THE NATURE OF TRUSTS AND THE CONFLICT OF LAWS

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1 Introduction

"From very early days down to the present time the essential nature of trusts and other equitable interests has formed a favorite subject for analysis and disputation."[1] Thus begins Hohfeld's seminal analysis of the nature of legal relations. Over a century later, the statement still holds true.[2] Moreover, it is still the case, as Hohfeld emphasized, that "the true analysis of trusts and other equitable interests is a matter that should appeal to even the most extreme pragmatists of the law." This is because specific practical questions can turn on "one's view as to the correct analysis of such interests."[3] As an example of such questions, Hohfeld referred to "difficult and delicate problems" in the conflict of laws. Those problems also persist and continue to demand judicial attention, as shown by the litigation in *Akers v Samba Financial Group*,.[4] which we will examine in Section 5 below. Our central argument, consistent with Hohfeld's analysis, is that the approach of the courts to such problems provides valuable insights into the nature of trusts and other equitable interests and, indeed, into the relations between common

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[1] W. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913-14) 23 Yale Law Journal, 16 at 16.

[2] For some recent contributions, see e.g. E. Zaccaria, "The Nature of the Beneficiary's Right Under a Trust: Proprietary Right, Purely Personal Right, or Right against a Right?" (2019) 135 L.Q.R. 460; B. McFarlane and R. Stevens, "The Nature of Equitable Property" (2010) 4 Journal of Equity 1; J. Edelman, "Two Fundamental Questions for the Law of Trusts" (2013) 129 L.Q.R. 66; J. Penner, "The (True) Nature of a Beneficiary's Equitable Proprietary Interest Under A Trust" (2014) 27 Canadian Journal of Law and Jurisprudence 473; P. Jaffey, "Explaining the Trust" (2015) 131 L.Q.R. 377.

[3] W. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 26 Yale Law Journal 16 at 18.

[4] *Akers v Samba Financial Group* [2017] UKSC 6; [2017] A.C. 424. For a further recent example, see *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7; [2019] A.C. 271.

law and equity more generally. The resolution of conflicts cases often requires judges to take a view on the precise nature and operation of rights, and so they are of interest not only to private international lawyers, but to anyone, whether academic or extreme pragmatist, seeking to understand the nature of trusts and other equitable interests.

First, in Section 2, we make a methodological point. Courts are rightly concerned with the practical context in which any concept is applied. It cannot, for example, be assumed that the domestic analysis of a particular concept will necessarily govern the characterization of an issue for the purpose of determining jurisdiction or selecting an applicable law.[5] Nonetheless, even if a court is reasoning with one eye, or more, to the practical outcome of a dispute, a judge's reasoning will still reveal, and be constrained by, his or her understanding of the relevant concepts. Indeed, it is the ability of concepts to have at least some invariance to context which allows them to function as organizing ideas at all,[6] and allows for a system of law as opposed to a wilderness of single instances.

In Section 3, therefore, we consider the approach taken to trusts and other equitable interests by English courts deciding conflicts disputes, prior to *Akers v Samba*. We show that it is consistent with what we call a "relational view" of such rights: it distinguishes them from legal property rights and emphasizes their dependence on the existence of a particular relationship between the parties. This approach, which requires a court to consider if a defendant's conscience has been affected, is in tension with what we call a "proprietary view" of the trust and other equitable interests. On that view, such rights are essentially simply a weaker form of their proprietary counterparts at common law, so that, for example, a beneficiary can be seen as an as an equitable owner of the trust property. It might then be tempting to distinguish the domestic and international contexts, and accept that a different view prevails in each, but, in Section 4, we resolve the tension differently, by showing that the domestic rules as to the operation of equitable interests are in fact consistent with the relational analysis employed in the conflicts case-law. This fits with the fact that the judges in the

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[5] As emphasized by e.g. Mance L.J. in *Raiffeisen Zentralbank Osterreich AG v Five Star Trading llc* [2001] EWCA Civ 68; [2001] Q.B. 825 at [27]. See too, in the context of a case concerning a trust, *Macmillan v Bishopsgate Investment Trust plc (No 3)* [1996] 1 W.L.R. 387 (C.A.) at 407-8 (Auld L.J.); [1996] 1 All E.R. 585.

[6] See e.g. H. Smith, "Emergent Property" in J. Penner and H. Smith (eds.) *Philosophical Foundations of Property Law* (Oxford: Oxford University Press, 2012) 320 at 333.

conflicts cases have not qualified their analyses as applicable only at the more abstract conflicts level.

In Section 5, we apply the relational view of the trust to support the reasoning of the Supreme Court in *Akers v Samba*, and also to explain an apparent paradox in Lord Sumption J.S.C.'s analysis in that case. In our view, then, the domestic and international levels are clearly linked: for example, changes to a system's domestic law of trusts may affect its characterization of an issue for the purposes of private international law.[7] However, we accept in Section 6 that, for the purpose of applying particular conflicts rules in the context of claims against third party recipients of property affected by a trust or other equitable interests, there are sound reasons for characterizing particular issues as proprietary. We go on to explain how this pragmatic concession to context is compatible with the relational view of the trust and other equitable interests.

Finally, in Section 7, we note that our argument has broader consequences for understanding the relationship between common law and equity. Like domestic law and a foreign law, the common law and equity can be seen as two different seams of law - and in that limited sense, two different jurisdictions - potentially applicable to a dispute. Indeed, in explaining why it is permissible for an English court to give effect to an equitable limit on the defendant's enforcement of a right to property situated abroad, judges have on occasion expressly drawn parallels with the purely domestic operation of equity.[8]

2 Methodology: Concepts and the Conflict of Laws

[7] As noted by Lord Briggs in *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2019] A.C. 271 at [241].

[8] See e.g. Cozens-Hardy M.R. in *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch. 502 (C.A.) at 514, applied in *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch.) and cited by Lord Mance in *Akers v Samba Group* [2017] A.C. 424 at [25], and discussed in Section 5 below. Note that the Court of Appeal's decision in *de Beers* was reversed by the House of Lords (*De Beers Consolidated Mines Ltd v British South Africa Co* [1912] A.C. 52 (H.L.)) but as a result of its different construction of the parties' agreement, rather than on the question of the governing law.

Our methodological argument is ultimately a modest one and fits with Hohfeld's point:[9] there is an inevitable synergy between the characterization of issues for the purposes of conflicts rules and the development of key concepts in domestic law, such as the trust. This argument can be challenged by the claim that it would be dangerous to rely on conflicts cases to make broader claims about the nature of particular legal concepts. It might be argued instead that the *context* is always crucial in such cases, and, to give effect to the demands of the instant context, judges may well manipulate the applicable legal concepts, particularly where the abstract nature of those concepts makes them relatively indeterminate. Indeed, such scepticism is supported by the work of many American scholars who wrote in the fifty years or so after Hohfeld's death and whose analysis shaped the Restatement (Second) of Conflict of Laws, published in 1971.[10] For example, as part of a broader attack on "mechanical jurisprudence",[11] the Legal Realist analysis attacked the whole mode of proceeding in choice of law cases: the categorization of the dispute into a legal category (e.g. tort) and the application of a rule applying a connecting factor (e.g. the place of the wrong) then indicating the applicable law. Instead, that analysis asked in what context, and for what reason, a situation was to be classified, allowing a court to engage directly with the relevant policy concerns underlying the conflict of laws in any given case.[12] The impact of this approach can be seen, for example,[13] in those parts of the Second Restatement where a broad, non-exclusive set of factors is set out to assist a court in identifying the state which has "the most significant relationship to the occurrence and the parties".[14]

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[10] See e.g W. W. Cook, *The Logical and Legal Bases of the Conflict of Laws* (Massachusetts: Harvard University Press, 1942).

[11] See R. Pound, "Mechanical Jurisprudence" (1908) 8 Columbia Law Review 605.

[12] See e.g. W. W. Cook, "Tort Liability and the Conflict of Laws" (1935) 35 Columbia Law Review 202, E. G. Lorenzen, "Tort Liability in the Conflict of Laws" (1931) 47 L.Q.R. 483.

[13] For a general survey of the impact of such approaches on the conflict of laws, see C. Wasserstein Fassberg, "Realism and Revolution in Conflict of Laws: In with a Bang and Out with a Whimper" (2015) 163 University of Philadelphia Law Review 1919.

[14] See e.g. Restatement (Second) of Conflict of Laws §§145, 208, 209, 212, 222.

Such a sceptical approach could, for example, be taken in relation to the decisions of Judge Paul Baker Q.C.[15] and of the European Court of Justice in *Webb v Webb*.[16] On the face of it, that case raised, as clearly as possible, a conceptual issue as to the meaning of a provision now contained in Article 24 (1) of the Recast Brussels Regulation (Art 24 (1)).[17] The provision states that the courts of the member state in which the property is situated are to have exclusive jurisdiction, regardless of domicile, "in proceedings which have as their object rights in rem in immovable property." The dispute related to a flat in Antibes which was purchased in the name of the younger Webb who, like his father, was domiciled in the United Kingdom. His father claimed, in High Court proceedings, that he had provided the purchase price, and sought a declaration that the son held title to the flat on a resulting trust for him, and should execute such documents as were required to transfer ownership of the flat. The son's argument that the French courts had exclusive jurisdiction was rejected, firstly by Judge Paul Baker Q.C. and then, when the case was referred to it by the Court of Appeal for a preliminary ruling, by the European Court of Justice. The reasons given by each court for refusing to classify the proceeding as having "as their object rights in rem" have been criticized, essentially for departing from the "proprietary view" of the nature of a beneficial interest under a trust[18] – in Section 3, however, we will defend their conceptual classification of the claim, by showing how it is consistent with the nature and operation of a beneficial interest under a trust. There is, however, a prior methodological question: does the particular context of the dispute rob the decisions of any significance, and thus make it pointless to draw conceptual lessons from the reasoning of the courts?

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[15] *Webb v Webb* [1991] 1 W.L.R. 1410 (Ch.); [1992] 1 All E.R. 17.

[16] *Webb v Webb (C-294/92)* [1994] Q.B. 696 (ECJ); [1994] E.C.R. I-1717.

[17] Regulation (EU) No. 1215/2012.

[18] See e.g. A. Briggs, *The Conflict of Laws* (3rd edn) (Oxford: Oxford University Press, 2013) at 68, it is argued the conclusion of the ECJ in *Webb* that "a beneficiary under a resulting trust has only an interest in personam and not one *in rem* was wrong, at least as a matter of English law, by several centuries". In the latest edition (A. Briggs, *The Conflict of Laws* (4th edn) (Oxford: Oxford University Press, 2019) at 59), the objection is modified, as it is said that the conclusion "may pay insufficient attention to the equitable doctrine of notice". In each case, the objection is that the third party effect of a beneficial interest means it is better seen as a right *in rem*: this is the view we will challenge in Sections 3 and 4 below.

Certainly, factors specific to the dispute in *Webb* argued in favour of dismissing the son's objection. First, there is the context of Article 24 (Art 24), which, like the other provisions as to exclusive jurisdiction, involves a derogation from the general principle[19] that it is permissible to sue a defendant in the courts of his domicile. It would not, therefore, be surprising if such exclusive jurisdiction provisions are given a narrow interpretation.[20] This is confirmed by the approach developed by the European Court of Justice in later authorities, which makes clear that Art 24:

> "[D]oes not encompass all actions concerning rights in rem in immovable property, but only those which both come within the scope of the [Regulation] and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with protection for the powers which attach to their interest."[21]

Thus, a nuisance claim brought by an owner of land is regarded as outside the scope of what is now Art 24(1),[22] while a claim by one joint legal owner of land for its sale is regarded as falling within it.[23]

Second, there is the context of the factual dispute. Both parties were domiciled and resident in England, and the substance of the dispute related to matters (such as the intention of the father when providing the purchase money) which had no particular connection to France rather than to England. A dispute as to, for example, ownership of land might generally be thought to require an examination of title registers or other documents located in the same jurisdiction as the land itself, so as to require the assignment of exclusive jurisdiction to the

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[19] See now Regulation (EU) No. 1215/2012, Article 2.

[20] As noted by the European Court of Justice in e.g. *Land Oberosterreich v CEZ* (C-343/04) [2006] 2 All E.R. (Comm) 665 (ECJ); [2006] E.C.R.I-4577 at [26]: "in that they introduce an exception to the general rules of jurisdiction…the provisions of Article [24] – in particular Art [24(1(a)] – must not be given an interpretation broader than is required by their objective."

[21] *Land Oberosterreich v CEZ* (C-343/04) [2006] 2 All E.R. (Comm) 665 at [30].

[22] *Land Oberosterreich v CEZ* (C-343/04) at [30].

[23] *Magiera v Magiera* [2016] EWCA Civ 1292; [2017] Fam. 327.

court of the place where the land is situated (as it is best placed to establish the facts).[24] However, that was unnecessary on the facts of *Webb*[25] as the father did not dispute his son's legal ownership of the property. Indeed, if the parties had made one arrangement in relation to land in different jurisdictions, there would be no good reason for demanding that the father bring proceedings in each jurisdiction, as this would give rise to a risk of conflicting decisions.[26] Further, as the dispute was simply between the possible trustee and beneficiary, it did not concern the effect of a trust on a third party, and so the decision could possibly be seen as limited to cases which raise only the personal, rather than the proprietary, aspects of the operation of a trust.[27]

There are thus different ways in which the result reached in *Webb* might be rationalized. It could be argued that the courts manipulated the concept of an "in rem" right, giving it an artificially narrow interpretation, in order to reach the result that best accorded with the underlying policy concerns that made England, rather than France, the more appropriate forum for the substantive dispute. Indeed, it might be said that the courts in effect anticipated the point, made clear in later authorities, that the exclusive jurisdiction provision should apply only to a sub-set of claims based on the assertion of a right in rem in immovable property.[28] On that

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[24] In *Land Oberosterreich v CEZ* (C-343/04) [2006] 2 All E.R. (Comm) 665 at [29], this was expressed to be part of the rationale of what is now the Art 24(1) rule.

[25] As noted by A. Briggs, *The Conflict of Laws* (4th edn) (Oxford: Oxford University Press, 2019) at 59: "Where the substantive law which the court will apply is not specifically land law or tenancy law, there is no pragmatic need to engage Article 24(1), for the same principles would apply in a claim made against the trustee-owner of a yacht or a parcel of shares."

[26] This point was made by the Advocate General in *Webb v Webb*. As will be discussed in Section 3 below, there is no obvious reason why the law applying to a single arrangement should vary according to the location of the property to which the arrangement relates. See too Millett L.J. in *Lightning v Lightning Electrical Contractors Ltd,* Court of Appeal (Civil Division), 23 April 1998; [1998] 4 W.L.U.K. 326.

[27] See e.g. *Akers v Samba Group* [2017] A.C. 424 at [82], where Lord Sumption distinguishes these two aspects of the trust. Note though that Dicey, Morris & Collins, *The Conflict of Laws* (15th edn) (London: Sweet and Maxwell, 2012) at [23-012] states that the ruling in *Webb* "suggests that, even if the object of proceedings is to vindicate equitable rights against a third party (for example, where a claimant seeks to establish that a purchaser of trust property holds it as constructive trustee), the proceedings should not be regarded as involving rights in rem." This point will be considered further in Section 3 below.

[28] See e.g. A. Briggs, *The Conflict of Laws* (4th edn) (Oxford: Oxford University Press, 2019) at 58-60.

view, it would be difficult to draw general lessons for domestic law from the characterization of a beneficiary's right adopted for the purpose of applying a conflicts rule. The wider realist prescription would be that abstract concepts, such as that of an "in rem" right, are best avoided when determining the resolution of a dispute, and that the relevant policy factors should instead be weighed directly.

Our contention, however, is that, provided sufficient care is taken, it *is* possible to draw general conceptual lessons from the analysis of the courts in a case such as *Webb*. First, the fact that later cases have excluded some disputes asserting a right in rem in land from the scope of Art 24(1) does not, in itself, alter the usefulness of *Webb* in providing evidence as to how judges, in reaching a conclusion that a claim for the existence of a trust was *not* a claim to assert a right in rem, understood the nature of a beneficiary's rights. Second, whilst *Webb*, like any decision, was decided in a specific context, the reasoning in the case, as we will explore in Section 3, is consistent with previous conflicts decisions considering the nature of a beneficiary's interest, and has also been applied by later English courts.[29] The more consistently a particular conceptual analysis is applied, the less invariant it is to changing contexts, and we will argue here that the relational view of the trust which motivates the reasoning in *Webb* also assists in understanding the domestic law, beyond the conflicts context.

Furthermore, there may be sound contextual reasons for giving prominence to conceptual reasoning: for example, the importance of uniformity in the interpretation, across different jurisdictions, of provisions such as Art 24(1) argues for giving a consistent meaning to the terms setting the scope of the provision, rather than asking individual courts to engage in the difficult task of balancing competing policy concerns directly. Indeed, the realist revolution in conflicts has had relatively little impact beyond the United States,[30] and whilst rules governing matters such as jurisdiction and choice of law continue to be expressly organized around abstract concepts, such as that of an "in rem" right, a court's decision must be constrained by its understanding of such a concept, and so its reasoning will provide valuable data as to how judges interpret and apply such concepts. In fact, it is important to

[29] See *Ashurst v Pollard* [2001] Ch. 595 (CA); [2001] 2 All E. R. 75, and *Prazic v Prazic* [2006] EWCA Civ 497; [2006] 2 F.L.R. 1128.

[30] See C. Wasserstein Fassberg, 'Realism and Revolution in Conflict of Laws: In with a Bang and Out with a Whimper' (2015) 163 University of Philadelphia Law Review 1919 at 1932.

consider such decisions, as they are relatively rare examples in which judges may be forced to consider directly the meaning of fundamental concepts.[31]

This does not mean that the realist argument can be entirely dismissed.[32] First, caution must be exercised in dealing with broad concepts. Indeed, the need to distinguish between different types of right, often confused behind the general label of "property", is central to our analysis, in Section 4, of the nature of trusts.[33] Second, in analyzing a particular decision, context is crucial, and it should not be assumed that judges using the same term, in different contexts and for different purposes, are in fact invoking the same concept.[34] This is particularly true in conflicts cases where a term, when used in the context of a multi-national convention or Regulation, must be given an "autonomous" meaning which may differ from the interpretation given to it in a purely domestic context.[35] It must be remembered, for example, that when characterizing an issue for the purpose of finding an applicable law, a court is not

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[31] A parallel can be drawn with the domestic law of limitation of actions. As long as statutory provisions such as the Limitation Act 1980 employ terms such as "tort" (s. 2), "contract: (s. 5) and "trust" or "trustee" (s. 21) to set limitation periods, the interpretation of such terms given by the courts may then have consequences beyond the context of limitation: in relation to trusts, see e.g., *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All E.R. 400; (1998) 95(35) L.S.G. 36 and *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] A.C. 1189.

[32] The "New Private Law" movement, for example, is significant not only in that it attaches greater weight to doctrinal scholarship and the concepts expressly used by legislatures and the courts, but also because it does not simply seek to return to a pre-realist approach, but rather to assimilate some of the more useful lessons of Legal Realism: see e.g. A. Gold et al (eds) *The Oxford Handbook of New Private Law* (Oxford: Oxford University Press, forthcoming).

[33] See e.g. B. McFarlane and R. Stevens, "The Nature of Equitable Property" (2010) 4 Journal of Equity 1; B. McFarlane and S. Douglas, "Property, Analogy, and Variety" (2020) 40 O.J.L.S. forthcoming.

[34] An example is given by the particular sense in which Lord Sumption uses the term "in rem" in *Akers v Samba Group* [2017] A.C. 424 at [82]: see Section 4 below.

[35] See, e.g., *Land Oberosterreich v C.E.Z.* (C-343/04) [2006] 2 All E.R. (Comm) 665 at [25], noting that, to ensure uniformity of application across different jurisdictions, 'an independent definition must be given in Community law to the phrase "in proceedings which has as their object rights in rem in immovable property"'. See too the definition of a trust adopted by Art 2 of Hague Convention on the Law Applicable to Trusts and on their Recognition (1985), which includes arrangements (such as a private purpose trust) which would not qualify as a trust under English law.

engaged in the same task as when analyzing the same set of facts in a purely domestic context.[36] As we will see in Section 6 below, for example, there may be good pragmatic reasons for adopting a broader-brush analysis at the characterization stage to avoid an undue increase in the number of distinct choice of law rules.[37] Nonetheless, even where judges take a "broad internationalist" view of concepts,[38] their reasoning will draw on, and thus provide useful evidence of, the judicial understanding of the domestic meaning of the term.[39]

We therefore agree with Hohfeld's observation that, as important practical consequences turn on the resolution of abstract questions as to the nature of rights, those abstract questions must be carefully considered. There is something of an irony here: realist conflicts scholars took inspiration from Hohfeld, but their conclusions run directly contrary to his call for paying close attention to the nature of concepts, as well as to the demands of context.[40] And, it seems, in the conflicts of laws[41] as in other areas,[42] the importance of concepts

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[36] As noted by Mance L.J. in *Raiffeisen Zentralbank Osterreich AG v Five Star Trading llc* [2001] EWCA Civ 68; [2001] QB 825.

[37] See e.g. *Macmillan v Bishopsgate Investment Trust plc (N.o 3)* [1996] 1 W.L.R. 387 at 407-8 (Auld LJ): the general point is robustly defended by A. Briggs "Misappropriated and Misapplied Assets in the Conflict of Laws" in S. Degeling & J. Edelman (eds) *Unjust Enrichment in Commercial Law* (Sydney: Lawbook Co, 2008).

[38] *Raiffeisen Zentralbank Osterreich AG v Five Star Trading llc* [2001] Q.B. 825 at [26] (Mance L.J.).

[39] See e.g. *Kitechnology BV v Unicor GmbH Plastmaschinen* [1995] F.S.R 765 at 777, where Evans L.J. considered the classification of a breach of confidence claim in English law as part of considering the application of the autonomously defined term "tort, delict or quasi-delict" employed by what is now Article 7(2) of the Recast Brussels Regulation.

[40] For a particularly clear example of this in relation to the conflict of laws, see Hohfeld's extremely careful and exhaustive analysis, over four articles, of the concepts relevant to determining which law should govern the individual liability of a holder of stock in a Californian company: W. N. Hohfeld, "The Nature of Stockholders' Individual Liability for Corporation Debts" (1909) 9 Columbia Law Review 285, "The Individual Liability of Stockholders and the Conflict of Laws" (1909) 9 Columbia Law Review 492 and (1910) 10 Columbia Law Review 283 and 520.

[41] See C. Wasserstein Fassberg, "Realism and Revolution in Conflict of Laws: In with a Bang and Out with a Whimper" (2015) 163 University of Philadelphia Law Review 1919 at 1938-1940.

[42] See e.g. H. Smith, "The Persistence of System in Property Law" (2015) 163 University of Philadelphia Law Review 2055, on property.

has endured, as they provide a means for judges to make sense of complex factual scenarios, and their relative indeterminacy to context promotes consistency in decision-making.

3 Lessons from the Conflicts Case-Law: The Position before *Akers v Samba*

As will be seen in Section 5, the reasoning of the Supreme Court in *Akers v Samba* is consistent with a long-established line of conflicts authorities, including *Webb v Webb*, which emphasize that the assertion of a trust or other equitable interest depends on establishing a specific relationship between claimant and defendant, so that the conscience of the latter can be said to be bound. The reasoning of the court thus lends support not only to the approach in *Webb* but also, we argue, to the relational view of the nature of a beneficiary's interest under a trust, which we will examine in Section 4. It is first necessary, however, to consider the authorities prior to *Akers*.

English courts have long declined jurisdiction in disputes to determine rights *in rem* in respect of foreign land (even where the defendant is amenable to service within the jurisdiction),[43] but from at least the eighteenth century[44] onwards, the Court of Chancery did not regard itself as bound by this rule in respect of disputes in which the claimant asserted a

[43] *British South Africa Co v Compania de Mocambique* [1893] A.C. (H.L.) *602*. On the changes to this rule wrought by the Brussels I Regulation (now Recast), the Lugano Convention and the Civil Jurisdiction and Judgments Act 1982, see Dicey, Morris & Collins, *The Conflict of Laws* (15th edn) (London: Sweet and Maxwell, 2012) at [23-024].

[44] Earlier decisions such as *Ardglasse v Muschamp* (1684) 1 Vern. 237; 23 E.R. 438, in which the court granted a sequestration order against the estates of a defendant situated in Ireland, seem to have been based on the "superintendent jurisdiction" of the English courts over the Irish courts, which related to Ireland's position as a conquered territory rather than the equitable jurisdiction of the Court of Chancery specifically. See e.g., *Lord Portarlington v Soulby* (1834) 3 My. & K. 104, 109; 40 E.R. 40; and P. Mitchell, "*Penn v Lord Baltimore* (1750)" in C. Mitchell & P. Mitchell (eds), *Landmark Cases in Equity* (Oxford: Oxford University Press, 2012) at 100-102.

direct equitable right (for example, arising from a contract or a fiduciary relationship) in respect of such land against a defendant over whom the Court had jurisdiction.[45]

This approach was explicitly founded on the Court's view that its domestic equitable jurisdiction operated in personam, in the specific sense that any order made simply recognised or imposed an obligation on the defendant rather than determining rights in rem. For example, in *Toller v Carteret*,[46] the defendant granted a mortgage of the island of Sark to the claimant and subsequently the claimant sought to foreclose. The defendant argued that Sark, part of the Duchy of Normandy, had its own laws and was within the jurisdiction of the Guernsey courts, not the Court of Chancery. Sir Nathan Wright, Lord Keeper, overruled the defendant's plea on the basis *inter alia* that the Court of Chancery had jurisdiction as he had been served in England and "*aequitas agit in personam*".

A key precondition to the Court of Chancery's ability to act in personam was that the defendant's conscience be affected by a personal obligation towards the claimant that equity would recognise and enforce.[47] For example, in *Angus v Angus,*[48] the plaintiff brought a bill for possession of lands in Scotland and for discovery of the rents and profits, and alleged that the defendant had been guilty of fraud in obtaining the deeds. The defendant pleaded that the lands and matters prayed by the bill were outside the jurisdiction. Hardwicke, L.C. held that the defendant's plea must be overruled as the court acted on the person in relation to fraud and discovery. He added that the plaintiff's bill would have been good "as to fraud and discovery if the lands had been in France, if the persons were resident here; for the jurisdiction of this court as to frauds, is upon the conscience of the party."[49]

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[45] In accordance with the general rules governing the courts' in personam jurisdiction: see e.g. Dicey, Morris & Collins, *The Conflict of Laws* (15th edn) (London: Sweet and Maxwell, 2012) Rule 29 at [11R-001].

[46] *Toller v Carteret* (1705) 2 Vern 294; 23 E.R. 916.

[47] On the centrality of the idea of conscience to equitable obligations generally, see S. Agnew, 'The Meaning and Significance of Conscience in Private Law' (2018) 77 C.L.J. 479.

[48] *Angus v Angus* (1737) West T. Hardwicke 23; 25 E.R. 800.

[49] *Angus v Angus* (1737) West T. Hardwicke 23 at 23.

In *Penn v Lord Baltimore*[50] Lord Penn brought an action in Chancery for specific performance of an English compromise agreement which settled long-running proceedings relating to a dispute between himself and Lord Baltimore in relation to the precise boundary between lands in North America (now Pennyslvania and Maryland), which had been granted to each of them by the Crown. Lord Baltimore had been validly served within the jurisdiction. The defendant argued *inter alia* that the position of parties as colonial proprietors required the matter to be heard by the King in Council (i.e., through the King's Bench Division) and that specific performance of an agreement in relation to foreign land should not be granted because the court could not make a decree and enforce it effectively. Nevertheless, Hardwicke L.C. ordered specific performance of the agreement in equity. His Lordship accepted the argument that Chancery had no original jurisdiction "on the direct question of the original right of the boundaries", but this did not matter, as the agreement had been executed in England, which meant that both the common law courts and Chancery had jurisdiction, whatever the subject matter of the agreement.[51] In his view, "the conscience of the party was bound by this agreement; and being within the jurisdiction of this court which acts in personam, the court may properly decree it as an agreement."[52]

Separately, Hardwicke L.C. rejected the defendant's argument that specific performance would be in vain. He held that although it would not be possible to make a decree *in rem* in relation to foreign land, that was not an objection against making an order for specific performance, "for the strict primary decree in this court as a court of equity is in personam".[53] Enforcement could take place by "process of contempt in personam and sequestration, which is within the proper jurisdiction of this court".[54]

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[50] *Penn v Lord Baltimore* (1750) 1 Ves Sen 444; 27 E.R. 1132. P. Mitchell, '*Penn v Lord Baltimore* (1750)' in C. Mitchell & P. Mitchell (eds), *Landmark Cases in Equity* (Oxford: Oxford University Press, 2012) at 96 argues that *Penn* must be understood in its colonial context. For other cases relating to jurisdiction in the colonies, see *Roberdau v Rous* (1738) 1 Atk. 543; 26 E.R. 342; *Foster v Vassall* (1747) 3 Atk. 587, 26 E.R. 1138.

[51] *Penn v Lord Baltimore* (1750) 1 Ves Sen 444 at 447.

[52] *Penn v Lord Baltimore* (1750) 1 Ves Sen 444 at 447.

[53] *Penn v Lord Baltimore* (1750) 1 Ves Sen 444 at 454.

[54] *Penn v Lord Baltimore* (1750) 1 Ves Sen 444 at 454.

The logic of this approach extended to assuming jurisdiction to recognise and give effect to trusts and other equitable interests over foreign land, even where the concept of such an interest was not recognised locally by the lex situs. Thus, in *Ewing v Orr-Ewing*[55] the House of Lords held that the English courts had jurisdiction to administer the trusts of a will of a testator domiciled in Scotland and possessed of a large Scottish estate comprising real and personal property, in circumstances where some of the trustees resided in England, even though Scots law did not recognise the trust. The Earl of Selborne L.C. held that:

> "The Courts of Equity in England are, and always have been, Courts of conscience, operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or ratione domicilii within their jurisdiction."[56]

In asserting this extra-territorial jurisdiction, the Court of Chancery did not see itself as affecting the foreign property itself and therefore interfering with the lex situs in any way. Rather it took the view that it was merely acting in personam to compel the defendant to exercise his ownership rights in a particular way.[57] However, this was only possible if "a privity existed between the plaintiff and the defendant; they had entered into some contract or some personal obligation had been incurred moving directly from one to the other".[58] The question was whether the defendant's conscience had been affected by a personal obligation of some kind,[59] ie, if in equity's eyes there was a good reason for imposing an obligation on the

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[55] *Ewing v Orr-Ewing (No. 1)* (1883) 9 App. Cas. 34 (H.L.), 40. See also *Re Courtney; Ex parte Pollard* Mont. & Ch. 239; [1835-42] All E.R. Rep 415, where the House of Lords enforced a lien over Scottish land created by way of an English memorandum and deposit of title deeds, even though under Scottish law these steps did not suffice to create a lien or equitable mortgage.

[56] *Ewing v Orr-Ewing (No. 1)* (1883) 9 App. Cas. 3 at 40.

[57] *Commissioners of Inland Revenue v Angus* (1889) 23 Q.B.D. 579 at 596 (Lindley L.J.), referring to *Penn v Lord Baltimore*. See also *Re Courtney; Ex parte Pollard* [1835-42] All E.R. 415 at 418; and *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch. 502 at 514 (Cozens-Hardy M.R.).

[58] *Norris v Chambres* (1861) 29 Beav 246 at 253 (Sir John Romilly M.R.); 54 E.R. 621, affd 3 De GF & J 583; 45 E.R. 1004.

[59] *Deschamps v Miller* [1908] 1 Ch. 856 (Ch.) at 863.

defendant in relation to how he dealt with the property. The particular reason for recognizing such an obligation would differ depending on the circumstances. It could arise:

> "out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a Court of Equity in this country, would be unconscionable, and do not depend for their existence on the law of the locus of the immovable property."[60]

For example, in *Penn*, Lord Baltimore had made a compromise agreement: equity regarded him as bound in conscience to honour it, and therefore was prepared to impose an obligation on him to give effect to it. Alternatively, the defendant's conscience may have been affected because he had expressly assumed the obligations of a trustee, as in *Orr-Ewing*.

A similar approach is evident in *Webb v Webb*.[61] As noted in Section 2 above, Webb's claim that his son held land in France on trust for him was not regarded as falling within the exclusive jurisdiction provision applying to a claim which has as its object a right *in rem* in immovable property. Even if Webb's ultimate aim was to acquire legal title, the European Court of Justice pointed out that the claim was not *based* on a right in rem.[62] It accepted his argument that he was seeking only to assert rights against his son and to impose an obligation on him to execute the documents necessary to transfer legal ownership of the flat. Webb did not claim that he *already* enjoyed rights in relation to the land which were enforceable against the whole world.[63] Put in the language of the earlier cases, Webb's claim was that the circumstances in which his son acquired legal ownership of the property (ie, following Webb's payment of the purchase price) – circumstances of which his son was fully aware - were such as to affect his son's conscience with an obligation to hold the property for his father's benefit, and thus he was entitled to an order that it be transferred to him. As noted in Section 2, the

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[60] *Deschamps v Miller* [1908] 1 Ch. 856 (Ch.) at 864-5.

[61] *Webb v Webb* [1994] Q.B. 696.

[62] It is worth noting that the English language version of what is now Art 24(1) is expressed slightly differently from e.g. the French or Italian versions, which refer to cases *'en matière' de droits réels immobiliers'* and *'in materia di diritti reali immobiliari'*, i.e., in the matter of real rights in land, and so do not refer to the *object* of the claim.

[63] Contrast e.g. *Komu v Komu (C-605/14)* [2016] 4 W.L.R. 26 (ECJ); [2016] C.E.C. 1065, where an action by a co-owner seeking the sale of the co-owned land fell within what is now Art 24(1) and the European Court of Justice emphasized that the claimant was seeking to assert a right in rem which has effect 'erga omnes'.

ECJ's decision in *Webb* may well have been informed by pragmatic considerations; nevertheless, it is striking that the decision accords not only with the view taken by HHJ Paul Baker QC at first instance but also with the many earlier English decisions noted above.

Where an equitable claim is made in relation to property situated abroad, the question of choice of law has not always been considered separately from jurisdiction. In cases such as *Penn, Orr-Ewing* and *Webb*, it appears to have been implicit in the reasoning in those cases that the English court regarded English law as applicable to the relationship between the parties to a contract or a trust. This trend is also visible in other cases. In *British South Africa Co v De Beers Consolidated Mines Ltd*,[64] for example, Cozens Hardy M.R. applied the English equitable rule against clogging the equity of redemption in relation to land in what was then Southern Rhodesia, despite the defendant's argument that the lex situs (Roman-Dutch law) did not recognise the rule. His Lordship noted that by simply restraining the mortgagee from exercising rights under the lex situs:

> "our courts would not in any way interfere with the lex situs, but would by injunction, and if necessary by process of contempt, restrain the mortgagee from exercising those rights. Similar observations apply to a trustee, if the lex situs does not recognise trusts."[65]

Much more recently, in *Luxe Holding v Midland Resources Holding Ltd*[66] Roth J. held that an equitable interest arose out of a specifically enforceable contract governed by English law for

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[64] *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch. 502.

[65] *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch. 502 at 514. Similarly, in *Re Anchor Line (Henderson Bros) Ltd* [1937] Ch. 483 (Ch); [1937] 2 All E.R. 823 the court enforced a floating charge in relation to funds held by the liquidator representing lands and movables in Scotland, a jurisdiction that did not recognise such an equitable interest. See too *Lightning v Lightning Electrical Contractors Ltd* [1998] N.P.C. 71; (1998) 23 T.L.I. 35, where the Court of Appeal recognised and enforced a resulting trust over land in Scotland, with Peter Gibson LJ noting (at 38) that in cases such as *Penn, Orr-Ewing* and *Webb* the court 'not unnaturally regarded English law as applicable to the relationship between the parties before it in the absence of any event governed by the lex situs destructive of the equitable interest being asserted.' Note our argument here is specific to the form of intervention in such cases and is not the outdated one, comprehensively refuted by T. M. Yeo, *Choice of Law for Equitable Doctrines* (Oxford: Oxford University Press, 2004) that the lex fori always applies to equitable claims: see further Section 6 below.

[66] *Luxe Holding v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch.).

the sale of shares in Russian and Ukrainian companies. This meant that following the sale of the shares by the vendor (Midland) to a third party, the original purchaser (Luxe) was entitled to assert an equitable interest in the sale proceeds retained by the vendor even though the lex situs did not recognise trusts. In Roth J.'s view, there was no reason why (English) equity, "acting on the conscience of Midland as a proper defendant to the English proceedings, could not require that Midland holds the money for the benefit of Luxe."[67]

4 The Nature of a Trust and Other Equitable Interests: Justifying the Position before *Akers v Samba*

The cases discussed in Section 3 show that the English courts' readiness to give effect to equitable rights in respect of property situated abroad rested on a relational analysis: the key question was whether the facts supported the recognition of a conscience-based obligation owed by the defendant to the claimant. If so, and the defendant was within the jurisdiction, English equity would act in personam, and enforce that obligation. There was no perceived conflict between this obligation and the defendant's property rights under the lex situs: instead, equity would simply direct the defendant as to how those rights should be exercised.

There are obvious parallels between the courts' view of the relation between equity and foreign law, as discussed above, and the domestic relation between equity and the common law: indeed the two have long been regarded as closely connected.[68] In *British South Africa Co v De Beers Consolidated Mines*,[69] in a passage relied on by Lord Mance in *Akers v Samba*, Cozens Hardy M.R. expressly drew the link between the relationship of foreign law and English law on the one hand, and the relationship of common law and equity on the other:[70]

> "To take a simple case, if A by an English contract agreed to give a mortgage to secure an English debt upon land in a foreign country, the law of which country does not

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[67] *Luxe Holding v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch.) at [42].

[68] See, eg, I. Redfield, *Story's Commentaries on Equity Jurisprudence, Volume II* (9th edn) (Boston: Little Brown & Company, 1866), chapter XXIII, [899]-[904]: the jurisdiction to offer relief in respect of matters relating to land situated abroad and to grant relief against vexatious domestic proceedings are dealt with sequentially.

[69] *British South Africa Co v De Beers Consolidated Mines* [1910] Ch. 502.

[70] *British South Africa Co v De Beers Consolidated Mines* [1910] Ch. 502 at 514 (emphasis added).

> recognize the existence of what we call an equity of redemption, *which was the case of our common law*, and if a mortgage was given and duly perfected according to the lex situs, I feel no doubt that our Courts would restrain the mortgagee from exercising the rights given by the foreign law and would treat the transaction as a mortgage in the sense in which that word is used by us. In doing this our Courts would not in any way interfere with the lex situs, but would by injunction, and if necessary by process of contempt, restrain the mortgagee from asserting those rights. Similar observations would apply to a trustee, if the lex situs did not recognize trusts."

The relational analysis adopted in the conflicts cases can also be applied in the domestic sphere. Just as an English court recognizing an equitable interest in respect of foreign property does not challenge the position that A holds the relevant property under the lex situs,[71] so equity, in affording B an equitable interest, does not seek to undermine the common law position that A holds a particular right.[72] In both cases, equity accepts the existence of A's right but regulates, in favour of B, A's use and enforcement of it.[73] Importantly, that intervention is grounded not on the existence of any general duty owed by everyone else to B to keep off B's property, but on a duty that arises because the conscience of the specific defendant, A has been affected in a manner that equity regards as justiciable. The chief attraction of this relational analysis of the trust and other equitable interests, in our view, is that it minimizes not only the external, international conflict between English law and a lex situs

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[71] *R. Griggs Group Ltd v Evans (No 2)* [2004] EWHC 1088 (Ch); [2005] Ch. 153 at [69]. See also the comments of Peter Prescott Q.C., sitting as a Deputy High Court Judge, on the relationship between the common law and equity at [43].

[72] The analysis here thus accords with Maitland's view as to the peaceful co-existence of common law and equity (see e.g. F. Maitland, *Lectures in Equity* (Cambridge, CUP, 1929)) rather than with Hohfeld's criticisms of Maitland in W. Hohfeld, "The Relations Between Equity and Law" (1913) 11 Mich L R 537: see further B. McFarlane, "Avoiding Anarchy? Common Law v Equity and Maitland v Hohfeld" in P. Turner et al (eds) *Equity and Law: Fusion and Fission* (Cambridge: Cambridge University Press, 2019) at 331.

[73] See further B. McFarlane, "Form and Substance in Equity" in A. Robertson and J. Goudkamp (eds) *Form and Substance in the Law of Obligations* (Oxford: Hart, 2019) and B. McFarlane and R. Stevens, "What's Special About Equity? Rights Against Rights" in in I. Samet-Porat, H. Smith & D. Klimchuk (eds), *Philosophical Foundations of the Law of Equity* (Oxford: Oxford University Press, forthcoming).

which does not recognize such interests, but also the internal, domestic conflict between common law and equity.

It might be thought that this relational analysis is inconsistent with the protection given to B against third parties, which is of course greater than the protection available where a party holds only a personal right against A.[74] The key point for our present purposes[75] is that Maitland was correct to argue against the (still) commonly held view that B's right under a trust is distinguished from full ownership only by its vulnerability to the defence of bona fide purchaser for value without notice.[76] This can be seen by considering two cases. The first is where A, without authority under the trust, transfers the trust property to C, who provides no value in return. C is unaware of any trust and, before gaining such awareness, C disposes of the property without retaining any traceable proceeds.[77] Here, C is *not* a bona fide purchaser

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[74] For the more limited protection available to a purely personal right, see e.g. *Port Line v Ben Line Steamers* [1958] 2 Q.B. 146 (QB); [1958] 1 All E.R. 787; and *Ashburn Anstalt v Arnold* [1989] Ch. 1 (CA); [1988] 2 All E.R. 147.

[75] There is of course a wider question, which cannot be fully examined here, as to why it is that a trust or other equitable interest is permitted to have its distinct third party effect. One explanation is that such interests can be distinguished from purely personal rights, as they arise only when A is under a duty to B in relation to a specific claim-right or power held by A: see e.g. B. McFarlane and R. Stevens, "The Nature of Equitable Property" (2010) 4 Journal of Equity 1; B McFarlane and R Stevens, "What's Special About Equity? Rights Against Rights" in in I. Samet-Porat, H.Smith & D. Klimchuk (eds), *Philosophical Foundations of the Law of Equity* (OUP, forthcoming). One important point, as noted by C. Mitchell in '*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* (Oxford: Hart, 2019), is that, as demonstrated by the position of a residuary legatee of an unadministered estate (considered in *Livingston [1965] AC 694 (PC)*: another important decision arising in the conflicts context), a party may have recourse against particular third party recipients of property even without having a proprietary interest in that property.

[76] As Maitland once noted, that notion is mistaken, but common: 'for the ordinary thought of Englishmen, "equitable ownership" is just ownership pure and simple, though it is subject to a peculiar, technical and not very intelligible rule in favour of bona fide purchasers.' F. Maitland, "Trust and Corporation" in D. Runciman & M. Ryan (eds), *State, Trust and Corporation* (Cambridge: Cambridge University Press, 2003) at 94. Maitland there cites J. Salmond, *Jurisprudence* (London: Stevens and Haynes, 1893) at 278, where B is referred to as the "real owner", with the trustee's ownership described as "nominal" and "fictitious".

[77] As would be the case if e.g. C made a gift of the property to C2 before becoming aware of the trust.

for value without notice; yet it is clear in English law that B has no claim against C.[78] C is free to deal with the asset unless and until C's conscience is affected by sufficient knowledge of B's interest to subject C to a duty towards B.[79] It is only when C has that knowledge that C can reason as to what he or she *ought* to do, ie, not deal with the asset other than for B's benefit: before then, there is no basis for equity to treat C as owing such a duty to B.[80] Ultimately, therefore, B will only recover from C such assets as remain in C's hands when that duty arises (which may be as late as the date on which B notifies C of B's intention to bring proceedings).[81] B's claim thus depends on showing that C's conscience was affected, through knowledge of B's position, at a point when C still held the trust property or its traceable proceeds.[82] The second case is where X, a stranger, carelessly destroys or damages the trust property. Again, X is not a bona fide purchaser; but X is not a successor in title to A, and the orthodox position[83] is that B has no claim against X;[84] but instead can if necessary compel A to enforce, for B's benefit, any claim A has against X.[85]

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[78] See e.g. *B.C.C.I. v Akindele* [2001] Ch 437 (CA); [2000] 4 All E.R. 221*; Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 C.L.R. 89. See too the analysis of Lord Sumption in *Akers v Samba Group* [2017] A.C. 424.

[79] *Independent Trustee Services Ltd v Noble* [2012] EWCA Civ 195; [2013] Ch. 91 (C.A.) at [76] (Lloyd LJ).

[80] See S. Agnew, 'The Meaning and Significance of Conscience in Private Law' (2018) 77 C.L.J. 279.

[81] For a fuller explanation of this argument, see See S. Agnew & B. McFarlane, 'The Paradox of the Equitable Proprietary Claim' in B. McFarlane & S. Agnew (eds), *Modern Studies in Property Law, Volume 10* (Oxford: Bloomsbury 2019) at 303.

[82] *Independent Trustee Services Ltd v Noble* [2013] Ch. 91 (C.A.).

[83] This orthodox position is consistent with Lord Sumption's analysis in *Akers v Samba Group* [2017] A.C. 424 at [82]-[89]: see Section 5 below.

[84] See e.g. *The Lord Compton's Case* (1587) 3 Leo. 196; 74 E.R. 629; *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785 (H.L.); [1986] 2 All E.R. 145*;* Restatement (Third) of Trusts (2003) §§ 107-108. B will have a claim if X has dishonestly assisted A in breaching the trust, but of course there may be no breach of trust involved where X simply damages the trust property.

[85] *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180; [2011] Q.B. (CA) *86* is controversial (for criticism see e.g. P. Turner, "Consequential Economic Loss and the Trust Beneficiary" [2010] C.L.J. 445; J Edelman, "Two Fundamental Questions for the Law of Trusts" (2013) 129 L.Q.R. 66; B. McFarlane, "Form and Substance in Equity" in A. Robertson and J. Goudkamp (eds) *Form and Substance in the Law of Obligations* (Oxford: Hart, 2019) at 203-206), as it suggests that, provided A is joined to the action against X, X can be made to pay

Taken together, these two cases help to explain the prominence of conscience when considering B's protection against third parties. B must provide a reason, grounded in extra-legal moral standards and related to C's own conduct, why equity should recognize that C now has a duty to B.[86] The role of conscience is central to the relational view of the trust. For B's claim to succeed, B must show that a particular relationship exists with the defendant, whether A or C. That relationship arises only if, while the defendant holds a right in relation to the relevant asset, the defendant's conscience is affected. Where A is the defendant, this will be because A has undertaken the duties of a trustee in respect of how that right is exercised; where C is the defendant, it will be because C knows that A was under such a duty and has transferred the right away without authority.[87]

Clearly then, the manner in which a trust or other equitable interest may affect a third party is quite different from that in which a legal property right binds third parties. Rather than binding the whole world, the proprietary effect of an equitable interest is highly personalized: it depends exclusively on the position of an individual third party, i.e., whether C holds a particular right and comes under a duty to B in respect of that right. This first point thus provides support for the view that B's interest under trust does not have an in rem effect, in the sense of correlating to an immediate duty that is prima facie binding *erga omnes*,[88] and also helps to explain why the rules as to the content and acquisition of equitable interests vary so markedly from those applying to legal property rights.

5 The Supreme Court's Reasoning in *Akers v Samba*

damages based on consequential economic loss suffered by B. Note that even in that case, the Court of Appeal regarded such loss of B as purely economic loss, which of course would not be the case if B had a legal, rather than an equitable, interest in the damaged property.

[86] S. Balganesh, "Quasi-Property: Like, but Not Quite Property" (2012) 160 University of Pennsylvania Law Review 1889, identifies a category of 'quasi-property' rights which do not impose an immediate prima facie duty on the rest of the world, but which rather have effect only on a limited class of third parties, if those third parties act in a specific way. For a consideration of this idea in relation to the trust, see B. McFarlane and S. Douglas, "Property, Analogy, and Variety" (2020) 40 O.J.L.S (forthcoming).

[87] See S. Agnew & B. McFarlane, "The Paradox of the Equitable Proprietary Claim" in B. McFarlane & S. Agnew (eds), *Modern Studies in Property Law, Volume 10* (Oxford: Bloomsbury 2019) at 312-315.

[88] To adopt the language of the European Court of Justice when considering, in *Komu v Komu*, the scope of what is now Art 24(1) of the Recast Brussels Regulation: see Section 2 above.

Akers v Samba proceeded on the basis that Al-Sanea purported to declare himself trustee of shares in a Saudi company for the benefit of S.I.C.L. (SICL), a company incorporated in the Cayman Islands. Subsequently, after a winding up petition had been presented against SICL, Al-Sanea caused the shares to be transferred in breach of trust to Samba, a Saudi Arabian company of which he was a director. The transfer was intended to discharge personal liabilities which Al-Sanea owed to Samba. The liquidators of SICL sought to set aside the share transfers under s.127 of the Insolvency Act 1986 (s.127), which provides that in a winding up by the court "any disposition of the company's property … made after the commencement of the winding up is, unless the court otherwise orders, void …".

It is important to note that what started as a jurisdictional challenge on forum non conveniens grounds[89] was treated by the Court of Appeal as raising squarely a matter of English law under s.127,[90] such that the English courts had jurisdiction to determine the issues. From then on the Court of Appeal and Supreme Court dealt with the matter as a strike out application, which required them to determine whether the claim had any reasonable prospects of success. At both appellate levels, arguments proceeded on the assumption that Cayman law governed the trust itself. One of Samba's arguments in the Supreme Court was that the transfer of the shares to them involved no disposition of SICL's property, as equitable property rights could not be created in assets situated in a jurisdiction, such a Saudi Arabia, where the lex situs does not recognise the creation of such rights. Samba submitted that, even if the Hague Trusts Convention (the Convention) applied,[91] the Cayman law position was irrelevant, as Samba's

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[89] *Akers v Samba* [2014] EWHC 540 (Ch); 16 I.T.E.L.R. 808.

[90] *Akers v Samba* [2014] EWCA Civ 1516; [2015] Ch. 451 (C.A.) at [2]. At first instance Sir Terence Etherton VC held that recognition orders of the English Court made in 2009 pursuant to the Cross Border Insolvency Regulations 2006 (CBIR) recognised the insolvency proceedings in the Cayman Islands as foreign main proceedings in accordance with the UNCITRAL Model Law on Cross-Border Law Insolvency, which is set out in Schedule 1 of the CBIR. The Model Law applied to enable a foreign liquidator to use British insolvency law to obtain relief against a defendant located in Great Britain, as if the insolvency proceedings had been commenced in this jurisdiction. The effect of the CBIR and Article 20 of the Model Law was to enable foreign liquidators to take advantage of s.127(1).

[91] The Hague Convention on the Law Applicable to Trusts and their Recognition (the Convention), which was given effect in England and Wales by the Recognition of Trusts Act 1987. Samba also argued that, as a result of

position as recipient of the shares raised a question of "the transfer of title to property" which, under Article 15(d) of the Convention, need not be governed by the law of the trust, and so can instead be determined by Saudi law as the lex situs.

The Supreme Court confirmed the approach taken in the authorities referred to above, and rejected Samba's argument that the English courts could not exercise jurisdiction to recognise and enforce a trust over Saudi assets. Lord Mance concluded that it was clear "that in the eyes of English law, a trust may be created, exist and be enforceable in respect of assets located in a jurisdiction, the law of which does not recognise trusts in any form."[92] Lord Sumption agreed, holding that, even if the trust property is situated in a jurisdiction which does not recognise the concept of an equitable interest, an English court can give effect to:

> "personal rights against the trustee, who may be ordered to give effect to the trust, either by specifically performing it where that can be done, or by making good his breach of duty financially...equity will exercise its personal jurisdiction to compel [the trustee] to deal with the shares in accordance with his trust."[93]

At the same time, the court confirmed that SICL's right under the trust fell within the definition of "property" provided by the 1986 Act. Lord Mance stated that a trust "creates a proprietary interest, at least to the extent that such an interest is capable of existing and being recognised in the relevant asset"[94], and Lord Sumption regarding an equitable interest as possessing "the essential hallmark of any right in rem", i.e., that it binds third party recipients of the trust property or its traceable proceeds "subject to the rules of equity for the protection

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Article 4 of the Convention, it did not apply to the dispute: that argument was examined in detail and rejected by the Court of Appeal ([2014] EWCA Civ 1516, [2015] Ch 451) and was discussed only briefly by the Supreme Court: see e.g. Lord Mance at [2017] AC 424 at [38]. For detailed discussion of the Article 4 point, see D. Hayton, "Proprietary Interests in Foreign Property: Equity's Viewpoint" in D. Clarry (ed) *The UK Supreme Court Yearbook Volume 8* (London: Appellate Press, 2018).

[92] *Akers v Samba Financial Group* [2017] A.C. 424 at [34] (Lord Mance). At [24]-[33], his Lordship explicitly referred to *Ewing v Orr-Ewing, British South Africa Co v De Beers, Deschamps v Miller* and *Lightning v Lightning*. *Webb v Webb* was cited in argument.

[93] *Akers v Samba Group* [2017] A.C. 424 at [84], [85].

[94] *Akers v Samba Group* [2017] A.C. 424 at [16].

of bona fide purchasers for value without notice…"[95] At one level, these comments reflect the tension, noted in Section 1 above, between the relational and proprietary views of the trust: it might even seem that, for the purposes of the conflicts analysis, the relational aspect of the trust was emphasized, whereas for the application of the domestic legislation, the proprietary view was preferred.

In our view, however, so long as concepts such as "proprietary interest" and "right in rem" as used by Lords Mance and Sumption are understood in their specific context, it is possible to resolve this tension. The first point is that, as noted by each of those judges, the definition of "property" in s.436 of the Insolvency Act is "exceptionally wide",[96] and can include even a purely personal right of B against A.[97] The second is that Lord Sumption adopted a somewhat unusual definition of "in rem": his analysis makes clear that B's equitable interest is not prima facie binding *erga omnes*, but rather has effect only successors in title to the trustee, and only if the conscience of such a party is affected. As Lord Sumption put it, equitable interests "arise from equity's recognition that in some circumstances the conscience of the holder of the legal interest may be affected", and that "[w]hen the asset is transferred to a third party, the question becomes whether the conscience of the transferee is affected."[98] This analysis, which is a general one and was not said to apply only in the conflicts context, is entirely consistent with the relational view of the domestic law set out in Section 4, and supports the view that the third party effect of a trust or equitable interest is markedly different from that of a legal property right.

Indeed, the Supreme Court's analysis on what proved the decisive point in the case – that the transfer by A of the trust property to C, in circumstances where B has no claim against C, is not a "disposition" of B's property – was, again, not said to depend on any points specific to the conflicts context and is, again, consistent with a relational view. The analysis emphasizes the difference between a trust or equitable interest on the one hand and ownership on the other, as it leads to a significant difference in the treatment of a company's legal and equitable

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[95] *Akers v Samba Group* [2017] A.C. 424 at [82]. See also the use of "in rem" in *Re Diplock* [1948] Ch. 465 (C.A.).

[96] As noted by Lord Sumption: *Akers v Samba Group* [2017] A.C. 424 at [87]. See too Lord Mance at [60].

[97] As noted by Lord Mance: *Akers v Samba Group* [2017] A.C. 424 at [44].

[98] *Akers v Samba Group* [2017] A.C. 424 at [89].

property rights on insolvency. There may be policy concerns about this consequence, which could justify a change to the insolvency legislation,[99] but nevertheless the trusts analysis that underpins it is, in our view, correct. It establishes that where a trustee (A) transfers legal title to an asset to C and B's equitable interest does not bind C, no disposition of B's interest has occurred. This is because B's interest has not been terminated or extinguished by A's actions alone. B's inability to bring a claim against C is rather a consequence of the special nature of B's equitable interest, and the inherent limits on the impact that such a right can have on third parties. As Lord Sumption explained: "the equitable interest of SICL was defeated not by the act of the transferor (Mr. Al-Sanea) but by the absence of anything affecting the conscience of the transferee (Samba)."[100] This analysis is consistent with the relational view: SICL's "property" was not the shares themselves, which Mr. Al-Sanea did of course transfer to Samba; it was an equitable interest in those shares, of which Mr. Al-Sanea had no power to dispose.

The consistency of this analysis with purely domestic law can be seen by considering the House of Lords' decision in *Vandervell v Inland Revenue Commissioners*,[101] which considered the meaning of a "disposition" of an equitable interest under s. 53(1)(c) of the Law of Property Act 1925. It was held there that A's outright transfer of trust property to C, at B's instruction, was not such a disposition, and so the loss of B's equitable interest could occur without the use of any writing signed by B or B's agent. As in *Akers*, the result of the transaction was that B did not have a claim against the holder of the property (now C), but that in itself did not mean that there had been a disposition of B's equitable interest. The outcome was rather the result of the fact that there was no basis on which C's conscience could be said to be affected such as to justify C's being under a duty to B in relation to the property now held by C. If B's equitable interest were instead regarded as a right in or to the trust property, a different outcome would have been likely in *Vandervell*, as well as in *Akers*.

6 The Relational View and the Third Party Defences

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[99] See, eg, the analysis of Briggs L.J., as he then was, in his 2017 Chancery Bar Association Annual Lecture, "Equity in Business" (2019) 135 L.Q.R. 135; but as Lord Neuberger found after a careful examination of the statute in his judgment in *Akers v Samba Group* [2017] A.C. 424 at [66]-[78], the Supreme Court's analysis is correct as an application of s. 127 of the Insolvency Act 1986 in its current form.

[100] *Akers v Samba Group* [2017] A.C. 424 at [89].

[101] *Vandervell v Inland Revenue Commissioners* [1967] 2 A.C. 291 (H.L.).

Our argument so far has been that the preference in the conflicts cases for a relational view of the trust and other equitable interests is in fact consistent with the operation of domestic English law, even though that law is often thought to rest on a proprietary view of such rights. We acknowledged at the end of Section 2, however, that in conflicts cases there may be some practical contexts which demand a departure from a purely conceptual approach. This can be seen by considering *Macmillan v Bishopsgate (No 3)*.[102]

In *Macmillan* B's claim to recover shares situated in New York, or their sale proceeds, in the hands of C rested on B's assertion of an equitable interest in the shares that the trustee, A, had, without authority, transferred to C. B sought to persuade the court that the conscience-based relational approach adopted in earlier cases should be applied. It argued that the lex fori should apply as its claim was based in restitution and was "in truth no more than an invocation of the power of a court of equity, acting in personam, as a court of conscience, to require the defendants to take whatever steps are necessary to restore the shares".[103] That argument was rejected by both Millett J. and the Court of Appeal, and the lex situs was applied to determine the conditions under which C, as a bona fide purchaser of the trust property, might have a defence to B's claim.

Millett J. accepted that it was correct to characterise B's claim as lying in restitution but drew a distinction between restitutionary claims arising out of a deprivation of B's property and those arising from the commission of a wrong, such as a breach of fiduciary duty.[104] He held that there was "no relationship between Macmillan and any of the defendants [in respect of the shares]. There is no equity between them."[105] It followed that C's liability to restore the shares or their proceeds "must be based upon Macmillan's continuing equitable ownership of the shares", rather than a wrong committed by C. The question in issue was therefore one of priority: could C "identify a particular act or event which had the result of extinguishing

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[102] *Macmillan Inc v Bishopsgate (No. 3)* [1995] 1 W.L.R. 978 (Ch.).

[103] *Macmillan Inc v Bishopsgate (No. 3)* at 988.

[104] *Macmillan Inc v Bishopsgate (No. 3)* [1995] 1 W.L.R. 978 at 988-989.

[105] *Macmillan v Bishopsgate (No. 3)* at 989.

Macmillan's interest or postponing it to that of [C]."[106] It was, in Millett J.'s view, "no answer to assert that a claim which invokes the intervention of equity is a claim in personam and … as such is governed by the lex fori."[107]

One means of reconciling Millett J.'s reasoning with that in the cases discussed in Section 3 is to point to the different contexts of two party cases (where B attempts to assert an equitable right against a party implicated in the initial creation of that right) and three party cases. Yet in *Akers* the Supreme Court specifically considered the means by which B's equitable interest under a trust can affect a third party; and Millett J.'s view that B's claim was based on "continuing equitable ownership" of the shares appears to conflict directly with Lord Sumption's analysis that B's claim depends on showing that C's conscience was affected. We have returned, it seems to the conflict between the relational and proprietary views.

A resolution is, however, possible. This is unsurprising as, in *Akers* itself, Lord Mance accepted the relevance of the lex situs to determining the applicable law in three party cases,[108] and none of the other Justices rejected it. Lord Mance held that B's rights under a trust are enforceable "unless and until the disposition of the legal title has the effect under the lex situs of the trust asset of overriding the protected trust rights."[109] Moreover, in *Macmillan*, Millett J., also emphasized the importance of notice in allowing B to assert a right against C,[110] and this is consistent with Lord Sumption's focus in *Akers* on the conscience of C. The fundamental point is that, when formulating choice of law rules, there may be sound pragmatic reasons (not

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[106] *Macmillan Inc v Bishopsgate (No. 3)* [1995] 1 W.L.R. 978 at 990. Note that Millett J.'s view was that such an issue of priority was governed by New York law as the lex loci actus, whereas the Court of Appeal, whilst also seeing the issue as one of priority, rejected that view and instead applied New York law as the lex situs of the shares. For discussion see R. Stevens (1996) 112 L.Q.R. 198.

[107] *Macmillan Inc v Bishopsgate (No. 3)* [1995] 1 W.L.R. 978 at 989.

[108] *Akers v Samba Group* [2017] A.C. 424 at [28] (citing Peter Gibson L.J.'s discussion of the Court of Appeal's decision in *Macmillan* in *Lightning v Lightning Electrical Contractors Ltd* [1998] N.P.C. 71) and at [51].

[109] *Akers v Samba Group* [2017] A.C. 424 at [51].

[110] *Macmillan Inc v Bishopsgate (No. 3)* [1995] 1 W.L.R. 978 at 989.

least avoiding a proliferation of choice of law rules) for a system to adopt a less finely-grained analysis than would apply in domestic law. [111]

For choice of law purposes, it is the issue between the parties, not the nature of B's right, that is characterized. In a three-party case such as *Macmillan*, the issue is not as to the nature of B's right, and so does not depend on accepting Millett J.'s view that B asserts "equitable ownership" against C. The issue is as to whether the circumstances in which C has acquired and now holds a right justify C's being under a duty to B. The centrality of C's acquisition of the relevant right means that there are good pragmatic grounds for applying the lex situs. Those reasons are precisely the same as those which apply in a dispute between a claimant asserting pre-existing *legal* ownership of property which has subsequently been stolen and was situated abroad when sold to a third party. Chief among them is the need to protect purchasers from having to investigate whether there was anyone who might successfully make a claim in relation to the property by reference to some other system of law.[112] However, those reasons are based on the nature of C's defence to B's claim,[113] and not on the nature of B's right. Accepting the pragmatic reasons in favour of the application of the lex situs is not inconsistent with the reasoning of the Supreme Court in *Akers*, as it does not mean that where B's claim is based on B's equitable interest under a trust, it must be analysed as an assertion of continuing ownership.[114] However, it does mean that there will be cases in which equity would regard C's conscience as sufficiently affected by knowledge as to subject C to a duty towards B in respect of the relevant assets, but this duty will be unenforceable because English law defers to the lex situs under which C's title is unimpeachable.

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[111] This point is made very effectively by A. Briggs "Misappropriated and Misapplied Assets in the Conflict of Laws" in S. Degeling & J. Edelman (eds) *Unjust Enrichment in Commercial Law* (Sydney: Lawbook Co, 2008).

[112] They are set out by Slade J in *Winkworth v Christie Manson & Woods Ltd* [1980] Ch 496, 512; [1980] 1 All E.R. 1121.

[113] Note that in the Court of Appeal in *Macmillan* Auld LJ characterized the issue as being whether 'each bank can resist Macmillan's equitable claim to return of the shares by showing that it was a bona fide transferee for value without notice': [1996] 1 W.L.R. 387 at 406. As this concerned the circumstances in which the banks had acquired the shares it was, for the purposes of characterization, a 'proprietary' issue: ibid, 409.

[114] Indeed, were that the case, the lex situs would apply in all cases to B's claim and so, contrary to the analysis in *Akers*, it would be impossible for B to make a claim where C acquires property in a jurisdiction which does not recognize equitable interests.

7 Conclusion

The main concern of our argument has been with managing conflicts: the ongoing battle between the relational and proprietary views of the trust and other equitable interests; the conflict, internal to English law and other common law systems, between common law and equity; and the external conflict between domestic law and other legal systems. Our central point is that the courts' analysis when tackling that third conflict in cases of trusts and other equitable interests provides us with a compelling model for understanding and resolving the first two tensions, albeit one that takes account of practical considerations that are not relevant in the purely domestic arena. For example, the analysis of the Supreme Court in *Akers v Samba*[115] depends on the fact that an English court recognizing A's duty to hold property situated abroad for the benefit of B does not seek to deny B's title to the property under the lex situs. In the same way, we argue, equity's enforcement of a purely domestic trust does not seek to deny the common law position that A has a particular right, such as ownership of property; equity rather regulates A's use and enforcement of that right as against B.[116] To make a similar claim against a third party, B cannot simply assert an equitable ownership that is prima facie binding *erga omnes*, but must instead, as Lord Sumption explained in *Akers*,[117] show that C acquired a particular right from A, and held that right or its traceable product at a point when C's conscience was affected by knowledge of B's pre-existing interest.

On this relational view of the trust and other equitable interests, the existence of a trust, as Maitland noted, does not mean that equity contradicts the common law position that A has ownership of the trust property; A's common law rights and powers are crucial to B, as equity gave B access to the benefits of those powers by imposing a particular duty on A. Hohfeld was of course correct to note that there is necessarily some modification by equity of the common law position:[118] at common law, for example, A owes no duty to B not to use the trust property

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[115] *Akers v Samba Group* [2017] A.C. 424: see Section 5 above.

[116] See further B McFarlane and R Stevens, "What's Special About Equity? Rights Against Rights" in in I. Samet-Porat, H.Smith & D. Klimchuk (eds), *Philosophical Foundations of the Law of Equity* (OUP, forthcoming).

[117] *Akers v Samba Group* [2017] A.C. 424 at [82] and [89].

[118] See W. Hohfeld "The Relations Between Equity and Law" (1913) 11 Michigan Law Review 537, dissenting from the view of F. Maitland, *Lectures in Equity* (Cambridge: Cambridge University Press, 1909) 17 that, with

for A's own benefit, and so equity and common law clearly take different views of the obligations A owes to B. Maitland's point, however, was the more significant one that the trust need not involve conflict at the crucial level of ownership: to adopt the language used by the European Court of Justice in determining the scope of Art 24(1), B, if claiming a trust, does not "seek to determine the extent, content, ownership or possession of [A's] property or the existence of other rights in rem therein".[119] Rather, B accepts that the title and the powers that go with it are held by A, but asserts that those rights and powers must be used for B's benefit. It thus seems that equity's distinctive supplementary role, evident in its relationship with the common law, is carried forward, through some key conflicts rules, into international cases. This reflects the fact that, simply in order to operate domestically, a court of equity must necessarily have considered the question of the compatibility of equitable principles with those of another legal system: the common law. After all, it is not only in cases with a foreign element that we ask whether equity has "jurisdiction".[120]

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one or two possible exceptions, the relationship between equity and law "was not one of conflict". For discussion of the differing views, see B. McFarlane, "Avoiding Anarchy? Common Law v Equity and Maitland v Hohfeld" in P. Turner et al (eds) *Equity and Law: Fusion and Fission* (Cambridge: Cambridge University Press, 2019) 331.

[119] *Land Oberosterreich v CEZ* (C-343/04) [2006] 2 All E.R. (Comm) 665 at [30]: see Section 2 above.

[120] For a particularly interesting use of the term in the context of domestic equitable intervention, see *Pilcher v Rawlins* (1871-2) L.R. 7 Ch. App. 259 (C.A.), 269 where James L.J. describes the plea of "a purchase for valuable consideration without notice" as "an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court."