Claims with Respect to Pre-Existing Property Rights: A Search for Principle and Coherence

Anirudh Belle
Pembroke College, Oxford

Thesis submitted to the Faculty of Law, University of Oxford, for the degree of Doctor of Philosophy

Michaelmas Term 2024 | Word count: c. 99,997 words

Abstract

This project isolates and examines a fundamental question: *how, and for what reasons, is an existing proprietary right relevant to claims subsequently made by the right-holder and the remedy she is awarded?* At law and in Equity, there are examples where it is controversial what role a pre-existing proprietary right plays in justifying subsequent claims and remedies. This thesis provides a systematic taxonomy for understanding different types of relationship that can exist between pre-existing rights, claims, and remedies. This scheme, it is argued, is useful in helping us make sense of knotty doctrinal issues. The structure of this project's inquiry proceeds in three broad steps. First, it examines the identity conditions of pre-existing proprietary rights at common law and in Equity. Second, it draws out a taxonomy through which different types of claims and remedies in relation to pre-existing proprietary rights can be understood. Finally, the analysis developed in these steps is applied and tested against a selection of 'hard cases'. At common law, this concerns cases based on: (a) mixtures, specification, and manufacture of the physical subject matter of a legal property right; and (b) substitutions of legal property rights (i.e., 'common law tracing' claims). In Equity, these include claims concerning: (a) rights dependent on tracing; and (b) rights against third-party recipients of trust assets following a breach of trust. In all these situations, there is a lack of clarity about whether a claim, and its remedial outcome, is, or is not, explained *simply* by a plaintiff's enforcement of a pre-existing right. Working out such 'hard cases' requires one to confront key issues attending the broader fundamental question underlying this project. Resolving them sheds light on how that fundamental question can be addressed more generally, and beyond the types of cases considered in this project.

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Chapter 1:

Introduction

This project isolates a specific aspect of a fundamental question. The fundamental question is: *how, and for what reasons, is an existing proprietary right relevant to claims subsequently made by the right-holder and the remedy she is awarded?* Both at law and in Equity, there are several examples where it is controversial what role a pre-existing proprietary right plays in justifying subsequent claims and remedies. This thesis provides a systematic taxonomy for understanding different types of relationship that can exist between pre-existing rights, claims, and remedies. This scheme, it is argued, is useful in helping us make sense of knotty doctrinal issues both at law and in Equity. After applying the taxonomy in relation to some difficult cases at common law, the thesis then specifically applies this taxonomy to two controversial cases in

Equity, in the context of pre-existing (fixed) trusts.[1] These are claims concerning: (a) rights dependent on tracing; and (b) rights against third-party recipients of trust assets following a breach of trust. As explained below (in Part A), in these situations, there is a lack of clarity about whether a claim, and its remedial outcome, is, or is not, explained *simply* by a trust beneficiary's enforcement of a pre-existing right. The two circumstances address key issues raised by the broader fundamental question underlying this project. Resolving them sheds light on how that fundamental question can be addressed in other contexts, beyond the law of trusts.

This project proceeds in three broad steps. First (in Chapters 2 and 4), it examines the identity conditions of pre-existing proprietary

[1] The focus in this thesis is on claims made by a beneficiary under an existing fixed trust. This is because debates on the nature of tracing and receipt-based claims are frequently articulated in this context (and there are recent cases that draw on these debates as well). That said, as discussed below in this chapter (in **Part B. SCOPE**), it *may* be possible to extend the analysis in this thesis to allied claims within and outside the law of trusts. It must be emphasised, however, that this thesis only provides a *provisional* frame within which those claims could be worked out. A full treatment of them is beyond the scope of this project.

rights. Second (in Chapters 3 and 4), it draws out a taxonomy through which different types of claims and remedies in relation to pre-existing proprietary rights can be understood. Finally, the analysis developed in these steps is applied (in Chapters 5 and 6, respectively) to two difficult cases in Equity. The inquiry finds that there may be two extreme paradigms into which claims respecting pre-existing rights can be classed. First, if a claim is seen as giving effect to the original right, it could be understood as doing so by replicating the justifications for that right. Second, should the claim depend on the existence of a new right, it is possible that the claim depends on entirely new justifications. This thesis' analysis accepts these as possibilities for some categories of claim, but rejects the view that *all* cases fall into one of these two possibilities. Instead, there is a spectrum of possibilities offered in this thesis that provides a more nuanced picture of the relationship between pre-existing rights and claims made in relation to them. Adopting this spectrum, one can usefully understand what judges are getting at when they talk, for instance, about tracing claims as 'vindicating' a pre-existing

right,[2] or a knowing receipt claim being 'ancillary'[3] to a trust beneficiary's 'continuing'[4] proprietary claim against a third-party recipient of trust assets.

Part A of this chapter begins by setting out the significance of this thesis' examination of the two controversial claims in Equity it ultimately considers. These concern, respectively, the justificatory basis of: (a) claims contingent on tracing; and (b) claims (proprietary and personal) against third party recipients of trust assets. Part B then details the scope and structure of the thesis. As a foundational feature of this project's inquiry centres on the taxonomy it develops, Part C explains certain key concepts associated with it which must be understood at the outset. It also shows how these concepts are applied to shape the categories in the taxonomy. Part D outlines the methodology adopted in

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[2] See, e.g., *Taylor v Plumer* (1815) 3 M & S 562, 105 ER 721 (KB), 574–75 (725–26). See also *Lane v Dighton* (1762) Amb 409, 27 ER 274 (Ch), 413–14 (275–76) (*per* Sir Thomas Clarke MR).

[3] *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457, [41]-[42] (*per* Lord Briggs)

[4] *ibid.*, [44] (*per* Lord Briggs), [155], [157]-[159], [172], [201] (*per* Lord Burrows).

this study. Finally, Part E defines certain basic terms – which have not already been explained in this chapter – that will recur in the substantive chapters of this thesis.

A. SIGNIFICANCE

The overarching significance of this thesis lies in working out suitable justificatory bases on which new rights – in the context of claims respecting pre-existing proprietary rights – may arise and be enforced. By 'suitable', it is meant the type of reasons that are of currency to practitioners, scholars, and students of the positive law. Often, the language in judgments provides under-theorised, or incomplete, justifications. Locating the reasons supporting various claims in a clear and principled way helps determine their scope and consequences. For instance, describing claims contingent on tracing as assertions of 'hard-nosed property rights'[5] obscures the fact that a trust beneficiary's (B's) claim in such a case is in respect of a *new* asset. It is not self-evident that her right in respect of an old asset must automatically entail a claim to

[5] *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson).

an unauthorised substitute in the trustee's (T's) hands. Indeed, Lord Browne-Wilkinson used the phrase to deny the possibility of any judicial discretion based on 'whether it is fair, just and reasonable' to recognise the content of the claim as conferring a proprietary right against a substitute asset. It need not be, however, that the recognition of a new right must *always* be discretionary. An application of the model developed in this thesis shows that a careful appreciation of the nature of B's pre-existing right can provide a principled account of her entitlement to a substitute asset. This account is sufficiently certain, eschewing any need for judicial discretion. So, in other words, the taxonomy developed in this thesis shows that there is a third possibility between claims justified simply by: (i) a pre-existing right; or (ii) judicial discretion. This view depends on finding the specific justifications for claims that are linked to, but not simply assertions of, a pre-existing right.

Likewise, to assert that a knowing receipt claim is dependent on B having a 'continuing proprietary interest'[6] against a third-party recipient (C) is unclear. If T is an express trustee, her consent to hold on trust for B forms part of the explanation grounding B's right against her. A third-party recipient, like C, did not consent to hold on trust for B in a similar way. Further, C's duties as a constructive trustee for B are more limited than T's.[7] So, a better view is that B's claim against C depends on a distinct right, justified on fresh grounds. If, nevertheless, B's original right (against T) has *some* continuing impact on her claim against C, its significance must be spelt out.

Resolving such issues can also have practical consequences. For instance, in cases concerning receipt-based liability, it can affect issues concerning the conflict of laws where a foreign *lex situs* may be relevant

[6] E.g., see *Byers v Saudi National Bank* [2022] EWCA Civ 43, [74]-[79]; *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457 (*per* Lord Briggs), [72], [201] (*per* Lord Burrows).

[7] *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189, [31].

to B's claim against C.[8] If the *lex situs* would regard a recipient as taking free from any pre-existing equitable interest of B, any subsisting beneficial interest in relation to that right is 'overridden'.[9] However, the effect of this principle on a specific claim of B depends on the specific sense in which that claim against C *is* or *is not* based on a 'pre-existing' or 'subsisting' right. If the better view is that B's claim depends on a *new* right, the significance of her pre-existing right as against T – and its subsistence in a claim against C – requires clarification. A similar issue arises domestically when looking at the operation of land registration rules.[10] Section 29 of the Land Registration Act 2002 allows a registered disposition for valuable consideration to take priority over 'any interest

[8] See *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457; *Akers v Samba Financial Group* [2014] EWCA Civ 1516; *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978 (Ch), 988C-990E. See also *Byers v Samba Financial Group* [2021] EWHC 60 (Ch), [38]-[88], where the issue is discussed in greater length.

[9] *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424, [20] (*per* Lord Mance).

[10] See *Farah v Say-Dee* (2007) 230 CLR 89 (HCA) and *Arthur v Attorney-General of the Turks and Caicos Islands* [2012] UKPC 30; see also *Byers v Samba Financial Group* [2021] EWHC 60 (Ch), [88]-[106] (*per* Fancourt J), where an analogy between the conflict of laws rules and the domestic rules on land registration was discussed – this was based on scholarly contributions on this point in M Conaglen and A Goymour, 'Knowing Receipt and Registered Land' in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010).

affecting the estate immediately before the disposition'. Again, in working out the impact of s 29 on a particular claim, one must know in what precise way that claim does, or does not, depend on B's assertion of a pre-existing interest in land.

B. SCOPE

An overarching goal of this project is to make a case for a more nuanced approach to resolving questions on the identity conditions of proprietary rights, the scope of claims that can be brought to protect them, and the nature of remedies the law recognises in response. To make this point, two early chapters (Chapters 2 and 3) focus on the situation at common law. They set out the normative and formal identity conditions of legal property rights – taking, as its core case,[11] a right to a specific physical thing. Chapter 3 demonstrates how this thesis' taxonomy usefully pieces rules at common law together in a coherent

[11] The treatment of a right to a physical thing being the 'core', and uncontroversial, case of a legal property right mirrors the approach in S Douglas and B McFarlane, 'Defining Property Rights' in J Penner and H Smith (eds), *Philosophical Foundations of Property Law* (2013): see, especially, at 237-240.

and intelligible scheme. A major advantage is that the scheme helps answer knotty issues concerning so-called 'hard cases' at common law. These include problems on physical mixtures, accessions, and specifications. One purpose of these chapters is to show how analogous problems in the context of fixed trusts can be successfully worked out through the analytical treatment applied in the common law context of rights over physical things. Chapter 4 begins the project's examination of proprietary rights, claims, and remedies in the context of a fixed trust. It draws parallels with the common law to show how the formal and normative identity conditions of a beneficiary's right under a fixed trust are distinct. This is so especially in Equity's operation as a system of 'meta-law' – a framework of rules that serve as a gloss on common law rules.[12] It then draws on these insights to demonstrate how the thesis' taxonomy can illuminate the nature and scope of proprietary claims and remedies available to the beneficiary of a fixed trust. Chapters 5 and 6 proceed to offer a detailed treatment of two 'hard cases' in this area.

[12] In this respect, the analysis in this project follows recent contributions in B McFarlane and R Stevens, 'What's Special about Equity?' in D Klimchuk, I Samet and H E Smith (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020). See also HE Smith, 'Equity as Meta-Law' (2021) 130 YLJ 1050.

These, as stated above, concern claims contingent on tracing and claims against third-party recipients of rights held on trust. Chapter 7 then provides a conclusion.

The emphasis in Chapters 4-6 is on claims relating to a trust beneficiary's pre-existing proprietary right under a trust. The principal aim is to show how the approach taken in this thesis can help resolve doctrinal problems concerning the nature of claims in this context. For ease of exposition, the central examples taken are usually of express (bare) trusts in which a trustee holds a right for the benefit of a beneficiary (or beneficiaries). While the chief contributions made by these chapters relate to the case of a fixed trust, it may be *possible* to extend the implications of their analysis, by analogy, to similar claims outside this context. This point is explored briefly, and in outline, below. It must be emphasised, however, that a full treatment of cases outside the fixed trust context is beyond the scope of this thesis.

So, the implications of this thesis' analysis in Chapters 4-6 *could* extend to: (a) trusts in which there are no beneficiaries who have an

equitable proprietary right (e.g., a charitable purpose trust); (b) discretionary trusts whose objects have no present or future rights in relation to a trustee's title to a trust asset; and (c) forms of power-holding allied to a trust (e.g., a company director's power to deal with title to the company's assets).

First, as Chapters 3 and 4 will show, the analytical approach of this thesis focusses on the particular ways in which the *reasons* grounding a beneficiary's pre-existing equitable proprietary right under a trust might persist to justify her claim and the remedy she seeks. Where there is no person who has a pre-existing proprietary right – such as in a discretionary or charitable trust – this thesis' approach could unfold by examining the reasons grounding the trustee's *duty* encumbering her right/power over a trust asset. Of course, where there is a beneficiary with a vested interest under a trust, the trustee's duty would correlate to the beneficiary's equitable proprietary right. In that case, it is the beneficiary – the holder of the equitable proprietary right – who will

have standing to bring a claim.[13] Where there is no such beneficiary with a correlative right, the focus would squarely be on the trustee's duty in relation to trust assets (and the reasons grounding it). In those cases, claims would be brought by the specific person(s) who have standing (e.g., the Attorney General, or persons with sufficient interest,[14] in the case of a charitable purpose trusts).[15] A consequence of this position *could* be that the identity conditions of a beneficiary's equitable proprietary right – set out in Chapter 4 – equally embraces those of a trustee's correlative duty. The main distinction would be that the identity conditions of the *right* depend on locating the correlative duty-bearer, but those of the *duty* do not depend on there being a correlative right-holder. If this is true, it will be the *reasons* grounding the trustee's duty in relation to a specific right or power held on trust that are of essence to the analysis at hand.

[13] See further: *Lewin on Trusts* (L Tucker, NL Poidevin QC and J Brightwell eds, 20th edn, Sweet & Maxwell 2020), [41-072], [44-036].

[14] See Charities Act 2011, s 115.

[15] For the *locus standi* to sue in the case of a discretionary trust, see *ibid.*, [41-073], [44-036]; and RC Nolan, 'Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures' in PS Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart 2019).

Second, as will be seen in Chapter 4, this thesis' analysis of claims respecting a beneficiary's pre-existing equitable proprietary right is fulcrumed on the particular *form* of the right (i.e., its formal identity). Its form consists of a specific (and distinct) right or power held by a specific person (the trustee) on certain terms for another's (a beneficiary's or beneficiaries') benefit. This structure is *arguably* mirrored in cases where, for instance, a company director holds a specific power to dispose of or deal with her company's title to an asset for the company's benefit.[16] As with a trustee, the director's power is not held outright, but is subject to a duty not to exercise it (absent authority) inconsistently with certain defined terms. So, in common with this thesis' treatment of tracing and receipt-based claims in the fixed trusts context, similar claims concerning a director's dealings with title to company assets could be understood by examining the ways in which

[16] This is also the case, e.g., with the bailor-bailee, mortgagor-mortgagee, and principal-agent relationships respecting specific assets. See further: A Nair, *Claims to Traceable Proceeds: Law, Equity, and the Control of Assets* (OUP 2018), chs 6 and 8.

the reasons grounding her duty-encumbered power might persist to justify claims and remedies sought.

C. Taxonomy

This thesis adopts a five-part taxonomy of claims. Its categories are: *vindicatio claims*, *Consequential claims*, *Linked claims*, *Partially independent claims*, and *Fully independent claims*. These claims concern cases where there is a pre-existing proprietary right and a relationship between that right and a claim which depends, in some way, on the former's existence. Specifically, the taxonomy examines the extent to which such claims – and remedies awarded – are simply assertions of the plaintiff's original right and, if they are not, what role(s) the pre-existing right may nevertheless play in the justification of different claims.

To answer this question, one must first work out the formal identity conditions of proprietary rights. In Chapters 2 and 4 of this

thesis, the formal identity conditions of proprietary rights at common law ('legal property rights') and in Equity ('equitable proprietary rights') are set out and explained. One key component of the identity of both types of right is their subject matter. Legal and equitable property rights differ in that the subject matter of the former (in the core case[17] considered in this project) is a physical thing, and the subject matter of the latter is a right (or power). It is argued in Chapters 2 and 4 that, in either case, when a claim, based on the existence of a prior right, depends on asserting a right in relation to new subject matter, that right must necessarily be recognised as a new right. However, once we can identify that a right on which a claim depends is not the original right itself, this does not necessarily mean that the new right and the original right have different justifications (i.e., normative grounds). As Chapters 3 and 4 will show, it is possible to find that differences in the formal identity of rights do not rule out continuity of normative grounds between them. Thus, to reach a nuanced view of the relationship between pre-existing rights and claims brought in relation to them, we need a clear account of the ways in which reasons grounding an original right might continue

[17] See (n 11), above.

and shape a claim, even if that claim is not simply an assertion of the prior right. The taxonomy developed in this thesis attempts to provide such an account.

The taxonomy classifies claims by reference to three factors. These are the reasons justifying a: (a) the pre-existing right; (b) the claim made in relation it; and (c) the remedy awarded in response to a claim. The means by which it does so are explained in the sections below. The final section of this part draws the discussion together to give a summary view of this thesis' taxonomy. That summary is important as it illuminates the specific ways in which the taxonomy is elaborated (in Chapters 3 and 4) and deployed as regards specific claims (in Chapters 5 and 6) in this project.

C.I. Pre-Existing Rights

First, the taxonomy begins with a pre-existing proprietary right and locates the reasons grounding it. In other words, these are the reasons justifying the law's recognition of that type of right (e.g., a

beneficiary's right under a trust) in a specific instance.[18] The taxonomy broadly sets out how the reasons grounding a plaintiff's[19] pre-existing right are relevant to the claim she makes in respect of it and the remedy she consequentially seeks. In doing so, it utilises a concept in analytical jurisprudence in private law. This is Professor John Gardner's influential account, titled the 'continuity thesis'.[20] In brief, the thesis argues that the reasons grounding a pre-existing right do not vanish when its correlative duty is breached. They continue to hold the duty-bearer accountable. These persisting reasons ground, upon breach, a *new* obligation, requiring the duty-bearer to do the 'next-best' thing to complying with the obligation she breached. So, where a wrong in tort or contract has been committed, a secondary obligation to pay damages can be seen as a next-best means of answering to the *same* reasons grounding the plaintiff's pre-existing right. This thesis' taxonomy draws

[18] Chapters 2 and 4 sets out the reasons grounding common law and equitable proprietary rights, respectively.

[19] Following Lord Woolf's reforms to the UK's civil justice system in the 1990s, it is more in mode to use the term 'claimant'. This thesis mainly uses the terminology of 'plaintiff' to avoid possible awkwardness in phrases like 'the claimant claims'.

[20] J Gardner, *Torts and Other Wrongs* (OUP 2019), ch 2.

on the continuity thesis, introducing two tweaks. It does not limit the application of the concept to cases where there are breaches of primary obligations. For instance, when discussing claims contingent on tracing, a causative event that does not depend on a legal wrong – a substitution – is treated as sufficient to trigger a continuity of reasons that may then ground a new duty of next-best compliance. Further, the taxonomy does not accept the binary that, upon a triggering event occurring, there is either a *perfect* continuity of reasons or *no* continuity at all. The first two categories (*vindicatio claims* and *Consequential claims*) in the taxonomy feature a perfect continuity of reasons, differing only in the relevance of new *facts* – although not new reasons – to *Consequential claims*. The third category (the *Linked claim*) features partial continuity, and the final two (*Partially independent* and *Fully independent* claims) present no continuity, differing only in the relevance of the pre-existing right as a background *fact* – though not a reason – in the case of *Partially independent claims*. Working out different senses in which a pre-existing right is relevant in the creation of a claim, and in informing the basis of a remedial response, helps put judicial reasoning in context.

For instance, as discussed in Chapters 5 and 6, when considering the notion of 'vindication' of prior property rights in the tracing context, or of a 'continuing' equitable proprietary right in a receipt-based claim in Equity, the apparent '*fiction* of persistence'[21] can seem *somewhat* less fictional. To understand the idea, one could consider a claim contingent on tracing. When a trust asset (asset-A) is replaced by a new asset (asset-B), a shift in the formal identity of the trust beneficiary's right occurs.[22] The subject matter of her right was initially in relation to her trustee's title to asset-A; now, its subject matter is in relation to her trustee's title to asset-B. On this basis, it is difficult to say that the beneficiary's claim respecting asset-B *asserts* her original right respecting asset-A.[23] Yet, the continuity thesis helps one see that there is a strong *link* between the reasons justifying the beneficiary's right respecting asset-A and the reasons justifying the beneficiary's right respecting asset-B, and hence claims that the beneficiary may make in respect of that right. In this

[21] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005), 34-37 (emphasis supplied); this comment was made in the context of claims contingent on tracing.

[22] This idea – of the formal identity conditions of legal and equitable proprietary rights – is discussed further in Chapters 2 and 4.

[23] As argued in Birks (n 21), 34-37.

(limited) sense, the idea of 'persistence', in our example, between two formally distinct rights becomes somewhat defensible.

So, although the formal conditions of a right – e.g., its subject matter, in the tracing context – have changed, such that it is impossible to say that a claim contingent on tracing *asserts* the original (substituted) right, it may still be possible to draw a link between an original right, and the new right claimed, based on a commonality of reasons justifying them. This insight is reached by drawing on the continuity thesis.

C.II. Claims

Second, the taxonomy looks at a plaintiff's claims more closely to examine their normative content – i.e., the different senses in which the reasons grounding a claim can be categorised. 'Claim', here, refers to a cause of action. A cause of action, as explained by Lord Escher MR in

Read v Brown,[24] is 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment.' Using this definition, the taxonomy examines how the facts proved in each type of claim contribute to the reasons grounding the claim. To unpack this point, it is important to distinguish between facts-as-'reasons' and facts-as-'causative events'. This project adopts a particular view of Professor Birks' usage of 'causative events' as an analytical concept.[25] To Birks, rights in private law – proprietary or personal, primary or secondary – arise in response to one of the following categories of event: consent, wrongs, unjust enrichment, and miscellaneous other events. He seems to treat a given causative event as *both* a justificatory basis for a claim and as a fact-situation that triggers an occasion to bring a claim. For instance, a legal wrong in tort or contract might, on a Birksian reading, serve as a trigger generating a claim for compensation *and* as a normative explanation for such a claim.

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[24] *Read v Brown* (1888) 22 QBD 128 (CA), 131-133 (citing *Cooke v Gill* (1872-73) LR 8 CP 107, 116).

[25] See P Birks, *An Introduction to the Law of Restitution* (Rev edn, Clarendon Press 1989), chs 1 and 2; P Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' 26 WALR 1; and Birks, *Unjust Enrichment* (n 21), ch 2.

This thesis does not accept a collapsing of fact and norm within the concept of a 'causative event'. This is because the idea is neither always true nor theoretically necessary. For instance, in a breach of contract claim, a legal wrong (the breach) need not be seen as anything more that presenting a set of facts that trigger an occasion for a plaintiff to make the claim. The justification for the claim, as approached in this thesis, is instead the persisting reasons that grounded the plaintiff's prior primary contractual right (and the defendant's correlative primary contractual duty).

Accordingly, under the five-part taxonomy set out in this thesis, in the first two categories (*vindicatio claims* and *Consequential claims*), the reasons underlying each claim correspond to those that support the pre-existing right respecting which claims are made. The facts proved in the claim – namely, with *Consequential claims* – only establish a causative event, which in turn triggers an *occasion* to bring the claim. It is argued, however, that those facts play no role in *justifying* the claim. In the third category (*Linked claims*), the reasons grounding the claim arise partly from those underlying the prior right and partly from the normative

significance of the specific facts proved in the claim. In the final two categories (*Partially independent claims* and *Fully independent claims*), the normative contribution of the pre-existing right recedes, and the facts proved in the claim do a greater portion (if not all) of the justificatory work.

C.III. Remedies

The final aspect of the taxonomy looks at the remedy awarded in response to each claim. 'Remedy', in this context, broadly refers to 'what courts do for plaintiffs who come to them asking for help' by way of '… rulings issued as part of the resolution of a legal action'.[26] 'Rulings' are 'legally operative judicial pronouncements'.[27] The emphasis, hence, is on the *legal effect* of a judicial ruling issued in response to, or in the course of, the resolution of a disputed claim.

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[26] SA Smith, *Rights, Wrongs, and Injustices* (OUP 2019), 19.

[27] *ibid*.

More specifically, this part of the taxonomy focusses on a '*dispositive decision*' that 'conclusively disposes of an action or part of an action'.[28] We are not concerned with an '*interim* or *procedural* decision'. A dispositive decision 'directs a party or another person to do something or refrain from doing something, or which determines the course of proceedings.'[29] Even more specifically, the aspect of a dispositive decision examined in this taxonomy is the ***right*** of the plaintiff (and the correlative ***duty*** of the defendant), associated with her cause of action/claim, that is recognised and enforced by a court order. An example is the right of the plaintiff to the payment of damages by the defendant, associated with a common law conversion claim, that is enforced by a court order.

As discussed below, the enforcement, by a court, of the plaintiff's right to damages (or any other right associated with the same or distinct cause of action) would generate a *new* court-ordered right. So,

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[28] A Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (4th edn, Sweet & Maxwell 2021), [23.3].

[29] *ibid*. Examples include interim injunctions, asset freezing orders, case management directions, etc.

where the claim is for damages, this would be a court-ordered right correlating to a debt owed by the defendant.[30] In other words, the defendant's prior duty to pay damages would, on judicial enforcement, merge into a new court-ordered duty.[31] This new duty, if not complied with, can be enforced through distinct means (e.g., seizure of assets, garnishment of earnings, contempt of court, etc.).[32] That said the form and justification for the secondary right to damages (or any other right that the plaintiff acquires following a cause of action) and the subsequent right granted through judicial enforcement would be materially identical. This is because the types of court order we are concerned with are not delivered in a vacuum. They principally *give effect* – in whole or in part – to rights associated with a cause of action by replacing their source with a judicial ruling.[33] For this reason, this thesis uses the general title of '**remedy**' – or expressions like '**right awarded by way of remedy**', '**right claimed by way of remedy**', '**right**

[30] *Re European Central Railway Co* (1876) 4 Ch D 33 (CA), 37–38.

[31] For an overview of the 'doctrine of merger', see: P Keane AC KC (ed) *Spencer Bower and Handley: Res Judicata* (6th edn, LexisNexis Butterworths 2024), [19.01]ff.

[32] See generally Zuckerman (n 28), ch 24.

[33] *Thoday v Thoday* [1964] P 181 (CA), 197–198 (*per* Diplock LJ).

recognised/enforced by way of remedy', or '**remedial response to a claim**' – to refer to *both* types of right (i.e., the court-ordered right and the one it enforces) interchangeably.

The emphasis in the taxonomy is to unpack how the reasons grounding remedial responses relate to those underlying the plaintiff's prior right and the claim she brings in respect of it. Put differently, the taxonomy draws a distinction between remedial responses whose justifications are closely linked to reasons grounding a plaintiff's claim and remedial responses that are justified to some extent by other reasons. As we shall briefly see below, in most (but not all) cases, the reasons justifying a remedial response are intimately linked to those grounding the plaintiff's claim.

Importantly, it should be noted that there is a lively scholarly debate concerning the precise legal relation obtaining between a plaintiff and a defendant when a cause of action is proved, and a remedy is sought. According to scholars like Professor Stephen Smith, a judicial order is the *source* of a plaintiff's right sought by way of remedy; till a

court order is obtained, the facts proved in the plaintiff's claim only reflect the defendant's *liability* to the plaintiff.[34] This can be called the 'liability thesis'. To some others, the plaintiff's remedial right (and the defendant's correlative duty) – in the cases under consideration – is sourced in the facts giving rise to a cause of action; that right is then *enforced* by a court order that creates a new right reflecting the content and justification of the right claimed (e.g., damages).[35] This can be called the 'duty thesis'. This project accepts and adopts the duty thesis. That said, even if the liability thesis is preferred, this would not disturb the taxonomical scheme of this thesis. The aim is to see how the defendant's duty (or, *per* Smith, her liability), proved by the plaintiff's cause of action, relates to the court's remedial response. So, nothing fundamental, in terms of this thesis' taxonomy, turns on whether one takes the right recognised by way of remedy to crystallise when a court order is made or at a prior point when the facts giving rise to a claim/cause of action occur. The point, to reiterate, is to unpack how this right (recognised and

[34] Smith (n 26), 191-199.

[35] See the arguments made in J Gardner, 'Damages without Duty' (2019) 69 UTLJ 412 and S Steel and R Stevens, 'The Secondary Legal Duty to Pay Damages' (2020) 136 LQR 283.

enforced by way of remedy) relates to the reasons grounding a plaintiff's claim and those justifying her pre-existing right.

Notwithstanding the above, it would be appropriate to restate some of the arguments in favour of the duty thesis. This is mainly to help defend the language used throughout this thesis. These arguments are made with reference to whether the defendant comes under an immediate duty to pay damages on committing a legal wrong (i.e., in tort or contract). As the controversy centres on whether such a duty exists, reasons for answering this question in the affirmative are presented below. That said, the general language used in this thesis is consistent as regards any right claimed by way of remedy following a plaintiff's cause of action (whether or not the remedy relates to the payment of damages). The arguments canvassed below, to defend the duty thesis in relation to damages, could apply, by way of analogy, to other rights enforced by court orders considered in this thesis.

For four overarching reasons, given by Professors Gardner, Steel and Stevens, this thesis accepts the duty thesis – i.e., that, upon the facts

of a cause of action (a legal wrong) in tort or contract arising, the defendant comes under an immediate duty to pay the plaintiff damages.

First, it is said that such a duty does not arise immediately because its content cannot be determined *before* a court order, thus making it impossible for the defendant to comply with the duty once the wrong occurs.[36] Let us say that C sues D for breach of contract, and claims consequential losses of various kinds. D counters that C should have mitigated her losses or that some heads of loss are too remote. Ultimately, the court orders D to pay £x by way of damages. Can it be true that D had a *duty* to pay C £x – which she could comply with – before the court order? On one view, it can. Just because the content of the obligation is undetermined when the wrong occurs does not mean it does not exist.[37] As Professors Steel and Stevens argue,[38] many duties in private law exist whose content cannot be determined *ex-ante*. They give the example of a contract in which B contracts with A to perform certain

[36] SA Smith, 'Duties, Liabilities, and Damages' (2012) 125 HLR 1727, 1743-1744.

[37] Gardner, 'Damages without Duty' (2019) 69 UTLJ 412 (n 35), 416-415; Steel and Stevens (n 35), 285.

[38] *ibid*.

works for A in return for reasonable remuneration. It would be surprising to argue say that A has no obligation to pay B just because the amount is undetermined.

Second, it is said that there cannot be an immediate duty to pay damages on committing a wrong because there is no tertiary duty to pay damages for breach of that former duty.[39] This argument can be resolved if we understand how the duty to pay damages is individuated.[40] If C suffers loss amounting £x at the time D commits a wrong against her, and further consequential loss of £y (attributable to the same wrong) a few days later, it would, on one view, be odd to conclude that D has *two* distinct duties to pay damages. Instead, '[subsequent] [l]oss attributable to the failure to pay damages, if causally attributable to the wrong itself, simply increases the size of the secondary obligation already in place.'[41]

[39] SA Smith, 'Why Courts Make Orders (and What This Tells Us About Damages)' (2011) 64 CLP 51, 71.

[40] Steel and Stevens (n 35), 287.

[41] *ibid*.

Third, as others have pointed out,[42] some evidence of there being an immediate duty to pay damages can be inferred from the fact that pre-judgment interest – in England and Wales, at least, accrues from the date of the wrong.[43]

Fourth, although courts often use the language of a 'liability' to pay damages,[44] this is so for good reason.[45] Whenever a duty to pay damages exists, the defendant is also under a liability to have that duty enforced. This liability correlates to the plaintiff's power to go to court and trigger the enforcement of the duty.[46] Once that duty is enforced, the court order creates a *new* duty, with the prior duty to pay damages

[42] Gardner, 'Damages without Duty' (n 35), 416; Steel and Stevens (n 35), 288-289.

[43] Senior Courts Act 1981, c 54, s 35A.

[44] *H West & Son Ltd v Shephard* [1964] AC 326 (HL), 364 (*per* Lord Pearce); Sale of Goods Act 1979, s 52 . See further: Smith, 'Why Courts Make Orders (and What This Tells Us About Damages)' (n 39), 72–73.

[45] Steel and Stevens (n 35), 287-288.

[46] See WN Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 YLJ 16, 44-54.

merging into this court-created debt.[47] Even though this is a new duty, sourced in a court order, its content (including its form, more generally) and justification will mirror the prior secondary duty to pay damages. That court-created duty can be enforced, if not complied with, in a number of ways (e.g., contempt of court or seizure of assets).[48]

- ~ -

So, in summary, each category in the taxonomy accounts for the respective reasons that ground: (i) a pre-existing right; (ii) the relevant claim made in respect of it; and (iii) the remedial response to that claim. The discussion and accompanying tables below draw together the taxonomy's key features, which will expanded on in Chapters 3 and 4 and applied to specific claim-types in Chapters 5 and 6.

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[47] *ibid.*, citing *Re European Central Railway Co* (1876) 4 Ch D 33 (CA), 37–38: '[T]he original debt is gone, *transit in rem judicatum*, a fresh debt is created with different consequences.'

[48] *ibid.*

C.IV. A Summary View of the Taxonomy

The taxonomy pieces together the different ways by which the reasons grounding a pre-existing right do (or do not) inform: (a) a claim; and (b) the remedial outcome of a claim. By examining each strand of the taxonomy, one can identify the precise ways in which a plaintiff's claim (her legal assertion before a court) and the remedy she gets (a court's legal response to her legal assertion) are explained by virtue of her holding a prior proprietary right.

C.IV.i) *Perfect or near-perfect continuity of reasons*

C.IV.i.a) vindicatio claims

The first possibility in the taxonomy is a case where the reasons grounding a pre-existing right ('$\mathbf{N}_p$') – also called its normative ground (hereafter '**norm**') – are the *same* as those justifying *both* a claim and the

remedy awarded. Drawing on the Roman action of the *rei vindicatio*,[49] this thesis calls this category *vindicatio claims*. The essence of the claim can be seen through the example of A owning a physical thing, say a pen. A can make a *vindicatio* claim against anyone who has possession of the pen through the simple assertion: 'that pen is mine!'. That is, no additional facts need be proved to bring or justify the claim.[50]

By contrast, as we shall further see in Chapters 3 and 4, with *vindicatio* claims, the formal identity – hereafter, '**form**' – of a pre-existing right ('$\boldsymbol{F_p}$') and the right enforced by a court's remedial response are not *always* identical. In our example above, it is true A's claim simply consists in the assertion of her pre-existing right to the pen, i.e., the defendant's pre-existing duty not to interfere with the pen. However, the court order enforcing the remedy could impose a new duty on the defendant to take positive steps to return possession of the pen to A. This new duty necessarily correlates to a new right with a new form ('$\boldsymbol{F_n}$').

[49] WW Buckland, *A Textbook of Roman Law* (CUP 1963), 675.

[50] See further: N McBride, 'Vindicatio: The Missing Remedy?' (2016) 28 Singapore Academy of Law Journal.

The argument presented in this thesis (in Chapters 3-6) is that the *vindicatio* – in so far as proprietary claims are concerned – does not exist in the common law of England and Wales. In that context it is, therefore, best seen as a theoretical possibility. However, in Equity, it is possible to show that a *vindicatio* claim exists. As discussed in Chapter 6, this is when an errant trustee, subsequent to making an unauthorised disposition of a trust asset, *re-acquires* that asset. In that case, the plaintiff-beneficiary would be asserting the *same* pre-existing right (and claim) she had against the defendant-trustee all along. No additional facts are needed to bring or justify the claim.

<table>
<tr><th colspan="3">vindicatio claims</th></tr>
<tr><th></th><th>Norm</th><th>Form</th></tr>
<tr><td>Pre-existing Right</td><td>N_p</td><td>F_p</td></tr>
<tr><td>Claim</td><td>N_p</td><td rowspan="2">F_p/F_n</td></tr>
<tr><td>Remedy</td><td>N_p</td></tr>
</table>

Note: A clarificatory point about the table above (and those below) is made. It was noted that with *vindicatio claims*, no additional facts need to be proved in the plaintiff's claim. In all other categories of claim in this taxonomy, additional facts must be proved. These facts, as we have seen,[51] show that a cause of action has occurred (e.g., in conversion, trespass, etc.). As we have also seen,[52] the occurrence of these facts gives rise to a distinct right (e.g., correlating to a secondary obligation on the defendant to pay damages). That said, as discussed earlier on, a court order recognises and enforces the plaintiff's right that previously arose in response to her cause of action (e.g., a right to damages in response to a cause of action/claim in conversion). While this court order generates a *new* right by way of remedy, this new right is materially *identical* in form to the one it enforces. So, the enforcement of a right to damages creates a new court-ordered debt, but it replicates the structure and content of the secondary right-duty legal relation entailed in the right to damages. The table, thus, does not include a **Claim-Form** box separate

[51] See discussion in Section C.II, above.

[52] See discussion in Section C.III, above.

from a **Remedy-Form** box. The form of the right featuring at the 'Claim' and 'Remedy' stage will usually be the same.

C.IV.i.b) Consequential claims

A second possibility is where (like with *vindicatio claims*) the reasons for the pre-existing right, the claim, and remedy share an identical normative ground (i.e., all feature $\boldsymbol{N_p}$). This category will be called *Consequential claims*. *Consequential claims* contrast with the *vindicatio* in two main respects. First, the plaintiff must prove additional facts ('$\boldsymbol{A_x}$') to ground her claim. While these facts do not play a part in justifying the claim, they provide a necessary occasion for the plaintiff to bring the claim. Second, in a *Consequential claim*, the formal identity of the prior right ($\boldsymbol{F_p}$) and the right recognised by way of remedy ($\boldsymbol{F_n}$) *will* be distinct. Whilst the former will consist of a specific proprietary right, the latter could be a personal right – e.g., to the payment of an abstract sum of money as damages (*jura in personam*) or to the acquisition (or reacquisition) of a specific asset (*jura in personam ad rem*). In other cases, the right claimed and given by way of remedy could consist of a distinct

proprietary right (e.g., as, argued in Chapter 5, a trust beneficiary's right respecting a traceable substitute).

Drawing on Gardner's continuity thesis (detailed above), the right recognised by way of remedy (F_n) in a *Consequential claim* correlates to a duty on the defendant to do the 'next-best' thing to complying with the reasons for her original obligation to the plaintiff. While this duty of next-best compliance is new in form, it is justified by the *same reasons* that grounded the defendant's prior obligation (or the plaintiff's prior right).

As Chapter 3 shows, a straightforward example in this category is of claims following a legal wrong in tort or contract. Say, for instance, that A has title to a laptop. B subsequently steals A's laptop. To bring a claim in conversion against B, A will have to prove additional facts (A_x) – i.e., which show that B has committed a legal wrong. It is argued in that chapter (and Chapters 4 and 5) that, with *Consequential claims*, these facts are important in that they present an *occasion* for the claim to be brought. So, absent B's wrong, there would be no basis to bring a claim

in conversion for damages against her. However, it is possible to argue that these facts have no role in *justifying* A's claim, the specific right she claims (damages) and the remedy (a court-ordered right that enforces her right to damages) that will ultimately be awarded. That is, if one accepts Gardner's continuity thesis, A's claim and the right to damages (and the remedy awarded) will simply be justified by the same reasons grounding her pre-existing right ($\boldsymbol{N_p}$).

Of course, in *some* cases, a court may be persuaded to award an order of delivery-up. As discussed in Chapter 3, this remedial outcome could well be a form of next-best compliance, on the defendant's part, with $\boldsymbol{N_p}$. However, these reasons *alone* will not exhaustively justify an order of delivery-up. The court will often take into account additional factors – e.g., the uniqueness of the asset converted or the adequacy of damages – to justify a departure from the default remedy of damages. Hence, in such cases, the reasons grounding the remedial response could be expressed as: $\underline{\boldsymbol{N_p}}$ + new reasons ('$\boldsymbol{N_n}$').

In Chapter 5, it is argued that another example of a *Consequential claim* is a beneficiary's claim in respect of a traceable substitute. Here, the fact of a trustee effecting a substitution of a trust asset can be seen as the additional facts ($\boldsymbol{A_x}$) that trigger an occasion to bring the claim. Yet, it is argued, the claim to the substitute asset itself could be viewed as justified by the same reasons grounding the beneficiary's prior right ($\boldsymbol{N_p}$) to the substituted asset (and the trustee's correlative duty in relation to it). Likewise, the remedy, which is the trustee's *new* duty to hold the substitute asset on trust (or the *new* duty to hold it subject to a lien, if B elects for that), can be justified by $\boldsymbol{N_p}$. Understood thus, we shall see that, notwithstanding that the change in formal identity between a pre-existing right and the new right claimed, there is *some* meaningful sense in which one can find that a claim respecting the latter is based on an assertion of the former. The reasons grounding the new right are the very same as those justifying the prior right.

Consequential claims		
	Norm	**Form**

<table>
<tr><th>Pre-existing Right</th><th>N_p</th><th>F_p</th></tr>
<tr><td>Claim</td><td>N_p

Note: additional facts (A_x), e.g., as to wrongdoing, must be proved to bring the claim. A_x does not contribute to the justification of the claim, but they provide a factual occasion to bring the claim.</td><td rowspan="2">F_n</td></tr>
<tr><td>Remedy</td><td>Default: $\underline{N_p}$

Non-default: $\underline{N_p} + \underline{N_n}$</td></tr>
</table>

C.IV.ii) *Partial continuity of reasons*

C.IV.ii.a) Linked claims

A third possibility in the taxonomy is where there is only partial continuity between a pre-existing right and a claim. As with *Consequential claims*, additional facts ($\boldsymbol{A_x}$) must be proved to bring the claim. Unlike with *Consequential claims*, these facts do not only provide a factual occasion to bring the claim. They also play a role in justifying the claim. This category will be called *Linked claims*. Here, $\boldsymbol{A_x}$ can be seen to supply additional reasons ($\boldsymbol{N_n}$) – i.e., in combination with $\boldsymbol{N_p}$ – to justify the claim. So, taken together, the reasons grounding the claim can be expressed as $\boldsymbol{N_p} + \boldsymbol{N_n}$.

In addition to the normative significance of additional facts proved in the claim, *Linked claims* mark another important shift in this taxonomy. The remedy awarded is not in the nature of a secondary obligation – i.e., one that follows from the defendant's conduct in relation to a prior, primary obligation. Instead, the remedy recognises or

enforces a *new* obligation *de novo*. That is, whilst the reasons grounding the plaintiff's pre-existing right are important in justifying the claim and remedy, this is not *necessarily* because the defendant was bound by a correlative primary duty. The facts proved in the claim, and the reasons supplied by them, reflect a new primary obligation which is then recognised or enforced by judicial remedy. For this reason, the justification for the remedy is simply expressed as $\boldsymbol{N_p} + \boldsymbol{N_n}$ and the obligation it imposes on the defendant does not amount to a form of *next-best* compliance with the reasons for a pre-existing right.

Chapter 6 argues that personal and proprietary claims against third-party recipients of trust assets (referred together in this thesis as 'receipt-based claims'), following a trustee's unauthorised disposal, can also be understood as a *Linked claim*. Here, the reasons grounding a beneficiary's pre-existing right – and the trustee's correlative duty – in relation to the asset are crucial. After all, a claim against a recipient depends on her receiving an asset following a trustee's unauthorised disposal of it.[53] Yet, further facts must be proved to establish that the

[53] *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685 (CA), 700.

recipient comes under a *new* duty to the beneficiary, in relation to the asset (or its product). In Chapter 6, it is argued that these facts include the third-party's *receipt* of trust assets (or its proceeds) from a trustee in circumstances where the former can plead no defence (such as of a bona fide purchaser). That chapter will also show how viewing receipt-based claims as types of *Linked claim* helps us understand how, regardless of the formal distinction between a beneficiary's prior right and the new right claimed, the reasons grounding the former persist (albeit in part) to justify a claim respecting the latter. This gives some meaning to the idea that receipt-based claims are based on the beneficiary's 'continued' assertion of an equitable proprietary right.

Linked claims		
	Norm	**Form**
Pre-existing Right	N_p	F_p

<table>
<tr><td>Claim</td><td>$N_p + N_n$

Note: additional facts (A_x), e.g., as to receipt, must be proved to bring the claim. A_x also contribute further reasons (N_n) to justify the claim.</td><td rowspan="2">F_n</td></tr>
<tr><td>Remedy</td><td>$N_p + N_n$</td></tr>
</table>

C.IV.iii) *No continuity of reasons*

C.IV.iii.a) Partially independent claims

A fifth option in the taxonomy features no continuity between the reasons for a pre-existing right (N_p) and claim. The claim, and the

subsequent remedy, are solely based on proving additional facts ($\boldsymbol{A_x}$) which supply their independent justification ($\boldsymbol{N_n}$). That said, the pre-existing right ($\boldsymbol{N_p}$) serves as a *necessary background condition* for the claim to be brought. This category is called *Partially independent claims*.

One example is of claims against third parties who induce the breach of the plaintiff's contract with another.[54] The claim, here, is not based on the defendant breaching the plaintiff's primary (contractual) right, but a different primary right founded in tort (the infringement of which supplies independent reasons for the claim).[55] Nevertheless, the claim depends – as a background pre-condition – on the *existence* of the plaintiff's primary contractual right. Thus, although the claim relates, in *some* sense, with the claimant's pre-existing right, it does so in a less *significant* sense than with the categories of claims discussed above.

[54] See *Lumley v Gye* [1853] EWHC QB J73, 118 ER 749 (QB). Such claims do not *depend* on the plaintiff having a pre-existing *proprietary* right and are thus not explored in any detail in this thesis. Claims in this category which could fall directly within this thesis' ambit are discussed in Chapters 3, 4, and 6.

[55] This point is discussed more comprehensively in B McFarlane, 'Equity, Obligations, and Third Parties' (2008) 2 SJLS 308, 308-309, 315.

<table>
<tr><th colspan="3">Partially independent claims</th></tr>
<tr><th></th><th>Norm</th><th>Form</th></tr>
<tr><td>Pre-existing Right</td><td>N_p</td><td>F_p</td></tr>
<tr><td>Claim</td><td>N_n

Note: N_p only serves as a background pre-condition to bring a claim. The claim itself is fully justified by new reasons (N_n) established by additional facts (A_x) proved in the claim.</td><td rowspan="2">F_n</td></tr>
<tr><td>Remedy</td><td>N_n</td></tr>
</table>

C.IV.iii.b) Fully independent claims

The final possibility in the taxonomy is similar to *Partially independent claims* in that there is no continuity between the reasons for a pre-existing right, claim, and remedy. Unlike that category, however, the reasons grounding a pre-existing right are not even necessary, as a background pre-condition, to bring a claim or secure a remedy. This category is called *Fully independent claims*. Technically, as such claims do not *depend* on the plaintiff's having a pre-existing right, they do not belong to this thesis' taxonomy. They are nevertheless included here to show the limits of this scheme. Examples of such claims are not discussed at length in this thesis (although some illustrations are given in Chapters 3 and 4).[56]

Fully independent claims		
	Norm	**Form**
Pre-existing Right	N_p	F_p

[56] See Sections A.IV and B.IV of Chapters 3 and 4, respectively.

<table>
<tr><td>Claim</td><td>N_n

<u>Note</u>: N_p has no role to play in justifying or enabling such claims. The claim, instead, is fully justified by reasons (N_n) established by additional facts (A_x) proved in the claim.</td><td rowspan="2">F_n</td></tr>
<tr><td>Remedy</td><td>N_n</td></tr>
</table>

D. METHODOLOGY

This project is pursued as a doctrinal work. A major part of the research endeavour focuses on studying case law to identify positions and patterns that characterise judicial reasoning. Case law from England and Wales is the principal focus. However, decisions from other

common law jurisdictions – and principles from Roman law – where relevant, are also studied. Equally, the project also draws on theoretical and normative literature on Equity, property, and private law more broadly, where these can help illuminate an examination of the positive law.

E. TERMINOLOGY

The meaning applied to specific terms that will recur in this thesis are clarified at the outset.

(1) '**Right**': in most cases (save where otherwise expressly stated, e.g., as detailed in the introductory part of Chapter 2) a Hohfeldian claim-right, held by a specific person, correlating to a duty owed by a specific and distinct person.[57]

[57] Hohfeld (n 46), 96-97, 65-114.

(2) ‘**Power**’: a narrower concept than a Hohfeldian power; the usage adopted here refers to ‘a person’s ability or capacity to effect an intended change to her and/or another’s legal status via her actions in manifesting her intention to effect that change.’[58]

(3) ‘**Claim**’: A claim is a cause of action, whose definition has been detailed above.[59]

(4) ‘**Remedy**’: a remedy is a dispositive court decision that enforces, where a claim succeeds, the plaintiff’s rights associated with a cause of action. A fuller definition has been supplied above.[60]

[58] J Hudson, ‘Equity’s Gloss on Authority’ in B McFarlane and S Elliott KC (eds), *Equity Today: 150 Years after the Judicature Reforms* (Hart 2023), 30-31. See also: J Raz, ‘Voluntary Obligations and Normative Powers’ (1972) 42 Proceedings of the Aristotelian Society 79 and J Raz, ‘On the Nature of Rights’ 93 Mind 194.

[59] See discussion above in Section C.II, above.

[60] See discussion above in Section C.III, above.

(5) ‘**Defence**’: This term follows Professor Stevens’ usage, which is ‘[a]ny *fact[s]* that the defendant pleads, that can in whole or in part resist the plaintiff’s action, that does not constitute a mere denial of an element of the claim, and that raises *a new reason why the claim should fail*’.[61] While a *denial* simply refutes a fact pleaded in the plaintiff’s claim, a *defence* allows the defendant to resist what would – absent the facts constituting the defence – be a good claim. As a legal defence, by the definition used in this project, provides a *new* reason for why a claim fails, it is not included as an element in this thesis’ taxonomy (which examines shades of *continuity* between reasons grounding pre-existing rights, claims, and remedies).

(6) ‘**Property**’/‘**proprietary right**’/’**property right**’: a specific type of right (i.e., one that relates to specific subject matter, and which is capable of binding strangers to its

[61] R Stevens, ‘Defenses’ in AS Gold and others (eds), *The Oxford Handbook of the New Private Law* (OUP 2020), 530-531 (emphasis supplied).

creation)[62]. So, in most instances where the word 'property' is used – e.g., 'X's property in her football' – it does not refer to the subject matter of the right *per se*, but to the *specific type of right* held over it. However, where 'property' does refer to the *subject matter* of the right – e.g., 'X's title to specific property' – the context of its use will make it clear.

(7) '**Legal property right**'/'**legal proprietary right**': proprietary rights recognised at common law. This thesis uses this term to specifically refer to property rights in respect of physical things.

(8) '**Equitable proprietary right**': proprietary rights recognised in Equity. This thesis specifically uses the term to describe a beneficiary's right in respect of specific assets held on trust. That right correlates to the trustee's duty to hold that asset on specific terms for the beneficiary.

[62] WJ Swadling, 'Property: General Principles' in AS Burrows (ed), *English Private Law* (3rd edn, OUP 2013), [4.03]- [4.12].

(9) '**Trust asset**'/'**Trust property**': specific *rights* or *powers* held by a trustee on trust (whether or not these rights or powers themselves relate to a tangible thing or other subject matter). As above, where the term refers to the subject matter of the right or power held on trust, rather than that right or power itself, the context will make this clear. For instance, in the statement 'title to the trust asset', it is clear that 'trust asset' refers to the *subject matter* of a right held on trust. However, 'transfer of the trust asset' or 'substitution of the trust asset' are statements where 'trust asset' refers to the specific *right* held on trust that is being transferred or substituted.

(10) '**Beneficial interest**'/'**trust interest**/'**trust right**': a beneficiary's equitable proprietary right in relation to distinct rights (or powers) held on trust.

(11) '**Core trust duty**': a trustee's duty to refrain from using her title to a trust asset for her own ends unless she is

authorised to do so (e.g., by the terms of the trust, through the beneficiaries' consent, or if the trustee herself is one of the beneficiaries of the trust).[63] This term is explained in greater detail in Chapters 4 and 6 of this thesis.

(12) '**Encumbered power**': a trustee's power to dispose of or vary specific rights held on trust, which is subject to the core trust duty.

(13) '**Subject matter**': this term refers to the physical thing (in the case of a common law property right) or a distinct right/ power (in the case of an equitable proprietary right) to which a proprietary right relates. The subject matter of a proprietary right underpins the legal relation obtaining between the right-holder and correlative duty-bearer (or duty-bearers). So, the form of A's legal property right over a football must necessarily include the specific football, as it is in respect of that specific thing that others owe *prima facie* duties of non-

[63] See further: B McFarlane, *The Structure of Property Law* (Hart 2008), 551-555.

interference. Likewise, a trustee’s core trust duty is defined in relation to the specific right or power that she holds on trust for a beneficiary (or beneficiaries).

Chapter 2:

The Identity of Legal Property Rights:

As Form and Norm

INTRODUCTION

This chapter considers the question of how pre-existing proprietary rights are *individuated*. To study the impact of a right on a claim made in relation to it, one must first determine the former's scope and nature. In other words, resolving this thesis' threshold question requires one to establish, at the outset, the identity conditions of pre-existing proprietary rights. This chapter sets itself to that task. It examines two distinct accounts of a proprietary right's identity. The first is formal. It supplies a structural account of the elements the right is composed of. The second is normative, focussing on the reasons

justifying the right. The overall finding of this chapter is that these two accounts are interrelated. To treat them as mutually exclusive is to deprive one of a full understanding of a proprietary right's scope and nature.

This chapter proceeds in three parts. Part A outlines the factors that inform the formal identity of a common law proprietary right (sometimes referred to hereafter as a 'legal property right'). It focusses on a legal property right as a right to a specific physical thing. This is because there is general consensus[1] over the fact that common law titles to physical things constitute the core case of 'property rights' at law. Whether the arguments canvassed in this chapter can *also* apply to other 'property' rights recognised at common law – such as rights over intellectual property or digital assets[2] – is beyond the scope of this thesis.

[1] The account of a right to a physical thing being the 'core', and uncontroversial, case of a legal property right follows S Douglas and B McFarlane, 'Property, Analogy and Variety' (2021) 42 OJLS 161. See also S Douglas and B McFarlane, 'Defining Property Rights' in J Penner and H Smith (eds), *Philosophical Foundations of Property Law* (2013).

[2] See Law Commission, *Digital Assets: Final report* (Law Com No 412, 2023).

The argument in Part A is that a formal account is useful, but ultimately incomplete. It is essentially descriptive. It cannot explain why some rights, which may share the same structure as a legal property right (e.g., a licensee's right to use another's bicycle), do not have proprietary effect – i.e., by binding strangers to their creation. Understanding why a 'proprietary' right can bind strangers to its creation is crucial to this thesis' inquiry. Without such an understanding, we cannot discern the basis on which a pre-existing right may have a *persisting* impact on claims its holder can make against strangers.

Accordingly, Part B turns to this issue. The argument there unfolds in two stages. First, the province of the inquiry is defined. To understand *why* legal property rights can bind strangers to their creation, it is important to determine *when* the law recognises a right respecting a physical thing as proprietary. The necessary and sufficient conditions to make a legal property right are identified by its specific content. The next stage proceeds to find the 'normative ground' of the

right – i.e., which explains why the right is capable of binding strangers to its creation in the distinct way it does. To be clear, in examining the normative ground of a legal property right, this chapter is not asking why private property exists at all. Instead, it unpacks why – granted that English law recognises private property for some background reasons that are beyond the scope of the thesis – some rights possess this 'proprietary' status and some do not.

Part C brings together the insights in the preceding parts and explains their significance to this thesis. It shows that the identity of a legal property right is fully expressed by reference to *both* its normative ground and its formal structure. The former usage is described as a an '***R***-right' and the latter as an '***r***-right' (more accurately, as a series of fundamentally similar, yet distinct, '***r***-rights').[3] It is explained that these conceptions neither rival each other nor do they operate in a mutually exclusive way. While remaining distinct identity markers, they are

[3] *Cf* a similar approach adopted in C Webb, 'Three Concepts of Rights, Two of Property' (2018) 38 OJLS. As discussed below – see text in and accompanying (n 62) – the approach in this thesis is not identical to Professor Webb's.

interlinked and provide a complete picture of a legal property right's existence. Understood in this way, one can also see how, notwithstanding a *formal* difference between a pre-existing right and a right on which a claim depends, the *reasons* grounding the former may nevertheless have a persisting impact in justifying the latter. This then sets the ground to analyse – in Chapter 3 – the range of relationships between claims at common law and the pre-existing legal property right respecting which they are made.

A final point on the language adopted in this chapter. As seen in Part A, this thesis adopts Hohfeld's analytical depiction of a property right as composed of fundamentally similar, but distinct, legal relations. This implies that it is impossible to refer to *a* legal property 'right', to a single thing, in the singular. Rather, it is composed of a series of distinct claim-'rights' (plural), powers, liberties and immunities. It will be shown in Part C that describing an owner's 'right' can be done without offending the analytical reality highlighted by Hohfeld. In short, a reference to a right in the singular is based on an appreciation of its

normative ground (i.e., by describing it in terms of an ***R***-right). The normative ground of a legal property right, which underlies its identity, depends only on a specific person[4] holding a right to a specific physical thing. Where reference is made to ***r***-rights, as instantiations of a single ***R***-right, one will of course have to be sensitive to the plurality of legal relations that underpin the ***R***-right. The language in the discussion leading to Part C will often apply the term 'right' in the singular, and this will simply be based on a legal property right's identity as an ***R***-right. The context of its use hereafter should make this clear.

A. FORM

A claim-right correlates with a duty.[5] Together they form a legal relation between a right-holder and duty-bearer, where the content of a right is intrinsically linked to the duty to which it correlates with. To understand the structure of a legal property right, consider an example

[4] Or specific persons, where a right is held by joint tenants at law.

[5] WN Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 YLJ 16, 96-97, 65-114 (hereafter 'Hohfeld 1913').

where A has a common law title to a football. A's claim-right correlates to a duty of another person's (e.g., B) in relation to the football. This is a legal property right and is often referred to as a right *in rem* that generates *prima facie* duties on the rest of the world that they refrain from careless or deliberate interference with that thing.[6] To Hohfeld, however, claim-rights *in rem* (which he called 'multital rights') are distinct legal relations. They are not to be understood as fused together, in the form of a single right, correlating with many duties or, indeed, with a general duty. Each multital right is a jural relation that comprises of a single right, held by a specific person, correlating with a single duty, owed by a specific person; what marks it out as *in rem* is that this jural relation is *accompanied* by a 'set' of *distinct*, though *fundamentally similar*, jural relations – with each claim-right in the set subsisting between just two people.[7] While a claim-right *in personam* (which he calls a 'paucital right')

[6] For a fuller discussion on the nature of a right to a specific physical thing as a right *in rem*, see Ben McFarlane, *The Structure of Property Law* (Hart 2008), 22-23, 132-206. See also Douglas and McFarlane, 'Defining Property Rights' (n 17).

[7] Hohfeld 1913 (n 5). While the word 'set' is used in this sentence, it must be noted that Hohfeld might not be best read as suggesting that this 'set' has a particular *in rem*

is not so accompanied, and exists either alone or as part of a small number of rights that correlate with duties owed only by a definite class of persons, rights *in rem* are distinct in that they each correlate to an individual duty owed, separately, by individuals 'constituting a very large and indefinite class of people'.[8]

The nature of a claim-right, as Professor Finnis reminds us, is that it 'can never be to do or omit something: it is always a claim that somebody else do or omit something.'[9] The triptych of a claim-right and a correlative duty, vesting in two distinct persons, underpinned by an *activity* that expresses the obligations animating this jural relation,

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identity *per se*; instead, he seems to argue that each individual right is multital in itself as it is *accompanied* by an indefinite number of *fundamentally similar* rights.

[8] WN Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 YLJ 710 (hereafter 'Hohfeld 1917'), 72, 76-77.

[9] J Finnis, *Collected Essays*, vol IV (OUP, 2011), 378 (at Ch 18: 'Rights: Their Logic Restated'; this is a slightly revised draft of an earlier essay, J Finnis, 'Some Professorial Fallacies About Rights' (1972) 4 Adelaide Law Review, where this point was raised at 380). Although, see a recent contribution to this theme in E Eldridge, 'Rights That' (2024) 20 OJLS 24 where it is argued that an individual can have a right against another that '*x*'*-happens* (i.e., that this need not be a duty of the other to do or not do something).

certainly provides a more complete picture of what it means to have a 'right'. However, in the case of a legal property right, a further element calls for inclusion. A's claim-rights to a football correlate to specific *prima facie* duties – 'activities' – that individuals in general refrain from careless or deliberate interference *with A's football*.[10] Hohfeld's description of multital rights pays no special mind to rights over physical things. As his focus was not on multital *property* rights, this omission is understandable. Multital rights can of course exist absent physical subject matter – e.g., one's right not to be defamed.[11] Yet, where the focus is on a legal property right's structure as a multital right, an emphasis on its physical subject matter is essential.[12] So, in our example, take the football out of this picture, and the activity animating A's multital jural

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[10] See Douglas and McFarlane, 'Defining Property Rights' (n 17) who explain the centrality of the obligation of self-exclusion to the concept of a legal property right.

[11] Professor Penner describes this as a 'general' right *in rem*: J Penner, *Property Rights: A Re-Examination* (OUP 2020), 91-93. It is general because it arises by the sheer fact of one's humanity, but *in rem* because the whole world owes prima facie duties to the individual not to defame her.

[12] In contrast to the above, Penner calls this a 'special' right *in rem*: *ibid*. It is *in rem* for the same reason as one's right to their bodily security or reputation is, but it is special as it depends on the special fact of holding a right over specific physical subject matter.

relations with others becomes bald and meaningless. In other words, as Professor Honoré observes,[13] the *subject matter* of A's rights, the football, is the material object that mediates her relationship with others, or the obligations others owe her, as a result of her claim-rights over it.

An emphasis on the physical subject matter of a legal property right's form comes with three qualifications. First, the physical thing at hand must be *extrinsic* to the right holder.[14] To legally own one's whole body would imply that one can dispose of it to others like one would one's land or chattels. This may be possible in a system that recognises slavery, but it has no application to English common law and to the laws of other civilised jurisdictions.

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[13] AM Honoré, 'Rights of Exclusion and Immunities against Divesting' (1960) 34 Tulane Law Review, 463-464.

[14] J Penner, *The Idea of Property in Law* (OUP 1997), ch 5. See also *R v Bentham* [2005] UKHL 18, [2005] 1 WLR 1057, [8]. An illustration of the idea can be seen in *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1, [2009] 3 WLR 118. There, semen ejaculated by the plaintiffs was held to be 'owned' by them: see, especially, at [45].

A second qualification is that the physical thing must be *specific* (i.e., ascertained). Thus, in *Re Goldcorp Exchange Ltd*,[15] a contract to sell unascertained generic goods was held incapable of giving a purchaser a common law title to the goods claimed.[16] As Lord Mustill reasoned:[17]

> [C]ommon sense dictates that the buyer cannot acquire title until it is known to what goods the title relates… It makes no difference what the parties intended if what they intend is impossible: as is the case with an immediate transfer of title to goods whose identity is not yet known.

Thirdly, legal systems may refuse to recognise certain physical objects as capable of being owned.[18] One obvious example is the bodies of other living persons.[19] This is clearly not possible in a system that does not recognise slavery.

[15] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC).

[16] See also *Re London Wine Company (Shippers) Ltd* [1986] PCC 121 (Ch).

[17] *ibid*., 90.

[18] K Gray, 'Property in Thin Air' (1991) 50 CLJ 252, 280-292 (see discussion on 'morally non-excludable resources').

[19] On the possibility of owning dead bodies, see McFarlane (n 6), 137.

Now, one possible objection to this emphasis on physical subject matter – to the form of a legal property right – emerges when examining the tort of procuring a breach of contract[20] and the multital (or *in rem*) protection it seems to give such personal rights. Consider an example where A, who has freehold title to Blackacre, enters into a contract with B to allow the latter to use a garage located on Blackacre every evening to run a retail shop. This is a contractual licence, and its term is three years. C, who is B's competitor, knows of the contract and bribes A to renege on his agreement with B. A takes the bribe and breaches his contract with B. Of course, in so doing, C commits the tort of procuring the breach of another's contract. However, before committing the wrong, everyone, including C, owed a *prima facie* duty to B (and A) not to procure the breach of their contract. Does this render this *contractual* right proprietary? No, it does not.[21] B's contractual right against A is not multital as other parties are not under the *same* or *sufficiently similar*

[20] See *Lumley v Gye* [1853] EWHC QB J73, 118 ER 749 (QB).

[21] This point is discussed more comprehensively in B McFarlane, 'Equity, Obligations, and Third Parties' (2008) 2 SJLS 308, 308-309, 315.

(contractual) duties to B that A is under. Further, the separate contention that B's right against C – that C not procure a breach of the A-B contract – could *itself* be a property right also does not work. This contention might be seen to follow as B's right is multital and relates to a specific physical thing (in this case, A's land). However, this right cannot be a property right as its relation to the physical thing is essentially *coincidental* – i.e., the same legal relations arise whatever the content of A's contractual duty to B (whether or not it relates to a specific physical thing).

Having thus grasped the significance of physical subject matter, the structure of a legal property right can be seen to comprise four elements:

(i) The holder of *claim-rights* in specific physical subject matter;

(ii) The identity of each individual who owes a *duty* correlative to each of these claim-rights;

(iii) The *activity* that determines the content of the duty in question – i.e., a *prima facie* obligation to refrain from careless or deliberate interference.

(iv) The specific *subject matter* of the right – this is the specific physical thing in respect of which a claim-right is held and a correlative duty owed.

The picture above outlines the form of a legal property right. As we have seen, only the first three elements of this formal structure are Hohfeldian. The last is not. The point is highlighted as the analysis in this thesis is not defined by an essentially Hohfeldian approach. Indeed, it cannot sensibly do so. Hohfeld's project was not aimed at giving one a complete picture of private property. A focus on the physical subject matter of a right was unnecessary to the multital-paucital distinction he

drew. So, when discussing the difference between rights *in rem* and *in personam*, he merely attributes the distinctiveness of rights *in rem* to 'extrinsic' factors and brings the point to a swift close.[22] Should one search for an analytically complete account of property rights and the duties they generate, Hohfeld does not seem like the ideal master to seek instruction from. His contribution to this inquiry, however, remains useful. It gives one a precise account of what it means: (a) to have a 'right' (distinguishing between rights 'in the strict sense' – 'claim-rights' – and other legal incidents that may accompany a claim-right); (b) to describe their *form* (underscoring the correlative nature of legal relations they generate); and (c) to explain their *function* (i.e., the consequences attendant on 'holding' a right).[23] The analysis in this chapter draws on these insights but applies them to questions Hohfeld did not. One of these questions concerns the distinctiveness of property rights at law. This is key to the broader distinction between 'pre-existing' and 'new' property rights featured in claims to protect the former. There are at least

[22] Hohfeld 1917 (n 8), 723.

[23] P Eleftheriadis, 'The Analysis of Property Rights' (1996) 16 OJLS, 45.

two reasons for this. First, by knowing the identity of a legal property right *generally*, the scope of the inquiry acquires definition. In other words, the type of rights and claims that call for examination become clear. Second, by understanding the distinguishing marks of a *specific* property right, a sensible basis for comparing pre-existing and new rights emerges.

One straightforward indication of a legal property right's uniqueness is in its formal structure. Indeed, *all* claim-rights – proprietary and personal – share the first three elements of the structure outlined above. The distinguishing mark of a legal property right is, as submitted above, its physical subject matter. As discussed in Parts B and C below, the presence of physical subject matter is highly significant, not just to the form but also to the normative condition of the right. In this part, the discussion is limited to the implications of a formal view of the right to its identity. So, this examination addresses not only its physical subject matter but also the other three formal elements of the structure.

A.I. The Scope of a Formal Account of Rights

A consequence of a formal account of rights is that changes in an entity's form result in a new entity. Hence, a change in any of the four identity conditions of a legal property right implies the creation of a 'new' right. Using an example of A owning a motorbike, consider the following alternative cases:

(a) A transfers her title to a motorbike to B. The identity of the right holder has changed.

(b) X, who lives in the same jurisdiction as A, dies and X2, a different individual, enters the jurisdiction. The identity of individuals in the duty-owing class has changed.

(c) A contracts with Y to allow the latter to exclusively use A's motorbike for a period of one year. The terms of Y's duty to A have changed. She formerly owed a duty to not carelessly or

deliberately interfere with A's use of the motorbike. She now has a duty to A to use the motorbike according to the terms of their contract.

(d) A dismantles her motorbike and melts its components, along with new materials she purchases, and uses the resulting stuff to build a robot. The physical subject matter of A's right has changed.

In each case, a 'new' right comes into being. In (a), B's right to the motorbike, when compared to A's, is, in formal terms, new. In (b), A's right against X is extinguished and a new right is acquired against X2. In (c), a change in the content of Y's duty to A results in the latter acquiring a new right against Y. Finally, in (d), the creation of a new physical object, with new physical materials entails a new property right.

Approaching the analysis through a formal lens is useful. It provides a neat account of how one can distinguish between rights. Its usefulness, however, like any analytical method, is limited by the idiom of the method itself. To give a crude example, a fork is useful in physically picking up food. Its use, though, is limited by the physical characteristics of a fork. Hardly anyone would assert that soup is best eaten with a fork. Its utility, as a tool, runs out in this situation. We can determine the scope of its utility by examining the physical structure of a fork and drawing out the types of food-lifting use it can meaningfully lend itself to. Likewise, the scope of a formal account of rights depends on its nature and the type of questions it can answer.

By nature, a formal account is *descriptive*. It tells one what a property right looks like. It does not tell us *what* makes it a *property* right. In other words, a descriptive account is *normatively* inert. HLA Hart's distinction between the 'external' and 'internal' aspects of rules underscores the importance of normative reasons to this inquiry.[24] An

[24] HLA Hart, *The Concept of Law* (2nd edn, OUP 1994), 82-91.

insider, subject to a legal system, has an obligation to operate according to its rules. Watching her operate from a distance, an external observer may draw patterns of factual behaviour, but these factual patterns, at best, only help predict what her conduct in a given situation may be. They do not tell us anything about the rules of her legal system which govern her situation and how to interpret or explain her behaviour, or that of others towards her, in light of those rules. In the context of property rights, two examples help capture the point of this distinction:

> **Example 1** – A owns a bicycle on an island with 100 inhabitants (including A). Every individual on the island (apart from A) owes A a duty not to interfere with A's bicycle carelessly or deliberately.

> **Example 2** – The facts are as above. A, however, enters into a contract with B allowing B to use her bicycle for a week exclusively. B subsequently concludes contracts with every inhabitant of the island that they refrain from careless or

deliberate interference with the bicycle for the period she enjoys exclusive use of it.

To an external observer, the content and structure of A's right in Example 1 and B's right in Example 2 are identical. Yet, only the first is a property right. The source of everyone's duties to A in Example 1 is A's ownership of the motorbike. The source of others' duties to B in Example 2 is in individually concluded contracts. Hence, should a new inhabitant enter the island, they *will* automatically come under a duty to A in respect of the motorcycle in Example 1, but not to B in Example 2.[25] A purely descriptive picture of rights, therefore, cannot tell one why A's and B's rights in the two examples differ.

So, there is clearly more to the identity of a right than one can gain from examining its form. The normative reasons underpinning a right – apparent to the 'insider', who appreciates its particular

[25] *Cf* A Kocourek, 'Rights in Rem' (1920) 68 University of Pennsylvania Law Review, 331-336.

significance as a legal concept operating in a legal system – are equally important. It is through this latter lens that one can tell that A's right in Example 1 is not identical to B's in Example 2. Further, when claims to enforce a pre-existing right are made, they may feature (or depend on) rights that are straightforwardly understood as 'new' because of their new formal structure. They may (or may not) also be identified as 'new' because of the specific reasons justifying their existence. For the purposes of this thesis, this supplies an important insight. Whenever a right on which a claim depends is formally new, the claim cannot – through a formal lens – be expressed as a reassertion of a pre-existing right. However, it is still possible to find that the reasons grounding a pre-existing right are identical (or in some sense connected) to those justifying the new right on which a claim depends. So, in Example 1, when a new inhabitant enters the island, a fresh legal relation between A and that person, in respect of the bicycle, emerges. This gives A, in a formal sense, a new right against her. However, the reasons why the new entrant is bound by a duty to A will be identical to those explaining why the prior inhabitants of the island have similarly been bound. Thus,

while A may be seen to acquire a new right in form, this need not be new in a normative sense. This idea is more fully addressed in Part C below and explored further in Chapter 3. For now, the discussion in this chapter proceeds to Part B, where the normative basis of a property right is explored in greater detail (the 'insider's' view of the right).

B. NORM

Before understanding *why* legal property rights *prima facie* bind everyone, a preliminary question must be answered. One must first determine *when* a right in respect of a physical thing *can* acquire 'proprietary' status.

B.I. When is a Right 'Proprietary' at Common Law?

At common law, the conditions for a right acquiring proprietary status depend on specific requirements as to its content.

B.I.i) *The numerus clausus principle*

The law, both in relation to chattels and land, imposes limits on the types of property right that can be created.[26] In relation to land, specifically, these limits are set out in the *numerus clausus* principle.[27] Briefly stated, it holds that there is a closed list of property rights over land – i.e., that a right in respect of land can be given proprietary status only if its content matches that of a right already admitted in the list. It should be noted that the content of a right is not determined through a *factual* inquiry, but a *legal* one. So, in determining whether a leasehold title has been conferred, the fact of exclusive occupation of land is immaterial; one must show that the plaintiff has a *right* to exclusive possession.[28] To establish what the legal content of a right is, one must

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[26] See further McFarlane (n 6), 140-146.

[27] *Keppel v Bailey* (1834) 2 My & K 517, 39 ER 1042 (Ch) and *Hill v Tupper* (1863) 2 Hurl & C 121, 159 ER 51 the *loci classici*, in English law, of the *numerus clausus* principle as it applies to land. The principle is now codified in s 1 of the Law of Property Act 1925.

[28] *Street v Mountford* [1985] AC 809 (HL), 818 (*per* Lord Templeman); *Watts v Stewart* [2018] Ch 423(CA), 435 (*per* Etherton MR). See further: WJ Swadling, 'Property: General Principles' in AS Burrows (ed), *English Private Law* (3rd edn, OUP 2013), [4.47]-[4.56].

turn to its creation and examine what was *conferred*[29] or *acquired*.[30] The point can be explored in reference to an example.

> **Example 3** – A is the owner of a canal. A enters into a contract with B granting the latter an exclusive right to put pleasure boats on A's canal.

The facts of Example 3 are from *Hill v Tupper*.[31] Here, A's contractual licence with B gives B a right to use A's canal. The contract, in this case, can be described as the 'causative event' that generates the parties' primary rights and obligations.[32] In addition to explaining how the parties *acquired* their rights, the contract also sets out the *content* of those rights. In *Hill v Tupper*,[33] the Basingstoke Canal Company (A)

[29] As when a right is acquired through transfer or grant of another person.

[30] This includes when a right is acquired through the independent act of taking possession of land or chattels.

[31] *Hill v Tupper* (1863) 2 Hurl & C 121, 159 ER 51.

[32] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005), 34-37.

[33] *Hill v Tupper* (1863) 2 Hurl & C 121, 159 ER 51.

granted Mr Hill (B) the exclusive right[34] to put pleasure boats on A's canal. During the subsistence of the grant, Mr Tupper (X), a third party, without lawful permission from A, sought to run his own pleasure boats on the canal. When B sought to sue X in the tort of trespass,[35] this claim was denied. The grant did confirm that B had acquired a right in respect of the canal. However, in setting out the content of that right, it was observed that the grant 'merely operates as a licence or covenant on the part of [A], and is binding on [A] as between [A] and [B], but gives [B] no right of action in his own name for any infringement of the supposed exclusive right.'[36] In other words, the *content* of the right, set out in its causative event (the contract), established that B's right is only a *personal* right, one that binds only A as the correlative duty-holder; it did not

[34] More accurately, it provides B with a *contractually protected liberty* to use Blackacre on specified terms. Prior to A granting B a contractual licence, B had a liberty, as against everyone generally (except A) to use Blackacre. A's contract with B, however, not only gives B a liberty, as against A, to use Blackacre, but this B-A liberty/no-right legal relation is protected by a contractual right, held by B which correlates to a duty of A, that A allow B to exercise this liberty against A on the terms specified in the contract. See Douglas and McFarlane, 'Defining Property Rights' (n 17).

[35] *Hill v Tupper* (1863) 2 Hurl & C 121, 159 ER 51, 124-125 (*per* Parke CB).

[36] *ibid.*, 127-128.

explain why third parties, like X, ought to be bound by it.[37] However, if A's agreement with B conferred on B the right of 'exclusive possession' of the canal for a certain term, and not merely its 'exclusive use', B's right may very well have amounted to a property right (a lease).[38]

At the level of principle, it is arguable – as scholars like Professor McFarlane have argued[39] – that there is no *conceptual* unity between the content requirements of different legal property rights. In other words, the legal system tells us that B's right to put boats on A's canal could amount to, e.g., a legal easement or lease – and therefore a legal property right – if it meets certain content conditions. Yet, there is nothing about these content conditions that explain why a legal easement, for instance, takes proprietary, multital, or *in rem* effect whilst a contractual licence concerning the use of someone else's land does not. This question –

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[37] As discussed below, the causative event in such a case *cannot* explain the third-party effects of a legal property right.

[38] *Street v Mountford* [1985] AC 809 (HL), 818, (*per* Lord Templeman).

[39] McFarlane (n 6), 139. See also: K Gray and SF Gray, 'The Rhetoric of Realty' in J Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (OUP 2003).

concerning the unique *effect* of legal property rights – is specifically addressed in Section II of this part. For now, the goal is simply to explain *when* the legal system recognises a right in respect of a physical thing as a legal property right. Once we have isolated the subjects of our inquiry, our inquiry can turn to their justifications.

Now, one might point to certain rights in respect of land, such as leasehold covenants,[40] whose content does not match those of rights admitted to the *numerus clausus*. Yet, such rights are in respect of specific physical subject matter (land) and do seemingly bind individuals who are not party to their creation.

[40] A discussion of restrictive covenants over land is beyond the scope of this chapter. The present inquiry focusses only on rights at common law. Restrictive covenants are rights recognised in Equity. For a thorough discussion of restrictive covenants and the *numerus clauses* principle, see: B McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' in S Bright (ed), *Modern Studies in Property Law*, vol 6 (Hart 2011).

B.I.ii) *Leasehold covenants?*[41]

Leasehold covenants in relation to land are a unique type of contractual undertaking. Like any other contract, they bind the parties to their creation. However, in certain circumstances, the obligations they create can also bind third parties who were not party to their creation. It is important to note, however, that these third-party effects are not brought about by altering the consequences of a *contractual* obligation (i.e., by making it anything other than a personal obligation binding the parties to the contract). As a matter of contract law, through the principle of privity of contract, such covenants will certainly bind the parties to the original contract.[42] Their capacity to bind specific types of third parties, however, is brought about by *separate* legal devices (and not the contract itself).

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[41] *ibid.*

[42] It should be noted that, per the post-1995 law, on assigning a lease or reversion, the original contracting party may be released from such contractual liability. See: Landlord and Tenant (Covenants) Act 1995, ss 5 and 6.

So, leasehold covenants created before 1 January 1996 bind successors in title to the original landlord and tenant through the doctrine of privity of estate. The doctrine allows only *successors in title* to the original parties, who acquire *the exact same right* to the land held by the original parties to the covenant, to be bound by these obligations.[43] In other words, privity of estate obtains between the *current* parties to a lease. So, when leasehold covenants are made between the original landlord (L1) and tenant (T1), anyone who subsequently holds the reversion (L2, L3, L4, etc.) and anyone who subsequently holds the leasehold estate (T2, T3, T4, etc.) will, so long as they hold these rights, be bound by the same covenants. Leasehold covenants created on or after 1 January 1996 are governed by a dedicated statutory code.[44] It is

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[43] Law of Property Act 1925, ss 141 and 142, For an understanding of the doctrine as it applied to leasehold covenants created before 1 January 1996, see *Megarry & Wade: The Law of Real Property* (M Dixon, J Bignell and N Hopkins eds, 10th edn, Sweet & Maxwell 2024), [19-004], [19-033]-[19-084].

[44] Landlord and Tenant (Covenants) Act 1995. The doctrine of privity of estate, as traditionally applied, does not apply in the statutory scheme of the 1995 Act: Hansard (HC), 14 July 1995, Vol.263, col.1241. For an overview of the 1995 Act, see *Megarry & Wade, ibid.*, paras 19-085 to 19-130.

through these statutory rules that the benefit and burden of particular terms of the lease pass to successors in title of the original covenanting parties.

Importantly, with both pre- and post-1996 leasehold covenants, their third-party effects are brought about not through a modification of the nature of the original contractual undertakings between the parties, but, as noted above, by a distinct doctrine or through statutory rules. Further, not *all* obligations in a leasehold agreement can bind third parties. To have third-party effect, they must conform to certain criteria.[45]

[45] With leasehold covenants created before 1 January 1996, the duty it creates must 'touch and concern the land' (*City of London Corp v Fell* [1994] 1 AC 458 (HL), 464 (*per* Lord Templeman); for examples of obligations that do not meet this requirement, see *Williams v Earle* (1868) LR 3 QB 739 (promise to repair tools) and *re Hunter's Lease* [1942] Ch 124 (Ch) (covenantee's promise to pay covenantor money at the conclusion of the tenancy if the lease is not renewed)). For leasehold covenants created after 1 January 1996, any promise in the original lease can bind successors in title to the original covenanting parties *unless* it is apparent that the promise is personal to one or both of them: Landlord and Tenant (Covenants) Act 1995, s 2.

Thus, to sum up: leasehold covenants must satisfy specific content requirements. Once they do, they can bind those who were not party to their creation, but only a specific class of such third parties. Unlike a legal property right to a physical thing, such obligations do not *prima facie* bind everyone simply by virtue of one having such a right. Finally, the third-party effects of leasehold covenants obtain not by altering the scope and consequences of a contractual obligation, but by distinct legal devices.

B.I.iii) *Conclusion to Part B*

From the discussion in this section, we have seen that the content of B’s property right (e.g., exclusive possession for a certain term) and its mode of acquisition are both explained by a ‘causative event’. Does the causative event *also* explain *why* the right is proprietary (i.e., why it is capable of binding strangers to its creation)? The next section argues that it does not and proceeds to locate the normative ground of a legal property right.

B.II. Explaining the Behaviour of Proprietary Rights at Law

To zero in on a suitable explanation for why proprietary rights at common law behave the way they do, it is helpful to isolate, at the outset, the sort of reasons that do not aid in this analysis.

First, it does not seem like a clear answer lies in the reason(s) why a legal system recognises private rights (whether proprietary or otherwise). The statement that A has title to Blackacre may be justified by a normative principle, recognised by a legal system, that property may be held by private individuals and, when they are so held, those individuals' personal dominion over their property – including, e.g., its use and control – will be legally protected. In this case, the normative principle explains why A has a legal right of a particular kind. Operating at a very general level, it is true that the normative explanations for our rights in private law are largely agnostic towards – or, sometimes, probably insignificant in – determining their unique behaviour. The law

has preferred to recognise private property holding over other models – e.g., a communal or collective model – and this preference may be underpinned by particular normative explanations that constitute the backdrop, or the preconditions, that enables such rights finding expression in a legal system. In other words, these reasons render A's *claim* – that she has freehold title to Blackacre – a sensible one to make in this legal system. But *why* A's legal property right – whose *recognition* in a legal system is endorsed through particular normative principles – is capable of binding strangers to its creation constitutes a distinct question. A different way of putting the point is that many plausible justifications for private property – utilitarian, Lockean, natural rights, etc. – can be seen to *converge* in justifying the *recognition* of such rights protecting one's interest in the exclusive use and control of specific things. The separate question of why private property rights necessarily take multital effect *need not* be seen as *intrinsic* to the inquiry concerning their recognition.

It must be noted, however, that this account reflects only one sense in which normative justifications apply in the life of a legal right. This sense, referred to so far, can be called 'general justifications'. With a more focussed view, the reasons why a right exists hit at the heart of *what* constitutes its existence, or acquisition, in *individual* cases. Take the example of A's claim that she has a contractual right enforceable against B, that B transfer her title to a pony to A. A will have to advance reasons to show that *she*, *in fact*, *does* have the sort of right she claims. These reasons may be instantiations of general justifications for the right in question, but they come into operation, and are expressed with reference to, a specific set of facts having obtained. So, in our example, A will have to show that A and B had arrived at a legally enforceable agreement that B would transfer her pony to A. The extent to which these *particular* reasons – which explain the existence of a plaintiff's right(s) – may aid in the present inquiry is an issue which will now be considered.

The existence and nature of some rights in private law can be explained by the causative event that resulted in their creation. To

understand this point, one must examine what a causative event reveals. Returning to the discussion above of *Hill v Tupper*, A's contractual licence with B gave B an exclusive right to use A's canal. The contract, in that case, was the causative event that generated the parties' primary rights and obligations. In addition to explaining how the parties *acquired* their rights, it also set out the *content* of those rights and provided the *reasons* for which they exist. If voluntariness or consent of the parties is the basis on which they enter a contractual relationship, this very fact extends to inform, in a broad sense,[46] why their rights against each other in contract arose. The content of their rights is equally understood in reference to the contract. Through the medium of a contract, A undertook an obligation to provide B with a right[47] to use the canal on specified terms.

[46] Because not all terms in a contract reflect the parties' voluntariness or consent. Some terms, for instance, may be implied into a contract by statute. This does not, however, take away from the fact that the parties legal relations under a contract exist predominantly by reference to their consent or voluntariness.

[47] See text in (n 34) above.

With common law property rights, the relevance of a 'causative event' is more limited. It has a role to play in answering the *acquisition* question – i.e., in explaining how such rights are created; it could also help determine the *content* of that right (e.g., if the content of the right satisfies what is required of the right in question such that it complies with the *numerus clausus* principle).[48] It does not, however, reveal the basis or *reasons* for such rights behaving as *in rem* or multital. In other words, causative events resulting in a legal property right tell one nothing about how a legal lease (or any other recognised property right) is justified as *prima facie* binding on everyone. Indeed, when Parke CB posed the question to himself in opposite terms – i.e., as to why the content of B's right in *Hill* could *not* amount to a property right in land – his answer was simply that 'the law will not allow it'.[49] It is clear, then, that the content of a contractual licence, and its mode of acquisition, do not explain why it is incapable of being a right *in rem* (or, in the obverse, why the presence of exclusive possession for a certain term may have

[48] The separation of the 'content' and 'acquisition' questions in the current analysis follows the general approach taken in McFarlane (n 6).

[49] *Hill v Tupper* (1863) 2 Hurl & C 121, 159 ER 51, 127-128.

rendered it a right *in rem*).[50] The decision to deny the contractual licence such status is a choice made by the legal system. In a similar way, one could say that rights over physical things, when recognised as property rights at law, take multital effect simply because the law decides they should. There is nothing objectionable in this conclusion, but it does not further this inquiry. It removes any role the normative ground of the right might have in justifying its distinct proprietary identity.

One clue to this puzzle lies in a factor that makes up the core instance of a legal property right. This is its subject matter as a right to a specific physical object. In examining *why* it is that a right to a material object entails something of a multital right (i.e., generating correlative duties of a greater scope than a paucital right does), Professor Penner's

[50] This is why, in this chapter, the question concerning the *content* of a legal property right preceded the present discussion of its normative basis or ground (i.e., one which explains its distinct *in rem* behaviour). As we have now seen, the former question does not lead us to the normative ground of a legal property right. Yet, examining that question was necessary as it defined the province of our inquiry. Before examining *why* a legal property right behaves the way it does, we must first determine *what* can count as such a right.

observation serves as a useful reminder: 'a material object, existing as it does in the world, is [...] in principle accessible by anyone and subject to the depredations of anyone'.[51] A personal right, such as a creditor's right to the repayment of a debt, is not vulnerable in this way.[52] By its nature, the right can only be breached by the debtor (or by someone acting lawfully, including ostensibly, on her behalf).[53] It is sensible, therefore, that this right exists against *only the debtor*, and that its justification lies in the contract concluded between the parties.[54] However, where A's right depends on the protection of her interest in a material object that is its subject matter – as opposed to a protection sought against a specific person or class of persons with respect to that material object – that

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[51] J Penner, 'The Bundle of Rights Picture of Property' (1996) 43 711 Law Review, 727.

[52] This discussion leaves to one side a broader debate, surrounding cases like *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1, on whether such choses in action *should* be treated as vulnerable to interference in the same way the physical subject matter of a legal property right is. For contrasting positions on this matter, see S Green and J Randall, *The Tort of Conversion* (Hart 2009), ch 5 and Douglas and McFarlane, 'Property, Analogy and Variety' (n 17), 164-172.

[53] *Cf* discussion above on the tort of procuring the breach of another's contract and its relevance to this situation.

[54] *Cf* the discussion above on leasehold covenants in relation to land.

object can be accessed, taken, or intruded upon by potentially everybody. So, if A's right is aimed at protecting A's interest in the use of a specific thing *per se*, then it must *prima facie* hold good against the whole world, as that interest is vulnerable to interference by anyone. For this reason, it is understandable why the law should generate a web of fundamentally similar obligations, owed by others generally, to the owner of that object, *by the sheer fact of her having a property right over it*, that they refrain from careless or deliberate interference with the object.

Care must be taken in framing this conclusion. The view advanced is that a property right to a physical thing is justified as *in rem* because it is vulnerable to the depredations of strangers. It could be argued that there is a meaningful sense in which a licensee of land can complain that her interest[55] is also vulnerable in this way. The intervention of a stranger can make it effectively impossible for her to exercise this licence. While this is no doubt true, it is clear that the law

[55] The word is not used in a technical (legal) sense, but to connote the factual, economic, or personal value an individual attaches to a right.

has decided that a line must be drawn *somewhere* (for instance, because of the interest of strangers in avoiding an endless duplication of duties);[56] that line, in the context of rights over physical things is drawn by the 'closed-list' or *numerus clausus* principle. In other words, the 'vulnerability to depredation' criterion set-out above explains why property rights at law bind third parties to their creation. It need not be seen to answer the preliminary issue over why the law recognises only *certain types* of rights in relation to physical things as *capable* of reaching the status a legal property right.

The core examples of rights which the law recognises as having *in rem* effects are, as Cave J states in *Allen v Flood*,[57] rights of reputation, of bodily safety and freedom, and rights over physical objects. Each of these rights is given *in rem* protection through the law of torts. From a

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[56] For further arguments on this point, see B McFarlane, 'Keppell v Bailey (1834); Hill v Tupper (1863): The Numerus Clausus and the Common Law' in N Gravells (ed), *Landmark Cases in Land Law* (Hart 2013).

[57] *Allen v Flood* [1898] AC 1 (HL). See WJ Swadling, 'Opening the Numerus Clausus' (2000) 116 LQR 358.

moral perspective, infringing these rights is *malum in se*. Beating someone up, slandering them, smashing their computer, ripping apart their books, or intruding into their home are all intrinsically wrongful acts from a moral point of view. This adds force to the view that they require multital protection by the law. By contrast, it is arguable that the moral wrongfulness entailed in breaching such rights is not replicated when an individual prevents a licensee from realising her personal objectives through her contract with another. This is not to deny that personal rights, like those of a contractual licensee, are valuable. They are valuable and the law protects such rights from interference by strangers in different ways, by giving the plaintiff, in some cases, the option of making direct claims against an interferer.[58]

[58] For instance, through claims based on the tortious wrong of procuring the breach of another's contract; or through the 'receipt after a promise principle' (see *Pallant v Morgan* [1953] Ch 43 (Ch) (when the plaintiff has no pre-existing property right) and *Lord Strathcona Co Ltd v Dominion Coal Ltd* [1926] AC 108 (PC) (when the plaintiff has a pre-existing property right)); the 'benefit and principle' (*Halsall v Brizell* [1957] Ch 169 (Ch)); or, through statutory claims based on the Contract (Rights of Third Parties) Act 1999. For a fuller discussion of these claims, see McFarlane (n 6), 269-283, 427-441. See also the discussion above on the devices applied by the law to protect certain kinds of obligations in respect of land, which originated in a contract, like leasehold covenants.

C. FORM, NORM, AND THE IDENTITY OF LEGAL PROPERTY RIGHTS: COMPLETING THE PICTURE

The next three sections explain how the formal and normative dimensions of a legal property right come together to constitute its identity. Three overarching points are made at the outset.

First, it was argued in Part B that a specific individual[59] holding a right to a specific *physical thing* supplies the normative justification of a legal property right. This aspect of the right shall be called its 'normative ground'. The concluding portion of Part A argued that the normative ground of the right is a facet of its identity. It explains why the right is capable of binding strangers to its creation – by imposing *prima facie* duties of non-interference on others – and is therefore distinct from a personal right. In other words, it shows how the nature of A's and B's rights in Examples 1 and 2 (above) differ.[60]

[59] Or specific individuals, where a right is held by joint tenants at law.

[60] See discussion in Part A, on page 77 (above).

Second, the normative ground of a legal property right supplies both a general and focussed justification. At a general level, it explains why rights to physical subject matter are recognised as proprietary at law. In a specific sense, it explains why a specific individual's right to a specific physical thing is proprietary. The normative ground of A's freehold title to Blackacre depends on identifying *her*, as the right-holder, and *Blackacre* as the specific thing that is the subject matter of her right. When she transfers her freehold title over Blackacre to B, the normative ground of the right shifts. It supplies a new explanation: the reason why *B's* right to Blackacre takes proprietary effect. Likewise, when A independently acquires a different freehold to a different plot of land – Whiteacre – the normative ground of the right is distinct from that underlying A's right to Blackacre: it explains why A's s right *to Whiteacre* takes proprietary effect. While the normative identity of the right changes in these fact situations, the *type* of justification supplied – of why rights to specific physical subject matter can bind strangers to its

creation – remains constant. The general justification is *instantiated* to explain specific instances.

Third, a further implication is that the normative identity of a legal property right is based on two specific factors that comprise its fourfold formal structure (discussed in Part A). These are: (a) the identity of the right-holder; and (b) the specific physical subject matter of the right. The identity of each duty-bearer and the activity forbidden (which underpins their duties) are not included in the formulation (i.e., of the right's normative ground) as those factors form part of what the normative ground seeks to explain. In other words, we wish to know why a legal property right binds third parties by imposing *prima facie* duties on them to refrain from careless or deliberate interference with the physical subject matter of the right.[61] The duty-bearers (the third parties) and the activity underlying each of their duties (the manner in

[61] As stated in (n 10), above, the view that *all* legal property rights respecting *physical* things impose duties to refrain from the same activity – i.e., careless or deliberate interference with the subject matter of the right – follows the carefully constructed arguments in Douglas and McFarlane, 'Defining Property Rights' (n 17).

which they are bound) comprise the *explanandum*, whilst the normative ground of the right is the *explanans*. The consequences of this point are discussed in Section C.I (below). For ease of exposition, the discussion below applies a terminological distinction between the two dimensions of a legal property right's identity. Reference to its normative ground will be addressed by the term '***R***-right' and its fourfold formal structure as '***r***-right'. This usage is similar, but not identical, to Professor Webb's distinction between 'R-Rights' (rights expressed as reasons) and 'C-Rights' (rights expressed as conclusions).[62] In common with Webb's usage, the language of Hohfeldian claim-rights underlies a legal property right as ***r***-rights, but such language is unnecessary when referring to it as an ***R***-right.

C.I. Distinguishing the Normative and Formal Identities of Rights

[62] See Webb (n 3).

Restricting the identity of a right to its formal structure, at the expense of its normative ground, is analytically incomplete. It also renders the language of property rights counter-intuitive and impossible to operate. So, in strict adherence to the correlatively structured legal relations underlying X's ownership of her football, it would be impossible to describe her owning it as a 'right' (singular). She has a vast complex of rights (plural), and each correlates with a distinct duty held by a distinct individual.[63] Yet, in legal usage, it is an absurdity to refer to a single individual's 'right*s*' of ownership over a single physical object. This is so for good reason. As indicated above, what unites each legal relation in the multital bunch are: (a) the identity of the claim-right holder (X); and (b) the subject matter of the legal relation (the football).[64] As seen in Part B, these unifying factors are the very stuff on which the normative account of property rights – as multital rights – is based. To

[63] These rights are, of course, accompanied by other legal entitlements, such as powers of disposition, etc.

[64] Of course, the *content* of the duty (the 'activity') in each legal relation is also the same; they are not, however, *identical* as they are owed by *separate* individuals (and, hence, as separate 'duties').

explain further: the normative depiction of X's ownership can be seen as unfolding in two stages. In stage 1, it refers to X's status as a right-holder in relation to the football. By this reference, it establishes a justification for lending it (i.e., *X's* entitlement, as owner, *to the football*) multital protection. It then proceeds, in stage 2, to add substance to what this entails. The general justification for multital protection is used to explain why each individual owes a *distinct*, yet *fundamentally similar*, *prima facie* duty to X in respect of her football. Seen thus, it should be clear that the normative reasons in stage 2 make no sense without reference to those in stage 1. The former, in other words, are only instantiations of the latter. So, referring to X's ownership as an ***R***-right only acknowledges the unified normative ground on which it stands – i.e., which is based on the right-holder's status in relation to a physical object. Of course, when articulating the norm in stage 2, one will describe X's ***r***-right against Y1 as distinct from her ***r***-right against Y2.[65] Yet, this usage is in no way inconsistent with the fact that these ***r***-rights are instantiations of a single ***R***-right. The focus in either context is just different, and the

[65] *ibid.*

former is parasitic on the latter. In the context of legal property rights, an ***R***-right is agnostic to the identity of individual duty-holders. This is because its articulation of the normative ground of X's ownership does not depend on them.[66] So, in Example 1 (above)[67] when a new inhabitant enters the island, the identity of A's ***R***-right – freehold title to Blackacre – remains unchanged.[68] She does, however, acquire a new ***r***-right as a new member of the duty-owing class generates a new legal relation.

C.II. The Structure of Rights and the Form of Reasons

It is evident from the discussion above that the normative and formal accounts of rights are not rival conceptions. They also do not (and cannot) operate in mutually exclusive ways. It was seen above that '***r***-rights' are instantiations of an '***R***-right'. The normative reasons supplied

[66] *Cf* J Raz, 'On the Nature of Rights' 93 Mind 194. See also Penner, *Property Rights: A Re-Examination* (n 11), Ch 5.

[67] See on page 76 (above).

[68] See Penner, *Property Rights: A Re-Examination*, (n 11), 89-93.

by the latter extend to explain the former. In doing so, the formal structure of '***r***-rights', as correlatively structured claim-rights, is of special significance. In other words, the form of a '***r***-rights' helps fashion the form of reasons that justify it.

To explain: if X owns a football, Y owes a correlative *prima facie* duty to not carelessly or deliberately interfere with the football. A single normative rule might explain why Y, and everyone else, is subject to such duties. The correlative structure of these right-duty legal relations, however, informs an important sense by which this normative rule is expressed. In other words, the norm *must* embrace the X-Y legal relation (and every legal relation of a similar kind X would have with others in respect of her football).[69] If X and Y were not linked together at the outset – as primary right-holder and duty-bearer – it is unclear why *Y*, on committing the wrong, should be held liable *to X*. In other words, if each duty-holder owed a *general* duty of non-interference to all holders of property rights in a system, why not lock up the trespasser in jail or

[69] *Contra* Penner, *ibid.*, 106-107.

require them to pay a certain amount as a penalty into a general fund held for aggrieved holders of property rights? The reason why Y's liability is directed *towards X* is because the enforcement of primary rights in private law, upon their infringement, through remedial rights *in personam*, *presupposes* the authority and bindingness of *Y's* primary obligation *to X*.[70] As Professor Stevens puts it:[71]

> The duties of private law do not exist in the air. Duties of this kind are also not owed to society, or to ourselves, or to God, or to the state as a placeholder for all of us. Rather, *private* duties are owed to other people. I owe a duty to Tony Blair not to punch him on the nose and I owe the same, but separate, duty to David Cameron. We can emphasise the relational nature of this duty and stress that it is not of the same kind as my duty not to drink alcohol to excess or not to be cruel to animals or not to make graven images, by talking in terms of the (claim) rights of those to whom the duty is owed. Claim rights always have correlative duties…

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[70] Eleftheriadis (n 23), 37.

[71] R Stevens, 'Rights and Other Things' in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart 2014), 117.

C.III. Individuating Pre-Existing Rights and Claims Made in Respect of Them

This thesis focuses on 'claims' made in respect of pre-existing proprietary rights. Claims, as outlined in Chapter 1, refer to a cause of action. The definition of a cause of action or claim in this thesis draws from Lord Escher MR in *Read v Brown*:[72] it is 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment.' Two consequences attend an examination of the identity of a property right in the context of claims.

First, claims made in respect of a pre-existing right usually, but not inevitably,[73] depend on the existence of a new (***r***-)right (i.e., the right claimed by way of judicial remedy or extra-judicial settlement). Take the case of a defendant wrongfully damaging a car to which the plaintiff has

[72] *Read v Brown* (1888) 22 QBD 128 (CA), 131-133 (citing *Cooke v Gill* (1872-73) LR 8 CP 107, 116).

[73] As seen in Chapter 1, a key exception is in a *vindicatio* claim, where the plaintiff's pre-existing right and the right claimed can be identical in form and norm.

title. The plaintiff's claim is made in respect of her pre-existing title to the car. However, the claim depends on the enforcement of a new right – one which correlates to a secondary personal obligation on the defendant to pay a sum of money (damages) to make good the wrong. This *personal* right is necessarily new on two grounds. The activity underpinning the defendant's duty is distinct. From the outset, she owes a duty to refrain from interfering with the plaintiff's car. Post the wrong, a court order would recognise (or impose)[74] she also owes a distinct duty, underpinned by a different activity: an obligation to pay a sum of money to make good her wrong. Further, while the plaintiff's pre-existing right is to a specific physical thing – and is therefore a legal property right – the right that is claimed is a personal right (which does not depend on enforcing a primary right to the car *per se*). Hence, the right on which the claim depends is a new ***r***-right, distinct in form from the plaintiff's pre-existing title to the car. This fact does not necessarily

[74] See discussion in Chapter 1 (Section C.III) addressing competing views on whether, in the present example, a defendant's duty to pay damages post a wrong crystallises when a court order is made or at an earlier stage. As noted in that chapter, nothing for the purposes of this thesis' analysis, turns on which side of that debate one falls on.

indicate that the normative basis of the personal right claimed is similarly divorced from that of the plaintiff's pre-existing legal property right (seen as an ***R***-right). It is possible to find that the facts proved in the claim draw on the reasons supplied by the plaintiff's prior ***R***-right.

As argued above, the normative ground of a legal property ***R***-right is based on the inherent vulnerability of a specific physical thing, owned by a distinct individual, to depredations of strangers. When a defendant interferes with a physical thing to which the plaintiff has title, she commits a legal wrong. To prove the wrong is to establish, precisely, that the type of depredation the right exists to guard against has occurred. Put differently, the factual scenario that expresses the normative ground of the plaintiff's prior right is identical to the factual occurrence on which her claim is mounted. Hence, the reasons justifying the plaintiff's pre-existing ***R***-right constitute the normative stuff on which the claim is mounted. Further, the persisting reasons that justify the claim can also explain the right on which it depends – i.e., the right

correlative to the secondary, personal obligation to pay damages.[75] The continuation of the reasons grounding the plaintiff's original ***R***-right imply that, on committing the wrong, the defendant remains answerable to them. That accountability can be seen as the foundation of a new, secondary obligation to do the 'next-best' thing to having complied with the defendant's original duty.[76] This duty of next-best compliance can take shape as a secondary obligation to pay damages to make good the wrong.

Understood thus, one can see that although a pre-existing legal property right and the personal right claimed are distinct in form, their normative bases are intimately related. The same reasons justifying the pre-existing right ground: (a) the plaintiff's claim against the defendant; and (b) the distinct personal right that the claim depends on. There is,

[75] This is based on Professor Gardner's 'continuity thesis', discussed in Chapter 1 of this thesis (and further explored in Chapter 3): J Gardner, *Torts and Other Wrongs* (OUP 2019), ch 2.

[76] *ibid*.

thus, a meaningful sense in which one can find that the claim against the wrongdoer is a reassertion of the plaintiff's prior title to the car.

Second, when examining the *form* of pre-existing rights and rights claimed, a binary distinction exists. Either the rights are formally identical or distinct. As we shall see in Chapter 3, this is not the case when comparing the normative foundations of both rights. The example discussed above demonstrated that the normative foundation between rights can be identical, notwithstanding their formal distinction. It is argued in Chapter 3 that such perfect continuity (or its obverse) is not inevitable. The facts proved in the claim, unlike our example above, need not replicate the normative reasons supplied by the plaintiff's prior ***R***-right. They can also supply partly, or entirely, new normative grounds on which a claim respecting the prior right may be brought. These new normative grounds can also inform the basis on which the right claimed (e.g., by way of judicial remedy) is justified. The details of these possibilities are reflected in this thesis' taxonomy, introduced in Chapter

1, and which will be further developed in Chapter 3. The groundwork established in this chapter will help us make sense of them.

CONCLUSION

The purpose of this chapter has been to explain how pre-existing proprietary rights, at common law, with respect to specific physical subject matter, can be individuated. Establishing this point helps us to subsequently work out in what ways claims might, or might not, be reassertions of those rights.

It was argued that pre-existing legal property rights can be individuated in form (as an ***r***-right) as well as in norm (understood as an ***R***-right). One account is not mutually exclusive of the other. First, one's understanding of an ***r***-right depends on its normative basis as an ***R***-right. Second, the normative significance of a legal property ***R***-right cannot be instantiated in the context of specific parties without acknowledging its parallel significance as an ***r***-right.

Based on this understanding, Chapter 3 will proceed to examine the types of relationship that can exist between pre-existing legal property rights and claims made in relation to them. One possibility is to find that a pre-existing right and the right on which the claim depends are identical in both an ***R*** and ***r*** sense. This is the case in a *vindicatio* claim. However, as we shall see, all other claims respecting a pre-existing legal property right are contingent on rights that are new in an ***r*** sense. The question then is whether, in these cases, the rights claimed are also necessarily new in an ***R*** sense. If not, one must map out the particular mode(s) by which the normative reasons grounding a legal property ***R***-right can inform the basis of claims made in relation to them and the new ***r***-rights on which they depend. This is a task that Chapter 3 undertakes. It draws out a taxonomy based on the distinct ways the normative ground of a pre-existing legal property right can supply the justificatory bases of claims and the particular rights on which they depend. Upon detailing the taxonomy, Chapter 3 will proceed to explain its usefulness in resolving knotty issues in certain 'hard cases' at common law.

Chapter 3:

Claims Protecting Pre-Existing Property Rights at Common Law

INTRODUCTION

The previous chapter explained how pre-existing legal property rights can be individuated in form and norm. This chapter builds on those insights, in order to work out the distinct ways in which a pre-existing legal property right is relevant to founding claims and to explaining their remedial outcomes.

Part A of this chapter expands on this thesis' taxonomy of claims that was introduced in Chapter 1. It consists of five categories – *vindicatio claims*, *Consequential claims*, *Linked claims*, *Partially independent claims*, and *Fully independent claims*. In the first category, the pre-existing right may

be the very same right that is recognised by way of remedy (a possible example, considered in this chapter, is of claims for declaratory relief). Further, in all cases of the *vindicatio*, no additional facts – aside from the existence of the pre-existing right – are needed to justify a claim respecting it or the remedy that is subsequently awarded. As we have seen in Chapter 1, in all other categories, a pre-existing right and the right recognised or enforced by way of remedy are formally distinct. However, this does not preclude a *normative* continuity between pre-existing rights, claims, and remedial outcomes. This idea was explained in Chapter 1, but can be briefly restated here through an example.

Let us say that A has legal title to a computer and X steals that computer. A's claim against X will be in conversion. Should A successfully plead her claim, a court order would recognise and enforce her claim for damages. That is, A's prior right to the payment of damages – arising upon X's wrong – would merge with a court-ordered duty creating a new debt owed by X[1] (albeit that debt would be identical in

[1] *Re European Central Railway Co* (1876) 4 Ch D 33 (CA), 37–38.

content and form to X's prior duty to pay damages). A's pre-existing right to the computer and the remedy would be *formally* distinct. The first is a legal property right and the second is a personal right to the payment of a sum of money. Yet, it is possible to argue that A's pre-existing right, her claim, and the remedy are normatively interlinked. This argument – as we have seen – unfolds when analysing our example as a type of *Consequential claim*. In that category, the reasons grounding a pre-existing right and a claim are the same. That is, the reasons grounding the plaintiff's pre-existing right persist to justify her claim against the defendant. The justification for the remedy can, in most cases, consists of the same reasons as those grounding the plaintiff's pre-existing right (and claim); the content of that remedy, as we have seen, would consist of a new obligation reflecting the *next-best* means of complying with the continuing reasons grounding the pre-existing right (and claim). In exceptional cases, a court may be persuaded to enforce a different remedy. For example, A's computer might be one among very few existing Apple-1s, the first computing devices produced by the brand. Being a rare commodity, a monetary remedy would likely not

satisfy A. So, the court would take account of additional factors (e.g., the special and unique nature of A's computer) to justify making an order of delivery-up.[2] This remedy would not simply enforce a right to the payment of an abstract sum of money (a *jus in personam*), but it would enforce a personal right of A's to reacquire, from X, possession to the original computer (a *jus in personam ad rem*). The latter obligation, like a remedy enforcing a right to damages, can be expressed as a next-best

[2] On one view, the idea suggested here might seem a bit odd. If the original right is a right to possession, it might be queried why a claim for damages is the default next-best form of compliance while a duty to give up the very computer a non-default mode of such compliance. However, as Professor Stevens has argued: '[c]ourts make money awards not because this is the next best which the *wrongdoer* can do, but because this is the next best that *courts* can compel to be done': R Stevens, *Torts and Rights* (OUP 2007), 336 (emphasis added). With orders of specific enforcement, there are a range of factors that have been acknowledged (albeit in the particular context of enforcing contractual obligations) that might prevent a court from making such an order (whether for claimant or defendant centric reasons or administrative concerns): see eg Lord Hoffmann's speech in *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL). With orders of delivery up (which is a type of specific enforcement), courts similarly take account of reasons that may justify (or prevent) such an order being made. Damages, on the other hand, usually involve a less complex weighing of concerns before courts can justifiably impose them. Such awards are thus treated as a default mode of next-best compliance (i.e., because it is usually the most straightforward order *a court* can justifiably enforce).

means of X complying with the continuing reasons grounding A's pre-existing right to her computer. However, unlike a right to damages, these continuing reasons *alone* cannot justify the remedy. As we saw in Chapter 1,[3] the formulation of the reasons for the remedy must *also* take account of the additional reasons that persuaded the court to make an order of delivery-up. Thus, the overall picture obtained by unpacking this example is that notwithstanding formal distinctions between a pre-existing right and the remedy, there is a clear normative continuity underlying both their justifications. This allows us to identify a meaningful sense in which one can find that A's claim in conversion and the remedy awarded – whether this consists in the enforcement of a right to damages or delivery-up – reflect a reassertion of her pre-existing right to the computer.

Building on examples like the one considered above, this thesis' taxonomy shows that, with the exception of the *vindicatio*, claims in each of its remaining four categories reflect differing ways in which the

[3] See Chapter 1, Section C.IV.i.b) Consequential claims.

reasons grounding a prior legal property right can have a persisting impact on the justifications for a claim and those of the (formally distinct) right recognised in a remedial response. The extent to which there is a normative continuity is seen when examining the facts proved in a claim (i.e., in the cause of action). These facts help us understand the specific way in which a claim may (or may not) feature a reassertion of a pre-existing property right. With some minor exceptions, the normative content of a claim also supplies the justification and scope of the remedial outcomes a court can give in response to it. Thus, once we have identified that a particular claim falls within one of the five categories in the taxonomy, we obtain a principled view of: (a) what a plaintiff must show to make that claim in relation to her pre-existing right; and (b) what a court can legitimately do in response to that claim. More broadly, the taxonomy also tells us how, and in what way, we might view a claim and a remedy as reassertions of a right a plaintiff originally holds.

While the detail of the taxonomy in Part A is instanced with 'easy cases', Part B turns to certain 'hard cases' at common law. The first set of such claims are cases featuring physical mixtures, accession, and specification. The second set looks at claims contingent on tracing at common law. These are not hard cases because they cannot be explained through the taxonomy. They are hard because the outcomes in those cases are contested or under-theorised. The aim of Part B is to show that these cases can be better understood by engaging this thesis' taxonomy. Doing so reveals the stakes attending on different outcomes and provides a clearer view of how courts can decide between competing approaches.

A. A Taxonomy of Claims

In working out the relationship between a pre-existing right, claim, and remedy, the taxonomy takes account of two types of relation. The first relates to the foundation, or justification, of a claim *per se*. We have seen in Chapters 1 and 2 that a claim – or cause of action – involves proving certain facts. These facts can help one understand the normative

basis of the claim. The first step then is to compare the normative basis of a particular claim with that of the pre-existing right. The second relation examined in the taxonomy is between the pre-existing right and the right recognised and enforced by way of remedy. Understanding the justifications for this right as against those of a pre-existing right helps one gain a fuller sense of how a claim may, or may not, consist in the *reassertion* of the pre-existing right.

The paragraphs immediately above demonstrate that the taxonomy is fashioned mainly in relation to the normative bases of pre-existing rights, claims, and remedies. It does not focus on the formal distinction between a pre-existing right and the remedy. This is for good reason. Except for the first category in this taxonomy – i.e., '*vindicatio* claims' – the rights claimed by way of remedial response in all other categories are *necessarily* formally distinct from the pre-existing right respecting which a claim is made. However, as the detail of this thesis' taxonomy shows, a formal distinction between rights does not preclude a continuity – either in part or in full – between their normative grounds.

The sections below provide an outline of this thesis' taxonomy, using 'easy' examples at common law. Part B then proceeds to show how the insights the taxonomy helps to solve certain doctrinal problems featured in a selection of 'hard cases'.

A.I. *Vindicatio claims*

> **Example 1** – A has a title to a football. X1 steals the football from A. Subsequently, X2 steals the same football from X1.

The *vindicatio* claim is a category in the Roman and civilian traditions. [4] A pre-existing right is directly asserted on its own terms. Thus, the reasons justifying the pre-existing right exhaust those grounding the claim. In other words, no additional reason is needed to

[4] WW Buckland, *A Textbook of Roman Law* (CUP 1963), 675.

justify the cause of action or the remedial response. So, when X1/X2 steals, and still has possession of, A's football, A's *vindicatio* claim will feature the simple assertion: 'That football is mine!'. A subsequent court order directing X1/X2 to return the football will, likewise, be justified by the fact that the thing belongs to A. X1/X2's wrongful conduct in stealing the item from A is not of the essence to the claim. So, X1/X2 would still be liable to render up the football even if – in an altered scenario – they had not personally touched or taken it (e.g., a thief left it in their house, and they had not received A's letters requesting its return). By contrast, in a *Consequential claim* (discussed below), X1/X2's wrong supplies a *necessary* factual occasion for A to bring a claim.

Common law systems do not recognise *vindicatio* claims to protect pre-existing legal property rights.[5] It might be argued that claims for declaratory relief are an example of *vindicatio*-like claims at common

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[5] See P Birks, 'Personal Property: Proprietary Rights and Remedies' (2000) 11 KLJ, 4-5. See also *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1, [308] (*per* Baroness Hale). The exposition of this point can be traced back to scholarship in the late nineteenth century: see F Pollock and RS Wright, *An Essay on Possession in the Common Law* (1888), 5.

law. This is because the form of a declaratory order entails a simple restatement by the court of the existence (or non-existence) of a plaintiff's pre-existing right. This thesis does not treat declaratory orders as pertinent to its inquiry. This is because, as stated in Chapter 1,[6] the focus, in the remedies section of this project's inquiry, is on 'dispositive decisions' which conclusively settle a cause of action (or part of an action). Declaratory orders do not fall within this definition. A dispositive judicial decision necessarily alters the parties' legal relations. Merely obtaining a judicial declaration does not produce this effect. That said, taken on its own, such orders do not fit the conceptual parameters of a *vindicatio* claim (as adopted in this thesis). The reasons why a claim to declaratory relief might succeed go beyond the plaintiff's mere assertion of a right. Its success, rather, is based on judicial discretion, and the factors influencing its exercise go well beyond a plaintiff's ability to prove that she has a pre-existing right.[7]

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[6] See Chapter 1, Section C.III. Remedies.

[7] The factors influencing the court's discretion to grant declaratory relief are discussed in *Fujifilm Kyowa Kirin Biologics Co Ltd v AbbVie Biotechnology Ltd* [2017] EWCA Civ 1, [58]-[61].

A.II. *Consequential claims*

Here, the reasons underlying a pre-existing right are reflected in the claim and the remedy. However, these reasons are addressed in the claim through a specific form. The focus is on those reasons as they apply *to the defendant's conduct* – e.g., her commission of a wrong against the plaintiff. This feature subsequently characterises the distinct form of remedy that the claim invites. This emphasis on the defendant's conduct distinguishes *Consequential claims* from the *vindicatio*. With *Consequential claims*, the *possibility* of bringing the claim is *necessarily* occasioned by proof of these additional facts (i.e., such as the defendant's committing a wrong).

One example may be a claim for conversion by X1/X2 of A's football (in Example 1,[8] above). In Chapter 2,[9] it was explained that A's

[8] See on page 122 (above).

[9] See Chapter 2, Section B.II. Explaining the Behaviour of Proprietary Rights at Law.

right correlates with *prima facie* duties on others to refrain from careless or deliberate interference with the football. This '*in rem*' effect is justified because the subject matter of the right – like any physical thing – is inherently vulnerable to depredation from strangers. Importantly, the additional facts proving X1/X2's tortious act do *not* present new reasons for the claim that are different from why A has a property right to the football in the first place. The same factual scenario that explains A's cause of action – the occurrence of a stranger's depredation – justifies her pre-existing title to the football. At best, the occurrence of this factual scenario provides an *occasion* for A to bring a personal claim against X1/X2.

However, respecting the remedial response merited by the claim, the occurrence of the wrong *is* distinctly relevant in two respects. First, the reasons why X1/X2 is bound by A's right, prior to X1/X2's converting the football, survive as against her after her wrong.[10] These

[10] As explained above, this point is adopted from the 'continuity thesis' explained in J Gardner, *Torts and Other Wrongs* (OUP 2019), ch 2.

surviving reasons can be seen as grounding a *new* personal duty on X1/X2 to do the 'next-best' thing to not having committed the wrong.[11] Yet, absent X1/X2's wrong, the circumstances calling for them to be bound by a duty of *next-best* compliance would not have arisen. So, the wrong can be seen as a background fact creating the normative circumstances in which a personal (secondary) duty of next-best compliance, grounded by the same reasons underlying A's pre-existing right, arises.[12] Second, X1/X2's wrong also underpins the *form* of her secondary obligation of next-best compliance. The remedy afforded to A takes the form of a *personal obligation on X1/X2* to place A in the situation she would be in, had the wrong not occurred.[13] This obligation is placed personally *on X1/X2* as it was *they* who committed a wrong by breaching their primary duty *to A*. As discussed in Chapter 1,[14] with the *vindicatio*,

[11] *ibid.*

[12] S Steel, 'Compensation and Continuity' (2020) 26 Legal Theory, 276.

[13] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (HL) (Scotland), 39. See also: *Robinson v Harman* (1848) 1 Ex 850, 154 ER 363, 855 (365) (stating the aim of a damages award for breach of contract).

[14] See Chapter 1, Section C.IV.i.a) vindicatio claims.

only the second of these features could obtain. In Example 1,[15] a court order would compel X1/X2, personally, to return A's football. However, the basis of this order is not a duty of next-best compliance on X1/X2's part. Their conduct is not seen to cause their duty, at the time of converting the football, to have been breached (and therefore, from that instant, to cease its existence as a *primary* obligation). Instead, X1/X2's primary obligation survives and forms the basis of the remedy granted against her. Before 'breach', X1/X2 owed A a *prima facie* duty to refrain from careless or deliberate interference with the football. Post-'breach', that *same* duty *entails* that they return the item to A.[16]

So: with *Consequential claims*, the reasons justifying a plaintiff's pre-existing right and her cause of action are identical.[17] While she must

[15] See on page 122 (above).

[16] As we shall see in Chapters 4 and 5, there is a parallel here to substitutive performance claims in Equity – e.g., like those which require a trustee to account following an unauthorised disposition of rights held on trust.

[17] In Chapter 2, it was argued that the justification for a plaintiff's *acquiring* a property right is not the same as the justification for the right itself. It is the latter which is the

prove additional facts (e.g., concerning the defendant's wrongdoing), these explain why an occasion has arisen to bring a claim for next-best compliance. Equally, they show why the remedy takes a specific form. So, the additional facts proved justify why the remedy recognised and enforced is a new *personal* obligation on the defendant; they do not, however, provide a justification for this secondary obligation. For *Consequential claims*, the justification for the secondary obligation – when the remedy sought is a money claim (for damages or for the value of the misappropriated chattel)[18] – is the need for next-best compliance with the justifications grounding the plaintiff's pre-existing right. That is, these reasons persist to ground her claim and is also closely related to the justification for the new personal right recognised by the resulting remedy it merits as of right. However, should the plaintiff seek specific relief for the delivery-up of goods,[19] this remedy is not available as of

focus of this argument. See Chapter 2, Section B.II. Explaining the Behaviour of Proprietary Rights at Law.

[18] Torts (Interference with Goods) Act 1977, s 3(2)(b) and s 3(2)(c).

[19] Torts (Interference with Goods) Act 1977, s 3(2)(a).

right.[20] The court may exercise its discretion to make such an order. In doing so, the court may take account of other factors such as the unique or exceptional character of goods or the adequacy of damages.[21] In these limited types of case, the reasons grounding a plaintiff's original right and the claim she brings in respect of it do not exhaustively ground a court's remedial response. That is, while an order of delivery-up would constitute a next-best means of the defendant complying with the continuing reasons grounding the pre-existing right, the remedy cannot be justified on the basis of those persisting reasons *alone*. Further reasons are required to secure an order for specific relief.

A final point must be made about *Consequential claims*. The continuity of reasons grounding A's primary right to the football helps us understand how her claim in conversion, and the remedy it invites, can – in a normative sense – be seen as a *reassertion* of her pre-existing title. However, it is not suggested that A's primary right to the football

[20] See text in (n 2), above.

[21] See further: *The Law of Personal Property* (M Bridge and others eds, 3rd edn, Sweet & Maxwell Ltd 2021), ch 34.

is *entirely* unaffected by her secondary claims against X1 or X2 to make good their wrongs. As we have seen, A's secondary claims against X1 or X2 may result in the specific recovery of the football[22] or an award of damages.[23] If the remedial response to the claim takes shape in an award of damages, A's pre-existing right to the football *will* be extinguished.[24] However, this does not disturb the fact that the secondary *claim* itself is based on the reasons grounding A's pre-existing right. The *satisfaction* of the claim (by way of remedy) might destroy her primary right to the football, but the foundation of the claim, prior to this point, depends on the *same* reasons grounding that right.

A.III. *Linked claims*

The claims in this category are not based on a simple restatement of justifications supporting a pre-existing right. Those justifications only

[22] Torts (Interference with Goods) Act 1977, s 3.

[23] Torts (Interference with Goods) Act 1977, s 5.

[24] *ibid*.

form *part* of the facts that ground the claim. Additional facts must be proved. Unlike with *Consequential* claims, these additional facts form part of the justificatory basis of the plaintiff's claim and the remedy she seeks. In other words, *Linked claims* present a new set of reasons justifying claims made respecting a pre-existing right and the consequent remedies awarded.

A straightforward instance of a *Linked claim* at common law does not immediately come to mind. However, as discussed below, certain 'hard cases', concerning claims following mixing, accession, and specification, could helpfully be explained when seen as a type of *Linked claim*.

A.IV. *Partially independent claims*

Unlike in the previous three categories, vindicating a pre-existing right's grounding reasons is not part of what justifies a claim or its resulting remedy in this category. Instead, the existence of a pre-

existing right serves as a *necessary background pre-condition* for bringing a claim and seeking a remedy.

A straightforward example in this category is a claim based on a statutory right to be compensated for a deprivation of a property right, as in *Re Ellenborough Park*.[25] The plaintiffs had to show they had an easement (a subsisting property right) for their claim for compensation from the state to succeed. Crucially, that claim for compensation was *not* a correlative of the *easement* itself. The reasons for recognising the easement as a property right, however, were a background pre-condition of the justification for a statutory cause of action entitling the right-holder to compensation (based on an inability to exercise the property right).

A.V. *Fully independent claims*

[25] *Re Ellenborough Park* [1955] 3 WLR 892 (CA).

This category of claims goes farther than *Partially independent claims* in its separation from the reasons grounding a pre-existing right. Simply put, these are claims where the factual context often involves the plaintiff's having (or having had) a pre-existing right but where this is not a *necessary* pre-condition of the claim. The reasons for recognising a new right, in these cases, has no necessary connection to the reasons supporting the old right. Technically, these claims do not belong to this thesis' taxonomy. They are nevertheless noted as they show the limits of the taxonomy.

One example of a *Fully independent claim* is a claim based on the rule in *Rylands v Fletcher*.[26] A, an occupier of land, is liable to B for loss caused in such cases whether or not B has a *property* right in neighbouring land.[27] Thus, B might only have a licence to use the neighbouring land but can still recover for loss caused from the release.

[26] *Rylands v Fletcher* (1865) 3 H & C 774, 159 ER 737.

[27] *Rainham Chemical Works v Belvedere Fish Guano Co* [1921] 2 AC 465 (HL), 479; *National Telephone Co v Baker* [1893] 2 Ch 186.

B. HARD CASES

In this part, this chapter's attention shifts to certain 'hard cases' at common law. In these, the subject matter of a plaintiff's prior legal property right is confounded with or attached to new subject matter, refashioned into a new form (with or without new material), or is replaced by new subject matter. In each of them, claims are brought[28] in respect of pre-existing legal property rights, but the outcomes are contested or under-theorised. The discussion below shows that this thesis' taxonomy can help us make sense of these claims and understand what is at stake as between different ways of resolving them.

B.I. Physical Subject Matter and Proprietary Claims: Mixing, Accession, and Specification

[28] Or purportedly made in the context of claims based on 'substitutions' or 'tracing'.

As discussed in Chapter 2, the specific physical subject matter of a legal property right is a key component of its normative and formal identities. Changes in this subject matter will bring about a new right, first in the '***R***' sense and consequently in the '***r***' sense. Claims based on mixing, accession, and specification, put the nature of this identity condition to the test.

In a plain sense, the physical identity of a material thing can be conveyed by its outward structure. A statue of Winston Churchill in Madame Tussauds is not just a pile of wax. Its peculiar structure gives it a special significance, marking it apart from other wax structures and things in general. Melt the structure and remould it into Cleopatra: its identity changes. Care must be taken, however, in understanding the significance of this change to one's *right* over it. Sometimes, changes in the physical structure of a thing mainly affect its material *attributes*. This can have important consequences on what it means to have a right to the thing. These consequences need not be seen to reach deep enough to alter the *identity* of one's right over the thing itself. That said, in some

other instances, changes in the physical structure of a thing can have a decisive impact on the identity of the right. Three points help convey this idea. We will first look at two consequences following the restructuring of a thing that do not affect the identity, but only the attributes, of one's right to the thing. The final point gives us an example of when such restructuring could affect the right's identity.

First, the cashable value of a Cleopatra statue may be greater than a Churchill statue. However, fluctuations in the value of a thing can be attributed to extraneous factors – e.g., changes in market conditions of the thing. Nothing about my ownership of a house, or a remoulded statue, changes when their market value fluctuates. The duties of non-interference owed by others in relation to my thing remains constant. This fact applies to both personal and property rights. The nature and content of a contractual obligation does not change simply because what was once a good bargain turns out later to be a bad one. Of course, the value of a legal property right is significant when its holder seeks to realise that value by disposing of it. It might also be relevant to her

remedial options. Damages awarded for the theft of a more valuable object will likely be more than for a less valuable one. These consequences, however, stem from the changed attributes of a physical thing, not because its core status, as a *specific physical thing*, has changed.

Second, changes in structure might also give the thing a new name and, therefore, a new way of expressing one's ownership over it and others' duties in relation to it. Yet, describing a thing in a new way – for practical ease – does not imply that the nature of one's right in it has meaningfully changed.

Third, and crucially, remoulding a thing changes its spatial coordinates. This impacts how others may come in contact with it and thereby interfere with its use. In line with our findings in Chapter 2, it can be argued that changes in the structure of a thing can sometimes entail a new *activity* underpinning the duty of non-interference owed by others. What it *means* to refrain from careless or deliberate interference with Churchill and Cleopatra statues will differ, even if both items are

made of the identical material (i.e., the same physical subject matter). In some other cases, the spatial arrangement of a thing is not necessarily of the essence to its identity, and changes to the structure of the subject matter need not entail a new right. One example is of one's legal title to a barrel of oil. The oil is a fluid substance whose structure is inherently shaped by the physical conditions in which it is stored. Should the oil be transferred from a barrel to the tank of a motor engine, or if its spills onto the floor, it would be odd to say that one's *right* to the oil changes.

The argument presented here is that individuating the subject matter of a legal property right depends on the objectively discerned status held by a specific physical thing. The test must necessarily be 'objective' as legal property rights bind third-parties. If others are to be bound by new duties of non-interference as regards specific physical subject matter, there must be an objective standard through which this can be discovered. Three variations of a single fact-pattern help explain this idea.

Variation 1: Consider a case where one has legal title to a single liquid barrel of wax. The identity of one's title to the wax does not change when the substance is moved from a container with one shape to a container with a different shape. The *shape* of the thing – taken as a singular unit – is not objectively linked to its *status* as a specific thing of its kind. The activity of non-interference underpinning others' duties will be the same regardless of how that wax, as a whole unit, is shaped. So, the right to the physical subject matter would, in such cases, be identical in both an ***R*** and ***r*** sense.

Variation 2: However, if the wax is divided into two distinct containers, the situation would be different. The identity of the right would necessarily transform, as the objectively discerned basis on which the subject matter exists has changed. A single thing has now been split in two parts. Initially, others owed identical duties of non-interference with a single unit of wax of 'x' quantity. It would be clear to them now that they would owe

two *separate* duties of non-interference in respect *distinct* quantities of wax. Thus, the rights would be new in an ***R*** sense, as the right holder acquires two separate titles to *distinct* units of what was formerly a singular unit. As the two resulting units are entirely sourced from the plaintiff's pre-existing subject matter, the reasons grounding title to the former can be said to inexorably follow from those of the latter. These reasons, however, cannot be expressed in the *same* way. One is dealing with rights over *separated* and *distinct* quantities of (what was previously) the same thing; the reasons justifying a right in respect of each unit must be expressed independently of the unified mass from which they derive. This point is not purely semantic but is practically necessary. Should title to one unit of the liquid wax owned by A, its owner, be destroyed, the reasons grounding her title to *that* unit cease to exist. Yet, the reasons grounding A's title to the other unit of wax which she retains (i.e., her ***R***-right to it) continue to exist. We reach this intuitively straightforward conclusion because we individuated the ***R***-right in respect of each unit

separately from each other and from the unified mixture they were drawn from. So, this factor, as regards the division of prior subject matter, along with the changed activity underlying others' duties of non-interreference in respect of each unit, makes the resulting rights in *Variation 2* new in both the ***R*** and ***r*** sense.

Variation 3: Now, if the wax is not kept in a liquid state, but is moulded to make a statue of Cleopatra, its objective basis is inherently grounded in its status as *that particular statue.* When the statue is melted and refashioned into one of Churchill, the identity of the right, as we have seen, changes. As with *Variation 2*, the right here is new in an ***r***, as the activity underpinning the duty of non-interference is altered. However, unlike *Variation 2*, as the subject matter of the right remains the same, the right is *not* new in an ***R*** sense. In other words, the normative ground of the right-holder's title to each wax statue is the same. So, the reasons why others owe duties of non-interference in relation to both statues will be identical. No new reasons, on this basis, are needed

to justify an owner's title to a Churchill statue once refashioned from a Cleopatra one.

It is thus submitted that when physical rearrangements of a physical thing impact on its objectively discerned status, the identity of one's ***r***-right to that thing always changes. However, where the *same* subject matter is *wholly* restructured, a new ***r***-right could be created (because of a new activity), but no new ***R***-right emerges. By contrast, where physical restructuring only impacts the *attributes* of a thing, the identity of the right is left unchanged. Of course, these attributes are significant to the right-holder, and others, in a number of ways, but not in a way that implicates the *identity* of the right one has to a specific physical thing.

The remainder of this section examines cases where a collective physical structure is comprised of things that are owned not only by one individual – say, A – but also by another person or persons. Three examples:

Example 2 (*mixing*) – A owns a wax statue of Winston Churchill. B owns a wax statue of Cleopatra. The statues are uncoloured and are made of wax of identical description. The statues are stored together in a museum owned by B. A fire breaks out in the building, and both statues melt. The wax from each intermingles to form a homogenous admixture.

Example 3 (*specification*) – As above, A and B own their respective statues. B steals A's Churchill statue and melts it with his Cleopatra statue. B uses the resultant wax mixture to make a new statute of Godzilla.

Example 4 (*accession*) – As above, A and B own their respective statues. B steals the nose from A's Churchill statue and melts it into the forehead of B's Cleopatra statue. The Churchill nose cannot be removed without irreparably damaging Cleopatra's forehead.

If the objective status of the subject matter of A's right, before each event, is defined as the Churchill statue (including its parts, such as his nose), it could be argued that her claims in respect of it (or its parts), after the events, can result in the acquisition of new property rights. These rights will be new because they will be in respect of new physical subject matter created after each event, with stuff that previously belonged to A forming an indistinguishable part of the result. The law's task will then be to define the extent of A's right in the resultant objects – i.e., as against B's competing claim – by reference to factors like the relative blameworthiness of each party or the contribution each makes to the final product. As discussed below, English law is yet to develop a coherent set of rules to govern the outcome in such cases. Yet, the possibilities of A (or B) holding new rights in these circumstances have been left open.

The analysis in the subsections below engage with a crucial question. This concerns whether a plaintiff's pre-existing property right

can be seen as surviving once a mixing, specification, or accession event takes place. If it does, the next step is to examine if the reasons grounding that (***R***-)right are capable of justifying particular claims and remedies. Engaging with these issues takes us back to the identity conditions of legal property rights discussed in Chapter 2. It will be seen in the discussion below that, at common law, there may be cases where judges have assumed that the plaintiff's claim must be based on the existence a new right whereas, in fact, it can be argued that the pre-existing right can be seen to survive. If this is true, many cases can usefully be analysed as types of either *Consequential claims* or *Linked claims*. Applying these categories of this thesis' taxonomy to these fact patterns helps us appreciate what is at stake in them and provides a sound basis on which judges can decide between competing approaches.

B.I.i) *Mixtures*

> **Example 5** – A and B owned a sack each of peanuts (of the same quantity). The peanuts were of identical grade and

quality. Each sack was separately marked and transported at the back of a truck owned by B. Mid-journey, both sacks burst. By the end of the journey, the peanuts in both sacks had intermingled. It was impossible to ascertain to whom each individual peanut belonged.

Example 6 – C and D each owned a one-litre container of petroleum that was of identical grade and quality. Each container was marked separately and carried at the back of a van owned by D. The containers spilt, and the petroleum in each intermingled.

In responding to Examples 5 and 6, the late Roman Law[29] took as decisive whether each unit of a mixture had 'lost their physical integrity and became a single unit as a result'.[30]

[29] J. Inst. 2.1.27-28. See further: Buckland (n 4), 208-209.

[30] P Birks, 'Mixtures' in N Palmer and E McKendrick (eds), *Interests in Goods* (2nd edn, London: LLP 1998), 232.

In Example 5, each of A's and B's peanuts still exists, but there is an evidential difficulty in identifying which peanut belongs to whom. This is an instance of *commixtio*, where separable items of property are mixed. Roman Law's response was to take each contributor – A and B – as continuing to own their respective items of property as they did prior to the mixture.

Example 6 (and Example 2[31]), however, is different. It is (seemingly) an instance of *confusio*, where separate items of property have become one and indistinguishable. Here, it appears that the resultant mixture was understood by the Romans as a *new* item of property created by the merging (destruction) of two or more contributions. This new item was held by the Romans to be co-owned by the owners of the items that contributed to its creation. This was a new right that arose in response to the supposed 'destruction' of either party's prior rights (i.e., when the mixture took place). The conclusion is based on the view that the subject matter of the prior right is destroyed

[31] See on page 143 (above).

and, therefore, the right over it extinguished too. In principle, this is correct *if it is true* that the subject matter of the prior right no longer exists. Applying that principle to Example 6, however, is not straightforward, especially as we know the subject matter of C's and D's pre-existing right continues to exist within the admixture (although in an inseparable state).

English Law is yet to formulate distinct rules on the lines above.[32] In dealing with mixtures that were consensually made, the co-ownership solution (a tenancy in common) seems to be preferred by at least two cases.[33] Neither case, however, establishes its preference with reference to prior authority. Where the mixture was accidentally brought about, or by a third party, there are some *obiter* remarks to

[32] See *Clough Mill v Martin* [1984] 3 All ER 982, [1985] 1 WLR 111 (CA), 124 (*per* Oliver LJ): 'English law has developed no very sophisticated system for determining title in cases where indistinguishable goods are mixed or become combined in a newly manufactured article.'

[33] *Mercer v Craven Grain* [1994] CLC 328 (HL), 329 (although no prior authority was cited in support of the conclusion). See also *Glencore International AG v Metro Trading International Ltd* [2001] 1 Lloyd's Rep 284.

suggest that the same result should follow.[34] Professor Smith has argued that such references in the cases to 'co-ownership' are likely inexact and, in any event, practically problematic.[35] These claims have been doubted by some.[36] For the present purposes, it is not necessary to assess these differing positions. Although English law has not yet affirmed a decisive body of rules to deal with physical mixtures, it is nevertheless possible to approach the matter with existing principles at common law. These are principles which were detailed in Chapter 2 and marshalled in this chapter to give expression to this thesis' taxonomy of claims.

[34] *Buckley v Gross* (1863) 3 B & S 566, 577, 122 ER 213 (QB) (*per* Blackburn J); *Spence v Union Marine Insurance Co* (1867-68) LR 3 CP 427 (CP), 438 (*per* Bovill CJ); *Sandemans & Sons v Tyzack & Branfoot Steamship Co Ltd* [1913] AC 680 (HL), 694 (*per* Lord Moulton); *Indian Oil Corp v Greenstone Shipping SA (Panama)* [1987] 3 WLR 869, [1987] 3 All ER 893, [1988] QB 345 (QBD), 370 (*per* Staughton J).

[35] LD Smith, *The Law of Tracing* (Clarendon Press 1997), 70-77.

[36] A Waghorn, 'Sorting Out Mixtures of Property at Common Law' (2021) 84 The MLR, 71-75. See also M Raczynska, *The Law of Tracing in Commercial Transactions* (OUP 2018), 66-67.

One option is to analyse cases concerning physical mixtures as types of *Consequential claims*.[37] This approach is principally useful in helping us resolve most cases where claims *between co-contributors* are assessed. The starting point of this approach is the acknowledgement that the uncertainty with physical mixtures is *evidential*, not *legal*.[38] The difficulty in Example 5 is that neither A nor B can *prove* which peanut from the mixed mass belongs to either. Each peanut that belonged to either party before the event continues to exist. The problem, in other words, is of identification. The same applies to Example 6. The petroleum that belonged to C or D, prior to the mixture, continues to exist – although in an inseparable condition – within the mixture.[39] As a matter of law, therefore, it is possible for the parties to specifically assert – as against each other – their pre-existing rights in relation to the mixture. In Examples 5 or 6, A or C can bring claims against B or D if the

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[37] This approach follows P Matthews, 'Proprietary Claims at Common Law for Mixed and Improved Goods' (1981) CLP 159 and R Stevens, *The Laws of Restitution* (OUP 2023), 198-201.

[38] Stevens, *ibid*.

[39] Birks (n 30), 234.

latter refuses to return the former's items of property. In such events, however, their claims would only succeed as ones for damages. Indeed, as Professor Stevens correctly observes: 'no court will order the delivery up of what cannot be identified.'[40]

Thus, in cases like Examples 5 and 6, the plaintiff's claims – as against each other – could straightforwardly be understood as a type of *Consequential claim*. The subject matter of the plaintiff's prior right persists into the mixture in both cases. As her prior right, continues, in both an ***R*** and ***r*** sense, into the composite material mass, she can bring a claim in conversion which would be justified by the same reasons grounding her subsisting title to the things she owns. The remedial response to the claim – damages – will similarly mirror these persisting reasons (i.e., as a next-best means of the defendant answering to the reasons grounding her original duty of non-interference).

[40] Stevens (n 37).

Analysing cases featuring physical mixtures as *Consequential claims* provides solutions that are sound in principle so far as claims *between co-contributors* are considered. The utility of this approach runs out when examining claims *against third parties* who interfere with an admixture. This is where the co-ownership model could become a more apposite solution.[41] It is argued that a fairly strong argument for this model can be made if a mixing claim can be analysed as a type of *Linked claim*. The starting point of this approach is to take a rather different approach to the identity of the co-contributors rights following a mixing event. As we have seen, the *Consequential claim* model was based on the 'continuing title' view explained by the persistence of the contributors' subject matter into an admixture. However, in cases like Example 6, it is arguable that, from a third-party's point of view, the objective status concerning the physical subject matter of each contributor's pre-existing

[41] To be clear, it is not suggested that the positive law should recognise one model of claims against co-contributors and another for those against third parties. There is a sound argument to be made that, given the limited application of the *Consequential claims* model, the *Linked claim* analysis set out in this paragraph may be more apposite and so should govern *both* the position as between co-contributors and the position of third parties.

rights *has* undergone a shift. In other words, the mixing event impacts the way the activity underlying the duty of non-interference can be complied with. Initially, third parties owed two separate sets of duties of non-interference respecting separate quantities of petrol. After the mixing event this is *theoretically* still the case as the individual units of petrol continue to exist in the admixture (albeit in an inseparable state). *Practically*, however, it is unlikely that strangers can interfere with the admixture and *only* breach a duty owed to C whilst not simultaneously also breaching a separate duty owed to D (and vice versa). In any event, even if they could do this, it is impossible to tell *whose* specific right has been infringed (this is a problem faced in Example 5 as well). There are thus practical difficulties the law would face if it enabled C and D (in Example 6), or A and B (in Example 5), to assert – as against third parties – separate rights over their distinct subject matters. This practical concern can be resolved by recognising a *new* right (in an ***r*** and ***R*** sense), over *new subject matter* (the *whole* admixture) that is held by the co-contributors as tenants in common. Each contributor's share would depend on their contribution to the mixture. Should a third party

interfere with the new subject matter, they would breach a single duty owed to both contributors who enjoy a shared right to possession of the admixture (and, subject to joinder, either, or both, could thus bring a claim against the third party).

The justification for the new right entailed in the co-ownership model can straightforwardly be seen through the mould of a *Linked claim*. Each contributor's claim to the admixture would depend, in part, on their respective contributions to it. Thus, the reasons grounding their prior rights, over their distinct subject matters, would be a necessary ingredient in justifying the claim. However, it is difficult to justify how a court order, recognising a *new* right over the *whole* admixture, can be explained as a next-best means of giving effect to the reasons for the contributors' prior rights. Hence, the better view is that their new title to the admixture must be justified by further facts – e.g., the fact that the mixing was done without the parties' consent. The court order recognising the tenancy in common over the admixture would similarly

be justified by taking account of: (a) the reasons grounding the contributors' rights; and (b) the additional reasons grounding the claim.

Finally, it should be noted that there may be rare cases where the plaintiff's contribution to the admixture may consist of subject matter of special value. For instance, in Example 2,[42] A's wax statue of Churchill may have been made from candles exclusively sourced from the Churchill household when the man was alive. A damages award may not satisfy A, given the unique value of her contribution to the mixture. Her claim for specific recovery of the admixture itself would be especially strong in this case. In these circumstances, there might be a principled ground for a court to *consider* granting her a new property right over the whole admixture. Of course, in doing so, the court would likely have to condition this remedy on the plaintiff paying over to the defendant co-contributor the money value of their contribution to the admixture. It might also have to balance the competing interests of the defendant and weigh factors like the relative wrongfulness or

[42] See on page 143 (above).

blameworthiness of the parties in creating the mixture. An outline of these factors is detailed below in the discussion on specification.[43] For brevity, it is not repeated here. For now, it should be noted that where such claims might succeed, it will (or should) depend on the recognition of new property rights under the category of *Linked Claims*. As with the co-ownership model discussed above, the plaintiff will have to advance additional facts (e.g., respecting the special value attached her contribution to the admixture), that go beyond just the defendant's wrongful interference with the subject matter of the former's pre-existing property right. The presence of these additional facts, and their normative significance, as we have seen, distinguishes *Linked claims* from *Consequential claims*.

B.I.ii) *Accession*

[43] See concluding discussion in subsection B.I.iii) *Specification* (below).

Example 7 – A owns a bicycle. X steals a basket attached to A's bicycle and welds it into B's bicycle. The basket cannot be removed without irreparably damaging B's bicycle.

This is an instance of accession, based on the Roman law concept of *accessio*.[44] In such situations, a subordinate item of property is joined to a dominant item such that the former's identity merges with the latter. Unlike in mixing, the issue here is *practical* and not evidential. The identity and location of the subordinate item are clear even after it has acceded to the dominant item. The difficulty is in separating out the component – to return it to its owner – without damaging the principal product. The solution, in Roman law, was to treat the ownership of the component as lost once it had acceded to the dominant property. Blackstone suggested that English law has adopted the same rule.[45] In relation to chattels, support for the claim is limited,[46] and it has been

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[44] J. Inst. 2.1.26.

[45] W Blackstone, *Commentaries on the Laws of England – Book II* (17th ed, 1830), 404-405.

[46] See *obiter* remarks in *Appleby v Myers* (1866-67) LR 2 CP 651 (Ex Ch), 659–660 (*per* Blackburn J): 'materials worked by one into the property of another become part of the

argued that the rule does not exist in this jurisdiction.[47] If an independent accession rule does exist in the context of chattels, it seems that its structure would look like a *Linked claim*. The dominant owner's title to the new resulting product would depend on the reasons grounding her prior property right. It would additionally be justified by her showing that the subject matter of the subordinate owner's right has lost its *independent* identity on merging with the subject matter of the dominant owner's subject matter.

In contrast to chattels, the position in English law in relation to land is clear.[48] Where the degree of accession of chattel to land, and the objective purpose for which this was done, renders the chattel 'part and parcel' of the land, the chattel is 'annexed' to the land.[49] The result is that the chattel forms part of the pre-existing subject matter of the

property… Bricks built into a wall become part of the house; thread stitched into a coat which is under repair, or planks or nails and pitch worked into a ship which is under repair, become part of the coat or ship.'

[47] Matthews (n 37).

[48] *Elitestone Ltd v Morris* [1997] 1 WLR 687 (HL).

[49] *ibid.*, 689–93 (*per* Lord Lloyd), 698 (*per* Lord Clyde).

landowner's legal property right (the land). Again, the landowner's claim can be understood as a type of *Linked claim*. There is no question that her pre-existing title to the land is a necessary element of the claim. However, further facts – concerning the degree of annexation and its objective purpose – must be shown to ultimately justify the claim. In any event, in the case of both land and chattels, the justificatory basis of the accession rule is troublesome – i.e., to the extent that it treats the subject matter of the subordinate owner's right as 'extinguished' upon its accession to the dominant property. As with mixing cases, we know that the subject matter of the subordinate owner's property right continues to exist in the resultant product. The key question to ask is whether, in a given case, the law should allow her to continue to retain a property right in relation to that subject matter. As we have seen, in the context of land, English law has defined the circumstances in which she should not be entitled to do so. The remainder of this subsection looks at instances concerning chattels and explains how outcomes in distinct accession cases can be systematically rationalised through this thesis' taxonomy.

One application of the accession rule may be seen in the Canadian case of *Jones v De Marchant*.[50] X took 22 beaver skins, including 18 that belonged to his wife (P), and used them to make a coat for his mistress (D). P was entitled to recover the coat from D, and X's contribution of four beaver skins was held to have acceded to the coat (the dominant property). Professor Stevens argues that the case emphasised X's *deliberate* wrongdoing; this, coupled with alternative justifications for the result, means that it is not a clear endorsement of the accession rule.[51] X's duty not to interfere with P's beaver skins that he had wrongfully taken from P was not extinguished when he incorporated them into a coat. That duty subsisted as the subject matter of P's rights continued to exist within the coat. Once the skins were made into a coat, one straightforward way of analysing P's claim in relation to it is to see it as a type of *Consequential claim*, the remedy for which may only be satisfied, on the facts, by a damages award (i.e., because it would be physically impossible to extract P's original beaver skins from the

[50] *Jones v De Marchant* (1916) 28 DLR 561 (Court of Appeal of Manitoba).

[51] Stevens (n 37), 201-203.

coat). This, as we know, was not the outcome in *Jones v De Marchant*. The court's decision to award P a right to the coat (which was a new right, as it was composed of new subject matter) may be justified based on the *deliberate* nature of X's wrong. As the reasons for this remedial response drew partly on those grounding P's prior title to her beaver skins and on additional reasons (based on X's deliberate conversion of them), the outcome in *Jones v De Marchant* can be justifiably understood as a type of *Linked claim* that is not based on applying the accession rule.[52]

Acceptance of the accession rule also becomes difficult in more complicated cases:

> **Example 8** – A owns a bicycle. X steals the handles, wheels, basket, and gears from A's bicycle and uses them to replace the same equipment on B's bicycle. The parts cannot be removed without irreparably damaging B's bicycle.

[52] See also Matthews (n 37), 162.

Have A's components 'acceded' to B's bicycle, or has X manufactured a new piece of property?

In common with the approach suggested with mixing cases, it is sensible to start with the recognition that the contributors' respective titles persist even after the accession takes place. The subject matter of their rights continues to exist, but there is a practical difficulty in separating the component items from the principal item. Should the owner of the component(s) make a claim for delivery up, a court may only order the return of the item *in specie* if: (a) the defendant deliberately affected the accession (like in *Jones v De Marchant*); and/or (b) no damage to the principal item of property would be done if the component item was separated from the whole.[53]

Where delivery up of the principal item is awarded, a court order would recognise that the plaintiff has a new property right. This is because that right will be in respect of new subject matter. In

[53] As in *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick* [1984] 1 WLR 485 (QBD).

grounding this claim, the plaintiff will have to advance additional facts (set out above) that go beyond the defendant's wrongful interference with the former's pre-existing property right(s). Again, as with mixing cases, the new rights recognised through the remedial response to such claims will be justified under the category of *Linked claims*.

If facts on which a delivery up award depends do not exist, a court will recognise a personal claim for damages in respect of the plaintiff's subsisting pre-existing property right (which will be lost once this claim has been satisfied by the remedial award). An award of this kind is straightforwardly an instance of a *Consequential claim*.

B.I.iii) *Specification*

Example 9 – A owns a block of wood. X steals the wood and sells it to B. B, unaware of the theft, chisels the wood into a statue of King Kong.

This situation mirrors the Roman law concept of *specificatio*. By the time of Justinian, the solution was the following: if the new item could not be refashioned into its original form, it is owned by the manufacturer but not otherwise.[54] In a case like Example 9, application of this specification rule would render B's claim to the statue a type of *Fully independent claim*. This is because its justification in no way depends on B having a pre-existing property right in relation to the item. Her claim to it is entirely justified by independent reasons (i.e., her manufacture of an item that cannot be returned to its prior condition).

As with the arguments made in relation to mixing and accession cases, it is argued here that there is no need to resort to an independent rule on specification to justify the outcomes (in English law) to the disputes at hand. As the subject matter of the plaintiff's original legal property right subsists into the resultant product, the reasons grounding her original right have a continuing impact on her claims respecting

[54] J. Inst. 2.1.25.

them.[55] In most cases, we can analyse the outcomes in specification cases as types of *Consequential claims*. In select circumstances, where the court awards the plaintiff a new right (over a resultant product consisting of new subject matter), that claim can be seen to depend on certain additional facts (e.g., blameworthiness of the defendant). In these circumstances, the outcomes can be readily explicable as examples of *Linked claims*. Before setting out the detail of these explanations, the discussion in this subsection briefly outlines the current English position on the *specificatio* rule. It will be seen that this position does not exhaustively cover the range of cases in this area and nor is it justified on a principled basis. Acknowledging this, we can then appreciate how the categories in this thesis' taxonomy can help us obtain a coherent explanation of the outcomes in specification cases.

[55] It should be emphasised that the focus, in cases like Example 9, is on what rights A has in a case that involves some manufacture by another. It is in these circumstances that the question of what happens to A's pre-existing property right occurs. What rights B gets following the manufacture is not of interest in itself to this thesis' inquiry given that those rights do not depend on any pre-existing property right of B.

In English Law, the *specificatio* rule has been accepted in the case of lawful (or consensual) specification, subject to a contrary intention expressed by the parties.[56] With non-consensual or unlawful *specificatio*, English law does not provide clear authority. There is some indication that the wrongfulness of the defendant's conduct might be a relevant factor. In *Silsbury v McCoon*,[57] X stole P's corn and turned it into whiskey. D, X's judgment creditor, seized the finished product. The New York Court of Appeals held that if the manufacture was done innocently, the manufacturer became the owner of the new product but not if she did so wrongfully. As Stevens notes, this position is not entirely straightforward in cases like Example 9.[58] B, though blameless, still commits the tort of conversion (and trespass) by working on A's block of wood. Is blameless wrongdoing sufficient to deny B a better title to

[56] *Clough Mill v Martin* [1984] 3 All ER 982, [1985] 1 WLR 111 (CA), 119 (*per* Goff LJ). Oliver LJ (along with Sir John Donaldson MR) reserved his opinion.

[57] *Silsbury v McCoon* 3 NY 379 (1850).

[58] Stevens (n 37), 203-205.

the finished product than A? As a matter of principle, the correct outcome is not apparent in applying the *specificatio* rule.[59]

One English case which can be seen as supporting the *specificatio* rule – in the context of innocently (i.e., because authorised) affected admixtures – is *Borden (UK) Ltd v Scottish Timber Products Ltd*.[60] In that case, P supplied resin to D. It was subject to an 'all moneys' retention of title clause by which title to the resin would not pass to D until all invoices had been paid. With P's consent, D used the resin (which was still owned by P) for the manufacture of chipboard. Bridge LJ stated that it was difficult to distinguish this situation from that of fuel being consumed in a furnace to make steel.[61] Templeman LJ stated that when 'the resin was incorporated into the chipboard, the resin ceased to

[59] *Cf: Jones v De Marchant* (1916) 28 DLR 561 (Court of Appeal of Manitoba) (discussed above) where the defendant was both blameworthy and wrongful in his conduct. The solution there is more straightforward than in cases where the defendant is a blameless wrongdoer.

[60] *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] 1 Ch 25 (CA).

[61] *ibid*., 42.

exist.'[62] The retention of title clause, therefore, did not assist P's claim to the chipboard. Professor Matthews has rightly described these statements as '[reinventions of] the laws of physics.'[63] The resin was not consumed, nor did it cease to exist. It was simply incorporated into a new item that was in D's possession.[64]

Stevens convincingly argues that the result in *Borden* can be explained differently (i.e., as a case involving mixing).[65] The resin was converted, with P's consent, into chipboard using material that also belonged to D. Such material never belonged to P. P could not assert an immediate right to possess the resin (e.g., in the form of its molecules that continued to exist in the finished product) as it had no right to the other materials in the finished product. To take possession of the chipboard would, in this case, amount to wrongful interference with the

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[62] *ibid.*, 44.

[63] P Matthews, 'The Legal and Moral Limits of Common Law Tracing' in P Birks (ed), *Laundering and Tracing* (Clarendon Press Oxford 1995), 46.

[64] Stevens (n 37), 203-205.

[65] *ibid.*

materials in the chipboard that were D's property. The key question in this case, argues Stevens, is not whether the finished product was a 'new' thing, distinct from its ingredients. Instead, it is about whether the admixture was wrongful (*Silsbury v McCoon*) or innocent because it was authorised (*Borden*). Even where innocent, the outcome will depend on whether there is sufficient reason for the law to allow her to hold a property right over her pre-existing subject matter which now exists in the resulting product. Understood thus, and using this thesis' taxonomy, the results in *'specificatio'* cases can be explained as follows (i.e., where the parties have not agreed as to their rights over the resultant product):

i. *Wrongful and blameworthy conduct that results in a product (whether featuring an admixture that consists of the defendant's property or not)*: the plaintiff holds a property right over her pre-existing subject matter within the resultant product. The reasons grounding that right can thus play a part in justifying her claim to a new property right over the *whole*

product. In grounding this claim, the plaintiff will have to advance additional facts that go beyond the defendant's wrongful interference with the subject matter of the former's pre-existing property right(s) (e.g., as to blameworthiness). As with some mixing and accession cases, the rights (whether new, owing to the presence of new subject matter, or not) recognised through such claims can be justified under the category of *Linked claims*. The outcomes in *Jones v De Marchant* and *Silsbury v McCoon*can be explained on this basis.

ii. *Wrongful but non-blameworthy conduct by the defendant*:

a. *Where there is no admixture consisting of the defendant's property*: the plaintiff holds a property right over her pre-existing subject matter within the product, and can claim a new property right over the product, subject, however, to a condition that she pays the

blameless manufacturer/improver a monetary sum for the work undertaken.[66] The outcome in Example 9[67] can be explained in this way. This will be an instance of a *Consequential claim* whose remedial response takes shape in the form of specific relief. That remedy, however, will be awarded on the condition that the defendant is reimbursed for the work done to improve the subject matter of her right. If the plaintiff refuses to reimburse the defendant, then a court may well be persuaded to restrict her remedy to a damages award reflecting the value of her pre-existing right. This, again, will take shape as a *Consequential claim*.

b. *Where there is an admixture consisting of the defendant's property*: the plaintiff can, generally, only seek a personal award to satisfy her claim in respect of her pre-

[66] E.g., as in *McKeown v Cavalier Yachts Pty Ltd* (1988) 13 NSWLR 303.

[67] See on page 163 (above).

existing property right(s). This, again, is a type of *Consequential claim* and will not depend on the recognition of a new legal property right. The outcome in *Borden* is explicable on this basis. The only means by which a new legal property right (to the resultant product or admixture) can arise, in this context, is when the plaintiff can show a sufficient reason to ground a claim over the whole admixture (see the concluding paragraph of the discussion in subsection B.I.i) *Mixtures* (above)). If such an additional reason is shown, the claim to the whole admixture will be a type of *Linked claim*, one whose justification partly depends on those grounding the plaintiff's title to her pre-existing subject matter and partly on additional reasons supplied in the claim.

B.II. Substitutions

Example 10 – B steals A's laptop. She exchanges possession of it with X for X's title to a motorcycle.

In a case like Example 10, there appears to be no reported case in which English law has permitted A to claim that she has a legal title over the motorcycle in B's hands. This is likely because X intended to convey her title to the motorcycle to B and not to A.[68] A can, of course, bring a claim against B for damages for the wrongful conversion of her laptop. But it is not straightforwardly clear that she can claim a right to the motorcycle itself. Further, if B had exchanged title to the laptop with X for title to cash, A could recover the amount for which it was sold to X, but not the physical cash itself.[69] This, and a claim for damages, are straightforward examples of *Consequential claims*.

The examples discussed so far in this chapter were analysed as claims based on 'following' – i.e., locating the subject matter of a right.

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[68] Title to the motorcycle depends on the transferor's intention. See: *Commercial Banking Co of Sydney v Mann* [1961] AC 1 (PC) (Australia); *Union Bank of Australia v McClintock* [1922] 1 AC 240 (PC) (Australia).

[69] *Lamine v Dorrell* (1705) 2 Ld Ray1216, 92 ER 303 (KB).

In Example 1,[70] A retained her (better) title to the football upon X1 (and then X2) stealing it. A's claims against either party were based on following the subject matter of her right – the football – into the hands of X1 and X2. Likewise, claims based on legal mixtures, accessions, and specifications, are not, save in narrow circumstances, inevitably understood as based on an alteration of the plaintiff's rights in respect of new subject matter. Instead, on the approach preferred in this analysis, their basis, generally, is on identifying the plaintiff's right to a product, whilst recognising her continuing right in respect of her property that contributed to its creation. 'Tracing', on the other hand, which is the theme of this section, is a distinct concept. It does not focus on locating the subject matter of a right, but on identifying a new right[71] (or set of rights[72]) that was received in exchange for a prior right (or set of rights).[73] A typical illustration of how tracing operates is in the context

[70] See on page 122 (above).

[71] E.g., a personal right or title to specific physical subject matter.

[72] E.g., an account-holder's rights against her bank reflected by an account that is in credit.

[73] Professor Smith described tracing as addressing when 'one *asset* stands in the place of another': Smith (n 35), 4 (emphasis supplied). He however seemed to use the word

of a trust (these claims are the focus of Chapter 5 of this thesis). An example:

> **Example 11** – T holds title to an antique vase on trust for B. In breach of trust, T exchanges title to the vase with C's title to £500 in cash. C purchased the vase from T without knowledge of the prior trust.

As C is a bona fide purchaser for value without notice of the prior breach of trust, her title to the vase is not subject to B's prior equitable proprietary right under the trust. 'Following' the legal title to the vase into C's hands will, therefore, be pointless. B may, however, trace into T's title to cash acquired in exchange from C. On this basis, B

'asset' to refer to 'a common law or equitable property right': Smith (n 35), 119. It appears that this conceptual point was missed in Lord Millet's explanation of 'tracing' and 'following' in *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 127: '[t]racing is the process of identifying a new *asset* as the substitute of the old' (emphasis supplied). Lord Millet's exposition on this point, as his Lordship acknowledged in *Foskett*, was heavily influenced by Smith's leading treatise on tracing (cited above in n 35).

may claim a right in respect of the exchanged asset – the cash – *in specie*, or she may claim an equitable lien over it to secure a personal claim against T to reconstitute the trust fund.[74] The nature and justification of B's claim are considered in Chapter 5 of this thesis. For the present purposes, it is sufficient to note that rules on tracing have typically been developed in Equity. So, in Example 10, when dealing with property rights at common law, A's claim to the motorcycle in B's hands could succeed if it were possible for tracing to operate at law. As noted above, there appear to be no reported cases where tracing at common law – in cases like Example 10, featuring substitutions of title to physical subject matter – has been permitted. However, the English position seems to be that tracing is *theoretically* possible in this context. 'Theoretically', because there are so-called 'common law tracing' cases that feature bank accounts, or similar personal rights to be paid a sum of money, as the subject of unauthorised substitutions.[75] If possible in these instances, the

[74] *Re Hallett's Estate* (1880) 13 Ch D 696 (CA), 709; *Foskett v McKeown* [1998] Ch 265 (CA), 277, *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 130.

[75] The leading case on so-called 'common law tracing' is *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).

view goes, similar claims could be made when title to physical things have been exchanged for title to new physical things.

That said, even though 'common law tracing' is taken to be a possibility, its conceptual basis and its legal consequences are unclear. For instance, on the existing authorities, there is a lively controversy surrounding the nature of the right the plaintiff obtains over a traceable substitute at common law.[76] The question can be encountered by looking at the leading case on 'common law tracing'. In *Lipkin Gorman v Karpnale Ltd*,[77] Cass was a partner in a solicitors' firm. As an authorised signatory, he drew on the firm's client account with a bank. He used the money to gamble at the defendant's casino, occasionally winning but mostly losing the money he spent. In previous Privy Council decisions, it was held that a partner obtains good title to cash withdrawn from the

[76] Some seminal scholarly pieces on this point are S Khurshid and P Matthews, 'Tracing Confusion' (1979) 95 LQR 78; LD Smith, 'Tracing in Taylor v Plumer: Equity in the Court of King's Bench' (1995) LMCLQ 240; and LD Smith, 'Taylor v Plumer (1815)' in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart 2006).

[77] *ibid*: see esp at 573-574 (*per* Lord Goff). This reasoning was followed at first instance in *Agip (Africa) Ltd v Jackson* [1990] Ch 265.

partnership's bank account if he is an authorised signatory.[78] The result would be the same even if the partner withdrew the cash for his personal (and not the partnership's) purposes. In *Lipkin Gorman*, Lord Goff accepted that Cass had acquired good title to the cash he withdrew.[79] However, as it was the traceable substitute of the firm's chose in action with the bank, the firm could establish that it had a right to the cash Cass had withdrawn and which was subsequently received by the casino.[80] From Lord Goff's speech, it is difficult to understand the nature of the firm's right in respect of the cash that was withdrawn. Lord Goff refers to it as 'their property at common law'.[81] If this means that it is a right similar to A's right to her laptop in Example 10 – i.e., a right to immediate possession – the firm ought to have had a claim in conversion against the casino. Lord Goff, however, expressly excluded this possibility.[82] Another view, suggested by Professor Birks, is that the firm had a

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[78] See cases noted in (n 68), above.

[79] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL), 573.

[80] *ibid.*, 574.

[81] *ibid.*

[82] *ibid.*, 570, 573.

'power' over the cash, similar to a claimant's power to rescind a contract and have title to property, transferred under it, revested.[83] Even if this were true, such a power is not a 'right', for if it were, it would not be a power to vest a right.[84] Alternatively, Smith argues that common law relief for money had and received was based on the firm's right in relation to Cass's legal property right to the cash. His argument then is that this claim is best understood as one arising in Equity, with Cass holding the cash on trust for the firm and the casino subsequently receiving trust property.[85] The casino's liability therefore could be explained as a claim in knowing receipt.[86] However, as Stevens argues,[87] this view is also difficult to sustain. The firm's counsel refrained from relying on an equitable interest, and it was not established that the casino was aware of the firm's entitlement in respect of the cash or if the cash it received, or its traceable proceeds, were retained such that those rights

[83] P Birks, 'The English Recognition of Unjust Enrichment' (1991) LMCLQ 472.

[84] LD Smith, 'Simplifying Claims to Traceable Proceeds' (2009) LQR 338, 338-339.

[85] *ibid*.

[86] *Banque Belge pour L'Etranger v Hambrouk* [1921] 1 KB 321 (CA) can be explicable on this basis.

[87] Stevens (n 37), 205-209.

could be held on trust. This leaves one with an awkward conclusion that the nature of the firm's right in relation to the cash was some sort of an 'innominate right'.[88] This is an unsatisfactory state of the law to be in.[89]

The discussion in the first subsection below attempts to take the possibility of 'common law tracing' seriously and considers whether the plaintiff can indeed acquire a common law title to a traceable substitute (i.e., in the *same* way she held a common law title to the substituted asset). It considers this question by engaging the taxonomy introduced in this chapter. Ultimately, it is argued that the taxonomy could provide a justificatory model – in the shape of a *Partially independent claim* – to explain this (theoretical) possibility, but the content of that explanation is yet to be articulated in English law. Crucially, it will be seen that any attempt to do so will run into serious challenges. Accordingly, in the second subsection below, it is submitted that such claims are better analysed as a type of claim in Equity, where the plaintiff ought to be seen

[88] Smith, *The Law of Tracing* (n 35), 335-339.

[89] For a different explanation of the result (though not the reasoning) in *Lipkin Gorman*, see Stevens (n 37), 205-209.

as obtaining an *equitable* proprietary right in relation to a traceable substitute. This would mean that tracing cases at common law are more appropriately seen as a type of *Consequential claim* in Equity. If this is correct, the form of analysis undertaken in Chapter 5 (considering tracing claims against a trustee) will provide a better means to explain such claims. Their analysis need not, thus, inevitably belong to the current chapter on claims at common law.

B.II.i) *A possible justificatory model for 'common law tracing' claims*

In Chapter 5, we shall see that such claims cannot be in the nature of the *vindicatio*.[90] They are not based on the bald assertion of a pre-existing right. Additional facts must be proved in the claim – e.g., as to a substitution of a prior right having occurred. Further, the claim depends on asserting a new right over *new subject matter*, not the *same*

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[90] See Chapter 5, Section B.III. *Tracing claims as Consequential claims*.

right that was substituted. It is argued in Chapter 5 that, in the context of a trust, tracing claims are best seen as a type of *Consequential claim*. This is based on the view that in cases like Example 11,[91] T, at the start of the story, owes B a duty to exercise her powers of disposition over her title to the vase in conformity with the terms of the trust. On disposing of that right in exchange for a new right over new subject matter, the reasons grounding that prior duty do not disappear. They continue to hold T accountable to them. Holding her title to the substitute item (the cash) will constitute a next-best means of complying with these persisting reasons. It is argued in Chapter 5 that the additional facts proved in the claim – i.e., as to a substitution having occurred – serve as a trigger for a continuity of reasons to kick in. The fact of a substitution does not, however, have a normative role in *justifying* a claim contingent on tracing. That justification, as noted above, is supplied by the *same* reasons grounding T's prior duty to B respecting the vase. This is why B's claim respecting T's new title over new subject matter is in the nature of a *Consequential claim*. Now, one might say the same model should

[91] See on page 174 (above).

explain the (purported) outcome to a traceable substitute in a case like Example 10. At the start of the story, B owed A a duty of non-interference with A's laptop. By stealing that laptop and selling her possessory title to it in exchange for X's title to a motorcycle, the reasons grounding that prior duty continue to hold B accountable. Could the law's conferral of a better *legal* title to the substitute asset on A comprise the next-best means of B's complying with the reasons grounding her prior duty? No, it cannot. The difficulty with providing an affirmative answer is that X intended to convey *her title* to the motorcycle *to B*.[92] There is thus no legal basis on which X's title to the motorcycle can vest in anybody but B.[93] This difficulty does not arise in a case like Example 11. There, consistently with C's intention, legal title to the cash vests in T. T, however, will come under an immediate *duty* to hold that right on trust for B, in a similar way she did title to the substituted asset (the vase). To be clear, the argument is that, through the mould of a *Consequential claim*, we cannot conclude that – in Example 10 – A acquires legal title to the

[92] See cases noted in (n 68), above.

[93] Unless, of course, A is an undisclosed principal and X intends to transfer title to the agent (B).

substitute. This would not, however, rule out B having legal title, and A having some *lesser* legal interest (e.g., a power against B) in relation to the substitute. While this may be theoretically possible, there is no evidence in the law for recognising such a lesser legal property right.

It is also difficult to see how a tracing claim in Example 10 can fit the mould of a *Linked claim*. The additional facts proved in the claim – as to the occurrence of a legal wrong by B and her effecting a substitution of a right – do not seem to have any special normative significance. That is, they do not tell us why, contrary to X's intention, *A* should acquire a right to the motorcycle. It is also impossible to justify the claim as a type of *Fully independent claim*. We know that the presence of A's pre-existing right to the laptop is, at least, a *necessary* background condition in enabling her to make a claim to a traceable substitute of that right. This leaves us with one final possibility – to justify the claim as a type of *Partially independent claim*. This model would acknowledge A's prior title to the laptop as a necessary precondition of her 'common law tracing' claim. The justification for that claim, however, would be

independent of the reasons grounding B's prior title to the substituted asset. Whatever this independent justification might be, English law is yet to articulate it. Indeed, doing so would be challenging. That justification would have to offer one of two explanations. First, it would have to explain why X's intention to confer title to the motorcycle on B in Example 10 ought to be disregarded in favour of conferring a superior right to that asset on A. Alternatively, it must explain that A instead has acquired a different legal interest in relation to the substitute (e.g., a power against B). As noted above, there seems to be no evidence in English law of such an interest being conferred on A in cases like Example 10 (i.e., once *Lipkin* is discounted from the analysis). Further, the justification must be squared with the leading judicial explanation of tracing claims supplied first in *Taylor v Plumer*[94] and repeated in subsequent authorities.[95] This is the view that claims contingent on

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[94] *Taylor v Plumer* (1815) 3 M & S 562, 105 ER 721 (KB), 574–75 (725–26). See also *Lane v Dighton* (1762) Amb 409, 27 ER 274 (Ch), 413–14 (275–76) (*per* Sir Thomas Clarke MR).

[95] See, e.g., *Banque Belge pour L'Etranger v Hambrouk* [1921] 1 KB 321 (CA), 330 (*per* Scrutton LJ); *Boscawen v Bajwa* [1995] 4 All ER 769 (CA), 777 (*per* Millett LJ); *Re Diplock* [1948] Ch 465 (CA), 520; *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 108 (*per* Lord Browne-Wilkinson), 115 (*per* Lord Hoffmann), 127 (*per* Lord

tracing are based on the vindication of a plaintiff's pre-existing right (i.e., to the substituted asset). At least with the *Consequential claims* and *Linked claims* categories, this notion can be given *some* meaning – i.e., based on the *persisting* impact, in each of these categories, of the *reasons* grounding a plaintiff's prior right on her claim and the remedial response sought. In other words, in these categories, notwithstanding the formal distinction between the prior right and new right claimed, there is a meaningful sense in which the reasons grounding the former justify a claim asserted in respect of the latter. A *Partially independent claim* features no such normative continuity that justifies a claim to the new, substitute asset.

B.II.ii) *A better view*

Millett). For a fuller account (and critique) of the authorities adopting this idea, see A Nair, *Claims to Traceable Proceeds: Law, Equity, and the Control of Assets* (OUP 2018), [2.21]-[2.34].

The position taken in this thesis follows the extensive contribution made by Dr Aruna Nair on this point.[96] In short, Nair shows that the cases – both on 'equitable' and 'common law' tracing – reveal that claims to traceable proceeds share a unified formal structure. First, the defendant (e.g., a trustee or agent) holds a power (or powers), in respect of a specific asset (or assets), to vary the right(s) of the plaintiff (e.g., a beneficiary or principal), in respect of that same asset(s), against third parties. Second, the defendant also owes the plaintiff a duty to exercise this power in conformity with certain terms. Finally, it will be possible for the defendant to validly exercise this power even when doing so might constitute a breach of this duty. A typical example of this situation in Equity is of a beneficiary under a trust making claims to traceable proceeds held by a trustee further to an unauthorised disposition of trust assets. At law, it includes a principal's claim against an agent to traceable proceeds acquired through an unauthorised

[96] *ibid*., see esp chs 6, 7, and 8.

transaction;[97] of a bailor of assets against a bailee;[98] of a company against its directors;[99] and of a mortgagee against a mortgagor.[100] With the exception of plaintiffs who are victims of stolen money,[101] Nair convincingly argues that the rules of tracing in Equity have been applied in almost all cases, whether or not the plaintiff's original right was at common law or in Equity, regardless of whether the defendant stood in relation to her as a fiduciary.[102]

Drawing on the structural parallels between the facts of 'common law tracing' cases and those in Equity, it is possible to justify

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[97] *Burdett v Willett* (1708) 1 Eq Ca Ab 370, 23 ER 1017 (Ch); *Scott v Surman* (1742–3) Willes 400, 125 ER 1235 (CP); *Taylor v Plumer* (1815) 3 M & S 562, 105 ER 721 (KB) ; *Hopper v Conyers* (1866) LR 2 Eq 549 (Ch); *Re Strachan* (1876) 4 Ch D 123 (CA).

[98] *Re Hallett's Estate* (1880) 13 Ch D 696 (CA).

[99] *Ernest v Croysdill* (1860) 2 De G F & J 175, 45 ER 589 (Ch); *Ex parte Oriental Bank* (1870) LR 5 Ch App 358 (CA); *Great Eastern Railway v Turner* (1872) LR 8 Ch App 149; *Re Leslie* [1976] 1 WLR 292 (Ch D); *Dyson Ltd v Curtis* [2010] EWHC 3289 (Ch); *Access Bank v Akingbola* [2012] EWHC 2148 (Comm); *Goldspan Ltd v Patel* [2012] EWHC 1447 (Ch); *Templeton Insurance Ltd v Brunswick* [2012] EWHC 1522.

[100] *Buhr v Barclays Bank* [2001] EWCA Civ 1223; *Dick v Harper* [2006] BPIR 20.

[101] Nair (n 95), [8.17]-[8.33].

[102] *ibid.*, [8.33]- [8.35].

both under the rubric of a *Consequential claim* (i.e., as done in Chapter 5). Three consequences follow from this position. First, to the extent that cases like Example 10 do not mirror the unifying structure set out above, claims to traceable substitutes cannot be justified through the mould of a *Consequential claim*. Second, the remedial response to a 'common law tracing' case will never result in the plaintiff acquiring legal title to the substitute asset. Instead, as with tracing claims in Equity, title to that asset will vest in the defendant. The defendant, however, will come under an immediate duty to hold title to that asset for the plaintiff's benefit (i.e., similar to how the defendant's power over the substituted asset was held). We shall see in Chapter 4 that this way of holding a right mirrors how a trustee holds a right on trust, and is therefore in the nature of an 'equitable' (not legal) proprietary right.[103] Third, as Dr Televantos has argued,[104] the so-called 'common law tracing cases' (involving agency, companies, etc.) all depend on an *explicit analogy with trusts*. For

[103] See Chapter 4, Part **A. EQUITABLE PROPRIETARY RIGHTS UNDER A TRUST: AS FORM AND NORM**.

[104] A Televantos, 'Losing the fiduciary requirement for equitable tracing claims' 133 LQR 492.

this reason, the analysis in Chapter 5 – of claims contingent on tracing against a trustee – could be useful in understanding how tracing claims, with common law analogues of the trust structure, work.

CONCLUSION

This thesis' taxonomy, introduced in this chapter, provides a principled account of whether – and, if so, in what way – a claim in relation to a pre-existing legal property right consists in the reassertion of that right. It has been seen that framing a dispute in relation to this taxonomy helps us understand the particular justifications and content of different types of claim and the remedies that may be awarded in response to them. Part A of this chapter evidenced how this taxonomy can be applied to a spectrum of claims in respect of pre-existing legal property rights at common law. Part B then explained how its insights help frame and make sense of doctrinal problems in the context of some 'hard cases'. One type of hard case – so-called 'common law tracing' claims – is of special note. If the argument made in this chapter is correct – that such claims are best seen as a type of *Consequential claim* in the

same way as tracing claims in the trusts context – tracing claims at common law can be analysed analogously to claims discussed in Chapter 5 of this thesis. Whilst Chapter 5 will not, in any way, focus on so-called 'common law tracing' cases, the mould of the analysis adopted there can help us understand them. It will be seen that the reasons grounding a trustee's original duty – respecting her powers to deal with her title to a trust asset – persist, post a substitution, to justify claims to traceable proceeds of that original asset. In the same way, it is possible to say that the reasons grounding the defendant's similar duty in a 'common law tracing' case – i.e., over her powers to deal with the *plaintiff's* legal property right – persist to justify the plaintiff's claim over a traceable substitute in the defendant's hands. It can be argued that such claims may well belong in Equity – and not at common law – because the right recognised by way of remedy is not a common law title to the traceable substitute. Instead, it would be in the form of an equitable proprietary right, where common law title vests in the defendant and is held by her not outright, but for the principal's benefit.

Chapter 4 of this thesis will begin our analysis of pre-existing proprietary rights, claims, and remedies in the context of the trust. In contrast to the insights gained in Chapter 2, we will first examine how a trust beneficiary's equitable proprietary right is individuated in form and norm. Subsequently, we will engage the taxonomy set out in Chapter 1 and in this chapter to explain parallel types of claims in Equity.

Chapter 4:

Equity: Pre-Existing Proprietary Rights Under a Trust and Claims in Respect of Them

INTRODUCTION

Chapter 2 examined how a property right at law can be individuated in form and norm. Chapter 3 examined the distinct ways by which the normative ground of a pre-existing property right can be relevant to claims made in respect of it and the remedial response

sought. The present chapter undertakes the same inquiries in the context of an 'equitable proprietary right' under a trust.[1]

Part A sets out the formal structure of an equitable proprietary right. It focusses on the *locus classicus* of such a right – a trust beneficiary's (B's) right in relation to a trust asset. This focus is owed to this project's particular concern – in Chapters 5 and 6 – with claims made by a trust beneficiary. It will be seen that, unlike a legal property right, the subject matter of an equitable proprietary right is another right/power (and not the physical thing – if any – over which that right/power obtains); that right is held by a specific person (a trustee, T), on certain terms for B's benefit. Apart from, e.g., charitable purpose trusts,[2] *all* trusts – express and non-express trusts – share this formal

[1] The rights of a beneficiary under a fixed trust represent the *locus classicus* of the 'equitable proprietary right'. The law's treatment of equitable proprietary rights may well support analogous treatment of other similar legal structures both within trusts law (e.g., charities and discretionary trusts) and outside (e.g., companies) but this point is beyond the scope of this thesis. See further the brief discussion of this point in Part B of Chapter 1 of this thesis.

[2] See (n 1), above.

structure. B’s equitable proprietary rights also differ from legal property rights in how one identifies their normative ground. The normative ground of a trust beneficiary’s proprietary right is interlinked with its formal structure. In locating *why* a specific person is obliged to hold a specific right on certain terms for another’s benefit (i.e., in understanding how this form of right-holding comes about), the reasons grounding B’s equitable proprietary right emerge. It will be argued that, drawing on the form of the right, we can see why the right does not bind strangers to its creation in the *same* way a legal property right does. Unlike a legal property right, the subject matter of an equitable proprietary right is not presently and unconditionally vulnerable to direct interference by the world at large. Hence, there is no good reason for the law to generate strict *prima facie* duties of non-interference on the world at large to protect it. However, it is explained that this does not make B’s right a right *in personam*. As we shall see, the subject matter of B’s right is *potentially* vulnerable to direct interference if certain conditions are met. This is when T transfers the subject matter of the

right (her title to a trust asset)[3] in breach of trust to a third-party (C). In so doing, T puts it out of her power to specifically perform her duties of trusteeship to B – i.e., in relation to the now-disposed-of title. The fact that T can *validly* exercise her dispositive powers over title to a trust asset in this way makes B's proprietary right respecting it vulnerable to frustration (i.e., because it can no longer be specifically enforced). This, of course, explains why B can bring claims against T to reconstitute the trust. It also explains why C, the recipient of title to the trust asset, can also be subject to a claim by B in relation to that title (or its product) *if* certain conditions are met. These conditions are discussed in Chapter 6. The discussion of this point in the present chapter underscores how the distinct vulnerability attending the subject matter of B's equitable proprietary right generates third-party consequences that are quite different to those we have seen in relation to a legal property right. It is argued in Part A that to understand the unique ability of B's equitable proprietary right to affect strangers to its creation requires an

[3] Or exercises other powers (e.g. over land, by granting a legal charge).

appreciation of the right's particular form. It is neither in the form of a legal property right nor a personal right. It is a right *in relation to* another, distinct right (or power).[4]

Part B proceeds to employ the insights achieved in this chapter by detailing this thesis' taxonomy as it applies to claims in Equity. Of these, two types of 'hard case' call for a more dedicated examination. These are claims dependent on tracing and those made against a third-party recipient of title to a trust asset. Accordingly, Chapters 5 and 6 study each claim in turn. It will be shown there that the analytical structure offered by this thesis' taxonomy helps us achieve a more nuanced and principled view of these claims.

Part C concludes by looking at a contrasting formal account of an equitable proprietary right under a trust. This theory holds that the beneficiary's right (or the trustee's correlative duty) does not take, as its

[4] This follows B McFarlane and R Stevens, 'The Nature of Equitable Property' (2010) 4 The Journal of Equity.

subject matter, the specific rights that comprise the trust fund. Instead, its subject matter should be identified with the 'fund' itself as a juristic entity. If true, this would mean that equitable proprietary claims in relation to traceable proceeds – which are explained in Chapter 5 to be a type of *Consequential claim* – would look a lot more like a *vindicatio*. Further, on this view, if B's right is all along in relation to a fund, then there is no need to say a *new* right exists in relation to a traceable substitute. It is argued that this theory of a 'reified' trust fund is ultimately unpersuasive. Establishing this point allows us to apply the insights achieved in Parts A and B of this chapter to our study of tracing claims in Chapter 5.

A. Equitable Proprietary Rights Under a Trust: As Form and Norm

Equitable proprietary rights reflect a distinct form of holding other rights.[5] In the previous two chapters, we principally discussed rights to physical things that were held outright. In this chapter, we will focus on rights held by an individual not outright, but for the benefit of another under a trust. A central example is the fixed trust. Here the trustee holds rights (or powers) over specific assets on trust for a beneficiary (or beneficiaries). The beneficiary's right is an 'equitable proprietary right' and it relates to the separate rights held by the trustee.

To contextualise the forthcoming discussion, the structure of an equitable proprietary right under a trust is outlined immediately below.

Using the example of a fixed trust, the elements of this right are four-fold:

[5] WJ Swadling, 'Property: General Principles' in AS Burrows (ed), *English Private Law* (3rd edn, OUP 2013), [4.140].

(i) *Trustee (T)*: the identity of the person (singular or plural, natural or legal), that holds specific claim-rights or powers for the benefit of another;

(ii) *Beneficiary (B)*:[6] the identity of the person (singular or plural, natural or legal) for whom these rights (or powers) are held;

(iii) *Subject Matter (i.e., of B's equitable proprietary right)*:[7] the specific right (or power[8]) that T holds for B's benefit. The right held can be a legal property right (to specific physical subject matter), a personal right (which features no

[6] Not all trusts have correlative right-holders in this sense (e.g., charitable purpose trusts). However, this thesis' focus is on claims made in the context of trusts in which there are beneficiaries. The implications of the analysis offered in Chapters 5 and 6 to charitable purpose trusts will, however, be flagged where appropriate.

[7] For a detailed discussion on what can count as the subject matter of an equitable proprietary right, see: McFarlane and Stevens (n 4), 12-15.

[8] E.g., a shareholder in a company can declare a trust over her power to vote in company meetings.

right *to* specific physical subject matter),[9] or a separate equitable property right; and

(iv) *Obligation*: the activity that determines the content of the obligation(s) T owes to B in respect of the specific rights (or powers) she holds. Such obligations exist for all equitable proprietary rights (i.e., there must be a duty governing the exercise of the right or the power held for another).[10] In the context of the trust, the nature of T's obligation to B requires brief elaboration as its significance must be appreciated before proceeding with our inquiry in this chapter and in Chapters 5 and 6. The full content of T's obligation would, of course, depend on the specific terms of a

[9] Like bank accounts (see, e.g., *Paul v Constance* [1977] 1 WLR 527 (CA)) or other benefits arising under a contract (or *Don King Productions Inc v Warren* [2000] Ch 291 (CA), 321 (affd [2000] Ch 291, 335–336, CA).

[10] However, this idea is potentially problematic for restrictive covenants. See further: B McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' in S Bright (ed), *Modern Studies in Property Law*, vol 6 (Hart 2011), 319-320

given trust. However, as Professor McFarlane has argued,[11] there is a 'core' aspect of T's obligation to B that obtains in any trust, whether an express trust or a non-express trust. This is a duty of T to refrain from using her title to a trust asset for her own ends, unless she is authorised to do so (e.g., by the terms of the trust, through B's consent, or if T herself is one of the beneficiaries of the trust). Hereafter, this will, in common with McFarlane's usage, be called the 'core trust duty'. Of course, what it means for T to comply with her core trust duty will vary from trust to trust. With an express trust, compliance with the core trust duty will translate to an obligation on T to use her title, if at all, only in conformity with the terms of her office as trustee. Where trusts arise for reasons independent of the defendant consenting to hold rights on trust,[12] there will

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[11] For an overview, see B McFarlane, 'The Centrality of Constructive and Resulting Trusts' in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010); Ben McFarlane, *The Structure of Property Law* (Hart 2008), 551-555

[12] See examples in (n 13), below.

be no distinct trust terms for the purported trustee to conform to (as she had not consented to hold rights in a particular way). The trustee's core trust duty, in such cases, could broadly be expressed as an obligation to refrain from using the specific right in her hands as if she held it outright (i.e., absent authority to do so, as noted above). Of course, in instances of a non-express trust, it is possible to describe the core trust duty with greater specificity. We shall, for instance, explore this point when examining constructive trusts claimed over title to trust assets (or their products) in the hands of a recipient of those rights in Chapter 6. For the present purposes, it would suffice to note that the core trust duty is an essential factor present in every trust. Thus – between a pre-existing equitable proprietary right and a new right claimed – it is possible to find that the core trust obligation (or the reasons grounding it) persists notwithstanding changes to the other formal conditions. The full relevance of this point will emerge when we examine the claims in Chapters 5 and 6.

The rest of this part broadly draws on the structure set out above to explain the distinctiveness of equitable proprietary rights in relation to trust assets. Before turning to that discussion, three preliminary points about the normative ground of an equitable proprietary right are noted.

First, unlike with legal property rights, the normative ground of an equitable proprietary right fully embraces its formal identity. The normative ground of an equitable proprietary right explains the existence of a trust, in a particular instance, in the following terms: 'for **x**-reason,[13] T has come under a duty to hold a particular right (or power)

[13] E,g, because a settlor declared a trust over a specific right, in respect of which the intended trustee has accepted the office of trusteeship. Of course, non-express trusts arise for a variety of distinct reasons. One example is in a case like *Attorney-General of Hong Kong v Reid* [1994] 1 AC 324 (PC), where a trust was imposed on specific rights received by T, by way of a bribe, contrary to a pre-existing fiduciary duty owed to B. Another example is where a trust arises when A is under a contractual duty to transfer a freehold or lease to B: see, e.g., *Lysaght v Edwards* (1876) 2 Ch D 499 and *Walsh v Lonsdale* (1882) 21 Ch D 9. The *type* of reason justifying *any* trust is one that explains why an individual (e.g., T or A) must hold a specific right(s) or power(s) subject to a

for B's benefit'. That very statement doubles up as a justification for the right and an explanation of the *form* of right-holding which has arisen. There is, thus, no need to separate out the formal and normative dimensions of the right when describing its identity.

Second, the statement of an equitable proprietary right's normative ground – as with that of a legal property right, discussed in Chapter 2 – also explains its unique 'proprietary' consequences. 'Proprietary', in this context, has two implications. The first refers to the right's third-party effects – its ability to affect strangers to its creation. So, the reason why T is under a core trust duty, owed to B, in relation to a right also explains why that right is ringfenced from T's estate. That is, it tells us why that right – in the event of T's insolvency/bankruptcy – is not available to T's unsecured creditors.[14] Further, as we shall see in Chapter 6, the reason why T is under a core trust duty in relation to a

core trust duty to refrain from using that right/power for her own ends (absent authority).

[14] Insolvency Act 1986, s 283(3)(a).

trust asset also explains (in part[15]) why third parties who receive title to a trust asset (or its traceable proceeds), in breach of T's duty, could be bound by a trust over that title in a similar way as T was so bound.

A different type of 'proprietary' consequence concerns how, as opposed to claims made in respect of a legal property right, claims in relation to an equitable proprietary right under a trust can be *specifically* enforced *as of right*.[16] 'Specifically', in the sense that the default remedial response to a claim concerning T's dealing with title to a trust asset is not restricted, for instance, to a substitutive money award (that would compel T to pay over the monetary equivalent of title to a trust asset wrongfully disposed of). B may, at her election, compel T to restore title to a trust asset if she wrongfully withholds it from the trust.[17] Equally, B

[15] It will be argued in Chapter 6 that the reasons grounding T's duty, coupled with further facts of normative significance, explains why a third-party recipient of title to trust assets can be bound a trust in B's favour. Such a claim, it is argued, takes shape as a *Linked claim* in this thesis' taxonomy.

[16] See LD Smith, 'Equity Is Not a Single Thing' in D Klimchuk, I Samet and HE Smith (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020), 149-163.

[17] *Holder v Holder* [1968] Ch 353 (CA), 370-373.

may also claim a trust over T's title to a traceable product acquired by substituting a prior right held on trust.[18] As above, these consequences follow from the reasons grounding the right (its normative ground). As we will see in Chapter 5, the existence of a core trust duty on T's part, in relation to her title over a trust asset, tells us that T is also *disabled* (as against B) from exercising a power over that title inconsistently with her trusteeship duty. This means that while T can *validly* dispose of rights held on trust in breach of this duty, she is, for instance, disabled from keeping title to their proceeds outright.[19] In other words, her disability – justified by the same reasons grounding T's prior core trust duty – explains why holding title to traceable proceeds on trust for B constitutes a next-best mode of complying with her prior duty respecting the substituted asset.[20]

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[18] *Lord Hardwick v Vernon* (1798-99) 4 Ves Jun 411, 31 ER 209; *Ex p Reynolds* (1800) 5 Ves Jun 707, 31 ER 816; *Re Daly* (1907) 39 SCR 122.

[19] Her disability, in this sense, similarly explains why she cannot (without authority) withhold title to a trust asset from the trust, claiming it absolutely for herself.

[20] This idea is expanded on in Chapter 5, where claims contingent on 'tracing' against a trustee are explained as a type of *Consequential claim* per this thesis' taxonomy of claims.

A third, and final, preliminary point to note is on how the normative ground of a prior equitable proprietary right is discerned. In Chapter 2, we saw that the normative ground of a pre-existing legal property right is not expressed in the causative event that results in the recognition of that right. That is, X's contractually transferring her legal property right to a pony to Y does not tell us why that particular right in Y's hands is capable of binding strangers to its creation. In that context, the causative event only tells us what the content of the right (a right to immediate exclusive possession) is and how it was acquired. With a pre-existing equitable proprietary right, on the other hand, the causative event leading to the right's recognition also supplies its normative ground. So, when a settlor declares a trust by transfer of a right to an intended trustee, and when the latter accepts the office of trusteeship, that event reveals: (a) the content of B's right (i.e., the duties imposed on T respecting title to a trust asset); (b) the mode of its acquisition; and (c) the reasons grounding its recognition (its normative ground).

The section immediately below expands on the form and nature of an equitable proprietary right under a trust set out at the start of this part.

A.I. The Form and Nature of an Equitable Proprietary Right Under a Trust

Consider the following:

Example 1 – T holds legal title to a bicycle on trust for B. X steals the bicycle from T.

T owes an obligation to hold her title to the bicycle for B's benefit according to the terms of the trust. Does B have a right in relation to the bicycle itself? It was seen in Chapter 2 that such rights are vulnerable to depredations by strangers. Their inherent vulnerability to be breached justifies why such rights generate *prima facie* duties on others not to carelessly or deliberately interfere with the right-holders' use of their

physical things. Breaching this duty would render the wrongdoer liable to the right-holder in tort. As discussed in Chapter 2, a legal property right is an example of such a right in relation to a physical thing. So, if B's right in Example 1 is a right in relation to the bicycle itself, there is good reason for her to have a claim against X in conversion.

One can call this the 'proprietary view' of an equitable proprietary right.[21] In *Leigh & Sullivan Ltd v Aliakmon Shipping Ltd*,[22] the House of Lords rejected this possibility. It was said in this case that X, who carelessly or deliberately interferes with a physical thing, where T's right to that physical thing is held on trust for B, is liable only to T, the legal titleholder of that trust property, for that wrong,[23] and *not* to B, who

[21] *Cf* RC Nolan, 'Equitable Property' (2006) 122 LQR; RC Nolan, 'Property in a Fund' (2004) 120 LQR; A W Scott, 'The Nature of the Rights of the 'Cestui Que Trust'' 17 Columbia Law Review.

[22] *Leigh & Sullivan Ltd v Aliakmon Shipping Ltd* [1986] AC 785 (HL).

[23] i.e., assuming here that no-one else has legal title to or possession of the said thing.

holds no legal right *to the trust property* itself. The view has been maintained in several other cases.[24]

Nonetheless, some support for the proprietary view can be found in the difficult case of *Shell UK Ltd v Total UK Ltd*.[25] In that case, the Court of Appeal allowed B, joining T, to recover from X economic loss suffered by B as a result of X's carelessly damaging property held on trust by T for B. This could be seen as an indication that B had a direct right over the trust asset, in much the same way that T did. As others have argued, however, the judgment in *Shell* is either *per incuriam*[26] or need not be interpreted as an inevitable endorsement of the proprietary

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[24] *MCC Proceeds v Lehman Brothers* [1998] 4 All ER 675 (CA); *Schalit v Joseph Nadler* [1933] 2 KB 79; *Parker-Tweedle v Dunbar plc (No 2)* [1991] Ch 12, [1990] 3 WLR 767, [1990] 2 All ER 577 (CA); *Atlasview Ltd v Brightview Ltd* [2004] EWHC 1056 (Ch), [2004] 2 BCLC 191.

[25] *Shell UK Ltd v Total UK Ltd* [2011] QB 86 (CA).

[26] See WJ Swadling, 'In Defence of Formalism' in A Robertson and J Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart 2019), 105 (at footnote 50). See also R Stevens, *The Laws of Restitution* (OUP 2023), 216 (at footnote 12).

view.[27] The position in this thesis agrees with those arguments. That said, by drawing a contrast with the nature of a legal property right set out in Chapter 2, this section provides two further reasons why the judgment in *Shell* – in so far as it endorses the proprietary view – is incorrect.

First, as discussed in Chapter 2, the scope of what can count as a legal property right is restricted by the *numerus clausus* principle. That principle holds that only rights whose content reflects certain stipulations can count as a legal property right. Given this pre-defined and limited set of conditions – and the predictable shape of duties they impose on others[28] – third parties can reasonably predict when such a

[27] See *Hayton, McFarlane and Mitchell: Text, Cases and Materials on Equity and Trusts* (C Mitchell, B McFarlane and J Hudson eds, 15th edn, Sweet & Maxwell 2022), [12-107]-[12-110].

[28] See S Douglas and B McFarlane, 'Defining Property Rights' in J Penner and H Smith (eds), *Philosophical Foundations of Property Law* (2013), who persuasively show that the unifying content of legal property rights in relation to physical things is a *prima facie* duty of others to refrain from careless or deliberate interference with the specific thing (i.e., the subject matter of the relevant right). This idea was discussed in Chapter 2.

right exists and can fashion their conduct in a way that avoids an infringement of the right. Indeed, the purpose of the *numerus clausus* is to protect strangers to the creation of a right from breaching varied duties which are potentially undiscoverable *ex ante*. It also limits the information costs of discovering both what rights exist and what compliance with their correlative duties require.[29] An equitable proprietary right under a trust, on the other hand, is not subject to the *numerus clausus* principle. That is, the content of T's obligation to a particular beneficiary respecting title to a trust asset can take diverse forms, with almost no conceptual limit on what shape it might take.[30]

Second, we have seen that the justification for imposing strict *prima facie* duties of non-interference on others, in respect of the physical subject matter of a legal property right, is based on the inherent

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[29] See further: TW Merrill and HE Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 YLJ 3.

[30] McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' (n 10), 319-320.

vulnerability of a physical thing to external interference. B's right under a trust takes, as its subject matter, *another right* (or *power*) held by T. That subject matter is not inherently vulnerable to trespassory interference in the way a physical thing is. This justification, then, for giving B's equitable proprietary right multital (or *in rem*) protection against trespassers like X in Example 1 does not exist. This, of course, does not mean that B's equitable proprietary right is not meaningfully frustrated when third parties like X destroy or damage the physical subject matter of T's title. Doing so might, for instance, hinder T's ability to specifically perform her duties of trusteeship, in relation to her title over a trust asset, in the way a trust was originally intended to allow. In these circumstances, the law does not leave B without redress. In Example 1, B may compel T to bring a claim in conversion, trespass, or negligence against X.[31] However, this does not indicate that B must have any vested right to the physical subject matter itself. After all, 'compelling' T to bring the action shows that it is only the trustee who has a direct right to

[31] CPR, Pt 64 and Practice Direction 64A—Estates, Trusts and Charities, para.1(2)(a)(iii) and (c).

the bicycle and who can therefore make the claim. Further, as X's wrong is committed against T, B, in principle, should be unable (contrary to the view in *Shell*) to make a claim against X even if B *personally*[32] suffers consequential loss from X's wrong (this is so even when B is joined in the same action with T against X).[33]

None of the above is to suggest that B's right in relation to a trust asset is a purely personal right (capable of binding only T).

[32] B can sue third parties, in the stead of the trustee, through the 'Vandepitte' procedure (named after *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70 (PC) (Canada)). This is only available for losses sustained by the trust fund, and not for B's personal loss. See: *Parker-Tweedale v Dunbar Bank Plc (No1)* [1990] 3 WLR 767, [1990] 2 All ER 577, [1991] Ch 12 (CA), 20-21 (*per* Nourse LJ).

[33] *Hayim v Citibank NA* [1987] 3 WLR 83, [1987] AC 730 (PC), 747–748; *Parker-Tweedale v Dunbar Bank Plc (No1)* [1990] 3 WLR 767, [1990] 2 All ER 577, [1991] Ch 12 (CA), 19–20; *Nimmo v Westpac Banking Corp* [1993] 3 NZLR 218, 236–237. B may, however, make a claim against T for breach of a duty of care – for instance, on the basis that T negligently allowed the trust assets to be stolen.

Example 2 – T holds legal title to a motorcycle on trust for B. In breach of trust, T gifts her title to the motorcycle to C, her friend.

In a case like Example 2, the law is clear that C, who receives a right from T in breach of trust – and who cannot plead a defence such as overreaching or of a bona fide purchaser for value without notice – will be liable to account to B as a constructive trustee of title to the asset received (or its traceable product).[34] The ability of B's right to affect third parties in this way is, as we have noted, one feature that renders it an equitable *proprietary* right. To understand why the right behaves this way, it would be useful to examine two distinct versions of a right *in rem*, as explained by Professor Penner.[35] The first is the 'trespassory' version which binds everyone presently, and unconditionally, with a

[34] *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91, [80] (*per* Patten LJ).

[35] J Penner, 'Duty and Liability in Respect of Funds' in John Lowry and Loukas Mistelis (eds), *Commercial Law: Perspectives and Practice* (Butterworths 2006), 214-216.

prima facie duty not to deliberately or carelessly interfere with the right-holder's property. The second is the 'successor' version which also binds everyone, but only *potentially*; that is to say it only binds, subject to defences, those who may be successors in title[36] to the initial right-holder.

As discussed in relation to Example 1, the first type of *in rem* protection is unavailable to B, as the subject matter of *her* equitable proprietary right (T's distinct right) is *not* inherently vulnerable to *direct* trespassory intrusion. Only the subject matter of T's legal property right is, which, in Example 2, is the motorcycle (and T's right is therefore afforded trespassory protection). Of course, the *value* of T's title to a trust asset – the subject matter of B's equitable proprietary right – can be impacted when a third-party interferes with the asset. This does not mean T's *right*, *per se*, is inherently and directly vulnerable to third-party intrusion. That said, the second – successor – version of a right *in rem*

[36] In the present context, a 'successor in title' also includes one who takes a lesser right from the trustee (e.g., a charge).

does obtain, in a distinct way, in B's favour. This is because the subject matter of *B's equitable proprietary right* – which, as noted above, is *T's distinct right* to a trust asset – is uniquely and *directly* vulnerable to interference in a scenario like Example 2. When C acquires a right to a trust asset from T, the subject matter of B's right exits the trust. Where this is done in conformity with the terms of the trust, no problem arises. B's right in relation to that subject matter will be overreached.[37] T would be discharged of her core trust duty in relation to it. However, if C acquires a right to a trust asset from T, in circumstances where T has exercised her dispositive power in breach of a core trust duty, T's ability to *specifically* realise that *subsisting*[38] obligation to B *in relation to her right*

[37] *State Bank of India v Sood* [1997] Ch 276 (CA). See also: Nolan, 'Property in a Fund' (n 21), 111-117; C Harpum, 'Overreaching, Trustees' Powers and the Reform of the 1925 Legislation' (1990) 49 CLJ; D Fox, 'Overreaching' in A Pretto-Sakmann and P Birks (eds), *Breach of Trust* (Hart 2002); RC Nolan, 'Understanding the Limits of Equitable Property' (2006) 18 Journal of Equity, 24-28.

[38] *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424, [51] (*per* Lord Mance): 'Where an asset is held on trust, the legal title *remains capable of transfer to a third party*, although this undoubted disposition may be in breach of trust. But the trust rights, including the right to have the legal title held and applied in accordance with the terms of the trust, remain' (emphasis supplied).

over that asset is, by T's own exercise of a power, put beyond her reach. In other words, by T's exercising her dispositive power over a trust asset, her ability to specifically perform her duties as trustee to B would be frustrated (in so far as the disposed of asset is concerned).

So, a key point, for the present purposes, is that *the subject matter of B's right* is *directly* vulnerable to intrusion when it moves, through T's exercise of power, from T's hands – in breach of trust – to those of her successor(s) in title. This is not the case in Example 1, where only the subject matter of *T's* legal property right is in a state of such *direct* risk. In that case, to the extent that the realisation of this risk, by the conduct of a wrongdoer, impacts on T's ability to specifically realise her core trust duty to B, B can compel T to seek redress against a tortfeasor like X. There is no compelling reason, thus, that B should be seen as having a direct right to the trust asset that correlates to strict duties of non-interference against potential trespassers in Example 1.

Thus, it is submitted that in cases where T's successor in title can plead no defence to a claim by B, her receiving and retaining title to a trust asset (or its proceeds) is an instance of that special vulnerability having been *potentially* exploited. So, it is underscored (once again) that an important part of the justification for B's ability to hold C liable in this way stems from the special and direct vulnerability to successor intrusion attending the subject matter of B's pre-existing equitable proprietary right.

That there is a distinct vulnerability to direct (successor) intrusion over the subject matter of B's right becomes additionally clear when looking at the nature of T's dispositive power over a trust asset. This point is discussed in detail in Chapter 5. It is explained in outline here. T, as titleholder, can exercise powers of disposition over a trust asset as any person of that status can.[39] As between T and the rest of the

[39] T's *power* to deal with a trust asset, on the other hand, is owed to a 'power-generating' rule that is based on the legal consequences afforded to T's status as a titleholder; these rules define the *existence* and *scope* of T's power: J Hudson, 'Equity's Gloss on

world (including C), T's powers of disposition are unfettered.[40] T's duty to exercise these powers in conformity with a core trust duty is owed only to B.[41] Thus, it is possible for T to *validly* exercise a power to dispose of her title to a trust asset whilst simultaneously doing so in breach of trust.[42] This further exposes the peculiar risk attending B's right – the possibility of the specific realisation of T's duty in respect of T's title to a trust asset being denied (i.e., in the manner the trust was originally meant to secure). Indeed, if the law decided to treat B's right like a legal lease, which would become automatically binding on a third party,

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Authority' in B McFarlane and S Elliott KC (eds), *Equity Today: 150 Years after the Judicature Reforms* (Hart 2023), 28-35.

[40] A similar observation has been made in the context of a company dealing with its assets outside the scope of its Articles (note, though, that the rule against *ultra vires* transactions in this context is currently shrunken): see *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 (CA), 304 (*per* Browne-Wilkinson LJ).

[41] The *authority* conferred by the trust terms can be described 'power-controlling' rules, which determine the *lawfulness*, but not the *validity* of exercising a power: see Hudson (n 39), 28-35

[42] *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424, [51] (*per* Lord Mance).

including those like C,[43] the arguments, outlined above, concerning the right's distinct vulnerability, would be significantly weakened. As a matter of positive law, however, B's right is not given such effect, as Equity imposes certain conditions which must be met before C can be liable to B as a constructive trustee.[44] This is different from a legal property right whose correlative duties are *strict* in nature.

Following from the discussion above, we can see that the form of an equitable proprietary right gives us an important insight into its distinct nature. It is neither a right *in rem* (like a legal property right) or a right *in personam* (in the nature of a contractual obligation). It has instead been described as a right 'against' (or in relation to) T's distinct right over a trust asset.[45] The existence of B's interest in relation to the trust property does not result in competing titles to that property – i.e.,

[43] Compare the third-party effect of a legal lease in *Ashburn Anstalt v Arnold* [1989] Ch 1 (CA) with the denial of such effect for a licence to use land in *King v David Allen & Sons, Billposting Ltd* [1916] 2 AC 54 (HL).

[44] This aspect is discussed further in Chapter 6.

[45] McFarlane and Stevens (n 7).

of T's title co-existing with B's title.[46] Instead, Equity respects the common law's vesting of title to the trust property in T while, at the same time, it imposes duties on T, in relation to that right, for B's benefit. The subject matter of B's right, therefore, is not the subject matter of the right held on trust itself, but *T's right* to that subject matter.[47]

A.II. Conclusions to Part A

The emphasis in this discussion on the form of B's right, and the consequences attaching to it, also helps locate the nature of an equitable proprietary right within the broader interface between rules at common law and those in Equity. Unlike the common law, Equity is not best seen as supplying a standalone body of rules. So, Equity is not correctly

[46] B McFarlane and R Stevens, 'What's Special about Equity?' in D Klimchuk, I Samet and HE Smith (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020), 194-195. See also FW Maitland, *Equity; Also, the Forms of Action at Common Law: Two Courses of Lectures* (AH Chaytor and WJ Whittaker eds, CUP 1929), 17.

[47] McFarlane and Stevens, 'What's Special about Equity?' (n 46).

understood as recognising rights that parallel, or rival, those at law. B and T do not have distinct 'titles' to a trust asset – one 'legal' and the other 'equitable'. It is only T who has title to a trust asset, albeit subject to a duty to hold that title on certain terms for B's benefit. Put differently, B's 'equitable proprietary right' depends on T's duty in respect of a distinct right that T holds for B. Understood thus, Equity, through this illustration, can be seen to depend on the common law. The nature and content of Equity's proprietary rights are modelled with reference to – and not in competition with – common law rights.[48] This distinct form helps identify, as we have seen, the unique grounds on which these rights arise. It also shows how rules and their justifications in Equity do not interfere with, invalidate, or modify those arising at law. Hence, as noted above, T can validly exercise her legal title, *notwithstanding* that in doing so she breaches a trust duty owed to B. For, if Equity were to invalidate T's exercise of power, that would, where T holds legal title to a trust asset, directly conflict with the common law rule which governs

[48] As argued in B McFarlane, 'Form and Substance in Equity' in A Robertson and J Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart 2019).

the same situation. This would create incoherence in the law.[49] Thus, Equity's approach is to take legal rules as a given and fashion itself as a body of rules in relation to those rules. This second-order, supplemental, quality has attracted an appropriate label for Equity as a system of 'meta law'.[50] Equity's function as meta-law is best seen in the distinct form of an equitable proprietary right under a trust, and it is this form that gives all such rights their conceptual and normative unity.

B. A TAXONOMY OF CLAIMS

This part sets out this thesis' taxonomy in relation to equitable proprietary rights under a trust and claims, in the same way Chapter 3 did for legal property rights. As in the case of common law claims, the taxonomy shows that – with the exception of the *vindicatio* – the formal

[49] Maitland (n 46), 111-112; McFarlane and Stevens, 'What's Special about Equity?' (n 46), 194-195.

[50] I Samet, *Equity: Conscience Goes to Market* (OUP 2018); McFarlane and Stevens, 'What's Special about Equity?' (n 46); HE Smith, 'Equity as Meta-Law' (2021) 130 YLJ 1050.

identities of a pre-existing right and the right on which the claim depends (i.e., the right claimed by way of remedial response) are distinct. Nevertheless, it is possible to find distinct shades of continuity between their normative grounds – from total, to partial, to no continuity. As we shall see in Chapters 5 (tracing claims) and 6 (receipt-based claims against third parties), the taxonomy helps us acquire a nuanced view of the particular ways in which the reasons grounding a pre-existing right are 'reasserted' in a claim made in relation to it. The taxonomy helps in understanding the judicial reasoning used in some leading cases considering those claims.[51] As discussed below, the taxonomy also offers us one mode by which we can make *some* sense of

[51] In the context of tracing, see: *Taylor v Plumer* (1815) 3 M & S 562, 105 ER 721 (KB), 574–75 (725–26), 574-575 (725-26); *Lane v Dighton* (1762) Amb 409, 27 ER 274 (Ch), 413–14 (275-76) (*per* Sir Thomas Clarke MR); *Banque Belge pour L'Etranger v Hambrouk* [1921] 1 KB 321 (CA), 330 (*per* Scrutton LJ); *Boscawen v Bajwa* [1995] 4 All ER 769 (CA), 777 (*per* Millett LJ); *Re Diplock* [1948] Ch 465 (CA), 520; *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 108 (*per* Lord Browne-Wilkinson), 115 (*per* Lord Hoffmann), 127 (*per* Lord Millett). For receipt-based claims, see: *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457, [41]-[44] (*per* Lord Briggs), [155], [157]-[159], [172], [201] (*per* Lord Burrows).

the reasoning explaining money-claims, following a wrongful disposition of trust assets, in the often-criticised cases of *Target Holdings Ltd v Redferns*[52] and *AIB Group (UK) Plc v Mark Redler & Co Solicitors*.[53]

B.I. *Vindicatio claims*

In this category, the formal structure of a pre-existing right, and of the remedy, can, but need not be, the same. Whether or not the form of the remedy replicates the pre-existing right, the normative ground of the prior right is the same as that justifying the claim and the consequent remedy. Further, no additional facts are needed to either justify the claim (and remedy) or to trigger an occasion to bring it.

It was seen in Chapter 3 that the common law does not recognise this category of claims. Chapters 5 and 6 will specifically respond to

[52] *Target Holdings Ltd v Redferns* [1996] 1 AC 421 (HL).

[53] *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503.

arguments for the existence of the *vindicatio* – in the context of tracing claims and proprietary claims against recipients, respectively. It is argued that while no tracing claim can fit the criteria of a *vindicatio* claim (as set-out in this thesis), there is one type of case discussed in Chapter 6 which might meet such criteria. These are cases where a trustee, following a wrongful disposition of a trust asset, *reacquires* title to that asset. In these cases, it can be said that the beneficiary's right (and her claim) in respect of that asset is identical to the right she had from the outset. No new facts need be pleaded to enable her to bring the claim or for it to be justified.

B.II. *Consequential claims*

With a *Consequential claim*, the formal identity of a pre-existing right and the remedy are always distinct. An example at common law includes claims in conversion of chattel. When X steals A's football, A's pre-existing (primary) right is in the form of a legal property right (a right *in rem*). The remedy she seeks is usually a personal (secondary)

obligation on X to pay her damages.[54] However, the reasons grounding the pre-existing right are the same as those justifying A's claim against X. While further facts must be proved in the cause of action – as to the commission of X's wrong – they only trigger an occasion to bring a claim personally against the wrongdoer. They do not contribute to the claim's normative justification. Where the remedy sought is a damages award,[55] that remedial response is also justified by the same reasons (with X's secondary duty taking shape as a next-best means of complying with those persisting obligatory reasons).

[54] Although, it was seen that in some cases, the remedy can take the form of an order of delivery-up. In these circumstances, the formal identities of the pre-existing right and the right awarded by way of remedy will be identical.

[55] As discussed in Chapter 3, where the remedy sought is an order of delivery-up, the reasons grounding A's prior right and claim will not exhaustively justify the remedial response. In these cases, the court normally takes account of additional factors in reaching a decision.

In Equity, instances in this category include monetary claims against express trustees. On one view,[56] these can be categorised as either 'substitutive' or 'reparative'.[57] Both claims follow a breach of trust by the trustee (T) and were traditionally mediated through proceedings for an account (which, as a first step, identifies the deficit in the trust fund caused by the trustee).[58] Importantly, the significance of 'breach' in either context differs.

B.II.i) *Reparative money-claims*

Reparative claims follow a straightforward breach of T's 'management stewardship duty' to 'manage the trust property with

[56] This terminology follows S Elliott, 'Compensation Claims Against Trustees' (DPhil Thesis, University of Oxford 2002).

[57] One keeps to one side the judgments in *Target Holdings Ltd v Redferns* [1996] 1 AC 421 (HL) and *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503, which are addressed shortly below.

[58] It is presently possible to circumvent the accounting process in cases where a discrete loss to the trust fund is caused by a single breach: *Barnett v Creggy* [2016] EWCA Civ 1004, [2017] Ch 27, [22].

proper care'.[59] Where its breach results in loss to the trust fund, a reparative claim will compel T to pay a sum of money to make good this loss.[60] The claim depends on B showing that the relevant loss would not have occurred 'but-for' T's breach of duty.[61]

B.II.ii) *Substitutive money-claims*

[59] *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503, [51] (*per* Lord Toulson). See also Trustee Act 2000, s 1.

[60] *Partington v Reynolds* (1858) 4 Drew 253, 255–256; *Dowse v Gorton* [1891] AC 190 (HL), 202; *Re Stevens* [1898] 1 Ch 162 (CA), 170; *Elder's Trustee and Executor Co Ltd v Higgins* (1963) 113 CLR 426 (HCA); *Fales v Canada Permanent Trust Co* [1977] 2 SCR 302, 320. This includes the lost opportunity to obviate a loss or gain a benefit: *Sanders v Parry* [1967] 1 WLR 753 (Assizes), 767; *Nestlé v National Westminster Bank Plc* [1993] 1 WLR 1260 (CA), 1269; *Colour Control Centre Pty Ltd v Ty* NSW Sup Ct (Eq Div) 24 July 1995; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 685–686.

[61] *Target Holdings Ltd v Redferns* [1996] 1 AC 421 (HL), 436; *Collins v Brebner* [2000] Lloyds Rep PN 587; *Hulbert v Avens* [2003] EWHC 76 (Ch), [56]; *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131, [147]. *Cf Bairstow v Queen's Moat Houses Plc* [2001] EWCA Civ 712, [2001] 2 BCLC 531, [53]–[54].

With substitutive money-claims, breach refers to an act done by T – essentially, the disposition, variation, or appropriation of rights held on trust – contrary to the terms defining T's exercise of her powers over the trust assets. The relevant duty is a 'custodial stewardship duty' to 'preserve the assets of the trust except insofar as the terms of the trust permit the trustee to do otherwise'.[62] Breach of this duty does not result in the beneficiary's (B's) rights *against T*, in relation to the alienated assets, being overreached (as would be the case if the transaction were authorised[63]).[64] In other words, T's obligations to B, in respect of those assets, persist even after they are unlawfully taken out of the trust fund.

[62] *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503, [51] (*per* Lord Toulson).

[63] The power to overreach is typically sourced in the trust terms, allowing B's pre-existing right in respect of the trust property to be extinguished on T's making a disposition in accordance with those terms. Occasionally, however, and principally owing to a statutorily conferred power, it may also be possible for overreaching to occur even when T makes an unauthorised disposition (e.g., see Trustee Act 1925, s 17; Trusts of Land and Appointment of Trustees Act 1996, ss 10(1), 16(1), and (2); and Land Registration Act 2002, s 26).

[64] *Harvey v Stacey* (1852) 22 LJ Ch 23; *Re Kerr's Trusts* (1877) 4 Ch D 600, 604; *Clark v Revenue and Customs Commissioners* [2020] EWCA Civ 204, [2020] 1 WLR 3354, [45].

So, substitutive claims essentially ask T, post her unauthorised act, to perform a *primary* obligation under the trust.[65] Hence, these claims will compel T to restore an asset *in specie* to the trust fund where this is possible.[66] If not, they will be satisfied by compelling her to pay an abstract monetary sum to B, or into the trust fund, which is measured by the objective value of the assets that T should hold for B under the trust.[67] Usually, this is achieved by B falsifying the unauthorised transaction.

Example 3 – T holds a bank account with Z Bank on an express trust for B. The credit balance in the account is £5,000. T

[65] *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499, [104] (*per* Longmore LJ).

[66] *Cf Thorpe v Revenue and Customs Commissioners* [2009] EWHC 611 (Ch), [2009] Pens LR 139, [19].

[67] *New Cap Reinsurance Corp Ltd v General Cologne Re Australia Ltd* (2004) 7 ITELR 295, [55] (*per* Young CJ in Eq). See also *Re Anglo-French Co-operative Soc* (1882) 21 Ch D 492, [506]; *Re Windsor Steam Coal Co (1901) Ltd* [1929] 1 Ch 151 (CA), 166–167; *Knight v Haynes Duffell, Kentish & Co (a firm)* [2003] EWCA Civ 223, [36]–[39]; *Re Lehman Brothers International (Europe) (in admin) (No 2)* [2009] EWHC 2141 (Ch), [53] (*per* Blackburne J); *Crossman v Sheahan* [2016] NSWCA 200, [313] (*per* Ward JA).

invests £1,000 from the account to purchase shares in C Co whose current net worth is £500. Under the terms of the trust, T was not permitted to invest in shares in C Co.

If B opts to falsify the unauthorised transaction, T's payment will be treated *as if* it were made with her own money.[68] The result is that T must reconstitute the trust fund[69] by paying the wrongfully invested amount (£1000) back into the account.

In both types of monetary claim (reparative and substitutive), the normative basis of B's claims is the same as that of B's pre-existing right(s) in relation to T's right(s). Additional facts must exist to show that T exercised her powers over trust assets in a way that constituted a breach of trust. With reparative claims, these would be the facts constituting, for instance, T's negligent dealing with trust assets. With

[68] *Jackson v Dickinson* [1903] 1 Ch 947, 951–952. See also *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189, [13] (*per* Lord Sumption).

[69] This, of course, assumes that B has no interest in claiming the shares.

substitutive claims, these would be facts explaining that T exercised her dispositive powers over trust assets in circumstances where her duties respecting them have not been discharged. With both types of claim, the same reasons why T owed B a duty to exercise her powers over the trust asset, before the unauthorised dealing, persists in justifying the claim and in informing why she must be subject to a new *personal* obligation to make good her breach.

B.II.iii) *The position post-Target/AIB*

For completeness, it should be added that the precise line drawn between substitutive and reparative monetary claims has been blurred after the judgments in *Target Holdings Ltd v Redferns*[70] and *AIB Group (UK) Plc v Mark Redler & Co Solicitors*.[71] In *Target*, Lord Browne-Wilkinson distinguished between: (a) subsisting/ongoing 'traditional'

[70] *Target Holdings Ltd v Redferns* [1996] 1 AC 421 (HL).

[71] *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503.

trusts (whose objects may include those with contingent or indeterminate interests); and (b) bare trusts (which include terminated/exhausted 'traditional trusts', with a single absolutely entitled beneficiary, and bare trusts in a commercial transaction). It is principally in relation to the those subsisting/ongoing 'traditional' trusts in group (a) that substitutive compensation claims (namely, the option to falsify an unauthorised transaction) apply. The other types of trust, in group (b), subject to narrow exceptions, are governed by compensation rules akin to those featured in reparative claims. The exact scope of the law handed down in *Target/AIB* is subject to debate[72] If the position in *Target/AIB* is correct, it would mean that a larger class of money claims would now involve a reparative remedial response rather than a substitutive one.

One advantage of the taxonomy adopted in this thesis is that it offers an intelligible basis for treating, as counterparts, money claims

[72] For one famous critique of *Target*, see: PJ Millett, 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214.

that are reparative or substitutive. A common criticism levelled against *Target/AIB* is that the decisions recast a remedy that is properly aimed at enforcing the performance of a trust obligation (a substitutive award) into one orientated towards 'compensating' for loss consequent upon a breach of that obligation (a reparative award).[73] This criticism has merit. However, there *is* a meaningful sense in which claims for either award *are* similar. Both claims are of course grounded in distinct causes of action (i.e., in relation to distinct duties held by T). They also differ in how the remedial response to the claim takes shape – i.e., in the distinct ways 'next-best' compliance is conceived. Reparative claims seek to place the trust fund in the counterfactual position it would be in absent the wrong. Substitutive claims seek to enforce a primary trust obligation *notwithstanding its breach*. That said, each type of claim treats T's wrong (the breach of a trust duty) as a necessary background condition that creates an occasion to enforce a duty of next-best compliance. Equally, neither claim, nor the remedial award they respectively seek, is *justified*

[73] *ibid*., 225-227.

by T's wrong. In both cases, that justification is supplied by the continuing reasons that had grounded the relevant duty T breached. So, the *form of reasons* adopted in each claim, and the remedial responses they call for, are the same. Hence, they are treated as siblings in this taxonomical scheme, and this provides *some* rationalisation for the approaches in *Target* and *AIB*.

Further, casting both types of claims as *Consequential claims* gives us a principled basis for critiquing the reasoning in *Target* and *AIB*. We have seen that the default manner in which next-best compliance is conceived following T's breach of a custodial stewardship duty is through a substitutive money award. This is justified by the unique consequences attendant on T's breach of the relevant duty. With claims made by beneficiaries of trusts in group (b) (see above), should a court depart from *this* mode of next-best compliance, it would not be sufficient to justify the remedy *simply* as *the* next-best means of giving effect to the reasons grounding T's custodial duty. While it may still be possible to justify this departure as *a* form of next-best compliance, that form is

distinct from the way next-best compliance is traditionally fashioned in such cases. So, as we have seen in Chapter 1, the remedy would best be expressed in terms of next-best compliance with the reasons grounding a beneficiary's pre-existing right *plus* new reasons. The new reasons, here, would explain why the court is justified in departing from the default *mode* of next-best compliance in such cases. In *AIB*, Lord Toulson provided such new reasons. Looking specifically at commercial trusts, his Lordship observed that '[such a] trust differs from a typical traditional trust in that it arises out of a contract rather than the transfer of property by way of gift. The contract defines the parameters of the trust.'[74] In these cases, T's duties are 'likely to be closely defined and may be of limited duration'.[75] His Lordship cited, with approval, Professor Hayton,[76] who argued that 'where a bare trust is mere incidental machinery in the furtherance of a contractual agreement it seems that

[74] *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503, [70] (*per* Lord Toulson).

[75] *ibid.*

[76] *ibid.*, [71].

there are sufficient policy reasons to oust traditional trust law principles as to consequential losses'.[77] As Professor Davies has shown, this justification relates to principles concerning concurrent liability – for breach of contract and breach of a trustee's custodial duty – and is based on a view that contractual principles should prevail.[78] If this is the correct way of framing Lord Toulson's justification for departing from the default mode of next-best compliance, it gives us a pointed basis to critique the departure. That is, rather than rejecting (or endorsing) wholesale the conflation of reparative and substitutive remedial responses to claims in cases like *Target/AIB*, understanding them as *Consequential claims* gives us a more nuanced way to assess whether such a conflation is sound in principle. On this approach, if one finds the conflation justifiable, it would not be based on deforming or recasting traditional equitable principles applying to such claims. That is, it would not depend on reformulating the consequences attendant on T's 'breach'

[77] D Hayton, 'Unique Rules for the Unique Institution, the Trust' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Sydney: Lawbook Co. 2005), 305.

[78] PS Davies, 'Remedies for Breach of Trust' (2015) 78 MLR 672, 687-688.

of her custodial duty. Instead, to use Hayton's language from the quote above, it would lead us to show why traditional principles in this context should be 'ousted' in favour of a *different* set of principles. This way of assessing claims and remedies in *AIB*/*Target*-type cases does not require one to view their outcomes as inevitable attacks on orthodoxy.

B.II.iv) *Claims contingent on tracing*

An important point must be addressed in relation to substitutive claims. In some cases, B may, in falsifying a transaction, claim an equitable lien over a substitute asset to secure T's personal duty to reconstitute the trust fund. Further, as an alternative to falsification, B may adopt T's unauthorised transaction.[79] In Example 3,[80] she might opt to do this if the current net worth of the shares in C Co is greater than

[79] *Harrison v Harrison* (1740) 2 Atk 121; *Bostock v Blakeney* (1794) 2 Bro CC 653, 656; *Pocock v Reddington* (1801) 5 Ves Jun 794, 800; *Re Patten* (1883) 52 LJ Ch 787; *Re Jenkins* [1903] 2 Ch 362; *Wright v Morgan* [1926] AC 788 (PC), 799.

[80] See on page 231 (above).

the amount for which the shares were purchased (e.g. £2,000). This claim could require T to hold title to the shares on trust for B. Adoption, like falsification, is a species of a substitutive claim. However, as with a money claim secured by an equitable lien, it does not simply seek the enforcement of a pre-existing right through a substitutive monetary award. Unlike (unsecured) falsification and reparative claims, adoption, and the security sought through an equitable lien, entail a claim that *depends* on a *new* proprietary right over *new subject matter*. As argued in Chapter 5,[81] an assessment of these strands of B's substitutive claim also falls within the category of *Consequential claims*.

A common judicial justification for claims dependent on tracing was stated famously by Lord Ellenborough CJ in *Taylor v Plumer*[82] and has been repeated in subsequent judicial justifications of rights

[81] See Chapter 5, Section B.III. *Tracing claims as Consequential claims*.

[82] *Taylor v Plumer* (1815) 3 M & S 562, 105 ER 721 (KB), 574–75 (725–26), 574-575 (725-26); *Lane v Dighton* (1762) Amb 409, 27 ER 274 (Ch), 413–14 (275-76) (*per* Sir Thomas Clarke MR).

contingent on tracing.[83] This is the view that claims respecting traceable proceeds are based on vindicating pre-existing proprietary rights. It has been argued in Chapters 2, 3, and the present chapter, that this view – in so far as it implicates the formal identity of proprietary rights – is analytically indefensible.[84] The justificatory account, defended in Chapter 5 or this thesis, of claims contingent on tracing, as a species of *Consequential claims*, therefore does *not* find that a plaintiff's pre-existing *proprietary* right endures when its subject matter is disposed of. As Chapter 5 shows, however, understanding a tracing claim as a type of *Consequential claim* helps lend *some* meaning to the language used in the cases. This is based on the perfect continuity between the reasons justifying a pre-existing right and the reasons justifying the substitute right.

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[83] See, e.g., *Banque Belge pour L'Etranger v Hambrouk* [1921] 1 KB 321 (CA), 330 (*per* Scrutton LJ); *Boscawen v Bajwa* [1995] 4 All ER 769 (CA), 777 (*per* Millett LJ); *Re Diplock* [1948] Ch 465 (CA), 520; *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 108 (*per* Lord Browne-Wilkinson), 115 (*per* Lord Hoffmann), 127 (*per* Lord Millett),

[84] See also A Nair, *Claims to Traceable Proceeds: Law, Equity, and the Control of Assets* (OUP 2018), [2.21]-[2.34].

B.III. *Linked claims*

With *Linked claims*, the reasons grounding a prior right necessarily persist to ground a claim made in relation to it and the remedy sought. However, these reasons are not *sufficient* to justify the latter two. Additional facts must be proved which also contribute to the justificatory basis of the claim and the remedy. Thus, *Linked claims* differ from *Consequential claims* in two ways. First, this category does not feature a perfect continuity of reasons between a prior right, a claim, and the remedy pleaded. Second, the additional facts proved in the claim do not serve as simple triggers occasioning a claim. Instead, these facts are also normatively significant in justifying the claim and remedy sought.

At common law, it was seen that some examples of mixing, accession, and specification cases could be explained as types of *Linked claims*. In Equity, a core example could be claims against third-party

recipients of trust property.[85] Chapter 6 argues that the reasons grounding a plaintiff's pre-existing equitable proprietary right under a trust are essential to justify her claims against the third party (not being a good faith purchaser or one otherwise entitled to a similar defence). However, it must (or ought to, in principle) be necessary to *also* prove further facts, such as the defendant's receipt of a right from the trustee and the former's knowledge of the disposition being made to her in breach of trust. It will be seen that these further facts do not merely supply an occasion for the plaintiff's cause of action to be brought; they also play a role in justifying the claim and the recognition of a new right entailed by the remedial response. This finding is consistent with a broader position in the positive law that makes the enforcement of an equitable property right turn on whether the defendant's 'conscience' has been affected.[86] It is also consistent with the Supreme Court's recent

[85] See generally S Agnew and B McFarlane, 'The Paradox of the Equitable Proprietary Claim' in S Agnew and B McFarlane (eds), *Modern Studies in Property Law*, vol X (Hart 2019).

[86] 'Equity acts on the conscience of the owner of the legal interest': *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL), 709 (*per* Lord Browne-

reasoning on the justificatory basis of receipt-based claims in Equity.[87] The court observed that a personal claim in knowing receipt is closely related to a beneficiary's associated proprietary claim against a third-party recipient.[88] If this is correct – and it is argued in Chapter 6 that, in principle, it is – it is possible to show that *both* claims are types of *Linked claim*. On this basis, it will be argued that if knowledge is an essential, and justifiable, ingredient of a knowing receipt claim, it ought to play the same role in a receipt-based proprietary claim.

B.IV. *Partially independent claims*

Wilkinson); '[E]quitable interests arise from equity's recognition that in some circumstances the conscience of the holder of the legal interest may be affected. When the asset is transferred to a third party, the question becomes whether the conscience of the transferee is affected': *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424, [89] (*per* Lord Sumption).

[87] *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457.

[88] *ibid.*, [43]-[44] (*per* Lord Briggs), [158]-[159] (*per* Lord Burrows).

Here, the reasons grounding a pre-existing right are a necessary background condition for a claim to be brought and remedy awarded. However, the normative ground of the prior right forms no part of the justifications for the claim or the remedy. Those justifications arise from an independent source.

The example given in this category at common law was of a claim for statutory compensation in a case like *Re Ellenborough Park*.[89] In Equity, an instance in this category could be some cases featuring claims against third parties who dishonestly assist in a breach of trust. Claims based on accessory liability for breach of trust are not explored in detail in this thesis as they do not present specific issues that this project's approach is uniquely suited to resolve. They are, however, addressed in Chapter 6 to flesh out the distinction between *Linked claims* and those in this category as it applies to receipt-based liability of third parties.[90]

[89] *Re Ellenborough Park* [1955] 3 WLR 892 (CA).

[90] See Section D.II of Chapter 6.

B.V. *Fully independent claims*

Here, the pre-existing right and the reasons grounding it have *no* role in enabling or justifying a claim and remedy. That is, those reasons need not even form a background pre-condition for a claim to be brought. As discussed in Chapter 3, this category does not strictly belong to this taxonomy. It is, however, included here to show the limits of the taxonomy.

At common law, one example of a *Fully independent claim* is a claim based on the rule in *Rylands v Fletcher*.[91] In Equity, one might point to the supposed constructive trust arising in cases like *Binions v Evans*.[92]

[91] *Rylands v Fletcher* (1865) 3 H & C 774, 159 ER 737.

[92] *Binions v Evans* [1972] Ch 359 (CA). These claims are discussed as generating 'new, direct rights' in McFarlane (n 11), 20-21, 502-522; see also B McFarlane, 'Equity, Obligations, and Third Parties' (2008) 2 SJLS 308. Another example in this category may be *Crabb v Arun DC* [1976] Ch 179 (CA). In such cases, B has a right at the start of the story (B's freehold), but that is not relevant to the principle on which B acquires a right against A, his neighbour. The principle, in such cases can apply even if B has no property right at the start of the story (e.g., *Thorner v Major* [2009] UKHL 18, [2009] 1

In *Binions*, A, a freeholder, gave B a licence to occupy A's land. A then transferred her freehold title to C. At the time of the transfer, C promised A that B would be allowed to remain in occupation of the land. In return for this promise, A sold the land to C for a lower price. Ordinarily, C cannot be bound by B's licence, as this is a personal right against A.[93] Lord Denning MR, however, took the view that it would be 'utterly inequitable for [C] to turn [B] out contrary to the stipulation subject to which [C] took the premises.'[94] This led Lord Denning to hold that B, in the circumstances, acquired an equitable property right under a constructive trust against C. This is a puzzling outcome, not least because it is unclear what the subject matter of the trust is.[95] In any event, later cases have developed this view to hold that a constructive trust can

WLR 776 or *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8), where B only has a licence at the start, or even if B has no right at all at the start of the story (e.g., *Yaxley v Gotts* [2000] Ch 162 (CA)).

[93] *King v David Allen & Sons, Billposting Ltd* [1916] 2 AC 54 (HL) *King v David Allen & Sons, Billposting Ltd* [1916] 2 AC 54 (HL). This case was decided before the Contract (Rights of Third Parties) Act 1999 came into force.

[94] *Binions v Evans* [1972] Ch 359 (CA), 367.

[95] Swadling, 'Property: General Principles' (n 5), [4.126].

arise in B's favour if:[96] (i) C acquires a right over land from A; (ii) C promises A that B will be allowed some use of that land; and (iii) C acquires some advantage from A in exchange for the promise. If this is correct, B's equitable property right is clearly new. Importantly, B's claim in such cases will be based on *fully* independent terms – i.e., it will be based on C's particular conduct. B's prior right has no relevance in grounding her claim against C or the remedy a court might award. Indeed, it seems that B can bring a *Binions*-type claim even if she had *no* pre-existing right at the start of the story.[97]

So, a *Binions*-type claim is best understood as a *Fully independent claim*. For completeness, it should be noted that in *DHN Food Distributors Ltd v Tower Hamlets LBC*,[98] Lord Denning MR held that whenever A gives B an irrevocable licence to use A's land, a constructive trust arises

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[96] See *IDC v Clark* [1992] 1 EGLR 187 (CA); *Ashburn Anstalt v Arnold* [1989] Ch 1 (CA); *Lloyd v Dugdale* [2001] EWCA Civ 1754, [2002] 2 P & CR 13; *Chaudhary v Yavuz* [2013] Ch 249 (CA) .

[97] See McFarlane (n 11), 371, 434-435.

[98] *DHN Food Distributors Ltd v Tower Hamlets LBC* [1976] 1 WLR 852 (CA).

automatically in B's favour.[99] B's claim, and the remedial response awarded against C, in such scenarios, will not be based on reasons entirely independent of those grounding her original right. B's right (recognised by way of remedy) might then be said to arise under the category of a *Linked claim* or on some other basis. However, Lord Denning's reasoning in *DHN* has been heavily discredited.[100] It would seem apposite, therefore, to continue to view such claims as *Fully independent claims*.

C. THE TRUST AS A REIFIED FUND?

This chapter began by setting out the formal structure of an equitable proprietary right under a trust and explained its key consequences. It was seen that the subject matter of the right – as with a legal property right – is a key element of its form. To secure this idea,

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[99] This view has been rejected, albeit through *dicta*, in *Ashburn Anstalt v Arnold* [1989] Ch 1 (CA), 24 (*per* Fox LJ).

[100] See, e.g., *ibid.*, 24 (per Fox LJ).

one must address an important and contrasting view. This is the view that it is possible to lift the concept of a trust 'fund' to a juristic reality of the sort that characterises a beneficiary's proprietary rights as reified in the 'fund' itself. In other words, it describes the subject matter of B's equitable proprietary right as the trust *fund*. This view is different from the argument presented in this chapter that the beneficiary's specific equitable proprietary right (or T's specific correlative core trust duty) relates to a distinct right (or power) held by T which is of the essence to the identity of B's right (and T's duty). The consequence of this (reified fund) view is that the beneficiary's rights are not properly to be seen as in relation to specific assets within the fund, but in the fund itself. Substitutions of rights within the fund – discussed in Chapter 5 on tracing claims – then, do not feature claims respecting *new* rights over *new subject matter*. The reified fund retains its identity while its composition is altered. If this account is correct, it would mean that, contrary to the arguments made in Chapter 5, rights contingent on tracing are not to be regarded as *Consequential claims*. They would, instead, look very similar to *vindicatio* claims. On this basis, the idea that

tracing claims are justified on the basis of simply vindicating pre-existing rights would become defensible.

The first section below distinguishes the conventional (and uncontroversial) account of the trust fund from a separate view (which is our subject of attack). The next section explains why this second account is unpersuasive.

C.I. Two Visions of the Trust 'Fund'

One view of the trust fund, presented by Professor Nolan, is simple, straightforward, and orthodox.[101] His conception is as follows:

> The exact nature of a beneficiary's equitable proprietary interest in a trust fund is [...] to be determined by taking the interest in question, subjecting it to the trustees' power to deal with trust assets free of that interest, but adding to it whatever rights to the product of such dealing the trust

[101] Nolan, 'Property in a Fund' (n 21). See also RC Nolan, 'Understanding the Limits of Equitable Property' (2006) 1 Journal of Equity.

> (expressly or impliedly) confers on the beneficiary, as well as any other rights attached to the interest, for example, rights under an enforceable covenant for value to settle property. In short, the beneficiary's proprietary interest is a limited right in the present assets, which the trustees can overreach and attach to substitute assets. [102]

A working definition, then, is:

> The 'trust fund' is […] a set of assets; the beneficiary has rights in the 'trust fund', and so the beneficiary has rights in those assets, subject to the possibility that those rights might be overreached.[103]

On this view, the beneficiary's proprietary rights under a trust are against whatever assets comprise the fund from time to time. Through authorised dispositions by the trustee, her rights against new assets in the fund arise through the doctrine of overreaching. Where the trustee makes an unauthorised disposition, the beneficiary's ability to claim against assets acquired by the trustee in exchange are not referrable to the trustee's power as fund manager. Instead, to Nolan,

[102] *ibid.*, 116.

[103] *ibid.*

such rights are generated by 'mandatory rules of law'[104] and are justified by the 'scope' of the beneficiary's right(s) in the original trust asset(s) that the trustee unlawfully disposed of.[105] What is meant by the 'scope' of a beneficiary's pre-existing right is left undefined. However, on the view of tracing claims as a type of *Consequential claim* developed in Chapter 5, the justification for claims respecting traceable substitutes – whether effected through an authorised or unauthorised exercise of a trustee's encumbered power – is found in the reasons grounding the trustee's authority to deal with each right she originally holds on trust.

In contrast to this picture is Penner's vision of the trust fund.[106] In Penner's view, the trust 'fund' is a distinct proprietary subject and the beneficiary's right is in respect of the fund itself, not in respect of the

[104] *ibid.*

[105] *ibid.*, 124-130.

[106] Penner (n 35). See also J Penner, 'Property, Value, and Unjust Enrichment' in R Chambers, C Mitchell and J Penner (eds), *The Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) and J Penner, *The Law of Trusts* (12th edn, OUP 2022).

specific assets it may contain from time to time.[107] He acknowledges, therefore, that the conception of a reified fund as the subject of a beneficiary's right implies a sort of hybrid interest, not a property right in its strict sense. What then does it mean for the beneficiary to have an interest in the fund? Penner's answer: 'The interest the fund beneficiary has is one in which [she] has *no present interest* in any of the properties comprising the fund; [her] interest is only in whatever rights are given under the terms of [her] interest in the fund.'[108] To be clear, he does not deny that the assets comprising the fund are, at any moment, specifiable.[109] So far as the *trustee* is concerned the rights she holds on trust can (and must) be referrable to specific assets.[110] Indeed, should a trust be settled on abstract conceptions of an unspecified fund, this would fall foul of the requirement that the subject-matter of rights held on trust must be certain (one of the 'three certainties'). Penner's point,

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[107] Penner, 'Duty and Liability in Respect of Funds' (n 35), 12.16; Penner, *The Law of Trusts* (n 106), 2.48-2.50, 16.37-16.39.

[108] Penner, 'Duty and Liability in Respect of Funds' (n 35), 12.16 (emphasis supplied).

[109] Penner, 'Property, Value, and Unjust Enrichment' (n 106), 315.

[110] Penner, 'Duty and Liability in Respect of Funds' (n 35), 12.16.

rather, seems to be this: *from the beneficiary's perspective*, there is not, save in an exceptional set of situations, anything about *her* proprietary entitlements that are referrable to those specified assets. The exceptional circumstance in which it does is when 'things go awry' – namely, on the occurrence of a breach of trust.[111] It is here, in the beneficiary's ability 'to enforce a direct proprietary interest in individual items of the fund' that her proprietary rights under the trust are referrable to specific trust assets.[112] Even in these scenarios, the beneficiary's rights in respect of specific assets are typically short-lived. Consider a simple example: a trustee, in breach of trust, transfers title to an original asset held on trust to a third party (not being a bona fide purchaser for value without notice) in exchange for title to a new asset. Should the beneficiary seek to adopt the trustee's wrongful transaction, the satisfaction of this claim results in the new assets merging into the original trust fund.[113] On the other hand, if she attempts to follow the original trust asset into the third

[111] *ibid.*, 12.16.

[112] *ibid.*

[113] *ibid.*, 12.26-12.37.

party's hands (who can plead no defence to the beneficiary's claim in respect of it), the satisfaction of that claim imposes a new (constructive) trust over title to the asset, with the third party acting as a 'custodian trustee'.[114] The moment this trust arises, the beneficiary's rights are automatically refashioned, turning into a right in a fund, albeit a new fund over the right(s) held by the custodian trustee.[115] Further, when the custodian trustee reconveys (as she is obliged to do[116]) title to the original asset (or its traceable proceeds) to a party who will hold on the terms of the prior trust (who may or may not be the original trustee), title to that asset will merge into the original fund. In short, the beneficiary's rights in respect of specific assets crystallise for the limited purpose of satisfying claims that arise when those assets have been misapplied. On the satisfaction of such claims, her grip over specific assets releases and her rights are referred back to the reified fund.

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[114] *ibid.*, 12.38.

[115] Penner accepts, rightly, that the custodian trustee's obligations under such a trust are far more limited than the typical express trustee's: *ibid*. See also *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189, [31] (*per* Lord Sumption).

[116] See *ibid*.

It should be apparent that Penner's conception of the trust fund is not simply functional, but also formal. Functionally, from the beneficiary's perspective, she may look to the trust fund, as an entity in itself, rather than to its specific components – in other words as 'an interchangeable repository of value rather than a specific item of property in which [s]he has a vested equitable interest.'[117] Her ultimate concern often lies in the *value* of her share in the fund, rather than with its component assets per se. Penner's point begins from this understanding,[118] but exceeds it. Acknowledging the beneficiary's typical concern with the wealth-potential, or monetary value, represented by the trust fund, he then observes that she cannot simultaneously have a right to a specific asset *and* the value subjacent in it. To realise the exchange-value of an asset, she must divest herself of her right in it.[119] The beneficiary's interest being in wealth, or potential

[117] *Snell's Equity* (J McGhee QC ed, 34th edn, Sweet & Maxwell 2021), 2-010.

[118] Penner, 'Property, Value, and Unjust Enrichment' (n 106), 309, 314-315.

[119] *ibid.*, 309.

wealth, as represented in the fund, it is not correct then to attribute her right to specific assets within it. Her right is best understood as correlative to a duty imposed on the trustee to exercise trust powers over specific assets in the fund in a way that helps realise the value in them for her benefit. While the trustee's rights are in the specific assets held on trust,[120] the beneficiary's right is in the fund itself (i.e., a right that corresponds to an obligation on the trustee that she exercises her rights and powers over its specific assets, at any given time, in accordance with the terms of the trust and the general law). The beneficiary's rights *derive* from the trustee's rights over specific assets, but the former is entirely oblivious to those specific assets (unless, as Penner puts it, should 'things go awry'). To thus describe the subject-matter of a trust beneficiary's property right as relating to a reified fund, Penner also makes a tellingly *formal* point – i.e., one which concerns the architecture of a trust beneficiary's right (and a trustee's duty) under a trust, the legal relations that are implied in it. If he is right, the inevitable conclusion is that

[120] Penner, 'Duty and Liability in Respect of Funds' (n 35), 12.16.

changes in the composition of the trust fund have no bearing on the identity of a trust beneficiary's equitable proprietary rights. The question, then, of *whether* Penner is right is the subject of the next section.

C.II. Critiquing the 'Reified' Trust Fund

The idea of a reified trust fund forming the subject matter of a beneficiary's property right is unorthodox and has invited stiff criticism.[121] First, as argued in Chapters 2 and 4 of this thesis, the presence of *specificity* of subject-matter is a crucial feature of property rights both at law and in Equity.[122] A legal property right to a tangible thing is defined in respect of *that specific thing*. An equitable proprietary right, on the other hand, takes a *specific right* for its subject-matter. Such

[121] See generally: D Sheehan, 'Property in a Fund, Tracing and Unjust Enrichment' (2010) 4 Journal of Equity and M Raczynska, 'Parallels between the civilian separate patrimony, real subrogation and the idea of property in a trust fund' in LD Smith (ed), *The Worlds of the Trust* (CUP 2013); see also B McFarlane, 'The Trust and its Civilian Analogues' in L Smith (ed), *The Worlds of Trust* (CUP 2013).

[122] See also LD Smith, *The Law of Tracing* (Clarendon Press 1997), 50-52.

rights may be property rights at law (e.g., T's title to a specific bicycle), personal rights (e.g., T's personal right against her bank for the payment of a sum of money), or an equitable property right (e.g., T's equitable property right under a trust). Now, if a trust beneficiary's rights are *derived* from the trustee's specific rights – legal or equitable – it is unclear why the former should not be characterised in relation to each right held by the latter.

Second, if 'fund' is an umbrella term for rights held over a pool of assets, whose content may fluctuate from time to time, the identity of the fund, at any given moment, can only be determined by referring to the assets comprising it. The point, though obvious, provides analytically straightforward insights. Consider an example:

> **Example 4** – T holds two separate fee simple titles to distinct farmlands, Blackacre and Whiteacre, on trust for B. B lives abroad, and the trust provides, among other terms, that, for a period of twenty years, total proceeds from the annual yield of

both farmlands are to be paid to B outright. In breach of trust, T transfers her title to Blackacre to C, a wealthy investor, in exchange for a one-of-its-kind antique lamp. B's pre-existing equitable property right in relation to Blackacre was not protected by a restriction on the land register and C acquires title to the land outright.

The lamp being much more valuable than Blackacre, B happily adopts T's unauthorised transaction, compelling T to now hold her title to the lamp on trust. What justifies B's power to adopt the new asset into the trust fund? At the start of the story T held rights to two distinct assets on trust for B. In breach of trust, T exchanged title to one of those assets for title to a new asset. The inquiry can take a straightforward form: *what about B's pre-existing entitlement to a specific right held by T, and T's subsequent misapplication of that right in exchange for a new right, justifies B's claim in relation to this new right?* Penner's account, however, takes a more tortuous route. Prior to T's breach, B has no rights in relation to specific assets within the trust fund; her rights attach to the fund, a

reified entity, which floats over whatever specific rights T holds as trustee, but never so much as touches them. At the time of T's breach, however, a spotlight is cast on the specific right that is misapplied, enabling B to identify a claim in respect of it. At this point, should B elect to adopt the unauthorised transaction, T's misapplication is deemed retroactively authorised, allowing B to treat it is as if it was authorised all along. This gives B the ability to make a claim in respect of the new asset. Once the claim is satisfied, title to the new asset merges into the pre-existing fund, just as products of T's authorised applications of trust property would. While it is possible to analyse the situation in this way, it is not clear why one *should* do this. Even on Penner's own view, identifying B's right in respect of the original trust asset – albeit one that only crystallises at the time of breach – is a necessary step in her making a claim to the new asset. What does denying her rights to specific pre-existing trust assets, prior to breach, achieve? Why insist on her right being characterised in respect of a reified fund? It also should be noted that the substance of B's entitlements before and after breach is substantially altered. The trust terms entitled her to specific benefits in

respect of T's fee simple *to Blackacre*. The moment T's title to this parcel of land is exchanged for title to a lamp, the original terms of the trust – so far as *Blackacre* is concerned – *cannot* be carried out. To understand this shift, one must compare B's entitlement to specific assets within the trust fund before breach with its composition after the fact. While the trust fund, as a notional entity, persists before and after breach, the implications in either situation for B is different. This is an insight which the idea of B principally having a right to a reified trust fund cannot capture.

It is also unconvincing to reason back from the application of specific statutory provisions to make conclusive claims about the nature of a beneficiary's right under a trust. Penner gives the example of s 53(1)(c) of the Law of Property Act 1925 and notes that if B wishes to transfer the bulk of her beneficial entitlements under the trust in Example 4, she need not specifically state, in writing, her interests in respect of Blackacre *and* Whiteacre. That she need not do so, the argument goes, confirms that she has no pre-existing entitlements to

those assets, but only to the totality of the fund (an entity abstracted away from the specific assets that comprise it).[123] It should be noted that judges often give meaning to words in a statutory provision that are restricted to its context.[124] In *Vandervell v IRC*,[125] Lord Upjohn held that the formality rule in s 53(1)(c) serves a special purpose:

> [T]o prevent hidden oral transactions in equitable interests in fraud of those truly entitled, and making it difficult, if not impossible, for the trustees to ascertain who are in truth the beneficiaries.[126]

In other words, the rule protects both beneficiaries and trustees – the former from the risk of the trustee performing her trust obligations to the wrong person and the latter from coming under liability for the

[123] Penner, 'Duty and Liability in Respect of Funds' (n 35), 12.19.

[124] One example is the Supreme Court's interpretation of s 127 of the Insolvency Act 1986 in *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424, where it was found that a trust beneficiary's interest in shares is properly understood as her 'property' within the scheme of that Act (see s 436 of that Act which gives a broad definition to the term): *ibid*, [42]-[57] (*per* Lord Mance), [87] (*per* Lord Sumption).

[125] *Vandervell v IRC* [1967] 2 AC 291.

[126] *ibid.*, 311 (*per* Lord Upjohn).

same reason to the true beneficiaries. If this is correct, there is no reason for B, in Example 4, to list every single item within the trust fund, to which her interests attach, while disposing of them, so long as she is disposing of the bulk of her interests under the trust. On the other hand, if she purports to transfer only *part* of her beneficial interests – e.g., her interests in respect of Blackacre alone – the best view is that she *should* specifically mention this interest in the instrument of transfer. There is reason, therefore, to avoid inferences on the nature of a trust beneficiary's right under a trust from the requirement set out in s 53(1)(c) or other such formality rules.[127]

[127] Notably, in certain contexts, namely involving markets where equitable interests are the subject of regular financial trading, s 53(1)(c) is expressly disapplied: see, for instance, reg 38(5) of the Uncertified Securities Regulations 2001 (SI 2001/3755) and reg 4(2) Financial Collateral Arrangements (No 2) Regulations 2009 (SI 2009/2462). The reason is that strict adherence with the rule can be greatly inconvenient, leading to stultification of trade: Financial Markets Law Committee, *Property Interests in Investment Securties: Analysis of the Need for and Nature of Legislation relating to Property Interests in Indirectly Held Investment Securities* (Issue 3, July 2004), [6.9]. Keeping this reason in mind, one can hardly arrive at useful conclusions on the nature of a trust beneficiary's rights from these rules.

None of these criticisms suggest that Penner's theory is bereft of use outside the trust situation – specifically, to allied forms of holding rights. Consider the doctrine of relation back in the context of future assets subject to an equitable charge.[128] When future assets are subject to a charge, the doctrine of relation back allows those assets, as and when they fall into the ambit of the charge, to be deemed as charged at the time of execution.[129] With the trust fund, however, where assets are currently held within the fund, there is no difficulty in finding that the beneficiary has an actual interest in them from the outset. This can be said of both fixed and discretionary trusts.[130] The beneficiary of a discretionary trust has no present or future, contingent or defeasible, right to the trust

[128] This argument follows Sheehan (n 121), 231.

[129] *Re Lind* [1915] 2 Ch 345 (CA).

[130] Sheehan (n 121), 231-234 (who makes a similar argument in the context of discretionary trusts).

capital[131] or to a definable portion of the income it generates.[132] It would, however, be mistaken to think that she has no existing right *in respect of* the trust assets. The trustee has a duty to consider the beneficiary of a discretionary trust as a potential recipient of the benefit(s) under that trust.[133] The beneficiary also has a right to compel the due administration of the trust,[134] a *prima facie* right against the trustee to receive information and accounts of the trust,[135] and the right to bring a claim for breach of

[131] *Gartside v IRC* [1968] AC 553 (HL), 617; *Re Tantular* [2014] JRC 128, 2014 (2) JLR 25 (CA, Jersey), [30]; *Granada Group Ltd v The Law Debenture Trust Corp Plc* [2016] EWCA Civ 1289, [2017] Bus LR 870, [30]; *Biema Holdings Ltd v SG Hambros Bank (Channel Islands) Ltd* [2017] JRC 122 (Royal Court, Jersey), [61]. See also McFarlane (n 11), 242, 531-533, 551.

[132] *Sainsbury v IRC* [1970] Ch 712, 723H.

[133] *Gartside v IRC* [1968] AC 553 (HL), 605–606 (*per* Lord Reid), 617H–618B (*per* Lord Wilberforce); *Re Munro's Settlement Trusts* [1963] 1 WLR 145, 149A; *IRC v Eversden* [2002] EWHC 1360 (Ch), [2002] WTLR 1013, [13]–[14] (aff'd [2003] EWCA Civ 668; [2003] WTLR 893); *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139, [2016] 1 WLR 160, [13].

[134] *Whaley v Whaley* [2011] EWCA Civ 617, [2012] 1 FLR 735, [112].

[135] *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 (PC), [51], [66]-[67].

trust (against the trustee and also third party recipients of the original trust assets).[136]

CONCLUSION

Part A of this chapter explained how an equitable proprietary right under a trust is individuated in form and norm. It was seen that, unlike with a legal property right, to confront the normative ground of an equitable proprietary right is to equally appreciate its interdependence with the right's form. Appreciating the right's form is particularly useful as it tells us how its subject matter is – in contrast to that of a legal property right – vulnerable to a distinct type of direct interference by third parties. This explains a unique 'proprietary' consequence associated with the right, which distinguishes an equitable proprietary right from both a legal property right and a personal right.

[136] *Joel v Mills* (1857) 4 K & J 458, 473-476; *Cosser v Radford* (1863) 1 De GJ & S 585. See also: *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 (PC), [51]; *Lemos v Coutts (Cayman) Ltd* (2005) 8 ITELR 153 (Cayman GC), [47] (*per* Michael Briggs QC) (aff'd (2006) 9 ITELR 616 (Cayman CA)). See too *Johns v Johns* [2004] NZCA 42, [2005] WTLR 529, [34].

Part B of this chapter was dedicated to explaining how this thesis' taxonomy categorises different types of claims in Equity respecting prior proprietary rights. The taxonomy helps us achieve some useful insights. For instance, it provides us with an intelligible sense in which money-claims following a wrongful disposal of title to a trust asset, whether resulting in a substitutive or reparative award, can be understood as siblings under the category of *Consequential claims*. This provides *some* sort of defence for the often-criticised decisions in *Target Holdings* and *AIB*. It was also seen that the taxonomy can potentially help us grasp a principled view of claims and remedies in the context of tracing and the liability of third-party recipients of title to trust assets. This depends on casting tracing claims as a type of *Consequential claim* and receipt-based claims as a type of *Linked claim*. Doing so, however, requires further elaboration. Chapters 5 and 6 undertake this task. They will develop and defend the particular application of this thesis' taxonomy to tracing and receipt-based claims, respectively. It will be argued that viewing them in this frame reveals a principled, analytically

sound, way of grasping the content and justifications of the claims. It will also be seen that the view defended in these chapters can be reconciled with the language and reasoning used in the cases.

Chapter 5:

Claims Against a Trustee Contingent on Tracing

INTRODUCTION

In Chapters 3 and 4, it was argued that the identity of proprietary rights – at law or in Equity – depends on their subject matter. On this count, legal and equitable property rights differ in that the subject matter of the former is a physical thing, and the subject matter of the latter is a right. In either case, when a cause of action, based on the existence of a prior right, depends on asserting a right in relation to new subject matter, that right must necessarily be recognised as a *new* right. Once this is seen, the inquiry can proceed to the reasons for the recognition of this new right and the relationship between those reasons and the reasons supporting the plaintiff's prior right.

This chapter undertakes such an inquiry in the context of a trust beneficiary's (B's) claims respecting traceable proceeds against an errant trustee (T). Under this thesis' five-part taxonomy, it will be argued that these claims are best seen under the rubric of *Consequential claims*. The justificatory logic of those claims turns on the view that there is a normative feature of T's *duty*[1] respecting a trust asset, prior to her effecting a substitution of her title to that asset, that persists to justify her duty respecting a traceable product acquired by T in place of the prior asset. The logic of a *Consequential claim* draws and builds on a concept in the analytical jurisprudence of private law popularly known as the

[1] The focus, here, on T's duty, rather than on B's correlative (claim) right is deliberate. The core case examined in this thesis is of a trust under which there are specific beneficiaries who have 'equitable proprietary rights' in relation to trust assets. However, by framing the analysis here in terms of T's duties respecting those assets, the analysis in this chapter *could* equally lend itself to those trusts – e.g., charitable purpose trusts – under which there may be no beneficiaries who have rights respecting assets held by T. Further, as with B's equitable proprietary right, the identity conditions of T's duty also include specific subject matter (T's title to specific assets held on trust). In making these points, it is also clarified that references in this chapter to the justification of B's rights can also be understood as references to the justification of T's duty.

'continuity thesis' (discussed in Chapter 1, Section C.I). In brief, it provides that the reasons grounding T's duty continue, post-breach, to demand a 'next-best' form of conformity with the now-breached obligation. This chapter advocates for a specific version of the thesis styled as '*Reasons Continuity*'. *Reasons Continuity* does not limit the application of the continuity thesis to cases where there are *breaches* of primary obligations. So, when applied to claims contingent on tracing, an event that does not depend on a legal wrong – a substitution – is treated as sufficient to trigger a continuity of reasons that may then ground a new duty of next-best compliance.

If the case made for tracing claims being a species of *Consequential claim* were accepted, judicial language often used to justify claims in this area[2] can be understood on an analytically sounder

[2] See, e.g., *Banque Belge pour L'Etranger v Hambrouk* [1921] 1 KB 321 (CA), 330 (*per* Scrutton LJ); *Boscawen v Bajwa* [1995] 4 All ER 769 (CA), 777 (*per* Millett LJ); *Re Diplock* [1948] Ch 465 (CA), 520; *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 108 (*per* Lord Browne-Wilkinson), 115 (*per* Lord Hoffmann), 127 (*per* Lord Millett).

foundation. Such language has centred on B's *continuing* right – or T's continuing correlative duty – respecting an old trust asset as justifying her claim respecting the new asset – the traceable product – acquired by T in the former's place. As discussed in Chapters 3-4 of this thesis, such descriptions, taken literally, are indefensible. However, if one treats the persisting *reasons* grounding a pre-existing right or duty as providing an important part of the basis of the claim, then the language used in many of the cases can simply be treated as a shorthand for what is a more defensible frame of reasoning.

A further upshot is that explaining claims contingent on tracing as a type of *Consequential claim* is consonant with the existing judicial attitude towards such claims.[3] It aligns with the orthodox approach that a beneficiary's claims respecting traceable proceeds can be sufficiently justified by existing principles of the law of trusts. In other words, tracing claims explained as a *Consequential claim* can be contrasted with

[3] *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 108 (*per* Lord Browne-Wilkinson), 127 (*per* Lord Millett).

accounts that seek a radical departure from the existing law by justifying claims in this area as based on reasons different from those justifying the initial right – e.g., through a cause of action in unjust enrichment.[4]

This chapter begins by distinguishing the rules of tracing from the basis on which rights contingent on tracing are justified.[5] Part B then focusses on the latter aspect and develops a case for explaining tracing claims as a type of *Consequential claim*. The core case under treatment is those where a trustee effects an *unauthorised* substitution of trust assets. Accordingly, Part C looks at whether new rights following an *authorised* substitution can be explained as a type of *Consequential claim*. It is argued that it can, however, where a trustee's breach is at play, it would be mistaken to think her 'wrong' plays no role in the analysis. Following an examination of the role of T's wrongdoing in the structure of a

[4] For advocates of the unjust enrichment analysis, see e.g., AS Burrows, *The Law of Restitution* (3rd edn, OUP 2011), ch 6; J Edelman and E Bant, *Unjust Enrichment* (2nd edn, Hart 2016), ch 5; and C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones on Unjust Enrichment* (10th edn, Sweet & Maxwell 2022), chs 7 and 8.

[5] See text in (n 7), below.

Consequential claim, the chapter then turns to the rules of tracing and their relationship with the justificatory account of claims developed so far. In Part D, it is explained that the law's preference in establishing transactional links in a tracing context is consonant with *Reasons Continuity's* distinct treatment of T's breach. Part E then looks at three 'hard' cases and explains how they can be reconciled with the analysis developed in this chapter.

A. 'TRACING' DISTINGUISHED FROM 'CLAIMING'

Before attempting to justify claims contingent on tracing, there is an anterior issue relating to whether two distinct rights are linked together in a relevant way. Once that link is established, the task of justifying a claim to the new right, based on the reasons grounding the prior right, takes over. So, at the stage of resolving this anterior issue, questions concerning the justificatory workings of *Consequential claims* do not arise.

To illustrate, once can use an example of what could be seen as a common law *Consequential claim*. This is a case of *fructus*: an ewe births a lamb; once the birth (the triggering event) occurs, the reasons grounding an owner's right to her ewe are sufficient to justify her claim to be the owner of the lamb.[6] But why must *this* ewe and *that* lamb be linked together at all? After all, they are entirely separate entities. One answer may be: because one creature birthed the other, as explained by the laws of nature, and the law (of our legal system) deems this sufficient to recognise a legally relevant link between them. The logic of a *Consequential claim* may then enter the picture to explain *why* a right to the ewe justifies having a right over the lamb.

In the law of tracing, the anterior link established is not between things, but as between a prior *right* and a new *right*. The link between these rights is, of course, not drawn by the laws of the material universe. The link is established by the *legal* rules of tracing, whether at common

[6] For an account of the authorities in this area, see LD Smith, *The Law of Tracing* (Clarendon Press 1997), 21-24 and R Stevens, *The Laws of Restitution* (OUP 2023), 205.

law or in Equity. Beyond establishing that two rights are relevantly linked, the tracing rules do not justify a *claim* in relation to the new right. As Professor Smith explains,[7] the tracing rules are 'an exercise or process that is preliminary to the making of a claim.'

At a basic level – and in the context of the trust – the rules play out in a specific situation. This is where a trustee (T) holds a specific right on trust (hereafter, '**trust asset**'). The exercise of her power of disposition over the trust asset is subject to a duty (these powers are, hereafter, called '**encumbered powers**'). In essence, this is a duty not to exercise her powers over a specific trust asset for her own ends, absent authority (hereafter, '**the core trust duty**').[8] The rules of tracing respond to a two-fold question – i.e., *whether* T's exercise of her encumbered power over a trust asset has resulted in: (i) the disposal or alteration of the asset from

[7] Smith (n 6), 11. This is also the position taken by the courts: *Boscawen v Bajwa* [1995] 4 All ER 769 (CA), 334 (CA) (per Millett LJ); *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 109, 113, 128.

[8] For an overview, see B McFarlane, 'The Centrality of Constructive and Resulting Trusts' in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010); B McFarlane, *The Structure of Property Law* (Hart 2008), 551-555.

the trust; *and* (ii) the acquisition of a new right by T in circumstances where such acquisition and the exercise of power in (i) are transactionally linked.

While it is important to distinguish between the rules of tracing and the justifications of claims contingent on them, it is equally important to acknowledge the relationship between both. As we shall see in Part B (below), the reasons that justify T's duties in relation to the original trust asset continue to inform the reasons that justify her duties in relation to a substitute acquired by the exercise of an encumbered power. While the rules of tracing do not tell us *why* these reasons continue to operate, they tell us *when* they apply.

Part B, below, turns to the justificatory question – i.e., as to *why* the reasons grounding T's duty respecting an original trust asset continue to justify her duty in relation to a traceable substitute. It shows how the 'continuity thesis' works in the tracing context to justify claims over substitute assets on the basis of a perfect continuity of reasons. That

is why this project classifies such claims under the category of *Consequential claims*. Of course, the mere application of the continuity thesis does not secure this conclusion. As we have seen,[9] a perfect continuity of reasons applies to the *vindicatio* claim category as well. Hence, a separate section of Part B will explain how claims contingent on tracing are properly seen as part of the *Consequential claims* category.[10]

B. TRACING CLAIMS AS CONSEQUENTIAL CLAIMS: THE CONTINUITY THESIS

Prior to the Judicature Acts,[11] when a trustee (T) misapplied or withheld rights held on trust, the beneficiary (B) could go to the Court of Chancery to initiate a judicial execution (or administration)

[9] See Chapters 1, 3 and 4.

[10] See Section **B.III.** *Tracing claims as Consequential claims*.

[11] The Judicature reforms did not abolish judicial execution, but only barred them from being granted as a matter of course; this was principally to ensure that disputes could be resolved in an efficient and cost-effective manner: see S Elliott, 'Compensation Claims Against Trustees' (DPhil Thesis, University of Oxford 2002), 83-88.

proceeding for a common account.[12] Through an execution order, the court would assume supervision of the trust to 'ascertain, secure, and apply the property for the benefit of its rightful owner.'[13] On deciding to make the order, the court would first identify the rights held on trust. This would require T to supply accounts recording her dealings with the trust assets. T would normally include the impugned transaction in the outgoings, claiming to be discharged in relation to the relevant trust asset. In response, B could challenge this account by falsifying the transaction or, in the alternative, adopting it. If it was found that T had dealt with the relevant right in an unauthorised way, the order could, at B's election, take at least four different forms:

i. If T withheld a trust asset, she could be ordered to restore it *in specie* to the trust (or, in some cases, to sell the asset and pay its proceeds into the trust fund).[14]

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[12] See generally: TH Haddan, *The Administrative Jurisdiction of the Court of Chancery* (William Maxwell 1862).

[13] *ibid.*, 1.

[14] *Holder v Holder* [1968] Ch 353 (CA), 370-373.

ii. She could be ordered to pay a monetary equivalent of the value of the right (plus interest), at the time of its misapplication,[15] into the trust fund. This personal right of B's may, *prima facie*,[16] be secured by an equitable lien over any substitute right (or rights) T acquired by disposing of an old trust right, in breach of trust.[17]

iii. If T acquired a new right through the unauthorised transaction, B could alternatively adopt the

[15] *Shepherd v Mouls* (1845) 4 Hare 500, 67 ER 746, 504. However, if the value of the asset is higher at the date of judgment, its value on this later date may be awarded: *Re Massingberd's Settlement* (1890) 63 LT 296; *Re Bell's Indenture* [1980] 1 WLR 1217 (CA).

[16] '*Prima facie*', because, in cases where the claim is not against a wrongdoer but is made in competition with other innocent co-contributors to a mixed fund, the option to, instead, claim an equitable lien over the new right is not permitted: *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 132 (*per* Lord Millett).

[17] *Re Hallett's Estate* (1880) 13 Ch D 696 (CA); *Foskett v McKeown* [1998] Ch 265 (CA), 277, *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 130.

transaction and insist that it be brought into the trust account.[18]

iv. Lastly, if specific (and not substitutive) enforcement is preferred but cannot be rendered,[19] and it is possible to provide a substantially similar performance, T could be ordered to do so.[20]

The purpose of *each* remedial outcome is made clear through the opening words of the execution order: it was a direction that the trust 'be performed and carried into execution'.[21] As Dr Steven Elliott KC explains,[22] these words had been used consistently since the 18th century,

[18] *Lord Hardwick v Vernon* (1798-99) 4 Ves Jun 411, 31 ER 209; *Ex p Reynolds* (1800) 5 Ves Jun 707, 31 ER 816; *Re Daly* (1907) 39 SCR 122. B is in practice likely to take this route if the new right is more valuable.

[19] E.g., because the relevant asset was sold to a good faith purchaser.

[20] *Rutherford v Acton-Adams* [1915] AC 866 (PC), 869-870.

[21] *Atkin's Court Forms*, vol 41 (2nd edn, Butterworths Tolley 2000), paras [118], [119], and [249].

[22] Elliott (n 11), ch 4.

and they are strikingly similar to those used in an order to specifically perform a primary contractual obligation.[23] As the Court of Chancery saw itself as enforcing the *performance* of the trust, the basis of an execution order was distinct from a damages award at common law for breach of contract or a tort. When alleging that a right held on trust was dealt with in an unauthorised way, the essence of B's complaint had not been for an injury suffered for which reparation was squarely sought. Instead, she asked the court to enforce a *subsisting* entitlement under the trust.

Now, the notion of enforcing a subsisting entitlement is not immediately clear. B's entitlement, under a trust, relates to T's duty respecting a specific asset which she holds for B. Should T dispose of that asset, how can B's entitlement in relation to it persist?

[23] Requiring that the contract be 'specifically performed and carried into execution': *Atkin's Court Forms*, vol 37 (2nd edn, Butterworths Tolley 2000), form 64.

B.I. *The notion of 'persistence'*

> **Example 1(a)** – T holds title to a motorbike on trust for B. In breach of trust, T exchanges title to the motorbike with C's title to an antique vase.

As seen above, we know that, in Example 1(a), B may now (at her election) claim that T holds title to the vase on trust for B. What explains this outcome? A leading judicial explanation was stated famously by Lord Ellenborough CJ in *Taylor v Plumer*.[24] This has been repeated in subsequent judicial justifications of rights contingent on tracing.[25] This is the view that claims respecting traceable proceeds are based on vindicating pre-existing proprietary rights. In Example 1(a), this justification would work as follows. B's *prior* right respecting the

[24] *Taylor v Plumer* (1815) 3 M & S 562, 105 ER 721 (KB), 574–75 (725–26), 574-575 (725-26). See also: *Lane v Dighton* (1762) Amb 409, 27 ER 274 (Ch), 413–14 (275-76) (*per* Sir Thomas Clarke MR).

[25] See, e.g., authorities cited in (n 2), above. For a fuller account (and critique) of the authorities adopting this idea, see A Nair, *Claims to Traceable Proceeds: Law, Equity, and the Control of Assets* (OUP 2018), [2.21]-[2.34].

motorbike is the *same* right she asserts in her claim against T's title to the vase. In *Foskett v McKeown*, Lord Millett (with whom Lords Browne-Wilkinson and Hoffmann agreed) explained the idea in terms of '[t]he transmission of a claimant's property rights from one asset to its traceable proceeds.'[26] Professor Birks rightly objects to this explanation as adopting a 'fiction of persistence'.[27] The vase and the motorbike are separate things, and B's right respecting one is, by definition, distinct[28] from the other. As explained in Chapter 4, the specific subject matter of T's right is of the essence to the identity of *B's* equitable proprietary right.[29] Further, a declaration of trust had been made over title to the motorbike. Absent the terms of the trust providing for traceable products of that right to fall within the *same* trust, it is odd to say that T's

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[26] *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 127, 132 (*per* Lord Millett); see also similar expressions at 108-109 (*per* Lord Browne-Wilkinson) and 132 (*per* Lord Hoffmann).

[27] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005), 34-37.

[28] See Chapter 4, Part **A. EQUITABLE PROPRIETARY RIGHTS UNDER A TRUST: AS FORM AND NORM**.

[29] Although, see the discussion (and critique) of a different view on this point in Chapter 4, Part **C. THE TRUST AS A REIFIED FUND?**.

latterly acquired title to the vase is caught by the same declaration of trust. The settlor would have had no knowledge of the vase, and the language of 'transmission' is empty of explanatory force.

Nevertheless, it is submitted that the idea of vindicating pre-existing rights – in the tracing context – is not wholly incomprehensible. This position is built on the view that the same *reasons* grounding T's prior encumbered power over her title to the motorbike *persist*, post substitution, to ground B's claim respecting T's new right to the vase. So, while B's equitable proprietary right (and T's duty) respecting a traceable substitute is *formally* seen as new (as the subject matter of the right/duty has changed), the *normative ground* on which the new right/duty is justified is very closely linked to the prior right/duty respecting the substituted asset.

B.II. *Reasons Continuity*

This section sets out the thesis that there is a feature of the pre-substitution normative position that persists to justify B's right (and, necessarily, T's duty) in relation to the vase post-substitution. By acknowledging the point, one can see how, in Example 1(a), this sustains the notion of B's *persisting* entitlement respecting the motorbike (notwithstanding T's disposal of her title to it).

The position taken here follows from Professor Gardner's influential account known today as the 'continuity thesis'.[30] Gardner's thesis is based on 'reasons' continuity: i.e., that the reasons grounding a duty continue, after a triggering event (here, T's effecting a substitution), to demand a 'next-best' form of conformity with the original obligation. Hereafter, this will be referred to as '*Reasons Continuity*'.[31]

[30] See J Gardner, *Torts and Other Wrongs* (OUP 2019), ch 2.

[31] This terminology follows the usage in S Steel, 'Compensation and Continuity' (2020) 26 Legal Theory.

Some scholars have invoked *Reasons Continuity* to justify claims contingent on tracing.[32] It works in the following way. The reason why T holds title to a motorbike for B is, for instance, because T agreed to do so as an express trustee.[33] A key feature of T's power to deal with her title to the motorbike is a core trust duty to exercise her powers over trust assets, if at all, only consistently with the terms of that trust, unless authorised to do otherwise (e.g., by B's consent). By transferring that right to C in exchange for a new right, T ensures that *this* duty, in so far as it constrains her power to deal with title to the motorbike, is impossible to perform. However, the *reason (or set of reasons)* grounding that duty (e.g., T's consent to hold that specific right on trust) does not

[32] See S Agnew and B McFarlane, 'The Paradox of the Equitable Proprietary Claim' in S Agnew and B McFarlane (eds), *Modern Studies in Property Law*, vol X (Hart 2019), 307; B McFarlane and R Stevens, 'What's Special about Equity?' in D Klimchuk, I Samet and HE Smith (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020), 203-204; MJ Hafeez-Baig and J English, *The Law of Tracing* (The Federation Press 2021), [2.44]-[2.65].
[33] However, see (n 35), below. Where one is dealing with a non-express trust, whatever the reasons are that ground the recognition of that original trust will be the subject of *Reasons Continuity*: *ibid.*, McFarlane and Stevens (n 32), 203-204.

disappear.[34] It persists and demands *something* – i.e., accountability, or an answer, to those reasons – from T. Where, as here, perfect compliance is not possible, the next-best means of conformity will suffice.

A key feature of *Reasons Continuity* is that the reason which continues is one that *grounds* T's pre-existing duty. 'Grounding' reasons are key in this formulation. T's *consent* to hold a specific right as an express trustee is a legally constitutive reason justifying her coming under a core trust duty in relation to that right.[35] That a settlor declared a trust out of generosity towards the beneficiaries or that a trustee agreed to hold rights on trust because she was bored are not *legally constitutive* reasons in this context. In this context, it is T's objectively expressed *intention* to create and/or hold on trust that is relevant, not the *motive* behind them.

[34] Gardner (n 30), 55-57: 'It seems to leave some traces of itself, some echo, behind for later.'

[35] Although, T's consent is not a *sufficient* reason. She must, for instance, also acquire the right she undertakes to hold on trust. For a more complete account of the legally constitutive reasons justifying the recognition of an express trust, see: YK Liew and C Mitchell, 'The Creation of Express Trusts' (2017) 11 Journal of Equity.

As explained earlier in this thesis,[36] *Consequential claims* (along *vindicatio claims*) are distinct in that they feature a perfect continuity of reasons between those grounding a plaintiff's original right and the right she ultimately claims. *Reasons Continuity* explains how this operates when examining tracing claims as a species of a *Consequential claims*. T is the very one who consented to hold title to an original asset on trust for B. T's consent is a key element of the reasons grounding her core trust duty to B in relation to that asset. Importantly, such consent encompasses T's core trust duty governing the exercise of her power to deal with her title to the original trust asset. Once she effects a substitution of her title to that asset, nothing further is needed to ground the same *type* of duty (the core trust duty) extending to title to new assets acquired by T *through* the exercise of those very powers.[37]

[36] Chapters 3 (Section A.II. *Consequential claims*) and 4 (Section B.II. *Consequential claims*).

[37] This point is expanded upon in Section **B.IV.** Holding Rights Respecting a Traceable Product as a Form of Next-Best Compliance.

So, to sum up, *Reasons Continuity* explains the outcome in Example 1(a) as follows. The example features a specific right (T's title to the motorbike) that exists at time *t* in relation to which T has a power of disposition or variation. At time *t+1*, T acquires a new right over a new asset (the vase). What connects *t* to *t+1* is the acquisition of a new right *through* T's exercise of a power to dispose of (or vary) the old right at *t*. In the language of tracing, T's exercise of power (at time *t*) effects a 'substitution' (at time *t+1*). This power is held by T, at time *t*, subject to an obligation – owed to B – to exercise her powers over trust assets, if at all, only consistently with the terms of that trust, unless authorised to do otherwise. Such powers have been referred to in this chapter as 'encumbered powers'.[38] When the encumbered power is exercised at *t*, resulting in T's acquisition of a substitute right at time *t+1*, the reasons grounding the encumbrance (T's core trust duty) *persist* and explain why holding that new right at the latter point for B's benefit is *one* form of next-best compliance with that duty. By such reasoning, the apparent

[38] On acquiring a new right *through* the exercise of an encumbered power, the event constitutes a substitution (or exchange).

'*fiction* of persistence'[39] can seem *somewhat* less fictional. In other words, the claim depends on what is – in its form – a new right, but the reasons justifying that new right (when accompanied by the occurrence of particular facts, which, here, is T's substitution of a right held on trust) are the same as the reasons justifying the initial right.

B.III. *Tracing claims as Consequential claims*

Reasons Continuity operates in the same way through two categories of claim in this thesis' taxonomy. These are *vindicatio claims*[40] and *Consequential claims*. This chapter argues that claims contingent on tracing fall within a distinct subset of the second of these categories. They are not *vindicatio* claims because the right claimed is in respect of

[39] Birks (n 27), 34-37 (emphasis supplied).

[40] The main differences, with *vindicatio* claims, are: (a) *Reasons Continuity* does not ground a duty of 'next-best' compliance. Instead, it takes the pre-existing duty to persist and its enforcement is ordered in terms of 'best' compliance; and (b) that specific facts (e.g., wrongdoing or T's effecting a substitution) are not needed to trigger a continuity of reasons.

new subject matter – and is therefore a new right. Further, the claim depends on proving additional facts – that T has effected a substitution of rights held on trust – which do not apply to the *vindicatio*.

The view that tracing claims are *Consequential claims* can be illustrated by contrasting it with another instance of a *Consequential claim* in Equity discussed in Chapter 4 – substitutive money-claims against a trustee.

> **Example 2** – T holds a bank account with *Z Bank* on an express trust for B. The credit balance in the account is £1,000. T invests £1,000 from the account to purchase shares in C Co whose current net worth is £500. Under the terms of the trust, T was not permitted to invest in shares in C Co.

If B opts to falsify the unauthorised transaction, T's payment will be treated *as if* it were made with her own money.[41] The result is that T

[41] *Jackson v Dickinson* [1903] 1 Ch 947, 951–952.

must reconstitute the trust fund by paying the wrongfully invested amount (£1000) back into the account.[42] This is a *Consequential claim* as T's obligation, at B's election, to reconstitute the fund is justified by the same reasons grounding her prior duty to hold her bank account – with £1,000 credit balance – on trust for B. Additional facts must be proved in the claim – concerning T's unauthorised disbursal – but they do not contribute to the reasons justifying the claim. Now, it is important to note that a core feature of a substitutive money-claim is that it does *not* depend on the plaintiff (here, B) having a new proprietary right, composed of *new subject matter*. This distinguishes a tracing claim from a substitutive money-claim, although both are instances of *Consequential claims*. Both types of claim seek to enforce T's subsisting primary obligation to perform the trust through substitutive means. However, substitutive money remedies have the effect of resurrecting – in terms of monetary value – rights within the trust which T wrongfully withholds or disposes of. Proprietary remedies contingent on tracing are 'substitutive' in a different sense. They allow the beneficiary to claim a

[42] This, of course, assumes that B has no interest in claiming the shares.

trust over new rights – composed of new subject matter – in place of initial rights that had been disposed of. In this sense, remedies dependent on tracing are forward looking – they do not simply effect a reversion to the status quo ante.

To explain further, one can return to Example 2. T's repayment into the bank account does not create a new right within the trust fund. Previously, the account's credit balance was £1,000. On T's wrongful disposition, it fell to nil. Post T's repayment, it is restored to its original state (thereby enabling T to perform her subsisting trust duty respecting it perfectly). However, if the facts of Example 2 were tweaked such that T holds £1,000 for B, not in a bank account, but as physical currency notes, the satisfaction of B's claim can *technically* result in her acquiring new rights. This is because T would have to reconstitute the fund by introducing new physical currency into the fund. These are new legal property rights that T will now hold for B on the same terms that she held the previous currency notes (that were disposed of in breach of trust). That said, the logic of a substitutive claim for monetary

recompense does not turn on the proprietary 'new'-ness of B's right. It essentially enforces T's primary obligations to B and, where this cannot be done in respect of pre-existing assets (i.e., *in specie*), it is achieved by requiring T to do the next-best thing through payment of an *abstract* sum of money. So, where the payment takes the form of physical currency, it is the *value* subjacent in them and not their physical identity that is the subject of B's claim.

Now, as discussed earlier on, B may, in falsifying a transaction, claim an equitable lien over a substitute asset to secure T's personal duty to reconstitute the trust fund. Further, as an alternative to falsification, B may adopt T's unauthorised transaction.[43] In Example 2, she might opt to do this if the current net worth of the shares in C Co is greater than the amount for which it was purchased (e.g., their worth is now £2,000). This claim could require T to hold title to the shares on trust for B. Adoption, like falsification, is a species of a substitutive claim. However,

[43] *Harrison v Harrison* (1740) 2 Atk 121; *Bostock v Blakeney* (1794) 2 Bro CC 653, 656; *Pocock v Reddington* (1801) 5 Ves Jun 794, 800; *Re Patten* (1883) 52 LJ Ch 787; *Re Jenkins* [1903] 2 Ch 362; *Wright v Morgan* [1926] AC 788 (PC), 799.

as with a money claim secured by an equitable lien, it does not simply seek the enforcement of a pre-existing right through a substitutive monetary award. Unlike (unsecured) falsification and reparative claims,[44] adoption, and the security sought through an equitable lien, entail a claim that *depends* on a *new* proprietary right. An assessment of these strands of B's substitutive claim, therefore, falls within a distinct subset of *Consequential claims* as per this thesis' taxonomy.

B.IV. Holding Rights Respecting a Traceable Product as a Form of Next-Best Compliance

A key issue must now be addressed. *Why* does Equity allow for next-best compliance by compelling, at B's election, new rights respecting traceable proceeds to be held on trust? One answer emerges upon examining the scope of a trustee's powers over rights held on trust.

[44] Reparative money claims, unlike substitutive money claims, seek to make good 'loss' caused by T to the trust fund. The distinction between 'reparative' and 'substitutive' money claims follows the usage in Elliott (n 11).

Dr Hudson explains that T's power to deal with a right held on trust arises from her position as a right-holder.[45] This 'power-generating rule' defines the existence and scope of T's dispositive powers and sets out what T must do to validly exercise them.[46] In Example 1(a) T's position as trustee and the terms of the trust have no bearing on whether her power to dispose of title to the motorbike is exercised validly. Hence, in exchanging her title to the motorbike for C's title to the vase, her power to do so is validly exercised notwithstanding that it is also *unauthorised* (according to rules in Equity). This means that, *as against B*, T has a duty to exercise that power in a certain way. However, to the rest of the world, T's power to deal with the asset is unencumbered.[47] For

[45] J Hudson, 'Equity's Gloss on Authority' in B McFarlane and S Elliott KC (eds), *Equity Today: 150 Years after the Judicature Reforms* (Hart 2023), 28-35.

[46] *ibid*.

[47] A similar observation has been made in the context of a company dealing with its assets outside the scope of its Articles (note, though, that the rule against *ultra vires* transactions in this context is currently shrunken): see *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 (CA), 304 (*per* Browne-Wilkinson LJ). See Hudson (n 45).

this reason, *as between T and C*, the exchange transaction – title to the motorbike for title to the vase – is perfectly valid – i.e., just as it would have been had T exercised her dispositive power in conformity with the trust terms.[48] Indeed, if Equity were to invalidate T's exercise of power, this would directly conflict with the common law rule which governs the same situation. This would create incoherence in the law.[49] However, to end the story here would place B in an unjustifiably vulnerable position. The rights that T holds for B's benefit would amount to nothing if T could deal with them in unauthorised ways without consequence. Hence, Equity steps in and places a 'gloss' on T's common law powers of disposition by introducing 'power-controlling rules'.[50] These rules do not determine the existence or validity of T's exercise of common law powers. Instead, they determine when their exercise is unauthorised and

[48] *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424 , [51] (*per* Lord Mance): 'Where an asset is held on trust, the legal title *remains capable of transfer to a third party*, although this undoubted disposition may be in breach of trust.' (emphasis supplied).
[49] FW Maitland, *Equity; Also, the Forms of Action at Common Law: Two Courses of Lectures* (AH Chaytor and WJ Whittaker eds, CUP 1929), 111-112 (Lecture IX); McFarlane and Stevens (n 32), 194-195.
[50] Hudson (n 45), 28-32.

also what redress B is allowed to seek (personal or proprietary) against T. In the context of a trust, power-controlling rules can be discerned, for instance, through the terms of the trust. Their presence shows that T's powers over trust assets are not held absolutely (or outright).

So far so good. Still, the analysis developed so far leaves our key question in this section unanswered. Why do Equity's power-controlling rules intervene to permit B to claim a trust over rights to traceable substitutes as one form of redress? Or, in the language of *Reasons Continuity*, why does affording B *this* option count as a form of next-best compliance on T's part?

Some might argue that a personal money claim could suffice.[51] One answer to this argument may be that to restrict B to a personal money claim would defeat the basis on which a trust was constituted in her favour. A trust was created so that *specific rights* could be held

[51] E.g., see the view presented in WJ Swadling, 'The Nature of Knowing Receipt' in PS Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart 2019), 321-322.

and/or used for B's benefit – not simply as an abstract fund of money representing the value subjacent in those rights. So far as it goes, this answer is not problematic. Yet, it remains unilluminating. One is still searching for an explanation as to why a *particular* type of right – a *traceable substitute* – falls within the ambit of claim-options available to B. For instance, in Example 1(a), why cannot B be restricted to either a substitutive money claim or an *in specie* claim that asks T to reconstitute the trust fund by acquiring and rendering into the fund title to an identical, or substantially similar, motorbike? It is submitted that examining T's position as a *trustee* – as opposed to one who holds rights outright (or absolutely) – is crucial in justifying B's ability to claim a trust over traceable proceeds acquired by T. The presence of Equity's power-controlling rules, as discussed above, enables one to grasp the significance of this point.

Prior to effecting a substitution, T's powers to dispose of or vary rights held on trust were *never* held absolutely. She was always under a core duty to not use rights held on trust inconsistently with the terms of

the trust. On breaching this duty respecting a specific trust asset, should T acquire new rights *through the exercise of this encumbered power*, there is no reason to justify her keeping those proceeds outright (or for someone else's benefit). She (or others for whose benefit she might hold the right) was never entitled, *as against the beneficiary*, to such a benefit. So, the encumbrance affecting her power over title to the original trust asset ought to taint her claim in relation to the new right she wrongfully acquired in its place.[52] Put differently: the reasons grounding T's original core trust duty reveal the presence of a *disability* on her exercise of a power encumbered by that duty. That disability explains why T, at her own election, is not permitted to keep rights acquired *through the exercise of an encumbered power* for herself, as an absolute right-holder might. So, T's consent to hold title to the original trust asset for B's benefit justifies T's core trust duty respecting that asset; the same consent suffices to justify why her title to a traceable product must be similarly encumbered by the same type of duty.

[52] Agnew and McFarlane (n 32), 307; McFarlane and Stevens (n 32), 204.

C. Consequential Claims and the Issue of T's 'Breach'

C.I. Claims Over Authorised Substitutes

As detailed above,[53] for *Reasons Continuity* to work under the category of *Consequential claims*, it needs a legally relevant *link* to be drawn between a prior right and the new right claimed. This link is established through the tracing rules.

In the tracing context, that link does not depend on T exercising an encumbered power in *breach*. Further, a claim for substitutive performance – through a traditional administrative proceeding for a common account – never depended on proving breach by the trustee.[54]

[53] See Part **A. 'Tracing' distinguished from 'Claiming'**, above.

[54] *Bacon v Clarke* (1837) 3 My & Cr 294, 40 ER 938, 298–99 (940); *Ahmed Angullia bin Hadjee Mohamed Salleh Angullia v Estate and Trust Agencies (1927) Ltd* [1938] AC 624 (PC). In the current context, courts generally only cite the pre-existing trust as a reason for grounding the claim: see, for instance, *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 108 (*per* Lord Browne-Wilkinson), 127 (*per* Lord Millett).

Thus, it might be argued that even where T acquires a new right by exercising her encumbered power over a trust asset in an *authorised* way, the new right can be justifiably appropriated to the trust fund through *Reasons Continuity*. This is *prima facie* correct,[55] but the finding must be expressed with care. One can see why by unpacking the analytical sequence explaining an authorised substitution effected by T.

> **Example 1(b)** – T holds title to a motorbike on trust for B. Acting within the authority conferred by the terms of the trust, T exchanges title to the motorbike for C's title to an antique vase.

At the start of the story, T had a duty to exercise an encumbered power over the motorbike on certain terms for a beneficiary (B). This duty was grounded by *x*-reasons. In compliance with those terms, she transfers title to the motorbike to a third party (C), and, in exchange, acquires C's title to a vase. The terms of the trust say nothing about what

[55] As the possibility will be defeated if the terms of the trust or the general law *allows* T to keep, outright, traceable products of authorised exercises of power.

T should do with that new right. One might argue that the logic of a *Consequential claim* should allow B to claim that T's title to the vase must now be held on trust by T. This is because, for *x*-reasons, T was always under a duty to hold her title to the motorbike on certain terms for B. *Through the exercise of this encumbered power*, T acquires a new right over the vase. As against B, T was never entitled to exercise this power in a way an absolute owner of the motorbike could (e.g., by exchanging it for an asset which she may keep for herself). On exercising that encumbered power, *x*-reasons, which grounds T's duty, may be seen as persisting. These persisting reasons may then justify B's claim respecting the vase. One must pause at this point in the analysis. The reasons grounding T's *duty* respecting the motorbike cannot *persist* in this scenario. On exercising her encumbered power over it in an *authorised* way, T is *discharged* from that duty (the encumbrance on her power), *in so far as this relates to the motorbike*. This ensures that she is no longer answerable to the reasons grounding *that duty*. Does this mean T gets to keep title to the vase outright? It seems not. However, on the footing of *Consequential claims*, the justification must be carefully expressed.

The encumbrance on – i.e., the duty attaching to – T's power to deal with the motorbike is defined by the terms of the trust. In other words, those terms confer on her the *authority* to exercise that power in a certain way.[56] The existence of T's *power*, itself, however, is not conferred by the terms of the trust. It arises, instead, from T's status as titleholder over the motorbike.[57] The terms defining T's authority impose a duty (or duties) in relation to exercising that power. They, thus, tell us when its exercise may be unauthorised. By defining T's authority to deal with a trust asset, the terms explain why she does not hold that asset in a way an outright owner could. They do so by denying her the liberty to use her right to the asset in any way she pleases. Now, crucially, should T exercise her power in an *authorised* way, this does *not* mean that, in doing so, she is unburdened by the terms governing its

[56] The *authority* conferred by the trust terms can be described 'power-controlling' rules, which determine the *lawfulness*, but not the *validity* of exercising a power: see Hudson (n 45), 28-35.

[57] T's *power* to deal with a trust asset, on the other hand, is owed to a 'power-generating' rule that is based on the legal consequences afforded to T's status as a titleholder; these rules define the *existence* and *scope* of T's power: *ibid*.

exercise. Quite the opposite. The exercise of her power is rendered authorised *because* the *terms* of her authority govern it and say that it is.

T's lawful exercise of her encumbered power over the motorbike in Example 1(b) discharges her of a specific duty governing its exercise. However, T's power was held on trust, not outright. This means that although she exercised the power lawfully, she remained *disabled* from exercising it *as if it was held outright*. If she kept the title to the substitute asset for herself, absent a good reason,[58] this would amount to her having exercised the power outright. T's *disability* from doing so entails that the reasons grounding the *authority* limiting her power to deal with the motorbike are *not* discharged, although a specific duty imposed by that authority *is*. The reasons grounding such *authority* remain. That is, they remain even though T has (lawfully) parted with the subject of that authority (i.e., her title to the motorbike, which includes her power to deal with it). Those reasons may now justify a claim on B's part that T's new right to (and power over) the vase, *acquired through the exercise of T's*

[58] E.g., because the terms of the trust allows for it or B consents to it.

prior encumbered power, now be held on trust. Another way of understanding this idea is to see that T's authority (as against B) to acquire a substitute right is conditional – the condition attaching to her authority to effect a substitution is met only when title to the new asset is held subject to the same core trust duty that encumbered T's power to deal with the substituted asset.

It is submitted that the logic of a *Consequential claim* justifies the outcome in Example 1(a)[59] (unauthorised substitutions) in the same way it does Example 1(b)[60] (authorised substitutions). The reasons grounding T's original core trust duty would mirror those grounding her authority. However, it would be mistaken to conclude that T's breach of her core trust duty plays *no* role in justifying outcomes in the tracing context. Where T's power is exercised in an *unauthorised* way, there are good reasons to pay attention to those grounding reasons as they apply to the duty breached.

[59] See on page 283 (above).

[60] See on page 303 (above).

C.II. The Role of T's Wrong

As indicated above, B's claim respecting a traceable product is not seen as being normatively grounded on the commission of a wrong. T's wrongdoing plays no part in *justifying* her duty of next-best compliance. *Per* the continuity thesis, its justificatory basis is the same as that applying to T's encumbered power prior to her wrongful exercise of it. Further, whilst T's duty of next-best compliance might be triggered by her wrongfully effecting a substitution, it does not *respond* to the *wrong*. More precisely, it is the fact of a *substitution* – whether done wrongfully or with authority – that triggers a continuity of reasons. In other words, unlike in breach of contract or tort,[61] the purpose of this duty is *not* to place the trust fund in the position it would be in had T's wrong not occurred. Indeed, in Example 1(a),[62] if the vase is significantly

[61] *Robinson v Harman* (1848) 1 Ex 850, 154 ER 363, 855; *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (HL) (Scotland), 39.

[62] See on page 283 (above).

more valuable than the motorbike, the trust fund would be in a *better* position than it would have been absent T's wrong (and vice versa). The aim of T's new duty, instead, is based on ensuring the continued *performance* of the trust (albeit through substitutive means), *notwithstanding T's wrong*.[63] This is a notion that is easily missed should one look at B's claim as resting, normatively, on T's wrong.

However, wrongdoing – in the sense of T breaching her core trust duty to refrain from using rights held on trust inconsistently with its terms – can play two specific roles in this context. T's conduct amounting to a wrong has a special role in explaining: (i) the distinct consequences on T, respecting B's remedial options, when compared to T's position pre-substitution; and (ii) the application of special rules against T post-substitution when evidential uncertainties arise from T's wrongful conduct.

[63] The significance of this point is revisited in Part **D. ATTRIBUTION THROUGH TRANSACTIONAL LINKS**.

C.II.i) *Distinct remedial consequences following T's wrongfully effecting a substitution*

One may begin with a basic insight reached in this chapter: the presence of T's core trust duty shows that from the start of the story (pre-substitution) to the point that B can bring her claim (post-substitution), T is under a persisting disability respecting her use of rights held on trust. She cannot exercise her powers over those rights in a way an outright right-holder might. Upon effecting a substitution, this disability means that T automatically holds a traceable product of an original trust asset on trust for B.[64] However, where T's substitution was made in breach of trust, the law does not *only* fix liability on T in relation to an *in specie* claim respecting a new asset, accruing automatically on T's effecting the substitution. It *also* entitles B[65] to other (alternative)

[64] *Cave v Cave* (1880) 15 Ch D 639. See also McFarlane (n 8), 324-325 (in which, see esp footnotes 154 and 155). *Cf* Smith (n 6), 356-361, 382-383.

[65] With a charitable purpose trust, this choice would likely be exercised by the Attorney General.

remedial options, of which claims contingent on tracing are a part.[66] These options are *not* available against T in a case like Example 1(b),[67] where there is no breach. T's *wrongful* exercise of her encumbered power explains the existence of these options in this context.[68] The choice as to *what* form of next best compliance T should *now* undertake must belong to the person(s) entitled to enforce T's core trust duty, as it was T who acted in breach of it. This provides a good reason to allow B (or the Attorney General, with a charitable purpose trust) a decisive say in the matter. Indeed, Equity's readiness to specifically enforce obligations relating to specific proprietary rights is unique; a similar approach is not taken, for instance, in respect of purely contractual obligations.[69] Examining this distinct approach is beyond the scope of this chapter.

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[66] As discussed above in Part **B. TRACING CLAIMS AS CONSEQUENTIAL CLAIMS: THE CONTINUITY THESIS**.

[67] See on page 303 (above).

[68] To be clear, T's wrongdoing, in this context, explains B's (or the Attorney General's) choice over which remedial outcome must be enforced. It has no bearing on whether *T* is given a say in the matter. Indeed, whether or not a substitution is effected in breach of trust, T is never entitled to exercise such a choice.

[69] See generally: LD Smith, 'Equity and Fusion' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Sydney: Lawbook Co. 2005).

However, in the context of an express trust (which is the focus of this thesis), at least, it could be argued that one explanation may well lie in the nature of the trustee's obligation. She does not only undertake to perform the trust. She undertakes to be *accountable* for her performance in respect of a *specific* right (or rights). Her duty to account (in the sense of providing information) on the state of the trust fund can be seen as evidence of this point.[70] So, given Equity's readiness to recognise either a substitutive monetary award (whether secured by a lien or not) or an *in specie* claim to a substitute asset, the fact that T is a wrongdoer counts towards giving the person entitled to enforce T's core trust duty a decisive say over which option should be enforced.

Further, T's wrong explains another remedial consequence unique to the post-breach situation (i.e., which do not obtain pre or absent breach). Under an express trust, pre-breach, T has reason to hold the trust asset in accordance with the trust terms and no more. So, for

[70] If this is correct, it would be interesting to examine if meaningful parallels can be drawn – through the frame just described – between the express trust and other situations in which equitable property rights are recognised.

instance, the risk of fluctuations in the value of a right held on trust does not fall on T.[71] In principle, the same position must follow in respect of authorised substitutes T holds for B's benefit (like in Example 1(b)[72]) — T must hold traceable products in accordance with a core trust duty and no more. However, once T effects an *unauthorised* substitution, B may elect between requiring T to hold the new right on trust or to secure a personal monetary obligation on T through a lien over the new right. Should B elect the latter option, the risk of depreciations in the value of the new asset – i.e., below the value of the original asset at the time of misapplication – shifts to T. Again, this adverse consequence can be explained by reference to T's committing a breach of trust.

C.II.ii) *Special rules operating against T in the face of evidential uncertainties*

[71] This assumes that T has not breached a duty of care in this context. See: *Speight v Gaunt* (1883) 22 Ch D 727 (CA) (affirmed in *Speight v Gaunt* (1883) 9 App Cas 1 (HL)).
[72] See on page 303 (above).

The situation examined in this subsection concerns evidential uncertainties created by a wrongdoing trustee. The uncertainty centres on the identification of rights held on trust. As we shall see, the fact that T acted in breach of trust gives rise to special rules that B can invoke against T. Further, the presence of these rules can be harmoniously understood within the framework developed in this chapter of tracing claims operating as a species of *Consequential claims* that is not justified by T's wrongful conduct.

C.II.ii.a) 'Mixed' substitutions

Examples 1(a)[73] and 1(b)[74] feature 'clean substitutions', where T exercises an encumbered power over trust property and uses it exclusively to acquire new property for her benefit (or for the benefit of someone apart from the trust beneficiaries). Applying the logic of *Reasons Continuity*, we have seen that B's tracing claim against T, in both

[73] See on page 283 (above).

[74] See on page 303 (above).

cases, can be understood as a species of *Consequential claim*. The same logic can extend to simple cases of 'mixed substitutions' – in which T takes trust property, mixes it with her own, and then exchanges rights over them for a new right (or rights). The example below briefly explains the point and the discussion then proceeds to show how a special rule operates against T where she effects a substitution out of a trust fund in breach.

> **Example 1(c)** – T holds title to 5,000 gold nuggets on trust for B. T inadvertently mixes them with 2,500 of her own (identical) gold nuggets. T uses all of the resultant mixture of nuggets to purchase an antique vase from C. Under the terms of the trust, T was not permitted to use trust property in this way.

Upon T's mixing the trust assets with her own, the subject matter of the trust rights remains with T, and she continues to hold them for B's benefit. However, within the mixture, there is an evidential uncertainty in locating the specific nuggets that were initially held on trust. To

resolve the uncertainty (in cases featuring physical mixtures of fungible items), the law allows B to identify a rateable portion of title to the physical mixture (depending on the trust fund's contribution to it) as attributable to the pre-existing trust.[75] This is the 'proportionate sharing rule'.[76] This would mean that T holds her title to the mixed quantity on nuggets on trust for T and B (as tenants in common), with a 2/3rds interest to that title being attributed to B's share. Now, when T uses the

[75] Of course, this rule will not apply if the wrongdoing trustee can distinguish items in the admixture which belong to her outright from those that are attributable to the trust: *Pennell v Deffel* (1853) 4 De GM & G 372, 43 ER 551, 381-382 (555-556); *Frith v Cartland* (1865) 2 H & M 417, 71 ER 525, 420 (526); *Madras Official Assignee v Krishnaji Bhat* (1933) 49 TLR 432; *Re Tilley's Will Trusts* [1967] Ch 1179, 1183; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 1 WLR 938, [1994] 4 All ER 890 (CA), 938-939. See also Nair (n 25), [2.38]-[2.49].

[76] This rule is derived from *Armorie v Delamirie* (1722) 1 Stra 505, 93 ER 664, under which evidential difficulties caused by a wrongdoer are resolved against her: see discussion in Nair (n 25), [2.35]-[2.66], for a comprehensive account of the principle's application in the tracing and following contexts. The proportionate sharing rule has been applied both to following and tracing claims: *Lupton v White* (1808) 15 Ves Jun 432, 441; *Indian Oil Corp v Greenstone Shipping SA (Panama)* [1987] 3 WLR 869, [1987] 3 All ER 893, [1988] QB 345 (QBD) , 369–371; *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 143; *Glencore International AG v Metro Trading International Ltd* [2001] 1 Lloyd's Rep 284, [185].

whole mixture of nuggets to purchase the antique vase, she *has* exercised an encumbered power over title to trust assets. *Reasons Continuity* explains the outcome in the same way it does with Example 1(a)[77]. T no longer has title to the 5,000 gold nuggets. However, she used her encumbered power over title to trust subject matter to fund the purchase of a new right. B may claim that T ought to hold title to the new asset on trust for her (albeit her claim will be to a proportionate share of the value of that asset corresponding to the trust fund's contribution to its purchase), or she may claim an equitable lien over the new asset to secure a personal claim against T to make the trust fund whole.[78] Both options supply a next-best means of complying with the continuing reasons grounding T's core trust duty respecting her title to the 5,000 gold nuggets. Finally, it is clear that B's claim respecting the vase is a *Consequential claim*. This is because: (a) the claim is justified by a perfect

[77] See on page 283 (above).

[78] *Scott v Surman* (1742–3) Willes 400, 125 ER 1235 (CP); *Re Tilley's Will Trusts* [1967] Ch 1179; *British Columbia Teachers' Credit Union v Betterley* (1975) 61 DLR (3d) 755; *Foskett v McKeown* [1998] Ch 265 (CA), 277; *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 130–131.

continuity of reasons between those grounding T's original core trust duty and her new duty; (b) T's substitution of trust property serves as a background fact that triggers this continuity of reasons; and (c) the claim depends on the existence of new subject matter (T's title to the vase).

Now, in some cases, B's next-best entitlement will not be limited by the pro rata rule. In Example 1(c), this may occur should T have entered a bad bargain in her purchase of the vase. The current market value of the vase may be equal to (or less than) the market value of the 5,000 gold nuggets. In such cases, B may elect to claim the *full* extent of T's title to the vase as a trust asset.[79] One might argue that this poses a difficulty for *Reasons Continuity*. After all, the vase was purchased both with rights held on trust and those which T held outright. How can next-best compliance with the reasons grounding T's duty respecting *the 5,000 nuggets* be satisfied by allowing B to claim the *full* extent of T's title to the vase? The answer lies in the scope of T's original duty and of the

[79] *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 132-133 (*per* Lord Millett).

reasons grounding it. Post breach, T remains answerable to the reasons grounding her core trust duty respecting the 5,000 nuggets. One way of meeting those reasons is by paying the money's worth of those items into the trust fund. Another is through holding title to a substitute asset on trust, B's entitlement to it being generally determined on a pro rata basis. However, in our variation of Example 1(c), a pro rata apportionment will not satisfy B's claim relating to the original gold nuggets in full. It will produce a *less-than* next-best means of meeting the reasons grounding T's original core trust duty. So, the law applies a rule which subordinates the *wrongdoing* trustee's entitlement to the substitute asset and allows the innocent beneficiary to claim the whole of the asset for the trust fund. *Reasons Continuity* embraces the outcome comfortably. In the circumstances, this *would* amount to the next-best means of complying with the reasons grounding T's original core trust duty. That said, it would be highly surprising if this same rule could apply in B's favour in a case like Example 1(b),[80] where T did *not* effect an unauthorised substitution. The fact of T's unauthorised use of rights

[80] See on page 303 (above).

held on trust – i.e., in confounding its identity by mixing it with identical non-trust subject matter[81] and disposing of the admixture in breach of trust – justifies the application of this special rule in B's favour. Absent wrongdoing on her part, it would be unduly harsh to subordinate T's interests in this way.

C.II.ii.b) Other 'mixing' cases featuring evidential uncertainties

Outcomes, however, vary when only *part* of a fungible mixture is disposed of from the trust. The example below sets out the situation under consideration with a simple case of following the physical subject matter of rights into a fungible mixture. The discussion then turns to examine the issue in the tracing situation. Again, it will be seen that special rules emerge that apply against T owing to the fact of her wrongdoing.

[81] *Cf Field v Field* [1894] 1 Ch 425 (Ch), 429 (*per* Kekewich J) addressing T's duty to ensure that title deeds/chattels that are held on trust are kept securely.

> **Example 3** – T holds title to 100 litres of crude oil on trust for B. T wrongfully mixes the trust crude oil with her own title to an identical quantity and quality of crude oil. 90 litres of the resulting mixture are subsequently stolen.

The question, in Example 3, is not simply about identifying subsisting trust rights in a fungible physical mixture. Before 90 litres of crude oil were stolen, the evidential uncertainty respecting the subject matter of pre-existing rights in the trust fund is resolved by the proportionate sharing rule. Each of T and B had a 50% beneficial share in T's title to the whole mixture. In other words, T would hold legal title to the 200 litres on trust for T and B as tenants in common. However, one is unsure as to how the loss from the mixture – the 90 litres subsequently stolen – should be apportioned as between the tenants in common. The general rule here is that any losses to the mixture are resolved against

the wrongdoing trustee and are attributed to her.[82] This means that the stolen oil is attributed to T's share, such that B's rights persist in relation to a 10/11 share of the 110 litres in the remaining mixture, whereas T's will be restricted to 1/11 share.

We turn now to an example directly concerning the theme of the present inquiry.

> **Example 4** – T holds title to £500 in cash for B. T subsequently mixes this cash with £500 of her own cash. She then takes £500 out of the mixture and spends it on an expensive meal, with £500 in cash remaining intact. Under the terms of the trust, T was not permitted to use cash from the trust fund for this purpose.

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[82] *Harris v Truman* (1881) 7 QBD 340, 358 (affirmed in *Harris v Truman* (1882) 9 QBD 264 (CA)); *Indian Oil Corp v Greenstone Shipping SA (Panama)* [1987] 3 WLR 869, [1987] 3 All ER 893, [1988] QB 345 (QBD), 370–371; *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 132; *Glencore International AG v Metro Trading International Ltd* [2001] 1 Lloyd's Rep 284, [159], [182]. See also, (n 76), above.

As with Example 3,[83] the question here is whether the dissipation from the trust should be attributed to T's share in the mixture. In *Re Hallet's Estate*,[84] Jessel MR held that in such a situation, T would be deemed to have acted in accordance with B's interests respecting the resulting mixture. Before T's wrongful exercise of an encumbered power, each of T and B had a proportionate share in relation to T's title to the whole mixture – valued at £500 each. By wasting away half of the mixture, T is deemed to have acted on her own share in doing so. Again, in deciding how to apportion the loss to the fund, the interests of a wrongdoing trustee are subordinated.

> [W]here a man does an act which may be rightfully performed… he is not allowed to say against the person entitled to the property or the right that he has done it wrongfully.[85]

[83] See on page 320 (above).

[84] *Re Hallett's Estate* (1880) 13 Ch D 696 (CA).

[85] *ibid.*, [727].

In Example 4,[86] therefore, title to the remaining £500 in cash will be held on trust wholly for B's benefit.[87]

Example 5 – T holds title to £500 in cash for B. T subsequently mixes this cash with £500 of her own cash. She then takes £500 out of the mixture and spends it on an expensive meal. With the remaining £500, she purchases an iPad. Under the terms of the trust, T was not permitted to use cash from the trust fund for either type of transaction.

[86] See on page 321 (above).

[87] In a technical sense, it may well be that B acquires a new right. This is because T may now hold different currency notes – i.e., title to new subject matter – on trust compared to the pre-breach situation. However, as currency notes are fungible, T will be able to perform her original core trust duty post-breach in a substantively equal way. This will, in substance, be the 'best' form of compliance with T's original core trust duty, not a 'next-best' means. So, the content of T's new core trust duty will be materially identical to her old core trust duty. The impact new subject matter has on the identity of the B-T legal relation – and hence on the identity of B's right – is only technical.

Here is a straightforward case where the rule in *Re Oatway*[88] applies. Again, the interests of the wrongdoing trustee are subordinated to B's; the right dissipated from the mixture is attributed to T's share and title to the remaining £500 is attributed to B. On using that cash to purchase a new asset, or make an investment, the right thereby acquired is a product of T's exercise of an encumbered trust power. In Example 5, *Reasons Continuity* would therefore conclude that title to the iPad must be held by T on trust for B.[89]

To be clear: *Re Hallet's Estate* and *Re Oatway* were cases featuring deposits in a bank account. As discussed below,[90] 'mixtures' in bank accounts do not create *evidential* uncertainties as physical mixtures do. Indeed, as will be emphasised, the language of 'mixing' is not apposite in the context of a bank account (which, as a chose in action, represents

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[88] *Re Oatway* [1903] 2 Ch 356.

[89] *ibid.*, 360 (*per* Joyce J): '[A trustee] cannot maintain that the investment which remains represents his money alone and what has been spent and can no longer be traced or recovered was money belonging to the trust.'

[90] See discussion following Example 8(b), below, in Section E.I. The 'First In, First Out' Rule, Pro Rata Sharing, and the Rolling Charge.

a non-physical entity, a *right*). For the present purposes, it is sufficient to note that the rules on *attribution* of losses to the trust fund in both these cases have been applied, analogously, to cases concerning physical mixtures to solve the specific issue of accounting as between tenants in common.[91]

There is some uncertainty as to the outcome where both the rules in *Re Hallett's Estate* and *Re Oatway* may apply.

> **Example 6** – T holds title to £500 in cash for B. T subsequently mixes this cash with £500 of her own cash. She then takes £500 out of the mixture and purchases an antique vase. The remaining £500 from the mixture remains intact. A month later, the value of the vase increases threefold to £1,500.

Should B's claim be restricted to the £500 cash remaining in the mixture (*Re Hallett's Estate*)? Or can she, in the alternative, claim that

[91] Nair (n 25), [2.35]-[2.37].

title to the more expensive asset – the vase – be held on trust for her (*Re Oatway*)? The authorities are inconsistent in their answers.[92] As a matter of principle, it seems fair that B should be given the choice to elect which of these options suits her best. There is no reason why the general position taken against wrongdoing trustees, who cause evidential uncertainty, should not extend to the present context. Allowing B this choice is an application of the so-called 'cherry picking' rule.[93]

The rules discussed so far – from *Re Hallett's Estate*, *Re Oatway*, and 'cherry picking' – can only be reconciled with our framework of tracing claims as *Consequential claims* if the specific (and limited) role of T's wrongdoing is understood. These rules exist to determine how to account between different tenants in common following evidential uncertainties caused by a wrongdoing trustee. Accordingly, where there

[92] Compare Rimer J in *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281, [144] (who answers the second question in the affirmative) with Patten J in *Turner v Jacob* [2008] WTLR 307, [102] (who answers the first in the affirmative).

[93] The term was used by Rimer J in *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281, [144].

is no difficulty as to how to account for losses to a fund following evidential uncertainties created by T's wrongful exercise of an encumbered power, these rules are irrelevant.

> **Example 7** – T holds title to £500 in cash for B. She combines this with £500 of her own cash and deposits the resulting amount into her personal bank account whose credit balance has, till that point, been nil. T then withdraws £900 from the account and spends it on an expensive meal. Under the terms of the trust, she was not authorised to use trust monies for this purpose. T subsequently deposits £900 of her own cash into the bank account, bringing its credit balance back to £1000.

The proportionate sharing rule tells us that on mixing trust cash with her own, each of B and T have a 50% share in relation to T's title to the whole mixture. On depositing the cash into her bank account, T acquires a new right against her bank – a chose in action. This is a personal right against the bank for the payment, on demand, of £1,000

to T. *Reasons Continuity* explains how this right is a traceable product of T's exercise of an encumbered trust power. The result is that B can claim that T must hold this new right on trust, albeit that B's share respecting it will be restricted to 50% (valued at £500). When T then draws £900 from the account and spends it on dinner, it can be said that she acted on her own share from the account to meet the expense. However, it is not unclear that, at most, £500 of this sum is attributed to T's share of the chose in action and the remining £400 (at least) is attributable to B's share. On the other hand, it is clear that the maximum extent of B's interest, following T's dissipating transaction, in the bank account is the remaining credit balance in it – £100. It is equally clear that subsequent injections into the bank account, which are neither trust money nor its traceable proceeds, cannot be attributed to the trust (unless, of course, T intended to reinstate the trust fund). B's claim to traceable proceeds must, therefore, be restricted to T's right in her bank account to the intermediate credit balance of £100. This is the so-called 'lowest

intermediate balance rule'. It was established in *James Roscoe (Bolton) Ltd v Winder*.[94]

In *Winder*, Sargant J explained that in a case like Example 7, B cannot 'cherry pick' between T's right in the bank account containing the intermediate balance of £100 and her subsequent right in it after the later deposit of £900. Cherry picking is only permissible when one can 'put [one's] finger on some definite fund which either remains in its original state or can be found in another shape.'[95] If, by 'some definite fund', one is referring to a specific right held for another, the explanation echoes *Reasons Continuity's* account of the situation. T's wrongful exercise of an encumbered power over the bank account resulted in £400 of trust money being dissipated. It did not lead to her acquisition of a new right to the £900 she later deposited into the account. As she did not acquire

[94] *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch 62. The rule was endorsed in *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC), 107-108 and in *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211 (CA), 219, 220. See also *Re Graphicshppe Ltd* (2005) 78 OR (3d) 401; *Boughner v Greyhawk Equity Partners Ltd* [2013] ONCA 26.

[95] *ibid.*, 68-69.

that right through the exercise of an encumbered power, it cannot be a 'substitute' into which B can trace.[96]

Having made these points on the role of T's wrongdoing, and its influence on shaping some rules in the tracing context, the discussion in this chapter now turns to other rules of tracing and their interrelation with the justificatory account of claims discussed so far. The scheme of *Consequential claims* based on *Reasons Continuity* disregards T's wrongdoing as a normative basis for B's tracing claims. In Part D, below,

[96] However, it was stated in *Re French Caledonia Travel Service Pty Ltd* [2003] NSWC 1008, (2003) 48 ACSR 97, (2003) 59 NSWLR 361 that, in a case like Example 7, if T's subsequent payment of £900 into the bank account was done 'with the intention of making good earlier depredations', B's claim respecting it might succeed: [175], (*per* Campbell J). One instance falling within this proviso is *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 1 WLR 938, [1994] 4 All ER 890 (CA), 939 (the point, however, was not considered on appeal). See also *Re BA Peters Plc (In Administration)* [2008] EWHC 2205 (Ch), [2008] BPIR 1180, [18], [46]-[47] (affirmed [2008] EWCA Civ 1604; [2010] 1 BCLC 142); *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In Administrative Receivership)* [2010] EWHC 1614 (Ch), [2011] 1 BCLC 202, [152]. See too *Viscariello v Bernsteen Pty Ltd (In Liquidation)* [2004] SASC 266, [30]. On the role of intention in cases such as these, see discussion below in Sections **E.II.** Bank Transfers and **E.III.** Backwards Tracing.

this point can also be seen to fit with a key aspect of the tracing rules. This is the law's insistence on transactional links, as opposed to those based on counterfactual causation.

D. Attribution Through Transactional Links

The account of *Reasons Continuity* developed so far can be summarised as follows. In respect of each right held on trust, T is under an obligation to exercise her powers, if at all, only consistently with the terms of that trust. This obligation has been called her 'core trust duty'. It includes a duty not to make an unauthorised disposal or variation from the trust fund. Should she effect an *authorised* substitution of a trust right (i.e., without breaching her core trust duty), the reasons grounding T's authority to deal with that right persist to justify why T must now hold the traceable product on trust for B. In other words, the fact that T holds rights on specific terms for B tells us that T does not hold those rights outright. She is, thus, disabled (absent authority) from exercising her encumbered powers over these rights in a way an outright holder of a right might. So, she cannot, at her own election, keep a traceable

product for her own benefit (or for the benefit of anyone else but B). Where T effects an *unauthorised* substitution, the same analysis follows, save that – for reasons discussed in Part C – we pay attention to the persisting reasons as they ground T's original core trust duty (which, as we have seen, is simply reflected in the reasons that ground T's authority to deal with the relevant right).

Whether T effects an authorised or unauthorised substitution, the obligatory reasons that persist normatively ground a *new* obligation on T to supply a next-best means of compliance with her core trust duty respecting the substituted asset. At B's election (i.e., where the substitution was unauthorised), this new duty can be satisfied by requiring T to hold a new right acquired, *as a consequence of* breaching the continuing obligation, on trust for B.

The picture outlined above tells us that B's claim in relation to traceable proceeds is *linked* to the specific power T spent in acquiring

those proceeds. For *Reasons Continuity* to operate, with sufficient practicability, the nature of this link must be spelt out.

On one view, this link should be determined causally (i.e., counterfactually).[97] That is, by finding in the affirmative that *but for* T's exercise of a specific encumbered power, she would not have acquired a right to the traceable product. This approach has been decisively rejected in English law. Instead, the focus has been on establishing a 'transactional link' between T's acquisition of a new right and the exercise of her encumbered power. The significance of this point is nicely illustrated in the leading case on tracing.

In *Foskett v McKeown*,[98] Mr Peter Murphy (T) bought a whole-of-life insurance policy from Barclays Life Insurance Co Ltd for an annual premium of £10,220. The policy was subsequently settled on trust for his

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[97] See, for instance: S Evans, 'Rethinking Tracing and the Law of Restitution' (1999) 115 LQR 46.

[98] *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson).

wife and children (X),[99] who would receive 10% and 90%, respectively, of the proceeds on his death. T paid the first two premiums from his own funds and the source of the third premium was disputed on the facts.[100] The last two premiums were paid with funds that T misappropriated from rights that a company – which he jointly controlled with one Mr Deasy (T2) – held on trust. The funds T and T2 held on trust amounted to approximately £2,645,000; this money was paid to them on the terms of an express trust by the plaintiffs (B), who were also the beneficiaries of this trust, for the purpose of purchasing development land in Portugal.[101] T then committed suicide, and £1,000,580.04 was paid-out

[99] 'X', here, is a shorthand for T's children. T's mother was also one of the beneficiaries – entitled to a 1/10th share – but she was subsequently paid-out: *Foskett v McKeown* [1998] Ch 265 (CA), 270; *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 108. The dispute was ultimately between the three children (as beneficiaries of the trust of the policy) and the plaintiffs (who are referred to hereafter as 'B').

[100] *ibid.*, 107.

[101] Whilst the facts in this case focused on T's misappropriating funds to pay the last two premiums on his life insurance policy, it should be noted that T and T2 had dissipated the entire funds held on trust for B. So, when the time came for the money to be returned to B for its intended purposes, there was nothing left of it.

by the insurer to the surviving trustees of the policy settlement for X.[102] B claimed that as at least 40% of the policy premiums had been paid from funds held on trust for them, they should be entitled to 40% of the insurance pay-out (i.e., not less than £400,000). X, on the other hand, argued that B were entitled to nothing or, alternatively, that they ought only to be entitled to the sum that T misappropriated from their trust fund (not less than £20,440 plus interest) that may be secured by a lien over the policy's proceeds. Overturning the Court of Appeal's decision, the House of Lords found for B – they were beneficially entitled to a proportionate share in the death benefit.

A crucial complication in the facts is that it was clear that, at the time T committed suicide, the amount of the death benefit ultimately paid-out would *not* have been affected *even if* the last two premiums (those for which trust money was used) had not been paid.[103] This was because T's life insurance policy contained two elements: (i) an

[102] T's wife, Mrs Jean Murphy (and later Mrs McKeown, as she had remarried) and Mr Nelson (a solicitor) were the surviving trustees of the policy.

[103] *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 138.

investment element for which part of the premiums payable were to be used to create an investment fund inside the policy; and (ii) a right, for the benefit of nominated beneficiaries (here, X), to the payment of a death benefit on T's, the policyholder's, death. Importantly, the policy featured a clause which stated that, provided that the first two premiums were paid, the policy would not lapse automatically should annual premiums not be paid; money from the investment fund (the first element) would then be used, until it was exhausted, to keep alive the policyholder's right to the death benefit being paid-out to his nominated beneficiaries.[104] The majority of the House of Lords, however, discounted this fact and held that the correct analysis was that the ultimate death benefit was funded by *all* five premiums which were in fact paid.[105] This meant that the absence of a counterfactually causal link was not fatal to B's claim in relation to the proceeds. The majority's

[104] However, if the amount in the investment element of the policy were to be used up, the policy would lapse, and no death benefit or surrender value would be payable: *ibid.*, 274-275. On the facts, it was found that the funds in the investment element were, at the relevant time, sufficient to fund the sums required to keep the policy alive for three years following T's payment of the first two premiums: *ibid.*, 285.

[105] *ibid.*, 133.

reasoning instead depended on the transactional links leading to Xs' right over the insurance pay-out.[106] Money from a bank account held on trust was used to pay premiums into a policy – seen as a 'bundle of rights to which the policyholder is entitled in return for the premiums'[107] – which then led to the acquisition of new rights from the insurance pay-out. In a 'but for' sense, that outcome would have obtained even if the payments were not made. However, the premiums *were actually advanced*, and they constituted a *factual basis* on which the insurance pay-out ultimately resulted. This transactional link was sufficient to satisfy the link between both events. The point can be explained with an analogous illustration not involving transactions. One can suppose that Y suffers from a terminal disease. In the usual course of events, the disease would have inevitably taken Y's life at precisely time *t*. However, it so happens that, at precisely time *t*, Y is hit by a bullet from X's gun and the shot, independently of Y's pre-existing ailment, would have instantly killed her. On the facts, as they happened, it can be said that

[106] *ibid.*, 134, 137.

[107] *ibid.*, 134.

X's gunshot was not the causal source of Y's death. Yet, it can still be maintained that it was an independent event that enabled the outcome to be secured. The finding of a transactional link follows similar logic.

This emphasis on transactional links confirms, and casts further light on, the distinct operation of *Reasons Continuity* in the trusts context. When an obligation in contract or tort is breached, the remedial goal is to place the plaintiff in the position she would have been in absent the breach.[108] So, deciding what counts as next best compliance, in this effort, *necessarily* requires an examination of the non-breach counterfactual position. As discussed above,[109] the remedial goal in the trusts context is to enforce the reasons grounding T's former obligation to perform her core trust duty, *notwithstanding her breaching it*. The need to examine B's non-breach counterfactual position is, by definition, closed off. On the facts of *Foskett*, there were grounds to find that the ultimate insurance pay-out was a product of T's exercise of an

[108] See (n 61), above. This is in the context of a claim for damages, which is the only remedy the plaintiff is entitled to *as of right*.

[109] See the discussion in Section **C.II.** The Role of T's Wrong, above.

encumbered power over money held on trust. Notwithstanding the absence of a causal link, this finding was enough to justify B's claim to a proportionate share of the insurance pay-out.

E. THREE HARD CASES

The view that claims contingent on tracing are a type of *Consequential claim* depends on the application of *Reasons Continuity* being true in *all* claims that are dependent on tracing. This Part of the chapter deals with three specific challenges to this view. It might be argued that they pose an objection to role of *Reasons Continuity* in the tracing context. This is the objection that there are some cases where claims dependent on tracing are allowed which cannot fit the need for a link between the exercise of a particular encumbered power and T's acquisition of a particular right. The three instances featuring this objection are addressed in turn.

E.I. The 'First In, First Out' Rule, Pro Rata Sharing, and the Rolling Charge

The first type of 'hard' case arises where a trustee combines assets from distinct trusts whose beneficiaries are equally innocent of her failure to keep the assets separate and monitor how those from each trust are managed.

> **Example 8(a)** – T puts £200 in cash held for *Trust 1* into an empty bag and then puts £400 in cash held for *Trust 2* into the same bag. The beneficiary of each trust is B1 and B2, respectively. The bag now comprises a fungible mass of identical currency notes. She then takes out £300 from the bag and spends it on a lavish dinner. Subsequently, she puts £300 in cash into the bag from *Trust 3*, the beneficiary of which is B3. T then draws a further £300 from the bag and purchases an antique vase which is now worth £3000.

Before spending on dinner, the bag comprises assets attributed to *Trust 1* and *Trust 2*. We know – *per* the proportionate sharing rule – title to the money in the bag is attributable to B1 and B2 in the ratio of 1:2. When T later dissipates £300 from the bag on a meal, there is a question as to whether, or how much of, B1's or B2's share of the mixture must bear this loss. On introducing £300 in cash from *Trust 3* into the bag and subsequently purchasing a vase now worth 10 times that amount, a similar uncertainty arises. How are the losses and gains to be attributed between the three trusts? The rules of attribution in *Re Hallett's Estate* and *Re Oatway* are of no help as they do not address cases where multiple *innocent* beneficiaries claim against a single mixed fund. The initial solution was to apply the 'pro rata' rule in *Re Diplock*.[110] It provides that all losses and gains to the fund are to be rateably shared in proportion to the contribution made by each trust to it. So, each of B1,

[110] *Re Diplock* [1948] Ch 465 (CA), 533, 534 and 539. See also *Edinburgh Corp v Lord Advocate* (1879) 4 App Cas 823 (HL) (Scotland).

B2, and B3's shares in respect of T's title to the vase will be in the ratio of 2:4:3.[111]

The pro rata rule is unsatisfactory. It produces outcomes that are unfairly prejudicial to the last contributor – *Trust 3* in Example 8(a) – who would have to share in depletions from the account affected *before* its contribution was made.[112] The rule is also analytically difficult to explain in terms of *Reasons Continuity*. No encumbered power respecting rights held under *Trust 3* could have been exercised before cash from that trust was put into the bag. There is therefore no analytical basis by which B3's claims should be affected by losses and gains to the mixed fund *prior* to *Trust 3's* contribution being made to it. To the extent that the pro rata rule applies to cases like Example 8(a), *Reasons Continuity* cannot provide a satisfactory justification.

[111] In cases where the claim is not against a wrongdoer but is made in competition with other innocent co-contributors to a mixed fund, the option to, instead, claim an equitable lien over the new right is not permitted: *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 132 (*per* Lord Millett).

[112] See *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281, [150] (*per* Rimer J).

It is said that today,[113] the attribution of shares to innocent co-contributors would follow a different rule if the 'mixing' of funds occurs in an unbroken running bank account.[114]

> **Example 8(b)** – T deposits £200 in cash held for *Trust 1* into an empty current bank account and then deposits £400 in cash held for *Trust 2* into the same account. The beneficiary of each trust is B1 and B2, respectively. She then withdraws £300 and spends it on a lavish dinner. Subsequently, she pays £300 in cash into the account from *Trust 3*, the beneficiary of which is B3. T then withdraws a further £300 from the account and purchases an antique vase which is now worth £3000.

[113] *Devaynes v Noble; Clayton's Case* (1816) 1 Mer 529, 35 ER 781.

[114] For a historical account of this distinction, see Smith, *The Law of Tracing* (n 7), 183-194.

The so-called 'first in, first out' rule applies in this scenario. It is derived from *Clayton's Case*,[115] which concerned the attribution of payments, into and out of a bank account, as between a customer and the bank. The rule can be understood through the following illustration: at time *t*, A's current account with *Bank X* has a credit balance of nil; at time *t+1*, when she deposits £100 in cash into the account, the bank owes A an immediate debt, payable on demand, of £100; at time *t+2*, when A withdraws £20 in cash from the account, this withdrawal is seen as constituting a part payment of *Bank X's* debt to A reflected in the earliest credit entry (of £100). The 'first in, first out' rule implies that the earliest deposit into a current account ('first in') creates a debt whose repayment(s) is attributed to each subsequent withdrawal ('first out(s)') until the full debt amount is reached. So, determined by attribution, A's title to £20 in cash withdrawn at time *t+2* is a traceable substitute of A's chose in action at time *t+1*.

[115] *Devaynes v Noble; Clayton's Case* (1816) 1 Mer 529, 35 ER 781.

Applying the logic to Example 8(b), A is substituted by T, and each of B1's, B2's, and B3's claims are underwritten by the same system of attribution (developed in *Clayton's Case*) between T and her bank. Hence, the whole of *Trust 1's* share in T's account (amounting to £200) will be deemed to be dissipated on T's meal along with £100 attributable to *Trust 2's* share in the same account. In the next part, the account has a credit balance of £600 – i.e., with £300 representing the intermediate balance attributed to *Trust 2* that was subsequently topped-up with a further deposit of £300 from *Trust 3*. When T draws on this account to purchase a vase worth £300, it would be deemed to be made with the entirety of *Trust 2's* share in the account. Only B2, therefore, can claim T's title to the vase as a traceable product.

This rule has been justly criticised[116] and rejected in other common law jurisdictions in favour of the *Re Diplock* pro rata rule.[117] A

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[116] *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22 (CA).

[117] *Re Ontario Securities Commission* (1985) 30 DLR (4th) 1 (affirmed (1998) 52 DLR (4th) 767); *Re Registered Securities Commission* [1991] 1 NZLR 545; *Keefe v Law Society of New South Wales* (1998) 44 NSWLR 451; *ASIC v Enterprise Solutions 2000 Pty Ltd* [2001] QSC

principal objection is that it operates arbitrarily. The claims available to any innocent co-contributor would depend purely on luck. One could swap the meal transaction in Example 8(b) with the purchase of the vase and the fortuitous twists of the plaintiffs' fates can be seen. Once we acknowledge the positive law's rejection of a counterfactual approach, and preference for one based on transactional links, the room for fortuity in determining outcomes based on pre-existing proprietary entitlements becomes doubly indefensible. A further issue is that the rule in *Clayton's Case* cannot apply to claims of innocent co-contributors to a bank account without embracing an unjustifiable degree of artificiality. Historically, the rule developed to govern the debt relationship between a bank and its customer.[118] For instance, it was used to determine if the bank had applied proceeds of a specific deposit on behalf of the client

82; *Re Esteem Settlement* [2002] JLR 53; *Re French Caledonia Travel Service Pty Ltd* [2003] NSWC 1008, (2003) 48 ACSR 97, (2003) 59 NSWLR 361; *Re International Investment Unit Trust* [2005] 1 NZLR 270.

[118] AW Scott, 'The Right to Follow Money Wrongfully Mingled with Other Money' (1913-14) 27 HLR 125, 130; DA McConville, 'Tracing and the Rule in Clayton's Case' (1963) 79 LQR 388.

(as her agent),[119] or if its receipt of a deposit of money in the account was met with an executed consideration.[120] As the rule speaks to the accounting imperatives between banks and their customers, it is artificial to extend its application to plaintiffs seeking to enforce a right *in respect of* a customer's debt against her bank.[121]

Of more direct concern for *Reasons Continuity* is the analytical problem generated by the rule in *Clayton's Case*. A bank's debt to its customer – represented in a bank account – correlates to a single, unitary right; it is not composed of a series of individuated debts which, together, total the credit balance in the account.[122] The latter view prevailed at one point, but it no longer informs the modern conception

[119] D Fox, *Property Rights in Money* (OUP 2008), [7.63], [9.36]-[9.37].

[120] *ibid.*, [7.63], [8.43]-[8.44].

[121] *ibid.*, [7.63].

[122] *N Joachimson v Swiss Bank Corporation* [1921] 3 KB 110; *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 127-128 (*per* Lord Millett). See further: Fox (n 119), [7.64], [1.43]-[1.51].

of a bank account.[123] On that latter view, whenever T deposits money into her bank account, it creates an individuated, discrete debt. Notwithstanding the principled objections discussed above, it is *analytically* plausible to apply the attributional scheme in *Clayton's Case* to work out claims against a customer's credit balance in a current account. However, as a modern bank account is understood as a single, global debt, the analytical foundation of a specific contribution to the account being attributed to a specific instance of T's exercising an encumbered power over that account falls away. For this same reason, the language of money being 'mixed' in a bank account is misleading. Rights, unlike physical things, cannot be mixed (as in Example 8(a)[124]), nor can they be amalgamated to form a new physical entity (as with the *specificatio* cases considered in Chapter 3[125]). However, one or more rights could be exchanged for another right or rights as in Example 8(b).

[123] For a historical survey on the evolution of a bank account as a debt, see: *Re French Caledonia Travel Service Pty Ltd* [2003] NSWC 1008, (2003) 48 ACSR 97, (2003) 59 NSWLR 361, [48]-[55] (*per* Campbell J).

[124] See on page 339 (above).

[125] See Chapter 3, Section B.I.iii) *Specification*.

In that situation, when T 'mixes' monies from *Trust 1* and *Trust 2* into a single bank account, one is *not* faced with *evidential* uncertainty in identifying the subject matter of rights belonging to either trust.[126] We know that T's title to the account is a *distinct* right which is held for both trusts in line with the proportionate sharing rule. The trouble is in determining whether T's subsequent withdrawals out of the account – to pay for dinner – is to be attributed to B1's or B2's share. The same attributional issue arises when *Trust 3's* money is deposited into the account, and a subsequent withdrawal is made to purchase a vase.

One solution is to invoke the the *Re Diplock* pro rata rule as it applies to situations like Example 8(a)[127]. The unfair outcomes it can produce, and its analytical implausibility, were discussed above. A fairer, more analytically defensible approach may be through the North American 'rolling charge'.[128] Its application in English law has been suggested by Woolf and Leggatt LJJ in *Barlow Clowes International Ltd v*

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[126] T Cutts, 'Dummy Asset Tracing' (2019) 135 LQR, 147-149.

[127] See on page 339 (above).

[128] The title is deceptive as there is no security right at play.

Vaughan.[129] It would entail that, in Examples 8(a) and 8(b), the first withdrawal from the account – which was dissipated by T on dinner – will be borne by *Trust 1* and *Trust 2* in the ratio 1:2. Likewise, the remaining £300 in the account, immediately after the first withdrawal, will be attributed to both trusts in the same ratio. This is based on the respective contributions to the account at the time of T's first withdrawal. Up to this point, the loss to the 'mixed' fund and the remaining credit balance is not attributable to *Trust 3*. When T then deposits £300 from *Trust 3* into the account, the resulting credit balance of £600 will be attributable to *Trust 1*, *Trust 2*, and *Trust 3* in the ratio 1:2:3. T's subsequently acquired title to the vase will also be held for each trust according to the same ratio.

As matters currently stand, there have been judicial statements acknowledging the problems with the attributional scheme in *Clayton's Case*[130] and the pro rata rule, and the relative strengths of the rolling

[129] *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22 (CA), 35, 54.

[130] It has been held that the rule should not be applied where it leads to unjust or impractical outcomes: *Russell-Cooke Trust Co v Prentis* [2002] EWHC 2227 (Ch), [2003] 2

charge solution.[131] It has equally been suggested that the pro rata rule would be preferable to the rolling charge in more complicated cases[132] where the latter may be impractical to apply.[133] However, as Professor Stevens rightly notes,[134] modern technology has rendered such complex cases more manageable through 'no more than a few lines of computer code.' So, with the case for the rolling charge solution being so strong, it is hoped that its acceptance in English law would be more complete in the near future. In that event, *Reasons Continuity* should have no difficulty justifying outcomes in the claims discussed in this section.

E.II. <u>Bank Transfers</u>

All ER 478; *Commerzbank Aktiengesellschaft v IMB Morgan Plc* [2004] EWHC 2771 (Ch), [2005] 2 All ER (Comm) 564.

[131] *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281, [150] (*per* Rimer J).

[132] Such as *Charity Commission for England and Wales v Framjee* [2014] EWHC 2507 (Ch), [2015] 1 WLR 16.

[133] *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22 (CA), 35 (*per* Woolf LJ).

[134] Stevens (n 6), 249.

Tracing rights through bank accounts raises two apparent challenges for *Reasons Continuity*.[135] Each can be illustrated by contrasting two fact patterns.

> **Example 9** – T holds title to a car on trust for B. T intends to gift £500 in cash to C. In breach of trust, T exchanges title to the car with X for title to £500 in cash. T then makes a gift of the cash to C.

> **Example 10** – T holds a bank account in credit of £5,000 with *X Bank* on trust for B. In breach of trust, T transfers £1,000 from this account to C's bank account with *Y Bank* as a gift. C's account is now in credit of £2,000.

In Example 9, T's unauthorised exercise of her power over the car caused that right to be lost from the trust fund *and* it resulted in T acquiring a new right in its place (title to £500 in cash). It was seen earlier

[135] Cutts (n 126).

on that *Reasons Continuity* can explain how B can trace into this new right in T's hands, then follow the cash into C's hands, and claim a right in relation to it.

By contrast, Example 10 is constituted by a different analytical path. T's wrongful disbursal from the account in *X Bank*, on one view, does not dispose of or vary a pre-existing right held on trust, such as to cause it not to exist[136] or to generate a new right in its place. The account represents a personal right against the bank for the payment of a sum of money. The disbursal, it would seem, only reduces the *value* of the right, but no *substitution* of that right occurs.[137] Equally, the wrongful exercise of T's power does not create a new right in C's hands. It only increases the value of her subsisting right against *Y Bank*.[138] If this reading of Example 10 is correct, then *Reasons Continuity* cannot explain it. This is a

[136] Although, it could have this effect if the wrongful disbursal empties the credit balance in the account.

[137] Edelman and Bant (n 4), 106.

[138] *ibid*.

serious problem as tracing through bank accounts is undeniably permitted in the positive law, and several cases are based on these facts.

It is submitted, however, that the view described above is not to be rigidly accepted. As others have argued,[139] Example 10 is amenable to a better interpretation. Before T's wrongful disbursal, X Bank owed T £5,000. After the disbursal, it now owes her £4,000. The essence of the bank's obligation to T at every given moment that her account is in credit is to pay a *specific* sum of money. So, after T's wrongful disbursal, the *content* of the bank's obligation shifts and, correlatively, T acquires a new right against *Bank X*. In the same way, C's receipt of the funds causes her to acquire a new right against *Bank Y*. In this way, a single event – T's wrongful exercise of her power to instruct *X Bank* to transfer £1,000 from T's account to C's account in *Bank Y* – results in two sets of substitutions. One in T's hands and another in C's. The view presented here concerns, to some extent, the identity conditions of *personal* rights. So, it could be said that whilst, for some purposes, one regards a bank as being under

[139] Fox (n 119), [5.05]; Hafeez-Baig and English (n 32), [1.58]- [1.62].

a *continuing* duty to pay out what is due under the account, for other purposes one can regard the account holder as having a *new* right each time the state of the account changes.

For completeness, it must be said that the analysis above offers a nice contrast between rights in a bank account and legal property rights. It was seen in Chapter 3 that the *value* of a legal property right is not of the essence to its identity.[140] My freehold title to a house remains the same right, notwithstanding its market value changing from time to time.[141] The realisable value of the house, as an asset, is an *attribute* of my right in it, but it is not *constitutive* of its *identity*. As titleholder over land, my right correlates to duties on third parties which have the *same* content *whatever* the value of the land. On the other hand, the quantum of money (notionally) represented in a bank account *is* of the essence to my right against the bank. One is not concerned here with the realisable value of the bank account as an asset. Instead, one's attention is on the nature of

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[140] See introductory discussion in Chapter 3, Part **B. HARD CASES**.

[141] *Cf Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 107 (*per* Lord Browne-Wilkinson).

the bank's obligation to me and my correlative right against the bank. This cannot be expressed without identifying the specific sum present in the account at any given moment. If the credit balance shifts, so does the bank's duty to me. If it falls to nil, then, at that point, the bank owes no obligation to me. If put into overdraft, then, to that extent, *I* owe an obligation to the bank.

A second challenge to *Reasons Continuity* emerges upon considering a variation of Example 9[142].

> **Example 11** – T holds title to a car on trust for B. T intends to gift £500 in cash to C. In breach of trust, T transfers title to the car to X on the condition that *X* then gifts £500 in cash to C. The transaction between T and X is completed, and X accordingly gifts her title to £500 in cash to C.

[142] See on page 350 (above).

On a strict application of *Reasons Continuity*, it is difficult to justify how B can 'trace' into *C's* title to the cash. Of course, T remains personally liable to B, and X's title to the car may also be vulnerable to a claim by B. However, title to the cash had *always* been held outright by X. In other words, by transferring it directly to C, she was not exercising a power encumbered by a trust in B's favour. Professor Lionel Smith's solution to this problem – which he calls 'tracing in transit'[143] – is to fuse the individual dealings in Example 11 into a single transactional scheme. That is, the T-X and X-C transactions are looked at as part of a composite dealing between T and C. After all, the intervening step in the parties' dealings were only meant to realise T's intention to give C title to £500 in cash. This could explain B's potential claim[144] against C in Example 11 on the basis that the *substance* of the transaction is, *in principle*, the same as in Example 9[145]. What T had intended in Example 9 was achieved

[143] Smith, *The Law of Tracing* (n 7), 243-262.

[144] As discussed below, on the basis by which 'backwards tracing' has been recognised in English law, it could be argued that B may be entitled to bring a claim on facts similar to Example 11. There do not, however, appear to be direct authority for this point.

[145] See on page 350 (above).

through a shorthand in Example 11. So, Smith's solution is simply to treat X's transfer of title to the cash *to T*, and T's subsequent transfer of the cash *to C*, as notionally obtaining in our varied facts of the case. This is a sensible solution. It is also consistent with the approach taken in complex cases featuring backwards tracing (discussed below),[146] where multiple dealings are taken as part of a single transactional scheme based on the overall purpose and effect intended by them. To adopt the 'tracing in transit' analysis does not undermine *Reasons Continuity*. This type of analysis – looking at the substance underlying the ostensible form of transactions – has been adopted in other contexts in the law.[147] It does *not* compel one to overlook the need for a transaction occurring through the exercise of an encumbered power, and for transactional links to be drawn pursuant to it. Instead, transactions of this kind are taken as *notionally* occurring. This is because the parties, in substance, intended to give effect to precisely such a transactional scheme. It should

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[146] See Section **E.III.** Backwards Tracing.

[147] E.g., in looking beneath occupancy agreements designed to avoid duties under the Rent Acts: *AG Securities v Vaughan; Antoniades v Villiers* [1988] UKHL 8, [1990] 1 AC 417 (HL).

not matter that they found an alternate way to achieve this intended outcome– i.e., by altering the formal sequence of their dealings.

In Example 10,[148] C's acquisition of £1,000 into her account with *Y Bank* had not been, strictly speaking, acquired *through* an exercise of T's encumbered power. T's instruction to *X Bank* to reduce the credit in its account is one transaction. In consideration for *X Bank's* debt to T being reduced, *X Bank* agrees to bring about a corresponding increase in C's account with *Y Bank* by asking the latter to do so and, in return, agreeing to reimburse it with that amount. In this way, *X Bank* and *Y Bank* enter into a distinct transaction by which the latter acquires a right to be reimbursed by the former. The final transaction is between *Y Bank* and C, by which *Y Bank's* debt to C is increased by the amount T's account in *X Bank* is reduced. Smith says that it should be possible to collapse the dealings in this scenario into a composite transactional scheme between T and C. In substance, they yield the same result as T's exercising an encumbered power over £1,000 in cash, by transferring it

[148] See on page 351 (above).

directly to C. Dr Tatiana Cutts objects to this move. She argues that the transaction that is notionally assumed – the 'transfer' of money from T to C – is impossible in the case of bank transfers.[149] This is factually true.[150] No coins or banknotes pass between *Bank X* and *Bank Y*. The debit and corresponding credit affect distinct rights – choses in actions – and there are no rights that strictly *move* from the payor to the payee. It is submitted, however, that this fact does little violence to Smith's application of the tracing in transit principle to Example 10. The principle does not say that a transactional step that did *not* occur is *taken* to have occurred. Instead, it acknowledges that this step *might* have been taken, but it was omitted as a more direct way of achieving the ultimate result existed.[151] There is no reason, therefore, not to treat the two, in substance, as the same (i.e., in so far as they are purported to achieve the same result). So, in principle, Example 10 is functionally identical, and formally analogous to the case where T simply hands over £1,000 in cash held on trust to C.

[149] Cutts (n 126), 145.

[150] Fox (n 119), [5.05].

[151] Hafeez-Baig and English (n 32), [1.69].

Reasons Continuity also avoids Cutts' objection in how the account is framed. The language of 'tracing' is used in this thesis as it is too entrenched in the law to be jettisoned. But the terminology creates some confusion.[152] To 'trace' implies following[153] the physical or metaphysical movement of something – 'value' or 'property' – as it passes from one location to another. In the discussion above, it is clear how this usage runs into problems.[154] Nothing truly moves between T and C for B to 'trace'. A similar problem arises when applying the term 'transaction' in its literal usage. The word comes from the Latin verb *transigere* – *trans*, meaning 'through'; and *agere*, meaning 'do' or 'lead'. So, 'to transact' implies to drive or lead from one place to another. Transactions concerning the sale of chattels can neatly meet this idea. Those featuring bank transfers, or the sale of shares, do not. Nothing

[152] See Stevens (n 6), 245-248.

[153] The term is not used here in the narrow, technical sense (e.g., 'following' as contrasted with 'tracing').

[154] In addition to bank accounts, a similar problem arises when considering other choses in action like shareholdings. See further: Nair (n 25), [1.78]-[1.95].

really *moves* between the parties in such cases. It is for this reason that *Reasons Continuity* does not depend on such terminology (or at least their literal meaning). For the claim at hand to work, what must be shown is: (a) T has had an encumbered power over a specific right; (b) T has exercised that power (with authority or without); and (c) *this* has resulted, transactionally, not counterfactually, in T's acquisition of a new right. B's claims against C in Examples 9-11 can be readily explained through this framing.[155]

E.III. Backwards Tracing

'*This*', in element (c) of the three-step formulation described immediately above, spotlights a key point. We know that there must be a transactional link – determined by the way in which the outcome was,

[155] Again, the 'shortcut' analysis implied by the 'tracing in transit' approach is not inconsistent with the formulation presented in this paragraph – namely, the need for establishing transactional, rather than counterfactual, links. See text in, and accompanying, (n 147) and (n 151), above, and the discussion on finding a composite transactional scheme, in Section **E.III.** Backwards Tracing, below.

in a transactional sense, produced – between T's wrongful exercise of an encumbered power and her (or C's) acquisition of a new right. As indicated earlier on,[156] where the events – T's exercise of power and acquisition of a new right – are not contemporaneous, the chronological sequence of transactional links is crucial for *Reasons Continuity* to do its justificatory work.

> **Example 12** – T's personal bank account has an overdraft facility of £10,000. The account is overdrawn to this limit. T then misappropriates £10,000 cash held on trust for B and deposits it into the same account. She then adds £5,000 of her own money into the account. The account is now in credit of £5,000.

B cannot trace into T's right in her bank account which is now in credit of £5,000. T's wrongful exercise of an encumbered power generated no new rights in place of the rights held on trust. It simply

[156] See the critique of the pro rata rule following Example 8(b) in Section **E.I.** The 'First In, First Out' Rule, Pro Rata Sharing, and the Rolling Charge.

resulted in the discharge of a pre-existing liability. Put differently, the source of T's ultimate right to the payment of £5,000 (represented in her bank account) has nothing, transactionally, to do with the money she misappropriated from the trust. That right was acquired *after* trust money was misappropriated and subsequently dissipated. This is also the reasoning applied in the cases, although the term 'asset' rather than 'right' is sometimes used.[157] This does not mean that unauthorised payments discharging a debt can never create new rights. Where the debt is secured by a charge, it may well be possible for the plaintiff to be subrogated to the creditor's position vis-à-vis the debtor.[158] Subrogation, however, is conceptually distinct from the rules on tracing.[159]

Example 13 – T purchases a car worth £5,000 by putting her personal bank account with *X Bank* in overdraft. T acquires

[157] See, e.g., *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281, 328 (*per* Rimer J).

[158] *Boscawen v Bajwa* [1995] 4 All ER 769 (CA).

[159] Stevens (n 134), 252-256. See also generally: R Gregson, 'Is Subrogation a Remedy for Unjust Enrichment?' 136 LQR. An opposite view, however, has been taken by Edelman and Bant (n 4), 115. For a persuasive rebuttal, see: LD Smith, 'Tracing into the Payment of a Debt' (1995) 54 CLJ 290.

title and possession of the car, and her account remains in overdraft. T subsequently misappropriates £5,000 in cash held on trust and uses it to discharge her debt to the bank.

In Examples 12 and 13, T owed a pre-existing debt to a third party and trust money was misappropriated and used to discharge it. However, in Example 13, *before* misappropriating trust money, T had acquired a new right. That right was acquired on credit, whose repayment was funded by trust money. From B's point of view, T's misappropriation of trust funds in Example 13 need not, *in substance*, be transactionally disassociated from T's acquisition of a new right (as is the case in Example 12[160]). From T's perspective, three separate but interlinked transactions underpin her acquisition of a new right. The first is her taking money on credit (by availing the overdraft). The second is her acquisition of title to the car with the money borrowed. The third is her repayment, through trust money, of the debt that allowed her to acquire the right. To allow B's tracing claim in Example 13 will be an

[160] See on page 361 (above).

instance of 'backwards tracing'.[161] She will be permitted to trace into a right acquired *before* T's exercise of an encumbered power. Whether she can do so ought to, in principle, depend on whether the three dealings listed above can be transactionally linked to each other. In other words, the issue is whether such links can be drawn in the absence of the dealings occurring in chronological sequence.

[161] In *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211 (CA), 211, Leggatt LJ (as his Lordship then was), stated that backwards tracing in such a case must never be allowed. However, at first instance, Vinelott J left the possibility open, and his reasoning was very similar to Lord Toulson's in the later case of *Brazil v Durant International Corp* [2015] UKPC 35, [2016] AC 297, [2015] 3 WLR 599 (discussed below). Dillon LJ, in *Homan*, also appeared to lend partial support to Vinelott J's position. The third member of the bench, Henry LJ, merely stated that he agreed with the judgments of both Dillon and Leggatt LJJ. Given the conflicting opinions in the case, *Homan* has rightly been described as 'frail authority' on backwards tracing: see J Penner, ''Sort of' Backwards Tracing' in PS Davies and J Penner (eds), *Equity, Trusts, and Commerce* (Hart 2019), 131. In any event, consider the support lent to Dillon LJ's position in *Jyske Bank (Gibraltar) Ltd v Spjeldnaes* (unreported, 23 July 1997) by Evans-Lombe J and in *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281, 328 (*per* Rimer J). On balance, and in light of the reasoning in *Durant*, it appears that backwards tracing could succeed on facts similar to those in Example 13.

At one time, the availability of a backwards tracing claim was in doubt.[162] Today, the possibility seems open.[163]

Backwards tracing was *explicitly applied* for the first (and, so far, only) time in English law in *Federal Republic of Brazil v Durant International Corporation*.[164] The Mayor of the Municipality of Sao Paulo, Mr Maluf and others had received several bribes. Between 9 January and 8 February 1998, thirteen transactions representing the bribe money (totalling $10.5m in US Dollars) were made to a New York bank account ('Account 1') owned by Maluf's son. Between 14 January and 26 January 1998, payments totalling $13.12m were made from Account 1 to a different account ('Account 2') controlled by the first defendant, Durant, in Jersey. Over the course of the next ten days, payments were made to

[162] As noted above (*ibid.*).

[163] *Brazil v Durant International Corp* [2015] UKPC 35, [2016] AC 297, [2015] 3 WLR 599. See also *Relfo Ltd (in Liquidation) v Varsani* [2014] EWCA Civ 360 and Sir Richard Scott V-C's judgment in *Foskett v McKeown* [1998] Ch 265 (CA), 283-303 – in both cases, on one view, backwards tracing seems to have been allowed, albeit without the court acknowledging that it was doing so).

[164] *Brazil v Durant International Corp* [2015] UKPC 35, [2016] AC 297, [2015] 3 WLR 599.

the tune of $13.5m from Account 2 to a different Jersey account ("Account 3") held by the second defendant, a wholly owned subsidiary of Durant, Kildare. The municipality claimed that they could trace the $10.5m payment from Account 1 into Account 2, and ultimately into Account 3, asserting that the defendants ought to hold the $10.5m in their account as constructive trustees. However, the defendants argued that they should only be liable for $7.7m. This was because three payments to Account 1, representing the bribe money (totalling just under $3m), were made *after* 26 January 1998. In other words, those payments to Account 1 were made *after* the final payments in favour of Account 2 were received. So, the defendants submitted that the full $10.5m could not be attributed to the whole bribe money since part of its receipt occurred *before* the final instalment of about $3m reached Account 1. The municipality's claim succeeded at all levels of litigation.

Lord Toulson delivered the advice of the Privy Council. His Lordship observed – as would defenders of *Reasons Continuity* – that '[c]onceptually the [defendants'] argument is coherent and it is

supported by a good deal of authority.'[165] However, upon a review of *dicta* in existing English cases and cases from other common law jurisdictions,[166] as well as academic arguments, his Lordship held that backwards tracing should be upheld. Its limits were to be carefully constrained. So, Smith's position that 'money used to pay a debt can in principle be traced into whatever was acquired in return for the debt', was rejected as too broad and beyond the limits suggested by the extant authorities.[167] Instead, the court must look to the 'overall purpose and effect' of the defendants' transactions and identify if they form a 'co-ordinated scheme'.[168] If they do, the court can overlook the 'camouflage of interconnected transactions'[169] and allow the plaintiff to trace, notwithstanding that 'either as a deliberate part of the choreography or

[165] *ibid.*, [18].

[166] Including the *obiter* findings in *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211 (CA), 216-217 (*per* Dillon LJ), but compare at 222 (*per* Leggatt LJ); *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281, 328. These and other authorities cited by his Lordship are examined in Hafeez-Baig and English (n 32), [7.151]- [7.166].

[167] *Brazil v Durant International Corp* [2015] UKPC 35, [2016] AC 297, [2015] 3 WLR 599, [33].

[168] *ibid.*, [38].

[169] *ibid.*

possibly because of the incidents of the banking system'[170] the bank accounts of the defendant, their intermediaries, and recipients did not reflect debits and credits in a strictly chronological order. In doing so, all transactions forming the scheme will be treated as a single transaction that is attributed to the 'depletion of the trust fund.'[171] This single transactional scheme will then ground attributional links between the unauthorised dealing with prior trust rights and rights over substituted assets acquired in their place.[172]

Before proceeding, one must address what it means to discern the overall 'purpose and effect' of a transactional scheme and locate its explanatory role in the context of backwards tracing. As the discussion below shows, the purposive categorisation of transactions is by no means exceptional in legal analysis. Example 14 below shows how it is

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[170] *ibid.*, [37].

[171] *ibid.*, [40].

[172] For a more recent judicial discussion on the scope of backward tracing in English law (that also draws on the reasoning in *Durant*), see: *The Serious Fraud Office v Hotel Portfolio II UK Ltd* [2021] EWHC 1273 (Comm), [22]-[48] (*per* Foxton J).

applied in finding, in substance, a single transaction, notwithstanding its being *technically* composed by two separate dealings. As explained below (following Example 14), such cases are not true instances of backwards tracing. Example 14, nevertheless, serves as a useful illustration of the non-exceptional use of the overall 'purpose and effect' analysis in characterising a transactional scheme. It also supplies a segue into locating true backwards tracing cases – as illustrated by Example 13[173] (above) and Example 15[174] (below) – and working out their facts can compare in their use of a purposive analysis.

> **Example 14** – T holds her right in a bank account with *X Bank* on trust for B. The account is in credit of £2,000. T intends to – and ultimately does – use £1,000 from this account, in breach of trust, to purchase C's iPhone from C for £1,000. The contract of sale was concluded at time *t*. At time *t+1*, T pays C the purchase price of £1,000.

[173] See on page 363 (above).

[174] See on page 372 (below).

Subject to the contract providing otherwise, the default rule – in relation to specific/ascertained goods (such as C's iPhone) – is that title to the phone passes to T the moment the contract is made at time *t*.[175] Between time *t* and times *t+1*, is a debt of £1,000 is created in favour of C? Technically, a debt does arise. It does not necessarily follow that its discharge must be characterised as a *separate transaction* (at least in the context of tracing).[176] Separate, that is, from the purchase transaction. From the objective standard of a reasonable person in the parties' position, the purpose and effect of the transaction is for T to make a purchase of C's phone from C in return for a payment of £1,000.[177] It is not to make a purchase *on credit*. If it were, their agreement must –

[175] Sale of Goods Act 1979, s 18.

[176] Assume that in Example 14 purchasing an iPhone is permitted under the terms of the trust, but making the same purchase on credit is not. As discussed in this paragraph, assessing the dealings between T and C contextually, it seems highly unlikely that a court would characterise T's actions as amounting to a breach of trust. See further: RC Nolan, 'The Administration and Maladministration of Funds in Equity: Making a Coherent Set of Choices' in P G Turner (ed), *Equity and Administration* (CUP 2016), 86-87.

[177] T Cutts, 'Tracing, Value and Transactions' (2016) 79 MLR, 151; Nolan (n 176), 85-87.

objectively construed – show that this is what the parties had intended. Resorting to a default rule on the conveyance of title to goods is not enough.[178] For this reason, it is difficult to accept that B's ability to trace into T's title to the phone in Example 14 is an instance of backwards tracing.[179] As discussed below, in the language of *Reasons Continuity*, T's exercise of an encumbered power (her payment of trust money to C) is transactionally wedded to her (prior) acquisition of title to the phone from C.

Framing both sets of dealings in this way – i.e., as part of a single transaction – depends on the purpose and effect intended by them. In cases like Example 14, the intended purpose and effect of the parties' dealings emerge from their *joint* intentions, objectively ascertained. However, in (true) cases of backwards tracing, the objective joint

[178] Where the item sold is ascertained, the parties' contract may provide for title to pass at a time other than when the contract is made; in such cases, the default rule will *not* apply: see Sale of Goods Act 1979, s 16.

[179] *Pace* Smith, *The Law of Tracing* (n 7), 146 (at footnote 59) and J Penner, 'Property, Value, and Unjust Enrichment' in R Chambers, C Mitchell and J Penner (eds), *The Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009), 318-319.

intentions of the transacting parties can be less relevant in identifying a unifying transactional scheme.

> **Example 15** – T holds title to £1,000 in cash on trust for B. T contracts with C to purchase, on credit, a computer worth £800. Two days after acquiring title to the computer from C, T makes an unauthorised payment of trust money to C to discharge her debt.

Unlike Example 14,[180] Example 15 is not a single transaction case.[181] It features two distinct transactions. The first is T's acquiring title to the computer from C on credit. The second is the discharge, with trust money, of her debt to C, with which she acquired the right to the computer. The objective *joint* intentions of the parties reveal two distinct dealings. T's purchase-on-credit transaction, from C's perspective, is separate from the former's repayment of the debt. The first featured a

[180] See on page 369 (above).

[181] For a discussion on how such single transaction cases are not true instances of backwards tracing, see: Hafeez-Baig and English (n 32), [7.135]-[7.150].

promise to convey a right on credit in consideration for a promise that the debt will be repaid according to agreed terms. The second was the discharge of a debt obligation in return for the actual repayment of the debt. To T, both transactions might be part of an overarching objective. This is unlikely to be relevant to C. Further, in cases like *Durant* and Example 13[182], where multiple transactions play out with multiple transacting parties, it need not be that each party share in a common adventure. The intermediaries in *Durant* may have participated in the money laundering scheme for their own ends and for reasons distinct from those of Maluf and his son. Yet, the facts of *Durant*, Example 13, and Example 15 show that the transactions featured in them occur to fulfil an overarching intention. This is normally the intention of the initial holder of an encumbered power – e.g., a trustee – to organise and initiate a series of transactions to achieve a particular result. Although it was not directly stated in *Durant*, Lord Toulson's discussion on the

[182] See on page 363 (above).

'inference' drawn on the overall purpose and effect of transactional scheme suggests that this is correct.[183]

E.III.i) *Explaining backwards tracing through Reasons Continuity*

The question now is how *Reasons Continuity* might justify the possibility of backwards tracing in cases where there is an overall 'purpose and effect' in a transactional scheme. It is submitted that this is done by invoking the 'overall purpose and effect' test to sidestep the temporal dissonance between transactions. That is, the problem is acknowledged but, for countervailing reasons, it is skirted by resorting to a fiction. This is essentially the move backwards tracing called for in *Durant* – i.e., respecting the three payments (totalling about $3m USD) made to Maluf's son's account after 26 January 1998. In any event, resorting to this fiction is not a move uniquely needed for *Reasons*

[183] *Brazil v Durant International Corp* [2015] UKPC 35, [2016] AC 297, [2015] 3 WLR 599, [40]. See also the discussion in Nair (n 25), [4.36].

Continuity, as a justificatory account of tracing, to work. Any account that accepts the importance of a chronological sequence of transactions cannot but invoke the fiction. Further, the fiction does not diminish *Reasons Continuity's* explanatory force. It allows it to do its work, but only by embracing a fact pattern that could, straightforwardly, have occurred but which was abandoned in preference for a more indirect (or intentionally closeted) sequence of events. This is similar to the rationale driving the tracing in transit principle. It was possible for Maluf to simply make a direct payment to the Kildare account in *Durant*. Once it is determined that he intended for the debits from each preceding bank account to correspond with credits to subsequent bank accounts, it must not matter that it was, in fact, achieved through a clandestine and non-consecutive sequence of transactions involving any number of intermediaries. This is because the intended effect had, as a matter of the transactional history, been achieved. In substance, for the purposes of tracing, both transactional routes are the same and ought to be treated as such.

CONCLUSION

Drawing on this thesis' five-part taxonomy of claims, the analysis in this chapter was based on four key findings. First, justifications of claims contingent on tracing as being based on the vindication of persisting property rights does not work.[184] Second, a trust beneficiary's claim respecting traceable substitutes can be seen as a *Consequential claim* within this thesis' taxonomy.[185] Third, *Consequential claims* work by drawing on *Reasons Continuity* as a conceptual tool.[186] Finally, understanding tracing claims as *Consequential claims* can be reconciled with 'hard' cases which, on one view, may pose some challenges to the application of *Reasons Continuity* in this context.[187]

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[184] See Section **B.I.** *The notion of 'persistence'*.

[185] See Section **B.III.** *Tracing claims as Consequential claims*. *Cf* the rebuttal of a counterview addressed in **Part C** of **Chapter 4** of this thesis.

[186] See **B.II.** *Reasons Continuity*.

[187] See Part **E. THREE HARD CASES**.

If the account developed in this chapter is correct, this would support some noteworthy consequences. At their core is the resonance *Reasons Continuity* affects between its analytical scheme and the language used in the cases to justify the claims at hand. From *Taylor v Plumer* to *Foskett*, judges have – in varying, but broadly similar, terms – justified claims contingent on tracing as a means of vindicating pre-existing proprietary rights.[188] As argued in Chapters 2-4, the subject-matter of a proprietary right – at law or in Equity – is a key component of its identity. Claims respecting traceable substitutes address new subject-matter, and therefore depend on new rights. It is unilluminating to simply justify them in the same way as a common law conversion claim respecting one's legal title to a stolen chattel. As Professors Agnew and McFarlane have explained, *Reasons Continuity* goes a good way towards reconciling this tension.[189] It does so by justifying a claim respecting a traceable substitute through the *same* reasons which grounded B's *initial* right respecting the trust asset. These persisting

[188] See text in and accompanying (n 24) and (n 25), above.

[189] Agnew and McFarlane (n 32), 306-307.

reasons ground a new duty on T to render a next-best form of compliance with the core trust duty she had breached. One form of such next-best compliance is an obligation to hold a traceable substitute on trust for B. In this way, there is an important sense in which their Lordships' reasoning in *Foskett*, which links the basis of B's claim respecting a traceable substitute to her *prior* equitable property right respecting the substituted right is justified.[190] It is not the old right itself which persists, but the *reasons* grounding that right.

Applying *Reasons Continuity* to this effect is also enabled by the approach that has traditionally informed the judicial execution of a trust. As Part B shows, this is the idea that there is a persisting primary obligation on T 'to perform' the trust – a duty which remains specifically enforceable even if T's rights over original trust assets, to which that duty relates, have been wrongfully disposed of. Without further elucidation, however, the idea is not intuitively clear. How can T's

[190] *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 108 (*per* Lord Browne-Wilkinson), 127 (*per* Lord Millett).

obligation to perform the trust in respect of asset-*A* remain enforceable once she has caused her title to it to exit the trust fund? *Reasons Continuity* offers one explanation. It is the reasons grounding her (now breached) duty that persist post-breach. Equity responds to these reasons in a unique way by allowing B the choice of *specifically enforcing* – i.e., through an *in specie* claim – T's obligation to render a next-best form of compliance with the obligation she breached. Further, unlike a defendant in tort or contract who is *discharged* of their primary duties on the payment of damages, a remedial award against T *prolongs* her duty to perform (albeit through next-best/substitutive means).

The possibility of applying *Reasons Continuity* in this way can also be sustained by the role of T's wrongdoing outlined in this chapter.[191] T's wrongful exercise of her encumbered power can be seen as: (a) explaining specific consequences attendant on T, as regards B's remedial options, following T's substitution of a right held on trust; and (b) justifying the application of special rules that apply against T, in the

[191] See discussion in Section **C.II.** The Role of T's Wrong.

tracing context, when T's wrongful conduct results in certain kinds of evidential uncertainties. On this basis, as T's wrong is *not* a reason grounding B's right respecting a traceable substitute, there is space for *Reasons Continuity* to perform this function without redundance.

Finally, on establishing the theoretical viability of *Reasons Continuity*, this chapter proceeded to address three 'hard' cases that may appear to problematise the view that tracing claims belong to the category of *Consequential claims*. Three aspects of *Reasons Continuity* – as it operates in tracing cases as a species of *Consequential claims* – were discussed.

First, to trigger the application of *Reasons Continuity*, it must be shown that T's unlawful exercise of her encumbered power is transactionally linked to the disposal or alteration of a right which T held for B. This is substantively the same starting point from which the tracing exercise – in the context of the trust – proceeds. If this fact is not made out, *Reasons Continuity* struggles to justify how claims may

nevertheless succeed. The issue was precisely at stake when *Reasons Continuity's* preference for the rolling charge solution and its incompatibility with the pro rata rule or the application of *Clayton's Case* was discussed.[192] It equally emerged in cases like *Durant*, where *Reasons Continuity* had to meet the possibility of tracing into rights acquired *before* an encumbered power could be exercised.[193]

Second, according to *Reasons Continuity's* scheme, allowing claims respecting traceable proceeds depends on T acquiring a new right *through an exercise* of an encumbered power respecting a specific, prior right held for B's benefit. This is also a key element of the tracing exercise. Again, this issue was engaged when discussing tracing through rights held in bank accounts.[194]

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[192] See discussion in Section **E.I.** The 'First In, First Out' Rule, Pro Rata Sharing, and the Rolling Charge.

[193] See Section **E.III.** Backwards Tracing.

[194] See Section **E.II.** Bank Transfers.

Third, it was seen that the logic of substitutive claims – of which claims contingent on tracing are a species – conceives of 'next-best' compliance in a unique way. In other words, the remedial response to the claim does not fashion the mode of next-best compliance such as to place the trust fund in the position it would be in *but for* T's breach. Instead, the objective is to affect a form of next-best compliance with T's core trust duty *notwithstanding its breach*.[195] This explains why the law's choice of transactional links, as opposed to counterfactual causation, is one that *Reasons Continuity*, in the tracing context, shares.

The pivot of this chapter has been on the normative ground of B's rights and its ability to justify claims concerning substitute rights *within* the trust fund. The scope of this normative ground is seemingly capable of going further. Namely, towards justifying proprietary claims against third parties acquiring rights held on trust from an errant trustee. Whether, and to what extent, this view holds is the subject of Chapter 6.

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[195] See Part **D. ATTRIBUTION THROUGH TRANSACTIONAL LINKS.**

Chapter 6:

Claims Against Third-Party Recipients of Trust Property

INTRODUCTION

> **Example 1** – T holds title to a basketball on trust for B. In breach of trust, T transfers title to the basketball to C.

In this example, B could bring one of two receipt-based claims against C. The first claim is a proprietary claim, an action to compel a transfer of the subject-matter[1] of B's equitable proprietary right (or its proceeds) (this is sometimes referred to as the 'equitable proprietary claim'). More specifically, this claim reflects a duty on to restore the very

[1] In Chapter 4 of this thesis, it was explained that the subject matter of B's equitable proprietary right under a trust is a *distinct* right held by T.

right transferred to C (or its traceable product) to T[2] (a restorative duty[3]).[4] The second claim is a personal claim (in 'knowing receipt') that C pay into the pre-existing trust the monetary value of the right C received (or of its traceable product).[5] As both claims depend on C

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[2] Or to B or a replacement trustee, depending on the terms of the trust.

[3] *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189, [31] (*per* Lord Sumption).

[4] Pending the reconveyance of the rights (compliance with the 'restorative duty'), there is also a duty on C not to use the right inconsistently with the terms of the trust affecting those rights. This intervening duty has been described as a 'custodial duty': *Arthur v Attorney-General of the Turks and Caicos Islands* [2012] UKPC 30, [37] (*per* Sir Terence Etherton).

[5] Some have argued that, in cases like Example 1, there should also be available a personal claim in unjust enrichment. See: P Birks, 'Misdirected Funds: Restitution from the Recipient' (1989) LMCLQ 296; Lord Nicholls, 'Knowing Receipt : The Need for a New Landmark' in WR Cornish and others (eds), *Restitution: Past, Present and Future* (Hart 1998); and P Birks, 'Receipt' in P Birks and A Pretto (eds), *Breach of Trust* (Hart 2002). However, as persuasively argued in WJ Swadling, 'The Nature of Knowing Receipt' in PS Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart 2019), 317-322, this view is difficult to accept. One reason is that defendant's (C's) enrichment cannot be shown as 'at the expense of' the claimant (B). This is because C did not receive *B's right* in relation to a trust asset (but rather the trust asset itself, which right belongs *to T*). It should be noted that in *Relfo Ltd (in Liquidation) v Varsani* [2014] EWCA Civ 360 the possibility of an unjust enrichment claim was discussed in the present context: see at [69]-[99] (*per* Arden LJ). That point, however, was only offered by way of *obiter*.

receiving a right from T pursuant to the latter's breach of trust, they will, hereafter, be jointly referred to as 'receipt-based' claims. As they depend on C's receipt of a right from T, receipt-based claims can be distinguished from parallel claims B may bring against C (namely, in dishonest assistance). B's ability to bring receipt-based claims against C will be defeated if C can make out a relevant defence, such as of a bona fide purchase for value without notice.[6]

This chapter develops and defends the view that each of B's receipt-based claims in cases like Example 1 are best understood as a type of *Linked claim* within this thesis' taxonomy. This is based on the idea that both types of receipt-based claim depend on the enforcement of the *same* underlying duty of C's. While an equitable proprietary claim specifically enforces that duty, a personal claim in knowing receipt will consist of a 'next-best' means of doing so.

[6] *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457, [18]-[28], [44] (*per* Lord Briggs), [158]-[159], [172], [201] (*per* Lord Burrows).

It will be recalled that a *Linked claim* is one that draws on the reasons grounding a plaintiff's pre-existing right for it to be justified. Further facts, however, must obtain for the claim to succeed. In this sense, *Linked claims* bear some similarity to *Consequential claims*. Unlike *Consequential claims*, however, the additional facts associated with a *Linked claim* do not serve as simple triggers for the claim to arise. That is, they do not generate a mere causative event that enables a plaintiff to bring the claim. Instead, they also go further to form part of the claim's justificatory basis. Seen thus, a *Linked claim* is *partly* justified by reasons linked to those grounding a plaintiff's prior right and *partly* by further facts associated with the claim.

The examination in this chapter matters because a principled analysis of each of B's receipt-based claims has not yet been settled and different judicial accounts have been proffered. That such an exposition is important was demonstrated by the recent Supreme Court decision in *Byers v Saudi National Bank*.[7] Part A of this chapter sets out the facts,

[7] *ibid*.

issues, and reasoning in *Byers* as they are salient to this chapter's inquiry. The concluding portion of Part A draws the discussion together and presents an outline of how this chapter's central argument will be defended. This is the argument that each of B's receipt-based claims in cases like Example 1 are best understood as types of *Linked claim*.

A. SETTING THE SCENE

A.I. *Byers v Saudi National Bank*

The facts of *Byers* are structurally similar to Example 1.[8] Mr Al-Sanea (T) held rights to certain shares in five Saudi Arabian companies on trust for SICL, a Cayman Islands registered company. Shortly after a winding-up presentation had been made against SICL in the Cayman Islands, T, in breach of trust, transferred his rights to the securities to a Saudi Arabian bank (C) in part discharge of a debt T had owed to C. One of the claims SICL's liquidators (B) brought against C was in knowing receipt – pleading that C be held liable to account to B as a constructive

[88] See on page 383 (above).

trustee for the market value of the disputed securities, on the footing that C had received them from T with knowledge that they were transferred in breach of trust. For an English court to hold C accountable as a constructive trustee, it must be shown that this does not contradict the *lex situs*, i.e., Saudi law, where the disputed securities were located and which thus governed the effect of the transfer of the shares from T to C (and under whose legal system the concept of a trust is not recognised). In *Akers v Samba Financial Group*[9] – which was decided on the same facts as in *Byers* – the Supreme Court held that

> the English courts have regularly stated their willingness to enforce *in personam* trusts in respect of trust property abroad.[10]

The point, consistent with earlier decisions of English courts[11] and the Court of Justice of the European Union,[12] is that it does not

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[9] *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424.

[10] *ibid.*, [24] (*per* Lord Mance).

[11] *Webb v Webb* [1991] 1 WLR 1410 (Ch).

[12] *Webb v Webb* [1994] ECR I-1717, [1994] QB 696 (ECJ).

undermine the *lex situs* for an English court to find that while T acquires a right to the securities, compatibly with the position under Saudi law, T may also be bound by a duty in respect of its *asserting* that right as an absolute right-holder.[13]

The issue in *Byers*, however, was different. It seems that the effect under Saudi law was that C had received title to the securities free from B's pre-existing claims in relation to them. In other words, under the *lex situs*, B's pre-existing rights respecting the securities were 'overridden' when C took title to them.[14] C argued that this effectively

[13] See also B McFarlane and R Stevens, 'What's Special about Equity?' in D Klimchuk, I Samet and HE Smith (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020), 195-196, who draw on this point to make important arguments on the distinctiveness of an equitable proprietary right when compared with a common law property right.

[14] Lord Mance, in *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424, [22], [51], and Lord Briggs in *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457, [20]-[21], [28], employed the term 'overriding' while addressing cases where it may be contended that a transaction between T and C results in an inability on B's part from asserting her pre-existing rights under a trust against C. In this chapter, wherever the term is used, reference is made specifically to a *system* of legal rules that may allow C to take title to trust property in a way that prevents her from later coming under a duty to B in relation to it. This may include the operation of foreign law (as in *Byers*) or

barred *any* claim, including a personal claim in knowing receipt, B may bring against it in respect of the securities. In response, B argued that its personal and proprietary claims must not be conflated. The effect of 'overriding', it was said, only deprived it of a *proprietary* claim, but its personal claim against C remained unaffected. This was based on the contention that a knowing receipt claim, as opposed to a proprietary one, is based on 'the apparent unconscionability of the recipient [C] treating the property as its own after learning that the property has been transferred to it in breach of trust.'[15]

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statute (e.g., the Land Registration Act 2002). By contrast, independent rules on 'overreaching' and the 'bona fide purchaser for value without notice' defence are referred to by their respective titles. It should be noted that, in *Byers*, Lord Briggs allowed the descriptor of 'overriding' to swallow-up the bona fide purchase defence: [20].

[15] *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457, [11] (*per* Lord Briggs). B's argument was essentially this: if the *lex situs* does not stop a court finding that it would be unconscionable *for T* to assert its right for its own benefit, why should it stop a court finding that it would be unconscionable now *for C* to assert a right for its own benefit? The Supreme Court's rejection, in *Byers*, of B's argument might suggest some inconsistency between the findings in *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424 noted above. However, in S Agnew and B McFarlane, 'The Nature of Trusts and the Conflict of Laws' (2021) 137 LQR 405, 42-424, it is argued that the issue in *Byers* was importantly different. The particular form of unconscionability that a

A unanimous Supreme Court dismissed B's appeal. Lord Briggs and Lord Burrows gave the only detailed judgments in the case.[16] Whilst their reasoning differed in significant respects, both their Lordships agreed on three broad counts.[17]

A.I.i) *B's 'continuing equitable proprietary interest' grounds C's proprietary and personal liability*

knowing receipt claim addresses is based on C's receipt of a right following the exercise of a power held by T subject to a core trust duty. If the law governing the T-C transaction prevents that pre-existing duty affecting C, then that particular form of unconscionability does not arise. This argument fits well with this chapter's position that a knowing receipt claim is receipt-based. So, it can be seen that *Akers* is different because the liability of T under the initial trust was not based on any *receipt* under a transaction governed by Saudi law, but was rather a result of *T's own conduct* in relation to shares which T *already held*.

[16] Lord Hodge (with whom Lords Leggatt and Stephens agreed) also dismissed the appeal, providing a brief 'summary of agreed matters' based on 'reasons common to the judgments of Lord Briggs and Lord Burrows': *ibid*, [1], [9].

[17] It should be noted that, to the extent Lords Briggs and Burrows differed, Lord Hodge, Leggatt, and Stephens preferred to support Lord Briggs' judgment: *ibid*., [8].

First, B's 'equitable proprietary interest' must survive T's transfer to C, for *either* a proprietary or personal claim to succeed.[18] The need for a 'continuing beneficial interest' was key to their Lordships' reasoning. Both saw a personal (knowing receipt) claim to be simply another means of giving effect to the *same* liability enforced against C in a proprietary claim.[19] The term 'liability', in this context, refers to C's susceptibility to a court order. *Per* both their Lordships, if C could not, from the time of receipt, be susceptible to a court order in response to a proprietary claim, there could be no basis for a later court order in respect of a personal claim. So, should the basis of C's proprietary liability disappear, so should her liability in knowing receipt.

A.I.ii) *Three defences for C: receipt-based liability cannot arise if B's 'continuing equitable proprietary interest' is defeated at the time of C's receipt*

[18] *ibid.*, [44] (*per* Lord Briggs), [157]-[159], [172], [201] (*per* Lord Burrows).

[19] *ibid.*, [44] (*per* Lord Briggs), [155] (*per* Lord Burrows).

Second, both also agreed that this liability cannot avail against C in three core circumstances, where B's 'continuing' equitable interest is defeated at the time of C's receipt. These are when:

(i) B's interest is 'overreached' by T's exercise of a 'power under the terms of the trust to dispose of the property free of the equitable interest';[20]

(ii) the transfer of title to a trust asset is to a bona fide purchaser for value without notice;[21] and

(iii) '[t]he mode of disposition of the legal title is such that, under the law applicable either to the property or to the transaction, the transferee takes free of it, even if the property is transferred in breach of trust.'[22]

[20] *ibid.*, [19] (*per* Lord Briggs). See also: [172], [201] (*per* Lord Burrows).

[21] *ibid.*, [20] (*per* Lord Briggs), [156] (*per* Lord Burrows).

[22] *ibid.*, [21] (*per* Lord Briggs). See also: [172], [201] (*per* Lord Burrows).

The third circumstance included both the operation of foreign law (as in *Byers*) and statute.[23] If these three situations do not obtain, C will be immediately liable to B in respect of the latter's 'continuing' equitable interest. This would allow B to make a proprietary claim against C. The same liability would also enable B's personal knowing receipt claim to be made (i.e., if the further conditions for that claim are met).

A.I.iii) *A contrast between 'pure' receipt-based claims and claims against dishonest assisters: reinforcing the requirement of 'continuity'*

Third, to cast further light on their reasoning, both judgments drew a distinction between knowing receipt and dishonest assistance claims. On Lord Briggs' view, both claims reflect a form of 'ancillary

[23] *ibid*. Lord Briggs cited the Law of Property Act 1925, s 2. Another example could be the operation of the Land Registration Act 2002, s 29.

liability'.[24] A dishonest assister (D) is an accessory to T's breach of trust, and D's liability is seen ancillary *to T's*.[25] A knowing recipient's (C's) liability, however, is also 'ancillary' in nature, but not in the same way. Instead:

> it is ancillary to the proprietary claim which will generally enable the continuing equitable beneficial owner 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.[26]

It was on this basis that Lord Briggs rejected any role of C's 'fault' (or 'unconscionability') in grounding a knowing receipt claim where B's proprietary claim (grounded on the 'continuance' of her equitable interest) had been defeated.[27] The knowing receipt claim is to be understood as parasitic on the proprietary claim.

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[24] *ibid.*, [41]-[42] (*per* Lord Briggs).

[25] *ibid.*, [41].

[26] *ibid.*, [42]. Lord Briggs referred to the bona fide purchase defence as a form of 'overriding': [20].

[27] *ibid.*, [44].

Lord Burrows, however, drew the distinction differently. Like Lord Briggs, he found claims in knowing receipt and dishonest assistance to be similar in one respect. Both are 'best viewed as an equitable wrong',[28] although the nature of the wrong in each case differs. D, as a dishonest assister, commits an accessorial wrong by dishonestly procuring or assisting a breach of trust (or fiduciary duty). On the other hand, C, as a knowing recipient, commits a wrong that is 'an equitable analogue of the tort of conversion'.[29] The details of this view are discussed in Section B.II, below. For now, we can note that, for Lord Burrows, the wrong consists of C:

> knowingly interfering with the equitable proprietary rights of [B] by receiving or retaining, with the requisite knowledge, an asset transferred in breach of trust (or breach of fiduciary duty), in which [B] has an equitable proprietary interest.[30]

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[28] *ibid.*, [145] (*per* Lord Burrows).

[29] *ibid.*, [151].

[30] *ibid.*, [155].

As with Lord Briggs, thus, Lord Burrows describes liability in knowing receipt as depending on B's 'continuing equitable proprietary interest' in respect of the asset transferred to C.[31] For, if no such interest were to 'continue' to bind C from the point she receives title to the asset, the basis of a knowing recipient's 'equitable wrong' cannot be made out.

Both their Lordships acknowledged that, despite the differences between accessory and receipt-based claims, C could, on a given set of facts, be concurrently liable for both.[32] A distinction in this regard can be made between a 'pure' knowing receipt claim against C and a claim for dishonest assistance, where C's receipt of trust property is only *incidental* to a broader cause of action based on dishonesty or fraud.[33] The latter claim is not *receipt*-based – i.e., it does not *depend* on C acquiring title from T. Therefore, C cannot take the benefit of, for instance, the overriding effect under the *lex situs*. The consequence, in such cases, is

[31] *ibid.*, [151].

[32] *ibid.*, [41] (*per* Lord Briggs), [150] (*per* Lord Burrows).

[33] This distinction is explored in further detail in Section D.II. A Contrast with Dishonest Assistance Claims, below.

that C would be subject to an independent liability in dishonest assistance, if the elements of this cause of action have been made out. Since B did not make a dishonest assistance claim against C, this was not a possibility that was pursued on the facts in *Byers*.

The reasoning in *Byers* presents some key issues. The judgments seem to raise more questions than they answer in establishing the foundation of each of B's receipt-based claims in cases like Example 1[34]. The section below sets out these issues and charts out this chapter's path to resolve them.

A.II. Two Issues and a Path Forward

Two issues from *Byers* are of key relevance to this chapter's inquiry.

[34] See on page 383 (above).

First, the language of a 'continuing beneficial/equitable interest'[35] raises two immediate problems:

i. In the trusts context, knowing receipt claims are clearly available where a pre-existing 'equitable beneficial interest' is not being asserted against a third-party. This includes cases where a co-trustee brings the claim[36] or where the pre-existing trust is a charitable purpose trust (which has no beneficiaries who enjoy a pre-existing beneficial interest).[37]

ii. Even where a pre-existing beneficiary brings a claim against C (like in Example 1), the language of a

[35] In the context of the judgments, it seems the term 'interest' was used synonymously with a *legal* 'right'. 'Legal', here, is *not* used in the limited sense of being a right recognised only at common law; instead, it refers to rights recognised by the legal system.

[36] *Young v Murphy* [1996] 1 VR 279 (VSCA), 281-285; *Montrose Investment Ltd v Orion Nominees Ltd (No 2)* [2004] EWCA Civ 1032, [2004] WTLR 1133, [24].

[37] LD Smith, 'The Continuing Interest of Knowing Receipt' (2024) 83 CLJ 238, 239. Here, the claim would be brought by the Attorney General. See: *AG v Compton* (1842) Y & C Ch 417, 62 ER 951 (Ch), 430 (956-957); *Eden Refuge Trust v Hohepa* [2012] NZCA 124.

> 'continuing' beneficial interest is unilluminating.[38] As discussed in Chapter 4,[39] the specific person (natural or corporate) who holds a right on trust for B is a key identity condition of B's equitable proprietary right under a trust. This is because B has no direct right in relation to a trust asset. Her right *relates to* a *distinct right* to that asset held by a *specific* person (for the existence of a right in private law cannot be abstracted from its holder). So, if the claim is brought against C, as opposed to T, B's claim necessarily depends on a 'new' right. Thus, in Example 1, B claims a new right in respect of C's title to the basketball.

This gives rise to one set of questions for this chapter. Notwithstanding the *formal* distinction between B's pre-existing right and the right on which her receipt-based claim depends, is it possible to find a useful insight contained in the language of 'continuity'? Further,

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[38] See also: Agnew and McFarlane (n 15), 423-425.

[39] See the introductory discussion in Chapter 4, Part **A. EQUITABLE PROPRIETARY RIGHTS UNDER A TRUST: AS FORM AND NORM**.

could receipt-based claims, in cases where there is no pre-existing equitable proprietary *right* that can 'continue', be harmoniously understood alongside instances where such a right does exist?

As we shall see below, the answer to both questions is 'yes'. Regardless of the *formal* distinction between a pre-existing right and the new right claimed, the *reasons* grounding the prior right might nevertheless persist to play a part in justifying a receipt-based claim against C. More broadly, nothing in this formulation compels one to look at the reasons grounding B's prior right *per se*. Those reasons would simply correlate to T's duty respecting her title to a trust asset. Thus, even when receipt-based claims in relation to trust property are *not* brought by beneficiaries,[40] one can locate the persisting reasons grounding T's *duty* and identify their role in justifying the claim.

[40] The possibility of the equitable proprietary claim being brought by non-beneficiaries is also noted in J Hudson, 'Assuring the express trust: the so-called 'beneficiary's proprietary claim'' (PhD thesis, The University of New South Wales 2019), ch 7.

A second issue from *Byers* relates to the idea that proprietary and personal receipt-based claims are grounded on the *same* type of liability against C. The view is, on one reading, problematised by judicial statements which require C's 'conscience' to be affected, in the form of knowledge, before a *personal* knowing receipt claim can be made; no such additional facts – barring the fact of C's receiving a right from an errant T – are required to ground a *proprietary* claim.[41] All that *Byers* explains is that a personal receipt-based claim depends on the prior *existence* of its proprietary counterpart. It does *not* put beyond doubt that both claims are founded on the *same type of liability*. In other words, *Byers* does not explain how the basis on which a court order can be made against C is identical as between a proprietary and personal receipt-based claim. Nevertheless, it is submitted that the view suggested in *Byers* is correct.

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[41] See, e.g., *Re Montagu's Settlement Trusts* [1987] Ch 264 (Ch), 277 (*per* Megarry VC); *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL), 707 (*per* Lord Browne-Wilkinson); *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson), 132 (*per* Lord Millett); *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424, [82] (*per* Lord Sumption).

The argument turns on the distinction between the justifications for a 'claim' as distinguished from those of a 'right' on which the claim depends. Consistently with existing judicial views, it is possible to argue that B's proprietary *right* (and C's correlative *duty*) arises – with good reason[42] – immediately upon C's receipt of title from an errant T (i.e., provided that C can plead no relevant defence). The *content* of that right – i.e., the activity underpinning C's correlative duty – can be formulated in the following terms: **a duty on C not to exercise her powers over a trust asset (or its proceeds) contrary to the *known* terms of the trust**. This duty is embraced by – and is a central aspect of – the idea that C, like T, is subject to the core trust duty as regards a specific asset (discussed in Chapter 4[43]) – a duty not to use that asset held on trust for one's own ends, absent authority. That said, the specific content of the duty varies as between T and C. With T, it requires that she exercises her

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[42] See discussion in **Part C. THE JUSTIFICATION FOR C'S IMMEDIATE CORE TRUST DUTY**, below.

[43] See the introductory discussion in Chapter 4, Part **A. EQUITABLE PROPRIETARY RIGHTS UNDER A TRUST: AS FORM AND NORM**.

power over an asset, if at all, only in *conformity* with the terms of the trust. This is because, as an express trustee, she consented to hold a specific asset (or assets) on specified terms. Thus, T's knowledge, in this context, is not limited to what is subjectively in T's mind; it includes matters which T can be reasonably regarded to know as someone who has *accepted* the position of trustee, such as the terms of a trust. Thus, T's core trust duty could be enforced in respect of her unauthorised dealings with a trust asset even when this is done innocently or mistakenly. By contrast, C's core trust duty as regards a specific trust asset (or its proceeds) cannot be said to arise in the same way that T's duty arose. She did not undertake or consent to hold an asset on specified terms. Thus, her core trust duty would – to the extent she knows that an asset was transferred to her in breach of trust – require her to refrain from exercising her powers over the asset *contrary* to those terms (and not necessarily in *conformity* with them).[44] This duty embraces C's specific

[44] So, as C Mitchell and S Watterson, 'Remedies for Knowing Receipt' in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010) argue (discussing *Evans v European Bank Ltd* [2004] NSWCA 82, (2004) 7 ITELR 19), once C knows of the terms of the prior

restorative obligation (noted above in the introduction to this chapter).[45] Framing C's duty in this way aligns the basis on which C may be subject to a court order in respect of *both* a proprietary *and* personal receipt-based claim. On this account, C cannot breach this duty if she innocently – i.e., without knowledge of the prior trust – disposes of the trust asset. She is equally discharged from that duty if she does so without retaining traceable proceeds in her hands – i.e., because she can no longer perform this duty if she has no trust assets or its traceable products in her hands. Thus, on the view presented here, C is under an *immediate duty* from the moment she receives a trust asset from an errant trustee (provided C can plead no relevant defence). However, as her knowledge is a key ingredient of her *complying* with the duty, no *claim* (and no subsequent court order) requiring her performance of it (or to account following her breach of it) can disregard her knowledge.[46]

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trust, it does not require her to comply with those terms by, e.g., by making particular investments of money received from an errant T.

[45] It equally includes her intervening custodial obligation: see (n 4), above

[46] It should be noted that the model developed in this chapter may been seen as similar to a different model developed by Eleanor Eldridge in her ongoing doctoral research at Oxford. On that model, C is taken to come under an immediate duty upon receipt of

Taking account of the outline presented above, the model of a *Linked claim* helps us identify how each of B's receipt-based claims are grounded on the same type of liability (or susceptibility to a court order). A summary view of receipt-based claims as *Linked claims* are given in the sections below. The conclusion of the discussion below provides a structure for this chapter's defence of that position.

A.II.i) *Persisting reasons grounding a pre-existing right*

Each of B's receipt-based claims can only be brought following T's breach of trust.[47] Stated differently, C must acquire a right from T

title to a trust asset, but only comes under a *liability* in relation to that duty once she gains knowledge (when her 'conscience' is affected).

[47] *Belmont Finance Corporation Ltd v Williams Furniture Ltd (No.2)* [1980] 1 All ER 393 (CA); *Polly Peck International Plc v Nadir (No.2)* [1992] 4 All ER 769 (CA); *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685 (CA), 700g; *Brown v Bennett* [1999] BCLC 649 (CA); *Courtwood Holdings SA v Woodley Properties Ltd* [2018] EWHC 2163 (Ch), [177]–[203].

further to the latter's wrongful[48] exercise of a specific power that is subject to a core trust duty.[49] Indeed, if trust property was disposed of with authority under the terms of the trust, B has no claim to make in

[48] Hudson (n 40) takes a different view by arguing that the claim does not require *breach* by T, but only a transfer without authority. There is not much authority for this point, and this chapter instead proceeds with the orthodox view that the claim depends on there being a breach of trust by T at the start of the story.

[49] Where the claim does not depend on a pre-existing trust – e.g., a disposition by a company director of assets owned by the company – the duty the defendant breaches will be analogous to the core trust duty owed by a trustee. This is a duty to exercise powers over specific rights consistently with the terms on which that power has been conferred. See: *Hayton, McFarlane and Mitchell: Text, Cases and Materials on Equity and Trusts* (C Mitchell, B McFarlane and J Hudson eds, 15th edn, Sweet & Maxwell 2022), [3-145]-[3-156], who refer to this obligation as a 'duty of due administration'. For an account of such duties held by company directors, see: *Re Duckwari Plc* [1999] Ch 253 (CA), 262; *Bairstow v Queens Moat Houses Plc* [2001] EWCA Civ 712, [2001] 2 BCLC 531, 548; *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2012] Ch 453, [34]. Similar duties have been found to burden dispositive powers over specific assets held by partners (*National Commercial Banking Corp of Australia Ltd v Batty* (1986) 160 CLR 251 (HCA) , 275 (*per* Brennan J)) and mortgagees (*Yorkshire Bank Plc v Hall* [1999] 1 WLR 1713 (CA), 1728; *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295 (PC), 315; *Barns v Queensland National Bank Ltd* (1906) 3 CLR 925 (HCA), 943). *Cf*, in *obiter*, the rather different approaches to explaining such cases in Lords Briggs' and Burrows' judgments in *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457: [56]-[61] (*per* Lord Briggs), [189]-[198] (*per* Lord Burrows).

respect of it; her beneficial interest would have been overreached.[50] However, where B's interest has not been overreached, the reasons grounding it are an important factor in the calculus of reasons supporting her claim against C. The persistence of those reasons can best explain notions of 'continuity' that hold together the judgments in *Byers*. However, it is submitted that these persisting reasons alone cannot exhaustively justify each of B's receipt-based claims.

A.II.ii) *Additional normative grounds supplied by further facts*

To fully justify those claims, further facts must be established.

[50] *State Bank of India v Sood* [1997] Ch 276 (CA). See also RC Nolan, 'Property in a Fund' (2004) 120 LQR, 111-117; C Harpum, 'Overreaching, Trustees' Powers and the Reform of the 1925 Legislation' (1990) 49 CLJ; D Fox, 'Overreaching' in A Pretto-Sakmann and P Birks (eds), *Breach of Trust* (Hart 2002); RC Nolan, 'Understanding the Limits of Equitable Property' (2006) 18 Journal of Equity, 24-28.

First, it must be shown that C comes under a relevant duty to B in respect of a trust asset. This occurs whenever C (not being entitled to a relevant defence) *receives* title to a trust asset from an *errant* T (the requirement of 'receipt').[51]

Second, C's merely being under a duty does not – on the view defended in this chapter – enable B to enforce a proprietary or personal receipt-based *claim* against C. In other words, the mere existence of a core trust duty on C's part is not sufficient for B's receipt-based *cause of action* to accrue. The *content* of C's duty – which determines how it might be complied with – turns on C's having knowledge that the specific asset(s) initially conferred on her by T was conferred in breach of trust. Thus, any claim by B must necessarily show that, at a time when C held the original trust asset (or its product), C had the requisite knowledge

[51] *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685 (CA), 700. See also: *Barnes v Addy* (1873-74) LR 9 Ch App 244 (CA), 254–255; *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 291–292; *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164, 194; *Evans v European Bank Ltd* [2004] NSWCA 82, (2004) 7 ITELR 19, [164]–[176]; *Sixteenth Ocean GmbH & Co KG v Société Générale* [2018] EWHC 1731 (Comm), [2018] 2 Lloyd's Rep 465, [109].

(the requirement of 'knowledge'). The presence of such knowledge forms an integral component of the claim (whether proprietary or personal). It is only from the point C acquires knowledge that compliance (or non-compliance) with her core trust duty comes into play.[52]

Further, as we shall see below,[53] the 'receipt' and 'knowledge' requirements do not simply serve as causative events enabling receipt-based claims against C. They are also normatively significant in *justifying* the claim. As explained below, they demonstrate that C is *implicated* in T's wrongful dealing with a trust asset, and thus tell us the point from which it becomes *'unconscionable'* for C to treat the right in her hands (or its products) as if she were entitled to it absolutely.

[52] For a similar type of argument, i.e., that *both* an equitable proprietary claim *and* knowing receipt claim depend on C's knowledge, see: B McFarlane, 'Trusts and Knowledge: Lessons from Australia' in J Glister and P Ridge (eds), *Fault Lines in Equity* (Hart 2012).

[53] In Parts **B. CLASPING AT C'S CONSCIENCE**, **C. THE JUSTIFICATION FOR C'S IMMEDIATE CORE TRUST DUTY**, and **D. CLOSING THE CIRCLE: THE ROLE OF 'CONTINUITY'**.

So, in summary, the reasons justifying B's right under the pre-existing trust are an essential component of the justificatory basis on which her claim against C is made. It must be shown that the right C received was in respect of a trust asset that was transferred to her in breach of *that trust*. These reasons alone, however, are insufficient to justify the claim. Further facts must be established: that C's right to the asset derives from T's and that C had knowledge that the transfer was made to her in breach of trust. Such knowledge may be acquired either at the time C receives the right or at a later point when she continues to hold it or its traceable proceeds.[54] The key point is that this knowledge must have affected C's conscience by the time the claim is brought. This might happen by C's discovering the relevant facts at or before the time of receipt, or at a later point (either from B or through an independent source), when she continues to hold the trust asset or its proceeds. In principle, it should not matter that C is ignorant of the relevant facts at the moment immediately prior to the claim being advanced. This is

[54] *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91, [76] (*per* Lloyd LJ).

because, in practice, the very process leading up to a claim – e.g., through a letter before action – would ensure C's awareness of what she must know. Thus, by the time the claim is formally made, and its enforcement is sought, its normative basis would have been secured.

Following this outline in Part A, the argument in this chapter proceeds in five parts.

Part B of this chapter explains the role and normative significance of 'knowledge' as 'conscience', and the requirement of 'receipt', in securing C's liability (and therefore the basis of each of B's receipt-based claims that may be brought against her).

Part C focusses on the recipient's (C's) core trust duty and explains why that duty arises, subject to defences, immediately upon receipt.

Part D ties together the significance of the insights developed in this chapter to explain the reasoning in *Byers*. It also compares the vision of receipt-based claims as *Linked claims* with the basis of certain claims (i.e., specifically with respect to B's pre-existing proprietary rights) against a dishonest assister (which, it is argued, are best seen as *Partially independent claims* in this thesis' taxonomy).

At this point, this chapter's central account of each of B's receipt-based claims being types of *Linked claim* concludes.

Part E takes a step back to examine, and reject, two alternate views (prevalent in the literature) on the 'continuity' of B's equitable proprietary right in each type of receipt-based claim. These are views that align closely with the position that such claims can either be cast in the form of a *vindicatio* or *Consequential claim* (as set out in this thesis' taxonomy).

Finally, Part F links some key conclusions in this chapter with those that were achieved in Chapter 5 (i.e., in relation to claims contingent on tracing).

B. Clasping at C's Conscience

In *ITS v Noble*,[55] Lloyd LJ explained that, for a receipt-based claim to become enforceable, C's knowledge, where she receives a right from an errant T gratuitously, need not arise at the time of receipt, but it must arise at some point when she has the trust property (or its traceable proceeds) – i.e., provided that she cannot rely on a defence such as overriding or overreaching. However, where C is a purchaser for value of the trust property,[56] it must (assuming some other defence does not

[55] *ibid*.

[56] 'For value', this framing, is not made redundant by the expression 'purchaser'. In this context, a 'purchaser' is 'a person who takes property by grant (e.g., by gift or sale) and not by mere operation of law (e.g., by intestacy)': *Nurdin & Peacock Plc v D B Ramsden and Company Ltd* [1999] 1 EGLR 119 (Ch), 123 (citing RE Megarry and HWR Wade (eds), *The Law of Real Property* (5th edn, Stevens 1984), 50). A gratuitous transferee, thus, is a 'purchaser', but she is not a purchaser 'for value'.

apply) be determined whether, at the point of receipt, C had notice of B's prior interest and T's transfer in breach. If she did not, from that point onwards, C would be immune to a receipt-based claim from B, meaning, that the possibility of coming under a duty (and, hence, also a liability in respect of it) is closed off. In other words, C would be a bona fide purchaser of the trust property for value without notice. If, on the other hand, C did have the required notice at that time, it has been argued that C need not automatically come under a liability to B respecting a core trust duty.[57] Her liability would, as with the case of a volunteer/donee, depend on whether she has 'knowledge' at a time when she either receives or retains the rights received from T (or its traceable products). This argument turns on the view that 'notice' (which disallows C from enjoying an immunity) consists of a lesser degree of awareness than 'knowledge' (which fastens liability on C).[58]

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[57] S Agnew and B McFarlane, 'The Paradox of the Equitable Proprietary Claim' in S Agnew and B McFarlane (eds), *Modern Studies in Property Law*, vol X (Hart 2019), 310-315, citing *Re Montagu's Settlement Trusts* [1987] Ch 264 (Ch), 276ff (*per* Megarry VC).

[58] Unlike the 'knowledge' requirement, the element of 'notice' in the bona fide purchase defence is expressly stated to include actual as well as constructive notice: *Credit*

In both cases – i.e., as against a purchaser (with notice) or a volunteer/donee – the extent of C's liability to B is limited by the precise rights transferred to her in breach of trust (or rights that derive from it) which she retains at the time she acquires the relevant knowledge. It follows that at the time her conscience is relevantly affected, should she have entirely disposed of the trust property (and retain none of its traceable proceeds), she cannot be held liable to B in knowing receipt.[59]

The present chapter is not the place to provide an account of the detailed working out of the tests for 'knowledge' that apply in determining liability in knowing receipt,[60] or of the difference between

Agricole Corporation and Investment Bank v Papadimitriou [2015] UKPC 13, [2015] 1 WLR 4265, 4275 ([14]-[15]), 4277 ([20]).

[59] *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91, [81], [84].

[60] For which, see Mitchell and Watterson (n 44) and Agnew and McFarlane, 'The Paradox of the Equitable Proprietary Claim' (n 57). The tests for knowledge, in this context, has been phrased variously, e.g.: (i) the property was diverted from someone else without legitimate reason (*Relfo v Varsani* [2012] EWHC 2168 (Ch), [78] (*per* Sales J)), (ii) the property represents the proceeds of fraud (*El Ajou v Dollar Land Holdings Plc*

the concept of 'notice' (as applying to the bona fide purchase defence) and 'knowledge' which fastens liability on volunteer-recipients or purchasers for value who receive trust property with notice.[61] The task instead is to explain why C's 'receipt' of a trust asset from an errant T, and the presence of 'knowledge' on her part, in a defined set of circumstances, serves as the 'additional facts' required for B to enforce a receipt-based claim against C.

[1994] 2 All ER 685 (CA), 478 (*per* Hoffmann LJ)), (iii) the property was 'entrusted by [B] to [T] and not lent to him' (*Ali v Al-Basri* [2004] EWHC 2608 (QB), [194] (*per* Tugendhat J)), (iv) 'there was a possibility that [T] did not have title to, or authority to sell' the property (*Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156, [278] (*per* Stephen Norris QC)), and (v) the level of knowledge required for C to be liable in knowing receipt, the test is whether that knowledge is 'such as to make it unconscionable for [C] to retain the benefit of the receipt' of the trust property (*BCCI (Overseas) Ltd v Akindele* [2001] Ch 437 (CA), 455 (*per* Nourse LJ)). However, as pointed out in Agnew and McFarlane, 'The Paradox of the Equitable Proprietary Claim' (n 57), the essence of these various articulations is as follows: 'It appears that the crucial fact which [the recipient] must know is that someone else [such as B] has a pre-existing right in respect of the property, which may be breached by [T's] exercise of her general power to transfer the property to [C], and that [T] is in fact dealing without that person's authority when she transfers the property to [C].'

[61] For which, see Agnew and McFarlane, 'The Paradox of the Equitable Proprietary Claim' (n 57), 310-315.

The language of 'conscience', in determining C's liability, towards B, has been used to describe the existence of both 'knowledge' and 'notice'.[62] The discussion below first addresses why 'knowledge' as 'conscience' is a necessary ingredient in determining when B's proprietary or personal receipt-based claims can become enforceable against C. The second section looks at the requirement of 'receipt' and explains how this element, along with knowledge, contributes to the normative basis of a receipt-based claim.

B.I. The Normative Significance of 'Conscience' as 'Knowledge' in Grounding Each of B's Receipt-Based Claims

B.I.i) *Justifying the content of C's duty*

[62] See *ibid*, 310-318, who explain the historical context in which these concepts were used in this way.

The test for B's claim respecting a prior trust asset to be enforceable against C – to whom trust property is transferred in breach – is that C's 'conscience' must be *affected*.[63] This is to say that the recipient must 'know' of the prior equitable interest and the transfer of T's title to her being made in breach of trust. It is only upon such knowledge affecting the conscience of the recipient that she becomes capable of performing her core trust duty, which obliges her 'not to part with the [trust assets] (and the traceable proceeds in her hands of any which had already gone) otherwise than by restoring them to or for the benefit of the beneficiaries.'[64] Why is this so? Professor Maitland suggests that the ground is 'fraud' – i.e., it would be 'against conscience' to take what one knows to be held on trust for another.[65]

[63] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL), 705 (*per* Lord Browne-Wilkinson).

[64] *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91, [81] (*per* Lloyd LJ).

[65] FW Maitland, *Equity; Also, the Forms of Action at Common Law: Two Courses of Lectures* (AH Chaytor and WJ Whittaker eds, CUP 1929), 113.

> The [recipient] in such a case is, we may well say, liable *ex delicto vel quasi*. He has done what is wrong; has been guilty of fraud, or something very like fraud.[66]

What about receiving, or retaining, property, knowing that it was transferred in breach of trust, brings this close to 'fraud'? William Hayes notes that the view emerged early on with the starting point that it was the feoffer (now the settlor) who had placed personal confidence in the feoffee (the trustee) to hold property for the *cestui que use* (the beneficiary); it was essential, therefore, in order to fasten an obligation on C, beyond T, to ask whether the former was affected by the settlor's (S's) confidence reposed in the trustee.[67] The concern was with the abuse of a relationship of *confidence* and *dependence*. 'Dependence', because, as we have seen in Chapters 4 and 5,[68] T, as titleholder, can validly deal with title to a trust asset even if doing so might be unauthorised. S,

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[66] *ibid.*

[67] W Hayes, *An Introduction to Conveyancing, and the New Statutes Concerning Real Property: With Precedents and Practical Notes*, vol Vol I (5th edn, London, S Sweet 1840), 42.

[68] See Chapter 4 (Section A.I. The Form and Nature of an Equitable Proprietary Right Under a Trust) and Chapter 5 (Section B.IV. Holding Rights Respecting a Traceable Product as a Form of Next-Best Compliance).

hence, not only reposes confidence in T carrying out the terms of the trust, but is also dependent on her doing so faithfully. Looked at in this way, the justification appears to be that for C, who is not a bona fide purchaser for value without notice (or otherwise entitled to a defence), to receive or retain trust property (or its traceable proceeds) with the awareness that title to trust property has been transferred in breach of trust is to *implicate* herself in the wrongfulness of the breach itself. The conscience of the recipient is tainted in this way.

It was seen previously that not all prior trusts, from which an unauthorised disposition is made to C, are express trusts.[69] It would seem that the argument that C has abused T's relationship of confidence and dependence, by implicating herself in T's breach, runs out in the context of non-express trusts. However, a closer look at the idea tells one that it is not S's confidence, *per se*, that is at issue in the express trust situation. True, S reposing confidence in T is part of the reason why the latter holds certain rights conferred upon her by the former on trust. But

[69] See examples and authorities mentioned in (n 150) and (n 156), below.

after S declares a trust, and T has knowledge of, or consents to, the duties of trusteeship, a *separate* relationship of confidence and dependence comes into being (i.e., assuming that the trust is not a charitable purpose trust[70]). This is the relationship between B and T, where T is obliged to hold rights in relation to property for B's benefit. B's beneficial interest is not secured by a direct claim-right of B against the trust property itself.[71] The 'benefit' that a trust is meant to provide to B depends on T's exercising her title to the trust property consistently with the terms of the trust. To once again repeat a point made in Chapter 5,[72] while T's claim-right and powers in relation to the trust property are encumbered as against B, these incidents of legal ownership are unburdened as against the rest of the world. Hence, even when T deals with trust

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[70] In these cases, it may be apposite to focus on the relationship between T and the state/the Crown/the public who repose trust and confidence in the trustee to carry out the particular charitable purposes of the trust.

[71] This point is addressed later in this chapter – see discussion following Example 2, below (see on page 428 (below)) – and, in more detail, in Chapter 4 of this thesis (see Chapter 4, A.I. The Form and Nature of an Equitable Proprietary Right Under a Trust).

[72] See Chapter 5, Section B.IV. Holding Rights Respecting a Traceable Product as a Form of Next-Best Compliance.

property inconsistently with B's interests, say, by making an unauthorised disposition of it to C, the terms of the trust will *not* operate to nullify such a disposition.[73] The trust obligations burden T's title *only against B*, but when T deals with the world outside she does so in the capacity of an independent titleholder. So, B's trust interests being served – and, in the case of non-express trusts, namely her 'core' trust interest – depends significantly on T's exercising her rights consistently with those interests. Seen in this way, in comparison to B's position, T's is a position of disproportionate power, and their relationship is underwritten by a sense of confidence and dependence that T *will* hold and exercise her title in a way that is consistent with B's interests. Therefore, whenever C, who can plead no defence such as of a bona fide purchaser for value without notice, has knowledge that the rights she receives or retains are transferred to her by T, in breach of trust, it is the abuse of this relationship of confidence and dependence, *between T and B*, that she implicates herself in. The concept of 'conscience', and its

[73] See J Hudson, 'Equity's Gloss on Authority' in B McFarlane and S Elliott KC (eds), *Equity Today: 150 Years after the Judicature Reforms* (Hart 2023). Specific arguments made in this piece were considered in Chapters 4 and 5 of this thesis.

principled role in justifying how C may be tainted by T's breach of trust, applies to dispositions made by any kind of trustee, regardless of the reasons or facts which give rise to them. The essential feature of every trust (not being a charitable purpose trust[74]) is that B is in a relationship of confidence and dependence with T which requires that the latter comply with her core trust obligation to hold and exercise her title to property for the former's benefit.

B.I.ii) *Reflecting the content and form of C's obligation*

A further point to note is that conscience or knowledge on C's part is important not only in showing that B's receipt-based claim becomes enforceable against C, but it also *reflects* the content and form of the obligation such claims enforce. The normative work performed by these facts is to show that C, who has received title to certain property, holds it with the awareness that she is not properly entitled to its

[74] See text in (n 70), above.

exclusive benefit. More specifically, since C is attempting to rely on T's exercise of a power to transfer, C's knowledge that T was under a duty to B in relation to the exercise of that power is essential, and it is important that T's duty relates to T's power to confer a right.[75] In other words, it substantiates B's objection that C must not hold rights to certain property for her own ends that are properly to have been held for B's benefit[76] under a pre-existing trust; this is an arrangement which was disturbed (or abused) when T exercised her power over the rights she held on trust, inconsistently with the terms of the trust, and hence inconsistently with B's interests in relation to them,[77] by making an unauthorised disposition of them to C. Therefore, it makes sense that her central claim against C is to restore that property to the trust and, until such time, to not deal with it in a manner inconsistent with the terms of

[75] This explains why and how, as LD Smith, 'Equity and Fusion' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Sydney: Lawbook Co. 2005), 32-35, argues, Equity demonstrates a commitment, in cases such as Example 1, to respect other people's obligations in relation to the benefit of property.

[76] Or for a specific purpose, in the case of a charitable trust.

[77] Or, as above, inconsistently with the purposes in service of which for which T was charged to hold title to trust assets.

that trust. As Agnew and McFarlane put it, the normative basis of the unconscionability concept, in this context, explains why only a '[a] core aspect of the initial trust relationship – T's duty not to deal with the property other than for the benefit of B – [is] replicated in the relationship between B and C'.[78] Moreover, underlying this point on 'replication' is the notion that since B's claim is based on the fact that property, to which C now holds title, was initially held for B's benefit under a pre-existing trust, there is no good reason why the law should allow B to make a *direct* proprietary claim to that property. It seems justified, therefore, that the form of relief granted to B takes the same *form* that her pre-existing interest under a trust did. So, when C receives trust property with knowledge that it is encumbered by a prior beneficial interest, she comes under a core trust duty which can be immediately enforced by B. B's equitable interest against C does not contradict the valid title the latter has in that property. It merely constrains, in a second-order, or meta, way, her acquisition and

[78] Agnew and McFarlane, 'The Paradox of the Equitable Proprietary Claim' (n 57), 316.

enforcement of that right.[79] It is clear, then, that in cases like Example 1,[80] the additional facts supporting B's claim, as to C's knowledge, reflect not only why her claim is against C in particular, but also the distinct form and content of the obligation this claim gives rise to. Further, unlike a common law conversion claim – discussed in Chapter 3 as a type of *Consequential claim* [81]– the further facts proved by B in cases like Example 1 need not show that C has committed a 'wrong' as such,[82] but rather that C owes a duty to B which can now be enforced (i.e., because compliance, or non-compliance, with the duty is now possible).

B.II. The 'Receipt' Requirement: C's Title Must Derive from a Person Whose Power to Confer it Was Encumbered by a Core Trust Duty

[79] This is an idea discussed more fully in B McFarlane, 'Form and Substance in Equity' in A Robertson and J Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart 2019).

[80] See on page 383 (above).

[81] See Chapter 3, Section A.II. *Consequential claims*.

[82] *Contra* Lord Burrows in *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457, [151]. See further the discussion below in Section E.II. *A Consequential Claim?*.

C's core trust duty to B, in so far as it is enforced through a receipt-based claim, is dependent on C *deriving* a particular right through the exercise of a specific power held by another (e.g., T) that is subject to a core trust duty.[83] This is manifest in an important requirement which is to be met first, before the inquiry into C's knowledge kicks in. If C's receipt or retention of a right from T, with knowledge of that right being held on trust for B, is to *implicate* her in T's wrongful disposition of it to her, it is essential that she actually receives the right to this property *through T's* wrongful exercise of an encumbered power. The scope of this requirement must be understood carefully. There are three points to address.

[83] In the Court of Appeal in *Byers*, it was held that C 'must have *received* trust assets, not just *benefited* from them' (emphasis supplied): *Byers v Saudi National Bank* [2022] EWCA Civ 43, [22]. Outside the trust – e.g., in the case of unauthorised dispositions made by company directors – a duty analogous to the core trust duty encumbers the transferor's powers of disposition: see text in and accompanying (n 49), above.

B.II.i) *No receipt-based claim if third-party's acquisition of a right is original*

The first point as regards the receipt requirement can be briefly made by considering Example 2, below.

Example 2 – T holds title to a basketball on trust for B. X steals the basketball from T.

As we have seen in Chapter 4,[84] in English law, B's claim respecting the asset will not prima facie bind X. One reason why this is not possible is because B cannot show that X's title to the basketball derives from T's. As Professors McFarlane and Stevens explain, X's title 'is original, coming from X's own conduct in taking possession'.[85]

[84] See, in Chapter 4, the discussion following Example 1 on page 211ff.

[85] B McFarlane and R Stevens, 'The Nature of Equitable Property' (2010) 4 The Journal of Equity, 5-6.

B.II.ii) *Implicating successors in title to T in the same scheme of wrongdoing*

A second point can be made in reference to Example 3 below.

Example 3 – T holds title to a tennis ball on trust for B. In breach of trust, T transfers title to the ball to C1 (who can plead no defence such as of a bona fide purchaser for value without notice) and C1 then transfers it to C2 (who can similarly plead no such defence).

Where T transfers trust property in breach of trust to C1, C1 clearly *derives* her title to the property *from T*. However, should C1, before acquiring the relevant knowledge that would allow B to enforce a receipt-based claim against her, transfer the property (or its traceable proceeds) to C2, C2 will of course not derive title from T, but from C1. Yet, by acquiring a right from C1, C2's receipt *does* derive from *C1's* power that was encumbered by a core trust duty. Although, prior to

gaining knowledge, the content of C1's core trust duty not to act contrary to the known terms of the trust is nil, it does not take away from the fact that C1's power to deal with title to the tennis ball is *encumbered* by the duty. Of course, absent knowledge on C1's part, she does not *breach* her core trusty duty by disposing of title to the asset to C2. Yet, this does not mean that C1 is *entitled* to exercise her power over the asset for her own ends – e.g., by making a disposition in C2's favour – like an absolute right-holder might. In *this* way, we can see that C2's receipt from C1 is *analogous* to C1's receipt from T. More simply, what this means is that C2 will also be considered to have taken title to trust property subject to a core trust duty in the same way that C1 had from T.[86] C2's knowledge will implicate her in the *same scheme* of wrongful dealing with respect to a trust asset that *originated* with T's breach of a core trust duty. The existence of this scheme explains how the reasons grounding T's original core trust duty have a *continuing* impact on the justifications for the subsequent core trust duties of each of C1 *and* C2. On C1/C2 acquiring

[86] *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91, [112] (*per* Lloyd LJ).

the relevant knowledge, those continuing reasons will also play a part in justifying receipt-based claims (proprietary or personal) B may bring to *enforce* C1/C2's core trust duty.

It bears emphasising that before C1 acquires the relevant knowledge, a receipt-based claim is not immediately enforceable against her.[87] Yet, unlike with the bona fide purchaser for value without notice, C1 enjoys no immunity from a receipt-based claim being *potentially* enforceable. Should, for instance, B alert C1 of her pre-existing equitable interest,[88] she exercises a power that makes C1's core trust duty, as regards the trust property (or its product), enforceable by B. This *potential* for making enforceable a core trust duty in respect of trust property persists when C1 passes on the property to others like C2 (where C2, of course, enjoys no defence such as of a bona fide purchaser for value without notice), even before C1 acquires knowledge of B's

[87] *ibid.*

[88] The same result follows should C1 – an innocent volunteer or purchaser for value with notice – come to know of the prior trust through any other means (i.e., independently of B exercising a power).

prior interest.[89] Should such successors in title acquire knowledge of B's interest, at any point while they continue to hold the property (or its traceable proceeds), their core trust duty, as regards the right(s) in their hands, will become automatically enforceable by B from that point.

B.II.iii) *The scope and limits of successor implication*

The second point on the receipt requirement emerges from Example 4 below.

> **Example 4** – T holds title to a tennis ball on trust for B. In breach of trust, T transfers title to the ball to C1 (who *is* a bona fide purchaser for value without notice) and C1 then transfers it to C2. C2 is a person who, not being entitled to a defence, *has* knowledge that title to the trust asset was acquired by C1 pursuant to T's breach of trust.

[89] *ibid.*

When C1 takes title to the trust asset from T, C1 does so with the defence of a bona fide purchaser. The effect of the defence is to immunise C1 from coming under a core trust duty. In other words, owing to the defence, the reasons grounding T's core trust duty cannot have a continuing impact against C1 in order to justify her coming under a core trust duty. So, as C1 takes title to the trust property free from a core trust duty, the potential for a receipt-based claim being enforced against her does not exist. Thus, C1 and her successors in title (like C2), can keep the trust property (or its proceeds) outright.[90] This would be the case *even if*, as in Example 4, C2 can plead no defence such as of a bona fide purchaser. Although C2's knowledge does, in a general or lay sense, make her part of the wrongful scheme initiated by T's exercise of a core trust duty, she cannot, in a *legal* sense, be implicated in it. This is because the justification for a third-party recipient coming under a core trust duty does not exist. As explained below,[91] that justification is based on

[90] *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457, [23]-[24] (*per* Lord Briggs), [172], [201] (*per* Lord Burrows).

[91] See **Part C. THE JUSTIFICATION FOR C'S IMMEDIATE CORE TRUST DUTY**, below.

the recipient having taken advantage of the wrongful exercise of an encumbered power by acquiring a right following its exercise. As C1 was not under a core trust duty respecting her power to dispose of the asset, C2, in acquiring the asset, did not take advantage of the exercise of an encumbered power. The normative basis of placing C2 under a core trust duty, thus, does not exist. Thus, by contrast to Example 3,[92] once a bona fide purchaser, like C1 in Example 4, enters the picture, the position of later parties, like C2, changes, as C2 will not be a successor in title to someone who held an encumbered power.

Lord Briggs, in *Byers*,[93] explained the outcome, as regards C2, in cases like Example 4, by citing *Wilkes v Spooner*.[94] That was not a trusts case, but one concerning a different equitable interest – a restrictive covenant over land. In *Wilkes*, X's leasehold title over a plot of land was subject to a covenant – made in A's favour – that X would not conduct

[92] See on page 429 (above).

[93] *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457, [84]-[85] (*per* Lord Briggs).

[94] *Wilkes v Spooner* [1911] 2 KB 473 (CA).

a butcher's business on it. X subsequently surrendered the lease to his lessor, Y, who did not have notice of the covenant. According to the law at that time, Y was therefore not bound by the covenant. Y then executed a new lease in favour of Z (X's son), who did have notice of the covenant. Z was held to be unbound by the covenant, just as Y had been.

Crucially, in *Wilkes*, if Y (or Z) granted a lease over the land to X, X would take the estate bound by the original covenant (as was initially the case).[95] Equally, in a trusts case like Example 4, if C2 were to subsequently transfer title to tennis ball (or its proceeds) back to T, the analysis in the preceding two paragraphs will not apply. On re-acquiring a trust asset (or its product) from a third-party who is immune from coming under a core trust duty (like C1 or C2), T will *resume* holding that right on trust for B.[96] This is because T's unauthorised disposition of the trust asset never discharged her from a core trust duty

[95] *Piggott v Stratton* (1859) 1 De G F & J 33, 45 ER 271 (Ch).

[96] *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457, [23]-[24] (*per* Lord Briggs), [167]-[171] (*per* Lord Burrows).

in relation to it.[97] By making a wrongful disposition of the asset, T simply put it out of her power to *specifically* comply with that duty. When the asset, or its product, returns to T's hands, T will automatically hold that right on trust just like she did at the start of the story. The justification for this outcome is not, of course, owed to T's *acquiring* a right following an unauthorised exercise of an encumbered power. Indeed, in Example 4, this is not possible as C1 and C2 never held an encumbered power over title to the tennis ball. Instead, the justification for the outcome is sourced in the very same reasons explaining T's original, and surviving, core trust duty.[98]

At this stage, for completeness, it must be noted that the discussion in the preceding paragraph reveals what is probably a good example of a *vindicatio* claim according to this thesis' taxonomy. In our

[97] *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424, [51] (*per* Lord Mance).

[98] This provides another reason why Lord Burrows in, *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457, is wrong to draw an analogy between a claim in knowing receipt and conversion. If, e.g., A has legal title to currency, and X steals them and transfers them to a bona fide purchaser, then A's legal title is extinguished and does not revive if title to the notes ends up back with X.

altered version of Example 4, trust property passes through the hands of a bona fide purchaser and then returns to T. B's claim against T in respect of that property simply asserts the very same right (or makes the very same claim) that B had before T disposed of the trust property. Aside from T's subsisting core trust duty, no additional facts are required for B to make her claim. By the same token, no additional reasons to those grounding T's original duty are needed to justify the claim.

C. THE JUSTIFICATION FOR C'S IMMEDIATE CORE TRUST DUTY

The discussion in Part B proceeded with prevailing view that,[99] subject to defences, a third-party recipient like C in Example 1[100] comes under an *immediate* core trust duty in respect of a trust asset from the moment it is received from an errant T, whether or not C has knowledge at that point of T's breach of trust. It was then explained that, at a time when C retains the original trust asset or its proceeds, should she acquire

[99] See authorities cited in (n 41), above.

[100] See on page 383 (above).

the requisite knowledge of T's breach, she then becomes capable of complying with that duty. It is, thus, from the point of knowledge that a receipt-based cause of action accrues and it becomes possible to bring claims to enforce C's core trust duty.

The aim in the present part of this chapter is to explain *why* C's mere receipt of a trust asset, in the absence of defences, fastens an *immediate* core trust duty on her.[101] It is submitted that the *reason* why C's duty arises immediately on receipt may well be because this outcome follows from the special vulnerability affecting a right held on trust.

This can be explained by drawing on Professor Penner's helpful description of two distinct versions of a right *in rem* (also discussed in

[101] To reiterate a key argument in this chapter: C's core trust duty is a duty not to exercise her powers over a trust asset (or its proceeds) contrary to the *known* terms of the trust. Once C (who is not entitled to a defence) receives a right from an erant T, this duty will have nil content until C acquires the required knowledge.

Chapter 4[102]).[103] The first is the 'trespassory' version which *prima facie* binds *everyone*, unconditionally, and presently, with a duty not to deliberately or carelessly interfere with the right-holder's property. The second is the 'successor' version which also binds everyone, but only *potentially*; that is to say it only binds those who may become successors in title to the initial right-holder, subject to defences.

This distinction is significant in understanding the reasons explaining the particular third-party effects of B's rights in relation to the trust property. The subject-matter of B's right is *T's right* to the trust asset, not the physical subject-matter (if any) of T's right *per se*.[104] A consequence of this view is that an equitable proprietary claim follows the particular right (or rights that derive from it) from T's hands into

[102] See Chapter 4, Section A.I. The Form and Nature of an Equitable Proprietary Right Under a Trust.

[103] J Penner, 'Duty and Liability in Respect of Funds' in J Lowry and L Mistelis (eds), *Commercial Law: Perspectives and Practice* (Butterworths 2006), 214-216.

[104] McFarlane and Stevens, 'The Nature of Equitable Property' (n 85), 12-15. The significance of this point was discussed in detail in Chapter 4 of this thesis (in Section A.I. The Form and Nature of an Equitable Proprietary Right Under a Trust).

those of third-party recipients, like C, who cannot invoke a defence such as that of a bona fide purchaser for value without notice. This is because the only way third parties can engage with the subject matter of B's right, which is *T's title to a trust asset*, is by *acquiring*[105] that title from T. There is no other means by which the *subject matter* of B's right is susceptible to third-party intervention.[106]

This is indeed different from a common law proprietary claim. There, a plaintiff's property right (in the core case) follows a specific *physical thing* to which that right relates. As that thing is inherently vulnerable to interference from others generally, the law recognises, in the plaintiff's right, a *prima facie* binding effect on everyone presently and unconditionally.[107] In the trusts context, the subject matter of B's

[105] Or by acquiring other rights that depend on T's exercise of a power that T held subject to a duty (as when, e.g., T holds a freehold on trust and grants a lease).

[106] In contrast to recipient liability, the liability of dishonest assisters and trustees *de son tort* does not *depend* on their interference with the *subject matter* of *B's* equitable proprietary rights under a trust. In relation to dishonest assister, see further the discussion below in Section D.II. A Contrast with Dishonest Assistance Claims.

[107] The point has been discussed in greater detail in Chapter 2 of this thesis.

right – being a right (a legal entitlement) that cannot be abstracted from its holder,[108] T – is not *inherently* vulnerable to interference from strangers at large.[109] It does not, therefore, *prima facie* bind everyone presently and unconditionally. So, in Example 1,[110] should others wrongfully interfere with the basketball, only T can bring a claim against them as it is she who has a right *to that basketball*. However, while B cannot claim against trespassers who interfere with the subject matter of T's right, she can, with good reason, *prima facie* claim against those who acquire *T's right*.[111] This is because the subject-matter of *B's right* has been

[108] Intellectual property rights – which are rights protecting certain types of information – also fit this description, but the law *does* recognise their ability to immediately and unconditionally impose *prima facie* duties of non-interference on others. However, this '*in rem*' quality was conferred on such types of information by Parliamentary intervention, and are best seen as justified for instrumental (or policy) reasons. See further: R Stevens, 'Crypto is not property' (2023) 139 LQR 615.

[109] As discussed in Chapter 4, it is important, in this context to distinguish between, on the one hand, the inherent and direct vulnerability of T's right to third-party intrusion and, on the other, the impact a third-party's intervention may have on the *value* of that right.

[110] See on page 383 (above).

[111] For completeness, this view also works in relation to cases where C acquires a lesser right that depends on T's right (e.g., where T has a freehold and grants a lease, or where T gives C only part of the trust property).

acquired by them, thereby frustrating the specific realisation of T's core trust duty in relation to it. Of course, should a trespasser destroy the subject matter of T's right respecting the trust asset, that asset would cease to exist; this would practically frustrate T's ability to specifically perform her core trust duty in relation to that right. However, as argued in Chapter 4, this does not justify giving trespassory protection to B's right in relation to the trust asset. This is because B can compel T to sue the trespasser for their wrongful interference with the subject matter of the T's title.[112] On the other hand, when a third-party like C *acquires* a trust asset from T, there is a *direct* sense in which she interferes with the subject matter of *B's* equitable proprietary right, removing T's ability to specifically perform her core trust duty to B in relation to it. As Dr Nair has argued, T's ability to validly dispose of rights held on trust, even when this is done in an unauthorised way, makes B's equitable

[112] It should be acknowledged that this idea has its limit. In some cases, it can seem quite legalistic. For instance, there may be cases where there is no practical way of T specifically performing her core trust duty when X, a trespasser, has burned the physical subject matter of T's right and has left the jurisdiction.

proprietary right in relation to a trust asset particularly vulnerable.[113] This vulnerability is C's problem because her own acquisition of rights held on trust is *dependent* on T's exercise of a power in C's favour. So, C, in other words, can be seen to have taken advantage of T's powers of disposition, and is therefore potentially (i.e., pending knowledge) implicated in T's unauthorised conduct.[114] It is this type of vulnerability – and C's ability to take advantage of it – that the 'successor'-effect of B's equitable proprietary right protects against.

In *Akers v Samba*,[115] Lord Sumption, while stating that B's equitable proprietary right bears 'the essential hallmark of any right *in rem*',[116] echoed this view by observing that

> it is good against third parties into whose hands the property or its traceable proceeds may come, subject to the

[113] A Nair, *Claims to Traceable Proceeds: Law, Equity, and the Control of Assets* (OUP 2018), 201-205.

[114] *ibid.*

[115] *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424.

[116] *ibid.*, [82] (*per* Lord Sumption). See also *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457, [18] (*per* Lord Briggs).

> rules of equity for the protection of bona fide purchasers for value without notice.[117]

One way of reading this statement is to interpret 'good against third parties' to mean that it is in the nature of B's right in Example 1[118] that it *prima facie*, albeit conditionally, binds everyone. Its binding effect is 'conditional' on two grounds.[119] First, a third-party like C must acquire a right through T's exercise of a power that is subject to a core trust duty.[120] Second, C must acquire rights from T in circumstances where T is acting in breach of trust. For, if T's disposition of a trust asset is in

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[117] *ibid*; see also, for instance, *Montrose Investment Ltd v Orion Nominees Ltd (No 2)* [2004] EWCA Civ 1032, [2004] WTLR 1133; *Pulvers v Chan* [2007] EWHC 2406 (Ch), [2008] PNLR, [380], where it was held that B (and not just T) has *locus standi* to bring an equitable proprietary claim against C (who is not a bona fide purchaser for value without notice) in a case like Example 1.

[118] See on page 383 (above).

[119] See B McFarlane, 'The Persistence of Equity: Lessons from the Trust' in B McFarlane and S Elliott KC (eds), *Equity Today: 150 Years after the Judicature Reforms* (Hart 2023), 20, who makes the point that Lord Sumption is using an odd definition of 'in rem' in this context.

[120] As discussed above, if a third-party, instead, steals the trust asset, she acquires an *independent* title, and T's (better) title to it remains with T. In these circumstances, T can still specifically perform her core trust duty in relation to the asset by, e.g., suing the third-party in conversion to recover the asset.

conformity with the terms of the trust, B's right in respect of the asset would be overreached. Thus, if both conditions are not met, there would be no grounds to say that T's ability to specifically perform a core trust duty in relation to a trust asset has been *frustrated* by C's acquisition of title to it. Further, the third-party effect of B's right is also 'prima facie' in nature as one must take account of other defences (apart from overreaching) – such as of overriding or bona fide purchase – that would allow a third-party to take title to the asset absolutely.

Hence, if C receives title to a trust asset from an errant trustee – and provided C cannot plead a defence, such as of a bona fide purchaser for value without notice – she will, with good reason, automatically be subject to a core trust duty, holding that right as a constructive trustee for B.

D. CLOSING THE CIRCLE: THE ROLE OF 'CONTINUITY'

The first section below ties together the insights gained from the analysis thus far. It explains how the idea of 'continuity' in a receipt-

based claim can be defensibly understood under the model of a *Linked claim* developed in this chapter. The second section then draws on the Supreme Court's contrast in *Byers* between a receipt-based claim and accessory liability (of a dishonest assister).[121] Although a discussion of dishonest assistance claims is not a central theme in this chapter, distinguishing it from a receipt-based claim, in light of *Byers* and the insights gained in this chapter, supplies a useful means to close the circle on our analysis.

D.I. Receipt-Based Claims as *Linked Claims*: A Summary View on 'Continuity'

Where a defendant derives her right from T, but T acted in breach of trust, a receipt-based claim follows this particular right (or rights that derive from it) from T's hands into those of third-party recipients. This is indeed different from a claim to a legal property right – a right *in rem* – which follows a specific 'thing' to which that right

[121] Which was set out in Section A.I. *Byers v Saudi National Bank*, above.

relates. Further, successors in title can be liable to a claim respecting a pre-existing equitable proprietary right, but only if specific conditions are met: as to 'receipt' following T's breach and 'knowledge'.[122] By acting on the conscience of a recipient, Equity operates *in personam*,[123] on that person, but certainly not by way of recognising a wholly new right, unconnected to the pre-existing right under the trust. This is an important point as it is precisely the argument that SICL's liquidators (B) advanced in *Byers*, which the Supreme Court rejected.

At or after receipt, when C's conscience is affected, the conditions of B's receipt-based claim against C are met. Subsequently, a core aspect of B's relationship with T, which, at the time of receipt, was

[122] *Investec Trust (Guernsey) Ltd v Glenella Properties Ltd* [2008] UKPC 7, [2018] 2 WLR 1465, [228] (*per* Lord Mance): 'The rights of the beneficiaries operate on the conscience of those party to or having notice of them'; *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424, [89] (*per* Lord Sumption): when an asset encumbered by a prior equitable interest has been transferred, 'the question becomes whether the conscience of the transferee is affected'.

[123] See *R Griggs Group Ltd v Evans (No 2)* [2004] EWHC 1088 (Ch), [2005] Ch 153, [43] (*per* Peter Prescott QC).

replicated in C's relationship with B, becomes enforceable. This is a core trust duty whose justification is linked to the reasons grounding T's pre-existing core trust duty to B. It is *in this sense* that an equitable proprietary right can be seen to have a *continuing* impact in grounding B's receipt-based claims against C.

An expanded view of the idea can be seen in Example 3.[124] Upon C1's receipt of title to a trust asset, T's core trust duty is replicated and engrafted onto C1's power to dispose of title to it. This is based on the view that T's core trust duty is described, like C's, as a duty not to act contrary to the *known* terms of the trust.[125] Should C1, at a time when she retains the original trust right or its traceable product, acquire the requisite knowledge, that duty acquires content and thereby becomes enforceable against C1. However, even before her conscience is affected, should C1 transfer title to the trust asset to C2, the core trust duty that was previously engrafted onto T's and C1's respective titles to the tennis

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[124] See on page 429 (above).

[125] As noted above, T, as an express trustee, will know of the trust terms by definition. See Section A.II. Two Issues and a Path Forward, above.

ball can attach to C2's title. Should C2 then learn that this right was transferred to her in breach of a core trust obligation owed to B, that duty would be enforceable against C2 in the same way it might have against C1. Importantly, even before C2's knowledge allows B's receipt-based claims to be enforced, the presence of a core trust duty on C2's part means that the reasons linked to those grounding T's original duty have the *potential* to make her *answerable* to them. Once C2's conscience is affected, this potentiality *actualises*. It is in this way that the reasons grounding T's original core trust duty persist to justify B's receipt-based claim against C1 or C2. Further, to trigger the enforceability of C2's core trust duty, it should not matter that C2 was unaware of T's breach of the *original* core trust duty owed to B. The key requirement is that C2 knows that the right C1 transferred to her was transferred following C1's exercise of an encumbered power (i.e., even if C1's core trust duty, at the time of the transfer, had nil content as C1 did not know of the prior trust). Once this occurs, C2 becomes implicated in the *same scheme* of wrongful dealing – as regards title to the trust asset or its traceable products – that *originated* with T's conduct.

As the discussion following Example 4[126] demonstrated, the principal way C1, C2, or their successors, can take title free from the potential of a core trust duty being enforceable against them is if they can plead a relevant defence. The effect of such a defence is to make a recipient immune from coming under a core trust duty encumbering her title to the right received (or its proceeds). In this way, the reasons grounding B's original core trust duty cannot persist to render that recipient potentially answerable; the continuing impact of B's original equitable proprietary right will cease. That recipient will, put differently, be free from the potential of being susceptible to a court order in respect of a proprietary or personal receipt-based claim. This means that she, and her successors, would be able to keep the right received absolutely.[127] Of course, if title to trust property (or its proceeds) *returns* to the hands of a person who originally owed a core trust duty to B, then

[126] See on page 432 (above).

[127] *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457, [23]-[24] (*per* Lord Briggs), [172], [201] (*per* Lord Burrows).

they will *not* be entitled to keep the right absolutely.[128] This is because, at the time they acquired title to the original trust asset (or its proceeds), they were *not* immune from the *potential* of coming under a core trust duty in relation to it. So, even if such persons acquire a right from one who could plead such an immunity, they would be *disabled* from claiming it outright. They will resume holding the right received subject to a core trust duty. If they are still to acquire the required knowledge, the potential of having that duty enforced will continue to avail against them. In a case like Example 3,[129] if that person is C1 or C2, the moment they acquire knowledge, their duty will acquire its content and B can bring a receipt-based claim against them.

Thus, once a recipient's core trust duty *in respect of trust property (or its proceeds)* becomes enforceable, B may then bring either a proprietary or a personal claim against C. The former consists of the specific enforcement of the core trust duty. The latter can be seen a next-

[128] *ibid.*

[129] See on page 429 (above).

best means to specific enforcement. Crucially, without the core trust duty in relation to trust property arising first, B cannot directly make an *in personam* claim in knowing receipt as it sought to do in *Byers*. In that case, C could not come under a core trust obligation as the effect under the *lex situs* was to 'override' this possibility. The very foundation of B's receipt-based claims (proprietary and personal) was thereby defeated.

Yet, neither the fact that C's right derives from T's, nor the replication of a core aspect of T's obligation onto C's, makes B's equitable proprietary right against C the *same* right as what she claims against T. Both rights are formally distinct and arise for different reasons. It would, therefore, be apposite to conclude that notions of 'continuity' in B's receipt-based claims are properly based on the persisting potentiality of the reasons grounding T's original core trust duty to bind her successors in title (and their successors). While these continuing reasons are not sufficient, on their own, for B to enforce a receipt-based claim against C, they are a *necessary* part of its justificatory ground. As in *Byers*, should these reasons cease to persist against a recipient, it is because she has

been rendered immune from coming under a core trust obligation to B. At that point, the continuing impact of B's original equitable proprietary right (and T's original correlative core trust obligation) is ended.

D.II. A Contrast with Dishonest Assistance Claims

The contrast between the foundations of receipt-based and dishonest assistance claims now becomes clearer. Both claims are alike in two main respects. First, both protect a plaintiff (e.g., B) from third-party interference with obligations owed to the plaintiff by a specific other (e.g., T). Second, each depends on the third-party defendant's conscience being affected – through the presence of 'knowledge' or 'dishonesty'. The first aspect is our focus.

Receipt-based claims protect against a specific type of third-party interference. It concerns the defendant's interference with T's core trust duty owed to B by *appropriating* the *subject matter* (or a right deriving from it) to which it (the obligation) relates. As we have seen in

Chapter 4, the subject matter of B's equitable proprietary right under a trust – and of T's correlative core trust duty – is a distinct *right* held *by T*. When a recipient (C) acquires this right from an errant T, she is *prima facie* implicated in the frustration of T's ability to specifically perform her core trust duty to B in relation to that right. Provided that C can plead no relevant defence, B's receipt-based claims can (upon C's conscience being affected) seek to enforce a core trust duty against C in relation to the right received. Seen as such, the starting point of a receipt-based claim against a third-party is her *acquisition* of a relevant right *from T*.

A dishonest assistance claim, on the other hand, attacks a broader type of interference. It does not depend on the defendant (D) acquiring the subject matter of T's core trust duty (or another right deriving from that subject matter). Instead, it is concerned with D's dishonestly participating in T's breach of a core trust duty[130] *or*, more

[130] *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 (Ch); *Belmont Finance Corporation Ltd v Williams Furniture Ltd (No.2)* [1980] 1 All ER 393 (CA); *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614, [2020] Ch 129.

broadly, a fiduciary duty (i.e., a duty to avoid conflicts of interest).[131] D's participating in the enterprise of T's breach may or may not result in her acquiring title to a trust asset from T. Nothing, so far as the basis of D's liability (i.e., her susceptibility to a court order) as an accessory is concerned, turns on this.[132] Where D does happen to acquire title to a trust asset from T, a concurrent and *separate* receipt-based liability could arise against D.[133] This was the ground on which a distinction between receipt-based and accessory claims was drawn in *Byers*. As D's receipt of a right from an errant T might only serve as an *incidental* feature of the claim, a personal money claim might still be available against D *even if* the overriding effect of the *lex situs* immunised D from coming under a core trust duty. That claim is justified because D's liability, as an accessory, is seen as co-terminus with T's. Once T's liability for a

[131] *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499.

[132] *Royal Brunei Airline Sdn Bhd v Tan* [1995] 2 AC 378 (HL), 382.

[133] It would normally be preferable, in practice, to bring a receipt-based personal claim in such cases as the mental element, as to 'knowledge', is likely easier to prove than 'dishonesty'. However, if D receives title to trust property ministerially (not beneficially), a receipt-based claim cannot be brought against her: *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164, [106].

substitutive money award is established, D would generally be taken to be liable for the same amount.[134] The justification for D's liability, in other words, does not depend on the continuing impact of the reasons grounding T's pre-existing core trust duty respecting title to a specific trust asset.

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[134] *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, [141] (*per* Lord Millett): '[D] is not in fact a trustee at all, even though he may be liable to account *as if he were'* (emphasis added). On one view, this outcome follows by describing D's wrong as *secondary* to T's *primary* wrong, and thereby explaining that D's liability is joint and several with T's: S Elliott and C Mitchell, 'Remedies for Dishonest Assistance' (2004) 67 MLR 16. However, as Professors Ridge and Davies have argued, this position is unpersuasive: P Ridge, 'Justifying the Remedies for Dishonest Assistance' (2008) LQR 445 and PS Davies, *Accessory Liability* (Hart 2015), ch 8. The nature and extent of D's liability is determined based on the consequences of her *participation* in T's breach of trust; in most (but not all) cases, the former will be liable to the same extent as the latter. This, however, does not mean that the extent of D's liability is *duplicative* of T's. There is also some judicial support for this idea, when considering D's liability to disgorge profits following her participation in a breach of trust. In *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), [2006] FSR 17, [1600], Lewison J stated that D is not jointly and severally liable to disgorge unauthorised profits and in *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499, [114]-[120] the judgment of the Court of Appeal (Longmore, Moore-Bick and Lewison LJJ) stated that, in principle, D can be liable to disgorge her own profits (hence suggesting a primary liability).

Based on this contrast, this thesis places *some* types of dishonest assistance claims under a separate category in its taxonomy: a *Partially independent claim*. Unlike the *vindicatio*, *Consequential claim*, and *Linked claim* categories, a *Partially independent claim* does not draw on the reasons grounding a pre-existing proprietary right (and its correlative duty) for its justification. Instead, it is justified on an independent basis. The reasons supporting B's pre-existing equitable proprietary right (and T's correlative duty), however, serve as a background pre-condition for the claim to be brought.[135] For completeness, it should be recalled that another example of a *Partially independent claim*, given in Chapter 1, closely resembles claims in dishonest assistance (i.e., as a form of accessory liability). This is the case, at common law, where the tort of procuring a breach of contract has occurred.[136]

[135] Another example of a *Partially independent claim* given in Chapter 1 closely resembles claims in dishonest assistance (i.e., as a form of accessory liability). This is the case, at common law, where the tort of procuring a breach of contract has occurred.
[136] See also the discussion of this point in Davies (n 134), ch 5.

The reason why only 'some' dishonest assistance claims fit the mould of *Partially independent claims* is because they do not *always* depend on the pre-existence of an equitable proprietary right. In many cases, as noted above, D's assisting in a breach of fiduciary duty would suffice. However, there are cases where a pre-existing equitable proprietary right *is* a necessary presence in the story. This would, for instance, be the case if D is liable to the same extent as T is in respect of a substitutive money claim brought against T.[137] The extent of T's, and therefore D's, liability would depend on the value of the title to the prior trust asset T misapplied. It is in these cases that D's liability is properly understood as a *Partially independent claim*.

Ultimately, therefore, a key point in this chapter, in respect of the Supreme Court's distinction in *Byers* between receipt-based and

[137] *Macdonald v Hauer* (1976) 72 DLR (3d) 110 (Sask CA), 129; *Re Bell's Indenture* [1980] 1 WLR 1217 (CA), 1231–1233; *Commercial Union Life Assurance Co of Canada v John Ingle Insurance Group Inc* (2002) 22 CCLI 221 (Ont SCJ) (affirmed in (2002) 217 DLR (4th) 178 (Ont CA)); *NCR Australia Pty Ltd v Credit Connection Pty Ltd (In Liquidation)* [2004] NSWSC 1, [150].

accessory claims, is the following: it is correct to say that a dishonest assistance claim is different in an important way from a receipt-based proprietary claim;[138] however, this does not mean either that the right enforced through a dishonest assistance claim need always be *wholly* 'new' and distinct from the pre-existing right, or that a receipt-based claim is based, *wholly*, on the protection of a pre-existing interest under a trust. Therefore, while there is an important difference between rights contingent on a dishonest assistance claim and a receipt-based claim, this distinction is a subtler one – i.e., between claims which depend in *some* sense on the existence of a pre-existing right (such as some dishonest assistance claims) and others where the claim depends, in a more *significant* sense, on a pre-existing right (such as a receipt-based claim). Viewing the former as a *Partially independent claim* and the latter as a *Linked claim* helps put this idea in its proper frame.

[138] See further *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457, [145]-[1550] (*per* Lord Burrows), discussing, with approval, Davies (n 134), 91-93.

E. TWO ALTERNATE VIEWS ON THE 'CONTINUITY' OF B'S PRE-EXISTING RIGHT

The discussion in Part D, above, concludes this chapter's defence of the view that each of B's receipt-based claims in cases like Example 1[139] are best understood as types of *Linked claims*. Nevertheless, from this thesis' taxonomy, it appears that such claims may be alternatively explicable by drawing on two other categories in which the *reasons* grounding B's pre-existing right *continue* to inform the justificatory basis on which receipt-based claims in relation to it are brought. These categories are: *vindicatio* claims and *Consequential claims*. There is some support in the literature for viewing each of B's receipt-based claims as a type of either category. Accordingly, the discussion in this part examines these possibilities. It is argued that they are ultimately unsustainable.

[139] See on page 383 (above).

E.I. A *Vindicatio* Claim?

We return to Example 1.[140] On one view,[141] B's proprietary receipt-based claim against C is Equity's instance of the *vindicatio*. For this to be true, on the terminology used in this thesis, three points must obtain. First, for the claim to succeed, B need not prove any additional facts in her claim. It should suffice for her to make the assertion – against anyone who possesses the basketball (not being a bona fide purchaser for value without notice, or a person entitled to a similar defence) – that 'this basketball is mine (in Equity)!'.[142] Second, the content of the right B has against T (i.e., the activity that must be undertaken under the correlative duty owed to B respecting title to the basketball) should be the same as regards the right that she claims against C. Third, the reasons grounding B's pre-existing right against T in respect of the basketball

[140] See on page 383 (above).

[141] See, e.g., P Birks, 'Personal Property: Proprietary Rights and Remedies' (2000) 11 KLJ, 4-5.

[142] 'Mine (in Equity)', meaning that title to that basketball is held by a specific person for B's benefit.

must be the same reasons that ground her claim in relation to the basketball against C. It is submitted that the second of these requirements can satisfied, *provided* that the conditions of a receipt-based claim against C (including the receipt and knowledge elements) are met.

When the conditions of B's equitable proprietary claim against C are met, a core aspect of B's relationship with T (respecting title to the basketball) is replicated in C's relationship with B. This is a core trust duty to refrain from using title to the basketball for her own ends (absent authority).[143] Lord Sumption explained in *Williams v Central Bank of Nigeria*[144] that C's duty to B, as a 'constructive trustee', is not that of a full-blown express trustee; it principally requires that C reconvey the trust property (or its traceable proceeds) to a party who will hold on the terms of the prior trust (a restorative duty) and, as part of the basic

[143] See RC Nolan, 'Equitable Property' (2006) 122 LQR whose argument also hives off the negative duty from the positive duties of trustees, treating the negative duty owed by C as identical in content to T's original duty.

[144] *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189, [31] (*per* Lord Sumption).

obligation which requires that until those rights are reconveyed to T,[145] C must not use them inconsistently with the terms of the trust affecting those rights (a custodial duty).[146] It is principally this 'core' feature of the prior trust obligation that persists into C's hands, not *necessarily* all the *same* duties that T owed to B. The word 'necessarily' is used as the prior trust, of which T is a trustee, need not be an express trust, decked with a broader range of personal and managerial duties. As Professor McFarlane explains,[147] the core duty of not using rights held on trust for the trustee's own ends is a feature present in all trusts, whether an express, constructive, or resulting trust.[148] It is typically only an express trust[149] that fastens obligations on T that add greater content to the core

[145] Or to B or a new lawfully appointed trustee, depending on the terms of the trust.

[146] *Arthur v Attorney-General of the Turks and Caicos Islands* [2012] UKPC 30, [37] (*per* Sir Terence Etherton).

[147] B McFarlane, 'The Centrality of Constructive and Resulting Trusts' in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010).

[148] While an express trust frequently fastens a broader range of personal and managerial responsibilities that T will owe to B with respect to rights held on trust, the core trust duty is an obligation trustees of any kind of trust will owe in respect of rights held on trust.

[149] With the notable exception of a bare trust.

trust duty. Hence, should T, a trustee of a non-express trust, make an unauthorised disposition to C, the content of C's duty would, in most cases,[150] be identical to T's (i.e., of just a core trust duty). Having noted this, the point underscored here is that when a receipt-based claim is said to follow a particular right held on trust, it is that encumbrance on T's right, which pertains to her core duty as a trustee, that is followed into C's hands to burden her title to the right received. It is in this sense that the content of B's right against T subsists when title to the basketball

[150] Not all non-express trusts impose *just* the core trust duty on T. A chief example concerns trustees *de son tort*, normally, intermeddlers, who are held to assume duties of trusteeship without being properly appointed as express trustees (*Long and Feaver v Symes and Hannam* (1832) 3 Hag Ecc 771, 162 ER 1339 (KB), 774 (1340); *Re Stevens* [1897] 1 Ch 422 (Ch), 426; although described as 'constructive trustees' (see, e.g., *High Commissioner for Pakistan in the United Kingdom v Prince Mukkaram Jah* [2016] EWHC 1465 (Ch); [2016] WTLR 1763, [130]), the duties of such trustees often go beyond just the core trust duty and resembles closely the duties of a full-blown express trustee: see *Taylor v Davies* [1920] AC 636 (PC), 651; *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 (Ch), 1579; *Citadel General Assurance Co. v Lloyds Bank Canada* (1997) 152 DLR (4th) 411 (Can SC), 420; *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA), 408–409; *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, [135]–[141]; *Cunningham v Cunningham* [2009] JRC 124, 2009 JLR 227 Royal Court, Jersey), [21]–[33]; see also YK Liew and C Mitchell, 'The Creation of Express Trusts' (2017) 11 Journal of Equity, 10-12.

is transferred to C. While this point is true, it is insufficient to render the nature of B's claim in Example 1 a species of the *vindicatio*. This is because the first and third elements outlined above cannot be made out.

With regard to the first element, it cannot be met for two key reasons. First, as discussed in Chapter 4, the identity of the party subject to a core trust duty is part of the identity condition of B's equitable property right under a trust; in Example 1, that has changed now that C has title to the trust asset, not T. B, thus, asserts a claim to a *new* equitable proprietary right, not the pre-existing right she had in respect of T's title. Second, B must, at the very least, show that the right in C's hands derives from the right that T originally had. In other words, B must prove that the right claimed is one that C received from T. The point can be understood through Example 2,[151] discussed above.

In Example 2, prior to X's intervention, B could assert against T: 'title to that basketball is mine (in Equity)!'. If Equity recognises B's

[151] See on page 428 (above).

vindicatio, it would mean that B could claim against X's possessory title to the basketball by making the same assertion as against T. As discussed in Chapter 4, the longstanding view is that B cannot claim against X in this way.[152] As discussed above, this is because C cannot show that X acquired a right from T's exercise of a power encumbered by a core trust duty.

The third requirement is similarly not satisfied. The justifications supporting T's core trust obligation to B are inseparable from the reasons why a trust arose between T and B. Where the prior trust is an express trust, it has been held that an intended trustee cannot

[152] *Leigh & Sullivan Ltd v Aliakmon Shipping Ltd* [1986] AC 785 (HL); *MCC Proceeds v Lehman Brothers* [1998] 4 All ER 675 (CA); *Schalit v Joseph Nadler* [1933] 2 KB 79; *Parker-Tweedle v Dunbar plc (No 2)* [1991] Ch 12, [1990] 3 WLR 767, [1990] 2 All ER 577 (CA); *Atlasview Ltd v Brightview Ltd* [2004] EWHC 1056 (Ch), [2004] 2 BCLC 191. Although this position was departed from in the difficult decision in *Shell UK Ltd v Total UK Ltd* [2011] QB 86 (CA), it is argued in Chapter 4 of this thesis that its reasoning is wrong, difficult to defend, and likely *per incuriam*. See: WJ Swadling, 'In Defence of Formalism' in A Robertson and J Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart 2019), 105 (at footnote 50) and R Stevens, *The Laws of Restitution* (OUP 2023), 216-222.

be forced to take on the duties of that office.[153] Professors Liew and Mitchell draw on this point to show that integral to the reasons supporting the full range of B's rights under an express trust is a settlor's valid expression of intent to declare a trust and T's acceptance of the obligations that come with that office (i.e., where a self-declaration of trust is not effected).[154] Upon such acceptance, T's obligations to B are enforced based on Equity's age-old adherence to the principle that she who has 'undertaken a trust is bound to fulfil it'.[155] However, in almost all cases concerning third-party recipients, no trust is declared and nor does C undertake the full gamut of trusteeship obligations. Similarly,

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[153] The Supreme Court of Western Australia in *Scarpuzza v Scarpuzza* [2011] WASC 65 held that an individual 'cannot be compelled to accept the burdens... against his or her own will': [47] (*per* EM Heenan J). See also the holding in the Chancery Division in *Robinson v Pett* (1734) 3 P Wms 249, 24 ER 1049 (Ch), 251 (1050) (*per* Talbot LC): an intended trustee 'may choose whether he will accept the trust or not.' This, of course, does not mean that an intended trustee who has the trust assets, and who does not accept to hold them on trust, can simply keep them outright. She will be susceptible to a court order to convey title to the assets to someone who *is* willing perform the trust. For further discussion on what rights B may have against such an intended trustee, see: Liew and Mitchell (n 150).

[154] See Liew and Mitchell (n 150).

[155] Maitland (n 65), 111-112.

where the prior trust is a non-express trust, it may have arisen for a range of distinct reasons.[156]

So, whenever an unauthorised disposition is made to C by trustees of either express or non-express trusts, the constructive trust imposed on C need not arise for the same reasons supporting T's owing trusteeship duties to B. This point is significant in unseating the view that B's claim in Example 1 is in the nature of the *vindicatio*. It is of the essence of such a claim that T's and C's normative positions as regards B are the same. In other words, the logic of the *vindicatio* in Example 1 would require that the justificatory basis of B's claim against T is

[156] For instance constructive trusts imposed on rights retained with the knowledge that they were paid by mistake (*Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL), 709D; *RCC v The Investment Trust Companies (in liq)* [2017] UKSC 29, [2018] AC 275, [70]); on trustees *de son tort* (see n 150); or resulting trusts arising upon the failure of dispositions on express trusts or in favour of a transferor who makes a gratuitous disposition of property to a stranger or to a 'true purchaser' (i.e., a purchaser who buys property in a stranger's name, essentially to use the latter as a front) (See *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL), 708A–B, citing *Vandervell v IRC* [1967] 2 AC 291, 312 onwards (*per* Lord Upjohn); *Re Vandervell's Trusts (No 2)* [1974] Ch 269, 288 onwards, Megarry J).

identical to the basis on which her claim against C is made. Consider the following example at common law.

> **Example 5** – A holds title to a football. X1 steals A's football and purports to convey good title to the football to X2.

Here the argument is that X2 and X1 had identical duties to A from the moment A acquired her title to the football. Nothing X1 has done has released X2 from her duty to A. X1 and X2 are in identical normative situations from the beginning. If A can bring a *vindicatio* claim against X1 and later against X2, the claims will rest on the same normative ground. This is to say that A's assertion in her claims, 'this football is mine!', regardless of who possesses the item at any given point, is justified on a singular, identical basis. In Example 1, however, T and C are in quite different normative situations and the justification for making C liable to B must depend on some new feature of C's normative situation. What it means for B to claim against T and C,

respectively, would differ and, hence, it would be incorrect to describe B's claims respecting the basketball as a type of *vindicatio* claim.

The argument in this section is that a receipt-based equitable proprietary claim is not in the nature of the *vindicatio*.[157] If this is correct, the same arguments can straightforwardly explain why the conclusion is true as regards a personal receipt-based claim in knowing receipt.

E.II. A *Consequential Claim*?

With a *Consequential claim*, the reasons underlying a pre-existing right are reflected in the claim and the remedial response. However, these reasons are addressed in the claim through a specific form. The focus is on those reasons as they apply to the defendant's conduct – e.g., her holding rights (or their traceable proceeds) received following a breach of trust. This feature subsequently characterises the distinct form

[157] However, as argued above, if the trust property is transferred without authority by T, but then is returned to T, the claim B can then have against T in such a case, to enforce the trust, could perhaps be seen as a *vindicatio* claim.

of remedial response that the claim invites. This emphasis on the defendant's conduct distinguishes *Consequential claims* from the *vindicatio*. With the former, the possibility of bringing the claim is necessarily occasioned by proof of these additional facts (i.e., such as the defendant's receiving trust assets from an errant trustee). With *vindicatio* claims, such additional facts are wholly unnecessary for the claim to work.

In *Byers*, Lord Burrows appeared to align B's personal (knowing receipt) claim against C in a case like Example 1[158] with a *Consequential claim*. His Lordship did so by describing the claim as 'an equitable analogue of the tort of conversion'.[159] The wrong involved in knowing receipt was described as follows:

> a proprietary wrong that is constituted by the defendant knowingly interfering, by receipt or retention, with the equitable proprietary rights of the claimant.[160]

[158] See on page 383 (above).

[159] *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457, [148] and [151].

[160] *ibid.*

Presumably, on this formulation, B's *proprietary* claim against C arises independently of a wrong. For instance, for the claim to arise, it should suffice that C *receives* title to a trust asset *from T* and retains it (or its traceable product) at the time B's claim is brought. Provided that C can plead no defence (such as of being a bona fide purchaser for value without notice), a proprietary claim would bite. Should B wish, however, to bring a personal (knowing receipt) claim against C, a further triggering fact must be proved: that C, at the time of receipt, or at a later point when she retains title to the original trust asset (or its traceable product), *knew* that the right was transferred to her by T in breach of trust.

Lord Briggs similarly seemed to describe B's receipt-based claims consistently with a *Consequential claim*, although this was done differently. C's primary duty was described as a 'restorative *and*

custodial duty'.[161] This looks identical to the core trust duty (discussed above).[162] As above, it appears that: (a) B's ability to make a proprietary claim against C to enforce this duty arises immediately on C's *receipt*; and (b) a personal claim would depend, additionally, on C possessing the required *knowledge* at a time when she holds title to the original trust asset (or to its traceable proceeds). That said, Lord Briggs also described a knowing receipt claim as 'com[ing] to [B's] rescue if [C] transfers, dissipates or destroys the property [or its traceable product]… so as to prevent the pursuit of a proprietary claim.'[163] On this framing, it is unclear if C's 'transfer, dissipation or destruction of the property [or its traceable product]' is a *necessary* trigger to bring a personal claim, or if it

[161] *ibid.*, [42] (emphasis added). It is probably more accurate, and consistent with existing authority, to describe the obligation as a 'custodial' *or* 'restorative' duty, as breach of just one of those duties should suffice to ground a knowing receipt claim: see T Pilkington and R Gregson, '*Byers v Saudi National Bank*: What's the Wrong in Knowing Receipt?' (2024) MLR 1, 10-11.

[162] See text in and accompanying (n 144) to (n 150), above.

[163] *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457, [42].

simply constitutes the typical situation in which she may wish to do so.[164]

In any case, both Lords Burrows and Briggs *seem*, in this context, to agree on four overarching ideas. First, that C's *receipt* is a sufficient trigger for B's ability to bring a proprietary claim. Second, to bring a personal claim, B must at least prove – as an additional triggering fact – that C also had *knowledge* of T's prior breach of trust at a time when C held title to the original trust asset (or its proceeds). Third, B's proprietary claim against C consists in the enforcement of a primary obligation respecting a specific right received from T, or its traceable product (although their Lordships expressed the content of this

[164] There is existing *dicta* to suggest that, despite C retaining title to an original trust asset (or its traceable product), B may nevertheless assert a personal (knowing receipt claim): *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685 (CA), 700 (*per* Hoffmann LJ); *Arthur v Attorney-General of the Turks and Caicos Islands* [2012] UKPC 30, [31] (*per* Sir Terence Etherton); *Grimaldi v Chameleon Mining NL* (2012) 200 FCR 296 (FCA), [251] (*per* Finn, Perram, and Stone JJ).

obligation differently).[165] Fourth, B's ability to bring a personal claim depends – at the time at which it is brought – on both the existence of B's primary proprietary claim *and* the presence (at least) of knowledge on C's part. On this overarching framework, the foundation of B's receipt-based claims is the availability of a primary proprietary claim against C. Their Lordships did not clearly explain what the justification for this claim might be. However, both treated C's *receipt* of a right from T as a triggering fact to bring the claim, and neither seemed to ascribe any normative value to this fact. Hence, this allows us to interpret each of their positions as lending itself to the view that the foundation of B's receipt-based claims in Example 1[166] aligns with a *Consequential claim*. To see whether this view is sustainable, it would be useful to compare it

[165] It is beyond the scope of this chapter to independently assess each of their Lordships' description of C's primary obligation respecting title to a trust asset received by C. It would suffice, at this point, to note that Lord Briggs' account aligns most closely with existing authority – i.e., that C's primary duty is a core trust duty which is 'custodial' and/or 'restorative' in nature: see text in and accompanying (n 144) to (n 150), above. This is the approach taken in this chapter. For a compelling critique of Lord Burrows' explanation of the primary duty, see Pilkington and Gregson (n 161), 7-9.
[166] See on page 383 (above).

with Example 5[167] (a common law conversion case), analysing the latter – as fits with the English common law analysis – as a type of *Consequential claim*.[168]

In Chapter 2, it was explained that A's right to the football correlates with *prima facie* duties on others to refrain from careless or deliberate interference with the football. This '*in rem*' effect is justified because the subject matter of the right – like any physical thing – is inherently vulnerable to depredation from strangers. Importantly, the additional facts proving X1's or X2's tortious act do not present new reasons for the claim that are different from why A has a property right to the football in the first place. At best, the occurrence of this factual scenario provides an occasion for A to bring a personal claim against X1/X2.

[167] See on page 468 (above).

[168] This would be doubly apposite when assessing Lord Burrows' model, which, as we noted above, was described as 'an equitable analogue of the tort of conversion'.

For Example 1 to fit the mould of a *Consequential claim*, it must be shown that the reasons grounding B's claim against C are the same as those grounding her claim against T. As we have seen above, this is not possible. C's duty to B respecting the trust asset is justified on fresh, or at least partly fresh, grounds. Relatedly, for the *Consequential claim* analysis to apply, the additional facts proved in the claim – e.g., C's receipt of a trust asset from an errant T – must be shown to simply serve as a causative event that triggers an occasion to bring a claim. In other words, these facts should not be seen as explaining why B has a claim respecting the trust asset against C. For, if they are, one reaches the inevitable conclusion that B's pre-existing right under a trust does not possess the normative horsepower required, on its own, for her claim against C to succeed. Therefore, should B's claim against C be based on fresh, or even partly fresh, normative grounds, there is good reason to conclude that that claim is not, strictly speaking, a mere assertion of the reasons grounding a pre-existing right (as is the case with a *Consequential claim*).

It was argued in Parts A-D, above, that the additional facts associated with B's claim in Example 1 go beyond serving merely as a causative event. They also play a part in justifying B's claim against C. These additional facts concern: (a) C's receipt of a right from T through the latter's exercise of a power subject to a core trust duty; and (b) C's knowledge that the right she acquired was conferred in breach of trust. Both facts, when established, show that C is implicated in T's breach of trust.

F. Conscience and Tracing Claims

The discussion in this part is a standalone supplement to the substantive portions set out above. Its chief objective is to explain how some conclusions made in this chapter fit with – and further the implications of – the analysis in Chapter 5 on tracing claims.

The view that B's receipt claims against C in Example 1 are justified by C's acquiring the required knowledge is not unique to receipt-based claims. This consideration should equally apply to other

situations in which B seeks to enforce claims under a trust. In the context of this thesis, the point can be briefly illustrated by looking at claims contingent on tracing against a trustee (discussed in Chapter 5).

> **Example 6** – T holds title to a motorbike on trust for B. In breach of trust, T transfers her title to the motorbike to C in exchange for C's title to a painting.

In Example 6, on effecting a substitution of title to an original trust asset, T is subject to an immediate core trust duty in respect of her title to the substitute asset.[169] If T is an express trustee – or a non-express trustee whose conscience has already been affected in a relevant way – the issue of whether she *also* comes under an immediate liability is moot. She is bound to know – or, at least, in good conscience cannot deny – that she has acted inconsistently with the terms of the trust. This provides a principled basis on which she ought to also be under an

[169] In English law, *Cave v Cave* (1880) 15 Ch D 639 is cited as authority for this point.

immediate liability to hold rights to any substitute assets on trust for B subject to a core trust duty.

The model advocated in this chapter also helps make sense of cases where a tracing claim is sought to be enforced against a party whose conscience had not, at the time of the relevant substitution, been affected in a relevant way (e.g., through knowledge).

> **Example 7** – T holds title to a painting on trust for B. In breach of trust, T transfers that right, for free, to C. At the time of the transfer, C was unaware, and could not reasonably have been aware, of T's breach of trust. C then exchanges title to the painting with X for title to £5,000 in cash. Whilst retaining title to the cash, C becomes aware of T's unauthorised transfer of the title to the painting to her.

The issue at hand concerns claims contingent on tracing against third parties who acquire a trustee's title to a trust asset in breach of

trust. The focus, additionally, is on those third parties who are not bona fide purchasers of the right and who cannot benefit from any similar defence against a trust beneficiary's potential claims respecting it. Example 7 is an instance of such a case.

We have seen, in Chapter 5, that B's tracing claim depends on enforcing a right respecting new subject matter (T's right to a substitute asset). This fact, coupled with an analytical concept that was referred to as '*Reasons Continuity*', led us to the conclusion that B's claims contingent on tracing are best understood as a type of *Consequential claim*. In brief, *Reasons Continuity* holds that when C effects a substitution of an original trust asset, the reasons grounding C's original core trust duty persist to immediately ground a new duty of next-best compliance on C. At B's election, this duty may take the form of compelling C to hold title to the substitute asset subject to a new core trust duty.

The view (defended in this chapter) that C comes under an immediate core trust duty to B upon receipt of title to the painting is

crucial for *Reasons Continuity* to justify B's ultimate tracing claim against C's title to the £5,000 in cash.[170] This is because, with claims justified by *Reasons Continuity*, the *continuation* of obligatory reasons requires that they had been *constituted* before the relevant obligation was breached (or, in Example 7, before C effected a substitution). Without adopting the model advocated in this chapter, one might have to concede that a justification for the outcome in Example 7 is not supplied by *Reasons continuity* (and the claim to the substitute asset therefore cannot be seen as a *Consequential claim*).

So, it can be seen from the discussion above that the analysis adopted in this chapter is consistent with that of Chapter 5. It is also necessary for the model of B's tracing claim, as a *Consequential claim*, to work in a case like Example 7. In that example, although C was originally innocent, C was under a core trust duty when receiving the trust asset, even though that duty was not yet enforceable by B. The argument in

[170] Which is a claim that B can undoubtedly make: *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91, 122-123 (*per* Lloyd LJ).

this thesis is that the existence of that duty is enough to justify B's ability to make a tracing claim in respect of a substitute that C ultimately acquires.

CONCLUSIONS

This chapter has argued that the Supreme Court's justification, in *Byers*, for B's receipt-based claims in cases like Example 1,[171] as based on a 'continuing' beneficial/equitable proprietary right is – if taken literally – indefensible. One key reason why is because the *form* of B's pre-existing right and the right she enforces against C in a receipt-based claim is distinct. However, there is an important sense in which we can identify a *continuing* impact of the *reasons* grounding B's pre-existing right – and, necessarily, T's correlative core trust duty[172] – on the receipt-based claims that can be brought against C.

[171] See on page 383 (above).

[172] As noted before, the emphasis on T's correlative core trust duty makes allowance for cases where there is no pre-existing beneficiary with an equitable proprietary right who brings a receipt-based claim.

The view defended in this chapter is that such claims are a type of *Linked claim*. These are claims which partly draw on the reasons grounding B's pre-existing right (and, necessarily, T's correlative core trust duty). They also depend on further facts that complete the justificatory basis of the claim. These additional facts include C's receiving a right from an errant trustee and her conscience being affected (by knowledge of T's breach) at a time when she continues to hold title to the original trust asset (or its proceeds).

The analysis of a receipt-based claim as a *Linked claim* has much going for it. First, it helps locate a defensible reading of the Supreme Court's description, in *Byers*, of knowing receipt claims being founded on a 'continuing' equitable proprietary right. Second, it also provides a sound basis for another idea advocated for in *Byers*. This is the view that a personal claim in knowing receipt is simply another means of giving effect to the *same* type of liability – or susceptibility to a court order – as is also enforced against C by means of an equitable proprietary claim.

To reiterate a central argument in this chapter: a knowing receipt claim enforces the *same* duty that an equitable proprietary claim does. This is a core trust duty which, specifically as regards C, has been articulated in this chapter as an obligation on C to not exercise her power over a trust asset (or its proceeds) contrary to the *known* terms of the trust. This duty can be specifically enforced through an equitable proprietary claim. Should C, upon acquiring knowledge, not specifically comply with her core trust duty (which consists of her restorative and custodial obligations), and no longer have the trust property or its traceable proceeds, B can enforce that obligation by requiring C's 'next-best' compliance with it. This would take the form of personal claim in knowing receipt. On this view, the basis of C's prior susceptibility to a court order as regards a proprietary claim also grounds her susceptibility to a court order enforcing a personal claim. Without C's core trust duty becoming enforceable first, no subsequent claim for next-best compliance with it can be enforced. It is in *this* sense that a proprietary and personal receipt-based claim rests on the same type of liability.

The arguments in this chapter depended, in some part, on a contrast between receipt-based claims in Equity and a common law conversion claim respecting physical chattels.[173] As discussed in Chapter 2, a physical thing, existing in the material world, is inherently vulnerable to interference by strangers. Thus, when the subject matter of a person's right is a physical thing, there is good reason for the law to impose immediate and unconditional *prima facie* duties on others to refrain from careless or deliberate interference with that thing. The subject matter of an equitable proprietary right – such as B's right respecting a trust asset – is vulnerable to a different and narrower kind of intrusion. B does not have a direct right in relation to a trust asset (whether a physical thing or not). The subject matter of B's equitable proprietary right is – and T's correlative core trust duty relates to – *a distinct right* held by T. This right in T's hands is not inherently vulnerable to third-party intrusion. For instance, it cannot be

[173] See discussion in **Part C. THE JUSTIFICATION FOR C'S IMMEDIATE CORE TRUST DUTY**, above.

independently taken or tampered with by others. Hence, there is no basis for the law to recognise immediate and unconditional *prima facie* duties on others to refrain from 'interfering' with the subject matter of B's right. However, there is a distinct sense in which the specific performance of T's core trust duty can be frustrated by third-party engagement with the subject matter of that duty. This is when C *acquires* a right following *T's* wrongful exercise of an encumbered power over a trust asset. Should C acquire a right from an errant T in this way, T's ability to specifically perform her core trust duty (respecting that right) is put beyond her power. Thus, since the subject matter of B's equitable proprietary right is susceptible to such third-party interventions, there is good reason to find that it is capable of binding third parties like C in a *conditional* way. Its binding effect is 'conditional' because it depends on C acquiring a right from *T's title* to a trust asset following T's disposition *in breach of trust*.[174] If a third-party steals T's title to a trust asset, they acquire an *independent* title, and T's title to the asset *remains*

[174] This includes cases where C is bound after acquiring a lesser right from T (e.g,, through grant of a lease) – there C does not acquire T's title, but they do still benefit from an exercise of a power which T held subject to the terms of the trust.

with her. If T's disposition is made in an authorised way, B's right in respect of the asset would be overreached – meaning, there would be no grounds to say that T's core trust duty in relation to it has been frustrated.

To be clear, when a third-party, like C, receives title to a trust asset from an errant trustee, the argument in this chapter is *not* that C has 'breached' a 'duty' owed to B. As it has been argued, prior to T's disposition in breach, the only person owing a *present* duty to B in relation to a trust asset is T. When C, however, receives title to that asset (or to a right deriving from it – e.g., a lease granted out of a freehold estate held on trust) from T in breach, C is *potentially* implicated in the same enterprise that renders it impossible for T to specifically perform her pre-existing core trust obligation to B.[175] C's potential to be implicated, in this way, allows the reasons grounding T's (now breached) core trust duty to colour C's title to the asset received, thereby

[175] See discussion in Part **B. CLASPING AT C'S CONSCIENCE**, above.

grounding a *new* core trust duty on C in relation to it.[176] This is the point at which a *continuity* of reasons between B's prior right, and a new right on which her receipt-based claim depends, occurs.[177] Of course, the reasons grounding C's core trust duty are not the *same* as those grounding T's. T's core trust duty arose for distinct reasons other than those explaining why C is now bound. The point is that C's *potential implication* in the enterprise of T's breach provides a new set of obligatory reasons that are intimately *linked* to those grounding T's original duty. Those linked reasons reflect the normative 'continuity' underlying a receipt-based claim. As argued in this chapter, those reasons ground a new core trust duty encumbering C's title to the original trust asset received (or its proceeds).

Now, notwithstanding the above, the simple existence of a core trust duty on C's part is not sufficient to justify B's receipt-based claims against C. Those claims seek to enforce (specifically or through a next-

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[176] For the content of this duty, see text in and accompanying (n 144) to (n 150), above.

[177] Discussed in greater length in Part **D. CLOSING THE CIRCLE: THE ROLE OF 'CONTINUITY'**, above.

best means) C's core trust duty. To enforce that duty, it must be shown that C is capable of complying with it. The content of C's core trust duty, as we have seen, depends on her having knowledge that the right she originally acquired from T was conferred in breach of trust. Once C acquires such knowledge, her compliance with her core trust duty – and therefore its enforcement (specifically or otherwise) – becomes possible. So, with C's conscience being affected through knowledge, the justificatory basis of B's receipt-based claims is complete. C becomes *answerable* to the (continuing) reasons that underpin her core trust duty respecting the right in her hands. In other words, with knowledge, C's *potential* implication in T's breach *actualises*. The specific enforcement of this duty reflects a *proprietary* claim against C, whilst a *personal* claim comprises the next-best means of specific enforcement. Seen in this way, the latter claim cannot be made where the possibility of making the former never existed.

So, in summary, the justification for B's receipt-based claims is linked to the reasons grounding her pre-existing right under a trust.

Provided C is entitled to no defence, these take effect against C when she receives title to a trust asset from T in breach of trust. It 'reifies', that is, by encumbering C's title to the asset received with a core trust duty. However, to be answerable to these reasons, it must also be shown that C has acquired knowledge of T's breach at a time when she holds title to the original trust asset (or its proceeds). On acquiring such knowledge, C becomes liable to B in relation to a core trust duty. By, thus, drawing its justification partly from those supporting B's pre-existing right, and partly from new facts (receipt coupled with knowledge), B's receipt-based claim takes shape as a *Linked claim*.

Chapter 7:

Conclusion

The overarching question for this project was whether, and if so, to what extent, a claim and a remedy can be seen as *reassertions* of a pre-existing right with respect to property. The thesis adopted a narrow definition of rights 'with respect to property'. It focussed on rights that necessarily depend – as a constitutive element – on the existence of specific subject matter. At common law, the core case considered was rights over physical things. One's title to a chattel, a freehold or leasehold estate, and an easement over land depend on specific subject matter – a particular physical object or a parcel of land. In Equity, the focus was on a beneficiary's equitable proprietary right in respect of an asset held by a trustee on a fixed trust. Here, the beneficiary's right takes the specific trust asset – i.e., the *distinct* right (or power) held by a trustee – as constitutive of its existence. On this definition, rights 'with respect

to property' do *not* include, for instance, rights to merely *use* certain subject matter. One example is a contractual licence to use a plot of land according to certain terms. The right, in this instance, clearly *relates* to a subject matter, but a contractual right does not require its existence as a *constitutive condition* of its existence. Indeed, contractual rights and obligations generally exist absent there being any subject matter whose use is at issue.

By formulating the threshold question for this thesis in this way, the structure of this project's inquiry became clearer. The effort was to first understand what is at stake when one holds a right with respect to property. In other words: how are rights respecting specific subject matter (also called 'property rights' or 'proprietary rights') individuated and what implications does the right have for its holder and others? Answering this question required the project to work out the identity conditions of proprietary rights. This was done in Chapters 2 (rights at common law) and 4 (rights in Equity of a beneficiary under a fixed trust). It was found that such rights can be individuated in *form* and,

independently, by reference to the reasons grounding a right (i.e., in *norm*). While each account is distinct, it was argued that they are interdependent and not mutually exclusive. The next step was to develop a framework by which distinct claims respecting pre-existing proprietary rights, and remedies sought, can be understood. Such a framework was introduced, in the form of a five-part taxonomy of claims, in Chapter 1; it was then expanded upon in Chapters 3 (rights at common law) and 4 (rights in Equity). The categories in this taxonomy were titled: *vindicatio claims*, *Consequential claims*, *Linked claims*, *Partially independent claims*, and *Fully independent claims*. The final step was to test the usefulness of the taxonomy by applying it to certain 'hard cases'. These cases were identified as 'hard' principally because their outcomes and justifications are either contested or under-theorised (or both). In Chapter 3, the examination of such cases was pursued against a selection of instances at common law. Chapters 5 and 6 further applied the taxonomy to specific cases in Equity which raise a more wide-ranging and complex set of issues. These cases are a fixed trust beneficiary's

claims that are contingent on tracing and those she may bring against a third-party recipient of trust assets.

A key insight from this thesis is that a claim and remedy can either be seen to give effect, in *form*, to a pre-existing right or not. However, even where there is a formal distinction between a pre-existing right and the right claimed (or the remedy awarded), it is possible to find distinct ways by which the reasons grounding the former can have a continuing impact in justifying the latter. Thus, by focussing on the persisting impact of a pre-existing right's reasons (i.e., following an individuation of the right in *norm*), one achieves a more nuanced picture of what it means for a claim and remedy to consist of reassertions of a pre-existing right. This insight was supplied through this thesis' taxonomy and was crucial to justify two key conclusions made in the project. First, in the cases examined in Chapters 3-6, it helped us work out what is at stake in resolving these issues and provided a principled basis on which one could critique, and choose between, differing outcomes. Second, it helped achieve a defensible

frame through which one can make sense of judicial reasoning in tracing and receipt-based cases in Equity. A common theme underpinning the analysis in Chapters 5 and 6 was that the courts in *Foskett v McKeown*[1] and *Byers v Saudi National Bank*[2] were not accurate in saying (or suggesting) that the trust beneficiary's claim, in those cases, asserted the very same right the beneficiary had at the start of the story. As other have pointed out,[3] the *form* of the right asserted differed in important ways from the form of the original equitable property right. However, in a specific and important sense, we can find that there is an important truth behind such judicial reasoning. This finding follows once it is acknowledged that the *reasons* for the initial right can play a crucial role in the grounds justifying the new right on which the claim depends. Even if the new right differs from the original right as to *form*, there may thus be some important continuity in relation to *norm*. Thus, a central

[1] *Foskett v McKeown* [2001] 1 AC 102 (HL), 109 (*per* Lord Browne-Wilkinson).

[2] *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457.

[3] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005), 34-37 (emphasis supplied) who made this point in the context of claims contingent on tracing.

contribution of this thesis is to reveal the truth that lies behind the judicial analysis in cases like *Foskett* and *Byers*.

The next part of this chapter provides brief summaries of the substantive chapters of the thesis. The final part offers a concluding note on the methods adopted in this project and its relevance.

SUMMARIES OF CHAPTERS

Chapter 1 introduced this research project. It explained what is at stake in working out the distinction between a pre-existing right, a claim, and a remedy. It then provided an overview of the thesis, introduced its taxonomy of claims, and detailed key concepts that help make sense of the taxonomy. Of these concepts, some emphasis was given to Professor John Gardner's 'continuity thesis'.[4] It was explained how this idea, and variations of it, will be developed in the thesis to give expression to its taxonomy.

[4] See J Gardner, *Torts and Other Wrongs* (OUP 2019), ch 2.

Chapters 2 and 3 specifically addressed property rights at common law ('legal property rights'). Chapter 2 focussed on the identity conditions of property rights at common law. It was clarified there that the core case under consideration (in both Chapters 2 and 3) was of rights to specific physical things. This is because their status as 'property' rights at law is generally uncontroversial. The goal was to explain how the analysis in this thesis can make sense of such rights, claims brought in relation to them, and remedies given. It may well be that the implications of this thesis' analysis can impact on how similar issues can be resolved in respect of other 'property' rights – e.g., rights over intellectual property or digital assets. The examination of those rights, however, was beyond the scope of this thesis' inquiry.

Chapter 2 found that legal property rights can be individuated in two ways. The first is by reference to formal structure. Whilst the formal structure of a legal property right supplies one account of its identity conditions, it was seen that it is insufficient. It does not explain

a legal property right's distinct capacity to bind strangers to its creation. It was then argued that this characteristic is justified by the inherent vulnerability entailed in an individual's holding a right to a specific physical thing. This is the 'normative ground' of the right and was expressed as a related, though distinct, account of the right's identity.

Chapter 3 proceeded to build on the insights supplied by Chapter 2. It specifically explored the range of claims available at common law to protect pre-existing legal property rights. In doing so, it employed and expanded on this thesis' five-part taxonomy of claims. It was shown how the taxonomy could usefully embrace, and conceptually piece together, the full range of claims with respect to pre-existing legal property rights. The taxonomy was subsequently applied to a selection of hard and under-analysed cases featuring mixing, specification, manufacture of physical subject matter, and substitutions of legal property rights. The analysis explained how applying the taxonomy isolates what is at issue when analysing such cases. It also provided a sensible way by which one could choose between competing outcomes.

The analysis in Chapters 2 and 3 set the stage to examine whether analogous problems in Equity could be gainfully studied in a similar way. To this end, Chapter 4 inaugurated this project's examination of rights, claims, and remedies in Equity. As explained in Chapter 1,[5] this thesis' study of claims in Equity centred on the case of a fixed trust. The goal in the context of Equity, as with this thesis' approach to legal property rights, has been to examine how the foundations of proprietary rights, claims, and remedies, in a specific and central case, can be worked out. That said, while emphasising this thesis' concern with the fixed trust, Chapter 1 provided a *provisional* frame through which the analysis in the project can usefully be applied to make sense of analogous instances in Equity – e.g., featuring discretionary trusts, charitable purpose trusts, and forms of power-holding allied to a trust (e.g., a company director's power to deal with title to the company's assets). Likewise, through Chapters 4 to 6, where points

[5] See discussion in Part B of Chapter 1.

made could extend to such analogous situations, this was flagged (usually in brief commentary in footnotes).

It was seen in Chapter 4 that the formal structure of a beneficiary's right under a trust is distinct from that of a legal property right. Unlike a legal property right, its subject matter is another right (and not a physical thing); that right is held by a specific person (a trustee, T), on certain terms for the benefit of another (B). A*ll* fixed trusts – express, constructive, or resulting – share this formal structure. Trust beneficiaries' equitable proprietary rights also differ in how one identifies their normative ground. Unlike with a right to a physical thing, the normative ground of a trust beneficiary's right is interlinked with its formal structure. In locating *why* a specific person is obliged to hold a specific right for another's benefit, the reasons grounding that right emerge. The second part of chapter employed these findings to expand on this thesis' taxonomy as it applies to the specific claims under consideration in Equity. Of these, two types of hard cases called for a

more dedicated examination. Accordingly, the final two substantive chapters of the thesis focussed on them.

Chapter 5 looked at claims against an initial trustee contingent on substitutions of trust assets (or 'tracing'). The central argument made was that such claims are best understood as a type of *Consequential claim*. This was established in the first part of the chapter. It was explained there that claims contingent on tracing are properly justified by seeing that the reasons grounding B's right – and, necessarily, T's duty – respecting a pre-existing trust asset persist to sufficiently explain her right in relation to an unauthorised substitute. Additional facts surrounding the claim – e.g., concerning T's effecting a substitution in breach – do not play a justificatory role in this scheme. They do, however, play an important part in: (a) explaining specific consequences attendant on T, as regards B's remedial options, following T's substitution of a right held on trust; and (b) justifying the application of special rules that apply against T, in the tracing context, when T's wrongful conduct results in certain kinds of evidential uncertainties. The

second part of the chapter showed how the analytical model adopted operates satisfactorily to explain some 'hard' cases in the law of tracing.

Finally, Chapter 6 addressed receipt-based claims – proprietary and personal – following T's wrongful dealings with trust assets in favour of a third-party (C). It was argued that such claims are best seen as types of *Linked claim*. This was established by showing that the reasons grounding a claimant's pre-existing right are essential to justify her claims against C (not being a bona fide purchaser or one otherwise entitled to a similar defence). However, it must (or ought to, in principle) be necessary to *also* prove further facts, such as C's receipt of a right from T, and C's knowledge of the disposition being made to her in circumstances where that disposition was made in breach of trust. These further facts do not merely supply an occasion for B's cause of action to be brought; they also play a role in justifying the claim and the recognition of a new right entailed by the remedial response. In this way, a *Linked claim* differs from a *Consequential claim*.

The view that receipt-based claims depend on C's 'knowledge' is consistent with a broader position in the positive law that makes the recognition of an equitable property right turn on the defendant's 'conscience' being affected.[6] It is also consistent with the Supreme Court's recent reasoning on the justificatory basis of receipt-based claims in Equity.[7] The court suggested that a personal claim in knowing receipt essentially offers an alternative means of giving effect to C's proprietary liability.[8] If this is correct – and it was argued in Chapter 6 that, in principle, it is – it fortifies a key claim made in this chapter. This is the claim that if knowledge is an essential, and justifiable, ingredient of a knowing receipt claim, it ought also to play the same role in a receipt-based proprietary claim. On this basis, personal and proprietary claims

[6] 'Equity acts on the conscience of the owner of the legal interest': *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL), 709 (*per* Lord Browne-Wilkinson); '[E]quitable interests arise from equity's recognition that in some circumstances the conscience of the holder of the legal interest may be affected. When the asset is transferred to a third party, the question becomes whether the conscience of the transferee is affected': *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424, [89] (*per* Lord Sumption).

[7] *Byers v Saudi National Bank* [2023] UKSC 51, [2023] 2 WLR 457.

[8] *ibid.*, [43]-[44] (*per* Lord Briggs), [158]-[159] (*per* Lord Burrows).

were looked at as sibling claims in Chapter 6 and were jointly justified as types of *Linked claims*.

A unifying theme in Chapters 5 and 6 was that judicial expressions concerning the 'vindication', 'persistence', or 'continuity' of pre-existing rights in the tracing and receipt-based contexts are, when taken literally, indefensible. It is impossible to find the original right, in its original form, reasserted: claims in each of those contexts depend on the recognition of a new right with a new form. However, once we frame tracing and receipt-based claims through this thesis' taxonomy – as *Consequential claims* and *Linked claims*, respectively – an important truth in such judicial statements emerges. We can find that, notwithstanding formal differences between an original right and the right asserted, there are distinct modes through which the reasons grounding the former justify the existence and recognition of the latter. This gives us a defensible way by which we can make sense of the judicial reasoning in such cases.

Two further upshots of Chapters 5 and 6 must be emphasised. First, it was shown that describing the claims in those chapters – as *Consequential claims* and *Linked claims*, respectively – is consistent with the positive law in those areas and the specific rules applying in each context. Second, the analysis defended in those chapters helps us see how the orthodox judicial approach to such cases can be upheld. This approach is based on the sufficiency of principles in the law of trusts in explaining the rules and outcomes in tracing and receipt-based cases. In other words, tracing claims explained as a *Consequential claim*, and receipt-based claims as *Linked claims*, can be contrasted with accounts that seek a departure from the existing law by justifying claims in this area as based on reasons different from those justifying the initial right – e.g., through a cause of action in unjust enrichment.[9]

METHODS AND RELEVANCE

[9] See discussion in and accompanying (n 4) in Chapter 5 and (n 5) in Chapter 6.

This thesis analysed the positive law in the areas it addressed and attempted to provide a sensible way by which the law can be pieced together and understood. The aim was to present an analysis that is readily intelligible and of use to doctrinal scholars, practitioners, and judges.

Chapters 1-4 of the thesis introduced and developed conceptual ideas – drawn from property, Equity, and private law more broadly – that were central to this thesis' inquiry. Many of these ideas were also applied and expanded on in Chapters 5 and 6.

It is evident that not all of the conceptual ideas advanced, and defended, in this project find authoritative endorsement in the positive law. Indeed, in a practical sense, they cannot be reasonably sought out, at least in any complete and conclusive sense, in case law.

As Professor Birks observes, case law, as it responds to the pressures and imperatives of adversarial litigation, does not always

grow 'with much regard for principle or for the coherence of one piece of law with another'.[10] This issue is particularly acute when considering foundational concepts in the realm of private property and Equity. The need to provide an authoritative definition of a property right, or of the nature of the beneficial interest, often does not arise in judicial pronouncements. This is because the resolution of disputes may not render this necessary. Provided there is judicial consensus over the central meaning of such concepts, and the consequences attendant upon them, they are applied in the cases to resolve practical disputes. Further, what counts as 'property' can often be a contextualised inquiry within the cases, one which does not seek out a general conceptual definition. For instance, in *Akers v Samba*,[11] the Supreme Court was interested in what counts as property within s 127 of the Insolvency Act 1986 Given the definition in s 436 of the Act, the court was content to give the term

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[10] P Birks, *An Introduction to the Law of Restitution* (Rev edn, Clarendon Press 1989), 1-2.

[11] *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424.

a wide meaning.[12] When searching for a conceptual understanding, one should treat such pronouncements with caution.

This thesis, however, made a dual sort of claim. It submitted that there is a clearer way such concepts can be understood, both individually and also in the broader legal framework to which they belong. It further defended this conceptual vision against other possible claims – advanced in scholarship or in aspects of the positive law – and argued that its application is useful both as a matter of achieving greater conceptual clarity in this area and in the positive practical outcomes it may yield. In making these claims, it adopted concepts and categories that are not only readily intelligible to students, scholars, and practitioners of the positive law, but which also form part of the analytical foundations of legal doctrinal thought within the common law.

[12] See also s 21 of the Taxation of Chargeable Gains Act 1992 which, for the purposes of the statute, similarly defines 'assets' in wide terms.

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