THE NATURE OF TRUSTS AND THE CONFLICT OF LAWS

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I. Introduction

> "From very early days down to the present time the essential nature of trusts and other equitable interests has formed a favorite subject for analysis and disputation."[1]

Thus begins Hohfeld's seminal analysis of the nature of legal relations. Over a century later, the statement still holds true.[2] Moreover, it is still the case, as Hohfeld emphasized, that:

> "the true analysis of trusts and other equitable interests is a matter that should appeal to even the most extreme pragmatists of the law."

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* We are very grateful to Professor Adrian Briggs, Professor Andrew Dickinson, Professor Jonathan Harris Q.C. and Professor Robert Stevens, for their comments and suggestions on an earlier draft of this article. The usual disclaimers apply. We are also grateful to Orestis Sherman and to Chui Yan Yeung for research assistance.

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

[2] As noted by B. McFarlane, "The Essential Nature of Trusts and Other Equitable Interests: Two and a Half Cheers for Hohfeld" in S. Balganesh, T. Sichelman and H. Smith (eds) *The Legacy of Wesley Hohfeld: Edited Major Works, Select Personal Papers, and Original Commentaries* (Cambridge: Cambridge University Press, 2021). For some recent contributions to the general debate, see e.g. E. Zaccaria, "The Nature of the Beneficiary's Right Under a Trust: Proprietary Right, Purely Personal Right, or Right against a Right?" (2019) 135 L.Q.R. 460; B. McFarlane and R. Stevens, "The Nature of Equitable Property" (2010) 4 J.Eq. 1; J. Edelman, "Two Fundamental Questions for the Law of Trusts" (2013) 129 L.Q.R. 66; J. Penner, "The (True) Nature of a Beneficiary's Equitable Proprietary Interest Under A Trust" (2014) 27 C.J.L.J. 473; P. Jaffey, "Explaining the Trust" (2015) 131 L.Q.R. 377.

This is because specific practical questions can turn on "one's view as to the correct analysis of such interests."[3] As an example of such questions, Hohfeld referred to "difficult and delicate problems" in the conflict of laws. Those problems also persist and continue to demand judicial attention, as shown by the ongoing litigation in, and arising from, *Akers v Samba Financial Group*,[4] which we will examine in Pts V and VI below. Our central argument, consistent with Hohfeld's analysis, is that the approach of the courts to such problems provides valuable insights into the nature of trusts and other equitable interests and, indeed, into the relations between common law and equity more generally. The resolution of conflicts cases often requires judges to take a view on the precise nature and operation of rights, and so they are of interest not only to private international lawyers, but to anyone, whether academic or extreme pragmatist, seeking to understand the nature of trusts and other equitable interests.[5]

First, in Pt II, we make a methodological point. Courts are rightly concerned with the practical context in which any concept is applied. It cannot, for example, be assumed that the domestic analysis of a particular concept will necessarily govern the characterization of an issue for the purpose of determining jurisdiction or selecting an applicable law.[6] Nonetheless, even if a court is reasoning with one eye, or more, to the practical outcome of a dispute, a judge's reasoning will still reveal, and be constrained by, his or her understanding of the relevant concepts. In Pt III, therefore, we consider the approach taken to trusts and other equitable interests by English courts deciding conflicts disputes, prior to *Akers v Samba*. We show that it is consistent with what we call a "relational view" of such rights: it distinguishes them from legal property rights and emphasizes their dependence on the existence of a

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

[4] *Akers v Samba Financial Group* [2017] UKSC 6; [2017] A.C. 424. *Byers v Samba Financial Group* [2021] EWHC 60 (Ch) is the latest decision, but unlikely to be the last, as an appeal is pending. For a further recent example, see *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7; [2019] A.C. 271.

[5] This point is amply demonstrated by *Byers v Samba Financial Group* [2021] EWHC 60 (Ch.), in which Fancourt J. undertook a thorough, and in our view generally persuasive, analysis of the nature of a knowing receipt claim. That question has of course attracted much academic analysis: see e.g., W. Swadling, "The Nature of 'Knowing Receipt'" in P. Davies and J. Penner (eds), *Equity, Trusts and Commerce* (Oxford: Hart Publishing, 2017).

[6] As emphasized by e.g. Mance L.J. in *Raiffeisen Zentralbank Osterreich AG v Five Star Trading llc* [2001] EWCA Civ 68; [2001] Q.B. 825 at [27]. See too, in the context of a case concerning a trust, *Macmillan v Bishopsgate Investment Trust plc (No 3)* [1996] 1 W.L.R. 387 at 407-408 (Auld L.J.); [1996] 1 All E.R. 585 at 604 (CA).

particular relationship between the parties. This approach, which requires a court to consider if a defendant's conscience has been affected, is in tension with what we call a "proprietary view" of the trust and other equitable interests. On that view, such rights are essentially simply a weaker form of their proprietary counterparts at common law, so that, for example, a beneficiary can be seen as an as an equitable owner of the trust property. It might then be tempting to distinguish the domestic and international contexts, and accept that a different view prevails in each, but, in Pt IV, we resolve the tension differently, by showing that the domestic rules as to the operation of equitable interests are in fact consistent with the relational analysis employed in the conflicts case-law. This fits with the fact that the judges in the conflicts cases have not qualified their analyses as applicable only at the more abstract conflicts level.

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

II. Methodology: Concepts and the Conflict of Laws

Our methodological argument can be challenged by the claim that it would be dangerous to rely on conflicts cases to make broader claims about the nature of particular legal concepts. It might be argued instead that the *context* is always crucial in such cases, and, to give effect to the demands of the instant context, judges may well manipulate the applicable legal concepts, particularly where the abstract nature of those concepts makes them relatively indeterminate. Indeed, such scepticism is supported by the work of many American scholars who wrote in the 50 years or so after Hohfeld's death and whose analysis shaped the *Restatement (Second) of*

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

Conflict of Laws, published in 1971.[8] For example, as part of a broader attack on "mechanical jurisprudence",[9] the Legal Realist analysis attacked the categorization of disputes into a legal category (e.g. tort) and the application of a rule applying a connecting factor (e.g. the place of the wrong) then indicating the applicable law. Instead, that analysis asked in what context, and for what reason, a situation was to be classified, allowing a court to engage directly with the relevant policy concerns underlying the conflict of laws in any given case.[10] The impact of this approach can be seen, for example,[11] in those parts of the *Restatement (Second)* where a broad, non-exclusive set of factors is set out to assist a court in identifying the state which has "the most significant relationship to the occurrence and the parties".[12]

Such a sceptical approach could, for example, be taken in relation to the decisions of Judge Paul Baker Q.C.[13] and of the ECJ in *Webb v Webb*.[14] On the face of it, that case raised a conceptual issue as to the meaning of a provision now contained in art.24 (1) of the Recast Brussels Regulation (Art 24 (1)).[15] The provision states that the courts of the member state in which the property is situated are to have exclusive jurisdiction, regardless of domicile, "in proceedings which have as their object rights in rem in immovable property." The dispute related to a flat in Antibes which was purchased in the name of the younger Webb who, like his father, was domiciled in the UK. His father claimed, in High Court proceedings, that he had provided the purchase price, and sought a declaration that the son held title to the flat on a resulting trust for him, and should execute such documents as were required to transfer that title. The son's argument that the French courts had exclusive jurisdiction was rejected, first

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

[9] See R. Pound, "Mechanical Jurisprudence" (1908) 8 Colum. L.Rev. 605.

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

[11] For a general survey of the impact of such approaches on the conflict of laws, see C. Wasserstein Fassberg, "Realism and Revolution in Conflict of Laws: In with a Bang and Out with a Whimper" (2015) 163 U.Pa. L.Rev. 1919.

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

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

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

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

by Judge Paul Baker Q.C. and then, when the case was referred to it by the Court of Appeal for a preliminary ruling, by the ECJ. The reasons given by each court for refusing to classify the proceeding as having "as their object rights in rem" have been criticized, essentially for departing from the "proprietary view" of the nature of a beneficial interest under a trust[16] – in Pt III, however, we will defend their conceptual classification of the claim, by showing how it is consistent with the nature and operation of a beneficial interest under a trust. There is, however, a prior methodological question: does the particular context of the dispute rob the decisions of any significance, and thus make it pointless to draw conceptual lessons from the reasoning of the courts?

Certainly, factors specific to the dispute in *Webb* argued in favour of dismissing the son's objection. First, there is the context of art.24), which, like the other provisions as to exclusive jurisdiction, involves a derogation from the general principle[17] that it is permissible to sue a defendant in the courts of his domicile. It would not, therefore, be surprising if such exclusive jurisdiction provisions are given a narrow interpretation.[18] This is confirmed by the approach developed by the ECJ in later authorities, which makes clear that art.24:

> "does not encompass all actions concerning rights in rem in immovable property, but only those which both come within the scope of the [Regulation] and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with protection for the powers which attach to their interest."[19]

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[16] See e.g., A. Briggs, *The Conflict of Laws*, 3rd edn (Oxford: Oxford University Press, 2013), at p.68, where it is argued that the conclusion of the ECJ in *Webb* that "a beneficiary under a resulting trust has only an interest in personam and not one *in rem* was wrong, at least as a matter of English law, by several centuries". In the latest edition (A. Briggs, *The Conflict of Laws*, 4th edn (Oxford: Oxford University Press, 2019), at p.59), the objection is modified, as it is said that the conclusion "may pay insufficient attention to the equitable doctrine of notice".

[17] See now Regulation (EU) No.1215/2012, article.2.

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

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

Thus, a nuisance claim brought by an owner of land is regarded as outside the scope of what is now art.24(1),[20] while a claim by one joint legal owner of land for its sale is regarded as falling within it.[21]

Secondly, there is the context of the factual dispute. Both parties were domiciled and resident in England, and the substance of the dispute related to matters (such as the intention of the father when providing the purchase money) which had no particular connection to France rather than to England. A dispute as to, for example, ownership of land might generally be thought to require an examination of title registers or other documents located in the same jurisdiction as the land itself, so as to require the assignment of exclusive jurisdiction to the court of the place where the land is situated (as it is best placed to establish the facts).[22] However, that was unnecessary on the facts of *Webb*[23] as the father did not dispute his son's legal ownership of the property. Indeed, if the parties had made one arrangement in relation to land in different jurisdictions, there would be no good reason for demanding that the father bring proceedings in each jurisdiction, as this would give rise to a risk of conflicting decisions.[24] Further, as the dispute was simply between the possible trustee and beneficiary, it did not concern the effect of a trust on a third party, and so the decision could possibly be seen as limited to cases which raise only the personal, rather than the proprietary, aspects of the operation of a trust.[25]

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

[21] *Magiera v Magiera* [2016] EWCA Civ 1292; [2017] Fam. 327. See too *LM v KD* [2018] EWHC 3057 (Fam).

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

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

[24] This point was made by the Advocate General in *Webb v Webb*. As will be discussed in Pt III below, there is no obvious reason why the law applying to a single arrangement should vary according to the location of the property to which the arrangement relates.

[25] In *Gray v Hurley* [2019] EWHC 1636 (QB) at [127], for example, *Webb* was applied to conclude that art.24(1) did not apply where it was simply argued that the defendant held an interest on trust for the claimant and so the claim did not "involve the external relations of the trust." See too, *Akers v Samba Group* [2017] A.C. 424 at [82], where Lord Sumption distinguishes these two aspects of the trust. Note though that Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn (London: Sweet and Maxwell, 2012), at para.[23-012] states that the

There are thus different ways in which the result reached in *Webb* might be rationalized. It could be argued that the courts manipulated the concept of an "in rem" right, giving it an artificially narrow interpretation, in order to reach the result that best accorded with the underlying policy concerns that made England, rather than France, the more appropriate forum for the substantive dispute. Indeed, it might be said that the courts in effect anticipated the point, made clear in later authorities, that the exclusive jurisdiction provision should apply only to a sub-set of claims based on the assertion of a right in rem in immovable property.[26] On that view, it would be difficult to draw general lessons for domestic law from the characterization of a beneficiary's right adopted for the purpose of applying a conflicts rule. The wider realist prescription would be that abstract concepts, such as that of an "in rem" right, are best avoided when determining the resolution of a dispute, and that the relevant policy factors should instead be weighed directly.

Our contention, however, is that, provided sufficient care is taken, it *is* possible to draw general conceptual lessons from the analysis of the courts in a case such as *Webb*. First, the fact that later cases have excluded some disputes asserting a right in rem in land from the scope of art.24(1) does not, in itself, alter the usefulness of *Webb* in providing evidence as to how judges, in reaching a conclusion that a claim for the existence of a trust was *not* a claim to assert a right in rem, understood the nature of a beneficiary's rights. Secondly, whilst *Webb*, like any decision, was decided in a specific context, the reasoning in the case, as we will explore in Pt III, is consistent with previous conflicts decisions considering the nature of a beneficiary's interest, and has also been applied by later English courts.[27] The more consistently a particular conceptual analysis is applied, the less invariant it is to changing contexts, and we will argue here that the relational view of the trust which motivates the reasoning in *Webb* also assists in understanding the domestic law, beyond the conflicts context.

Furthermore, there may be sound contextual reasons for giving prominence to conceptual reasoning: for example, the importance of uniformity in the interpretation, across different

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ruling in *Webb* "suggests that, even if the object of proceedings is to vindicate equitable rights against a third party (for example, where a claimant seeks to establish that a purchaser of trust property holds it as constructive trustee), the proceedings should not be regarded as involving rights in rem."

[26] See e.g., Briggs, *The Conflict of Laws*,4th edn (2019), at pp.58-60.

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

jurisdictions, of provisions such as art.24(1) argues for giving a consistent meaning to the terms setting the scope of the provision, rather than asking individual courts to engage in the difficult task of balancing competing policy concerns directly. Indeed, the realist revolution in conflicts has had relatively little impact beyond the US,[28] and whilst rules governing matters such as jurisdiction and choice of law continue to be expressly organized around abstract concepts, such as that of an "in rem" right, a court's decision must be constrained by its understanding of such a concept, and so its reasoning will provide valuable data as to how judges interpret and apply such concepts. In fact, it is important to consider such decisions, as they are relatively rare examples in which judges may be forced to consider directly the meaning of fundamental concepts.[29]

This does not mean that the realist argument can be entirely dismissed.[30] First, caution must be exercised in dealing with broad concepts. Indeed, the need to distinguish between different types of right, often confused behind the general label of "property", is central to our analysis, in Pt IV, of the nature of trusts.[31] Secondly, in analyzing a particular decision, context is crucial, and it should not be assumed that judges using the same term, in different contexts and for

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[28] See Wasserstein Fassberg, "Realism and Revolution in Conflict of Laws: In with a Bang and Out with a Whimper" (2015) 163 U.Pa. L.Rev. 1919 at 1932.

[29] Further, judges in such cases may make clear that their analysis is not intended to be limited to the immediate conflicts context: see e.g., *Macmillan Inc v Bishopsgate (No.3)* [1995] 1 W.L.R. 978 at 990 (Ch.D) and *Byers v Samba* [2021] EWHC 60 (Ch) at [82]. A parallel can be drawn with the domestic law of limitation of actions. As long as statutory provisions such as the Limitation Act 1980 employ terms such as "tort" (s.2), "contract: (s.5) and "trust" or "trustee" (s.21) to set limitation periods, the interpretation of such terms given by the courts may then have consequences beyond the context of limitation: in relation to trusts, see e.g., *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All E.R. 400; *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] A.C. 1189.

[30] The "New Private Law" movement, for example, is significant not only in that it attaches greater weight to doctrinal scholarship and the concepts expressly used by legislatures and the courts, but also because it does not simply seek to return to a pre-realist approach, but rather to assimilate some of the more useful lessons of Legal Realism: see e.g., A. Gold et al. (eds) *The Oxford Handbook of New Private Law* (Oxford: Oxford University Press, 2021).

[31] See e.g., McFarlane and Stevens, "The Nature of Equitable Property" (2010) 4 J.Eq. 1; B. McFarlane and S. Douglas, "Property, Analogy, and Variety" (2021) 41 O.J.L.S. forthcoming.

different purposes, are in fact invoking the same concept.[32] This is particularly true in conflicts cases where a term, when used in the context of a multi-national convention or regulation, must be given an "autonomous" meaning which may differ from the interpretation given to it in a purely domestic context.[33] It must be remembered, for example, that when characterizing an issue for the purpose of finding an applicable law, a court is not engaged in the same task as when analyzing the same set of facts in a purely domestic context.[34] As we will see in Pt VI below, for example, there may be good pragmatic reasons for adopting a broader-brush analysis at the characterization stage to avoid an undue increase in the number of distinct choice of law rules.[35] This means, for example, that observable differences in the domestic operation of two particular concepts need not prevent those concepts being regarded in the same way at the characterization stage.[36] Nonetheless, even where judges take a "broad internationalist" view

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

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

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

[35] See e.g. *Macmillan v Bishopsgate Investment Trust plc (No.3)* [1996] 1 W.L.R. 387 at 407-408 (Auld LJ): the general point is robustly defended by A. Briggs "Misappropriated and Misapplied Assets in the Conflict of Laws" in S. Degeling and J. Edelman (eds) *Unjust Enrichment in Commercial Law* (Sydney: Lawbook Co, 2008).

[36] In the context of equitable concepts, see e.g. Clarke J. in *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) at [177]-[185] and [223], noting, whilst dishonest assistance is not a tort in domestic law, there are strong grounds for regarding a claim in dishonest assistance as a "tort" for the purposes of the Private International Law (Miscellaneous Provisions) Act 1995. See too T. M. Yeo, *Choice of Law for Equitable Doctrines* (Oxford: Oxford University Press, 2004), Chs 1, 2 and 8.

of concepts,[37] their reasoning will draw on, and thus provide useful evidence of, the judicial understanding of the domestic meaning of the term.[38]

We therefore agree with Hohfeld's observation that, as important practical consequences turn on the resolution of abstract questions as to the nature of rights, those abstract questions must be carefully considered. There is something of an irony here: realist conflicts scholars took inspiration from Hohfeld, but their conclusions run directly contrary to his call for paying close attention to the nature of concepts, as well as to the demands of context.[39] And, it seems, in the conflicts of laws[40] as in other areas,[41] the importance of concepts has endured, as they provide a means for judges to make sense of complex factual scenarios, and their relative indeterminacy to context promotes consistency in decision-making.

III. Lessons from the Conflicts Case-Law: the Position before Akers v Samba

As will be seen in Pt V, the reasoning of the Supreme Court in *Akers v Samba Financial Group*[42] draws on a long-established line of conflicts authorities which emphasize that the assertion of a trust or other equitable interest depends on establishing a specific relationship between claimant and defendant, so that the conscience of the latter can be said to be bound. English courts have long declined jurisdiction in disputes to determine rights in rem in respect

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

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

[39] For a particularly clear example of this in relation to the conflict of laws, see W. N. Hohfeld, "The Nature of Stockholders' Individual Liability for Corporation Debts" (1909) 9 Colum. L.Rev. 285; "The Individual Liability of Stockholders and the Conflict of Laws" (1909) 9 Colum. L.Rev. 492; and (1910) 10 Colum. L.Rev. 283 and 520.

[40] See Wasserstein Fassberg, "Realism and Revolution in Conflict of Laws: In with a Bang and Out with a Whimper" (2015) 163 U.Pa. L.Rev. 1919 at 1938-1940.

[41] See e.g., H. Smith, "The Persistence of System in Property Law" (2015) 163 U.Pa. L.Rev. 2055.

[42] [2017] A.C. 424

of foreign land (even where the defendant is amenable to service within the jurisdiction),[43] but from at least the 18th century[44] onwards, the Court of Chancery did not regard itself as bound by this rule in respect of disputes in which the claimant asserted a direct equitable right (for example, arising from a contract or a fiduciary relationship) in respect of such land against a defendant over whom the court had jurisdiction.[45] As demonstrated in *Akers*, the courts have been willing in more recent cases to apply the same analysis even where the specific issue is not as to jurisdiction in relation to foreign land.[46]

This approach was explicitly founded on the court's view that its domestic equitable jurisdiction operated in personam, in the specific sense that any order made simply recognised or imposed an obligation on the defendant rather than determining rights in rem.[47] A key precondition was that the defendant's conscience be affected by a personal obligation towards

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

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

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

[46] See e.g., *El Ajou v Dollar Land Holdings plc* [1993] B.C.C. 698 at 715; [1993] 3 All E.R. 717 at 737; *Luxe Holding v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch). In *Lightning v Lightning Electrical Contractors Ltd* [1998] N.P.C. 71; (1998) 23 T.L.I. 35 (CA), Millett L.J. stated that: "If A provides money to B, both being resident in England, to purchase landed property in his own name but for and on A's behalf, and B does so, the consequences of that transaction are governed by English law. It would be absurd if they were governed by the law of the place where the property in question happened to be located."

[47] See e.g., *Toller v Carteret* (1705) 2 Vern 294; 23 E.R. 916.

the claimant that equity would recognise and enforce.[48] In *Penn v Lord Baltimore*,[49] for example, Lord Penn brought an action in Chancery for specific performance of an English compromise agreement which settled long-running proceedings relating to a dispute between himself and Lord Baltimore in relation to the precise boundary between lands in North America (now Pennyslvania and Maryland), which had been granted to each of them by the Crown. Lord Baltimore had been validly served within the jurisdiction. The defendant argued inter alia that the position of parties as colonial proprietors required the matter to be heard by the King in Council (i.e. through the King's Bench Division) and that specific performance of an agreement in relation to foreign land should not be granted because the court could not make a decree and enforce it effectively. Nevertheless, Lord Hardwicke L.C. ordered specific performance of the agreement in equity. His Lordship accepted the argument that Chancery had no original jurisdiction "on the direct question of the original right of the boundaries", but this did not matter, as the agreement had been executed in England, which meant that both the common law courts and Chancery had jurisdiction, whatever the subject matter of the agreement.[50] In his view:

> "the conscience of the party was bound by this agreement; and being within the jurisdiction of this court which acts in personam, the court may properly decree it as an agreement."[51]

The logic of this approach extended to assuming jurisdiction to recognise and give effect to trusts and other equitable interests over foreign land, even where the concept of such an interest was not recognised locally by the lex situs. Thus, in *Ewing v Orr-Ewing (No.1)*[52] the House of

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[48] See e.g., *Angus v Angus* (1737) West T. Hardwicke 23 at 23; 25 E.R. 800 at 800. On the centrality of the idea of conscience to equitable obligations generally, see S. Agnew, "The Meaning and Significance of Conscience in Private Law" [2018] C.L.J. 479.

[49] *Penn v Lord Baltimore* (1750) 1 Ves. Sen. 444; 27 E.R. 1132. See P. Mitchell, "*Penn v Lord Baltimore* (1750)" in C. Mitchell and P. Mitchell (eds), *Landmark Cases in Equity* (2012) for discussion of the colonial context.

[50] *Penn* (1750) 1 Ves. Sen. 444 at 447.

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

[52] (1883) 9 App. Cas. 34 at 40 (HL). See also, *Re Courtney; Ex parte Pollard* Mont. & Ch. 239; [1835-42] All E.R. Rep 415, where the House of Lords enforced a lien over Scottish land created by way of an English memorandum and deposit of title deeds, even though under Scottish law these steps did not suffice to create a lien or equitable mortgage.

Lords held that the English courts had jurisdiction to administer the trusts of a will of a testator domiciled in Scotland and possessed of a large Scottish estate comprising real and personal property, in circumstances where some of the trustees resided in England, even though Scots law did not recognise the trust. The Earl of Selborne L.C. held that:

> "The Courts of Equity in England are, and always have been, Courts of conscience, operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or ratione domicilii within their jurisdiction."[53]

In asserting this extra-territorial jurisdiction, the Court of Chancery did not see itself as affecting the foreign property itself and therefore interfering with the lex situs. Rather it took the view that it was merely acting in personam to compel the defendant to exercise their ownership rights in a particular way.[54] However, this was possible only if "a privity existed between the plaintiff and the defendant; they had entered into some contract or some personal obligation had been incurred moving directly from one to the other".[55] For example, in *Penn*, Lord Baltimore had made a compromise agreement: equity regarded him as bound in conscience to honour it, and therefore was prepared to impose an obligation on him to give effect to it. Alternatively, the defendant's conscience may have been affected because he had expressly assumed the obligations of a trustee, as in *Orr-Ewing*.

A similar approach is evident in *Webb v Webb*.[56] Even if the father's ultimate aim was to acquire legal title, the ECJ pointed out that the claim was not *based* on a right in rem.[57] It accepted his argument that he was seeking only to impose an obligation on his son to execute

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[53] *Orr-Ewing* (1883) 9 App. Cas. 34 at 40.

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

[55] *Norris v Chambres* (1861) 29 Beav. 246 at 253 (Sir John Romilly M.R.); 54 E.R. 621 at 624, affd 3 De G.F. & J. 583; 45 E.R. 1004. See further Pt VI below.

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

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

the documents necessary to transfer legal ownership of the flat. The father did not claim that he *already* enjoyed rights in relation to the land which were enforceable against the whole world.[58] Put in the language of the earlier cases, his claim was that the circumstances in which his son acquired legal ownership of the property (i.e. following the father's payment of the purchase price)–circumstances of which his son was fully aware–were such as to affect his son's conscience with an obligation to hold the property for his father's benefit, and thus he was entitled to an order that it be transferred to him. As noted in Pt II, the ECJ's decision in *Webb* may well have been informed by pragmatic considerations; nevertheless, it is striking that the decision accords not only with the view taken by H.H.J. Paul Baker Q.C. at first instance but also with the many earlier English decisions noted above.

Where an equitable claim is made in relation to property situated abroad, the question of choice of law has not always been considered separately from jurisdiction.[59] In cases such as *Penn, Orr-Ewing* and *Webb*, it appears to have been implicit in the reasoning in those cases that the English court regarded English law as applicable to the relationship between the parties to a contract or a trust.[60] Similarly, in *Luxe Holding v Midland Resources Holding Ltd*[61] Roth J. held that an equitable interest arose out of a specifically enforceable contract governed by English law for the sale of shares in Russian and Ukrainian companies. This meant that following the sale of the shares by the vendor (Midland) to a third party, the original purchaser (Luxe) was entitled to assert an equitable interest in the sale proceeds retained by the vendor even though the lex situs did not recognise trusts. In Roth J.'s view, there was no reason why (English) equity:

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

[59] In *Macmillan Inc v Bishopsgate (No.3)* [1995] 1 W.L.R. 978 at 989 (Ch.D.), [1996] 1 W.L.R. 387 at 392 (CA), for example, Millett J. noted that in *Norris v Chambres* (1861) 29 Beav 246 at 253, affd 3 De G.F. & J. 583, the "case was treated as one of jurisdiction, but it would today more properly be regarded as one of choice of law".

[60] See too, *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch. 502, where the equitable rule against clogging the equity of redemption was applied in relation to land in what was then Southern Rhodesia.

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

"acting on the conscience of Midland as a proper defendant to the English proceedings, could not require that Midland holds the money for the benefit of Luxe."[62]

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

The cases discussed in Pt III show that the English courts' readiness to give effect to equitable rights in respect of property situated abroad rested on a relational analysis: the key question was whether the facts supported the recognition of a conscience-based obligation owed by the defendant to the claimant. If so, and the defendant was within the jurisdiction, English equity would act in personam, and enforce that obligation.[63] There was no perceived conflict between this obligation and the defendant's property rights under the lex situs: instead, equity would simply direct the defendant as to how those rights should be exercised.

There are obvious parallels to the domestic relation between equity and the common law.[64] In *British South Africa Co v De Beers Consolidated Mines*,[65] in a passage relied on by Lord Mance in *Akers v Samba*, Cozens Hardy M.R. expressly drew the link between the relationship of foreign law and English law on the one hand, and the relationship of common law and equity on the other:[66]

"To take a simple case, if A by an English contract agreed to give a mortgage to secure an English debt upon land in a foreign country, the law of which country does not recognize the existence of what we call an equity of redemption, *which was the case of our common law*, and if a mortgage was given and duly perfected according to the lex situs, I feel no

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[62] *Luxe Holding* [2010] EWHC 1908 (Ch) at [42].

[63] Note our argument here is specific to the form of intervention in such cases and is not the outdated one, comprehensively refuted by Yeo, *Choice of Law for Equitable Doctrines* (2004), Chs 1 and 2, and rejected by e.g. Clarke J. in *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) at [177]-[185], that the lex fori always applies to equitable claims: see further Pt VI below.

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

[65] [1910] Ch. 502.

[66] [1910] Ch. 502 at 514 (emphasis added).

> doubt that our Courts would restrain the mortgagee from exercising the rights given by the foreign law and would treat the transaction as a mortgage in the sense in which that word is used by us. In doing this our Courts would not in any way interfere with the lex situs, but would by injunction, and if necessary by process of contempt, restrain the mortgagee from asserting those rights. Similar observations would apply to a trustee, if the lex situs did not recognize trusts."

The relational analysis adopted in the conflicts cases can also be applied in the domestic sphere. Just as an English court recognizing an equitable interest in respect of foreign property does not challenge the position that A holds the relevant property under the lex situs,[67] so equity, in affording B an equitable interest, does not seek to undermine the common law position that A holds a particular right.[68] Importantly, that intervention is grounded not on the existence of any general duty owed by everyone else to B to keep off B's property, but on a duty that arises because the conscience of the specific defendant, A, has been affected in a manner that equity regards as justiciable. The chief attraction of this relational analysis of the trust and other equitable interests, in our view, is that it minimizes not only the external, international conflict between English law and a lex situs which does not recognize such interests, but also the internal, domestic conflict between common law and equity.

It might be thought that this relational analysis is inconsistent with the protection given to B against third parties, which is of course greater than the protection available where a party

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

[68] The analysis here thus accords with Maitland's view as to the peaceful co-existence of common law and equity (see e.g. F. Maitland, *Lectures in Equity* (Cambridge, Cambridge University Press, 1929)). See too B. McFarlane, "Form and Substance in Equity" in A. Robertson and J. Goudkamp (eds) *Form and Substance in the Law of Obligations* (Oxford: Hart, 2019) and B. McFarlane and R. Stevens, "What's Special About Equity? Rights Against Rights" in D. Klimchuk, I. Samet and H. Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford: Oxford University Press, 2020).

holds only a personal right against A.[69] The first key point for present purposes[70] is that Maitland was correct to argue against the (still) commonly held view that B's right under a trust is distinguished from full ownership only by its vulnerability to the defence of bona fide purchaser for value without notice.[71] This can be seen by considering two cases. The first is where A, without authority under the trust, transfers the trust property to C, who provides no value in return. C is unaware of any trust and, before gaining such awareness, C disposes of the property without retaining any traceable proceeds.[72] Here, C is *not* a bona fide purchaser for value without notice; yet it is clear in English law that B has no claim against C.[73] C is free to deal with the asset unless and until C's conscience is affected by sufficient knowledge of B's interest to subject C to a duty towards B.[74] It is only when C has that knowledge that C can reason as to what he or she *ought* to do, i.e. not deal with the asset other than for B's benefit: before then, there is no basis for equity to treat C as owing such a duty to B.[75] Ultimately, therefore, B will recover from C only such assets as remain in C's hands when that duty arises

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

[70] See further the discussion of Lord Sumption's analysis in *Akers v Samba Group* [2017] A.C. 424 at [82]-[89] in Pt V below. There is of course a wider question, which cannot be fully examined here, as to why it is that a trust or other equitable interest is permitted to have its distinct third party effect. One explanation is that such interests can be distinguished from purely personal rights, as they arise only when A is under a duty to B in relation to a specific claim-right or power held by A: see e.g. McFarlane and Stevens, "The Nature of Equitable Property" (2010) 4 J.Eq. 1; McFarlane and Stevens, "What's Special About Equity? Rights Against Rights" in Klimchuk, Samet and Smith (eds), *Philosophical Foundations of the Law of Equity* (2020).

[71] See F. Maitland, "Trust and Corporation" in D. Runciman and M. Ryan (eds), *State, Trust and Corporation* (Cambridge: Cambridge University Press, 2003), at p.94.

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

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

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

[75] See Agnew, "The Meaning and Significance of Conscience in Private Law" [2018] C.L.J. 279.

(which may be as late as the date on which B notifies C of B's intention to bring proceedings).[76] B's claim thus depends on showing that C's conscience was affected, through knowledge of B's position, at a point when C still held the trust property or its traceable proceeds. The second case is where X, a stranger, carelessly destroys or damages the trust property. The orthodox position[77] is that B has no claim against X,[78] but instead can, if necessary, compel A to enforce, for B's benefit, any claim A has against X.[79]

Taken together, these two cases help to explain the prominence of conscience when considering B's protection against third parties. B must provide a reason, grounded in moral standards and related to C's own position, why equity should recognize that C now has a duty to B.[80] In some cases, that reason may be unconnected to C's acquisition of a particular asset: this is the case, for example, where B's claim is based on C's dishonest assistance in A's breach

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

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

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

[79] *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180; [2011] Q.B. (C.A.) 86 is controversial (for criticism see e.g. P. Turner, "Consequential Economic Loss and the Trust Beneficiary" [2010] C.L.J. 445; Edelman, "Two Fundamental Questions for the Law of Trusts" (2013) 129 L.Q.R. 66; McFarlane, "Form and Substance in Equity" in Robertson and Goudkamp (eds) *Form and Substance in the Law of Obligations* (2019), at pp.203-206), as it suggests that, provided A is joined to the action against X, X can be made to pay damages based on consequential economic loss suffered by B. Note that even in that case, the Court of Appeal regarded such loss of B as purely economic loss, which of course would not be the case if B had a legal, rather than an equitable, interest in the damaged property.

[80] S. Balganesh, "Quasi-Property: Like, but Not Quite Property" (2012) 160 U.Pa. L.Rev. 1889, identifies a category of "quasi-property" rights which do not impose an immediate prima facie duty on the rest of the world, but which rather have effect only on a limited class of third parties, if those third parties act in a specific way. For a consideration of this idea in relation to the trust, see McFarlane and Douglas, "Property, Analogy, and Variety" (2021) 41 O.J.L.S forthcoming.

of fiduciary duty to B.[81] The significance of B's initially having an equitable interest in a particular asset, rather than a merely personal right against A, is that it provides a different reason for which C's conscience can be affected. That reason depends on both C's acquisition of an asset, and C's conscience being affected by knowledge of A's pre-existing duty to B in respect of that asset.[82]

Clearly then, the manner in which a trust or other equitable interest may affect a third party is quite different from that in which a legal property right binds third parties. Rather than binding the whole world, the proprietary effect of an equitable interest is highly personalized: it depends on whether a specific party, C, holds a particular right and comes under a duty to B in respect of that right. This means that B's interest under a trust does not have an in rem effect, in the sense of correlating to an immediate duty that is prima facie binding *erga omnes*,[83] and also helps to explain why the rules as to the content and acquisition of equitable interests vary so markedly from those applying to legal property rights.

V. The Supreme Court's Reasoning in Akers v Samba

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

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[81] See e.g., *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 A.C. 378 (PC).

[82] See Agnew and McFarlane, "The Paradox of the Equitable Proprietary Claim" in McFarlane and Agnew (eds), *Modern Studies in Property Law, Volume 10* (2019), at pp.312-318. The same analysis applies where A's duty to B existed in relation to an asset which is different from, but is relevantly linked to, the asset acquired by C–as, for example, where C acquires traceable proceeds of initial trust property, or where A grants C a limited interest (such as a charge) in a trust asset.

[83] To adopt the language of the ECJ when considering, in *Komu v Komu (C-605/14)* [2016] 4 W.L.R. 26, the scope of what is now art.24(1) of the Recast Brussels Regulation: see Pt II above.

It is important to note that what started as a jurisdictional challenge on forum non conveniens grounds[84] was treated by the Court of Appeal as raising squarely a matter of English law under s.127,[85] such that the English courts had jurisdiction to determine the issues. From then on the Court of Appeal and Supreme Court dealt with the matter as a strike out application, which required them to determine whether the claim had any reasonable prospects of success. At both appellate levels, arguments proceeded on the assumption that Cayman law governed the trust itself. One of Samba's arguments in the Supreme Court was that the transfer of the shares to them involved no disposition of SICL's property, as equitable property rights could not be created in assets situated in a jurisdiction, such a Saudi Arabia, where the lex situs does not recognise the creation of such rights.

The Supreme Court confirmed the approach taken in the authorities referred to in Pt III and rejected Samba's argument that the English courts could not exercise jurisdiction to recognise and enforce a trust over Saudi assets. Lord Mance concluded that it was clear that:

> in the eyes of English law, a trust may be created, exist and be enforceable in respect of assets located in a jurisdiction, the law of which does not recognise trusts in any form."[86]

Lord Sumption agreed, holding that, even if the trust property is situated in a jurisdiction which does not recognise the concept of an equitable interest, an English court can give effect to:

> "personal rights against the trustee, who may be ordered to give effect to the trust, either by specifically performing it where that can be done, or by making good his breach of duty

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

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

[86] *Akers v Samba Financial Group* [2017] A.C. 424 at [34]. At [24]-[33], Lord Mance explicitly referred to *Ewing v Orr-Ewing* (1883) 9 App. Cas. 34*, British South Africa Co v De Beers Consolidated Mines Ltd* [1910] Ch. 502*, Deschamps v Miller* [1908] 1 Ch. 856 and *Lightning v Lightning Electrical Contractors Ltd* [1998] N.P.C. 71. *Webb v Webb* [1991] 1 W.L.R. 1410 was cited in argument.

financially ... equity will exercise its personal jurisdiction to compel [the trustee] to deal with the shares in accordance with his trust."[87]

At the same time, the court confirmed that SICL's right under the trust fell within the definition of "property" provided by the 1986 Act. Lord Mance stated that a trust:

> "creates a proprietary interest, at least to the extent that such an interest is capable of existing and being recognised in the relevant asset"[88]

For his part, Lord Sumption regarded an equitable interest as possessing "the essential hallmark of any right in rem", i.e., that it binds third party recipients of the trust property or its traceable proceeds "subject to the rules of equity for the protection of bona fide purchasers for value without notice…"[89] At one level, these comments reflect the tension, noted in Pt I above, between the relational and proprietary views of the trust: it might even seem that, for the purposes of the conflicts analysis, the relational aspect of the trust was emphasized, whereas for the application of the domestic legislation, the proprietary view was preferred.

In our view, however, so long as concepts such as "proprietary interest" and "right in rem" as used by Lords Mance and Sumption are understood in their specific context, it is possible to resolve this tension. First, as noted by each of those judges, the definition of "property" in s.436 of the Insolvency Act is "exceptionally wide",[90] and can include even a purely personal right of B against A.[91] Secondly, Lord Sumption's analysis of a right "in rem" makes clear that B's equitable interest is not prima facie binding *erga omnes*. Rather, as Lord Sumption put it, equitable interests "arise from equity's recognition that in some circumstances the conscience of the holder of the legal interest may be affected", and that "[w]hen the asset is transferred to a third party, the question becomes whether the conscience of the transferee is affected."[92] This analysis, which is a general one and was not said to apply only in the conflicts context, is entirely consistent with the relational view of the domestic law set out in Pt IV, and supports

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[87] *Akers* [2017] A.C. 424 at [84], [85].

[88] *Akers* [2017] A.C. 424 at [16].

[89] *Akers* [2017] A.C. 424 at [82]. See also the use of "in rem" in *Re Diplock* [1948] Ch. 465; [1948] 2 All E.R. 318 (CA).

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

[91] As noted by Lord Mance: *Akers* [2017] A.C. 424 at [44].

[92] *Akers* [2017] A.C. 424 at [89].

the view that the third party effect of a trust or equitable interest is markedly different from that of a legal property right.

Indeed, the Supreme Court's analysis on what proved the decisive point in the case–that the transfer by A of the trust property to C, in circumstances where B has no claim against C, is not a "disposition" of B's property–was, again, not said to depend on any points specific to the conflicts context and is, again, consistent with a relational view. The analysis emphasizes the difference between a trust or equitable interest on the one hand and ownership on the other, as it leads to a significant difference in the treatment of a company's legal and equitable property rights on insolvency. There may be policy concerns about this consequence, which could justify a change to the wording of s.127,[93] but nevertheless the trusts analysis that underpins it is, in our view, correct. It establishes that where a trustee (A) transfers legal title to an asset to C and B's equitable interest does not bind C, no disposition of B's interest has occurred. This is because B's interest has not been terminated or extinguished by A's actions alone. B's inability to bring a claim against C is rather a consequence of the special nature of B's equitable interest, and the inherent limits on the impact that such a right can have on third parties. As Lord Sumption explained:

> "the equitable interest of SICL was defeated not by the act of the transferor (Mr. Al-Sanea) but by the absence of anything affecting the conscience of the transferee (Samba)."[94]

This analysis is consistent with the relational view: SICL's "property" was not the shares themselves, which Mr. Al-Sanea did of course transfer to Samba; it was an equitable interest in those shares, of which Mr. Al-Sanea had no power to dispose.

The consistency of this analysis with purely domestic law can be seen by considering the decision of the House of Lords in *Vandervell v Inland Revenue Commissioners*,[95] which considered the meaning of a "disposition" of an equitable interest under s.53(1)(c) of the Law

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[93] See e.g., the analysis of Briggs L.J., as he then was, in his 2017 Chancery Bar Association Annual Lecture, "*Akers v Samba*: Equity's Darling Reigns Supreme"; but as Lord Neuberger found after a careful examination of the statute in his judgment in *Akers* [2017] A.C. 424 at [66]-[78], the Supreme Court's analysis is correct as an application of s.127 in its current form.

[94] *Akers* [2017] A.C. 424 at [89]. See too, *Clark v Commissioners for HMRC* [2020] EWCA Civ 204 at [45].

[95] [1967] 2 A.C. 291; [1967] ! ALL E.R. 1. It should be noted that the interpretation of a term such as "disposition" within the context of one statute need not govern its interpretation when used in a different statutory context: see e.g., *SL Claimants v Tesco plc* [2019] EWHC 2858 (Ch) at [113], where the meaning of "disposal" in para.8(3) of Sch.10A of the Financial Services and Markets Act 2000 was considered.

of Property Act 1925. It was held there that A's outright transfer of trust property to C, at B's instruction, was not such a disposition, and so the loss of B's equitable interest could occur without the use of any writing signed by B or B's agent. As in *Akers*, the result of the transaction was that B did not have a claim against the holder of the property (now C), but that in itself did not mean that there had been a disposition of B's equitable interest.

VI. The Relational View and Third Party Defences

Our argument so far has been that the courts' adoption, in conflicts cases such as *Akers*, of a relational view of the trust and other equitable interests is consistent with the operation of domestic English law, even though that law is often thought to rest on a proprietary view of such rights. The relational view may however seem to be in tension with the approach adopted in conflicts cases in which C asserts a defence to a claim by B based on a pre-existing right under a trust. In *Macmillan v Bishopsgate (No.3)*,[96] A (a trustee) had, without authority, transferred to C shares situated in New York in which B had an equitable interest. B's claim to recover the shares or their sale proceeds in the hands of C rested on B's assertion of its equitable interest. B sought to persuade the court that the conscience-based relational approach evident in earlier cases should be adopted.

B argued that the lex fori should apply as its claim was based in restitution and was:

> "in truth no more than an invocation of the power of a court of equity, acting in personam, as a court of conscience, to require the defendants to take whatever steps are necessary to restore the shares".[97]

That argument was rejected by both Millett J. and the Court of Appeal, and the lex situs was applied to determine the conditions under which C, as a bona fide purchaser of the trust property, might have a defence to B's claim. The reasoning in that case was applied in *Byers v Samba Financial Group*.[98] The case follows on from *Akers v Samba* and considered a knowing receipt claim brought by the liquidators of SICL (B) against Samba (C). The issues to be considered by the court were limited because procedural failures prevented C from making certain arguments: for example, C could not challenge the assumption that B's knowing receipt

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[96] [1995] 1 W.L.R. 978 (Ch.D.); [1996] 1 W.L.R. 387 (CA).

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

[98] [2021] EWHC 60 (Ch). An appeal is pending.

claim was governed by English or Cayman law.[99] B's claim was nonetheless rejected and Fancourt J. held that, as a matter of English or Cayman law, a knowing receipt claim could not be made against C where Saudi Arabian law, as the law governing the transfer of shares from A to C,[100] prevented B from asserting its pre-existing interest under the trust of those shares against C.

It therefore seems that we have returned to the conflict between the relational and proprietary views. Indeed, in *Macmillan*, Millett J. stated that B's claim was based on "continuing equitable ownership" and in *Byers* Fancourt J. adopted the requirement of a "continuing proprietary base",[101] finding that a knowing receipt claim cannot arise if from the moment of receipt C "had good title".[102] If, however, B's claim against C depends on showing that C's conscience has been affected,[103] so that C holds (or held) an asset subject to a duty to B, this apparent need for B to show "ownership" can be questioned. If, as held, for example, in *Akers*, A's holding of title under the lex situs does not prevent B's relying on a different law to show that A is under a duty to B in respect of that title, why is the analysis different when B seeks to show that C is under such a duty?[104]

There is nonetheless a resolution to this apparent conflict which, we argue, involves a happy marriage of context and concept. Within the context of the conflict of laws, it is the issue between the parties, not the nature of B's right, that is characterized.[105] In *Macmillan* and in

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[99] *Byers* [2021] EWHC 60 (Ch) at [16]-[19].

[100] B had "effectively conceded" that Saudi Arabian law must govern the effect of the transfer of the shares from A to C: *Byers* [2021] EWHC 60 (Ch) at [18].

[101] *Byers* [2021] EWHC 60 (Ch) at [51], [115] and [205].

[102] *Byers* [2021] EWHC 60 (Ch) at [116].

[103] As recognised by, e.g., Lord Sumption in *Akers v Samba Group* [2017] A.C. 424 at [89].

[104] Indeed, it can be argued that: "[l]iability for knowing receipt is a distinctive, primary, custodial liability, which closely resembles the liability of express trustees to account for the trust property with which they are charged.": C. Mitchell and S. Watterson, "Remedies for Knowing Receipt" in C. Mitchell (ed.), *Constructive and Resulting Trusts* (Oxford: Hart Publishing, 2010), at p.129.

[105] *Macmillan Inc v Bishopsgate (No.3)* [1995] 1 W.L.R. 978 at 988 (Ch), [1996] 1 W.L.R. 387 at 391 and 418 (CA); *Byers v Samba Financial Group* [2021] EWHC 60 (Ch) at [52]. The following statement of Millett J. in *El Ajou v Dollar Land Holdings plc* [1993] B.C.C. 698 at 715, whilst cited by Lord Sumption in *Akers v Samba Group* [2017] A.C. 424 at [86], is therefore clearly too broad: "Although equitable rights may found proprietary

Byers, the issue was whether the circumstances in which C had acquired shares protected C from a claim based on A's pre-existing duty to B in relation to those shares. There are good pragmatic grounds for applying the lex situs to that issue.[106] Those grounds are precisely the same as those which apply in a dispute between a claimant asserting pre-existing *legal* ownership of property which has subsequently been stolen and was situated abroad when sold to a third party. Chief among them is the need to protect purchasers from having to investigate whether there was anyone who might successfully make a claim in relation to the property by reference to some other system of law.[107] Those reasons are based on the nature of C's defence to B's claim,[108] and not on the nature of B's right. Characterizing an issue as proprietary because of the pragmatic reasons in favour of applying the lex situs to that issue is not inconsistent with the reasoning of the Supreme Court in *Akers*, as it does not mean that, whenever B's claim is based on B's equitable interest under a trust, it must be analysed as based on an assertion of ownership. However, it does mean that there will be cases in which equity would regard C's conscience as sufficiently affected by knowledge as to subject C to a duty towards B in respect of the relevant assets, but this duty will be unenforceable because English law defers to the lex situs which protects C from claims based on a pre-existing right of B.

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as well as personal claims, it has long been settled that they are classified as personal rights for the purposes of private international law."

[106] Those reasons are particularly strong where, as in *Macmillan*, C acquires rights under a negotiable instrument, such as bearer shares, and so may qualify for protection against any pre-existing rights, whether legal or equitable: see *Macmillan Inc v Bishopsgate (No 3)* [1995] 1 W.L.R. 978 at 1005-1006. We are grateful to Professor Robert Stevens for the observation that the particular nature of the shares in *Macmillan* forms a ground of distinguishing that case from *Byers* and thus querying the concession that Saudi Arabian law applied to determine the effect of the transfer of the registrable shares in *Byers*: see too fn.109 below. It should be noted however that the reasoning of Millett J. and of the Court of Appeal in *Macmillan*, like Lord Mance's summary of its effect in *Akers v Samba Group* [2017] A.C. 424 at [20], is not limited to the case of bearer shares.

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

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

This analysis, as noted by Fancourt J. in *Byers*, also has important conceptual consequences for purely domestic law. A foreign lex situs is not the only possible source of a rule which aims to protect C, when acquiring property in particular circumstances, from the risk of being affected by a pre-existing right of B. Such rules may arise purely domestically,[109] for example under a land registration scheme,[110] or in order to recognise the overreaching effect of a transaction.[111] Such domestic rules may apply even where C acquires a right with sufficient knowledge of B's pre-existing right under a trust to affect C's conscience in the eyes of equity. There has been some uncertainty as to whether, in such a case, B might bring a knowing receipt claim.[112] In *Byers*, therefore, B relied on support for such claims to argue that, if Saudi Arabian law barred B's assertion of a "proprietary" claim against C, a knowing receipt claim might still be possible under English or Cayman law. Fancourt J., in our view correctly, found that, as a matter of domestic law, a rule preventing B from asserting a pre-existing right under a trust against C will also rule out a knowing receipt claim.[113]

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[109] A domestic rule, such as that applying to money or negotiable instruments, may also protect C from the risk of being bound by a pre-existing legal property right. Indeed, L. Smith, "Unjust Enrichment, Property and the Structure of Trusts" (2000) 116 L.Q.R. 412, at fn.91 notes that, if such a rule applies, C may be regarded as acquiring a "*fresh* legal title". If so, C's immunity from B's pre-existing equitable interest can be explained on the basis that the title now held by C is a new one and so is not relevantly linked to the title A held on trust for B. The negotiable nature of the bearer shares in *Macmillan* thus provides a further reason for the outcome in that case which is not applicable on the facts of *Byers*.

[110] See e.g., Land Registration Act 2002, s.29.

[111] See e.g., Law of Property Act 1925, ss.2 and 27; Trusts of Land and Appointment of Trustees Act 1996, s.6.

[112] *Byers v Samba Financial Group* [2021] EWHC 60 (Ch) at [94]-[106]. In addition to the analyses cited there, see too E. Cooke and P. O'Connor, "Purchaser Liability to Third Parties in the English Land Registration System: A Comparative Perspective" (2004) 120 L.Q.R. 640 at 659-664.

[113] Fancourt J., approving the analysis in M. Conaglen and A. Goymour, "Knowing Receipt and Registered Land" in Mitchell (ed.), *Constructive and Resulting Trusts* (2010), at p.159, thus stated, contrary to a previous suggestion of the Law Commission, *Land Registration for the Twentieth-First Century* (Law Com. No. 254, 1998) at paras [3.48]-[3.49], that a knowing receipt claim cannot be made where C is protected from B's pre-existing right under a trust by s.29 of the Land Registration Act 2002. It does not follow that all land registration schemes will have that same effect, as the particular terms of a scheme may allow such a claim to operate: see e.g. the analysis in *Arthur v Attorney-General of the Turks & Caicos Islands* [2012] UKPC 30, which, as noted by Fancourt J. in *Byers v Samba Financial Group* [2021] EWHC 60 (Ch) at [112], turned on the specific provisions of the Turks & Caicos Registered Land Ordinance.

The critical conceptual point,[114] which we have previously made elsewhere,[115] is that a knowing receipt claim is not based on any independent wrongful conduct of C but rather on the existence of exactly the relationship between B and C which must be demonstrated in order for B to succeed in an "equitable proprietary claim".[116] That relationship depends on C's having held a right (to either the initial trust property or its traceable proceeds) with sufficient knowledge of A's earlier duty to B. A claim that C must give up that right, as in *Macmillan*, and a claim that C must account for its value, as in *Byers*, are simply different means of giving effect to the same relationship.

Logically, then, a rule which has its purpose the protection of C from B's pre-existing right must also protect C from a knowing receipt claim. Indeed, such a rule can be seen as stipulating that, given the particular circumstances in which C acquired the relevant property, C enjoys an immunity from a claim based on B's pre-existing right. Sometimes that immunity depends on whether C's conscience is affected by knowledge of B's pre-existing right at the date of receipt, as in the case of the bona fide purchase defence.[117] But equally, an immunity may arise irrespective of the state of C's conscience, such as where the lex situs, or a defence provided by overreaching or a land registration scheme, protects C from any claim based on B's pre-existing rights.

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[114] Similar views as to the nature of a knowing receipt claim have been proposed by e.g., Mitchell and Watterson, "Remedies for Knowing Receipt" and Conaglen and Goymour, "Knowing Receipt and Registered Land" in Mitchell (ed.), *Constructive and Resulting Trusts* (2010), at pp.115 and 159, as well as R. Chambers, "The End of Knowing Receipt" (2016) *Canadian Journal of Contemporary and Comparative Law* 1.

[115] Agnew and McFarlane, "The Paradox of the Equitable Proprietary Claim" in McFarlane and Agnew (eds), *Modern Studies in Property Law, Volume 10* (2019), at p.303. See too B. McFarlane, *The Structure of Property Law* (Oxford: Hart Publishing, 2009) at pp.256-258 and 418-419.

[116] We therefore agree with the view of Conaglen and Goymour, "Knowing Receipt and Registered Land" in C. Mitchell (ed.), *Constructive and Resulting Trusts* (2010), at p.159, accepted by Fancourt J. in *Byers v Samba Financial Group* [2021] EWHC 60 (Ch) at [107]-[117], that there is an important distinction between a knowing receipt claim and a dishonest assistance claim. See too Mitchell and Watterson, "Remedies for Knowing Receipt" in Mitchell (ed.), *Constructive and Resulting Trusts* (2010), at pp.150-154.

[117] C's immunity endures even if C subsequently acquires knowledge of B's pre-existing right. In the words of Lord Hatherley L.C. in *Pilcher v Rawlins* (1871-2) L.R. 7 Ch. App. 259 at 266 "equity declines all interference with the purchaser, having, as is said, no ground on which it can affect [C's] conscience".

The decisions in *Macmillan* and *Byers*, given in the conflicts context, thus demonstrate a distinction, crucial in domestic law, between two different sorts of relational claim. The distinction does not depend on the remedy sought by B, nor on the role of conscience, but rather on the *reason* for which the defendant's conscience is said to be affected: that is, the reason for which B claims that the defendant is under a duty to B. It is between cases where the reason said to affect the defendant's conscience depends on the defendant's acquisition of property in relation to which another party was previously under a duty to the claimant,[118] and those in which the defendant's conscience is said to be affected for some other reason, such as, for example, the defendant's promise or assent to hold a right on trust for the claimant, a breach of a fiduciary duty owed by the defendant to the claimant, or dishonest assistance in a breach of another party's fiduciary duty to the claimant.[119] As noted in *Byers* by Fancourt J.,[120] *Macmillan* demonstrates that in cases of the first category, where the defendant's acquisition of specific property is crucial, the lex situs may have a decisive role,[121] and there are sensible pragmatic reasons for deferring to it. As shown by *Akers* and the cases discussed in Pt III, however, that is not true of the second category of cases, where the same pragmatic considerations do not apply.

The language used in *Macmillan* and *Byers* risks obscuring the nature of this distinction. The treatment of cases in the first category, including a knowing receipt claim, as depending

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[118] As noted at fn.82 above, the claim in such cases can also be made where the defendant receives traceable proceeds of the right initially subject to the duty, or where the defendant acquires a different right that depends on that initial right (as where, e.g., A, who holds a freehold on trust for B, grants C a charge).

[119] On this distinction between the two classes of case see too *Norris v Chambres* (1861) 29 Beav. 246 at 253 (Sir John Romilly M.R.), affd 3 De G.F. & J. 583; *Deschamps v Miller* [1908] 1 Ch. 856 at 864-865 (Ch.D.). See too *Macmillan Inc v Bishopsgate (No.3)* [1995] 1 W.L.R. 978 at 989, where Millett J. states that in cases in the first class "there is no equity or privity between the parties which the court can enforce except such equity, if any, as may arise from [C's] notice; while the sufficiency of such notice to affect [C's] title is a matter for the lex situs." It is not, however, notice alone which gives B a claim against C (see e.g., *re Montagu's Settlement Trusts* [1987] Ch. 264 (Ch.D.)) and it does not follow that the lex situs must govern the question of what level of knowledge is required for B's claim to arise: see note 125 below.

[120] *Byers v Samba Financial Group* [2021] EWHC 60 (Ch) at [116].

[121] See too *Norris v Chambres* (1861) 29 Beav 246, affd 3 De G.F. & J. 583.

on a "continuing proprietary base"[122] appears to be at odds with the relational approach adopted in cases such as *Akers*. However the two are easily reconciled[123] if B's right under a trust is seen as "proprietary" only in the special, limited sense employed by Lord Sumption in *Akers*.[124] It is not prima facie binding *erga omnes*, but rather opens up the possibility of C, a party later acquiring the right held on trust or its traceable proceeds, also coming under a duty to B, if, given the circumstances of C's acquisition and holding of the right, C's conscience is affected.[125]

VII. Conclusion

The main concern of our argument has been with managing conflicts: the ongoing battle between the relational and proprietary views of the trust and other equitable interests; the conflict, internal to English law and other common law systems, between common law and equity; and the external conflict between domestic law and other legal systems. Our central point is that the courts' analysis when tackling that third conflict in cases of trusts and other equitable interests provides us with a compelling model for understanding and resolving the

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[122] *Byers v Samba Financial Group* [2021] EWHC 60 (Ch) at [205], echoing Millett J.'s reference in *Macmillan Inc v Bishopsgate (No.3)* [1995] 1 W.L.R. 978 at 989 to claims based on "continuing equitable ownership".

[123] On this view, the analysis of Millett J. in *Macmillan* can also remain consistent with his view in *Lightning v Lightning Electrical Contractors Ltd* [1998] N.P.C. 71 that English law governs the question of whether foreign land is held by A on trust for B as a result of B's provision of the purchase price.

[124] See too Conaglen and Goymour, "Knowing Receipt and Registered Land" in Mitchell (ed.), *Constructive and Resulting Trusts* (2010), at pp.172-173: the authors state that "the fundamental purpose of the [knowing receipt] claim seems to be to vindicate the pre-existing property rights that have been lost as a result of the wrongful disposition", whilst also acknowledging that "'Property' can mean different things in different contexts and equitable property rights have always been protected in different ways from legal property rights." (citations omitted).

[125] In *Byers*, argument was not permitted as to the law governing B's knowing receipt claim, which was assumed to be English or Cayman law: see *Byers v Samba Financial Group* [2021] EWHC 60 (Ch) at [16]. Given the fact that such a claim depends not only on the nature of B's pre-existing right and C's acquisition of particular property, but also on C's coming under a duty to B as a result of C's knowledge, it is unsurprising that differing views can be taken as to how the law governing a knowing receipt claim should be identified. For discussion see e.g. Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn (2012) at paras [36-062]-[36-068].

first two tensions, albeit one that takes account of practical considerations that are not relevant in the purely domestic arena.

For example, the analysis of the Supreme Court in *Akers v Samba Financial Group*[126] depends on the fact that an English court recognizing A's duty to hold property situated abroad for the benefit of B does not seek to deny B's title to the property under the lex situs. In the same way, we argue, equity's enforcement of a purely domestic trust does not seek to deny the common law position that A has a particular right, such as ownership of property; equity rather regulates A's use and enforcement of that right as against B.[127] To make a similar claim against a third party, B cannot simply assert an equitable ownership that is prima facie binding *erga omnes*, but must instead, as Lord Sumption explained in *Akers*,[128] show that C acquired a particular right from A, and held that right or its traceable product at a point when C's conscience was affected by knowledge of A's pre-existing duty to B. If, however, the circumstances in which C acquired C's right fall within the scope of a rule that protects C from claims based on such an acquisition, then, irrespective of whether C's conscience is affected by knowledge of A's duty to B, C will enjoy an immunity from any claim by B based on B's pre-existing equitable right. This means that B can succeed neither in an "equitable proprietary claim" nor in a knowing receipt claim. As demonstrated in *Macmillan* and *Byers*, this is relevant where the rule protecting C is provided by the law governing C's acquisition of C's right; as discussed in *Byers*, it is also relevant where the rule protecting C is a product of domestic law, such as a land registration scheme.

On this relational view of the trust and other equitable interests, the existence of a trust, as Maitland noted, does not mean that equity contradicts the common law position that A has ownership of the trust property; A's common law rights and powers are crucial to B, as equity gave B access to the benefits of those powers by imposing a particular duty on A. Hohfeld was of course correct to note that there is necessarily some modification by equity of the common law position:[129] at common law, for example, A owes no duty to B not to use the trust property

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[126] [2017] A.C. 424: see Pt V above.

[127] See further McFarlane and Stevens, "What's Special About Equity? Rights Against Rights" in Klimchuk, Samet and Smith (eds), *Philosophical Foundations of the Law of Equity* (2020).

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

[129] See W. Hohfeld "The Relations Between Equity and Law" (1913) 11 Mich. L.Rev. 537, dissenting from the view of Maitland, *Lectures in Equity* (1929), at p.17 that, with one or two possible exceptions, the relationship

for A's own benefit, and so equity and common law clearly take different views of the obligations A owes to B. Maitland's point, however, was the more significant one that the trust need not involve conflict at the crucial level of ownership: to adopt the language used by the ECJ in determining the scope of art.24(1), B, if claiming a trust, does not "seek to determine the extent, content, ownership or possession of [the defendant's] property or the existence of other rights in rem therein".[130] That is the case, we have argued, whether B's claim is made against A or against C, a successor in title to A. Rather, B accepts that the title and the powers that go with it are held by A, or C, but asserts that A, or C, is under a duty to B in relation to that property. This reflects the fact that, simply in order to operate domestically, a court of equity must necessarily have considered the question of the compatibility of equitable principles with those of another legal system: the common law. After all, it is not only in cases with a foreign element that we ask whether equity has "jurisdiction".[131]

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

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

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