-holder and treat a corresponding portion of the trust assets as their own. In their words, recoupment for expenses "allows the trustee to treat trust property as her own, free of her duties as trustee, to the extent required to make good her loss".[80]

A key implication of their analysis is that the trustee's power of reimbursement is not generated by the trust terms and does not arise as a proprietary entitlement carved out of the

[77] *Carter Holt* (n 6) [92].
[78] Jessica Hudson and Charles Mitchell, 'Trustee Recoupment: A Power Analysis' (2021) 35 Trust Law International 3 (Hudson and Mitchell, Recoupment).
[79] Hudson and Mitchell, Recoupment (n 78) 1 – 3.
[80] Hudson and Mitchell, Recoupment (n 78) 6.

trust fund. Rather, it derives from the trustee's pre-existing powers as title-holder, with the trust terms merely defining the circumstances in which the trustee is permitted to deploy those powers for their own benefit.[81] Hudson and Mitchell therefore argue that when a trustee reimburses themselves they are not exercising a special trust power at all; they are exercising "a power to deal with the property that she holds by virtue of her ownership"[82] and the trustee's permission to do so is limited only by the extent of the terms of the trust.[83] The trustee's entitlement to recoup stems from their status as title-holder rather than from any separate equitable right.

The consequence is that beneficiaries possess no entitlement to complain when the trustee exercises this power properly, because their interests are always contingent upon prior satisfaction of the trustee's indemnity. Hudson and Mitchell argue that any entitlement a beneficiary enjoys is conditional from the outset upon reimbursement of the trustee's expenses[84] and that, if a beneficiary receives less because the trustee has recouped, "there is nothing for her to complain about" because the amount available for distribution is always conditional upon whether the trustee chooses to exercise the reimbursement power.[85] Indeed, they reject the idea that the trustee acquires a proprietary right over the trust assets through reimbursement, insisting instead that the trustee already has title to those assets and simply enjoys a permission to deploy their powers as title-holder for their personal benefit when the conditions for recoupment are satisfied.[86]

[81] Hudson and Mitchell, Recoupment (n 78) 13.
[82] Hudson and Mitchell, Recoupment (n 78) 13.
[83] Hudson and Mitchell, Recoupment (n 78) 13.
[84] Hudson and Mitchell, Recoupment (n 78) 13.
[85] Hudson and Mitchell, Recoupment (n 78) 13.
[86] Hudson and Mitchell, Recoupment (n 78)16.

From the perspective of a scheme-based analysis, the weakness of Hudson and Mitchell's account[87] is that it risks presenting the trustee's reimbursement power as an exceptional suspension of the trust's normative structure. By characterising reimbursement as a permission allowing the trustee to treat trust property as their own and to act "free of her duties as trustee"[88], the analysis can be read as suggesting that the trustee temporarily steps outside the scheme and exercises ordinary ownership powers for personal purposes. A scheme-based analysis would instead explain reimbursement as an incident of the scheme itself: the trustee is not liberated from the trust's terms, but is authorised by those terms – and by the law's commitment to the continued administration of the scheme – to use trust resources to satisfy liabilities properly incurred in carrying out the scheme. On that view, reimbursement is not a moment in which the trustee ceases to be constrained by the trust; it is a mechanism through which the scheme preserves its own operational integrity by ensuring that trustees are not discouraged from administering it and that trust liabilities can be met from the resources appropriated to the trust's purposes.

C. Protecting the trustee's right of indemnity, the extent of the law's commitment to that indemnity and overall protection of the trustee

The rule in *Hardoon v Belilios*[89] can be understood on a scheme-based analysis as further incentivising a trustee to act as such, by giving them a personal indemnity from a beneficiary, where the assets of the trust are insufficient to meet the trustee's indemnity.

The defendant in *Hardoon* was the sole beneficiary of a trust of shares and the plaintiff trustee claimed a personal indemnity against them when the plaintiff paid calls made

[87] Televantos also criticises Mitchell and Hudson's analysis: Televantos, 2025 (n 65) 568.
[88] Hudson and Mitchell, Recoupment (n 78) 6.
[89] [1901] AC 118 (PC) (*Hardoon*).

on the shares and the trust assets were insufficient to reimburse the trustee. Lord Lindley said that where certain conditions are satisfied, the trustee may claim a personal indemnity from the beneficiary for properly incurred trust liabilities:

> Where the only cestui que trust is a person *sui juris* and absolutely entitled to the trust property, the trustee's right to indemnity is not confined to the trust assets but extends to a personal obligation enforceable in equity against the beneficiary.[90]

His Lordship justified the rule on the following basis:

> [A]bsolute beneficial owners of property must in equity bear the burdens incidental to its ownership and not throw such burdens on their trustees.[91]

The rule in *Hardoon v Belilios* is not accepted in all common law jurisdictions. For example, it has been abolished in New South Wales[92] and some commentators argue it lacks sound foundations, as a matter of authority and principle.[93] However, given the analysis in this chapter, the rule has a principled basis. The trustee's indemnity has priority over the claims of the beneficiary. The law is more committed to seeing that the trustee not suffer any personal losses in their stewardship of the trust assets than it is to seeing that the beneficiary receive their due under the scheme. As explained in *Carter Holt*:

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[90] *Hardoon* (n 89) 124.
[91] *Hardoon* (n 89) 124.
[92] Trustee Act 1925 (NSW) s 100A(1).
[93] Joseph Campbell 'The Undesirability of the Rule in '*Hardoon v Belilios*' (2020) 34 Trusts Law international 131-164.

> A court of equity will assist the trustee to realise trust assets to satisfy the trustee's right of indemnity, in priority to the beneficiaries' interests[94].

When combined with Lord Lindley's benefit/burden justification, the rule should not be seen as an aberration. Where B is the sole beneficiary, then the law has good reason for choosing the trustee over the beneficiary, if any party is to personally respond for the debts incurred in due administration of the scheme.

The scheme-based analysis therefore supports the result in *Hardoon v Belilios*, but not necessarily Lord Lindley's explanation of it. On the present analysis, Lord Lindley's justification mistakes a Level 3 doctrinal rule for its underlying Level 2 rationale. The decisive consideration is not that the beneficiary is the beneficial owner of the trust assets, but that the legal system is committed to ensuring that trustees are willing to undertake and continue the administration of schemes. A trustee who properly incurs liabilities in the execution of the trust should not ordinarily be left personally out of pocket merely because the trust fund has proved insufficient. The personal indemnity recognised in *Hardoon* can therefore be understood as one mechanism by which the law strengthens the trustee's protection and thereby promotes the effective administration of trusts.

Equally, however, the scheme-based analysis does not entail that every legal system must recognise the *Hardoon* rule. The law's commitment to preserving the integrity of schemes is a Level 2 commitment; the doctrinal techniques adopted to give effect to that commitment belong at Level 3. Different legal systems may reasonably conclude that the trustee's ordinary indemnity against the trust assets provides sufficient encouragement to accept the office of trustee and that any remaining risk should not be transferred personally to

[94] *Carter Holt* (n 6) [83].

the beneficiary. Other systems may conclude that the additional protection afforded by *Hardoon* better secures the continued willingness of trustees to administer schemes and therefore better serves the underlying commitment to their integrity. The existence or absence of a personal indemnity is therefore best understood as a permissible doctrinal choice rather than a necessary implication of the law's underlying commitment.

On that analysis, the abolition of the *Hardoon* rule in jurisdictions such as New South Wales does not undermine the scheme-based analysis. It simply reflects a different institutional judgment about how best to balance the competing interests of trustees and beneficiaries while still preserving the effective administration of trusts. The scheme-based analysis therefore explains both why the *Hardoon* rule has a principled justification where it is recognised and why its absence elsewhere is a Level 3 doctrinal choice.

III. Adjudicating between the rights of indemnity of current and former trustees of an insolvent fund

Investec II concerned a contest between current and former trustees. The assets of the trust were insufficient to satisfy all the trustees' indemnities in full. One issue for the Privy Council was to determine how to deal with cases of such "insolvent trusts"[95], where the rights held on trust are insufficient to meet the claims of the current and former trustees and the trust creditors in full. The majority judgment was given by Lord Briggs (with whom Lady Rose and Lord Reed agreed and Lady Arden agreed in part). Lord Briggs agreed with the joint opinion of Lord Richards and Sir Nicholas Patten (with whom Lord Stephens agreed) on the point that the trustee's right of indemnity should be understood as constituting a "proprietary interest" in the trust fund, that proprietary interest being hierarchically superior

[95] *Investec II* (n 10) [61].

to that of the beneficiary of the trust. Unlike some Australian decisions[96], the Privy Council preferred avoiding the description of the trustee's right of indemnity as a beneficial interest. However, the court found that nothing turned on that terminological point.[97] There was also an important disagreement between the judges. For Lord Briggs and the majority, where the trust assets are insufficient to pay the claims of all the current and former trustees, then they should share *pari passu*. According to Lord Richards and Sir Nicholas Patten, that is the wrong conclusion. Rather, the dispute between current and former trustees should be determined with reference to the first-in-time rule that applies generally to competing legal and equitable interests.[98] The minority saw no good reason for departing from that rule.

The reasoning and approach of the majority in *Investec II* are supported by the scheme-based analysis. Lord Briggs, as seen in Chapter I.II.C.v, described the trust as having an "enduring character which is not dependent upon separate legal personality".[99] His Lordship's approach is aligned with the levels analysis: when a right is appropriated to a scheme, authority over that right has been reconstituted and that structure persists across office-holders. He refrains – correctly – from reducing the trust to a web of bilateral obligations. Instead, he defines the trust as a "continuing institution or scheme".[100] Lord Briggs calibrates the rules applying in the case of the trust whose debts exceed its assets on what best advances the due administration of the scheme over time[101] and Lord Briggs also draws an analogy with partnerships in his analysis, thereby noting important structural similarities to the trust.[102] In his reasoning, Lord Briggs explains why a first-in-time rule

[96] Most recently in *Jaken* (n 23).
[97] *Investec II* (n 10) [143].
[98] *Macmillan Inc v Bishopsgate Investment Trust (No 3)* [1995] 1 WLR 978 (Ch D) 999-1000 (Millett J).
[99] *Investec II* (n 10) [256].
[100] *Investec II* (n 10) [256].
[101] *Investec II* (n 10) [254].
[102] *Investec II* (n 10) [256]; see analysis in Chapter I.II.B.

would be inimical to the notion that the trustees are administering a common enterprise. Furthermore, his Lordship further grounds the strength of the *pari passu* approach in fairness to the trust creditors, who are important in ensuring the rights can be administered in the fashion contemplated by the scheme.[103]

A scheme-based analysis explains why Lord Briggs was entitled to attach weight to the position of trust creditors. Trust creditors are not merely incidental third parties. Their willingness to transact with trustees is an indispensable condition for the practical administration of the scheme. Trustees cannot ordinarily administer a trust without entering contracts, employing agents, retaining professionals or otherwise incurring liabilities in furtherance of the trust's purposes. The trustee's rights of indemnity and exoneration therefore serve not only to protect the trustee personally, but also to assure those dealing with the trustee that liabilities properly incurred in administering the scheme will ultimately be met from the trust fund. In this respect, the protection afforded to trust creditors is derivative of, and instrumental to, the law's commitment to preserving the integrity of the scheme. This explains why Lord Briggs regarded fairness to trust creditors as a relevant consideration when selecting between competing priority rules. By contrast, the minority's reasoning[104] treats the trustee's indemnity principally as a mechanism for protecting the trustee and therefore sees no reason to depart from ordinary temporal priority rules merely because trust creditors may benefit indirectly. On the present analysis, however, that understates the systemic role of trust creditors in enabling the continuing administration of the appropriated rights in accordance with the terms of the scheme.

[103] *Investec II* (n 10) [276].
[104] *Investec II* (n 10) [181].

IV. Characterising claims

One issue that frequently arises in trust litigation is the proper characterisation of a dispute for conflict of laws purposes.[105] Where a trust has connections with more than one jurisdiction, the court must determine the juridical nature of the issue before identifying the applicable law.[106] The question is whether the matter is properly characterised as concerning the administration of the trust, proprietary rights, personal obligations, or some other legal category.[107] The answer determines which system of law governs the dispute and, consequently, the outcome of the dispute.[108] This issue was considered in *Investec I* and the scheme-based analysis supports the reasoning and conclusion of the majority of the Board.

The TDT is a discretionary trust governed by Jersey law. The Board was confronted with several issues on appeal from the Court of Appeal of Guernsey. Centrally for the purposes of this chapter, the Board had to determine the extent of the liability of the former trustee of the TDT and whether Jersey law was applicable according to the private international law rules of Guernsey (the law of the forum). Trustee B (the current trustee) argued that Trustee A (the former trustee) could not access the value of the trust assets, because, *inter alia*, their liability was unreasonably incurred. Trustee A denied that proposition and further argued that its personal assets were unavailable to meet the claims of

[105] The Hague Convention on the Law Applicable to Trusts and on their Recognition (adopted 1 July 1985, entered into force 1 January 1992) art 8; Recognition of Trusts Act 1987, s 1; *Chellaram v Chellaram (No 2)* [2002] 3 All ER 17 (Ch); Adrian Briggs, *The Conflict of Laws* (4th edn, OUP 2019) 273–77.
[106] *Dicey, Morris and Collins on the Conflict of Laws* (Lord Collins of Mapesbury and others eds, 16th edn, Sweet & Maxwell 2022) r 158, [29-001]–[29-003]; *Augustus v Permanent Trustee Co (Canberra) Ltd* (1971) 124 CLR 245, 261 (Mason J); Lawrence Collins, 'The Hague Trusts Convention and the Conflict of Laws' (1989) 38 ICLQ 553, 556–57.
[107] Recognition of Trusts Act 1987, s 1(2); Hague Trusts Convention, art 8; *Webb v Webb* (Case C-294/92) [1994] ECR I-1717 (distinguishing proprietary and personal claims for jurisdictional purposes); *Chellaram v Chellaram (No 2)* [2002] 3 All ER 17 (Ch) 54–55 (Lawrence Collins J); Jonathan Harris, *The Hague Trusts Convention: Scope, Application and Preliminary Issues* (Hart 2002) 195–223.
[108] *Gomez v Gomez-Monche Vives* [2008] EWCA Civ 1065, [2009] Ch 245 [52]–[60] (Lloyd LJ); *Blue Sky One Ltd v Mahan Air* [2010] EWHC 631 (Comm) [204]–[210] (Beatson J).

the trustee's trust creditors, because – in its submission – Article 32 of the Trusts (Jersey) Law (TJL) applied, which provides that if trust creditors know that the trustee is incurring a liability whilst acting as trustee, then the trustee does not expose their personal assets to claims by those trust creditors.

Whether the TJL applied was an issue that divided the Board. The majority of the Board (Lord Hodge, with Lords Sumption and Carnwath agreeing) held that Article 32(1) TJL limits a trustee's liability to third parties to the trust assets — via the trustee's right of indemnity, not by any direct claim against the trust fund — and that this effect applies irrespective of the proper law governing the transaction or the law of the forum in which the claim is litigated, because the question is characterised as one going to the trustee's status and capacity. Lord Briggs agreed with the majority, although he thought that the rules of Guernsey private international law, which determined the appeal, were not necessarily the same as the English private international law rules.[109] Lord Mance dissented and thought that the proper law of the loan agreement (which all parties agreed was not Jersey law) entered into by Investec as trustee with the Icelandic bank Kaupthing Bank hf should apply to determine the extent of the liability of Trustee A.[110]

Lord Hodge explained that the TJL is the principal indigenous source of trust law in Jersey.[111] The TJL takes as its starting point the principles of English trust law.[112] However, Lord Hodge argued that Article 32 has made an important departure from English law.[113] According to his Lordship, in English law, the trustee does not have two separate capacities

[109] *Investec I* (n 4) [237]–[41].
[110] *Investec I* (n 4) [194, 209–10].
[111] *Investec I* (n 4) [58].
[112] *Investec I* (n 4).
[113] *Investec I* (n 4) [61].

or statuses, when it comes to the consequences of them being trustee.[114] Rather, the trustee, even when incurring liabilities in due administration of the trust, engages their personal estate, unless they specifically contract "as trustee only".[115] Unless that express contractual stipulation is included, the trustee's personal estate will be engaged, even where the other party knew the trustee was acting as trustee. According to Lord Hodge, the TJL has departed from that position, by introducing the idea that the trustee does have two separate capacities and that the knowledge of the third-party will determine in which of these two pre-existing capacities the trustee has acted.[116]

In the view of the majority, in characterising the issue at hand – which concerned the liability of Trustee A – the "time has come"[117] to recognise that such an issue goes to the status or capacity of the trustee and that consequently the proper law of the trust (namely Jersey law) was applicable.[118] In reaching this conclusion, the majority drew on private international law cases determining the liability of officers of a company[119], as well as the members of unincorporated associations and partnerships.[120] The majority therefore agreed with the former trustee that the TJL was applicable and that its personal assets were immune from execution.[121] The core move by the majority was to characterise the issue of the former trustee's liability as a question going to status and capacity, rather than as an issue of contractual liability.[122] The majority asked whether the trustee incurred liability personally or only in a representative capacity, whether recourse was limited to the trust assets and whether

[114] *Investec I* (n 4) [59](iii).
[115] *Investec I* (n 4) [59](iv).
[116] *Investec I* (n 4) [61].
[117] *Investec I* (n 4) [88].
[118] *Investec I* (n 4) [88].
[119] eg *National Bank of Greece and Athens SA v Metliss* [1958] AC 509 (HL).
[120] eg *Rowan Companies Inc v Lambert Eggink Offshore Transport Consultants VOF* [1998] CLC 1574 (QBD); *Oxnard Financing SA v Rahn* [1998] 1 WLR 1465 (CA).
[121] *Investec I* (n 4) [102].
[122] *Investec I* (n 4) [76]–[79].

Article 32 of the TJL applied.[123] This was not a question about the construction of the loan contract, but rather about the status in which the trustee acted. Just as the status of a company is determined by the law of the company's creation, so should the status of the trustee be determined by the law of the trust.[124] However, the majority did not think it appropriate to find that the TJL had departed further from English law by giving the trust creditor a direct "*in rem*"[125] access to the assets of the trust.[126] The trust creditor's means of access to the trust fund remained derivative and indirect, via subrogation to the trustee's rights of indemnity.[127]

Lord Mance thought that the majority's dual status idea was "novel", "radical" and "unprincipled".[128] According to his Lordship, the TJL had not done anything as disruptive as finding the trustee could act in two distinct capacities, but rather that Jersey law had simply removed the requirement in English law that if the trustee wishes to shield their personal assets from the claims of trust creditors, the trustee must expressly contract "as trustee only".[129] For Lord Mance, the proper law of the loan agreement should instead apply to determine the liability of the former trustee.[130]

The scheme-based analysis supports the majority's characterisation of the issue of the trustee's liability as one of status. Choice of law proceeds by first characterising the issue (what kind of legal question is this?) before applying the relevant connecting rule for that

[123] *Investec I* (n 4) [76].
[124] *Investec I* (n 4) [83–84, 88].
[125] *Investec I* (n 4) [61](ii).
[126] *Investec I* (n 4) [61(ii)].
[127] *Investec I* (n 4) [62]–[63].
[128] *Investec I* (n 4) [222].
[129] *Investec I* (n 4) [203], [209].
[130] *Investec I* (n 4) [205, 209–10].

category. All counsel treated as a starting point[131] the following three stage test set out by Mance LJ in *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC*[132], namely:

(i) characterisation of the relevant issue;

(ii) selection of the rule of conflict of laws which lays down a connecting factor for that issue; and,

(iii) identification of the system of law which is tied by that connecting factor to that issue.

Where the issue is characterised as contractual, the proper law of the contract should apply. Where the issue concerns status or internal constitution, the proper law of the trust should apply, as the law under which the trustee acquires their status. On the scheme-based analysis, the trust involves a reconstitution of authority[133] over rights (Level 1). At level 1[134], there has been a status-change: rights are no longer held beneficially, but have rather been appropriated to a scheme. Once this is accepted, the liability of the trustee to third parties can be understood as a doctrinal Level 3 incident of that status change. Therefore – as a matter of private international law rules – the issue of the trustee's liability to third-party creditors can plausibly be governed by the law that effected that status-change: ie the proper law of the trust.

[131] *Investec I* (n 4) [65].
[132] [2001] QB 825, [26].
[133] See analysis in Chapter I.I.E.
[134] For an explanation of the levels analysis see Chapter I.II.A.

Another strength of the majority's approach – on the scheme-based analysis – is that it mirrors how courts treat partnerships under private international law.[135] Even where the partnership[136] lacks separate legal personality, questions of partners' liability are treated as going to status. Those issues are therefore governed by the proper law of the partnership. This can be understood on the scheme-based analysis. Trusts are the same as unincorporated partnerships in structural terms. They are institutions defined by reconstituted authority over a right.[137] The majority's reasoning is therefore consistent with the levels analysis introduced in Chapter I.II.A.

Company officers are also subject to duties of due administration[138], in the same way as trustees. Company officers and trustees deal with third-parties in due administration of their respective schemes and the doctrinal rules at Level 3 are sourced in the fundamental reconstitution of authority or status over rights and powers at Level 1. Private international law treats status as an issue that organises authority, defines capacity and structures relations with third-parties. This is consistent with the Level 1 point that appropriation to a scheme re-defines authority over a right. When the majority say that the issue of a trustee's liability to third-parties goes to the status of the trustee, they are implicitly recognising the point that the trust is defined by the reconstitution of authority over a right. The majority's analysis in *Investec I* is susceptible to a clear justification on the scheme-based analysis.

[135] eg *Rowan Companies Inc v Lambert Eggink Offshore Transport Consultants VOF* [1998] CLC 1574 (QBD); *Oxnard Financing SA v Rahn* [1998] 1 WLR 1465 (CA).
[136] For analysis of partnerships and other non-trust scheme structures and the role they play in this thesis, see Chapter I.II.B.
[137] As argued in Chapter I.II.B, this thesis is not arguing that eg partnerships or deceased estates are exactly the same as trusts in their doctrinal operations. For example, Televantos analyses the additional powers that partners have as a result of being agents for each other: A Televantos, 'The Nature of Partnership Property and Equitable Interests' (2023) 139 LQR 26.
[138] eg *Charitable Corp v Sutton* (1742) 2 Atk 400, 26 ER 642; Companies Act 2006, ss 170–177.

Lord Mance's dissent – meanwhile – has been supported by McFarlane and Televantos[139]:

> The fact that Jersey law alters the third-party effect of Jersey trusts on A's creditors does not automatically justify treating such trusts as entities.

However, there is no need to treat the trust as an entity to support the conclusion that the trustee's liability to third-party trust creditors should be understood as an issue going to their status or capacity. Rather, applying the proper law of the trust is a reflection of the structural Level 1 point that there has been a reconstitution of authority over a right and its holder occupies an office[140] in relation to that right (that of trustee). Lord Mance – conversely – treated the issue as one of contractual liability, rather than status. On that view, the trustee's personal liability under the loan agreement is governed by the proper law of the contract.

The question in *Investec I* was not "what does the loan agreement say"? but rather "in what capacity did the trustee incur liability"? This is best understood as a question of status. The trustee is not an ordinary contracting party. The trustee holds rights in a reconstituted capacity. Lord Mance's approach risks stripping the trust of its institutional character and sits uncomfortably with Lord Briggs' majority analysis in *Investec II* that the trust is a "continuing institution or scheme".[141] When rights have been appropriated to a scheme (Level 1) it makes sense that the incidents of that appropriation must be governed – as a matter of Level 3 doctrinal private international law consequences – by the law of the trust.

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[139] Ben McFarlane and Andreas Televantos, 'Third Party Effects in Private Law: Form and Function' in Paul B Miller and John Oberdiek (eds), *Oxford Studies in Private Law Theory: Volume I* (Oxford University Press 2020) (McFarlane and Televantos).
[140] For analysis of trusteeship as an office, see Chapter I.II.C.ii.
[141] *Investec II* (n 10) [256].

The levels analysis provides a clear structure with reference to which the doctrinal rules can be calibrated. The majority's reasoning and conclusions in both *Investec I* and *Investec II* can plausibly be seen as implicitly committed to such an architecture of understanding.[142]

It is also possible to suggest that Lord Mance's conclusion that the issue of the trustee's liability to third parties is contractual, rather than going to their status, is tied to his Lordship's understanding of why trust assets are immune from the claims of the trustee's personal creditors. For example, he says:

> *Because equity will recognise and enforce the beneficiaries' interests* … the trust assets will only be available to meet such liability to the extent that the trustee can look to them for indemnity against third party liability (in which case the third party will also have a right of subrogation).[143]

Previously in his judgment, Lord Mance defined the trust as:

> [A] relationship between a trustee and a beneficiary or beneficiaries for a specified purpose, in relation to property (including rights) of some form or other, which relationship will bind the trustee and any third party receiving or acquiring such property with notice of the trust.[144]

[142] This thesis recognises that not *all* issues relating to trusts are governed by the law of the trust. One example where that is not the case is in relation to liability of a third-party recipient, as shown in *Byers v Saudi National Bank* [2023] UKSC 51, [2024] AC 1191 where the Supreme Court confirmed that the *lex situs*, not the law of the trust, governs the question of whether the recipient of the shares takes free from any proprietary or personal claim by the beneficiary of the trust.
[143] *Investec I* (n 4) [202] (emphasis added).
[144] *Investec I* (n 4) [200].

Indeed, Lord Mance in *Investec I* seems to favour a proprietary understanding of the beneficiary's rights:

> Whether the relationship is to be seen as giving the beneficiaries a purely personal or a proprietary interest remains a matter of academic controversy, of no relevance to the appeal, though it is commonly described as giving a proprietary interest: [*Akers v Samba Financial Group* [2017] UKSC 6; [2017] AC 424, paras 15-16].[145]

Lord Mance appears to source a key feature of the trust – the immunity of the trust assets from the claims of the trustee's personal creditors – in the proprietary rights of the beneficiary. As argued in Section I.I above, this is to start in the wrong place. When the key features of the trust in English law are instead sourced in the structure of right-holding (rather than the position of a beneficiary), then it is more intuitive to understand why the issue of the trustee's liability to a third-party should be understood as going to their status. The majority's judgment has calibrated (Guernsey) private international law rules in a way which gives effect to that reconstitution of authority at level 1.

These conclusions do not in any way see the trust as having a separate legal personality. The status-change at Level 1 does not endow the scheme with the aptitude to holds rights or be fastened with liabilities.[146] McFarlane and Televantos' sympathy with Lord Mance's position might be sourced in McFarlane's commitment to the rights against rights theory[147] in understanding the key features of the trust with beneficiaries. Although in more recent scholarship he has moved in the direction of focussing on the position of the trustee[148],

[145] *Investec I* (n 4) [201].
[146] See analysis in Chapter I.II.C.ii and the criticisms of Lepaulle.
[147] See analysis in Chapter I.I.B.ii.
[148] McFarlane, Express Trusts (n 35).

he continues to be committed to the idea of the key features of the trust with beneficiaries being located in the latter's rights against rights; this will be seen in the next chapter and in the context of his co-authored articles with Agnew.[149]

Section III: Reform?

The current mechanics of English law are not the only way in which the rules on trust law could be structured. For example, on the patrimonial understanding of the trust favoured by certain civilian authors[150], the trust would constitute a distinct patrimony and the trustee would be endowed with two universalities of law that would not overlap. At present, English law does not work that way, both because the trustee's personal estate is *prima facie* available to meet the claims of the trustee's trust creditors and because the trust creditors have no direct access to the assets held on trust. On the scheme-based analysis, it has been seen that the present operation of English law can be justified. On that analysis, it is not the case that English law necessarily has to be reformed.

I. Should the personal estate of the trustee be shielded from the trust creditors?

The scheme-based analysis can defend English law's current position that the trustee's personal assets are *prima facie* available to meet the claims of the trustee's trust creditors. The law's commitment to the integrity of the scheme does not have any necessary implications for the availability of the trustee's personal assets to the claims of the trust creditors. Indeed, that *prima facie* exposure may potentially enhance due administration of

[149] Sinead Agnew and Ben McFarlane, 'The Paradox of the Equitable Proprietary Claim' in B McFarlane and S Agnew (eds) *Modern Studies in Property Law: vol 10* (Hart, 2019); B McFarlane and S Agnew, 'The Nature of Trusts and the Conflict of Laws' (2021) 137 LQR 405.
[150] See analysis in Chapter I.II.C.ii.

the scheme, by giving trust creditors greater incentive to deal with trustees, as they have two pools of assets they can potentially claim.

The current operation of English law may exemplify the point made by McFarlane and Televantos[151] that the trust should have limited third-party effects, if the informality and flexibility pursuant to which the trust may arise continue to be justified. English law is sufficiently committed to the integrity of the scheme to conclude that even if the third-party does not know T holds rights in a non-beneficial capacity, those rights will be shielded from T's personal creditors. However, there is a justification for the law not automatically shielding T's personal estate from the claims of trust creditors. To do so would not seem to further the integrity of the scheme and would increase the third-party burdens of the trust. As argued by McFarlane and Televantos[152], those third-party effects have to be carefully calibrated.

Furthermore, English law already has the tools to strike a balance between fairness to both the trustee and third parties. The trustee can shield their personal estate from the claims of voluntary trust creditors, if they expressly stipulate so in their contract with the third party.[153] Furthermore, the existence of trustee indemnities gives the trustee priority access to the value of the trust assets to meet debts owed to trust creditors.[154]

[151] McFarlane and Televantos (n 139).
[152] McFarlane and Televantos (n 139).
[153] *Muir v City of Glasgow Bank* (1879) 4 App Cas 337 (HL).
[154] *Carter Holt* (n 6) [32].

II. Should trust creditors have direct access to the trust assets?

As seen in the introduction to this chapter, a trust creditor has no direct access to the trust assets. Their access is derivative, via subrogation to the trustee's rights of indemnity and that access is vulnerable to that right of indemnity being defeated by – for example – unrelated breaches of trust committed by the trustee.[155]

The present operation of English law can be understood compatibly with a scheme-based analysis. If the trustee could access the value of the trust assets to discharge a debt owed to Trust Creditor A, despite the trustee owing a duty to reconstitute the trust estate, because of an independent breach of trust, that would arguably fail to further the integrity of the scheme. After all, it is important to incentivise the trustee to act compatibly with the terms of the trust. By reducing the value of the trustee's right of indemnity commensurately with breaches of trust committed by that trustee, the law is providing the right incentives for the integrity of the scheme to be upheld.

Furthermore, the operation of subrogation shows that – for as much as a comprehensive account of the trust must explain the claims of trust creditors – trust creditors are not the direct destination of the rights held on trust. After all, the trust scheme under English law is set up to advance the interests of individual beneficiaries or to promote a charitable purpose. Trust creditors are not usually named in the terms of the trust. Rather, they are parties that may facilitate the due administration of the trust scheme. For these reasons, it is correct that they do have some access to the value of the trust fund and the majority opinion in the Privy Council was correct in *Investec II* to highlight the importance of

[155] *Re Johnson* (1880) 15 Ch D 548 (CA) 552–53.

taking into account the interests of trust creditors in adjudicating on the nature of the trustee's right of indemnity.[156]

However, giving the trust creditor the *same* rights to the trust assets as a beneficiary of the trust would arguably seem to misunderstand that the scheme was set up to advance the interests of the particular trust beneficiaries or to promote the charitable purpose. The current derivative access of the trust creditors therefore ensures that the trust creditors are not seen as part and parcel of the all-encompassing set of terms, but rather as parties who may further the achievement of that scheme.

Furthermore, as Televantos explains[157], the trust creditor is not in the same position as a creditor of a deceased, who *does* have a right to due administration of the deceased estate, of the same nature and extent as the right to due administration of the legatees. Unlike the trust, the deceased estate scheme was set up in part to meet the claims of the deceased's creditors, who are therefore part and parcel of the all-encompassing set of terms to which the rights have been appropriated. It is therefore understandable that the deceased's creditors can initiate claims against the executor[158], legatees[159] and third parties[160], whereas a trust creditor does not have such standing.

[156] *Investec II* (n 10) [275].
[157] Televantos, LQR 2025 (n 65) 584, 581–582 (Televantos, LQR).
[158] *Re Stevens* [1898] 1 Ch 162 (CA) 177. See Alexander Learmonth, Charlotte Ford and Jane Evans-Gordon, *Williams, Mortimer and Sunnucks: Executors, Administrators and Probate* (22nd edn, Sweet & Maxwell 2023) (Learmonth, Ford and Evans-Gordon) para 42-71.
[159] *Harrison v Kirk* [1904] AC 1 (HL) 7; See Learmonth, Ford and Evans-Gordon (n 158) para 74-07.
[160] *Freeman v Fairlie* (1817) 3 Mer 29, 36 ER 12.

As explained by Televantos, the subrogation mechanism:

> [I]s only available to trust creditors collectively. An individual trust creditor cannot, for its benefit alone, seek subrogation to the trustee's indemnity and lien in respect of that specific creditor's debt. Instead, the trust creditors can ask for accounts to be taken between trustee and the beneficiaries, and collectively receive what they are owed from any indemnity due to the trustee[161].

This point flows nicely from the idea that the trust is a "continuing institution or scheme".[162] In determining how trust assets are to be used to discharge the debts owed to trust creditors, the court arguably requires the holistic flexibility to assess the matter in the round, hence the idea that trust creditors can only initiate the subrogation mechanism "collectively". This point is consistent with the majority's analysis in *Investec II*, that trustees are part of a "common enterprise".[163] Giving trust creditors individual access to the trust assets would arguably be inconsistent with that vision and the court's overall supervisory jurisdiction over the administration of the trust.[164]

That said, if English law were to be reformed[165], that would also not be inconsistent with a scheme-based analysis. Were trust creditors to be individually given direct access to the assets held on trust, without having to be subrogated to the rights of indemnity of a trustee, this would not be inconsistent with the scheme-based analysis. As emphasised in

[161] Televantos, LQR, 2025 (n 65) 578 – 579.
[162] *Investec II* (n 10) [256].
[163] *Investec II* (n 10) [254].
[164] See analysis in Chapter I.II.C.ii.
[165] There have been suggestions to reform English law so as to give trust creditors direct access to trust assets: *Trust Law Committee, Rights of Creditors Against Trustees and Trust Funds (1998)*.

Chapter I.II.A, different jurisdictions will operationalise their integrity commitment in their own ways, consistently with their legal traditions and wider policy objectives.

Conclusion

This chapter has shown that the current rules operating in English law, namely that the trust assets are unavailable to meet the claims of the trustee's personal creditors, as well as the rules on trustee indemnities, are given a clear justification on the scheme-based analysis. Conversely, the analyses that the thesis resists (equitable ownership and rights against rights) struggle to account for the rules operating in this area. The dual patrimony/dual estate analysis, as seen in Chapter I.II.C.ii, struggles to provide a justification for the insulation of trust assets from the personal creditors of the trustee, because it only states conclusions rather than providing a normative rationale that can explain such features of the law. Furthermore, as the analysis in this chapter has shown, the dual patrimony/dual estate analysis fails to accurately capture the actual content of the rules operating in this area.

Chapter V: Proprietary Claims

Section I: Introduction and the basic rules

A key feature of the trust is that misapplied trust assets may be claimed from the recipient and returned to the trustee or a newly appointed one.[1] In *Byers v Saudi National Bank*[2], the Supreme Court said that the equitable proprietary claim depends on the beneficiary's interest continuing to attach to the misapplied trust asset.[3] As will be seen in Chapter VI, Lord Briggs (with whom Lords Hodge, Leggatt and Stephens agreed) described the personal claim in knowing receipt as ancillary to the equitable proprietary claim.[4] Furthermore, it is a key feature of the trust that if the trustee substitutes trust assets in an unauthorised transaction, the substitute asset may become subject to the terms of the trust in the hands of the trustee.[5] If a third-party receives an asset that represents the traceable proceeds of rights initially held on trust, the third-party may be required to transfer that substitute asset into the trust fund.[6]

A distinction is drawn between following, tracing and claiming.[7] Where T transfers title to a car held on trust to D, it is possible to follow the right to the car in the hands of D. Where T transfers the right to the car to D in return for title to a painting, it is possible to say that the right to the painting represents a traceable substitute to the right initially held on trust (the right to the car). The act of claiming is to say that the right in the hands of T or D is not

[1] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) (*Westdeutsche*) 705; *Arthur v Attorney General of the Turks & Caicos Islands* [2012] UKPC 30 [34].
[2] [2023] UKSC 51, [2024] AC 1191 (*Byers*).
[3] *Byers* (n 2) Lord Briggs [42] [69]; Lord Burrows [160]—[165].
[4] *Byers* (n 2) [42].
[5] *Foskett v McKeown* [2001] 1 AC 102 (HL) (*Foskett*).
[6] *Foskett* (n 5).
[7] Lionel Smith, *The Law of Tracing* (Clarendon Press 1997) (Smith, Tracing); the distinction is endorsed in *Foskett* (n 5) 127–129.

at T or D's unfettered free use[8] and so T or D is under the core scheme duty.[9] A classic statement of following, tracing and claiming is given by Lord Millett in *Foskett v McKeown*[10]:

> Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old … Tracing is also distinct from claiming.

These key features of the trust – the possibility of laying claim to the misapplied trust asset or its traceable proceeds – are best explained on the scheme-based analysis, rather than the competing models of equitable ownership and rights against rights. It will be seen that proponents of an unjust enrichment explanation of tracing have also been closely associated with a beneficial ownership model of the trust.[11] This chapter will therefore also discuss attempts to justify tracing rules in the wider law of unjust enrichment.

Rather than sourcing these features in the persistence of proprietary rights or rights against rights, the chapter argues they are rooted in the law's commitment to the integrity of the scheme. Proprietary claims and tracing are not sourced in the persistence of rights across assets, but rather in the law's technique for maintaining the integrity of a scheme across substitutions. What persists, then, is scheme-defined authority[12] across substitutions.

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[8] For analysis, see Chapter II.
[9] For analysis, see eg Chapter I.II.A.
[10] *Foskett* (n 5) 127–128.
[11] See analysis in eg Ben McFarlane, 'Property and Equity' in William Day and Julius Grower (eds), *Borderlines in Private Law* (Oxford University Press 2024) 171, where McFarlane criticises Birks' equitable ownership model of the trust. As seen in the analysis in Section II.II below, Birks has attempted to understand the tracing rules as sourced in unjust enrichment principles.
[12] See analysis in Chapter I.I.B.

The role of the chapter is therefore to source the existence of proprietary claims to misapplied trust assets or their traceable proceeds in an integrity commitment to the scheme. Section II highlights the problems with competing analyses to explain these rules, including an unjust enrichment analysis. Section III explains how the scheme-based analysis accounts for important features of the rules applying to proprietary claims.

Section II: Competing Models

Perhaps the clearest difficulty for both the beneficial ownership and rights-against-rights analyses is that neither can explain why the law permits the recovery of misapplied trust assets or their traceable proceeds where no person holds an equitable proprietary right, or a right against a right, in those assets. The paradigm example is the charitable purpose trust, but the same difficulty arises in non-trust schemes, such as deceased estates, where recipients may likewise be compelled to restore the very misapplied scheme assets or their traceable substitute despite the absence of any identifiable beneficial owner or rights-against-rights structure.

I. Equitable ownership

A. *Byers v Saudi National Bank*

i. Facts, Reasoning and Result

Title to shares was vested in a trustee on trust for the beneficiary. The shares were in a Saudi Arabian company and thus located for conflict of laws purposes in Saudi Arabia, a

jurisdiction that does not recognise the institution of the trust. The trust was governed by Cayman Islands law, which was treated as materially identical to English law on the issue of knowing receipt for the purposes of the appeal.[13] The shares were transferred to the defendant in breach of trust. It was accepted – for the purposes of the appeal – that the defendant had sufficient knowledge of the breach, for the purposes of a knowing receipt claim.[14] The issue was whether the defendant could be liable in knowing receipt, despite the defendant having received clean title under the rules of the *lex situs*.

Lord Briggs in *Byers* described the personal claim in knowing receipt – discussed further in Chapter VI, Section II – as ancillary to the equitable proprietary claim.[15] According to the reasoning of the Justices, in a case such as *Byers* (where there is a beneficiary of the trust), the ability to lay claim to specific misapplied trust assets or their traceable proceeds depends on the misapplied trust asset continuing to be burdened by the equitable proprietary right of the claimant beneficiary. *Byers* is an example of the judges favouring an equitable ownership model for understanding the trust (where there is a beneficiary of the trust) and some of its key features:

> [T]he continuing equitable beneficial owner [is enabled] to recover the trust property where it has passed into the hands of someone other than the trustee, without the equitable interest having been overreached or overridden.[16]

Where the equitable proprietary right has been extinguished by the facts of the transaction, it is not possible to claw those specific assets back from the recipient:

[13] *Byers* (n 2) [13].
[14] *Byers* (n 2) [14].
[15] *Byers* (n 2) [42].
[16] *Byers* (n 2) [42].

The extinction or overriding of a proprietary equitable interest by the time when the recipient receives the property defeats a proprietary claim.[17]

For the Supreme Court, the ability to recover misapplied trust assets therefore depends on a continuing equitable proprietary right and the proprietary claim is primary, whereas the personal claim in knowing receipt is derivative or ancillary to that proprietary claim.[18] Where the equitable proprietary interest is extinguished by the facts of the conveyance to the defendant, neither the equitable proprietary claim nor a personal claim in knowing receipt is available against that defendant.[19]

ii. Problems

First, an immediate problem with the reasoning of the court is that it is too narrow: it excludes cases where proprietary claims may be initiated and yet where there is no individual with equitable proprietary rights, as with charitable purpose trusts[20] and deceased estates. The court therefore risks mistaking a contingent feature (an individual endowed with a beneficial interest) for a necessary condition or overarching rationale for a key feature of the trust.

Second, the reasoning seems to confuse title-based reasoning with an overarching normative structure. The judgment is replete with reference to "clean title"[21], "overriding"[22]

[17] *Byers* (n 2) [6].
[18] For analysis of the personal claim in knowing receipt, see Chapter VI, Section II.
[19] A dishonest assistance claim may be available.
[20] See eg *A-G v Plymouth Corp* (1845) 9 Beav 67, 50 ER 268 (*Plymouth Corporation*).
[21] *Byers* (n 2) [11].
[22] *Byers* (n 2) [6].

and "extinguishment".[23] This proprietary language does not explain *why* the claim arises. The court assumes that because claims track equitable proprietary title, they must be explained by that title. As argued in Part III of this chapter, the better explanation for these proprietary claims is that rights have been appropriated to a scheme and that these proprietary claims vindicate the law's commitment to the integrity of that scheme, rather than equitable ownership.

Third, the Supreme Court's analysis does not expressly address and so struggles to explain, why the trustee can initiate proprietary claims.[24] If the claim is rooted in the beneficiary's equitable proprietary rights, the trustee's standing[25] to initiate the same claims as the beneficiary is conceptually challenging to explain.[26] As will be argued in Chapter VII, standing is structured with reference to the law's commitment to the integrity of the scheme, rather than equitable ownership of assets. As seen below in the context of *Foskett* and tracing, the Supreme Court's analysis in *Byers* also struggles to account for the tracing rules. Tracing operates across substitutions and mixed funds.[27] These features are difficult to reconcile with a strict proprietary base. As argued in Section III of this chapter, tracing is better understood as a technique for scheme-enforcement, rather than a vindication of equitable proprietary rights.

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[23] *Byers* (n 2) [170].
[24] See eg *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072 (PC) 1074; *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91 [32], [76]-[77]; *Young v Murphy* [1996] 1 VR 279; *Eden Refuge Trust v Hohepa* [2012] NZCA 124; *Shovlin v Site Civils and Surfacing Ltd* [2024] EWCA Civ 585 (where the claim failed on the facts).
[25] Standing is discussed in Chapter VII.
[26] On one view – discussed in Chapter VII, Section II – it might be said that the trustee acts as a representative, enforcing the beneficiary's rights when initiating these claims. However, that does not explain the standing of trustees of eg a charitable purpose trust, where the trustee cannot be seen as representing any beneficiary's equitable proprietary rights.
[27] eg *Re Diplock* [1948] Ch 465 (CA).

Fourth, the Supreme Court's analysis struggles to convincingly explain why misapplied company assets can be clawed back from the recipient. The Supreme Court explained the availability of proprietary recovery in cases involving the misapplication of company assets by treating directors, for this limited purpose, as trustees of company assets under their control. In the view of Lord Briggs**,** the trust only arises when the misapplication of company property occurs.[28] On this basis, where company assets are transferred in breach of the directors' fiduciary duties to a recipient who receives them with the requisite knowledge, the recipient may become subject to the same equitable proprietary claims as a recipient of trust property transferred in breach of trust.[29] The Court considered that the company may therefore pursue either an equitable proprietary claim (where the assets remain identifiable) or, if the proprietary remedy has become unavailable, a personal claim in knowing receipt, provided the requirements of that cause of action are satisfied.[30]

Ho and Mitchell[31] argue that the Supreme Court's attempt in *Byers* to reconcile the company authorities with the requirement of a "continuing equitable interest"[32] is unpersuasive because it requires the company to possess an equitable proprietary interest which, on orthodox principles, it never had prior to the impugned transfer.[33] They observe that a company is the full beneficial owner of its own assets and therefore does not possess a separate equitable proprietary interest in those assets before the directors' breach.[34] They further contend that neither Lord Briggs' suggestion that the company's equitable interest

[28] *Byers* (n 2) [61].
[29] *Byers* (n 2) [58].
[30] *Byers* (n 2) [196].
[31] Lusina Ho and Charles Mitchell, 'Knowing Receipt, Equitable Proprietary Rights, and Duties of Due Administration' (2026) 89 MLR 278 (Ho and Mitchell).
[32] *Byers* (n 2) [16].
[33] Ho and Mitchell (n 31) 286.
[34] Ho and Mitchell (n 31) 284.

remained[35] with it after the transfer[36], nor Lord Burrows' suggestion that the directors became constructive trustees immediately before the transfer[37], fit either the company cases or the orthodox analysis in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[38], since any constructive trust in favour of the company could arise only upon the recipient's receipt of the assets rather than beforehand.[39]

B. *Foskett v McKeown*: Facts, reasoning, result

i. Facts and the majority's analysis

The claimant beneficiaries had paid monies into a development scheme in Portugal. The monies were held on express trust by Murphy in their favour. Murphy misappropriated part of the trust fund and used £20,440 to pay two premiums on a life insurance policy he had taken out earlier. He had already paid the first two premiums from his own money.[40] He later settled the policy for the benefit of his wife, mother and children. When he committed suicide in 1991, the insurers paid just over £1 million under the policy.

The claimant beneficiaries claimed against the policy proceeds. At first instance, they recovered 53.46% of the proceeds, calculated with reference to the extent to which the trust monies had contributed to the investment value of the life insurance policy at Murphy's

[35] *Byers* (n 2) [60].
[36] Ho and Mitchell (n 31) 286.
[37] *Byers* (n 2) [172]–[188].
[38] *Westdeutsche* (n 1) 706: In *Westdeutsche*, Lord Browne-Wilkinson explained that a person who is solely entitled to the full beneficial ownership of property at law does not simultaneously possess a separate equitable interest in that property, because, absent a separation of legal and equitable title, the legal title carries with it all beneficial rights and it is therefore 'meaningless' to speak of the owner retaining an equitable interest that never previously existed.
[39] Ho and Mitchell (n 31) 285–286, citing *Westdeutsche* (n 1), 706.
[40] The source of one of the premiums remained disputed.

death. The 53.46% figure awarded at first instance by Laddie J was not calculated by reference to the proportion of premiums paid with trust money. It was calculated by reference to the extent to which the trust money had contributed to the investment value (the unit-linked element) of the policy at the date of Murphy's death — that is, the surrender value of the policy attributable to the trust funds' contributions, expressed as a proportion of the total death benefit paid.

The majority in the Court of Appeal disagreed with the first instance decision and found instead that the claimant beneficiaries were entitled to a lien or charge over the proceeds, securing the amount of the misapplied premiums, plus interest, rather than a proportionate claim to the proceeds. The majority of the House of Lords, by contrast, restored the order made at first instance. The claimant beneficiaries were entitled, at their election, either to a lien for the misapplied trust monies or to a proportionate share of the policy proceeds. Since the beneficiaries of the life insurance policy were volunteers, the majority held that the claimant beneficiaries were entitled to claim a proportionate share.[41] Lords Steyn and Hope dissented on this point, although all members of the judicial committee rejected the cross-appeal that would have denied even the lien.[42]

The majority view was principally developed by Lord Millett, with Lords Browne-Wilkinson and Hoffmann giving concurring judgments. Lord Browne-Wilkinson stressed that the claim was not sourced in unjust enrichment principles, nor on judicial discretion. Rather, the successful claim to the traceable proceeds was a case of "hard-nosed property rights."[43] His Lordship averred that the claimant beneficiaries' starting point was their equitable

[41] *Foskett* (n 5) 103A–B.
[42] *Foskett* (n 5) 108D–E.
[43] *Foskett* (n 5) 109.

interest in the original trust monies held on the terms of the express trust deed and that this equitable interest continued in any property which in law represented the original trust assets.[44] Lord Millett advanced a similar idea, though in slightly different language. After tracing the money through the bank accounts and into the insurance pay-outs, he said:

> Having completed this exercise, the plaintiffs claim a continuing beneficial interest in the insurance money.[45]

Lord Millett also agreed that unjust enrichment principles were not the source of the claimant's successful claim:

> The transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment.[46]

The claimant beneficiaries could not follow the money once it entered the various bank accounts or the insurer's hands. However, they were entitled to trace the original trust monies into the chose in action represented by the policy and then into the insurance proceeds.[47] The majority also rejected the idea that separate sequential payments prevented *pro rata* sharing. Lord Browne-Wilkinson accepted Lord Millett's analogy with mixing and bank accounts: when trust monies and the trustee's own monies contribute to the value of a chose in action, each contributor has a rateable interest in the resulting asset.[48] Lord Browne-Wilkinson reasoned that, immediately before the misapplied premium was paid, the subject-

[44] *Foskett* (n 5) 108G–H.
[45] *Foskett* (n 5) 127.
[46] *Foskett* (n 5).
[47] *Foskett* (n 5) 127C–D.
[48] *Foskett* (n 5) 110B–D.

matter of the trust in favour of the children (the settlement made by Murphy in December 1989 for the benefit of, *inter alia*, his three children) was the chose in action under the policy. When the errant trustee paid the premium out of the claimant beneficiaries' trust monies, he wrongfully mixed the value of the premium with the value of the policy. Thereafter, the same chose in action reflected both contributions. Therefore, the policy and its proceeds belonged rateably to the children and the purchasers according to their respective contributions.[49]

The fourth and fifth premiums were the annual payments of £10,220 made in November 1989 and November 1990 respectively under the whole life policy effected by Murphy with Barclays Life in November 1986, which Murphy paid not from his own funds but from moneys misappropriated in breach of trust from the purchasers' trust fund[50] of which he and his associate Deasy were trustees. A central argument advanced by the respondents was that the fourth and fifth premiums did not in fact increase the value of the death benefit, because the policy would still have been paid out when Murphy died.[51] The majority rejected this argument. At the time the premiums were paid, the future was unknown. Had Murphy lived longer, those premiums might have been crucial in keeping the policy in force. Therefore, beneficial ownership of the proceeds had to be fixed when the premiums were paid and not with hindsight.[52]

The majority of the House of Lords in *Foskett* therefore rejected the causation-based approach to tracing advanced by the Court of Appeal, insisting instead on a purely transactional account of attribution. For Lord Millett, the operative question was never

[49] *Foskett* (n 5) 110D–F.
[50] *Foskett* (n 5) 107C–D.
[51] That was the case, as things turned out and that is why it could be said that there was no unjust enrichment as a result of the payments of the fourth and fifth premiums.
[52] *Foskett* (n 5) 111A–C.

whether the misappropriated premiums had produced — in any counterfactual or empirical sense — the death benefit received by the children, but rather whether the death benefit was *attributable* to all the premiums or only to some of them: the question was "one of attribution not causation".[53] This distinction had direct doctrinal force, because Hobhouse LJ's causal analysis in the Court of Appeal — which had denied the purchasers a proportionate share on the ground that the fourth and fifth premiums were not needed to keep the policy on foot — was condemned by Lord Millett as "a category mistake derived from the law of unjust enrichment".[54] The majority's position was that the death benefit "represents the proceeds of realising the policy, and the policy in turn represents the product of all the premiums"[55], so that each premium was implicated in the chose in action as a matter of transactional structure, not empirical contribution.

This transactional logic was confirmed by Lord Millett's treatment of the insurance contract itself: the policy was "an entire contract, not a contract for a year with a right of renewal" and its benefits were expressly payable "in consideration of the payment of the first premium already made and of the further premiums payable"[56], meaning the causal question — whether the same sum would have been paid irrespective of the later premiums — was simply irrelevant to the identification of the traceable proceeds.

Lord Browne-Wilkinson concurred, emphasising that the "beneficial ownership of the policy, and therefore the policy moneys, cannot depend upon how events turn out" and that

[53] *Foskett* (n 5) 137G.
[54] *Foskett* (n 5) 137F.
[55] *Foskett* (n 5) 137G–H.
[56] *Foskett* (n 5) 133G–H.

"the rights of the parties in the policy, one way or another, were fixed when the relevant premiums were paid when the future was unknown".[57]

The rejection of causation thus tracked a deeper methodological commitment shared across the majority: that tracing is an exercise in identifying value as it moves through substitutions, not in establishing what losses or gains would have occurred in a counterfactual world and that to permit causal reasoning to limit the beneficiary's claim would be to import the logic of unjust enrichment into what is, properly understood, the vindication of a subsisting property right.

ii. Minority's analysis

Lord Steyn and Hope agreed that the claimant beneficiaries could trace into the premiums and recover them from the trustees of the life insurance policy with interest.[58] Their disagreement with the majority centred on whether that tracing justified a proprietary share in the death benefit itself. Lord Steyn averred:

> In truth tracing is a process of identifying assets: it belongs to the realm of evidence. It tells us nothing about legal or equitable rights to the assets traced.[59]

His Lordship endorsed Birks' separation of tracing from claiming[60]: one first identifies the substitute asset and only then asks what rights, if any, the claimant can assert in relation

[57] *Foskett* (n 5) 111B–C.
[58] *Foskett* (n 5) 113F, 119G–H.
[59] *Foskett* (n 5) 113.
[60] Peter Birks, 'The Necessity of a Unitary Law of Tracing', in Ross Cranston (ed), *Making Commercial Law, Essays in Honour of Roy Goode* (Clarendon Press, 1997).

to it.[61] Lord Steyn emphasised that the children did not receive an additional benefit from the fourth and fifth premiums.[62] Their entitlement to the death benefit derived from their pre-existing entitlement under the policy that had been settled on trust for them.[63] This is why he thought the claimant beneficiaries should recover the premiums with interest, but no more.[64] Lord Steyn also accepted the analogy made by the majority of the Court of Appeal: if trust money is invested in improving another's house, the claimant is ordinarily limited to a charge, not to co-ownership of the house.[65] He thought the same applied to the facts of the appeal.[66] Lord Hope adopted a similar strategy.[67]

C. *Foskett v McKeown*: problems and commentary

i. Too narrow in focus: the problem of trusts with no beneficiaries

As seen, the majority explains the claim to the traceable proceeds with reference to the purchasers' pre-existing equitable proprietary interest and the way it continues into substitutes. An obvious problem with this argument is that it assumes trusts with beneficiaries who can be understood as holding equitable proprietary interests. But claims of this sort also arise across structures where there are no beneficiaries or individuals with equitable proprietary rights, such as the charitable purpose trust and deceased estates.[68] Belle, in his DPhil thesis[69], makes this point expressly. Therefore, *Foskett* risks mistaking a feature of one

[61] *Foskett* (n 5) 113C–E.
[62] *Foskett* (n 5) 112G.
[63] *Foskett* (n 5) 112G–H.
[64] *Foskett* (n 5) 115F–G.
[65] *Foskett* (n 5) 113G–114A.
[66] *Foskett* (n 5) 114A–B.
[67] *Foskett* (n 5) 122G–123A.
[68] *Freeman v Fairlie* (1817) 3 Mer 29, 36 ER 12 (*Freeman*). See too Hui Jing, 'The Concept of Beneficial Ownership in Express Trust: A Necessity?' (2025) 18 J Equity 131.
[69] Anirudh Belle, *Claims with Respect to Pre-Existing Property Rights: A Search for Principle and Coherence* (University of Oxford DPhil thesis, 2024) (Belle), ch 5.

case (a trust with beneficiaries) for a general justificatory basis for claims to traceable substitutes.

Another problem with the majority's analysis is that – as pointed out by *Hayton, McFarlane and Mitchell*[70] – reliance on the beneficiary's equitable proprietary interest or ownership cannot be a source of justification for a claim *to the traceable proceeds*. The right to the substitute cannot literally be the same right as the right to the original trust property, since a property right is tied to specific subject-matter and cannot be detached from one asset and reattached to another.[71] If the claim is made against a new asset, it requires a different explanation.

As Birks explains[72], the so-called "leech theory" — under which a single proprietary right detaches itself from the original *res* and reattaches to any passing substitute — is incoherent, because the very idea of a beneficial interest floating independently of any thing cannot be sustained[73]; and the theory is in any event refuted by the fact that the right brought down on the substitute is often different in content from the right in the original, changing, for example, from sole ownership to co-ownership in cases of mixed substitution.[74] It follows that what the claimant acquires – in Birks' view – against the substitute is a new proprietary right, generated by a distinct causative event — non-consensual substitution — rather than the continuation of the original right in new subject-matter.[75]

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[70] Charles Mitchell, Ben McFarlane and Jessica Hudson, *Hayton, McFarlane and Mitchell: Text, Cases and Materials on Equity and Trusts* (15th edn, Sweet & Maxwell 2022) ((Hayton, McFarlane and Mitchell) 15–147.
[71] Belle (n 69); James Penner, *The Idea of Property in Law* (Clarendon Press 1997) chs 2–3; Ben McFarlane, *The Structure of Property Law* (Hart 2008) 23–27; Christopher Newman, 'Hohfeld and the Theory of In Rem Rights: An Attempted Mediation' in Shyamkrishna Balganesh, Ted Sichelman and Henry Smith (eds), *The Legacy of Wesley Hohfeld* (Cambridge University Press 2019).
[72] Peter Birks, 'Property, Unjust Enrichment, and Tracing' (2001) 54 *CLP* 231 (Birks, Tracing).
[73] Birks, Tracing (n 72) 244.
[74] Birks, Tracing (n 72) 244.
[75] Birks, Tracing (n 72) 245.

As Cutts argues[76], the analysis in *Foskett* is incomplete. In *Foskett*, the majority describes the result as sourced in the fact that the claimants enjoyed an initial equitable proprietary interest that could be traced into the premiums and then into the death benefit. That interest is then vindicated by the recognition of a proportionate share. However, Cutts shows that this reasoning is incomplete as it does not tell us *why* the tracing rules allowed the beneficiaries to assert a proprietary interest in the policy proceeds. To say that the old interest persists into the new asset does not explain why the law should recognise that persistence. It entails a "fiction of persistence".[77]

McFarlane's recent Current Legal Problems article also identifies problems in the reasoning animating the majority in *Foskett*.[78] His core position is that it is a mistake to treat equitable proprietary rights in the same way as direct claims to underlying resources that *prima facie* bind the world. McFarlane also shows that reasoning which makes some of the key features of the trust – such as claims to substitute assets – depend on a beneficiary's equitable proprietary interest cannot explain the wider operation of the law of trusts, because analogous claims arise where there is no beneficiary with equitable proprietary rights. If the logic of claims to traceable proceeds must extend beyond trusts with beneficiaries, then "continuing beneficial interest"[79] or "hard-nosed property rights"[80] of the beneficiary cannot be the foundational explanation:

[76] Tatiana Cutts, *The Role of Tracing in Claiming* (DPhil thesis, University of Oxford 2015) (Cutts, DPhil) 124.
[77] Peter Birks, *Unjust Enrichment* (2nd edn, OUP, 2005) (Birks, Unjust Enrichment) 34-37.
[78] Ben McFarlane, 'The Nature of Equitable Property Revisited' (2026) 79 CLP (McFarlane, CLP) IIIC.
[79] *Foskett* (n 5) 127G.
[80] *Foskett* (n 5) 109C.

> [C]laims to traceable proceeds are not limited to cases where there is a beneficiary: if A holds a right on a charitable trust, and acquires a new right through an unauthorised dealing with that initial right, A may also come under a duty in relation to that new right.[81]

Another problem with *Foskett* is that its reasoning also struggles when the law of trusts is understood in a comparative perspective. Jing – in his recent article[82] questioning the centrality of beneficial ownership in understanding the law of express trusts[83] – shows that moving away from equitable proprietary rights and instead directing attention to the due administration of the trust[84], provides a vocabulary that accounts for the rules functioning across the jurisdictions that adopt the trust. For example, civilian legal systems like Scotland[85] and Quebec[86] adopt the trust, without equitable proprietary rights or equitable ownership being concepts of their jurisdiction. Jing explains how real subrogation (a civilian concept with some similarities to tracing[87]) is a key feature of – for example – Asian trusts[88], without those jurisdictions recognising any concept of equitable ownership or equitable proprietary rights.

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[81] McFarlane, CLP (n 78) IIIC; see also Jessica Hudson, 'Equitable Ownership and Restitution of Misapplied Trust Property' (2017) 11 J Eq 245.
[82] Hui Jing, 'The Concept of Beneficial Ownership in Express Trust: A Necessity?' (2025) 18 J Equity 131.
[83] See analysis of Jing's article in relation to standing in Chapter VII.
[84] See analysis in Chapter I.C.iii.
[85] David Hayton, 'Liability of Trustees to Third Parties: The Scottish Law Commission's Proposals' (2008) 12 Edinburgh Law Review 446, 447; Kenneth GC Reid, 'Patrimony Not Equity: The Trust in Scotland' in Remus Valsan (ed), *Trusts and Patrimonies* (Edinburgh University Press 2015) 110, 116–17.
[86] Civil Code of Québec 1991, arts 1260 and 1261. See also Alexandra Popovici, 'Trust in Quebec and Czech Law: Autonomous Patrimonies?' (2016) 24 European Review of Private Law 929, 931–32.
[87] See eg Magda Raczynska, 'Parallels between the Civilian Separate Patrimony, Real Subrogation and the Idea of Property in a Trust Fund' in Lionel D Smith (ed), *The Worlds of the Trust* (Cambridge University Press 2013) 454.
[88] Masayuki Tamaruya, 'Japanese Law and the Global Diffusion of Trust and Fiduciary Law' (2018) 103 Iowa Law Review 2229, 2237–38; Ying-Chieh Wu, 'Trusts in South Korea: Towards an Independent Fund Mechanism' in Ying Khai Liew and Ying-Chieh Wu (eds), *Asia-Pacific Trusts Law: Adaptation in Context* (Hart 2023) 311, 319–20; Rebecca Lee, 'Conceptualizing the Chinese Trust' (2009) 58 International and Comparative Law Quarterly 655, 665–66; Ying-Chieh Wu, 'East Asian Trusts at the Crossroads' (2015) 10 National Taiwan University Law Review 79.

ii. The problems with the language of tracing value

Cutts criticises the tracing-value theory[89], espoused by Lord Millett in *Foskett*, which gave judicial endorsement of the ideas of Lionel Smith in his tracing monograph.[90] The idea that tracing is concerned with capturing value as it moves from one asset to the next can be criticised.[91]

First, value cannot literally move from one right to another.[92] If value means ordinary market value, the theory struggles. Where a tennis racket worth £300 is exchanged for a Rolex worth £1000, it is problematic to say that the £300 is now represented by the £1000 value. On this view, value has no abstract existence capable of moving from one right to another.

Second, even if value means exchange potential, the theory is still problematic.[93] It could be that value means not the market value, but rather the exchange potential inherent in an assignable right. On such an analysis, the continuity is sourced in a single actor using one right to acquire another. However, such a model struggles to explain several transactions, including bank transfers. In such a case, there is no single exchange by a single actor.[94] Rather, as explained by Cutts, there is a matched destruction and creation of debts across bank accounts. Therefore, the supposed continuity of "value" disappears. The example of

[89] Cutts, DPhil (n 76); see also Tatiana Cutts, "Tracing, Value and Transactions" (2016) 79 MLR 381.
[90] Smith, Tracing (n 7).
[91] James Penner, 'Value, Property, and Unjust Enrichment: Trusts of Traceable Proceeds' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009).
[92] Hayton, McFarlane and Mitchell (n 70) 15 – 013.
[93] Hayton, McFarlane and Mitchell (n 70) 15 – 014.
[94] James Edelman, 'Understanding Tracing Rules' [2016] QUT Law Review 1.

bank transfers exposes some of the weaknesses in the tracing value model. There is no transfer of any identifiable right from one person to another in such an example.

The starting point of Cutts' DPhil thesis is that the language of tracing value creates an appearance of conceptual unity where none exists.[95] She argues that the idea that one asset stands in place of another discharges no real function in the actual operative facts that establish claims.[96] Furthermore, Cutts contends that searching for a continuous stream of value distorts the notion of transactional link and that the identification and characterisation of transactions depend fundamentally on intention. As seen in the analysis above, it is not clear that in *Foskett* the misapplication of the original trust fund contributed to the value of the defaulting trustee's rights, as the trustee would have had those rights anyway under the death policy, but there is a transactional link nonetheless, which justifies the beneficiaries' claim succeeding in the House of lords.

In agreement with Cutts, this thesis supports the argument that the tracing-value model is conceptually unstable, treats tracing as more explanatory than it really is and obscures the need to identify the reason why a duty can be imposed against the holder of a substitute asset.[97] Cutts is persuasive in her argument that the language of tracing value is misleading as it encourages the false idea that once the claimant can trace, they can also claim. Her objection is that this model fails to identify the *reason* required to justify a claim to the substitute asset.[98]

[95] Cutts, DPhil (n 76) 16–17.
[96] Cutts, DPhil (n 76) 17; see also 91–105.
[97] Cutts, DPhil (n 76) 213–214.
[98] Cutts, DPhil (n 76) (Abstract), 213–214.

II. Unjust enrichment

A. Birks' model and criticisms of *Foskett*

An influential critique of *Foskett* has been Birks' model of unjust enrichment[99], arguing that claims to traceable proceeds are justified to prevent the enrichment of the defendant at the expense of the claimant. His starting point is methodological. Property and unjust enrichment are not rival categories. Rather, unjust enrichment is an event and property, in the sense of a property right, is a response to an event. It is therefore a mistake, according to Birks, to ask whether a claim is proprietary or brought in unjust enrichment, as though these were mutually exclusive categories. He calls this a categorical error. His key claim is that proprietary rights (for Birks, this includes a beneficial interest under a trust) can arise from unjust enrichment.[100] For Birks, property rights must be sourced in their causative events, of which unjust enrichment is an example. According to Birks, tracing is not itself a source of rights. It is a process of identification.[101] For Birks, although tracing identifies whether one asset is the substitute of another, it does not tell you whether the claimant enjoys a right to that substitute. That depends on whether there was a proprietary base in the original.[102]

Birks argues that unjust enrichment may be a source of proprietary rights, but not always. He distinguishes, for example, between initial failure of basis and subsequent failure of basis. Where the enrichment was never freely at the recipient's disposition, a proprietary

[99] Birks, *Unjust Enrichment* (n 77).
[100] Peter Birks, 'Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?' (1997) 54 NZLR, 631 (Birks, Categorical Truths).
[101] Birks, *Unjust Enrichment* (n 77) 199.
[102] Birks, *Unjust Enrichment* (n 77) 185.

response can ensue; whereas if the enrichment was freely at the recipient's disposition before the basis failed, there can be no proprietary response.[103] He went as far as arguing that:

> The law's best hope of coherence is to accept the proposition that a proprietary interest is generated by every initial failure of basis.[104]

For Birks, proprietary rights arising from unjust enrichment are vulnerable to a change of position defence. Such vulnerability is a hallmark of what he calls "restitutionary property rights".[105]

Birks does not criticise the result in *Foskett*, but rather the reasoning and conceptual structure.[106] Birks' criticism of *Foskett* is that the House of Lords elected for a fiction that the original beneficial interest persisted into the substitute, rather than openly recognising that unjust enrichment can be the source of a proprietary response. On Birks' view, the "continuing beneficial interest" position favoured by Lord Millett is not a satisfactory explanation: it is a fiction deployed to avoid conceding that unjust enrichment produces proprietary consequences. Birks is also clear that the right to the substitute asset is to be understood as a power, rather than an immediately vested continuing beneficial interest.[107] For Birks, the proprietary response is sourced in unjust enrichment and the tracing rules identify substitutes to which that proprietary response can attach.

[103] Birks, *Unjust Enrichment* (n 77) 182.
[104] Birks, *Unjust Enrichment* (n 77) 192.
[105] Birks: Categorical Truths (n 100) 632.
[106] Birks, *Unjust Enrichment* (n 77) 204.
[107] Birks, *Unjust Enrichment* (n 77) 198.

B. Problems with the unjust enrichment model

As argued by Belle[108], when a claimant asserts a right to a substitute asset, that right is necessarily a new right, not the same as the old one.[109] Unjust enrichment is concerned with reversals of transfers[110], whereas tracing involves the recognition of a new right in new subject-matter. Belle's central claim is that the reasons grounding the trustee's duty in relation to the original asset continue to justify duties in relation to the substitute.[111] For Belle, this is fatal to an unjust enrichment analysis, because unjust enrichment relies on new reasons[112] (enrichment, unjust factor), whereas Belle explains that the justification for the claim to the substitute asset derives from existing reasons continuing.[113] An unjust enrichment explanation assumes that the claimant's right to the substitute asset arises because the defendant has been enriched at the expense of the claimant. But Belle says that this is not what is happening. Rather, the claim to the substitute asset arises because the structure of duties attaching to the original right persists.[114] For Belle, tracing claims are not about reversing enrichment, but about the continuity of justificatory reasons across substitutions of rights.[115]

Belle's argument highlighting the importance of the continuity of justificatory reasons develops ideas seen in the existing scholarship. For example, Agnew and McFarlane say:

[108] Belle (n 69).
[109] Belle (n 69) 278–279, 509.
[110] *Investment Trust Companies (in liq) v HMRC* [2017] UKSC 29, [2018] AC 275 [60].
[111] Belle (n 69) 279, 285–286, 293–299.
[112] Belle (n 69) 281.
[113] Belle (n 69) 279, 285–286, 293–299.
[114] Belle (n 69) 279, 285–286, 293–304, 509.
[115] Belle (n 69).

> [W]hatever reason justifies T or C being under a duty to B in relation to the initial trust property also justifies that party's being under a duty to B in relation to its traceable proceeds.[116]

Similarly, McFarlane and Stevens argue[117] that a claim to a substitute asset is not justified by any new reason arising at the point of substitution. Rather, once the trustee is under a duty not to use the original right for their own benefit, that original justificatory reason continues to operate even after the original asset has been exchanged. Where perfect compliance with the original duty has become impossible because of the unauthorised substitution, equity requires the trustee to do the "next best thing"[118] to perfect compliance by holding the substitute right on the same trust. No fresh justification – such as unjust enrichment – is required; the original reason supporting the trustee's duty is itself sufficient to require that the substitute asset be subjected to the same duties.

Cutts also exposes a conceptual problem with the unjust enrichment analysis.[119] The claimant may elect to abandon their claim to the original asset in order to claim the proceeds.[120] However, since the claimant chose to give up the title, they cannot then say that the defendant's acquisition is unjust.[121] Furthermore, although Birks criticises Lord Millett's "continuing beneficial interest" language, his own account continues to be framed around a beneficiary focussed, equitable proprietary rights logic. As Belle suggests, this model is too

[116] Sinead Agnew and Ben McFarlane, 'The Nature of Trusts and the Conflict of Laws' (2021) 137 LQR 405 307.
[117] Ben McFarlane and Robert Stevens, 'What's Special about Equity? Rights about Rights' in Dennis Klimchuk, Irit Samet and Henry Smith (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020) (McFarlane and Stevens, Special).
[118] McFarlane and Stevens, Special (n 117) 204.
[119] Cutts, DPhil (n 76).
[120] *Foskett* (n 5) 127–130.
[121] *Foskett* (n 5) 140.

rooted in structures with beneficiaries and cannot explain the operation of tracing in the context – for example – of the charitable purpose trust.[122]

III. Rights against rights[123]

A. The relational model: summary

The precise nature of the arguments made by the rights against rights exponents in the realm of proprietary claims and tracing can be seen in both the initial co-authored article by McFarlane and Stevens[124] and in two co-authored articles by Agnew and McFarlane.[125] For McFarlane and Stevens, the fact that a recipient of misapplied trust assets is liable to give up the specific misapplied rights received, is sourced – at least for trusts with beneficiaries – in the rights against rights of the beneficiary.[126] They also explicitly address tracing:

> Tracing can be used by B to identify a particular right as a product of another right. Its usefulness to B arises where it allows B to acquire a right. Tracing can almost never be used to support B's acquisition of a right against a thing. However, in many cases, tracing can be used to support B's acquisition of an equitable property right.[127]

[122] Belle (n 69), 278.
[123] For analysis of this model, see Chapter I.I.B.ii.
[124] Ben McFarlane and Robert Stevens, "The Nature of Equitable Property" (2010) 4 J Eq 1 (McFarlane and Stevens).
[125] Ben McFarlane and Robert Stevens, Special (n 117); Sinead Agnew and Ben McFarlane, 'The Paradox of the Equitable Proprietary Claim' in Ben McFarlane and Sinead Agnew (eds) *Modern Studies in Property Law, vol X* (Hart, 2019) (Paradox).
[126] McFarlane and Stevens (n 124), 20.
[127] McFarlane and Stevens (n 124) 20.

McFarlane and Stevens deploy *Attorney-General (Hong Kong) v Reid*[128] as an example: tracing showed that the freehold title to land was the traceable product of the initial bribe and given the bribe was itself held in circumstances that made A's holding of the bribe subject to a duty to B, the substitute right could also be brought under that structure.

In their piece on the "paradox" of the equitable proprietary claim, Agnew and McFarlane attempt to solve the supposed mystery of how equitable proprietary rights can be "proprietary" and yet depend on C's conscience having been affected. Their answer is that the beneficiary's right is proprietary only in a special and limited sense. The trust's effect on third parties depends on C being in a particular relationship with B, not on some abstract depersonalised proprietary right of B.[129]

The analysis is therefore explicitly relational in nature. Some of the key features of the trust (at least those with beneficiaries) should be understood as sourced in a relationship arising between T and B (which may be replicated – in part – between C and B), that relates to specific rights.[130] They argue that B's so-called equitable proprietary claim against C is that C must give up the trust property or its traceable proceeds if C holds them in circumstances where C is subject to a duty owed to B.[131] If C no longer holds the property (for example because C has dissipated that property), the same underlying duty may support a personal claim in knowing receipt.[132]

[128] [1994] 1 AC 324 (PC).
[129] Paradox (n 125) 303.
[130] Paradox (n 125)303–304.
[131] Paradox (n 125)304.
[132] Paradox (n 125) 305; see further analysis in Chapter VI, Section II.

It is therefore important to understand that on Agnew and McFarlane's analysis, the proprietary claim to the specific misapplied trust asset or its traceable proceeds and the knowing receipt claim are two different remedial expressions of the same underlying duty (C owing B a duty that relates to a specific right).[133] C is not subjected to that duty merely by receiving the misapplied trust asset. The receipt must be coupled with knowledge of the breach.[134]

Tracing is important on the rights against rights model, as it provides some of the rules with reference to which a third-party may come under a duty in relation to specific rights. The explanation for the claim is relational and not proprietary in the "hard-nosed" sense envisaged in *Foskett*.[135] In sum, the rights against rights proponents make the following points, as they relate to the key features of proprietary claims and tracing. First, B is not an equitable owner of the asset in the ordinary sense. Instead, B has a right against T's right. Second, such a right is "persistent", rather than universally binding: it binds those who acquire rights derived from T's right. Third, tracing identifies a new right as a substitute for the old right and through these rules B's right can be extended to substitutes. Fourth, proprietary claims against third-parties depend on conscience and knowledge: C is not immediately bound upon receipt, but only if their conscience has been affected while C still holds the original misapplied right or its traceable proceeds. Fifth, proprietary claims and knowing receipt are two remedial responses that give effect to the same underlying relationship: they are different means of giving effect to the same duty of C owed to B.

[133] Paradox (n 125).
[134] Paradox (n 125) 306.
[135] Paradox (n 125) 416–417.

B. Rights against rights: problems

Although the rights against rights exponents reject the language of equitable ownership, they still make the beneficiary's right the core explanatory tool for understanding the key features of the trust with beneficiaries. Even where the trust has beneficiaries, it is problematic to deploy B's position in understanding the trust's key features.[136] The rights against rights model is less persuasive once one moves beyond private trusts with beneficiaries. Although initially concerned with describing the rights of parties said to have equitable property, in the co-authored articles between Agnew and McFarlane, the authors are providing a more general understanding for the trust. Indeed, one of their articles is entitled "the nature of the trust and the conflict of laws" and they suggest two definitions of the trust, both of which are centred on the existence of a beneficiary.

It is also possible to argue that Agnew and McFarlane's model mistakes a potential relational manifestation for a deeper underlying explanatory structure. Even where there are beneficiaries, it does not follow that the rights of the beneficiary are the source of the key features associated with the trust. Instead, the interest of the beneficiary can be understood as a Level 3 doctrinal manifestation[137] of a deeper structure: rights appropriated to a scheme. Their model identifies important phenomena associated with the trust – eg proprietary claims and tracing – but they arguably invoke the wrong explanatory centre: for them, B's right against T's right explains the persistence of the trust, tracing and third-party effects.

[136] See analysis in eg Chapter I.II.C.iv.
[137] See examination of the levels analysis in Chapter I.II.A.

Furthermore, Agnew and McFarlane's articles ascribe significant weight to C's conscience and knowledge. This may describe particular features of doctrine, such as knowing receipt.[138] However, it risks transforming the existence of the proprietary claim against C as also depending on facts about C's mental state. Although conscience may be part of the law's machinery in determining when a third-party recipient of misapplied trust assets is under a duty not to use an asset for their unfettered free use[139], conscience does not explain why those constraints exist in the first place. On this basis, Agnew and McFarlane's articles may be stronger as an account of third-party enforceability conditions, but weaker as an account of the nature of the trust itself. This suggests that the deep structural reason for personal and proprietary claims against recipients is something other than conscience and Hohfeldian webs of right-duty relations.

On the scheme-based analysis, C's knowledge does play an important role, but not the foundational role assigned to it in relational accounts. Knowledge is not what explains *why* the recipient's rights are constrained; those constraints arise because the rights have already been appropriated to a scheme whose integrity the law is committed to maintaining. Rather, C's knowledge forms part of the conditions under which those pre-existing constraints become enforceable against a particular recipient by way of particular doctrines.

This conclusion follows from the levels analysis.[140] At Level 3, the law gives effect to its integrity commitment through a range of doctrinal mechanisms – including proprietary claims, tracing, knowing receipt, dishonest assistance and (potentially) strict liability personal claims[141] – which specify the conditions upon which particular legal consequences arise. Knowledge therefore belongs at the third level of analysis: it is relevant to the operation of

[138] See analysis in Chapter VI, Section II.
[139] For explanation of this terminology, see Chapter II.
[140] See analysis in Chapter I.II.A.
[141] See analysis in Chapter VI, Section III.

certain doctrines, but not to the existence or normative foundation of the constraints themselves. This explains why conscience occupies a central place in some doctrines, such as knowing receipt[142], whilst strict liability proprietary claims and strict liability personal claims can arise independently of any affected conscience. The recipient's state of mind therefore determines whether particular legal consequences attach to their receipt or retention of scheme assets, but it does not explain why those assets are subject to constraints in the first place. Knowledge is thus an enforceability condition rather than an explanatory foundation. The scheme-based analysis therefore preserves what is valuable in the conscience-based literature[143] whilst relocating conscience from the foundation of the trust to one part of the law's remedial and enforcement machinery.

On tracing specifically, the rights against rights model identifies a new right as the substitute for an initial right so that B's right against T's right can extend to the new asset. In formulating a justification for why that should happen, Agnew and McFarlane answer that the same reason that justified the original duty grounds the duty in relation to the substitute.[144] This is a useful argument. However, as explained in Section III of this chapter, that position looks very similar to a continuity of the duty theory, rather than a pure rights-against-rights model. Once the argument is made that the same reason justifies the new duty, the real explanatory work is being done not by B's right against A's right, but rather the continuing normative structure governing the trustee's holding of the right. That structure is then capable of applying more broadly, to trusts without beneficiaries, such as a charitable trust. As will be see below, this analysis is much closer to a scheme-based analysis, rather than a relational, beneficiary-centric formulation. Therefore, Agnew and McFarlane's best insights point beyond rights-against-rights. As argued below, the deeper explanation lies in

[142] *BCCI (Overseas) Ltd v Akindele* [2001] Ch 437 (CA) 455.
[143] eg Irit Samet, *Equity: Conscience Goes to Market* (Oxford University Press, 2018).
[144] Paradox (n 125) 307.

the continuation of the scheme that constrains the recipient's powers. In agreement with Belle, this thesis argues that what centrally matters are the effects of T's duty, rather than the effects of B's right.

Section III: The scheme-based analysis

A. Comprehensive: accounting for all trusts and structures of right-holding where these features apply

i. The proprietary claim to the return of the misapplied trust asset

Misapplied trust assets may be claimed back from the recipient, as well as any assets that represent the traceable proceeds of the original trust property. It is a doctrinal feature of all English trusts that misapplied trust assets can potentially be clawed back in this way. This doctrinal feature can be sourced in the law's commitment to the integrity of the scheme. The fact that this feature applies across all instances where rights are held in accordance with an all-encompassing set of terms suggests that its existence is animated by that qualified Level 2 integrity commitment discussed in Chapter I.II.A. Unless there is good reason for doing so, the law says that misapplied trust assets must be returned for due administration. The justification for allowing the misapplied trust asset to be clawed back from the recipient – unable to invoke a relevant defence – is the same justification for which trust assets are insulated from the claims of the trustee's personal creditors, as discussed in Chapter IV, Section II.I.

Invoking the law's commitment to the integrity of the scheme, rather than the individual rights of a particular beneficiary, provides an account that works for all trusts and non-trust scheme structures. It explains why the claim to misapplied trust assets applies in the context of the charitable purpose trust[145] (where there is no beneficiary) and in non-trust scheme examples, such as the deceased estate[146], where there is no individual endowed with equitable proprietary rights in the assets of the unadministered estate.

In *Attorney-General v Kell*[147], a fund of £421 10s raised by voluntary subscription among the inhabitants of Lewes in 1742 had been applied in the purchase of premises conveyed to twenty-four trustees to be used as a pest-house for persons afflicted with smallpox or other infectious diseases.[148] In 1808, the trustees — purportedly acting under a resolution of a general meeting of inhabitants — sold the premises for £450 and transferred the proceeds to the local paving commissioners. The central question before Lord Langdale MR was whether the arrangement constituted a charitable foundation and, if so, whether the alienation of the fund amounted to a breach of trust. The Master of the Rolls held that a valid charitable trust had been constituted in 1742, reasoning that the voluntary origin of the fund and the absence of formal endowment were immaterial to its charitable character; that the trustees had no authority to sell the property or redirect its proceeds; and that the commissioners, who held the purchase-money[149], remained bound to restore the full sum

[145] *Plymouth Corporation* (n 20).
[146] *Freeman* (n 68).
[147] (1840) 2 Beav 575, 48 ER 1305 (*Kell*).
[148] *Kell* (n 147), 575.
[149] The commissioners were never purchasers of the trust property at all — the actual purchaser was the parish of St Anne, while the commissioners merely received the trust's purchase-money as a loan secured on the rates and expressly covenanted by deed to repay it, so the Attorney-General could follow the money into their hands as recipients of trust funds rather than treat them as *bona fide* purchasers for value: *Kell* (n 147) 581.

together with interest.[150] Notably, the court rejected both the cy-près argument[151] — that devotion of the fund to general sanitary improvements was a permissible approximation of the original purpose — and the contention that lapse of time barred relief, confirming that charitable trusts are not defeated by limitation in the ordinary sense.[152] The decision thus illustrates the robust policing of scheme integrity in the charitable context: the settlors' original purpose defined the boundaries of permissible trustee action and no subsequent resolution of the contributing community could authorise a departure from it.

In *Attorney-General v Compton*[153], the directors and guardians of the poor of the parish of St Marylebone, acting under statutory powers to apply rate-derived funds exclusively to the relief and maintenance of the poor, resolved by a majority to discharge the legal costs incurred by two parish physicians — Dr Glendinning and Dr Boyd — in successfully defending a libel action brought against them by a dismissed workhouse surgeon.[154] The funds so applied, amounting to £346 16s 8d, were drawn from monies held by the directors and guardians that consisted principally, if not wholly, of sums raised by the poor rate and paid over to them by the vestrymen for the sole purpose of poor relief.[155] The central question before Sir J L Knight Bruce V-C was whether a court of equity had jurisdiction to intervene, to compel restitution of public trust monies misapplied by those charged with their administration. The Vice-Chancellor held unequivocally that equity possessed such jurisdiction: the directors and guardians were trustees of a public fund in a meaningful sense and the absence of any identifiable individual in whom the beneficial

[150] *Kell* (n 147) 579.
[151] The cy-près doctrine permits the court to modify the purposes of a charitable trust where the original purposes have become impossible or impracticable to fulfil, directing the property instead to a purpose as close as possible to the settlor's original charitable intention: Charities Act 2011, ss 62–67.
[152] *Kell* (n 147), 578–579.
[153] (1842) 1 Y & C Ch Cas 417, 62 ER 951 (*Compton*).
[154] *Compton* (n 153) 419–420.
[155] *Compton* (n 153) 420–421.

interest was vested did not preclude intervention — rather, it made the proceeding by information the only appropriate form, since the Crown's officer alone could adequately represent the diffuse public interest.[156] The court further rejected the argument that good faith or absence of moral turpitude could excuse a knowing breach of trust, confining the principle in *AG v City of Exeter*[157] strictly to its facts involving centuries of honest though mistaken administration.[158] Critically, Randall — the solicitors' surviving partner who received the cheques — was found equally liable, the Vice-Chancellor holding that a recipient who takes trust monies with knowledge both that they are trust funds and that their application is improper is answerable to the trust. The decision is accordingly significant for its confirmation that the equitable jurisdiction extends to publicly-held funds devoted to specific statutory purposes.

ii. Proprietary claims dependent on tracing

The scheme-based analysis furnishes a comprehensive account for why the traceable proceeds of the original trust property may also be held subject to the terms of the original trust. When a right is appropriated to a scheme, the totality of the right's jural relations is anchored to an all-encompassing set of terms[159], including the power to transfer that right. It was the exercise of that power that provides the link with the right acquired in its stead. Instead of focussing on the continuity of an equitable proprietary right, it is more illuminating to shift the centre of analysis to the continuity of the scheme. Given that the original trust

[156] *Compton* (n 153) 426–428.
[157] (1826) 2 Russ 45, 38 ER 252. Lord Eldon held that where trustees had, over a very long series of years — in that case considerably more than a century — honestly though mistakenly administered a charitable fund by distributing it in charity rather than applying it to its strictly intended purpose, a court of equity would not compel them to account for the entire period of that mistaken administration, provided there had been no application of the funds to their own private benefit.
[158] *Compton* (n 153) 428–429.
[159] See analysis in Chapter I.I.A.

property had been anchored to an all-encompassing set of terms, including the power to acquire substitutes, the traceable proceeds of the original trust property ought also – subject to countervailing considerations such as the *bona fide* purchase defence[160] – be subject to the restrictions envisaged by the scheme.

The scheme-based analysis builds on the insights of – for example – Belle[161] and McFarlane.[162] These authors focus on the continuity of the duty of the trustee as the reason that justifies the claim to traceable substitutes. This thesis invokes the integrity of the scheme as the deep structural reason for the tracing rules. As argued in Chapter I.II.A, it is the fact that the law is qualifiedly committed to the integrity of the scheme that provides the anchor for the existence of particular doctrinal rules, such as tracing and proprietary claims. As argued in the introduction to Chapter I, the idea of the scheme and the law's commitment to its integrity explain why the law treats the trustee's duties differently from other types of duty, such as a standard contractual duty, where the tracing rules do not apply.

Therefore, this thesis would take the insights of Belle and McFarlane a step further by locating the tracing rules in the continuity of the law's commitment to the integrity of the scheme. The power of disposition of the trustee is itself scheme-constrained and when exercised it generates a new asset. That asset is normatively downstream of the original scheme. The substitute is not linked by value or the persistence of proprietary rights, but by the exercise of scheme-governed power.

[160] *Pilcher v Rawlins* (1872) LR 7 Ch App 259 (CA in Ch) (*Pilcher*).
[161] Belle (n 69).
[162] McFarlane, CLP (n 78).

In *Foskett*, Lord Millett insisted that tracing does not depend on locating a persisting proprietary interest in a single asset, but on demonstrating a sequence of exchanges connecting the original trust right to its current substitute.[163] Each step in that sequence – the payment of a premium, the allocation of units, the payment of the death benefit – is not a mere causal event but the exercise of a power: the trustee's power to deal with the trust right by converting it into, or mixing it with, another right.[164]

On the account developed here, the trustee's power is itself a creature of the scheme: it must be exercised in accordance with its terms. When the trustee exercises that power – even wrongfully – the resulting asset is generated through a power that is subject to the terms of the scheme. The new asset is therefore not linked to the old by any surviving quantum of value, nor by the beneficiary's persisting ownership of a thing, but by the fact that its very presence in the hands of the trustee is the product of a scheme-governed right. Tracing rules, on this view, are the doctrinal mechanism by which the law identifies what rights the assets appropriated to the scheme have produced.

This refines Belle's and McFarlane's account of continuity of duty. It is not merely that the trustee's duty continues in relation to whatever the trustee does with the trust right; it is that the duty continues because the power exercised is one that fell under the scheme structure, so that everything downstream of its exercise remains within the scheme's normative reach, however many substitutions intervene.

As *Foskett* makes clear, the beneficiary can choose to say that traceable proceeds of an unauthorised exercise of the trustee's powers can be subjected to the terms of the original trust. It was suggested in Chapter III, Section II.IV.iv, that the beneficiary's ability to adopt

[163] *Foskett* (n 5) 127–128.
[164] *Foskett* (n 5) 130–131.

unauthorised transactions enhances the beneficiary's autonomy. It may also be said that requiring the trustee to hold unauthorised substitutes on the terms of the original trust also disincentivises them from engaging in these unauthorised transactions in the first place, because they cannot just pay the value of the misapplied trust asset into the trust fund and keep the higher-value substitute for themselves.

Nair's monograph may provide some support for a scheme-based analysis of tracing. Her central insight is that tracing depends upon a person having exercised a legal power over an asset which they were under a duty not to exercise except for another's benefit. Her analysis centres upon what she terms a relationship of "control of assets".[165] That analysis closely parallels the present account, which explains tracing through the continued operation of a scheme: Asset B is connected to Asset A because Asset B was acquired through the exercise of powers that had been appropriated to the scheme.

Nair repeatedly rejects the view that tracing is simply about following value or ownership. Instead, she argues that tracing presupposes a relationship of control of assets, under which the defendant possesses a legal power to alter another's legal position together with a duty governing the exercise of that very power.[166] The transactional link between the original and substitute assets is therefore constituted by the exercise of that power, rather than by any metaphysical continuity of the property itself.

The parallels with the scheme-based analysis become even clearer in her treatment of trusts. Nair expressly argues that tracing by beneficiaries depends upon the trustee's legal power to deal with the trust asset, coupled with duties restricting the exercise of that

[165] Aruna Nair, *Claims to Traceable Proceeds: Law, Equity, and the Control of Assets* (OUP 2018) (Nair) 6.01–6.04.
[166] Nair (n 165) 6.01–6.04.

power.[167] The trust therefore provides the paradigm instance of a legal structure in which authority over assets has been allocated to one person for the benefit of another.[168]

B. A better understanding for the result reached in *Foskett*

This analysis of the law provides both an account for the result in *Foskett* as well as fitting the rules as applied across the law as a whole. Instead of invoking the "hard-nosed"[169] property rights of the beneficiary, it is better to source that successful claim in the continuity of the law's commitment to the integrity of the scheme. The scheme-based analysis can show why the House of Lords did not have to invoke an equitable proprietary rights analysis in order to avoid an unjust enrichment or discretionary factors account. A scheme-based analysis provides an alternative to a beneficiary-centric account, which also avoids the pitfalls of the unjust enrichment explanation. Furthermore, the scheme-based analysis is in alignment with the majority's focus on a transactional link, rather than a but-for causation test.

As seen in the analysis in I.B.i above, it did not matter that the death benefit would have been paid regardless of the premiums paid with misapplied trust monies. The tracing rules are engaged because of the continuity of the scheme, rather than any causal analysis. Given the children in *Foskett* were volunteers, there was then no sufficiently compelling countervailing reason for the law to relieve its commitment that the traceable proceeds of the initial trust property be administered in accordance with the terms of the original scheme.

[167] Nair (n 165) 7.01–7.07 and 7.15–7.18.
[168] Nair (n 165) 7.01–7.03.
[169] *Foskett* (n 5) 109C.

At Level 1, the original trust property was appropriated to a scheme, constraining the trustee's authority. At Level 2, the law is committed, subject to limits, to maintaining the integrity of that scheme across the consequences of actions taken under it. At Level 3, the tracing rules identify the policy and its proceeds as rights generated through the exercise of that constrained power, and the proprietary claim gives effect to the law's decision to treat those rights as falling within the scheme. The election between a lien and a proportionate share is likewise a Level 3 feature: a doctrinal technique through which the law calibrates how the scheme's integrity is to be preserved in a mixed or substituted asset.

C. Remote recipients

The scheme-based analysis explains the familiar case where a right held on trust is transferred successively through multiple hands (A to B, B to C, C to D and ultimately to E). Each subsequent transfer involves the exercise of a power of disposition that was, at its source, scheme-constrained. Where a recipient acquires a right that is normatively derived – through a chain of substitutions – from the exercise of such powers, the law is entitled to treat that right as continuing to fall within the scheme, unless a countervailing reason intervenes (for example, the protection of a *bona fide* purchaser).[170] The fact that the right has passed through multiple hands does not sever its normative connection to the original scheme, because each link in the chain is constituted by the exercise of a power whose scope was defined by that scheme. At Level 3 of the scheme-based analysis[171], the law gives effect to its integrity commitment by imposing liabilities on recipients who hold such rights without a sufficient countervailing justification. The liability of remote recipients is therefore not explained by the persistence of a proprietary interest, but by the law's decision to treat rights

[170] *Pilcher* (n 160).
[171] See analysis in Chapter I.II.A.

derived from scheme-constrained powers as remaining subject to the scheme across successive substitutions.

This analysis of remote recipients mirrors the role performed by the transactional link[172] in the law of tracing. On the scheme-based analysis, the significance of the chain of transactions is not that it evidences the persistence of an equitable proprietary interest through successive substitutions. Rather, it demonstrates that each successive right is normatively derived from the exercise of a power that was itself constrained by the scheme. The same transactional link which enables the law of tracing to identify a substitute asset therefore explains why a remote recipient may become subject to liabilities respecting that asset. At Level 3, tracing identifies the succession of substitutions through which a right has been derived from scheme-constrained powers, while the law's response to remote recipients determines the circumstances in which the holder of that derived right should be treated as subject to a duty not to use the right as they wish. The transactional link therefore identifies the continuity of the scheme across successive substitutions and explains why the law may continue to regulate the exercise and retention of rights notwithstanding that they have passed through multiple intermediate hands.

Conclusion

This chapter has asked what explains a key feature of all trusts: misapplied trust assets and their traceable proceeds may be clawed back from the recipient. It has shown the challenges faced by the equitable ownership, unjust enrichment and rights against rights analyses. It has suggested that those challenges are not encountered on the scheme-based analysis, which is

[172] See analysis in Part II.I.B.i of this chapter.

instead capable of providing a comprehensive account for why proprietary claims and tracing rules apply to all trusts, whether there is a beneficiary or not. What the competing models conceptualise as the movement of value or the persistence of proprietary rights, is in truth part of the law's commitment to the integrity of the scheme.

Chapter VI

Personal claims against third parties

This chapter aims to show how a scheme-based analysis of the trust can shed light on several debates concerning certain personal claims against third parties to the trust. The chapter is divided into three sections. Section I assesses personal claims initiated against negligent tortfeasors, who damage a physical thing to which the trustee has title. Section II discusses knowing receipt claims. Section III asks whether the law of trusts should recognise strict liability personal claims against recipients, with reference to *Re Diplock*.[1] The chapter does not aim to consider all possible personal claims that may be made against a third party to a trust: for example, it does not consider dishonest assistance claims.

Section I: Personal claims against trespassers and other tortfeasors

I. The position and authorities prior to *Shell UK Ltd v Total UK Ltd*[2]

A. Authorities prior to *Shell* that confirm that the beneficiary has no claim against the tortfeasor for their consequential economic losses

The position – that the beneficiary of a trust has no personal claim against X (a party who negligently damages the trust property) for their consequential economic losses – is

[1] [1948] Ch 465 (CA) (*Diplock*).
[2] [2010] EWCA Civ 180, [2011] QB 86 (CA) (*Shell*).

supported in a long line of authorities.[3] In *Parker-Tweedale v Dunbar Bank plc* [4], the trustee was a mortgagor. The beneficiary of the trust argued that the mortgagee had breached a duty to them in the way the mortgagee's power of sale was exercised and therefore claimed part of the sale proceeds of the exercise of the power. Nourse LJ explained that the beneficiary had no direct claim against the mortgagee. The freehold title to the land was vested in the trustee. It was the trustee that created the mortgage in favour of the mortgagee. The mortgagee owed their duties of skill, care and good faith to the mortgagor[5], not to a beneficiary in whose interests the mortgagor was holding the freehold title on trust. Therefore, even if there is a beneficiary whom the courts might label a beneficial owner and the beneficiary suffers loss as a result of a breach of a duty owed by X to the trustee, this does not mean that the beneficiary can initiate claims to recover their consequential losses against X.

In *The Aliakmon*[6], Lord Brandon explained, *obiter*, that only a party vested with a legal property right or legal possessory title could initiate claims against X, who had damaged goods.[7] The buyer in *The Aliakmon* argued that because they had agreed to buy specific goods, they immediately acquired an equitable interest under a vendor-purchaser constructive trust.[8] Lord Brandon said that even if the buyers had acquired an equitable interest in the goods at the time when the damage occurred, such an interest – unless accompanied by either possession or the immediate right to possession – is not sufficient to found an action in tort for the negligence of the third party.[9] This applies even though the vendor-purchaser constructive trust would (once B has paid the purchase price, as the buyer had done in *The*

[3] eg *Lord Compton's Case* (1585) 1 Leon 203; 74 ER 121; *MCC Proceeds Inc v Lehman Brothers International (Europe)* [1998] 4 All ER 675 (CA).
[4] [1991] Ch 12 (CA) (*Parker-Tweedale*).
[5] eg *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 (CA).
[6] *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785 (HL) (*Aliakmon*).
[7] *Aliakmon* (n 6) 801 – 05.
[8] See analysis in Chapter I.II.B.
[9] *The Aliakmon* (n 6), 801 – 05.

Aliakmon) be a simple case of A holding on trust for B, such that B is beneficial owner. Only if the beneficiary was in possession and had thereby acquired a legal possessory interest, could they claim for personal consequential economic losses inflicted on them by the negligence of X.[10]

II. *Shell v Total*

A. Facts, reasoning and decision

The Court of Appeal's decision in *Shell* presents a challenge to the analysis in Section I.I. Title to land, on which an oil processing facility was located, was vested in trustees. The defendant (X) negligently caused an explosion on the land, thereby damaging the oil processing facility. A beneficiary of the trust had harnessed their position to supply customers with fuel. Given the explosion, the beneficiary suffered economic losses in being unable to continue supplying the customers. The beneficiary initiated a direct claim against X, claiming for the consequential economic losses they had suffered. David Steel J rejected the claim at first instance.[11] The judge began by formulating the basic rule: English law does not allow claims in the tort of negligence for pure economic loss.[12] There is a general rule that bars negligence claims for consequential economic losses that were not caused by the violation of a legal property right or legal possessory interest.[13] The claimant beneficiary was not endowed with a legal property right to the land. Rather, that legal property right was vested in their trustees. The claimant beneficiary was instead endowed with a beneficial

[10] In *Healy v Healy* [1915] 1 KB 938 (KBD) the beneficiary did have a right to immediate possession.
[11] Reported at first instance as: *Colour Quest Ltd v Total Downstream UK Plc* [2009] EWHC 540 (Comm) (*Colour Quest*).
[12] *Colour Quest* (n 11) [471]–[473].
[13] *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27 (CA); *Weller & Co v Foot and Mouth Research Institute* [1966] 1 QB 569 (QBD).

interest under a trust, which is not a legal property right. On the authority of *The Aliakmon*[14], the claim failed. The judge recognised that claims for pure economic loss would only succeed as an exception to the general rule[15], where there existed a special relationship between the claimant and the defendant. However, there was no such special relationship on the facts; no such relationship existed between the claimant beneficiary and X (the negligent tortfeasor).

The claimant beneficiary successfully appealed. The Court of Appeal recognised that the claimant beneficiary succeeded in a claim for pure economic loss, namely consequential economic losses that were not caused by a violation of the claimant's legal property right or legal possessory interest. *The Aliakmon* was not determinative of the issue[16], as the House of Lords had not considered the possibility of the beneficiary joining the trustee in their claim against the defendant, as had happened in *Shell*. The Court of Appeal found that a special relationship did exist on the facts, which allowed the claimant to invoke one of the exceptions to the default position that bars claims for pure economic loss: a special relationship existed between the trustee and the claimant beneficiary. A claimant beneficiary's dependence exceeded that of a mere contractual party.[17] Indeed, the Court of Appeal averred that the claimant beneficiary was in substance the "real owner" of the oil processing facility and that it would therefore be "legalistic" to deny them a claim for their consequential economic losses.[18]

[14] *The Aliakmon* (n 6).
[15] *Colour Quest* (n 11) [474]–[475].
[16] *Shell* (n 2) [131].
[17] *Shell* (n 2) [136].
[18] *Shell* (n 2) [143].

B. Reception of *Shell*

Swadling has criticised the emphasis on substance to which the Court of Appeal ascribed such importance.[19] He highlights that in understanding the functioning of the trust and the rules that govern its operation, it is important to focus on its form.[20] Indeed, McFarlane notes a contradiction in the Court of Appeal's language of the beneficiary of the trust being the "real owner" and the idea that the beneficiary was claiming for pure economic losses ie losses that did not flow from the violation of a legal property right.[21]

McFarlane also notes that the Court of Appeal's logic is internally incoherent.[22] It cites with approval the general exclusionary rule[23] and agrees that a special relationship must exist between the claimant and the defendant for a claim in pure economic loss to succeed.[24] However, instead of identifying such a relationship between the claimant and the defendant, the Court of Appeal proceeded to highlight the special nature of the relationship between the trustee and the beneficiary of the trust.[25]

McFarlane and Televantos highlight the dangers for third parties, if the scope of the Court of Appeal's judgment is taken to its logical conclusion.[26] After all, there is – in principle – no limit to the number of beneficiaries that could exist under a trust, as long as the

[19] William Swadling, 'In Defence of Formalism' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart 2019) 95.
[20] See analysis in Chapter I.II.C.i.
[21] Ben McFarlane, 'Form and Substance in Equity' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing 2019) 197 (McFarlane, Form and Substance) 203 – 206.
[22] McFarlane, Form and Substance (n 21).
[23] *Shell* (n 2) [132].
[24] *Shell* (n 2) [135].
[25] *Shell* (n 2) [136].
[26] Ben McFarlane and Andreas Televantos, 'Third Party Effects in Private Law: Form and Function' in Paul B Miller and John Oberdiek (eds), *Oxford Studies in Private Law Theory: Volume I* (Oxford University Press 2020) (McFarlane and Televantos).

certainty of objects test is satisfied.[27] On this basis, had the title to the land been held on trust for one thousand beneficiaries, each of whom harnessed their position under the trust to supply customers with oil, then through one act of negligence, the defendant could expose themselves to liability for the consequential economic losses suffered by one thousand separate beneficiaries. Furthermore, McFarlane and Televantos[28] explain that the justification for the informality with which a trust can be created, as well as the scope conceded to the right-holder in determining its content[29], rest on its limited third-party effects. However, if a defendant could – through one act of negligence – be exposed to a potentially open-ended set of liabilities to an open-ended class of beneficiaries, then those features of the trust (informality of creation and flexibility in content) might have to be revisited. Stevens suggests *Shell* was decided *per incuriam*.[30] Relevant authorities – such as *Parker-Tweedale*[31] – were not cited to the court. As well as being problematic to align with the formal structure of the trust, *Shell* appears inconsistent with the authorities discussed previously in this chapter, such as *The Aliakmon*.[32]

This chapter begins with *Shell*, as the judgment shows some obvious dangers with the equitable ownership analysis of the trust.[33]

[27] *McPhail v Doulton* [1971] AC 424 (HL).
[28] McFarlane and Televantos (n 26).
[29] Hanoch Dagan and Irit Samet, 'Express Trust: The Dark Horse of the Liberal Property Regime' in Simone Degeling, Jessica Hudson and Irit Samet (eds), *Philosophical Foundations of the Law of Express Trusts* (Oxford University Press 2023) 139.
[30] Robert Stevens, *The Laws of Restitution* (Oxford University Press 2023) 116.
[31] *Parker-Tweedale* (n 4).
[32] *The Aliakmon* (n 6).
[33] See further analysis in Chapter I.I.B.i; Dagan and Samet treat *Shell* as wrongly decided on the damages point — they agree with critics that the Court of Appeal was wrong to award the beneficiary consequential damages, but they think those critics are wrong to blame this outcome on the court's proprietary characterisation of the beneficiary's right. On Dagan and Samet's view, the claim should fail as relational justice means such damages should not be recoverable where the beneficiary's identity is obscured by the trust (Hanoch Dagan and Irit Samet, 'The Beneficiary's Ownership Rights in the Trust Res in a Liberal Property Regime' (2023) 86 MLR 701, 724–725). However, it should be noted that in *Shell*, the specific defendant knew perfectly well the identity of the beneficiary, as the defendant was also one of the beneficiaries of the trust.

III. The limitations of the rights against rights analysis

Both the equitable ownership and rights against rights analyses are – to an extent – answering the same question: how to best define the individual position of the beneficiary. For both these analyses, when understanding trusts with beneficiaries, it is the individual position of the beneficiary that explains the trust's insolvency effects[34], the availability of tracing[35] and personal and proprietary claims[36] against recipients. McFarlane and Stevens' concern with describing the beneficiary of the trust as endowed with a right *in rem*/property right is the lack of universal exigibility of the beneficiary's interest.[37] By drawing on the distinction between successor and trespassory liability[38], the beneficiary's interest under the trust – with reference to the authorities discussed previously in this chapter – seems to lack the latter. The reason for which the beneficiary can directly initiate a claim against a recipient of misapplied trust assets – according to McFarlane and Stevens – is that they have received a right encumbered by the beneficiary's interest.[39] McFarlane and Stevens' distinction between successor and trespassory liability and the fact that the defendant in *Shell* had not received a right held on trust, or a right that depended on the exercise of a power entailed by a right held on trust, might be seen as a clear reason for dismissing the Court of Appeal's decision as an aberration.

However, it is important to understand that both the equitable ownership and rights against rights analyses are concerned with describing the individual position of a beneficiary, as both theories emphasise that individual position's central importance in explaining the key

[34] See analysis in Chapter IV.
[35] See analysis in Chapter V.
[36] See analysis in Chapter V.
[37] Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 J Eq 1 1–2.
[38] See analysis in Chapter I.I.B.ii.
[39] See analysis in Chapter I.I.B.ii.

features of the trust (at least where the trust has beneficiaries).[40] If working within this vein, it is possible to construct a defence of the Court of Appeal's decision in *Shell*. If working with a methodology that explains the key features of the trust with beneficiaries in the individual position of the beneficiary, then the Court of Appeal in *Shell* could argue that its decision operates within that tradition. A defence of *Shell* could argue that trusts with beneficiaries should be understood differently to other trusts (for example the charitable purpose trust) and to non-trust scheme examples. The rights against rights model is – to an extent – aligned with that position; after all, McFarlane and Stevens' analysis of equitable property cannot work for the charitable purpose trust; it cannot be the individual position of any party (endowed with a right against a right) that explains the key features of the charitable purpose trust. It is implicit in the work of McFarlane and Stevens that they would have to explain the key features of the trust without beneficiaries differently from trusts with beneficiaries.[41]

Therefore, *Shell* could be defended on the grounds that trusts with beneficiaries should not share the same rules as charitable purpose trusts and other non-trust scheme examples. Given the nature of the position occupied by a beneficiary, whose individual interest is treated in particular ways across a range of contexts – including in tax law[42] – then they should be able to claim for consequential economic losses. If one sees – as do McFarlane and Stevens – the key features of the trust with beneficiaries as grounded in the individual position of the beneficiary, then it is possible to understand the harm inflicted by the defendant tortfeasor – in damaging the oil processing facility – as damage inflicted on the

[40] See analysis in Chapter I.I.B.ii.
[41] This may explain why McFarlane in his more recent scholarship on the trust has moved towards focussing on the position of the trustee and the nature of the trustee's duties, to understand the operation of the trust and its key features: Ben McFarlane, 'Trusts, Property, and Rights' in Irit Samet, Simone Degeling and Jessica Hudson (eds), *Philosophical Foundations of the Law of Express Trusts* (Oxford University Press 2023); Ben McFarlane, 'The Nature of Equitable Property Revisited' (2026) 79 CLP (McFarlane, CLP).
[42] *Baker v Archer-Shee* [1927] AC 844 (HL).

beneficiary's right against a right. On the facts of *Shell*, the claimant beneficiaries had harnessed their individual position under the trust to supply their customers with fuel, that same individual position which furnishes the basis – on the theory of McFarlane and Stevens – for explaining the key features of the trust with beneficiaries. Although McFarlane and Stevens' distinction between successor and trespassory liability might seem to furnish a clear reason for rejecting *Shell*, once their rights against rights theory is understood as part of a tradition that seeks to explain the key features of the trust with beneficiaries in the individual position of the beneficiary, their model does not provide the best means for understanding why *Shell* is problematic.

To defend the decision in *Shell*, a distinction needs to be drawn between the position of a party with a purely contractual right (who suffers consequential loss as a result of damage to another's property[43]) and a beneficiary of a trust. In distinguishing between rights against rights and personal rights, McFarlane and Stevens do offer a tool that could be used to defend the Court of Appeal's decision and when coupled with their view – described in Chapter I.I.B.ii – that it is the beneficiary's right against a right that explains some of the key features of the trust, their analysis does not provide the clearest reason why the Court of Appeal made a mistake.

IV. Arguments against *Shell* on the scheme-based analysis

Once the trust is understood as entailing a right appropriated to a scheme, it is clear why the beneficiary should not have been able to claim for their consequential economic losses in *Shell*. Those losses were not concerned with the integrity of the scheme nor with the value of

[43] As in, for example, *Cattle v Stockton Waterworks* (1875) LR 10 QB 453.

the right held on trust. The integrity of the scheme is not harmed when the beneficiary is unable to supply its customers with fuel. Its integrity would be harmed if the right were transferred to an unauthorised third-party: such a transfer is contrary to the terms of the trust. It was the value of the right held on trust that was harmed in *Shell*, because the land to which it related was damaged. The beneficiary is entitled to compel the trustee to recover the value of that right from X.[44] The consequential economic losses suffered by the beneficiary in *Shell* were not scheme-based losses ie they did not harm the integrity of the scheme. Those consequential economic losses flowed from the fact that an individual had decided to harness their position under the scheme for their own purposes.

The scheme-based analysis of the trust provides a more compelling understanding for why *Shell* is problematic than the rights against rights theory. As seen in the analysis above, commentators tend to criticise *Shell* as incompatible with the law of trusts, because it is difficult to align with authorities such as *Parker-Tweedale*[45] and fails to align with the distinction between trespassory and successor liability. However, when the trust is analysed as a scheme, the real problem with *Shell* is its failure to see the link with that wider overarching category and in thinking of the individual position of the beneficiary of the trust as its guiding tool for analysis, rather than the integrity of the scheme and the value of the right appropriated to the scheme. The differences between the position occupied by the legatee under a will and that of a trust beneficiary should not be exaggerated.[46] Where the legatee of a will makes a contractual arrangement with a third party, relying on their interest

[44] *Vandepitte v Preferred Accident Insurance Corporation of New York* [1933] AC 70 (PC).
[45] *Parker-Tweedale* (n 4).
[46] See further, Giuseppe Jafari, *Rights Appropriated to a Scheme: Trusts, Partnerships and Deceased Estates Compared* (University of Oxford, M Phil thesis, 2021); this is not to deny that the beneficiary of the trust in English law has powers that are unavailable to other parties that stand to benefit under a scheme structure, such as the beneficiary's power under the rule in *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282 – see analysis in Chapter III, Section II.IV.iv.

as legatee under the deceased estate scheme and X damages the property of the deceased, X's conduct could inflict consequential economic losses on the legatee, but such losses should not be recoverable by either the legatee or the executor.[47]

Section I: Conclusion

Understanding personal claims for consequential economic losses suffered by beneficiaries at the hand of parties that physically damage the trust property is a lively topic in the law of trusts, especially since *Shell*. The argument advanced in this thesis is that by thinking of the trust as a scheme, it is possible to better understand why the Court of Appeal's decision is an aberration. It is possible to learn from *Shell* the problems that not only an equitable ownership model can entail, but any theory which sees the individual position of the beneficiary as the guiding tool for analysis where the trust has beneficiaries.

Section II: Claims in knowing receipt

Introduction

Personal and proprietary claims against recipients[48] exist not only in the law of trusts, but in several other examples[49] where rights are held subject to duties of due administration. In

[47] I have not been able to locate any reported authority concerning a case where the claimant is eg a legatee of an unadministered estate and initiates a claim for recovery of their consequential economic losses against a negligent tortfeasor who damages the deceased estate assets. However, it is probable that the reason for which such a claim does not appear in the law reports is that it is only in the trust context, where the beneficiary has been described as the beneficial owner (see analysis in Chapter I.I.B.i) that such a claim has been initiated. Therefore, the absence of such claims in the law reports from eg legatees of an unadministered estate strengthens the argument of this thesis that *Shell* is inconsistent with the wider operation of rights appropriated to a scheme.

[48] For the proprietary claims available, see analysis in Chapter V.

[49] See analysis in Chapter I.II.B.

addition to beginning the analysis with the charitable purpose trust, the argument here also emphasises that knowing receipt claims may be initiated by trustees, a party that is not generally endowed with an equitable proprietary right. The argument advanced in Section II of this chapter is that knowing receipt claims are best understood as a means for the law to uphold the integrity of the scheme.

I. An outline of the claim in knowing receipt

Before turning to knowing receipt claims against recipients of misapplied assets held on charitable trust, it is helpful to summarise, largely following Lord Briggs' analysis in *Byers v Saudi National Bank*[50], the requirements of a knowing receipt claim.[51] Not every commentator would formulate the requirements in the terms adopted by Lord Briggs,[52] but that analysis is now the authoritative starting place in English law.

A knowing receipt claim is a personal claim brought against a recipient of misapplied trust assets (or their traceable proceeds). The recipient must have known of the misapplication whilst holding such assets and yet failed to return the assets for due administration. On this view, a personal claim in knowing receipt is a fault-based claim: the recipient must have used the assets contrary to what conscience demands.[53] When the recipient holds misapplied trust assets (or their traceable proceeds) with sufficient knowledge of the breach of trust, such that their conscience has become affected, they are fastened with a restorative duty.[54] The content of that duty entails an obligation to return the misapplied rights (or their traceable proceeds)

[50] [2023] UKSC 51, [2024] AC 1191 (*Byers*).
[51] *Byers* (n 50) [10]–[46].
[52] For a different view of the requirements of knowing receipt, see eg William Swadling, 'The Nature of Knowing Receipt' in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing 2017) ch 13.
[53] *BCCI v Akindele* [2001] Ch 437 (CA) 455 (*Akindele*).
[54] *Byers* (n 50) [42].

for due administration, and it is when the recipient uses those rights inconsistently with that duty that they expose themselves to a personal claim in knowing receipt.[55] They breach that duty by bringing to bear their unfettered preferences[56], for example by gifting the misapplied assets to a friend.[57]

On this analysis, the personal claim is closely tied to, and ancillary upon, the proprietary claim to the specific misapplied assets. It is the recipient's disposal, dissipation or destruction of the assets, thereby defeating the proprietary claim, that calls the personal claim into play; while the assets remain identifiable in the recipient's hands, the beneficiary may instead seek their return.[58] It would, on this view, be illogical for the personal claim to survive where the proprietary claim has already been defeated because the beneficiary's equitable interest was extinguished or overridden before the recipient ever received the assets.[59]

II. Charitable purpose trusts

McFarlane – in his Current Legal Problems article[60] – revisits his initial rights against rights theory. He emphasises that understanding the trust requires us to explain not only the textbook example of the trustee holding rights on trust for a beneficiary, but all arrangements governed by the law of trusts, including the charitable purpose trust, as well as examples beyond the law of trusts[61], which share some of the same key features and claims as with the trust with beneficiaries. McFarlane emphasises that personal claims against recipients exist

[55] *Byers* (n 50) [42].
[56] See analysis in Chapter II.
[57] *Byers* (n 50) [41]–[42], [46]; note that gifting them to a friend would not necessarily prevent recovery of the assets by a proprietary claim, as the friend would not be a *bona fide* purchaser.
[58] *Byers* (n 50) [42], [46].
[59] *Byers* (n 50) [44].
[60] McFarlane, CLP (n 41).
[61] See analysis in Chapter I.II.B.

not only in the example of the fixed trust, but also the charitable purpose trust[62] and other examples where the claimant initiating the action is not endowed with an equitable proprietary right.[63] The courts have consistently said personal claims in knowing receipt may be initiated by parties that lack such equitable proprietary rights.[64] The example of such claims being initiated against recipients of misapplied charitable trust assets is a clear illustration that such claims can be justified without invoking the equitable proprietary rights of any party.

Consider a case in which a trustee holds rights appropriated to the purpose of promoting animal welfare in England.[65] The trustee transfers those rights, in breach of trust, to a cat sanctuary in Wales. The trustee mistakenly believed they had a power – under the terms of the trust – to make the transfer. The cat sanctuary knows that the trustee had no power – under the terms of the trust – to make the transfer. Instead of returning the assets to the charity trustee, the cat sanctuary expends the misapplied funds to improve their existing buildings. The trustee has a power to initiate a claim in knowing receipt against the cat sanctuary in this example.[66] As Hudson points out[67], the trustee is one of the parties empowered to initiate the knowing receipt claim. If the charity trustee knowingly commits a breach of trust, by transferring the rights to their wife, it is unlikely that the charity trustee is the best party to initiate the knowing receipt claim. In this example, where the wife uses the misapplied rights knowing of their improper provenance, it is more likely that parties with

[62] For knowing receipt claims against recipients of assets held on charitable trusts, see eg *A-G v Kell* (1840) 2 Beav 575, 48 ER 1305 (*Kell*); *Fletcher v Eden Refuge Trust* [2012] NZCA 124, [2012] 2 NZLR 227.
[63] eg knowing receipt claims initiated against recipient of misapplied deceased estate assets.
[64] eg *Greenwood v Wakeford* (1839) 1 Beav 576, 48 ER 1064.
[65] Charities Act 2011, s 3(1)(k).
[66] eg *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072 (PC) (*Space Investments*) 1074; *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91 [32], [76]-[77].
[67] Jessica Hudson, *Assuring the Express Trust: The So-Called 'Beneficiary's Proprietary Claim'* (PhD Thesis, University of New South Wales, (Hudson, PhD) ch 7.

standing to hold the charity trustee to account will initiate the claim. Jing has provided an analysis of the parties with standing to hold the charity trustee to account.[68] He notes that the Attorney-General, the Charity Commission[69] and interested members of the public may have standing to ensure the due administration of the charitable trust.[70] In the example of a deliberate breach of trust, one such party will likely initiate the claim in knowing receipt against the wife of the charity trustee. The wife's liability will then be to restore the trust fund[71], not to make payment to a specific individual.

A theory that explains knowing receipt claims as vindicating equitable proprietary rights cannot explain the availability of the claim in the charitable purpose trust example. Proponents of the equitable ownership model – such as Lord Diplock in *Ayerst (Inspector of Taxes) v C&K (Construction) Ltd*[72] – seem to attempt a definition of the trust. They see the trust as entailing a split between legal and equitable ownership[73] and this is the reason why its proponents must relegate the charitable purpose trust to an exception or creature of public law.[74] McFarlane and Stevens, meanwhile, provide a theory for understanding the nature of the interest of a party who is said to enjoy equitable proprietary rights, rather than providing a definition of the trust.[75] The example of the charitable purpose trust shows that describing the nature of a beneficiary's interest is not the same as providing a theory for the trust, for there can be trusts without beneficiaries.

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[68] Hui Jing, "Enforcing Charitable Trusts: A Study on the English Necessary Interest Rule" (2022) 42 LS 228.
[69] Charities Act 2011 s.115.
[70] Charities Act 2011 (c 25) ss 15, 33–34; see analysis in Chapter VII.
[71] See analysis in Chapter III, Section I.
[72] [1976] AC 167 (HL) (*Ayerst*) 177; see analysis in Chapter I.I.B.i.
[73] *Ayerst* (n 72).
[74] Paul Matthews, 'The Comparative Importance of the Rule in *Saunders v Vautier*' (2006) 122 LQR 266, 275; Paul Matthews, 'From Obligation to Property and Back Again? The Future of Non Charitable Purpose Trusts' in David Hayton (ed) *Extending the Boundaries of Trusts and Other Ring-Fenced Funds* (Kluwer Law International, 2002), 231.
[75] See analysis in Chapter I.I.B.i.

Focussing on the integrity of the scheme provides a clear explanation for the knowing receipt claim in the charitable purpose trust example. The transfer to the unauthorised recipient undermined that integrity. Given the recipient learned of the misapplication and yet used those rights incompatibly with what their conscience demanded, the law will fasten them with a personal liability for the losses that have been occasioned to the scheme, through her failure to return the misapplied assets for due administration. The charitable purpose trust is particularly useful because it shows that all that is required for a scheme to exist is that a party is vested with a specific right held in accordance with an all-encompassing set of terms. A scheme can operate without beneficiaries and have many of the same key features and claims as a scheme with beneficiaries. It is important for a theory to be capable of explaining why these key features and claims exist and operate for schemes without beneficiaries, as much as with schemes with beneficiaries.

III. Beyond trusts: non-trust schemes

As McFarlane also highlights[76], personal claims in knowing receipt are not only a feature of the law of trusts. These claims can be initiated in other contexts also, such as against recipients of misapplied deceased estate assets.[77] A central argument advanced by McFarlane is that these claims cannot depend on the equitable proprietary rights of the claimant. It is however possible to argue that these cases, like the case of the trust, depend on the existence of a scheme.[78] McFarlane discusses work by Charles Mitchell[79] on *Commissioner of Stamp*

[76] McFarlane, CLP (n 41).
[77] Lusina Ho and Charles Mitchell, 'Knowing Receipt, Equitable Proprietary Rights, and Duties of Due Administration' (2026) 89 MLR 278 (Ho and Mitchell) give the example of *Freeman v Fairlie* (1817) 3 Mer 29, 43–44; 36 ER 12, 17–18.
[78] See analysis in Chapter I.II.B.
[79] Charles Mitchell, '*Commissioner of Stamp Duties (Queensland) v Livingston* (1964): Rights of Estate Beneficiaries and Trust Beneficiaries Compared' in B Sloan (ed) *Landmark Cases in Succession Law* (Hart, 2019) (Mitchell, Livingston).

Duties (Queensland) v Livingston.[80] In his chapter, Mitchell highlights that claims against recipients may be initiated by estate creditors and legatees during administration.[81] This is notwithstanding – as explained by Viscount Radcliffe in *Livingston* and as confirmed in a series of earlier and later authorities[82] – that before the deceased's assets have been fully administered (ie the debts of the deceased have been paid), the legatees enjoy no beneficial interest in those assets. Personal and proprietary claims may be initiated against recipients of misapplied deceased estate assets[83] and a scheme-based analysis provides a clear justification for such claims.

As seen, trustees are empowered to initiate personal and proprietary claims against recipients. The same is true with the managers (ie the trustee equivalents) of non-trust schemes. The executor, for example, may also initiate these claims against recipients[84], despite the executor not being endowed with equitable proprietary rights or equitable ownership. As with the charitable purpose trust, it is not only the trustee of the scheme who is endowed with the ability to initiate claims against the recipient. Other parties – usually those with standing to hold the scheme manager to account – can also initiate claims against the recipient. For example, estate creditors and legatees in the context of the deceased estate.[85]

When the deceased estate is understood in the way favoured in this thesis, it is simple to justify why the executor, as well as parties that stand to receive assets beneficially in the scheme's due administration, should be allowed to initiate personal and proprietary claims

[80] [1965] AC 694 (PC) (*Livingston*).
[81] The authorities cited by Mitchell, Livingston (n 79) include: *Hill v Simpson* (1802) 7 Ves 152, 32 ER 63.
[82] eg *Re Leigh's WT* [1970] Ch 277 (Ch D) 281 – 82.
[83] eg *M'Leod v Drummond* (1810) 17 Ves 152, 169–70; 34 ER 59, 65–66; and note the Administration of Estates Act 1925, s 38.
[84] *Brooksbank v Smith* (1836) 2 Y & C Ex 58, 160 ER 311.
[85] eg *Travis v Milne* (1851) 9 Hare 141; 68 ER 449.

against recipients. Furthermore, the effect of the claim, namely that the defendant must restore the estate[86], rather than paying individuals, is consistent with a scheme-based analysis, rather than an individual rights focus. The law is committed – as far as possible compatibly with countervailing demands[87] – to ensure that the specific rights in question are used to, for example, discharge debts owed to the creditors of the deceased and to pay the legacies envisaged in the deceased's will. By failing to return the misapplied rights for due administration and instead knowingly using those rights for other purposes, the recipient undermines the integrity of those terms. Given their conscience had been affected by sufficient knowledge of the assets' improper provenance, the law will fasten the recipient with a personal liability. That personal liability aims to restore the estate[88], by ensuring that the monetary equivalent of the rights disposed in breach of the restorative duty can be fastened with the terms of the original scheme, as well as any further losses the scheme may have suffered at the hands of the recipient.

IV. The nature and extent of the recipient's liability

The availability of personal claims in knowing receipt against recipients of misapplied charitable trust assets or deceased estate assets supports a scheme-based analysis. Further, the nature and extent of that liability strengthens that analysis. The recipient's liability is not to compensate individuals for their consequential economic losses, but rather to restore the fund to the position it would have been in, had the recipient restored the misapplied assets in accordance with their duty.

[86] See analysis below of *Re Rothko* 43 NY 2d 305; 372 NE 2d 291 (1977) (*Rothko*); see also analysis in Chapter III, Section I.
[87] See analysis in Chapter III, Section II.
[88] See analysis of *Rothko* (n 86).

Where the original trust property has gone up in value and the scheme was denied that increase in value because the property had been disposed of, the knowing recipient has to make up the difference.[89] In *Re Rothko*[90], the executors of Mark Rothko's estate wrongfully disposed of 798 valuable paintings to the Marlborough Gallery corporations, which received them with full knowledge of the executors' conflicts of interest and of the consequent impropriety of the transfers.[91] The New York Court of Appeals confirmed two analytically significant propositions bearing on third-party recipient liability and the measure of relief for breach of the executors' duties. First, on knowing receipt, the court held that a transferee who receives the assets of the estate with notice of the breach by which it was transferred is personally accountable to the estate, the Marlborough corporations' knowledge of the executors' conflicts being sufficient to fix them with liability as recipients.[92] Second, and most significantly for the measure of relief, where an executor in breach of duty transfers the estate's property to a person who takes with notice of the breach and that transferee has disposed of the property, it is proper to charge the transferee with the value at the time of the decree (if that is higher than the value at the time of receipt), since if it had not been for the breach the property would still have been part of the estate; accordingly, appreciation damages measured by the value of the paintings at the date of the decree — rather than the date of the wrongful disposal — were imposed on both the defaulting executors and the knowing recipient corporations alike, the court characterising such damages not as punitive but as the minimum necessary to make the estate whole.[93]

[89] *Rothko* (n 86).
[90] Discussed by Charles Mitchell and Stephen Watterson in 'Remedies for Knowing Receipt' in Mitchell (ed) *Constructive and Resulting Trusts* (Hart 2010).
[91] *Rothko* (n 86) 311–313.
[92] *Rothko* (n 86) 314–316.
[93] *Rothko* (n 86) 321–323.

The scheme-based analysis accounts well for *Rothko*. What equity vindicates is not the discrete interest of any individual beneficiary but the integrity of the scheme as a continuing administrative arrangement — including its asset base as it would have stood had the breach not occurred.[94] Because the paintings would have remained within the scheme and appreciated within it, the decree restores the scheme to the position it would have occupied and the recipient's liability is calibrated accordingly.[95] Knowing receipt liability on this account is not an appendage to the individual rights of any estate creditor or legatee but an independent response to the disruption of scheme integrity by a third-party who intervenes with notice.

The scheme-based analysis of personal claims in the non-trust scheme examples also provides a clear reason for which the parties initiating the claim should not be able to recover their consequential economic losses occasioned by the recipient's failure to adhere to their immediate restorative duty. Consider a situation where a pecuniary legatee harnesses their position under the terms of the scheme by entering their own separate arrangements. For example, the pecuniary legatee – on the strength of their position as a legatee – purchases a car on credit. The executor misapplies the estate assets and the third-party recipient, knowing their improper provenance, dissipates the funds. On a scheme-based analysis, the pecuniary legatee should be able to ask the recipient to pay the value of the funds dissipated in breach of their restorative duty. However, the pecuniary legatee should not be able to ask the recipient to compensate them for consequential economic losses that the pecuniary legatee suffered in having harnessed their position under the scheme, by entering their own separate arrangements. For instance, the pecuniary legatee, because of the misconduct of the knowing

[94] *Rothko* (n 86) 322–323.
[95] *Rothko* (n 86) 322.

recipient, fails to pay the car dealer on time and incurs a penalty as a result. The recipient is not responsible for compensating the pecuniary legatee for this loss.[96] This is because the law is committed to protecting the integrity of the terms to which rights have been appropriated[97]; when the rights are transferred in breach, the integrity of those terms has been undermined. It is that scheme-based loss that the law is interested in compensating; not individual consequential economic losses suffered by parties that harness their position under the scheme to enter their own individual arrangements. The liability to pay the penalty to the car dealer is not concerned with the integrity of the scheme nor the value of the right held in accordance with the terms of the scheme.

V. Returning to the trust: the example of the fixed trust

A. *Byers*: facts, reasoning and decision

As explained by McFarlane[98], much analysis of knowing receipt claims has been focussed on the example of a trustee holding rights on trust for a fixed trust beneficiary. The Supreme Court in *Byers* had the opportunity to revisit the fundamentals of the knowing receipt claim, on a set of facts that aligned with the textbook situation of a trustee holding rights on trust for an absolutely entitled beneficiary.[99]

The appellant argued that the defendant is liable in knowing receipt if they knew of the misapplication and yet used those misapplied assets for their own purposes, rather than returning them for due administration. No other requirement was necessary – for example

[96] This proposition is consistent with the reasoning and result in *Rothko* (n 86).
[97] See analysis in Chapter I.II.A.
[98] McFarlane, CLP (n 41).
[99] For summary of the facts, see Chapter V, Section I.I.A.i.

that the misapplied assets continued to be encumbered by the beneficiary's equitable proprietary rights. Even if the effect of the transaction under the rules of the *lex situs* was to give the defendant title free from those equitable proprietary rights, a claim in knowing receipt could still succeed.[100]

The Supreme Court unanimously rejected this pure unconscionability idea[101] (the two fuller judgments being delivered by Lord Briggs and Lord Burrows). The Supreme Court held that if the effect of the transaction was to destroy the claimant's equitable proprietary rights, no claim in knowing receipt could succeed.[102]

Lord Briggs described the claim in knowing receipt as ancillary to the beneficiary's equitable proprietary claim.[103] The effect of the conveyance from the trustee to the unauthorised recipient had been to destroy the claimant beneficiary's equitable proprietary right. The rules of the *lex situs* gave the recipient clean title ie title free from the claimant's equitable proprietary right.[104] By the beneficiary's equitable proprietary claim, Lord Briggs means the claim the beneficiary may initiate against a recipient of misapplied trust assets (or their traceable proceeds)[105], that specific rights in the hands of the recipient are encumbered by the claimant beneficiary's equitable proprietary rights and so should be restored to the trust (or, in the case of a bare trust, transferred to the beneficiary).[106] On this basis, the beneficiary can ask the recipient to return those very misapplied rights (or their traceable

[100] *Byers* (n 50), Lord Briggs [16]; Lord Burrows [99].
[101] Namely the view that all that suffices for a knowing receipt claim to succeed is that the defendant uses misapplied trust assets knowing of their misapplication, even if at the moment of receipt the beneficiary's equitable proprietary interest no longer encumbered the asset in question.
[102] *Byers* (n 50), Lord Hodge [4]; Lord Briggs [27], [97]; Lord Burrows [172], [201].
[103] *Byers* (n 50) [42].
[104] *Byers* (n 50) [42]–[44].
[105] See analysis in Chapter V.
[106] *Foskett v McKeown* [2001] 1 AC 102 (HL) (Foskett).

proceeds) either to the trustee, a newly appointed trustee or (in the case of a bare trust) to the beneficiary directly.[107]

For Lord Briggs, the personal claim in knowing receipt is ancillary to the equitable proprietary claim, in the sense that the defendant's wrong consists in having used specific rights, encumbered by the claimant's equitable proprietary rights, inconsistently with the rights of the claimant.[108] On this basis, if the defendant always had clean title, because the effect of the conveyance from the trustee to the defendant was to give the latter rights that were freed from the equitable proprietary rights of the claimant beneficiary, then the defendant could not commit the wrong of knowing receipt.[109] The defendant had – from the moment of receipt – free use[110] of the assets: the defendant was under no restorative duty. The restorative duty – the core obligation of the knowing recipient – only arises where the defendant receives rights that are encumbered by the beneficiary's equitable proprietary rights and the defendant knew of the misapplication. If either of those conditions is missing, then the restorative duty does not arise.[111] The defendant could not be liable in knowing receipt, simply in virtue of them knowing of the misapplication. Instead, they must receive specific rights that continue to be encumbered by the beneficiary's equitable proprietary rights. This is therefore the reason for which Lord Briggs rejected the pure unconscionability analysis favoured by the appellants. It is not enough that the defendant knew of the misapplication; the specific form of unconscionability addressed by knowing receipt is using a right for one's own benefit, which one knows is encumbered by the equitable proprietary rights of another.[112]

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[107] *Byers* (n 50) [10], [42].
[108] *Byers* (n 50) [42].
[109] *Byers* (n 50) [43]–[44].
[110] For analysis of free use, see eg Chapter II.II.
[111] *Byers* (n 50) [10], [42].
[112] *Byers* (n 50) [26]–[27], [47].

Lord Burrows agreed with Lord Briggs that a personal claim for knowing receipt could not succeed where the defendant had taken free from the claimant beneficiary's equitable proprietary rights. However, whereas Lord Briggs describes knowing receipt as ancillary to the claimant's equitable proprietary claim, Lord Burrows goes as far as drawing an analogy with the common law tort of conversion[113], drawing on a 1998 article by Lionel Smith.[114] To the extent there is a difference between them, Lord Hodge and the other Justices prefer Lord Briggs' rationalisation of the claim.[115] Where a claimant is vested with a legal property right to a car and the defendant takes that car without the claimant's consent or other lawful authority, the defendant commits the common law tort of conversion against the claimant.[116] For Lord Burrows, a defendant who knowingly uses misapplied trust assets inconsistently with the equitable proprietary rights of the claimant beneficiary commits a wrong that is analogous to the tort committed by the defendant against the holder of a legal property right. For these reasons, he describes knowing receipt as equity's analogue to the common law tort of conversion.[117]

B. *Byers*: problems

The fixed trust trustee can initiate claims in knowing receipt.[118] This shows that standing for knowing receipt claims need not be grounded in the claimant being endowed with equitable ownership. Although someone in favour of an equitable ownership model might contend that

[113] *Byers* (n 50) [151]–[152].
[114] "W(h)ither knowing receipt?" (1998) 114 LQR 394; cf Lionel Smith, 'Unjust Enrichment, Property, and the Structure of Trusts' (2000) 116 Law Quarterly Review 412 (Smith, 2000).
[115] Byers (n 50) [8].
[116] Torts (Interference with Goods) Act 1977; *Kuwait Airways Corp v Iraqi Airways Co (No 6)* [2002] UKHL 19, [2002] 2 AC 883; *Armory v Delamirie* (1722) 1 Stra 505, 93 ER 664.
[117] *Byers* (n 50) [151]–[152].
[118] eg *Space Investments* (n 66) 1074.

a trustee is given standing to sue in knowing receipt to vindicate the equitable proprietary rights of their beneficiary[119], it is not possible to make that argument in the context of the charitable purpose trust. A charity trustee is not vindicating the equitable proprietary rights of their beneficiaries, for they have no beneficiaries, but rather administers rights in accordance with a charitable purpose. Furthermore, beyond the charitable purpose trust, there are non-trust scheme examples – such as the deceased estate – where no party concerned with its due administration is described as endowed with an equitable proprietary right or beneficial interest; yet claims in knowing receipt are a feature of these schemes, as much as with fixed trusts.[120] It is not clear, therefore, how Lord Briggs and Lord Burrows would have explained the availability of claims in knowing receipt in the context of the charitable purpose trust, as well as with the non-trust scheme examples.

The Supreme Court's analysis – that ties the knowing receipt claim closely to the rights of the beneficiary – may expose the defendant to compensating a beneficiary for the consequential economic losses the beneficiary has suffered as a result of the recipient's failure to restore the trust property. Indeed, the defendant – in the view of Lord Burrows – commits the wrong of interfering with the equitable proprietary rights of the claimant beneficiary. For Lord Burrows, the wrong of knowing receipt is defined by the fact that the defendant uses misapplied rights for their own purposes, knowing those rights were encumbered by the equitable proprietary rights of the beneficiary. The defendant therefore breaches a duty to the claimant in using rights inconsistently with the claimant's interest. If the view of the Supreme Court in *Byers* is taken seriously, it seems difficult to resist a claimant beneficiary's argument that the defendant's failure to return the assets for due

[119] See for example Liau's argument about standing in his discussion (analysed in Chapter VII, Section II) of *re Diplock* where one party is given standing to enforce another's rights.
[120] Ho and Mitchell (n 77) 287 – 289.

administration caused them consequential economic losses for which they should be compensated, even if those losses come from arrangements that the beneficiary has separately entered into and do not reflect loss to the trust fund itself.

The rights against rights analysis is exposed to some of the same criticisms as can be levelled against the reasoning in the Supreme Court. Both the Supreme Court's equitable proprietary rights reasoning and the rights against rights model may leave the defendant exposed to an indeterminate amount of liability for consequential economic losses occasioned to beneficiaries by harnessing their position under the trust for their own individual arrangements. It was argued in Section I of this Chapter, that the rights against rights model's distinction between successor and trespassory liability[121] might provide some reason for rejecting the claim in *Shell,* albeit the scheme-based analysis provides a more convincing explanation. However, knowing receipt *is* concerned with the liability of successors in title. Therefore, McFarlane and Stevens' focus on the individual position of the beneficiary, as explaining the key features of the trust with beneficiaries, leaves their model exposed to the criticism that it potentially leaves the defendant open to an indeterminate set of liabilities to an indeterminate class of beneficiaries. As was seen, in criticising *Shell*, McFarlane and Televantos[122] highlight the dangers for a third-party tortfeasor in being exposed to an indeterminate class of liabilities through one act of negligence. The logic of the equitable ownership and right against right models could lead to the conclusion that a beneficiary should be able to claim against the recipient for consequential economic losses; however, that could expose a defendant to an indeterminate range of liabilities, through having breached one duty (the core restorative obligation).[123] If this logic is taken seriously, it might be

[121] See analysis in Chapter I.I.B.ii.
[122] McFarlane and Televantos (n 26).
[123] See the outline of the requirements of the knowing receipt claim given at the outset of Section II.

necessary to revisit the feature of the trust that there is no limit – in principle – to the number of potential beneficiaries.

C. *Byers*: knowing receipt claims following an unauthorised disposition of company assets

In *Byers*, the Supreme Court also discussed several company knowing receipt cases.[124] The appellant argued that knowing receipt claims can exist even where the recipient took free from the claimant's equitable proprietary rights. The appellant drew on the company knowing receipt cases as showing that the company has no equitable proprietary rights and yet they have knowing receipt claims. The Supreme Court therefore had to explain the company cases to rebut this argument of the appellant.

According to the Supreme Court, when company assets are misapplied – for example because transferred by a company director for an improper purpose – the recipient (if aware of the misapplication) would receive rights encumbered by the beneficial interest of the company, arising under a constructive trust.[125] That constructive trust arises in a *scintilla temporis* prior to receipt by the defendant. This was necessary to align with the Supreme Court's view that a defendant must receive rights that are encumbered by the equitable proprietary rights of the claimant, for a claim in knowing receipt to succeed.

However, the rights that were misapplied in the company scenario – because transferred, for example, for an improper purpose – were vested in the company. There is no

[124] eg *Re Lands Allotment Co* [1894] 1 Ch 616.
[125] *Byers* (n 50) [61].

party in the company scenario that initially holds a beneficial interest or equitable proprietary right. The company does not hold its rights on trust for shareholders or other parties. Rather, the shareholders are vested with their own rights (shares) which they might hold beneficially (ie in accordance with their unfettered preferences) or non-beneficially (ie in accordance with a scheme).

The real problem with the Supreme Court's analysis of the company knowing receipt cases is its understanding of the basis of a knowing receipt claim. For the Supreme Court, the personal claim in knowing receipt is ancillary to the equitable proprietary claim. Given this understanding of knowing receipt, the Supreme Court thought it necessary to extract a continuing beneficial interest in favour of the company, to fit with its overarching analysis.

As seen in Chapter V, Section II.I.A.ii, Ho and Mitchell have also criticised the Supreme Court's understanding of the company knowing receipt cases. The authors propose instead that the company cases are better explained not by reference to any equitable proprietary interest, but by the fact that companies, like trust beneficiaries, have standing to enforce equitable duties of due administration owed by directors whose powers to dispose of company property are subject to limits enforceable in equity.[126] On a scheme-based analysis, an analogy can be drawn between the company and the trust cases. A company does not have unfettered preferences in the same way as a natural person. A company is a legal entity that can only act through its agents. In a sense, then, the rights are vested in the company non-beneficially[127], as its assets are administered by the company directors and other corporate officers in accordance with the company's constitution and articles of association.[128]

[126] Ho and Mitchell (n 77) 284 – 287.
[127] See analysis in Chapter VIII, Section II.
[128] Companies Act 2006, ss 17 – 20.

D. *Byers*: a scheme-based analysis

Reasons have been given for questioning the reasoning of the Supreme Court in *Byers*. A question arises whether on the scheme-based analysis the result in *Byers* itself would have been different. The orienting tool for analysis of the trust should be the integrity of the scheme. The conveyance of assets in breach of trust undermines the integrity of the scheme. The question arises whether the defendant taking free from the terms of the trust means that they are free to bring to bear their unfettered preferences in the use made of the misapplied assets. An argument could be that the defendant cannot owe a duty not to bring to bear those unfettered preferences, if they received title that was cleared from any requirement to uphold the integrity of the scheme. It is only because the law's commitment to the integrity of the scheme continues to encumber those rights, that the defendant owes a duty not to bring to bear their unfettered preferences.

The appellants were correct in arguing that a knowing receipt claim can succeed despite the defendant never having held title encumbered by the claimant's equitable proprietary rights, as the example of the charitable purpose trust and the company cases show. However, the claimant cannot succeed if the defendant received title that was cleared from the law's commitment to the integrity of the scheme. Although the defendant is not required to administer the misapplied right or its traceable proceeds in accordance with the all-encompassing set of terms, as their duty is to return the right for due administration (rather than undertaking that due administration themselves), the personal claim in knowing receipt can only succeed if the law is still committed to ensuring that the specific right in

question in the hands of the defendant be used in accordance with the terms of the scheme in question.

This analysis suggests that the Supreme Court was correct in dismissing the argument made by the appellants that the company knowing receipt cases should have allowed the appellant to initiate a knowing receipt claim. However, the reason is not because the defendant in a knowing receipt case receives rights that are already burdened by the claimant company's equitable proprietary rights, but rather that the defendant receives specific rights which the law is still committed in ensuring are used compatibly with the duties of the directors to administer the company assets according to authorised purposes. Therefore, the result in *Byers* should have been the same if the defendant had received company assets, rather than trust assets. The effect of the rules of the *lex situs* was to give the defendant title free from a requirement to uphold the integrity of the scheme. The assets had been freed from the law's commitment to upholding the integrity of the scheme as concerning those specific misapplied assets. Therefore, the Supreme Court should have understood the significance of the company cases differently. They are not examples of cases where the defendant receives assets encumbered by pre-existing equitable proprietary rights. Rather, they are examples of cases where the defendant receives specific rights that have not been freed from the law's commitment to upholding the limitations on the authority of the company directors.

In summary, in its analysis of knowing receipt claims, the Supreme Court in *Byers* is liable to at least two distinct criticisms. First, its understanding of the claim provides a poor fit for the rest of the law. Second, even within the context of the fixed trust, grounding the claim in the individual position of the beneficiary leads to conclusions which cause concern:

for instance, the possibility of beneficiaries claiming for their consequential economic losses and the dangers of indeterminate liability, through one breach of the restorative duty.

Section III: Strict liability personal claims

Introduction

Unless the recipient acted unconscionably, it is not possible – in the law of trusts – to initiate a personal claim against them.[129] They cannot be asked to restore the value of the trust fund, if they disposed of the trust assets and their traceable proceeds, without knowing of the breach. There are arrangements (such as the deceased estate) – which also involve specific rights held subject to the core scheme duty[130] – where such strict liability claims are recognised. This section of the chapter will ask why such claims might be justified and whether the law has good reason for not allowing such claims against recipients of misapplied trust assets.

I. *Re Diplock*

Caleb Diplock left a will for "charitable and other benevolent purposes". Given the failure to provide exclusively for charitable purposes, this attempted disposition was void.[131] However, before the House of Lords pronounced the will's invalidity, assets from Diplock's estate had already been distributed to various charities and associations, in accordance with the

[129] *Akindele* (n 53) 455.
[130] See analysis in Chapter I.II.A.
[131] *Chichester Diocesan Fund & Board of Finance Incorporated v Simpson* [1944] AC 341 (HL).

provisions of the impugned document. The *Diplock* litigation concerned claims initiated by Caleb's next of kin against the recipients of assets under the invalid disposition.

Importantly, for the purposes of this analysis, the House of Lords recognised that recipients of misapplied estate assets could be liable to strict liability personal claims.[132] They could be under a duty to pay the value of the misapplied assets into the fund, even if they had dissipated those funds without knowing of their improper provenance.[133] There are two conditions on the strict liability claim being asserted. First, the claim is only available where the estate is without remedy against the wrongdoing executor or personal representative.[134] Second, the claim does not exist if, at the time of payment, there were sufficient assets to pay all the beneficiaries in full and the deficiency arose through some subsequent accident or devastavit[135] committed by the executor or personal representative.[136] As in *Diplock* itself, the personal claims might also be initiated alongside proprietary claims to specific misapplied assets or their traceable proceeds that are presently in the hands of the unauthorised recipients. For example, tracing claims succeeded against the charities which had chosen to deposit the cheques into their bank accounts.

[132] *Diplock* (n 1) 267.
[133] The issue of whether the estate creditors and legatees must first exhaust their claims against the executor/administrator before they can initiate a strict liability claim against the recipient will be examined in Chapter VII on standing.
[134] *Diplock* (n 1) 503 – 504.
[135] Discussed in Chapter III, Section I.I.
[136] *Fenwicke v Clarke* (1862) 4 De GF & J 240, 45 ER 1176; *Re Winslow* (1890) 45 Ch D 249 (Ch D) (accident); *Peterson v Peterson* (1866) LR 3 Eq 111 (Ch). See also *Re Lepine* [1892] 1 Ch 210 (CA) (devastavit).

A. Reaction to *Diplock*

i. Lionel Smith's analysis

Smith has sought to provide a justification of the strict liability claim recognised in *Diplock*.[137] At the same time, he supports the continued inability to initiate such claims in the law of trusts. Smith highlights that when an executor or administrator is vested with the rights of the deceased, they are under a duty to deploy those rights in accordance with an order of priorities.[138] The executor must pay the tax authorities and the creditors of the deceased, prior to any of their legatees[139]; the pecuniary and the specific legatees should have their claims satisfied prior to those of the residuary legatee.[140] Smith argues that when a transfer of rights is made incompatibly with those terms, that upsets the order of priorities.[141] For Smith, the claim should only succeed where the recipient thought that they were entitled to the transfer under the rules of the estate.[142] If the recipient thought that the executor was dealing with their own general assets ie rights vested beneficially, then Smith does not think – it seems – that the *Diplock* strict liability claim should succeed.[143] In the language adopted in this thesis, Smith's understanding of the operation of the deceased estate can be seen as a scheme-based analysis. A deceased estate entails rights appropriated to an all-encompassing set of terms and those terms furnish an order of priorities and a hierarchy of interests. If the executor pays the residuary legatee prior to a creditor of the deceased, then the integrity of the scheme has

[137] Lionel Smith, 'Unjust Enrichment, Property, and the Structure of Trusts' (2000) 116 LQR 412 (Smith, 2000).
[138] Smith, 2000 (n 137) 437–438.
[139] Administration of Estates Act 1925, s 38.
[140] *Re Cottrell* [1942] Ch 477 (Ch D); *Re Eden's Will Trusts* [1946] Ch 185 (Ch D).
[141] Smith, 2000 (n 137) 440.
[142] Smith, 2000 (n 137) 440–441.
[143] Smith, 2000 (n 137), 441; *Gray v Richards Butler* (1996) 140 SJLB 194 (Ch D).

been undermined: the specific rights that formed the subject-matter of appropriation were distributed incompatibly with the all-encompassing set of terms to which those rights had been appropriated.

Smith's analysis of the trust, in this 2000 article, is very different. His focus seems to be on a fixed trust scenario, where a trustee holds rights on trust for an absolutely entitled beneficiary. Smith contends that in this example, the claim against the recipient is grounded in the beneficiary's equitable ownership:

> Whether or not you were aware of it, that property is mine (in equity).[144]

Smith sees the claims against recipients of misapplied deceased estate assets in a different light to the claims against recipients of misapplied trust assets; the two respond to different themes, which justify strict liability claims in one context, but not the other.

ii. Unjust enrichment and Liau's analysis

Birks' response to *Diplock* was that the law was failing to treat like cases alike.[145] He understood *Diplock* as recognising a strict liability unjust enrichment claim in favour of the next of kin. On this basis, he thought it unjustifiable that the beneficiary of a trust should not be given a similar strict liability unjust enrichment claim against recipients of misapplied trust assets. Birks' analysis has been criticised in several ways. For example, Swadling has highlighted that the enrichment of the third-party is at the expense of the trustee, not the

[144] Smith, 2000 (n 137), 442; there is some similarity between this view and the views expressed by Lords Briggs and Burrows in *Byers* (n 50), discussed above in Section II.
[145] Peter Birks, 'Misdirected Funds: Restitution from the Recipient' [1989] Lloyd's Maritime and Commercial Law Quarterly 296; Peter Birks, 'Receipt' in Arianna Pretto and Peter Birks (eds), *Breach of Trust* (Hart 2002).

beneficiary of the trust.[146] The recipient received rights from the trustee and not the beneficiary.

In a recent analysis of the *Diplock* litigation, Liau has attempted to provide a justification for the strict liability claim recognised by the House of Lords against recipients of misapplied estate assets.[147] It is important to note that Liau – like Smith – is attempting to provide a justification for the claim against recipients of estate assets; like Smith, Liau continues to defend the absence of strict liability claims against recipients of misapplied trust assets. Liau builds on Smith's earlier analysis.[148] Smith had identified a policy-motivated reason for allowing a strict liability claim against recipients of misapplied estate assets: to maintain the order of priorities imposed in relation to the administration of estate assets. Liau deploys this idea to construct an unjust enrichment analysis of the claim recognised in *Diplock*. His argument is that the claim belongs to the executor and that the enrichment of the recipient is at their expense. The unjust factor is defined as a policy-based goal of upholding the administration of estates.[149] The estate creditors and next of kin are given standing to assert the executor or administrator's strict liability unjust enrichment claim against the recipient.[150] Liau goes further than Smith. He contends that the unjust enrichment claim should succeed against the recipient of the misapplied estate assets, irrespective of whether the latter purported to take under the rules of the estate.[151]

[146] William Swadling, 'Ignorance and Unjust Enrichment: The Problem of Title' (2008) 28(4) Oxford Journal of Legal Studies 627; see also Ben McFarlane, 'Unjust Enrichment, Property Rights and Indirect Recipients' (2009) 17 Restitution Law Review 37.
[147] Timothy Liau, *Standing in Private Law: Powers of Enforcement in the Law of Obligations and Trusts* (Oxford University Press 2023) (Liau) ch 8 and 9.
[148] Smith, 2000 (n 137).
[149] Today, another potential unjust factor would be the mistake of law by the executors: *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL).
[150] This explanation helps to explain why the payment goes to the estate, not to the claimants themselves.
[151] Liau (n 147), Ch 9.

II. Strict liability personal claims: a scheme-based analysis

A. Extending Smith and Liau's analysis to the trust

Smith's analysis of *Diplock* can be seen as a form of scheme-based analysis. He rightly explains that an executor administers rights in accordance with an order of priorities. However, such an analysis can also be applied to understand the position where a trustee makes an unauthorised disposition of trust property. Arguably, part of the problem is that Smith's examples are confined to the fixed trust scenario. He does not engage with charitable purpose trusts, for example. As argued above, it is impossible to explain the personal claims available in that context in the equitable ownership of the claimant. The Attorney-General, Charity Commission or interested members of the public do not say to the recipient "whether or not you were aware of it, that property is mine (in equity)".[152]

A trust, like the deceased estate, entails rights appropriated to a scheme. That scheme furnishes an order of priorities, a hierarchy of interests and a set of rules to determine to whom rights should be distributed and in which chronology. For example, the rights of indemnity of a trustee are to be met before the claims of the beneficiaries.[153] Trusts and deceased estates share the fundamental form of non-beneficial right-holding.[154] This gives rise to the question of why the liability of third-parties receiving an unauthorised disposition should be different in each case.

[152] Smith, 2000 (n 137), 442.
[153] *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20, (2019) 268 CLR 524 [29]; see analysis in Chapter IV.
[154] See analysis in Chapter I.II.B.

In *Re Montagu's Settlement Trusts* [155], for example, the defendant *did* purport to take under the rules of the trust. The defendant thought they were entitled to a transfer under the rules of that particular scheme. In reality, the transfer constituted a misapplication, but the defendant was unaware of the breach and so was not liable in knowing receipt.

Liau's overall analysis is susceptible to the same criticisms as those which can be levelled against Smith. It is surprising that Liau does not proceed to ask whether his unjust enrichment analysis could be used to justify strict liability claims in the law of trusts. If the executor is armed with an unjust enrichment claim, the unjust factor grounded in upholding the integrity of the rules on the administration of the estate, a very similar analysis could be applied to the trust: the trustee is armed with an unjust enrichment claim, the unjust factor being sourced in the integrity of the rules on the administration of the trust having been undermined.[156] This thesis therefore argues that if the justification for the strict liability claim in the deceased estate context is premised on the law's commitment to upholding the rules on the administration of an estate, then it is difficult to see why that same analysis does not apply to the trust.

Whittaker has provided an historical account of the Diplock *in personam* claim.[157] He argues that the availability of the strict liability claim is sourced in the fact that historically the recipient from a deceased estate had to provide security in case it later transpired that another party had a hierarchically superior claim.[158] The availability of the strict liability

[155] [1987] Ch 264 (Ch D) (*Montagu*).
[156] This is also why it matters whether a mistake of law analysis is applied instead: a trustee who deliberately breaches a trust when disposing of the trust assets makes no mistake of law. However, on the present analysis, that does not affect the availability of the strict liability claim, grounded on the policy of upholding the due administration of the trust estate.
[157] Simon Whittaker, 'An Historical Perspective to the 'Special Equitable Action' in *Re Diplock*' (1983) 4 JLH 3 (Whittaker); see also Charles Harpum, 'The Basis of Equitable Liability' in Peter Birks (ed), *The Frontiers of Liability* (OUP 1994) vol 1.
[158] Whittaker (n 157) 13–15, 19–21, 24–28, 28–32.

claim might therefore be understood as a *quid pro quo* for the fact that the recipient was no longer required to provide security.[159] Whittaker's goal is not to directly intervene in the debate as to whether there should be strict liability claims against recipients of misapplied trust assets and his point does not undermine the analogy made in this thesis.[160]

As seen in the analysis in Chapter I.II.B, it is important not to exaggerate the differences between the trust and the deceased estate. Once the trust is understood as entailing rights appropriated to a scheme, those all-encompassing set of terms providing a hierarchy of interests and an order of priorities, in the same way as the rules on the administration of a deceased estate, then it is necessary to be careful before contending that the trust and the deceased estate are fundamentally different.[161] The context or cause of the appropriation is specific: namely the deceased estate scheme only arises upon the death of the testator or intestate. However, the possibility that a hierarchically superior creditor appears from the woodwork exists across both the trust and the deceased estate. Current and former trustees, trust creditors and beneficiaries are all creditors of the scheme at a general level: they all stand to potentially receive assets from the fund beneficially and their claims are organised with reference to rules of administration and priority. Where the trustee pays a particular beneficiary, it is always possible that another beneficiary or trustee may appear and contend that the distribution was a breach of trust because a particular rule of administration had been infringed because their claim is hierarchically superior.[162]

[159] Whittaker (n 157) 14–16, 21.
[160] Whittaker (n 157) 36–37.
[161] It is of course the case that there are trusts in the context of a deceased estate — eg the statutory trusts arising on intestacy (Administration of Estates Act 1925, s 33) — and personal representatives are given the same powers as trustees under the Trustee Act 1925, s 68(17).
[162] eg as in *Naaman v Jaken Properties Australia Pty Ltd* [2025] HCA 1, (2025) 99 ALJR 295 *(Jaken)*.

B. Comparing unjust enrichment scholarship with the scheme-based analysis

Unjust enrichment scholarship has sought to explain certain personal strict liability claims by recognising an unjust factor of "want of authority".[163] Birks' early work treated *Re Diplock* as an unjust enrichment claim[164] and subsequent writers have argued that a recipient is unjustly enriched where assets are transferred pursuant to an exercise of power that was unauthorised.[165] On this view, want of authority is the unjust factor which explains why the recipient's enrichment should be reversed.[166] Birks' later work sought to generalise this approach further through his theory of absence of basis.[167] Rather than relying upon a catalogue of unjust factors, Birks argued that the unifying question is whether the defendant's enrichment lacked a legal or explanatory basis, so that transfers made without authority simply become one manifestation of the broader principle that enrichments without a legal basis should be reversed.[168]

The scheme-based analysis is doing something slightly different. It is not an account of unjust enrichment and does not seek to identify either an unjust factor or an absence of basis. Instead, it operates within the distinct category of situations in which rights have been appropriated to a scheme. At Level 1, rights are held non-beneficially because they have been appropriated to an all-encompassing set of terms. At Level 2, the law is committed to preserving the integrity of that scheme. The question is therefore not whether the recipient has been unjustly enriched, but whether the exercise of the relevant power was compatible with the scheme to which the rights had been appropriated. On the scheme-based analysis, if

[163] Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (10th edn, Sweet & Maxwell 2022, 1st Supplement) (Goff & Jones) para 8-198A.
[164] Peter Birks, 'Misdirected Funds: Restitution from the Recipient' [1989] LMCLQ 296; Birks did not use the want of authority language but originally saw the claim as about ignorance and *a fortiori* of mistake.
[165] *Goff & Jones* (n 163) para 8-198A.
[166] *Goff & Jones* (n 163) para 8-198A.
[167] Peter Birks, *Unjust Enrichment* (2nd edn, OUP, 2005) (Birks, Unjust Enrichment) Chapter 6.
[168] Birks, Unjust Enrichment (n 167).

the law were to recognise a strict liability personal claim against recipients of misapplied trust assets, that claim would not derive from the law of unjust enrichment. Rather, it would constitute one possible Level 3 operational mechanism through which the law gives effect to its Level 2 commitment to maintaining the integrity of the scheme.[169] On this analysis, "want of authority" and "absence of basis" are explanations internal to the law of unjust enrichment, whereas the scheme-based analysis explains the normative foundation of the strict liability personal claim by reference to the law regulating rights appropriated to a scheme. The strict liability claim is therefore understood, not as a response to unjust enrichment, but as one possible doctrinal technique by which the law vindicates the integrity of the scheme. It is also important to emphasise that the effect of the claim is not that money be paid directly to the beneficiary/ next of kin, but rather that the fund be restored, whereas Birks' view of ignorance – which focusses on the position of beneficiary/next of kin – would more naturally lead to the conclusion (not supported by the authorities), that the beneficiary/next of kin should be paid directly.

Section III: Conclusions

Smith and Liau each provide a potentially persuasive analysis of the *Diplock* claim. However, neither is very convincing in explaining why their analysis should not also apply to the misapplication of trust assets. It is important to remember that the link between the trust and deceased estate is at a general level. As emphasised in Chapter I.II.B, there is a diversity of schemes across the law, as well as a diversity of schemes within the law of trusts. The particular context in which an appropriation occurs *may* justify the specific rules varying from one scenario to the next. Whittaker has, for example, suggested a specific historical

[169] For an explanation of the levels analysis, see Chapter I.II.A.

reason, applying to deceased estates and not to trusts. The aim of this section of the chapter is not to categorically establish that strict liability personal claims should exist in the law of trusts. Rather, its goal is to show a potential justification for that claim and to argue against dubious ways of distinguishing the trust from other areas in the law, such as the deceased estate.

Furthermore, the analysis also highlights the errors of Birks' equitable ownership model.[170] For Birks, the beneficiary is the owner in equity of the trust assets.[171] Given the legal owner has strict liability personal claims in unjust enrichment against recipients[172], Birks thought the owner in equity should also have such claims and that there was therefore an inconsistency between common law and equity.[173] For Birks, *Diplock* is an example of an inconsistency within equity, because he saw the next of kin as entitled to an unjust enrichment claim and thought the law was failing to treat like cases alike in denying such a claim to the beneficiary of a trust.[174] Although Birks is possibly right in thinking that there was an inconsistency between the trust and deceased estate cases, his analogy was the wrong one. The reason for the strict liability claim should not be sourced in any individual's equitable ownership, but rather in what is necessary to uphold the integrity of the scheme. The link drawn between the trust and deceased estate should have been to the law's integrity commitment to the scheme to which specific rights have been appropriated. Furthermore, Birks' analysis would have no way of explaining why the strict liability claim should be available against recipients of misapplied charitable purpose assets, whereas the argument developed in this thesis would explain why the claim is available across the law of trusts,

[170] eg seen in Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 University of Western Australia Law Review 1 (Birks, Taxonomy).
[171] Birks, Taxonomy (n 170) 18–19.
[172] *Kelly v Solari* (1841) 9 M & W 54, 152 ER 24.
[173] Birks, Taxonomy (n 170) 67–69.
[174] Birks, Taxonomy (n 170) 67–69.

because it does not focus on the individual rights of any party, but rather on the integrity of the scheme.

In sum, Birks is led astray in saying that an absolute owner and beneficial owner should both be protected in the same way. As Smith notes[175], that overlooks some important differences between the position of an absolute owner and the position of a beneficiary under a trust. On a scheme-based analysis, the point is rather that there is an analogy between the receipt from a personal representative/executor and receipt from a trustee as each involves a need to protect the integrity of a scheme. The scheme-based analysis of *Diplock* is an example of how the analysis in this thesis moves away from strict focus on the position of an individual to looking at the existence of a scheme.

Whether the law of trusts should recognise strict liability personal claims against recipients has been a source of significant academic controversy[176], as well as judicial discussion.[177] The goal of this section of the chapter has been to present a new way of potentially justifying such a claim, which is rooted in the law's commitment to upholding the integrity of the scheme, rather than in the individual position of any party concerned with its due administration.

A potential avenue for future development of the law might be to reframe the significance of knowledge. It could be argued that the strict liability claim should be available

[175] Smith, 2000 (n 137) 430–431, 444.
[176] eg James Edelman and Elise Bant, *Unjust Enrichment* (2nd edn, Hart 2016) 288; James Edelman, '*Marsh v Keating* (1834)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart 2006).
[177] *Akindele* (n 53) 456; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* is a good example of judicial debate on this issue, given the divergence in the views of the NSWCA ([2005] NSWCA 469) and the HCA ([2007] HCA 22, 230 CLR 89).

whenever the recipient knew that they were receiving assets from a scheme, whether or not they were aware that the transfer was a misapplication of the assets. If it later transpires that the transfer was unauthorised, then the recipient might be liable to a strict liability claim. The basis (compatibility with the terms of the scheme) pursuant to which the defendant received the assets has failed and this might expose them to a strict liability claim, subject to a change of position defence. This suggestion would mean reassessing cases such as *Montagu*. After all, the defendant *did* receive assets from the trustees knowing that the assets were from the trust. The defendant did not know that the transfer constituted a misapplication and therefore could not be liable in knowing receipt. However, if the suggestion favoured in this paragraph is taken forward, the defendant should be liable to a strict liability claim as they received on the basis that they were an authorised recipient under the trust. Arguably, therefore, a sound principle for future development of the law is to distinguish between cases where the defendant thought they were receiving assets that were vested beneficially in the transferor and cases where the defendant knew they were receiving scheme assets. If the latter, then the defendant may expose themselves to a strict liability personal claim if it later transpires that the transfer was unauthorised.

The knowing receipt claim and the strict liability claim have different requirements and different effects[178], though they can both be understood as sourced in the law's commitment to upholding the integrity of the scheme. The knowing receipt claim requires knowledge on the part of the recipient of the misapplication itself. Furthermore, for the knowing receipt claim to succeed, it must not be a case like *Byers* where the nature of the transaction prevents the scheme from having an effect on the recipient, by clearing the

[178] *DD Growth Premium 2X Fund (In liq) v RMF Market Neutral Strategies (Master) Ltd* [2017] UKPC 36, [2018] Bus LR 1595 [58].

recipient's title from the terms of the trust. Namely, the effect of the transaction must not clear the law's commitment to ensuring that specific right or its traceable proceeds be used to promote the terms of the scheme, if the knowing receipt claim is to succeed. Where the recipient knows of the misapplication and there is no rule that clears the rights received from that commitment, then the recipient is encumbered by custodial and restorative duties[179], meaning that if they bring to bear their unfettered preferences, then they will be liable for the losses occasioned to the scheme.[180] For example, if the deceased estate or trust would have made a profitable investment had the misapplied assets been returned in accordance with the knowing recipient's duties, then the knowing recipient will be liable to pay the value of that profitable investment.[181]

A personal strict liability claim against a recipient of misapplied trust assets does not require proof that the defendant owed, still less breached, any restorative or custodial duty. It requires only that the defendant received an asset traceable to the trust and is, on that basis, liable to restore its value.[182] The same structure operates in the administration of deceased estates, where a personal claim against an overpaid recipient does not depend on the recipient's knowledge or fault.[183] The differences between the trust and the estate are not sufficient, in principle, to justify the claim in one context but not the other.

Knowing receipt, by contrast, remains a fault-based personal claim[184]. It depends on establishing that the recipient's conscience was sufficiently affected to bring the recipient under a restorative duty and that the recipient breached that duty by failing to restore the

[179] eg *Re Holmes* [2004] EWHC 2020 (Admin), [2005] 1 WLR 857 [22]; *Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council* [2006] NSWSC 1217 [47].
[180] eg *Rothko* (n 86).
[181] *Rothko* (n 86).
[182] *Diplock* (n 1) 478–479.
[183] *Ministry of Health v Simpson* [1951] AC 251 (HL) 265–266.
[184] *Byers* (n 50) [63]–[66].

assets[185]. This difference in structure produces a difference in effect. Because the knowing recipient is treated as having come under a duty, their liability can extend beyond the value received: they may be liable to compensate the trust fund for further losses caused by their breach, for example a lost opportunity for the fund to have made a profitable investment.[186] A strict liability claim, being independent of duty, cannot generate this consequential head of liability; it is confined to restoration of the value received.[187] Knowing receipt would therefore retain a distinct and necessary role, even if a strict liability claim were also recognised.

Chapter conclusion

The aim of this chapter has been to show how the scheme-based analysis can shed light on certain personal claims available against third-parties to a trust. In the view of this thesis, the scheme-based analysis provide a better fit for the claims considered, providing unity in the law of trusts, as well as with arrangements beyond the law of trusts. Furthermore, the scheme-based analysis shows why beneficiaries should not be able to claim for consequential economic losses suffered, either against trespassers or recipients, and therefore provides a better fit than the rival analyses for the effect of the personal claims. This restriction on a beneficiary's claim is something the equitable ownership and rights against rights models struggle to explain. The chapter has also shown a link between the deceased estate and trust which might justify both areas having personal strict liability claims against recipients of misapplied assets, that link focussing on the law's commitment to the integrity of the scheme. The next chapter considers the usefulness of the scheme-based analysis when considering

[185] *Akindele* (n 53).
[186] *Target Holdings Ltd v Redferns* [1996] AC 421 (HL) 434 (Lord Browne-Wilkinson); *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503.
[187] *Rothko* (n 86)).

who has standing to initiate personal and proprietary claims against the trustee and third-party recipients of misapplied trust assets.

Chapter VII: Standing

Section I: Introduction and basic rules

This chapter argues that the rules on standing to bring personal and proprietary claims in the law of trusts to reconstitute the trust fund, against both the trustee and third-party recipients of misapplied trust assets[1], are ultimately sourced in what is necessary to uphold the integrity of the scheme. The chapter proceeds in Section II to show why the beneficial ownership and rights against rights analyses struggle to account for the rules in this area. Section III explains how the scheme-based analysis can shed light on several themes which arise in this area.

Standing has attracted recent scholarly analysis and the chapter argues that Hudson and Mitchell's article[2], as well as that of Jing[3], provide strong support for a scheme-based analysis. A scheme without enforceability mechanisms is not a legal structure, but rather a moral aspiration. The existence of standing rules is therefore necessary to any legally relevant law of trusts: someone must be able to invoke the court's jurisdiction to secure compliance with the scheme. It will be argued in this chapter that, as schemes include structures without beneficiaries with equitable proprietary rights, standing cannot be helpfully understood as grounded in any single party's individual rights. On the view of this chapter, the function of standing is institutional, not correlational. It serves the scheme, not the individual as such.

Hudson and Mitchell define standing as a concept concerned not with the existence of substantive rights but with the legal entitlement to invoke the court's jurisdiction for the

[1] Questions about standing to *defend* claims are not discussed in this thesis.
[2] Jessica Hudson and Charles Mitchell, 'Standing in Trusts Law, the Beneficiary Principle and the Juridical Nature of Trustee Duties' (2026) 142 LQR 208 (Hudson and Mitchell).
[3] Hui Jing, 'The Concept of Beneficial Ownership in Express Trust: A Necessity?' (2025) 18 Journal of Equity 131 (Jing, Necessity).

enforcement of legal rules. Standing determines who may ask a court to declare or enforce a right, restrain a breach of duty, invalidate a transaction or grant other forms of judicial relief. In their view, standing is therefore analytically distinct from the substantive rights or duties that may be the subject of the proceedings. Rather than identifying the holder of a right, rules of standing allocate the legal powers and liberties to commence, conduct and, where appropriate, defend litigation. This allocation is of fundamental importance because those with standing determine whether, and in what manner, the law's enforcement machinery is engaged.[4]

Mitchell and Hudson develop this understanding by drawing upon the work of Liau[5] and Barker.[6] Following Liau, they accept that standing is conceptually distinct from substantive rights[7] and that one must distinguish the existence of a right from the legal power to enforce that right before an adjudicative body.[8] They also adopt Barker's analysis of standing as consisting of Hohfeldian liberties and powers – what Barker describes as "rights of action"[9] – which enable a person to invoke the court's jurisdiction independently of the substantive claim-rights whose enforcement is sought.[10] Both Liau and Barker therefore reject the conflation of substantive rights with procedural powers of enforcement. Mitchell and Hudson expressly endorse this analytical separation as the proper starting point for analysing trusts law.[11]

[4] Hudson and Mitchell (n 2) 211–214.
[5] Timothy Liau, *Standing in Private Law: Powers of Enforcement in the Law of Obligations and Trusts* (OUP 2023) (Liau).
[6] Kit Barker, *Enforcement in Public and Private Law: Paradigms, Exceptions and Hybrids* (OUP, 2026) (Barker).
[7] Hudson and Mitchell, (n 2) 213–214.
[8] Hudson and Mitchell, (n 2) 213.
[9] Barker (n 6) 12.
[10] Hudson and Mitchell, (n 2) 213–214.
[11] Hudson and Mitchell, (n 2) 211–214.

The focus of this chapter is on standing to initiate claims against the defaulting trustee[12] or a third-party recipient of misapplied trust assets that they reconstitute the trust fund, either through personal[13] or proprietary claims.[14] Such claims are a feature not only of the trust, but also of non-trust schemes. Beneficiaries of a standard fixed trust invariably have standing to initiate personal and proprietary claims against both the trustee and third parties.[15] However, not all trusts have beneficiaries. With the charitable purpose trust, claims against the trustee or third-party are initiated by the Attorney-General, Charity Commission or select members of the public.[16] Even with the standard fixed trust, not only beneficiaries, but also the trustees themselves have the ability to initiate personal and proprietary claims.[17] It is also a feature of English law that mere objects of a discretionary power of appointment have the ability to hold the trustee to account, as well as to initiate personal and proprietary claims against recipients of misapplied trust assets.[18] Such parties are not understood as enjoying equitable proprietary rights in the trust assets.[19] Beyond the law of trusts, non-trust scheme structures[20] are upheld by parties who do not qualify as holders of a beneficial interest. For example, estate creditors[21] and residuary legatees[22] are empowered to initiate personal and proprietary claims against both the executor/personal representative and third-parties. The aim of such claims is to reconstitute the deceased estate.[23]

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[12] See analysis in Chapter III, Section I.
[13] See Chapter III, Section I and Chapter VI.
[14] See Chapter V.
[15] *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424 [82].
[16] Hui Jing, 'Enforcing Charitable Trusts: A Study on the English Necessary Interest Rule' (2022) 42 LS 228 (Jing, Charitable Trusts).
[17] Jessica Hudson, *Assuring the Express Trust: The So-Called 'Beneficiary's Proprietary Claim'* (PhD Thesis, University of New South Wales, (Hudson, PhD) ch 7. See eg *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072 (PC) (*Space Investments*) 1074; *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91 (*Independent Trustee Services*) [32], [76]-[77].
[18] *Lewis v Tamplin* [2018] EWHC 777 (Ch) (*Lewis*) [39].
[19] eg *Gartside v IRC* [1968] AC 553 (HL) (*Gartside*) 607.
[20] See analysis in Chapter I.II.B.
[21] eg *Noble v Brett* (1858) 24 Beav 499, 510; 53 ER 450, 455 (*Noble*); *Hooper v Smart* (1875) 1 Ch D 90 (Ch D) 98 (*Hooper*).
[22] *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 (PC) (*Livingston*) 713–14.
[23] See analysis in Chapter VI, Section II.III.

As Ho and Nolan have said[24]:

> The obligations of a trustee are fundamentally different from the obligations of a contracting party. This difference is most obviously reflected in the remedies for breach of the respective obligations. *But it also has other important structural consequences*.

In the law of contract, it makes sense to ground the standing of the contracting parties to enforce the contract in their respective rights to performance of the contract. After all, that analysis aligns with the effect of the claim in contract, which can include compensation for at least some consequential economic losses.[25] However, as the passage from Ho and Nolan suggests, that is *not* how the law of trusts works. As seen in Chapter III, Section I and in Chapter VI, Sections II and III, the effect of the claims brought against a defaulting trustee or third-party recipient, following an unauthorised disposition of trust assets, is to reconstitute the trust fund, rather than to compensate an individual party for their personal losses. The structural difference between trust and contract therefore explains why we should also expect the standing rules to be different in each case, as well as the remedies being different.

Section II: Competing Models

An obvious challenge to the rival analyses is that parties are given standing to enforce trusts, where that party has no beneficial ownership or rights against rights, nor can they be seen as

[24] Lusina Ho and Richard Nolan, "The Performance Interest in the Law of Trusts" (2020) 136 LQR 402 (Ho and Nolan), 402 (emphasis added).
[25] *Hadley v Baxendale* (1854) 9 Exch 341, 156 ER 145.

a representative enforcing the rights of such a party. This is clear from the example of the charitable purpose trust, which is discussed below in Section III.I.A.

In a recent article challenging the centrality of beneficial ownership in understanding the express trust[26], Jing has highlighted that focussing on the division between a legal and an equitable estate to property struggles to account for the rules operating across the law of express trusts. In his case-study, Jing addresses four types of express trust: the fixed trust, discretionary trusts with closed and open-lists, charitable purpose trusts and non-charitable purpose trusts. In his analysis, Jing specifically discusses standing rules and the difficulty of locating their basis in the beneficial ownership of the beneficiary.

Furthermore, beyond the law of express trusts, it cannot account for why parties are given standing to uphold the due administration of other non-trust scheme structures[27], such as with the deceased estate. As explained by Viscount Radcliffe in *Commissioner of Stamp Duties (Queensland) v Livingston* [28], creditors of the deceased[29] and residuary legatees[30] are empowered to initiate claims against the executor and third parties, despite having no beneficial interest in the assets of the unadministered estate.[31]

Invoking the equitable proprietary right of the beneficiary as the reason for which they have standing to initiate personal and proprietary claims against the trustee and third parties provides a poor fit for the relevant law as a whole. Standing to hold the trustee to account, as well as standing to initiate personal and proprietary claims against third parties is

[26] Jing, Necessity (n 3).
[27] See analysis in Chapter I.II.B.
[28] *Livingston* (n 22) 713–14.
[29] *Noble* (n 21), 455; *Hooper* (n 21) 98.
[30] *Livingston* (n 22) 713–14; *Hill v Simpson* (1802) 7 Ves 152, 32 ER 63.
[31] *Livingston* (n 22) 707-708.

a key feature of all trusts. The beneficial ownership model cannot properly account for this key feature, as at best it can explain why standing is given in the context of the fixed trust. However, even in that context, as will be explained in Section III, viewing equitable proprietary rights as the reason for granting standing is problematic.

Comparative experience illustrates that there is no conceptual necessity for beneficiaries themselves to possess standing in every case. Under Japanese trust law, for example, claims against third-party recipients of misapplied trust assets are brought by the trustee rather than by the beneficiary.[32] The protection of the trust is therefore achieved through a different allocation of enforcement powers. The contrast demonstrates that standing is properly understood as a Level 3 question concerning the institutional allocation of enforcement authority. Once the law has recognised at Levels 1 and 2 that rights have been appropriated to a scheme and that the scheme's integrity ought to be preserved, it remains for the legal system to determine which actors are best positioned to give practical effect to that commitment. Different legal systems may answer that institutional question differently while pursuing the same underlying objective of maintaining the integrity of the scheme.

Trustees themselves are ordinarily entitled to initiate both personal and proprietary claims against co-trustees, former trustees and third-party recipients of misapplied trust assets.[33] Such claims are directed towards restoring the trust fund[34], a responsibility that naturally forms part of the trustee's office. Trustees will frequently be well-informed of the trust's administration, the relevant transactions and the evidence necessary to pursue recovery, making them institutionally well placed to conduct litigation effectively. Moreover,

[32] See analysis in Chapter I.II.A.
[33] Hudson, PhD (n 17) ch 7; *Space Investments* (n 17) 1074; *Independent Trustee Services* (n 17) [32], [76]-[77].
[34] See analysis in Chapter III, Section I.

conferring standing upon trustees avoids making the vindication of the scheme necessarily dependent upon the willingness, resources or competence of individual beneficiaries. As seen in Chapter IV, the trustees also have rights of indemnity which are to be satisfied from the trust fund and in initiating trust proceedings and protecting the trust fund, the trustee is thereby also guarding the value of their right of indemnity.

Franco v Franco[35] offers an early and instructive illustration of a trustee's standing to sue a co-trustee to reconstitute misapplied trust property, independently of the beneficiaries. Francis Franco and Jacob Franco held £3,000 in bank annuities as trustees on the terms of a testamentary trust for three of the settlor's grandchildren who had not yet attained a vested interest. At Jacob's instigation, Francis agreed to transfer the fund into Jacob's sole name so that Jacob could sell it, on the strength of an assurance that the transfer was merely a temporary accommodation and that the annuities would shortly be replaced, together with proposed collateral security over a copyhold and other estates. Jacob sold the stock, received the proceeds and never restored the fund. Francis, as the remaining trustee, brought a bill against Jacob seeking a discovery and account, an order compelling replacement of the fund or surrender of the copyhold and an order making good any deficiency. Jacob demurred on the ground that the three beneficiaries were necessary parties, invoking the general rule that all persons interested in the subject matter of a suit must be before the court. Lord Chancellor Loughborough overruled the demurrer with costs. The case supports the proposition that a trustee possesses a standing of their own, distinct from and not derivative of the beneficiaries' equitable interests, to compel a co-trustee to restore trust property lost through a breach of the trustees' joint obligations of custody and control. On a scheme-based reading, this standing is best explained not as an assertion of the beneficiaries' rights by proxy, but as an incident of

[35] (1796) 3 Ves Jr 75; 30 ER 902.

the trustee's own duty to preserve the integrity of the trust fund: the trustee sues to vindicate the scheme itself and it is this feature — rather than any need to protect identified beneficial entitlements — that explains why the beneficiaries' presence before the court was unnecessary.

Greenwood v Wakeford[36] strengthens the proposition that trustees (and those standing in the trustee's place) possess an independent standing to bring proceedings to restore the trust fund following a breach of trust.[37] Under a marriage settlement, trustees had improperly advanced trust money to the tenant for life, Mr Wakeford, on a promissory note, without complying with the settlement's requirement that the advance be authorised by the wife's written consent and secured by the husband's bond. After the surviving trustee died, his executors and devisees discovered that the trust fund had been misapplied and that the estate of the deceased trustee was exposed to liability for the breach of trust. They therefore commenced proceedings against Mr Wakeford, joining the other *cestuis que trust* as parties, seeking restoration of the trust fund, the correction of the irregularities affecting the trust property and the appointment of new trustees.[38] Lord Langdale MR rejected the argument that the representatives lacked standing because the deceased trustee had himself participated in the breach of trust. Instead, he held that they were entitled to invoke the court's jurisdiction because they had inherited both the duties and the responsibilities of the trustee, were themselves exposed to claims by the beneficiaries and were therefore entitled to seek relief against the person who had received the trust fund in breach of the settlement in order to have the trust property restored.[39]

[36] (1839) 1 Beav 576, 48 ER 1064 (*Greenwood*).
[37] *Greenwood* (n 36) 576.
[38] *Greenwood* (n 36) 577–578.
[39] *Greenwood* (n 36) 579–581.

McFarlane and Stevens do not explicitly address standing. However, it would seem consistent with their project to say that standing depends on being owed the duty of performance and holding the correlative claim-right to that duty. The rights-against-rights analysis encounters substantially the same difficulties as the equitable ownership analysis in explaining the standing rules in the law of trusts. Although it rejects the language of equitable ownership[40], it continues to treat the beneficiary's right against the trustee's rights as the fundamental juridical notion from which the key features of the trust are said to derive. This approach may explain why a beneficiary is entitled to enforce the trust, but it does not satisfactorily explain why the law allocates standing to persons who possess no such right. In particular, it cannot account for trusts that validly exist despite the absence of any beneficiary capable of holding rights against the trustee, such as charitable trusts. Nor does the rights-against-rights analysis satisfactorily explain why trustees themselves may initiate trust proceedings. Trustees possess no rights against their own rights and therefore cannot derive standing from the very juridical relationship said to justify the key features of the trust. Their standing instead reflects the law's decision that, by virtue of their office and responsibility for administering the trust, they are institutionally well placed to vindicate the integrity of the scheme.

Liau's framework allows one to distinguish rights from standing, so one might argue that the substantive rights always belong to the beneficiary, while the trustee has standing to enforce those rights. Liau argues that the ordinary structure of private law is that standing and rights coincide, but that the law occasionally separates them by giving one person the power to enforce another's rights.[41] As seen in Chapter VI, Section III, this is how Liau analyses *Re Diplock*[42], where, on his view, the next of kin enforce the executor's rights to restitution.

[40] See analysis in Chapter I.I.B.ii.
[41] Liau (n 5), Chapter 5.
[42] [1948] Ch 465 (CA).

Proponents of an equitable ownership or rights against rights analysis might say that the trustee is given a power to enforce the substantive rights of their beneficiaries and that a trustee's standing can therefore be rooted in the law's goal of vindicating the beneficiary's equitable rights. Yet that account immediately struggles in situations in which no beneficiary possesses such rights. The clearest examples are charitable trusts and other trusts lacking beneficiaries with corresponding substantive equitable proprietary rights, as with discretionary trusts. The trustee's standing in charitable trusts cannot plausibly be described as enforcing a beneficiary's rights because there are no such rights to enforce. Even within ordinary private trusts, the representative analysis is still problematic, because it does not align with the effect of the claim. As seen in Chapter III, Section II, as well as in Chapter VI, Sections II and III, the goal of the remedy awarded against the defaulting trustee or third-party recipient of misapplied trust assets is to reconstitute the trust fund, rather than to compensate the beneficiary for losses that they have personally incurred. The nature of the remedy awarded provides a challenge to an account seeking to ground standing in the law of trusts in the individual position or interests of a particular beneficiary.

Section III: The scheme-based analysis

On the scheme-based analysis, standing rules are a Level 3 feature of the legal system. Those standing rules are therefore best understood as calibrated to upholding the legal system's Level 2 integrity commitment. When the standing rules are oriented around the law's commitment to the integrity of the scheme, rather than beneficial ownership or rights against rights, it is possible to provide a unified explanation of the law of trusts, which is consistent not only with the actual standing rules, but also the effect of the claims when they are successful. It therefore makes sense that the standing rules that must be satisfied in order to

initiate those claims (whose claim is to reconstitute the trust fund) are also calibrated on the basis of what is necessary to uphold that integrity.

Although the law is committed at Level 2 to preserving the integrity of the scheme, it does not follow that this commitment may be invoked by anyone. The law instead identifies particular persons or institutions as entitled to require compliance with scheme-defined duties because they possess a sufficient normative connection to the scheme. In the ordinary private trust, that connection is usually supplied by the beneficiary and the trustee's position within the scheme. In charitable trusts it is mostly supplied by the Attorney General, acting on behalf of the public interest. By contrast, a stranger who possesses no legally recognised connection to the scheme has no standing merely because they have observed a breach. Consider the following example: a fixed trust is created in favour of B, who is entitled to £10,000 a month under the terms of the trust. As a result, B's sister (who is not a beneficiary under the trust) enrols in a private school, because B decides to pay her tuition fees. B's sister should not – on the scheme-based analysis – have standing to enforce T's duties. The reason is sourced in the terms of the scheme, which envisage B being paid, not B's sister. This analysis also suggests why a trust creditor, unlike a creditor of a deceased, does not have standing to enforce T's duties. A trust creditor is not described in the terms of the trust as a party who is to receive a disbursement under its terms, but is a party to whom T may incur a debt, in due administration of the trust. The terms of the trust and the parties identified by those terms are the reason for which the beneficiary of a fixed trust and the object of a power of appointment are given standing, whereas a party that stands to indirectly benefit from due administration of the trust is not given standing. For example, as will be seen in the analysis of the charitable purpose trust below, a party with a financial incentive to enforce the charitable trust is not given standing for that reason alone.

A scheme-based analysis does not therefore collapse into an *actio popularis*, nor does it collapse the differences between a trust beneficiary and a trust creditor. Although protecting the integrity of schemes is a value recognised by the law, the legal system must also determine who is institutionally entitled to invoke the court's supervisory jurisdiction. Standing performs that coordinating function.[43] If any member of the public could compel the due administration of a trust merely because they shared a general interest in the observance of the law, the administration of the scheme would become vulnerable to duplicative, inconsistent, or strategically motivated litigation.[44] Such a rule would itself undermine the efficient and coherent administration that the law seeks to secure. The law therefore confines enforcement powers to those persons or institutions whose relationship to the scheme makes them appropriate custodians of its integrity. Those parties possess a legally recognised responsibility or stake in ensuring that the scheme is administered according to its terms and can be expected to exercise enforcement powers in a manner consistent with that objective. The commitment to preserving the integrity of the scheme thus explains *why* enforcement powers exist, whereas standing rules determine *who* should exercise them. The two questions are conceptually distinct: the former concerns the justification for judicial intervention, the latter the institutional allocation of authority to invoke it.

The limitations on standing serve important institutional and pragmatic objectives. If every member of the public were entitled to enforce scheme-constrained duties, the courts would be exposed to claims brought by persons lacking any meaningful connection to the relevant scheme, resulting in unnecessary litigation and an inefficient use of judicial resources.[45] Standing rules also protect the privacy of particular trusts. Trusts frequently govern family wealth, commercial arrangements, or personal affairs in which the participants

[43] Barker (n 6) ch 8.
[44] Barker (n 6) chs 6–8.
[45] Barker (n 6) Chs 6 and 10.

have a legitimate interest in avoiding unwarranted intrusion by outsiders. Furthermore, there is an important link to the autonomy of the beneficiaries discussed in Chapter III, Section II.IV.iv: if the beneficiaries decide not to challenge conduct of the trustee – even if it entails a breach of trust – and given the beneficiaries may even decide, as seen in that same analysis, to adopt unauthorised transactions, it seems inconsistent with that beneficiary autonomy ideal to allow any member of the public to have standing to enforce trusts.

I. Purpose trusts

A. Charitable purpose trusts

The Attorney-General has historically been charged with upholding the integrity of the charitable purpose trust.[46] Those charitable purpose trusts which have been registered with the Charity Commission can also be upheld by the Charity Commission itself.[47] Both scholars and practitioners have noticed the difficulties with leaving enforcement of the charitable purpose entirely to the Attorney-General and the Charity Commission.[48] The law therefore also allows some members of the public to be the guardians of the scheme's integrity. The extension of standing beyond the Attorney-General and the Charity Commission is carefully circumscribed.[49] English law does not permit any member of the public to enforce a charitable purpose trust merely because the trust serves the public benefit. Instead, under s 115 of the Charities Act 2011, charity proceedings may be brought by a

[46] *Uniting Church in Australia Property Trust (NSW) v Monsen* (1978) 1 NSWLR 575, 587.
[47] Charities Act 2011 s 114(1)–(4).
[48] Rosemary Teele Langford and Miranda Webster, 'Misuse of Power in the Australian Charities Sector' (2022) 45 UNSW Law Journal 70, 102; Kathryn Chan, 'The Role of the Attorney General in Charity Proceedings in Canada and in England and Wales' (2011) 89 Canadian Bar Review 373, 391–92; Jing, Charitable Trusts (n 16) 230.
[49] Jing, Charitable Trusts (n 16).

person who has a sufficient interest in the charity, but ordinarily only with the authorisation of the Charity Commission or the leave of the High Court.[50]

The special interest rule allows parties with a particular stake in the trust's due administration to initiate the same claims available to the Attorney-General and the Charity Commission. An example of this rule can be found in s 115(1) of the Charities Act 2011 (England and Wales), which states that:

(1)Charity proceedings may be taken with reference to a charity by—

(a) the charity,

(b) any of the charity trustees,

(c) any person interested in the charity, or

(d) if it is a local charity, any two or more inhabitants of the area of the charity,

but not by any other person.

As explained by Jing:

> [T]he special interest rule reflects the court's primary concern with ensuring the proper administration of charitable trusts, rather than determining the specific location of beneficial ownership of the trust property.[51]

[50] Charities Act 2011, s 115(1), (5) and (8).
[51] Jing, Necessity (n 3) II.C.

Interpretation of section 115(1) by the courts is consistent with a scheme-based analysis. These cases show that the courts interpret the provision as referring to an interest in ensuring that the integrity of the scheme be upheld. In *Haslemere Estates v Baker*[52], Sir Robert Megarry V-C drew a distinction between individuals who have a claim against the charity and those whose claims focus on ensuring the due administration of the charitable purpose. He stated that only the latter group has standing to initiate the charity proceedings.[53] This is an example of the difference between having an individual financial interest and having a wish to uphold the integrity of the scheme. Nicholls LJ endorsed this reasoning in *Re Hampton Fuel Allotment Charity*[54]:

> If a person has an interest in securing the due administration of a trust materially greater than, or different from, that possessed by ordinary members of the public … that interest may, depending on the circumstances qualify him as a "person interested." It may do so because that may give him, to echo the words of Sir Robert Megarry V.-C. [in *Halsemere Estates*]: "some good reason for seeking to enforce the trusts of a charity or secure its due administration..."

The "good reason" requirement does not refer to any financial stake in the charity, any personal relationship with the settlor, or any general sympathy for the charity's objectives. Rather, the authorities demonstrate that the inquiry is functional: the claimant must possess a sufficiently close connection with the charity that gives them a genuine interest in securing its proper administration, rather than merely advancing their own private interests.[55] Thus, a commercial developer seeking to enforce contractual rights against a charity was denied

[52] [1982] 1 WLR 1109 (*Haslemere Estates*).
[53] *Haslemere Estates* (n 52) 1122.
[54] [1989] Ch 484 (CA) (*Re Hampton*), 493 – 94.
[55] *Halsemere Estates* (n 52) 1121–1122.

standing because his claim was directed towards improving his own commercial position at the charity's expense rather than ensuring the due administration of the charity.[56] By contrast, standing has been recognised where the claimant's relationship with the charity means that the proper administration of the charity directly affects them in a manner materially greater than the public generally, including parents whose children attended a charitable school[57], tenant farmers whose activities were integrated with the work of the National Trust[58] and regular worshippers and contributors to a charitable church.[59] Nor is it sufficient merely to support the charity or share its objectives: a sentimental or altruistic concern, or modest financial support, does not constitute the necessary interest, since the claimant's connection must be materially greater than, or different from, that possessed by ordinary members of the public.[60] Ultimately, the cases show that the "good reason" inquiry is directed to identifying those persons whose relationship with the charity makes them appropriate guardians of its proper administration. On a scheme-based analysis, that approach is coherent. Standing is conferred, not because the claimant possesses a beneficial entitlement or some personal right against the trustee, but because their connection with the scheme makes them an appropriate person to invoke the court's supervisory jurisdiction in order to preserve the integrity of the charitable scheme.

It is also important to highlight that Nicholls LJ in *re Hampton Fuel Allotment*[61] rejected the analysis of Hoffmann J in *Bradshaw v University College of Wales*.[62] Hoffmann J

[56] *Halsemere Estates* (n 52) 1122; *Rosenzweig v NMC Recordings Ltd* [2013] EWHC 3792 (Ch) [34]–[35].
[57] *Gunning v Buckfast Abbey Trustees Registered* The Times, 9 June 1994 (Ch D).
[58] *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 (Ch D) 714–715.
[59] *Bisrat v Kebede* [2015] EWHC 840 (Ch) [22], [26].
[60] *Re Hampton* (n 54) 493–494.
[61] *Re Hampton* (n 54) 493.
[62] [1988] 1 WLR 190 (*Bradshaw*).

asserted that the phrase “interested in the charity” should have the same meaning as “beneficial interest in the charity’s property”.[63]

The rejection of Hoffmann J's analysis also illustrates the broader limits of an approach that explains standing by reference to individual proprietary interests. Hoffmann J's reasoning proceeds from the premise that a person is "interested in the charity" because they possess, or possess something analogous to, a beneficial interest in the charity's assets.[64] However, that approach is both too narrow and too wide. It is too narrow because it excludes persons whose connection with the charity plainly justifies their participation in ensuring its proper administration, despite their lacking any proprietary entitlement to the charity's assets. Thus, a local authority that establishes and continues to supervise a charitable trust, or parents, members, tenant farmers and regular worshippers whose relationship with the charity gives them a substantial interest in its proper administration, cannot readily be accommodated within an analysis centred upon beneficial ownership. At the same time, the approach is too wide because many nationwide charities have vast classes of potential recipients who might be described as beneficiaries in a loose sense, yet who possess no sufficient connection with the administration of the charity to justify standing merely by virtue of their potential eligibility to receive charitable benefits.[65] It is therefore unsurprising that subsequent authorities have overwhelmingly adopted Nicholls LJ's functional analysis of "necessary interest", whilst largely ignoring Hoffmann J's proprietary approach.[66] The trajectory of the authorities demonstrates that the standing inquiry is not directed towards identifying who possesses a sufficient private interest in the charity's assets, but rather who is sufficiently

[63] *Bradshaw* (n 62) 194E.
[64] *Bradshaw* (n 62) 194E–F.
[65] *Re Hampton* (n 54) 492–494.
[66] *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 (Ch D) 714–715; *Metropolitan Petar v Mitreski* [2001] NSWSC 976 [8]; *Bisrat v Kebede* [2015] EWHC 840 (Ch) [22]; *Sik Chiu Yuet v Secretary for Justice* [2017] HKCU 2269 [50], [67].

connected with the administration of the charitable scheme to invoke the court's supervisory jurisdiction.[67] This exposes a broader weakness in any analysis founded upon individual rights or beneficial ownership. Such analyses naturally ask whether the claimant possesses a sufficient personal interest to justify enforcement. The authorities instead ask a different question: whether the claimant's relationship with the charity makes them an appropriate person to assist the court in securing the due administration of the charitable scheme. That inquiry is concerned with the integrity of the scheme, not the protection of individual proprietary entitlements.[68]

B. Non-charitable purpose trusts

As Jing explains[69], there are several examples of non-charitable purpose trusts in English law. These have been described as "concessions to human weakness or sentiment"[70] and, therefore, must be viewed as "anomalous and exceptional".[71] As explained in the conclusion to Chapter II, English law may have good reason for limiting the extent of the non-charitable purpose trusts it will recognise and enforce. However, they are conceptually possible as schemes and English law already recognises and enforces a small menu of such non-charitable purpose trusts, such as trusts for the saying of private masses[72], for the preservation of monuments and graves[73], for foxhunting[74] and for care of particular animals.[75]

[67] Jing, Charitable Trusts (n 16) 239.
[68] Jing, Charitable Trusts (n 16) 242–245.
[69] Jing, Necessity (n 3) II.D.
[70] *Astor v Scholfield* [1952] Ch 534 (Ch D) (*Astor*) 547.
[71] *Astor* (n 70), 547.
[72] *Bourne v Keane* [1919] AC 815 (HL).
[73] See, eg *Trimmer v Danby* (1856) 25 LJ Ch 424 (*Trimmer v Danby*); *Re Dean* (1889) 41 Ch D 552 (Ch D); *Re Pearce* [1946] SASR 118; *Re Filshie* [1939] NZLR 91; *Mussett v Bingle* [1876] WN 170 (Ch D); *Re Spehr* [1965] VR 770.
[74] *Re Thompson* [1934] Ch 342 (Ch D).
[75] *Pettingall v Pettingall* (1842) 11 LJ Ch 176.

These trusts cannot be understood on an equitable ownership model. There is no beneficiary. Indeed, one reason for which such trusts might be thought of as "anomalous" is precisely because they lack beneficiaries. Jing explores two lines of case-law concerning the enforceability of these non-charitable purpose trusts. The first line of case-law suggests that these trusts can be valid, even if they depend on the trustee to enforce them.[76] The second line of case-law suggests that without robust enforcement mechanisms, these trusts cannot be valid.[77] Jing argues that both lines of case-law evidence the same underlying concern: the court's focus is on whether the trust can be properly administered. The real question is not "who owns the beneficial interest?", but rather if there is a mechanism to uphold the integrity of the scheme.

Through his analysis of charitable purpose trusts and non-charitable purpose trusts[78], Jing shows that standing is concerned not with protecting equitable proprietary rights, but rather that standing is a cluster of procedural rules that allow the court to supervise the administration of the trust. Jing shows that possible enforcers for non-charitable purpose trusts include trustees and residuary legatees.[79] What Jing's analysis shows is that there must be someone able to invoke the court's supervision of the scheme. When the trust is understood as entailing rights appropriated to a scheme, the non-charitable purpose trust is no longer a conceptual anomaly, though the law may still have good reason for limiting their recognition to a small menu of forms. It is important to emphasise that having someone to enforce is necessary but not sufficient for the validity of a non-charitable purpose trust: even

[76] eg *Trimmer v Danby* (n 73).
[77] eg *Minty v Bourne* (1909) 1 Ch 567.
[78] Jing, Necessity (n 3) II.C and D.
[79] *Re Thompson* [1934] Ch 342 (Ch D) 344; *Re Pacella* [2019] VSC 170 [41]; *Johansons v ANZ Executors & Trustee Co Ltd* [1999] VSC 219 [15]–[16].

if an enforcer is expressly appointed by the settlor, there can still be good reasons for not allowing the non-charitable purpose trust.[80]

II. Discretionary trusts

Objects of a power of appointment – despite lacking equitable proprietary rights – may initiate the personal[81] and proprietary claims[82] explored in this thesis. For example, in *Lewis v Tamplin*[83], HHJ Paul Matthews said:

> If the trustee of a discretionary trust in breach of trust gave away a trust asset to a third party, no one can doubt that even a discretionary object of the trust in whose favour an appointment could still be made would have standing to sue the third party for the return of the asset to the trust fund.

The scheme-based analysis explains well the standing available to objects of the power of appointment under a discretionary trust. The court is not concerned with discerning the existence of a party's equitable proprietary rights in determining whether they should be entitled to initiate claims against the trustee or third parties. Rather, the court is concerned with ensuring that the rights vested in the trustee are administered in accordance with the terms of the scheme. The object of a power of appointment is identified in the trust instrument as a potential recipient of trust assets. The terms of the trust therefore partly govern the question of who has standing to enforce. The justification for standing is not an

[80] See analysis in the conclusion to Chapter II.
[81] See analysis in Chapter III, Section I and Chapter VI.
[82] See analysis in Chapter V.
[83] *Lewis* (n 18) [39].

equitable proprietary right, but is rather being identified under the terms of the trust as a potential recipient of trust assets.

In *Gartside v IRC*[84], the House of Lords found that the object of a discretionary trust could not – for the purposes of particular taxation legislation – be considered as endowed with a beneficial interest in the trust assets. However, Lord Wilberforce recognised that such objects did have the ability to invoke the jurisdiction of the court of equity:

> No doubt in a certain sense a beneficiary under a discretionary trust has an 'interest': the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity … But that does not mean that he has an interest which is capable of being taxed by reference to its extent in the trust fund's income: it may be a right, with some degree of concreteness or solidity, one which attracts the protection of a court of equity, yet it may still lack the necessary quality of definable extent which must exist before it can be taxed.[85]

These observations are also consistent with the operation of discretionary trusts. A trustee of a discretionary trust is in a position where a decision rendered in favour of B, will necessarily mean that B1 has been disadvantaged. However, if T reached their decision properly, B1 has no reason to complain. Both B and B1 have standing to ensure that T is administering the trust properly. Given that B and B1 are the potential recipients of the

[84] *Gartside* (n 19).
[85] *Gartside* (n 19) 295.

exercise of the discretionary powers, it is natural to expect that the court will grant such parties standing.

The notion that discretionary trust beneficiaries have standing to initiate claims against the trustee and third parties is confirmed across Commonwealth jurisprudence. In the New Zealand Court of Appeal, Tipping J expressed the view in *Johns v Johns*[86] that – despite lacking an equitable proprietary interest in the trust property – they "may well be able to bring proceedings to compel proper administration of the trust". In Australia, McMillan J in *Re Cooper Street Property Trust (No 2)*[87] explains that although a discretionary trust beneficiary is not "a person beneficially interested in the trust [and does not have] a proprietary interest in the assets of the Trust, [they do have] the right to have the Trust duly administered".

These cases and analysis stand in contrast to the view expressed by Lionel Smith that objects of powers "do not have standing to sue for breach of trust".[88] It is perhaps not surprising that Smith espouses this view, given his understanding of the nature of claims initiated against, for example, recipients of misapplied trust assets. As seen in the previous chapter[89], Smith conceptualises such claims as B asserting their equitable ownership against the recipient ("that property is mine in equity").[90] However, when that understanding is seen to be problematic and instead the claims against trustees and third parties explored in this thesis are sourced in the law's commitment to upholding the integrity of the scheme, it is not surprising that objects of a discretionary power of appointment are given standing. The

[86] [2004] 3 NZLR 202 211.
[87] [2017] VSC 291 [4].
[88] Lionel Smith, 'Massively Discretionary Trusts' in Richard C Nolan, Kelvin FK Low and Tang Hang Wu (eds), *Trusts and Modern Wealth Management* (Cambridge University Press 2018) 130 (Smith, MDT), 135–36.
[89] See analysis in Chapter VI, Section III.
[90] Lionel Smith, 'Unjust Enrichment, Property, and the Structure of Trusts' (2000) 116 LQR 412 442.

difference between a discretionary trust and a fixed trust is that in the latter, the trustee *must* make payments to B from the trust fund, whereas in the former the trustee *may* may make such payments to B: in each case, B is identified by the terms of the trust as an actual or potential recipient of the trust assets.

It is also helpful to draw on Hudson and Mitchell's criticism of Smith's argument that objects of mere powers do not have standing to hold the trustee to account. Smith invokes the beneficiary principle in support of his argument.[91] However, as shown by Hudson and Mitchell[92], Smith's argument is misaligned with cases showing that standing to enforce the trustee's duties can be allocated to parties with no right to benefit from the trust property, such as – for example – other trustees.[93]

III. The fixed trust and coherence with the effect of the claims

In Jing's analysis, only the standard fixed trust can plausibly be conceptualised through the lens of beneficial ownership.[94] The purpose of his analysis is to show that such a model cannot be used across the law of express trusts. In the view of this thesis, all trusts should be understood as entailing rights appropriated to a scheme and the key features examined in this thesis – including standing to initiate claims against the trustee and third parties following an unlawful disposition of the trust property – should be seen as sourced in the law's commitment to upholding the integrity of the scheme. This position is consistent with the effect of the claims when successful.

[91] Smith, MDT (n 88) 23.
[92] Hudson and Mitchell (n 2).
[93] Hudson, PhD (n 17) ch 7; *Space Investments* (n 17) 1074; *Independent Trustee Services* (n 17) [32], [76]-[77].
[94] Jing, Necessity (n 3) II.A.

Standing to initiate claims against the trustee of a fixed trust and claims against third party recipients do not need to and should not be sourced in the beneficiary having equitable ownership of the trust assets, but rather on what is necessary to uphold the integrity of the scheme. If standing were truly grounded in the individual rights of a beneficiary (in the same way that a contracting party is given standing to enforce their right to contractual performance), it would be expected that the law would award compensatory damages for personal losses incurred by the beneficiary. But – as argued in Chapters III and VI – that is not the law's metric for analysis. The premise that standing is sourced in individual rights is therefore problematic. Although the fixed trust might seem like the strongest case for the rival analyses, the scheme-based analysis provides a better fit for the fixed trust, highlighting the point made in Chapter I that even if the law did not recognise purpose trusts and only recognised and enforced private fixed trusts, the scheme-based analysis would be a valuable tool. In sum, if the justification for the claim were the protection of the right of an individual beneficiary, then one would expect the claim to have a particular content, which is not the content it has under the current law. The beneficiary of a fixed trust is given standing – on the scheme-based analysis – because of the terms of the trust. It is those terms – and therefore the scheme – that determines who has standing to enforce its integrity. This analysis that focusses on the terms of the trust and who falls under the structure those terms provide, explains why the beneficiary has standing, but not a party that indirectly stands to benefit from due performance of the trust, such as a relative of the beneficiary, in the example given previously in the chapter.

IV. Standing, not rights?

A. Hudson and Mitchell's analysis

In their analysis of standing in the law of trusts, Hudson and Mitchell[95] argue that the core duties of trustees are best conceptualised as undirected.[96] Standing to enforce those duties is allocated in a depersonalised way to those best placed to engage the court's supervisory jurisdiction.[97] Irrespective of the correctness of always describing the trustee's core scheme duty as undirected[98], their article provides support for the scheme-based analysis. Hudson and Mitchell begin their discussion by distinguishing substantive rights from standing.[99] In this respect, as seen in the introduction to this chapter, they agree with Liau and Barker that the power to initiate proceedings is analytically distinct from the underlying right being vindicated, or duty being enforced.[100]

Trust law, on Hudson and Mitchell's analysis, contains rules that are not helpfully understood as generating ordinary bilateral right-duty relations at all.[101] Rather, the core rules of trust law control the exercise of powers over trust property by trustees and third parties and standing concerns who may engage the court's supervisory jurisdiction to ensure that those powers are exercised lawfully.[102] Hudson and Mitchell do not ask: who holds the right correlative to the trustee's duty? Rather, the pertinent question is: who may ask the court to supervise and enforce the trustee's compliance with rules controlling the trustee's powers?[103]

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[95] Hudson and Mitchell (n 2).
[96] Hudson and Mitchell (n 2) 215, 226–231; See analysis in Chapter I.II.C.iv.
[97] Hudson and Mitchell (n 2) 231–233.
[98] See analysis in Chapter I.II.C.iv.
[99] Hudson and Mitchell (n 2) 213.
[100] Hudson and Mitchell (n 2) 213–215.
[101] Hudson and Mitchell (n 2) 216, 231.
[102] Hudson and Mitchell (n 2) 215–216.
[103] Hudson and Mitchell (n 2) 227.

A core thesis of their article is that although the law speaks of trustees owing duties, those central duties – such as the duty of due administration – are not directed duties owed to particular right-holders.[104] They explicitly reject the view that all private law duties are directed and contend that trust law is an important example of undirected duties in private law.[105] They contend that the core duties associated with trustees – such as the duty to comply with the terms of the trust, to act in good faith, for proper purposes and so forth – are not duties owed to any single person with a correlative right, but are rather duties governing what the trustee may do with the right held on trust.[106] Their focus is on the control of the trustee's conduct, not Hoheldian correlativity.[107] The rules of trust law are focussed on what the trustee does with the legal entitlements held on trust and on what actions they can take that are consistent with the trust terms, in furtherance of the trust project.[108] In this respect, their analysis is consistent with Nolan's scholarship on equity's role in the administration of funds, as discussed in Chapter I.II.C.iv and also Ho and Harding's commitment theory discussed in Chapter I.II.C.i.

Hudson and Mitchell also explain that a right to due administration is not a claim-right in the ordinary sense. It does not correlate to a directed duty in the Hohfeldian sense.[109] Instead, the language of right to due administration is better understood as a shorthand for an equity of relief necessary to secure the due administration of the trust.[110] The available relief to secure that due administration includes injunctions[111], declarations[112], access to

[104] Hudson and Mitchell (n 2) 215.
[105] Hudson and Mitchell (n 2) 214.
[106] Hudson and Mitchell (n 2) 215, 227–228.
[107] Hudson and Mitchell (n 2) 227–228.
[108] Hudson and Mitchell (n 2) 216, 228.
[109] Hudson and Mitchell (n 2) 227.
[110] Hudson and Mitchell (n 2).
[111] eg *Wilson v Turner* (1883) 22 Ch D 521 (CA)
[112] eg *Public Trustee v Cooper* [2001] WTLR 901 (Ch).

information[113], proprietary recovery of misapplied trust property[114] and so forth.[115] However, the purpose of these remedies is not to vindicate any one person's personal position. Rather, it is to secure the due administration of the trust.[116] They stress that equitable relief against trustees and third parties is oriented towards reconstitution of the trust fund, not compensation for an individual's personal consequential losses.[117]

Hudson and Mitchell frame the standing rules as part of the court's supervisory jurisdiction over the trust.[118] Proceedings concerning the trust are not always ordinary bilateral adversarial actions. Some are advisory, some administrative, some representative, some concern claims against third parties, some concern disputes between the trustees or between the beneficiaries.[119] What unifies these proceedings is that they engage the court's jurisdiction to supervise the trust and ensure that the trust is operating in accordance with its terms and rules.[120] A central theme of their project is that standing is allocated to facilitate the court's supervision of the trust project, rather than to enforce individual rights.[121] Standing is not exclusively vested in any one beneficiary as right-holder. Rather, it is shared among a range of parties whose standing is justified by their role in securing the due administration of the trust.[122] Hudson and Mitchell's analysis helps to explain the contrast with a standard contractual claim, where the claimant is almost always the right-holder and this standing rule in contract aligns with the effect of the claim, which can include compensating the

[113] *Spellson v George* (1987) 11 NSWLR 300; *Schmidt v Rosewood Trust Co* [2003] 2 AC 709 (PC) (*Schmidt*).
[114] *Foskett v McKeown* [2001] 1 AC 102 (HL); *Strang v Owens* (1925) 42 WN (NSW) 183.
[115] Hudson and Mitchell (n 2) 216.
[116] Hudson and Mitchell (n 2) 216, 228.
[117] Hudson and Mitchell (n 2) 228–229.
[118] Hudson and Mitchell (n 2) 216.
[119] Hudson and Mitchell (n 2) 212–213, 216–217.
[120] Hudson and Mitchell (n 2) 216; see analysis in Chapter I.II.C.iv. This can affect the remedies awarded in cases concerned with breaches of trustee duties: see analysis in Chapter I.I.D.
[121] Hudson and Mitchell (n 2) 216, 233.
[122] Hudson and Mitchell (n 2) 211, 217–222.

claimant[123] personally for the losses they have suffered in the contract not having been performed.[124]

Hudson and Mitchell accept that beneficiaries have standing, but deny that this shows that the trustee's duties are directed.[125] Even where the terms of the trust require payment to a specific beneficiary, that clause can still be analysed as the trustee's undirected duty to comply with the terms of the trust, which may equally be enforced by a co-trustee.[126] They emphasise that standing is not limited to those with fixed transmissible beneficial interests.[127] They show that discretionary trust beneficiaries and objects of mere powers may have standing to enforce due administration.[128] In alignment with Jing, they reject the idea that this standing must turn on some proprietary interest akin to ownership of the trust assets.[129]

A theme of Hudson and Mitchell's piece is that trust law standing rules are non-exclusive and depersonalised.[130] What explains standing is functional and principled: it is allocated according to what is most conducive to securing the due administration of the trust or the best interests of the trust.[131] It depends on who is best placed to further the trust project

[123] The effect of a contractual claim is not always to compensate for loss, unless failure to receive the promised performance is itself seen as a loss: eg a debt claim can be made without showing any loss (eg where even on the facts, if D had paid the debt in time, C would necessarily have lost the money).
[124] Liau (n 5) 75–81 (arguing that, as a general feature of private law, standing and rights ordinarily coincide in a single holder, so that usually only the right-holder has standing to enforce the relevant right), and 103–104 (distinguishing standing from contractual claim-rights and explaining that standing is ordinarily exercised by the promisee to enforce the promisor's primary or secondary obligations; further observing that it is generally only the victim of a breach of contract who acquires the secondary claim-right to contractual damages).
[125] Hudson and Mitchell (n 2) 217–218, 226–227.
[126] Hudson and Mitchell (n 2) 219–220, 230–231.
[127] Hudson and Mitchell (n 2) 218.
[128] Hudson and Mitchell (n 2) 218–219; *Schmidt* (n 113) [55]; See also *Armitage v Nurse* [1998] Ch 241 (CA) 261; *Johns v Johns* [2004] NZCA 42, [2004] 3 NZLR 202 [34]*; Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 [125]; *Whaley v Whaley* [2011] EWCA Civ 617, [2011] WTLR 1267 [112]; *Kan Lai Kwan v Poon Lok Otto* [2014] HKCFA 65 [43]; *Lewis* (n 18) [39]; Paul Matthews and others, *Underhill and Hayton: Law of Trusts and Trustees* 20th edn (London: LexisNexis, 2022) [1.65], [10.138]; Richard Nolan, "Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures" in Paul S Davies and Jamer Penner (eds), *Equity, Trusts and Commerce* 159-169.
[129] Hudson and Mitchell (n 2) 220–221.
[130] Hudson and Mitchell (n 2) 225.
[131] Hudson and Mitchell (n 2) 231–232, citing *Re X Trust* [2012] JRC 171 [7], [22].

by engaging the court's supervisory jurisdiction.[132] When Hudson and Mitchell ask what is in the best interests of the trust or for the benefit of the trust, they are using language that is shorthand for the successful carrying out of the trust project in accordance with its terms.[133] Hudson and Mitchell are not therefore entifying the trust. Hudson and Mitchell's article provides support for the scheme-based analysis: it relocates the centre of gravity away from the individual position of a beneficiary and towards the integrity of the scheme.

Hudson and Mitchell also note that standing can be held in different capacities.[134] For example, a beneficiary is not usually duty-bound to exercise their powers of standing, whereas a trustee is.[135] A regulator, who is given standing to enforce pension trusts, superannuation investment schemes, managed investment schemes and public-regulatory trusts is also duty-bound to exercise their powers of standing.[136] Hudson and Mitchell explain that standing is joint and several: multiple parties share standing.[137] There is one entitlement to relief in relation to the trust project, but multiple parties can exercise standing to pursue it. Questions about multiplicity of proceedings and priority of standing are addressed through procedural and substantive principles.[138] The rules controlling trustees do not themselves generate rights in favour of specific individuals at all times.[139] On their view, trust law is best understood as a system controlling the exercise of power rather than a network of bilateral relationships.[140]

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[132] Hudson and Mitchell (n 2) 232, citing *AIT Investment Group Pty Ltd v Markham Property Fund No 2 Pty Ltd* [2015] NSWSC 216 [91]–[96] and *Wright v Stevens* [2018] NSWSC 548 [333].
[133] Hudson and Mitchell (n 2) 233.
[134] Hudson and Mitchell (n 2) 219, 221–222.
[135] Hudson and Mitchell (n 2) 219–220.
[136] Hudson and Mitchell (n 2) 221–222, citing Pensions Act 2004 ss 15–16, 19; Australian Securities and Investments Commission Act 2001 (Cth) ss 1(2), 11, 12A, 13; and *Australian Prudential Regulation Authority v Kelaher* [2019] FCA 1521.
[137] Hudson and Mitchell (n 2) 217, 225.
[138] Hudson and Mitchell (n 2) 216–217.
[139] Hudson and Mitchell (n 2) 216.
[140] Hudson and Mitchell (n 2) 234–235.

B. Implications for this thesis

The core claim of this thesis is that four key features of the trust are better explained by the need to protect the integrity of a scheme, rather than by the individual interests of a particular beneficiary as such. Standing to invoke claims can therefore be understood without necessarily sourcing them in the individual position of a particular beneficiary. Hudson and Mitchell's analysis supports these claims. The beneficiary of a fixed private trust has standing because the trustee's due administration determines whether that beneficiary receives the very benefit that the trust scheme has allocated to them. Their interest is internal to the operation of the scheme: the trustee's powers exist to administer property for the beneficiary in accordance with the trust terms. By contrast, a person who may benefit incidentally from the due administration of a charitable purpose has no corresponding position within the scheme. The charitable trust allocates no part of the trust fund and no entitlement to receive its benefits to any particular individual. Any financial benefit they receive is merely the consequence of the trustees implementing the charitable purposes, not the fulfilment of an allocation made by the scheme itself. For that reason, although both have practical incentives to ensure proper administration, only the beneficiary of the private trust has the kind of scheme-defined interest that ordinarily justifies standing.

In a similar vein, given the express public law commitment of the law in recognising and enforcing charitable trusts, the court almost invariably gives the Attorney-General – a public official – standing to initiate those claims. This analysis is slightly different from the one favoured by Smith in *Loyalty*.[141] For Smith, the charitable purpose trust is different from the

[141] Lionel Smith, *The Law of Loyalty* (Oxford University Press 2023) 281, 285–286, 376–377.

private fixed trust, for the duties of the trustee in the latter case are directed and it is therefore the rights of an individual beneficiary which explains why they have standing. However, even if one prefers describing the trustee's core scheme duty as directed and owed to the beneficiary, building on Hudson and Mitchell's insights, this thesis takes the view that Smith's analysis still obscures or underplays an important unity between charitable purpose trusts and fixed trusts: an institutional commitment to the integrity of a scheme.

V. The enforcer debate and whether the settlor should have standing

Whether the settlor should be able to nominate a party with power to enforce the trustee's duties without that party holding any beneficial interest in the trust property is conventionally treated as a question about whether English law should import an "enforcer principle" of the kind found in offshore trust regimes.[142] Hayton, Mitchell and McFarlane frame the stakes in explicitly conceptual terms: on one view of the trust, its essence lies in the beneficiary's equitable proprietary rights, so that substituting an enforcer for a beneficiary "would indeed involve a fundamental shift in the conceptual nature of the English law of trusts";[143] on a second view, the essence of the trust lies in the trustee's holding of property subject to a duty, so that the same substitution "would not require a rethinking of the fundamental basis of the trust".[144] Hayton, Mitchell and McFarlane note that English law already tolerates parties being given standing who do not enjoy a beneficial interest in the assets of the trust[145]

[142] Charles Mitchell, Ben McFarlane and Jessica Hudson, *Hayton, McFarlane and Mitchell: Text, Cases and Materials on Equity and Trusts* (15th edn, Sweet & Maxwell 2022) (Hayton, McFarlane and Mitchell) 8–054 to 8–058, discussing the Bermuda Trusts (Special Provisions) Act 1989, ss 12A–12B.
[143] Hayton, McFarlane and Mitchell (n 142) 8–061.
[144] Hayton, McFarlane and Mitchell (n 142) 8–060.
[145] Such as co-trustees, the Attorney-General and the Charity Commission.

without apparent conceptual strain, which they take to weaken the case for treating a general enforcer principle as revolutionary.[146]

The scheme-based analysis supplies the resolution that Hayton, Mitchell and McFarlane leave open and does so independently of, but convergently with, Hudson and Mitchell's recent argument that the "beneficiary principle" misdescribes English and Australian law as it stands.[147] Hudson and Mitchell show, through an extensive survey of standing rules, that holders of an equitable proprietary interest in the trust assets are not in fact the exclusive holders of standing to enforce trustee duties: trustees may sue co-trustees[148]; objects of mere powers may compel due administration despite having no beneficial interest in the trust property[149]; pension scheme employers enforce trustee duties as donees of powers under the scheme rather than as beneficiaries or trustees[150]; and regulators and the Attorney-General enforce duties owed by charitable and other public trustees as a matter of course.[151]

The question of who has standing to invoke the court's supervisory jurisdiction is a separate and further question to be answered by asking whom the scheme's terms identify as appropriately placed to trigger that supervision, not by asking who owns the property beneficially. Hudson and Mitchell reach the same conclusion: because the courts' supervisory jurisdiction exists to ensure that trusts are properly administered rather than to vindicate bilateral right-duty relationships as such[152], the identity of the party empowered to engage

[146] Hayton, McFarlane and Mitchell (n 142) 8–062.
[147] Hudson and Mitchell (n 2).
[148] Hudson and Mitchell (n 2) 219–220.
[149] eg *Australian Securities and Investments Commission v Carey (No 6)* [2006] FCA 814, (2006) 153 FCR 509 [21].
[150] *British Airways plc v Airways Pension Scheme Trustee Ltd* [2018] EWCA Civ 1533, [2018] 1 PLR 19; *British Telecommunications plc v BT Pension Scheme Trustees Ltd* [2018] EWHC 69 (Ch), [2018] PLR 7.
[151] *Wallis v Solicitor General for New Zealand* [1903] AC 173 (HL) 181–182; Charities Act 2011, ss 15(1)–(2), 114, 115.
[152] Hudson and Mitchell (n 2) 215–216.

that jurisdiction is, and always has been, "a matter for the trust parties to determine just as they determine the other terms of an express trust".[153] The scheme-based analysis therefore does not merely tolerate the enforcer principle as an exotic offshore phenomenon; rather, English law's own doctrine could already look this way and the case law that Hudson and Mitchell assemble strengthens that prediction.

Locating the enforcer question within the scheme-based analysis also answers the objection, voiced by Hayton, Mitchell and McFarlane themselves, that an enforcer "will [not] have sufficient incentive properly to supervise the trustees of a non-charitable purpose trust".[154] On the scheme-based analysis, this is a design question internal to the scheme, not a conceptual bar external to it: the same question arises and is answered by allocative choice rather than by ownership, wherever standing is already given to parties that lack equitable proprietary rights in the trust assets — to regulators such as the Pensions Regulator[155], to the Attorney General under the historic relator procedure[156] and to mere objects.[157]

What the scheme-based analysis requires is not that the enforcer have a personal stake of the beneficial kind, but that the scheme retain what Lord Eldon in *Morice v Bishop of Durham*[158] identified as the irreducible condition of trusteeship: that the trust be "of such a nature that it can be under [the court's] control", so that maladministration can be reformed and due administration directed.[159] That is a condition about the scheme's susceptibility to judicial correction, not about anyone's proprietary entitlement — and it is the same condition Goff J relied upon in *Re Denley's Trust Deed*[160] to hold that a trust could be valid,

[153] Hudson and Mitchell (n 2) 234.
[154] Hayton, McFarlane and Mitchell (n 142) 8–060.
[155] Pensions Act 2004, s 16.
[156] Hudson and Mitchell (n 2) 220–221.
[157] *Schmidt* (n 113) [55].
[158] (1804) 9 Ves 399; 32 ER 656, affd (1805) 10 Ves 522, 32 ER 947 (*Morice*).
[159] *Morice* (n 158) 539.
[160] [1969] 1 Ch 373 (Ch D) (*Re Denley*).

notwithstanding the absence of beneficiaries with equitable ownership, wherever the carrying out of its purpose was such that the court could execute the trust "both negatively... and positively".[161]

On this analysis, then, the enforcer debate should not be framed as a choice between preserving orthodoxy and importing an alien offshore device. It is better understood as a question about what the scheme's own claim to integrity actually demands: not a beneficiary with an equitable proprietary right, but *someone*, identified by the scheme's constitutive terms, positioned to invoke the court's jurisdiction to correct a departure from those terms. Recognising a general power in the settlor to nominate such a person is, on the scheme-based analysis, not a fundamental shift in the nature of the English trust, but a specification — made explicit rather than left to the accidents of standing doctrine — of a capacity English law already distributes to trustees, objects of mere powers, regulators and the Attorney General alike.

A question also arises as to whether the settlor should automatically have standing to enforce the trust. As the creator of the trust, it might be said that they are an obvious candidate to enforce the integrity of the scheme. However, under English law, the settlor has no right to enforce the trust once it has been validly constituted. Absent an express reservation of powers, the settlor drops out of the arrangement entirely, retaining neither standing to compel the trustee's performance nor any residual interest capable of enforcement.[162] This exclusion is not an oversight of the scheme-based analysis; rather, it reflects the scheme's allocation of enforcement powers to those parties it identifies as

[161] *Re Denley* (n 160) 382–384.
[162] *Paul v Paul* (1882) 20 ChD 742 (CA) 744 (Jessel MR); Geraint Thomas and Alastair Hudson, *The Law of Trusts* (2nd edn, OUP 2010) [1.37]-[1.38]; Often settlors will be happy to drop out of the picture, as there could be tax implications for them if they still retained some control over the assets, see eg *Vandervell v IRC* [1967] 2 AC 291 (HL).

benefitting from performance of the scheme and as entitled to shape and potentially terminate it, rather than to the party who merely established it. As Chapter III, Section II demonstrates, a beneficiary who is *sui juris* and absolutely entitled may adopt an unauthorised transaction, thereby informally varying the terms on which the scheme operates[163] and beneficiaries collectively may collapse the scheme altogether and call for the underlying assets.[164] These powers, which involve no corresponding role for the settlor, indicate that English law privileges the autonomy of beneficiaries over that of the settlor. Given the availability of the defence of consent and the rule in *Saunders v Vautier*, it makes sense that the settlor is not given an automatic power of enforcement: such a power would duplicate, and potentially undermine, control already vested in the beneficiaries. In jurisdictions lacking equivalents to these doctrines, the calculus differs: absent an alternative *locus* of beneficiary control over the scheme, it may make more sense to give the settlor an automatic power to enforce the trust they created.

Conclusion

Without rules on standing, the integrity of the scheme cannot be upheld. As the analysis in this chapter shows, standing is not best grounded in any one party's individual position or individual interests. Across all types of trust, the identity of the claimant varies but the function of standing remains constant: to secure the law's commitment to the integrity of the scheme. This functional unity is obscured by theories that seek to ground standing in the rights of particular parties, but is revealed once the trust is understood as consisting of rights appropriated to a scheme and as based on the law's qualified commitment to the integrity of that scheme.

[163] *Re Pauling's Settlement Trusts* [1964] Ch 303 (CA) 333 (Willmer LJ).
[164] *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282; *CPT Custodian Pty Ltd v Commissioner of State Revenue* [2005] HCA 53, (2005) 224 CLR 98 [47]—[50].

Part III: Conclusion and Future Research

Chapter VIII: Conclusion

I. Summary

This thesis has focussed on four key features of the English trust. These features apply to all trusts and are absent in the case of a standard contractual duty.[1] The goal of the thesis has been to show that a scheme-based analysis provides an equally plausible (if not better) explanation for those four key features, than an analysis centred on beneficial ownership or rights against rights.[2] Those analyses invoke the third-party and insolvency effects of the trust as important illustrations of the nature of a trust and of the beneficiary's rights under a trust. This thesis has therefore focussed on those features, so that it can engage with the rival analyses of beneficial ownership and rights against rights at their strongest. It has been argued that a scheme-based analysis, rather than those rival analyses, better accounts for those third-party and insolvency effects, as well as for the trustee's rights of indemnity and for the standing rules applying to trusts.

In Part I, the thesis explained the foundations of the scheme-based analysis, by describing when a scheme arises (Chapter II) and noting that the law is qualifiedly committed to upholding the integrity of the scheme (Chapter III, Section II). In Chapter I, it was emphasised that the scheme-based analysis of four of the trust's key features builds on a strong tradition of existing scholarship that avoids a single-minded focus on the rights of a

[1] See the introduction to Chapter I.
[2] Those analyses are introduced in Chapter I.I.B

beneficiary to explain the trust, but rather focusses on the position of the trustee[3], the limits on their authority[4] and equity's commitment[5] to ensuring that the limits on that authority are respected. It notable that some of this scholarship has been published very recently, suggesting that finding a way to explain the trust and some of its key features that does not rest on the individual rights of a beneficiary is continuing to gain traction.

Part II then shows how the scheme-based analysis can be used to explain four of the trust's key features equally as plausibly as, or better than, the rival analyses of beneficial ownership and rights against rights. Chapter IV examined the insolvency effect of the trust and the trustee's rights of indemnity, Chapter V turned to proprietary claims that may be initiated against recipients of misapplied trust assets or of their traceable proceeds, Chapter VI explored several personal claims against recipients, whereas Chapter VII analysed the rules that determine who can initiate those personal and proprietary claims against the trustee and third-parties to reconstitute the trust fund following an unauthorised disposal of trust assets.

Part II has revealed that the scheme-based analysis is well placed to defend the existence of those four key features, as it provides a convincing justification for them, in a way that accounts for the operation of those features across all trusts. The scheme-based analysis also shows that focussing on the integrity of the scheme, rather than the rights of any individual party, also explains better the operation of those features in the context of the

[3] See eg Ben McFarlane, 'Trusts, Property, and Rights' in Irit Samet, Simone Degeling and Jessica Hudson (eds), *Philosophical Foundations of the Law of Express Trusts* (Oxford University Press 2023; see also eg William Swadling, 'Trusts and Ownership: A Common Law Perspective' (2016) 24 European Review of Private Law 951.
[4] See eg Jessica Hudson, 'Equity's Gloss on Authority' in Ben McFarlane and Steven Elliott (eds) *Equity Today: 150 Years after the Judicature Reforms* (Hart, 2023) and Lusina Ho and Charles Mitchell, 'Knowing Receipt, Equitable Proprietary Rights, and Duties of Due Administration' (2026) 89 MLR 278.
[5] See eg analysis in Chapter III, Section II.

private fixed trust. Each of the beneficial ownership and rights against rights views focusses on the rights of the individual beneficiary of a private fixed trust to ground those features. This thesis has argued that, as a result, such views do not align with the effect of the claims that are made against the trustee[6] or third-party[7], following an unauthorised disposition of the trust assets. Such claims aim to reconstitute the trust fund, rather than to compensate any individual party for their personal losses. A scheme-based analysis would therefore be valuable even in a jurisdiction that only recognised and enforced private fixed trusts. The scheme-based analysis can also give some coherence across the wider law of trusts, as it exists in England, by explaining features of eg charitable trusts too. The scheme-based analysis also usefully draws attention to the similarities between trusts and other schemes eg deceased estates and partnerships.

The scheme-based analysis also provides a defence of traditional rules of trust law which have been challenged in recent times. For example, the language focussing on individual rights and on compensating the claimant beneficiary in cases such as *Target Holdings Ltd v Redferns*[8] and *AIB Group (UK) plc v Mark Redler & Co Solicitors* [9] – explored in Chapter III, Section I – may question the traditional rules of trust law that focus on reconstituting the trust fund. The scheme-based analysis provides a justification for those traditional rules.

In the view of this thesis, the scheme-based analysis provides a persuasive fit for the operation of the four key features set out in Chapter I and a compelling justification for them. At times, the very reasoning and language used by the courts reveals a commitment to a more

[6] See analysis in Chapter III, Section I.
[7] See analysis in Chapter VI.
[8] [1996] AC 421 (HL).
[9] [2014] UKSC 58, [2015] AC 1503.

scheme-based analysis, rather than one focussing on individual rights. A good example is the majority analysis of the Privy Council in *Equity Trust (Jersey) Ltd v Halabi; Investec Trust (Guernsey) Ltd v Fort Trustees Ltd*[10], where Lord Briggs expressly describes the trust as a "continuing institution or scheme"[11], which led to his conclusion that trustees of an insolvent trust should share *pari passu*, rather than have their rights of indemnity paid in order of appointment.

At other times, the reasoning and language used by the courts suggests a focus on the equitable proprietary rights of the beneficiary as an explanation for some of the key features of the trust. A good example is *Byers v Saudi National Bank*[12], where Lord Briggs describes the personal claim in knowing receipt as ancillary to the equitable proprietary claim[13], whereas Lord Burrows went as far as describing the knowing receipt claim as the equitable analogue of the common law tort of conversion.[14] It was argued in Chapter VI, Section II, that the result in *Byers* can be justified, but that the language used can cause problems, such as inviting beneficiaries to claim for their consequential economic losses against the knowing recipient. Invoking the individual interest of a beneficiary to justify the claims available against third parties does not seem to align with the effect of those claims when initiated, which are aimed at reconstituting the trust fund, rather than compensating any beneficiary for their individual losses.[15]

Although it might be thought harmless to invoke the equitable proprietary rights or individual interest of the beneficiary as the foundation of some of the key features of the

[10] [2022] UKPC 36; [2023] AC 877 (*Investec II*); see analysis in Chapter I.II.C.v and in Chapter IV.
[11] *Investec II* (n 10) [256].
[12] [2023] UKSC 51, [2024] AC 1191 (*Byers*); see analysis in Chapter VI, Section II.
[13] *Byers* (n 12) [42].
[14] *Byers* (n 12) [151]–[152].
[15] See analysis in Chapter I.I.D.

trust, especially if the scheme-based analysis would reach the same conclusions and defend the same features, it has also been seen that the justification given for a particular feature can have practical consequences. The possibility of the beneficiary recovering their consequential losses against both the trustee and third parties is one example, which has been highlighted throughout this thesis.[16] A clear example of where it matters what view of the trust is taken is *Shell UK Ltd v Total UK Ltd*[17], analysed in Chapter VI, Section I. As McFarlane notes[18]:

> What was the source of the Court of Appeal's error? It was the heuristic that a beneficiary of trust is the "real owner" of the relevant resource: a short-cut that is often harmless, but which here led the court astray.

It therefore matters what view of the trust is taken. As Hohfeld said[19]:

> [T]he true analysis of trusts and other equitable interests is a matter that should appeal to even the most extreme pragmatists of the law.

The way in which some appellate decisions – such as *Byers*[20], *Foskett v McKeown*[21] and *Shell*[22] – analyse the private fixed trust seems inconsistent with the operation of structures where some of the trust's key features also apply[23], despite there being no party endowed with equitable proprietary rights. A scheme-based analysis would allow the courts to defend

[16] See eg Chapter III, Section I and Chapter VI.
[17] [2010] EWCA Civ 180, [2011] QB 86 (*Shell*).
[18] Ben McFarlane, 'The Nature of Equitable Property Revisited' (2026) 79 CLP II.A.
[19] Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913-4) 23 Yale LJ 16 18.
[20] *Byers* (n 12).
[21] [2001] 1 AC 102 (HL); see analysis in Chapter V.
[22] *Shell* (n 17).
[23] See analysis in Chapter I.II.B.

the operation of those features in the context of the private fixed trust, whilst maintaining consistency of analysis across the law.

II. Future research

This thesis has focussed on a scheme-based analysis of four important features of the English trust. It has made *no* claim that these are the *core* or *most* important features. Focus was made on the four features explored in this thesis because they apply to all trusts, do not apply in the case of a standard contractual duty, have given rise to judicial and scholarly analysis and are features to which the rival analyses of beneficial ownership and rights against rights ascribe significant importance. However, focus on four of the trust's key features does not preclude the possibility that a scheme-based analysis could also explain well other key features of the trust, such as the court's supervisory jurisdiction over the trust. Future research could explore further key features of the trust, beyond those seen in this thesis.

In future work, it can also be asked in more detail what might justify different rules applying to different types of scheme[24], as well as exploring whether it might be said that a company holds its rights non-beneficially. After all, beneficial right-holding was defined in this thesis as the ability to bring to bear one's unfettered preferences in the use of the right.[25] A company – being a legal entity[26] that acts through its agents – has no unfettered preferences. It might therefore be argued that definitionally it is vested with its rights non-beneficially. It might be said that its rights have therefore been appropriated to a scheme,

[24] See eg analysis in Chapter VI, Section III, asking whether there might be good reasons for strict liability personal claims being available against recipients of misapplied deceased estate assets, but not recipients of misapplied trust assets.
[25] See eg analysis in Chapter II.
[26] *Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL) 51.

because a company can – because of its very nature – only hold rights non-beneficially. It might therefore be said that the company's agents are under a duty to exercise powers over the company's rights in a manner consistent with the company scheme, represented by its constitution and articles of association.[27] It would matter in practice if a company were seen as a kind of scheme, because it could, for example, help cast some light on the question, not satisfactorily resolved in *Byers*, of why there can be knowing receipt claims against a recipient of company assets transferred following a breach of duty by a director.

Another question that might be explored in future research is whether all forms of co-ownership of property entail rights appropriated to a scheme. In the context of land, wherever the same legal title is vested in two or more parties, a statutory trust automatically arises[28] and hence a scheme-based analysis is possible. In English law, such a trust does not arise where two or more parties are jointly vested with title to personal property, such as title to a car. Nonetheless, it may be possible to see such co-ownership as involving a scheme. On the definition given in Chapter II, the question is whether co-owners are necessarily vested with the joint title non-beneficially. After all, an individual co-owner does not have the ability to exert their unfettered preferences in the same way they would if they were the only party vested with title. For example, if A and B are jointly vested with title to a car, A cannot unilaterally decide to paint the car as they wish, or to sell the car unilaterally. The picture is complex, however, as if the co-owners act together, they can do with the title to that car as they wish. Therefore, when they act together, they do have the ability to exert their unfettered preferences.[29]

[27] Companies Act 2006, ss 17 – 20.
[28] Law of Property Act 1925 ss 34(2), 36(2).
[29] Joshua Getzler, 'Plural Ownership, Funds, and the Aggregation of Wills' (2009) 10 Theoretical Inquiries in Law 241.

Another question that might be explored in future work is the conceptual and practical possibility of English law recognising and enforcing schemes for oneself. For example, consider a situation where A appropriates their bank account with Lloyds for the exclusive purpose of promoting A's own linguistic, philosophical and literary education. Given recent scholarship arguing that the trustee's core duty to administer assets in accordance with the terms of the trust is undirected[30], it could be possible to argue that in the case of a scheme for oneself, the trustee owes an undirected duty, that can be enforced by a third-party enforcer[31], appointed by the settlor. Schemes for oneself, even if conceptually possible, might be outlawed for policy reasons, in the same way as most non-charitable purpose trusts. One such policy reason might be to protect the creditors of the settlor. However, conceptually, it might be possible to argue that they count as schemes and – if their validity is eg premised on there being a third-party enforcer and there being limits on the extent of one's wealth one can devote to schemes for oneself – there might even be good practical motivations for allowing such schemes. For example, if a reason for allowing trusts to be set up is to promote the autonomy of the settlor[32], allowing these types of scheme might seem consistent with that ideal.

It was argued in Chapter I.II.C.i that in order to understand the moral value (if any) served by the trust, it is essential to first grasp its juridical and conceptual nature. Part of the goal of this thesis has been to achieve that goal, by suggesting the trust can be understood as a scheme. Future work might ask – given the nature of the trust as entailing a right appropriated to a scheme and the law's commitment to upholding its integrity – what moral

[30] See eg analysis in Chapter I.II.C.iv.
[31] See analysis of the enforcer debate in Chapter VII, Section III.V.
[32] Hanoch Dagan and Irit Samet, 'Express Trust: The Dark Horse of the Liberal Property Regime' in Simone Degeling, Jessica Hudson and Irit Samet (eds), *Philosophical Foundations of the Law of Express Trusts* (Oxford University Press 2023) 139.

and other values (if any) might be served by the trust. It is notable that scholars – such as Ho and Harding[33] – have already began the task of discerning moral values served by the trust that do not ground such values in the rights of individual beneficiaries, but rather the importance of allowing parties to devote assets to stewardship arrangements.

Finally, the scheme-based analysis advanced in this thesis may find external corroboration in the trajectory of trust law in jurisdictions in the United States, which might be seen to offer a "natural experiment" for the propositions defended here. The Uniform Trust Code permits trusts in which beneficiaries hold no enforceable rights[34] and confers on trustees a capacity distinct from their personal estate, excluding personal liability for trust debts.[35] Recent state legislation extending non-charitable purpose trusts and asset protection trusts further attenuates beneficiary-centred accounts of the trust.[36] These developments might be seen to be consistent with a structure in which duties are generated by the scheme itself rather than derived from correlative beneficiary rights and future work might test whether the scheme-based analysis offers a more coherent account of this trajectory than orthodox proprietary theories.

[33] Lusina Ho and Matthew Harding, 'A Commitment Theory of Express Trusts' (2025) 141 LQR 247; see analysis in Chapter I.II.C.i.
[34] Uniform Trust Code (2000, as amended 2010) § 603(b).
[35] Uniform Trust Code (2000, as amended 2010) § 1010.
[36] See eg Delaware Trust Act 2025 — non-charitable purpose trusts (Del Code tit 12, § 3556) and Texas HB 4058 (2025) — self-settled asset protection trusts.

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