The nature of equitable property revisited

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I. Two claims

In this article, I revisit a topic that I first examined around fifteen years ago: the nature of equitable property and of the trust. Hohfeld claimed 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'.[1] Certainly, a number of appellate decisions over the past fifteen years have turned on the resolution of conceptual questions as to the true nature of equitable property rights, particularly those of a beneficiary of a trust. This article uses three such decisions, and builds on some new academic thinking, to explain why resolving those questions matters in practice, and also to clarify and develop the two essential claims of my earlier work:[2] there is a fundamental formal and conceptual difference between equitable property rights and legal property rights, and it is a mistake to understand the trust as involving a split between legal and equitable ownership. The preferred analysis will be referred to here as View 1. It involves two, linked claims. The first applies to all equitable property rights; the second is focussed on the trust.

A. The first claim

The first claim is that all cases in which a party (B) has an equitable property right depend on another party (A) holding a right and being under a duty to B in relation to that right. In finding that B has an equitable property right, therefore, equity does not recognise that B has a direct right in an underlying resource, such as land or goods, that is prima facie binding on the rest of the world. As a result, equity does not extend the list of types of right that relate to a resource independent of B and have *in rem* eff-

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W Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913–14) 23 Yale LJ 16, 18.

2. B McFarlane, *The Structure of Property Law* (Hart 2008) and B McFarlane and R Stevens, 'The Nature of Equitable Property' (2010) 4 Journal of Equity 1.

ect. Nor does equity extend the list of resources in relation to which it is possible to have such rights. Those questions are left to the common law. Rather, equity, in its characteristic role as a secondary and supplementary system, recognises that a party may validly have a right but also be under a duty in relation to the exercise of that right.

This explains why, for example, a bank account, which is itself a right against the bank that does not relate to a specific resource and is not prima facie binding on the rest of the world, can be held on trust, or be the object of other equitable property rights, such as a charge. The recognition of such trusts of bank accounts, or equitable property rights in relation to bank accounts, does not require equity to extend either the list of types of right that relate to resources and have *in rem* effect, or the list of resources that can be the object of such rights. Rather, it requires only that A hold a right (such as a bank account) and be under a duty in relation to that right.

View 1 does not mean, however, that equitable property rights are best seen as simply personal rights. The key feature of equitable property rights, distinguishing them from purely personal rights, lies in their distinctive third party effects.[3] First, equitable property rights are capable of binding, in some circumstances, a *particular group* of third parties: put briefly, C, a successor in title to A, can be affected by B's equitable property right, if C's conscience is bound. So, for example, consider a case where A is under a duty to grant B an easement, and B as a result has an equitable easement. If, before complying with the duty to grant the easement, A transfers A's estate in the land to C, then it is possible for C to come under a duty to grant the easement to B. Where A holds rights on trust, which are then transferred, without authority under the trust, to C, this binding effect is recognised in each of the 'equitable proprietary claim'[4] and the knowing receipt claim. In the former, the claim is that specific rights held by C must be given up, usually[5] so that they can be returned to a trustee to hold on the terms of the initial trust. In the latter, most usually brought where C no longer has either the rights transferred in breach of trust or their traceable proceeds, the claim is that C must pay (usually to a trustee to hold on the terms of the initial trust) a sum of money, usually with the aim to restore the trust to the position it would have had, but for the unauthorised transfer to C.

Second, B's equitable property right is protected in the insolvency of A: the right of A, in relation to which B has an equitable property right, is not available to A's general creditors.[6] This feature of equit-

3. The focus here is not on *all* third party effects of equitable property rights but rather on the effects that are distinctive to such rights. For example, where A holds on trust for B, B may be able to bring a dishonest assistance claim against a third party, whether or not that third party has received any rights from A. This is not a third party effect that is distinctive to an equitable property right, as the liability may arise whenever a third party dishonestly assists in a breach of fiduciary duty: see eg Lord Nicholls in *Royal Brunei Airlines v Tan* [1995] 2 AC 378 (PC) 392. See further B McFarlane, 'Equity, Obligations, and Third Parties' [2008] Sing J Legal Studies 308.

4. For consideration of this claim from the perspective of View 1, expressing concerns about its label, 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: vol 10* (Hart 2019).

5. In a case where A holds on trust for B, and the claim against C is brought by B, it is possible for a court to order C to transfer the specific rights directly to B: this effectively combines the 'equitable proprietary claim' and B's power, under the rule in *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282, to collapse the trust. Compare Lord Browne-Wilkinson in *Target Holdings v Redferns* [1996] AC 421 at 434–35.

6. See eg *Scott v Surman* (1742) Willes 400, 402; 125 ER 1235, 1236.

able property rights is best explained as simply a consequence of the fact that such rights are capable of binding a successor in title to A. So, even if a statutory insolvency regime protects B, a beneficiary of a trust, by stating that the rights held by A on trust for B do not vest in A's trustee in bankruptcy,[7] the reason for this rule is that, even if those rights did so vest, B could, in equity, prevent the trustee in bankruptcy from using those rights inconsistently with the terms of the trust.[8]

The aim of View 1 is not to deny these third party effects of equitable property rights. It is rather to provide the most coherent explanation for them. The contrasting, and currently conventional, analysis of the trust and equitable property rights will be referred to here as View 2. It explains the third party effects of equitable property rights in the same way as the similar third party effects of legal property rights, so that a holder of an equitable property right has a direct entitlement to a resource that is prima facie binding on the rest of the world, and the beneficiary of a trust may be seen as having equitable ownership of the trust property.[9] On this view, the recognition of equitable property rights *does* involve an addition, by equity, to the list of rights that relate to a resource and have *in rem* effect and *does* involve an addition to the list of resources that can be the object of property rights. For example, on View 2, it can be said that, by recognising that a chose in action can be assigned in equity, or be the subject matter of a trust, or an equitable charge, equity has expanded our notion of which resources can count as property.[10]

View 1 rejects the explanation that the third party effects of equitable property rights arise because B has an entitlement to a particular resource, and C has interfered with that resource. Such an explanation is persuasive where B has a *legal* property right; but it provides a poor fit for the circumstances in which an equitable property right has third party effect. This can be seen in two limits to the third party effect of equitable property rights, neither of which involves bona fide purchasers. First, legal property rights are prima facie binding on *all* third parties. This means that, unlike equitable property rights, legal property rights are binding on a third party, whether or not that third party is a successor in title to A. Second, legal property rights can bind third parties whether or not the conscience of the third party is affected.

Consider the case, for example, where B owns a bicycle. A steals the bicycle from B and purports to make a gift of the bicycle to C, who is wholly innocent and reasonably believes that A was the true

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7. See eg Insolvency Act 1986, s 283(3)(a).
8. See *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20, (2019) 268 CLR 524 at [27], citing *Gladstone v Hadwen* (1813) 1 M & S 517, 526; 105 ER 193, 197: 'it would be absurd' for rights to vest in a third party 'for no other purpose but in order that there may be a bill in equity brought against [that third party]'.
9. See eg Lord Diplock in *Ayerst (Inspector of Taxes) v C&K (Construction) Ltd* [1976] AC 167, 177–78; Lord Briggs, XXIV Old Buildings Lecture 2025 (28 February 2025). For analyses of the trust broadly consistent with View 2, and opposed to View 1, see eg J Penner, 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust' (2014) 27 Can J L & Juris 473; P Jaffey, 'Explaining the Trust' (2015) 131 LQR 377; E Zaccaria, 'The Nature of the Beneficiary's Right Under a Trust: Proprietary Right, Purely Personal Right or Right Against a Right?' (2019) 135 LQR 460; H Dagan and I Samet, 'The Beneficiary's Ownership Rights in the Trust Res in a Liberal Property Regime' (2023) 86 MLR 701.
10. See eg S Worthington, *The McPherson Lecture Series: Equity and Property* (University of Queensland Press 2009) and 'The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Thomson-Reuters 2005) 93, reprinted (2007) 42(3) Texas International Law Journal 917.

owner of the bicycle. C then makes a gift of the bicycle to C2. In such a case, C is liable to B in conversion for C's interference with the bicycle, even though C was wholly innocent and no longer has the bicycle itself. In contrast, consider the case where A holds a right on trust for B. A transfers the right, without authority under the trust, to C. A does so as a gift, with C providing nothing in return. C then makes a further gift of the right to C2. In such a case, C is under no liability to B.[11] The 'equitable proprietary claim' is not available as C no longer holds the relevant right, or its traceable proceeds. And C is not liable in knowing receipt, as C never held the right (or its traceable proceeds) with knowledge of A's breach of duty.

On View 1, then, the justification for the distinctive third party effect of an equitable property right is *not* that C has interfered with B's resource. It is rather that C acquired a particular type of right from A and that, at some point in time, C held that right (or its traceable proceeds) with knowledge of the fact that C's acquisition of the right depended on A's having acted in breach of the duty that A owed to B in relation to A's right.[12] The third party effect of equitable property rights thus differs from that of legal property rights, not only in its form but also in its justification.

B. The second claim

The second, linked claim is specific to the trust. It is that the trust does not depend on there being a split between legal ownership and equitable ownership. This point is trivially made by noting the acceptance in English law, and other common law systems, of charitable trusts.[13] The operation of the charitable trust also provides important support for the first claim. The distinctive third party effect of equitable property rights were noted in Section I.A. However, exactly the same third party effects can apply whenever A holds on trust, even if that trust does *not* involve any party having an equitable property right. So, if A holds on charitable trust and transfers a right to C without authority under the trust, then C is potentially liable both to the 'equitable proprietary claim' and to a claim in knowing receipt.[14] There is no beneficiary who can bring those claims, but that does not matter, as the claims are available to other parties,[15] and the required conduct of C (to return the rights, or to restore the trust fund) does not have to be performed in favour of any beneficiary.

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11. See *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91 (CA).
12. Of course, the third party effect may apply not only against C but against later third parties (eg C2, C3) who do not acquire any right directly from A, but who acquire rights that derive from A's initial unauthorised dealings with C.
13. In many other systems, it can also be made by pointing to the validity of non-charitable purpose trusts, see eg Cayman Islands Trusts Law (2017 Revision), Part VIII.
14. For claims in relation to specific rights held by the third party, see eg *Attorney General v Plymouth Corporation* (1845) 9 Beav 67. For knowing receipt claims against recipients of assets held on charitable trusts, see eg *AG v Kell* (1840) 2 Beav 575, 48 ER 1305; *Eden Refuge Trust v Hohepa* [2012] NZCA 124, (2012) 14 ITELR 914. I am grateful to C Mitchell and L Ho, 'Knowing Receipt, Equitable Proprietary Rights, and Duties of Due Administration' (2026) 89 MLR (forthcoming) for bringing these cases to my attention.
15. In England and Wales, not only the Attorney General and the Charity Commission but also 'persons interested' in the administration of charity: see too Charities Act 2011, s 115, discussed by H Jing, 'Enforcing Charitable Trusts: A Study on the English Necessary Interest Rule' (2022) 42 LS 228 and J Hudson and C Mitchell, 'Standing in Trusts Law, the Beneficiary Principle and the Juridical Nature of Trustee Duties' (2026) LQR (forthcoming).

When they arise in relation to a case where A holds on trust for B, it is tempting to see the third party effects of the trust as depending on B's equitable property right, or even on B's equitable ownership. However, as essentially the same third party effects arise in *any* trust, even one without beneficiaries, it is clear that those effects do not prove that B has equitable ownership. Those third party effects, on View 1, can be explained as justified by the nature and content of the trustee's duty, whether or not that duty is to benefit a specific beneficiary.

This second claim builds on a point first made by Charles Mitchell when considering the rules applying to a deceased's estate in the course of administration.[16] It is clear that, in such a case, a party such as a residuary legatee has no equitable property right or equitable ownership: there is no asset that will necessarily come to that party, given that the debts of the deceased must be met before any distribution occurs.[17] Nonetheless, the third party effects of a right being part of the deceased's estate are essentially the same as those where A holds a right on trust for B: personal creditors of the executor or administrator have no access to the deceased's estate,[18] and unauthorised recipients of assets from the deceased's estate may be liable to return those assets, or their value.[19] This supports View 1: the special third party effects that are associated with equitable property rights depend not on the nature of B's right but rather on the nature and content of A's duty, as a duty relating to a specific right of A.

The two best things that can be said about View 2 are also the two worst things that can be said about it: it is nearly right and it is useful in practice. It is these two features that have made View 2 so hard to displace, notwithstanding its relative novelty,[20] the difficulties it creates for the relationship between law and equity,[21] and the conceptual problems it gives rise to even in simple cases, as when a bank account is held on any type of trust[22] or when any type of asset is held on a charitable trust. View 2 is nearly right because, in many cases, it leads to the same outcome as View 1. It is useful in practice because, in such cases, it leads to that outcome more directly, by applying the well-known model of a party having a right in relation to a resource that is prima facie binding on the rest of the world. View 2

16. C Mitchell, '*Commissioner of Stamp Duties (Queensland) v Livingston* (1964): Rights of Estate Beneficiaries and Trust Beneficiaries Compared' in B Sloan (ed), *Landmark Cases in Succession Law* (Hart 2019).
17. See *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 (PC) 707–08.
18. *Farr v Newman* (1792) 4 TR 620, 629; 100 ER 1209 (KB) 1213. This shows that, contrary to the suggestion of Dagan and Samet (n 9) 717–19, 'the shielding rule' (whereby trust assets are protected from the general creditors of the trustee) does not demonstrate that a beneficiary of the trust has ownership of the trust assets – such shielding can apply even if, as in the case of the deceased's estate in the process of administration, or charitable trusts, there is no party who can be identified as having beneficial ownership of the assets.
19. *Freeman v Fairlie* (1817) 3 Mer 29, 36 ER 12. See too H Jing, 'The Concept of Beneficial Ownership in Express Trust: A Necessity?' (2025) 18 J Equity 131, 136.
20. For example, as noted by J Edelman, 'Two Fundamental Questions for the Law of Trusts' (2013) 129 LQR 66, 67–72, views of the trust prior to the mid nineteenth century focussed on its obligational basis rather than on the property rights of beneficiaries. See further Section III.D.
21. See eg F Maitland, *Equity; also, The Forms of Action at Common Law: Two Courses of Lectures* (A Chaytor and W Whittaker eds, CUP 1909) 17 pointing out the conceptual difficulties arising if common law and equity were to disagree on a fundamental question such as whether A or B was the owner of particular property. See further B McFarlane, 'The Persistence of Equity: Lessons from the Trust' in B McFarlane and S Elliott (eds), *Equity Today: 150 Years after the Judicature Reforms* (Hart 2023).
22. See Section I.C below.

is simpler and quicker because it dispenses with the need, central to View 1, to recognise that certain types of duty can have a different, more nuanced form of third party effect. In the many cases, then, where View 1 and View 2 lead to the same outcome, View 2 may be preferred as the simpler and more direct route to that destination: it is in that sense the intuitive,[23] or 'thinking fast',[24] explanation.

The problem with View 2 is, of course, the problem with any such heuristic way of thinking: in some cases, it will lead to the wrong outcome. Examples of this will be considered in Section II below. In such cases, the benefit of View 1, of accepting the complexity that comes from equity's recognition of a different means by which third parties may effected, is clear. Sometimes 'thinking slow' is required. Or, to borrow some poetic licence,[25] the problem with View 2 is that to be nearly right, and yet not quite, in law is wholly evil. The mischief of View 2 is not only that it leads to the wrong outcomes in some cases but also that it mischaracterises the operation of equitable property rights and trusts *in every case*, and so obscures the true nature of equity's contribution to the legal system.

C. Clarifications

It is worth clarifying that the central argument of this article depends on the substantive differences between View 1 and View 2, and not on any terminological stipulations. It is for that reason that the article adopts the conventional term 'equitable property right' to refer to situations in which A is under a duty to B in relation to a specific right held by A. The first claim made by this article is as to how and why such rights can have an effect on particular third parties: it argues that the 'how' and 'why' each differ from the answers given when considering how legal property rights effect third parties. If that first claim is accepted, a further question arises: should that difference be reflected by abandoning talk of there being equitable property rights at all, and a different label be found for rights such as that of a beneficiary of a fixed trust, or of a party with an equitable lease or equitable charge? That is a distinct question that will not be addressed here.

It is also worth clarifying that, as shown by the discussion above of equitable easements, View 1 is also intended to apply to equitable property rights in relation to land. On View 2, the chief difference between equitable property rights and legal property rights lies in the former's inability to bind a bona fide purchaser of a legal estate for value without notice ('equity's darling'). On that view, the replacement, in land law, of that defence with tests based on registration may seem to do away with the need to distinguish between equitable property rights and legal property rights.[26] Such a conclusion would be misguided and shows the difficulty of assuming that the only significant difference between equitable property rights and legal property rights resides in the bona fide purchaser defence. First, Section

23. See eg Maitland's reference to the 'ordinary thought of Englishmen': D Runciman and M Ryan (eds), *Maitland: State, Trust and Corporation* (CUP 2012) 94 and the invocation by Lord Briggs of lay understandings of a beneficiary of a trust as the owner of the trust property: XXIV Old Buildings Lecture 2025 (28 February 2025) and *Stevens v Hotel Portfolio UK Ltd* [2025] UKSC 28 at [3] and [8].

24. D Kahneman, *Thinking, Fast and Slow* (Penguin 2011).

25. Compare S Smith, 'To the Tune of the Coventry Carol' in *The Frog Prince and Other Poems* (Longmans 1966).

26. See eg M Dixon, 'Real Property Rights in England and Wales: No Need for Law and Equity' in C Bevan (ed), *Research Handbook on Property, Law and Theory* (Edward Elgar 2024).

I.A gives two examples of the limited third party effects of equitable property rights, as opposed to legal property rights, and neither of those involves a bona fide purchaser. Second, as I attempted to show in *The Structure of Property Law*,[27] and as Aruna Nair has demonstrated much more concisely and persuasively,[28] the structure of the Land Registration Act 2002 can be understood only by noting the fundamental differences between the legal estates and interests on the one hand, and equitable interests on the other. That structure deals not only with priority and defences but also with how such rights are acquired. It is significant, for example, that, whilst substantive registration is generally required for the acquisition of a legal estate or interest,[29] it is *never* required for the acquisition of an equitable interest.[30]

Such differences in the tests applied to the acquisition of legal property rights on the one hand, and equitable property rights on the other, form another important piece of evidence in support of View 1. On that view, if B claims an equitable property right, the key question is whether A is under a duty to B in relation to a specific right held by A. As a result, all the different means by which A can come under a duty to B (contract; wrongs; court orders etc.) are potential means by which an equitable property right may be acquired. On View 1, the question in relation to legal property rights is different: it is whether B has acquired a right in relation to a particular resource that is prima facie binding on the rest of the world. The means by which B acquires such a right may depend on A's coming under a duty to B,[31] but it need not. After all, B can acquire a legal property right through B's own, unilateral action, without any dealings with another party.[32] For proponents of View 2, the radical differences in the tests for the acquisition of equitable property rights and of legal property rights is a problem – if the two types of rights operate in essentially the same way, why are the tests for their acquisition so different?

A final clarification is that, just as View 1 is capable of applying to equitable interests in land, it is also capable of applying where the equitable interest or trust does not relate to any physical thing. It has been claimed that View 1, as it was presented in 2008 and 2010, works well in explaining a trust that relates to physical things, but not in other cases.[33] This is a surprising claim.

First, a key advantage of View 1 is that it can apply whenever A holds a right and is under a duty in relation to that right – it does not matter if A's right relates to a physical thing or not, or even whether A's right can be assigned.[34] Indeed, it is View 2 that instead may depend on the subject matter of the

27. See n 2.

28. A Nair, 'Equity and the Land Registration Act 2002: Form, Conscience, and the Judiciary' in B McFarlane and S Elliott (eds), *Equity Today: 150 Years after the Judicature Reforms* (Hart 2023).

29. See eg Land Registration Act 2002, ss 4 and 27. 'Substantive registration' as used here means registration of the right such as to attract the guarantee of title in s 58 of the 2002 Act: see further McFarlane (n 2) 87–94.

30. Indeed an equitable interest cannot be substantively registered; rather, at most, a notice can be entered on the register to protect its priority, and even this method of protection is unavailable to an interest under a trust: Land Registration Act 2002, s 33 (a)(i).

31. As in the case where title to goods passes under a contract of sale: see Sale of Goods Act 1979, s 17.

32. See eg *Armory v Delamirie* (1722) 5 Stra 505, 93 ER 664.

33. See Lord Briggs, XXIV Old Buildings Lecture 2025 (28 February 2025) and Penner (n 9).

34. This is consistent with the fact that it is possible for a non-assignable contractual right to be held on trust: see eg *Don King Productions Inc v Warren* [2000] Ch 291 (CA); *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148.

trust: if an equitable property right involves a claim to a resource that is protected against third parties, there must be a resource that can be the object of such a property claim. For example, it has been argued that data cannot be held on trust, as data is not an object of property.[35] Such a claim is understandable on View 2 but is shown to be false on View 1, as long as the data concerned consists of specific rights, and the holder of such rights may come under a duty in relation to them.[36] Second, as was argued in 2008 and 2010, one of the advantages of View 1 is *precisely* that it avoids the conceptual awkwardness that arises when View 2 is applied to the very common case of A's holding a personal right, such as a bank account, on trust for B. On View 2, A has a personal right against A's bank, but the existence of the trust gives B an equitable property right. But what is the resource to which B has a claim, or which B owns in equity? How can A, by declaring a trust of A's bank account, magic a property right from the thin air of a personal right? Third, and similarly, View 1 also makes better sense of the sub-trust. Where A holds a right on trust for B, B then has a right, and B can come under a duty to B2 in relation to that right. If that occurs, B2 can then come under a duty to B3 in relation to B2's right, and so on. The modular nature of such sub-trusts is perfectly consistent with View 1. It is more difficult, in fact, to explain on View 2. As each of B, B2 and B3 is a beneficiary of a trust, does each of them have equitable ownership of an underlying resource? It is tempting on View 2 to say that, in such a case, B3 is the equitable owner and so B and B2 must 'drop out of the picture'. That is not, however, how sub-trusts operate;[37] rather, the structure depends on B's retaining B's right, and coming under a duty to B2 in relation to that right.[38]

II. Three examples

The purpose of this section is to examine three appellate decisions, decided in 2010 or later, that show why understanding the nature of equitable property rights is crucial in practice.

A. *Shell UK Ltd v Total UK Ltd*

In *Shell UK Ltd v Total UK Ltd*,[39] the Court of Appeal considered a case where, as a result of the carelessness of D, land and facilities held by A on trust for B and others[40] had been damaged. As a result of

35. That view was adopted by Reed, BPE Solicitors and Pinsent Masons, 'Data Trusts: Legal and Governance Considerations' (2019) in a report for the Open Data Institute, 12, <theodi.org/wp-content/uploads/2019/04/General-legal-report-on-data-trust.pdf> accessed 29 October 2019.

36. For arguments in favour of the validity and usefulness of data trusts, see eg S Delacroix and N Lawrence, 'Bottom-up Data Trusts: Disturbing the "One Size Fits All" Approach to Data Governance' (2019) 9 International Data Privacy Law 236; and J Lau, J Penner, and B Wong, 'The Basics of Private and Public Data Trusts' [2020] Sing J Legal Studies 90.

37. See eg *Nelson v Greening & Sykes* [2007] EWCA Civ 1358, [47]–[57] and CH Tham, 'Exploding the Myth that Bare Sub-Trustees Drop Out' (2017) 31 Trust Law International 76.

38. See B McFarlane and R Stevens, 'Interests in Securities: Practical Problems and Conceptual Solutions' in L Gullifer and J Payne (eds), *Intermediated Securities: Legal Problems and Practical Solutions* (Hart 2009).

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40. Including in fact D, although nothing seems to have turned on this in assessing D's liability.

this damage, B had suffered consequential economic loss through disruption to B's business. At first instance, B's claim to recover that loss from D had been rejected – the loss was consequential on damage to property, but B had no legal title to that property, and so B's loss was purely economic loss. This analysis is consistent with View 1, and it shows an important practical consequence of the formal difference between a legal property right to a physical thing and an equitable interest. If a party has a legal property right, then economic loss arising from careless damage to the thing is not *purely* economic loss, as it is consequential on the defendant's breach of a duty not to deliberately or carelessly interfere with the physical thing. In contrast, on View 1, where B has an equitable interest, then it is A who has the right to the physical thing, and so any consequential economic loss suffered by B through an inability to use the thing is pure economic loss.

The Court of Appeal, however, allowed B's appeal. The result is thus consistent with View 2 rather than with View 1. However, the decision is inconsistent with authority[41] and is unpopular,[42] even with supporters of View 2.[43] It is important to note the confusion in the reasoning of the court. First, the Court of Appeal agreed with the first instance characterisation of B's loss as purely economic loss. This step of the reasoning is consistent only with View 1, and not with View 2. Second, the court stated that, even where B's loss is purely economic, recovery is allowed where there is a 'special relationship' between claimant and defendant, establishing proximity between the two. It was then found that B's 'beneficial ownership of the damaged property … does indeed constitute a special relationship'.[44] That reasoning is very hard to follow – the existence of the trust, of course, shows there is a special relationship between A and B but, by itself, tells us nothing about the relationship between B and a third party, who may know nothing either of the trust or B, but who simply carelessly damages a physical thing.[45]

What was the source of the Court of Appeal's error? It was the heuristic that a beneficiary of a trust is the 'real owner' of the relevant resource: a short-cut that is often harmless but which here led the court astray. 'Beneficial ownership' can be used in a general sense to identify a party who is free to take the economic or other benefits of a particular asset.[46] In that sense, it can include some beneficiaries of trusts. That does not mean, however, that the rights of such parties should have the same third party effects as a legal property right, such as the right I have in my bicycle. For example, if A holds shares on trust for B, then the existence of A's duty to B means that it is ultimately B, rather than A, who takes the economic benefit of the shares. To describe B as having 'beneficial ownership' is misleading if it leads to the assumption that B should have the same rights as someone who just holds shares outright. If I hold shares outright, then I am registered as their holder, and I have the rights and powers that go with the shares, such as to vote or receive dividends. Where A holds the shares on trust for B, it is A

41. See eg *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785; *Parker-Tweedle v Dunbar plc (No 2)* [1991] Ch 12 (CA).
42. See eg Edelman (n 20) 67–72.
43. See eg Penner (n 9) at fn 36.
44. *Shell* (n 39) [136].
45. See further B McFarlane, 'Form and Substance in Equity' in A Robertson and J Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart 2019).
46. See Lord Briggs in *Frenkel v LA Micro Group (UK) Ltd; LA Micro Group Inc v LA Micro Group (UK) Ltd* [2024] UKSC 42 at [20].

who has those rights and powers, not B. To describe B as having 'beneficial ownership', simply because B will ultimately take the economic benefit of those rights, overlooks a crucial aspect of the structure of the parties' rights.

In *Shell*, the Court of Appeal suggested that it would be 'legalistic' to deny B recovery of B's economic losses as it was B, rather than A, who was the '"real" owner' of the damaged property.[47] Yet it is strange for a court to say that the structure of the parties' rights should not be determinative, and to treat B as having the advantages of ownership of land, where that land was registered in the name of A. The controls placed on the acquisition and content of legal property rights are not mere technicalities. The significance of legal property rights lies precisely in the prima facie strict duty they impose on the rest of the world. This is why recognising liability for economic loss consequent on the breach of such a duty does not impose an unfairly indeterminate liability on defendants.[48] The absence of the same constraints on the acquisition and content of equitable property rights means that such unfairly indeterminate liability is a result of the Court of Appeal's analysis in *Shell*. The irony is that the court recognised that the need to avoid such liability lies behind the 'exclusionary rule'[49] denying general recovery of pure economic loss in negligence but it did not appreciate that precisely that problem arises if recovery is allowed for a beneficiary of a trust. After all, there is no limit on the number of beneficiaries of a trust, or on the varied ways in which their economic well-being might depend on the asset held on trust.

B. *Akers v Samba*

In *Akers v Samba*,[50] B claimed that shares in a Saudi company were held by A on trust for B. If B were thereby making a direct claim to the shares themselves, to equitable ownership of that underlying asset, it would be natural for the *lex situs* to govern B's claim. That was in fact an argument made against B: it was contended that Saudi law would not give effect to a claim that a trust existed, and so B's claim should fail. That argument was, however, rejected by the Supreme Court. Drawing on a long line of authorities, Lord Mance stated 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'.[51]

It is very hard to square this analysis with View 2, on which, certainly in a simple case such as *Akers*, B *is* making a direct claim to equitable ownership of the underlying asset. On View 1, in contrast, the simple point is that B is not disputing A's ownership of the shares, acknowledged by Saudi law, but is rather arguing that A must use that right for the benefit of B. View 1, then, explains why establishing the existence or otherwise of a trust, or other arrangement giving B an equitable interest, does not require B to show that B has a claim to a particular asset, and so does not vary according to the nature of

47. *Shell* (n 39) [132].
48. See eg *Cattle v Stockton Waterworks Co* (1875) LR 10 (QB) 453, 457 (Blackburn J).
49. *Shell* (n 39) [116] and [132].
50.
51. ibid [34].

that underlying asset, or the jurisdiction in which it is located. The decision on this point provides an implied, but clear, rejection of the Court of Appeal's reasoning in *Shell*. In Akers, the fact that B was claiming an interest under a trust, rather than the shares themselves, was not seen as a mere technicality, but was crucial to the finding that B's claim need not be determined by Saudi law.

In *Akers*, the question then arose of whether A's transfer of the shares to C, made after a winding up petition had been presented against B, was prima facie void under section 127 of the Insolvency Act 1986. This would be the case if the transfer were a 'disposition' of B's property. Under the very broad definition provided by that Act[52] it is clear that a right under a trust can count as 'property'. It is worth noting in passing that this causes no difficulties for View 1, which depends not on whether the 'property' label is or is not applied to equitable property rights but rather on the proper characterisation of how such rights have third party effect and why they are thus treated differently from purely personal rights. So, under section 127 of the Insolvency Act 1986, an assignment by B to B2 of B's equitable property right will be a disposition of B's property. In *Akers*, however, B had made no such assignment: it was rather A's right that had been transferred to C.[53] Under View 1, the transfer of the shares from A to C is not caught by section 127 as there is no disposition of B's property. Under View 2, in contrast, B has an interest in the shares themselves, and so the transfer of the shares *must* be a disposition of B's property. Indeed, *Akers* seems to be a case of a bare trust, where A held the shares subject to a duty to comply with B's directions in relation to the shares, and so B, on View 2, can be seen as the equitable owner of the shares. In *Akers*, the Supreme Court unanimously decided that the transfer of the shares by A was *not* a disposition of B's property: this is impossible to accept under View 2[54] but is perfectly consistent with View 1. Certainly, not all acts which bring an end to an equitable property right count as dispositions of that right. In *Vandervell v IRC*,[55] the House of Lords confirmed that, where A, at the request of B, transfers the trust assets to C, there is no disposition of B's equitable interest to C, and so the formality requirement in section 53(1)(c) does not apply. Although *Vandervell* was not mentioned in the judgments in *Akers*, that later case turned on the same essential point: where A transfers shares to C, what C acquires is simply the shares, and, whether or not B can make a claim against C, there is no transfer of B's equitable property right to C.

Along with *Shell*, *Akers* thus provides a practical example of when 'thinking slow' is required: where the heuristic of equitable ownership fails, and a more precise analysis is required. In contrast to *Shell*, the Supreme Court did not feel it would be unduly 'legalistic' for the legal outcome to depend on a proper analysis of the precise nature of the parties' legal relations.

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52. Insolvency Act 1986, s 436. As Browne-Wilkinson V-C noted in *Bristol Airport plc v Powdrill* [1990] Ch 744, 759: 'it is hard to think of a wider definition of property'.

53. *Akers* (n 50) [54] (Lord Mance), [73] (Lord Neuberger) and [88]–[90] (Lord Sumption).

54. It is interesting, given his analyses in *Byers* (see Section II.C), that, speaking extra-judicially, Briggs LJ (as he then was) was critical of the practical impact of the Supreme Court's decision in *Akers*: '*Akers v Samba*: Equity's Darling Reigns Supreme' (2017 Chancery Bar Association Annual Lecture).

55.

C. *Byers v Saudi National Bank*

Byers v Saudi National Bank[56] is a sequel to *Akers v Samba*. Having failed to persuade the Supreme Court that A's transfer of the shares to C was void under section 127 of the Insolvency Act, B argued instead that C was liable in knowing receipt to account for the value of the shares. It is worth noting that B did not argue that C had to give up the shares themselves. It seems that B accepted that such a 'proprietary claim' would not be possible, as the legal effect of the transfer of the shares by A to C would be governed by Saudi law, under which C would be regarded as having acquired the shares free from any claim of B. A knowing receipt claim, B argued, could nonetheless succeed, as it focussed instead on C's unconscionable conduct in acquiring the shares where it knew that the shares were transferred to it in breach of A's duties as trustee. After all, B might argue, *Akers* had acknowledged that A held the shares on trust for B, even though Saudi law would not recognise such a trust; if A's conscience could thus be affected, why not C's?

The Supreme Court unanimously rejected B's argument: the same reason that prevented B making a 'proprietary claim' also prevented a knowing receipt claim. Such a claim was impossible where C acquired the shares free from B's pre-existing right under the trust. It should be said immediately that, unlike *Shell* and *Akers*, *Byers* is one of the many cases where the outcome is the same under each of View 1 and View 2. It is nonetheless significant that the reasoning of the Justices of the Supreme Court depended on View 2. The argument to be made here is that it is precisely this reliance on View 2 which causes some problems with that reasoning, which would have been avoided under View 1.

Lord Briggs described the liability in knowing receipt as 'ancillary' to the 'proprietary claim' which might be made in relation to trust assets, or their traceable proceeds, held by C.[57] The liability, therefore, could not arise if the circumstances of the transfer to C meant that B had no 'continuing equitable interest' in the trust property. Lord Burrows also regarded a 'continuing equitable interest' as necessary for a knowing receipt claim, explaining this on the basis that knowing receipt 'can be helpfully viewed as the equitable analogue of the tort of conversion'.[58] The remaining Justices accepted the need for a 'continuing equitable interest' stating that, to the extent that the views of Lords Briggs and Burrows differed, they preferred the former.[59] This reasoning is consistent with View 2: one aspect of the third party effect of B's equitable property right, the liability in knowing receipt, is seen as depending on B's having a right in relation to a resource that imposes a duty on the rest of the world. The difficulty, however, is that, such reasoning, whilst attractive in a simple case like *Byers* where A holds on what is effectively a bare trust for B, and B brings the knowing receipt claim, cannot explain the wider operation of knowing receipt. First, as Jessica Hudson has highlighted, it is possible for a trustee to bring either the

56.
57. ibid [42].
58. ibid [48].
59. ibid [6].

'equitable proprietary claim' or a knowing receipt claim against a recipient of trust assets:[60] such a party does not, of course, have an equitable property right in those assets. Second, as Lusina Ho and Charles Mitchell have emphasised,[61] where assets held on charitable trust are misapplied, an 'equitable proprietary claim' or a knowing receipt claim can be made by a party (such as the Attorney General) with standing to enforce the charitable trust. Such a party does not have an equitable property right in the assets. Similarly, as noted in Section I.A, either claim can be brought by a legatee of an unadministered estate.

The reasoning in *Byers* thus seems to fall into the trap noted in Section I.A above: it assumes that a feature of the law of trusts (the possibility of a knowing receipt claim) depends on a beneficiary of the trust having an equitable proprietary interest, even though that feature can apply both in relation to trusts without a beneficiary and in relation to situations where there is no trust but a party holds a right and is under a duty in relation to that right. The influence of View 2 is particularly apparent in the judgment of Lord Burrows, which sees knowing receipt as analogous to the tort of conversion,[62] and so assumes that there is a structural similarity between the third party effects of an equitable property right and of a legal property right. The problem with this analysis is that the tort of conversion recognises the strict prima facie duty that the rest of the world owes to someone with a right to a physical thing, and there is no such duty where B has an equitable property right.

The reasoning of the Supreme Court in *Byers* is less problematic if suitably limited. The point is that where, as in *Byers*, B's knowing receipt claim depends on B's having an equitable interest under a trust, then such a claim will fail if the circumstances of C's acquisition of the trust assets means that C takes free from B's pre-existing equitable interest. In such a case, the particular means by which C's conscience is said to be affected is C's acquisition of a right, where that acquisition depended on A's exercise, in breach of a duty to B, of a power to give C that right. So if there is a reason why the circumstances of that acquisition prevent C's conscience being so affected, C should be protected from both an 'equitable proprietary claim' and a knowing receipt claim.[63] This does not mean, however, that *all* cases of knowing receipt depend on B's having such a continuing equitable property right: in some cases (as when the knowing receipt claim is brought by the trustee, or by a party with standing to enforce a charitable trust) the claim can be made even where the claimant has no such right. Indeed, even in such cases, it is still the case that the circumstances of C's acquisition may mean that C is protected from both a 'proprietary claim' and a knowing receipt claim: if assets held on charitable trusts were trans-

60. J Hudson, 'Assuring the Express Trust: The So-Called "Beneficiary's Proprietary Claim"' (PhD thesis, University of New South Wales 2019) ch 7. See eg *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072, 1074; *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91 at [32] and [76]–[77]; *Young v Murphy* [1996] 1 VR 279; *Eden Refuge Trust v Hohepa* [2012] NZCA 124; *Shovlin v Site Civils and Surfacing Ltd* [2024] EWCA Civ 585 (where the claim failed on the facts). I am grateful to an anonymous referee for these references.

61. Mitchell and Ho (n 14): see Section I.B.

62. *Byers* (n 56) [48]: knowing receipt 'can be helpfully viewed as the equitable analogue of the tort of conversion because it is a proprietary wrong concerned with interference with equitable property rights, albeit that that analogy is a loose one because, unlike the tort of conversion, it requires knowledge and does not impose strict liability'.

63. See B McFarlane and S Agnew, 'The Nature of Trusts and the Conflict of Laws' (2021) 137 LQR 405.

ible against C. Certainly, View 1 can also make sense of Lord Briggs' view that a knowing receipt claim is 'ancillary'[64] to the 'equitable proprietary claim': on View 1, each claim gives effect, as closely as possible in the circumstances, to C's duty, arising where C's conscience is affected by knowledge of the unauthorised nature of the transfer from A to C, to restore the rights so that they can be held, by A or a replacement trustee, on the terms of the initial trust.

The particular facts of *Byers* also caused the Supreme Court to overlook an important point about the justification for liability in knowing receipt. Where A holds on trust for B, and B brings the knowing receipt claim, B, as in *Byers*, may ask for C to account directly to B for the value of the misapplied trust assets. This does not mean, however, that the purpose of the claim is to protect an equitable property right of B in those assets. As noted in Section I.A, the more usual aim of a knowing receipt claim in the trust context is to ensure that the assets held on trust are restored to the value they would have but for the unauthorised disposition. This is clear where, for example, the knowing receipt claim is brought by a trustee. Further, in a charitable trust, or discretionary trust, if a non-trustee brings the knowing receipt claim, they will not be asking for payment direct to them, but rather for payment to the trustee to restore the value of the assets held on trust. The aim of the claim is not to compensate a particular party, such as a beneficiary, for loss suffered; it is rather to restore the value of the assets held on trust, and thus to uphold the initial duty subject to which rights were held, prior to the unauthorised disposition.

III. Four arguments

The purpose of this section is to consider four arguments in favour of View 1, each of which builds on academic work since 2010. These arguments also build on the discussion in Sections I and II above. The first two arguments are specific to trusts; the third and fourth are not.

A. The variety of trusts

This argument builds on the analysis of *Byers* in Section II.C above. It is based on the danger of centring analysis of the operation of trusts on the simple, but not necessarily representative, case where A holds a right on trust for B. For the purposes of exposition, it is common to start with such a case. As shown by *Akers* and *Byers*, such cases do occur in practice. Similarly in *Shell*, whilst B was in fact one of six beneficiaries, the trust was a simple one, under which each of those six parties had an immediate vested equitable property right. In these relatively straightforward cases, it is understandable that B may be thought of as having equitable ownership, or at least as having an interest which closely resembles a legal property right.

As shown in the discussion above of each of *Shell* and *Byers*, it is, however, dangerous to generalise from such cases. An adequate account of the trust must be capable of explaining rules which operate

64. *Byers* (n 56) [41]–[42].

across the widely diverse forms of trust which exist in practice, and which vary in important ways from A's holding on trust for B. As Lusina Ho has suggested,[65] a useful parallel can be drawn with the decision of the Privy Council in *Schmidt v Rosewood Trust Co.*[66] As courts had ordered disclosure of trust documents to beneficiaries with immediately vested equitable property rights, it had been thought that such disclosure was based on the claimant having an equitable property right in relation to, even equitable ownership of, the trust documents. As a result, it was assumed that such disclosure could not be ordered where the claimant had no such equitable property right. That assumption was proved incorrect in *Schmidt*, where Lord Walker held that disclosure could potentially be ordered in favour of a party, such as a potential recipient under a power of appointment, who had no immediately vested equitable property right. The principal issue is not the nature of the claimant's right, and whether it is proprietary or not; it is rather the duty of the defendant, which subjects them to the court's supervisory jurisdiction over trusts.

The standard model where A holds on trust for B may mislead as it has *too few beneficiaries*. In a case such as *Shell*, where A holds a legal property right to a physical thing on trust for only a small number of beneficiaries, it may seem reasonable that a party who carelessly damages the physical thing should be liable for the consequential economic losses of those beneficiaries. However, as noted in Section II.A, the problems of such a liability are clear when it is remembered that there is no limit to the number of beneficiaries of a trust. Conversely, the standard model of A holding on trust for B can also include *too many beneficiaries*. A problem with View 2 is that it can ascribe particular results to B's being the 'real owner',[67] or having a 'continuing equitable interest',[68] even if such results also apply in a case where there is no party who can plausibly be said to have such a right. As noted in Section II.C, for example, the availability of proprietary claims and knowing receipt claims following the misapplication of assets held on charitable trust demonstrates that such claims do not require the claimant to have an equitable property right.

B. The position of the trustee

It was noted in Section II.C that, following an unauthorised disposition of a right held on trust, it is possible for a trustee to make a claim for the return of that right, or for knowing receipt. This links to a second way of presenting View 1 more effectively: to focus on the position of the trustee. The analysis in Section II.B of *Akers* has already shown one practical advantage of doing so. In that case, as the Supreme Court confirmed, the transfer of shares by A to C did not involve a disposition of B's property. It is thus clear that, even if the transfer by A led to C taking the shares free from any claim of B, A did not transfer B's equitable property right in the shares to C; rather, A simply transferred the shares.

65. L Ho, 'The Nature of the Interest of an Object of a Trust or Power' in J Penner and others (eds), *The Property-Contract Interface: Historical and Theoretical Perspectives* (forthcoming).
66.
67. *Shell* (n 39) at [132].
68. *Byers* (n 56) at [42].

On View 1, it is important to note that the right that A holds on trust is not in itself changed by the existence of the trust.[69] As Andreas Televantos and I have argued, View 1 can be useful in understanding the operation of the bona fide purchaser for value without notice defence in a case where A holds on trust.[70] Contrary to View 2, as adopted by, for example, Peter Birks,[71] that defence does not form an exception to the principle of *nemo dat*. In a case such as *Akers*, C, when acquiring the shares from A, has no need of such an exception: A does indeed have the shares, and thus has a power to transfer them to C. The question therefore is not whether C has acquired an equitable interest as well as a legal interest in the shares. The question is rather whether C, when acquiring the shares, also came under a duty to B in relation to it; or, to use Lord Sumption's language in *Akers*,[72] whether C's conscience is affected.

Further, even in a simple case where A holds on trust for B, significant rights and powers can be exercised by A for purposes other than the immediate benefit of B. This has been made clear by the decisions of the High Court of Australia in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth*[73] and of the Privy Council in *Equity Trust (Jersey) Ltd v Halabi; Investec Trust (Guernsey) Ltd v Fort Trustees Ltd.*[74] Each case considered trustee indemnities: the ability of a trustee to make use of rights held on trust to meet authorised trust debts, or to reimburse the trustee where the trustee has itself met such debts. The main point for present purposes is that A is free to exercise these powers *before* using the trust asset directly for the benefit of B. So, for example, even in the simple case of A holding on trust for B, the *Saunders v Vautier* power[75] available to B to put an end to the trust and acquire the trust assets directly cannot be exercised if there are outstanding trustee indemnities. This means that, even in that simple case, and even if 'beneficial ownership' is interpreted broadly, to refer to economic enjoyment of an asset, B's supposed 'beneficial ownership' of the trust assets is quite different in its nature from the direct, unmediated rights that I enjoy over my bicycle. B has to take B's place within the set of parties, including current trustees and former trustees, with entitlements to access the value of the trust assets.

The reasoning of the Privy Council in *Halabi* also reveals the difficulties that View 2 causes when considering the operation of a trustee's powers of indemnity. Lord Briggs' view in that case was that, whilst the beneficiaries have equitable ownership of the trust assets, the trustee has an equitable lien over those assets. The trustee's lien is, however, a special, 'sui generis', type of equitable property right, as the usual priority rules do not apply.[76] As a result, the powers of indemnity of an earlier trustee do

69. See W Swadling, 'Property' in A Burrows (ed), *English Private Law* (3rd edn, OUP 2013) 4.145: 'It is of the essence of a trust that the placing of a right on trust in no way alters the nature of the right.' See too B McFarlane, 'Trusts, Property, and Rights' in S Degeling and others (eds), *Philosophical Foundations of the Law of Express Trusts* (OUP 2023) 44.

70. B McFarlane and A Televantos, 'As Complex as ABC? Bona Fide Purchasers of Equitable Interests' in P Davies and T Cheng-Han (eds), *Intermediaries in Commercial Law* (Hart 2023).

71. P Birks, 'Notice and Onus in *O'Brien*' (1998) 12 TLI 2.

72. *Akers* (n 50) [89]: '[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.'

73. *Carter* (n 8).

74.

75. *Saunders* (n 5).

76. *Halabi* (n 74) [250].

not necessarily take priority over those of a later trustee; rather, the indemnities should be ranked *pari passu*, to avoid unfairly placing the risk of there being insufficient trust assets to meet the indemnities on the later trustee. One difficulty with this analysis is its starting point: that, as the beneficiaries have a property right in the trust property, the trustee's indemnity, since it takes priority over the beneficiaries' right, must also be a property right in the trust property. It then seems odd to downplay the proprietary nature of the trustee's right by failing to apply the standard equitable priority rules between successive trustees. Andreas Televantos has argued that the outcome reached by the majority in *Halabi* can equally be explained, consistently with the majority's emphasis on the 'enduring quality' of a trust, by seeing a trustee's rights of indemnity as an aspect of the trustee's right to the due administration of the trust fund.[77] It can be argued that the rights of beneficiaries have the same source and are unduly, and misleadingly, promoted if thought of instead as 'beneficial ownership'. As Giuseppe Jafari has argued,[78] B's position is perhaps closer to that of the legatee of an unadministered estate than to that of an owner of a bicycle: B, like the legatee, is simply one of a number of parties who benefit from another's duty of due administration. The aim of the law in such cases is not to rank competing property rights by applying priority rules; it is rather to have a set of duties and power that works best towards the overall aim of ensuring, as far as possible, that, where A has a duty in relation to particular rights held by A, that duty is performed.

Even in the simple case of A holding on trust for B, therefore, View 2, and its suggestion that B has a direct proprietary right in the trust assets, mischaracterises B's position. A focus on the simple case of A's holding on trust for B suggests that a trustee's duty is to act for the benefit of B, but it becomes readily apparent, when looking beyond that simple case, that the trustee's duty is in fact dictated by the terms of the trust, and so is better described, in a formulation capable of capturing the wide diversity of trusts, as a duty of due administration.[79] This duty, as we have seen, can be enforced by not only the beneficiaries but also other trustees.

C. The importance of A's powers

The third argument which can improve the case for View 1 depends on paying careful attention to what is meant when it is said that A holds a right subject to a duty. In making this argument, I am indebted to the work of a doctoral student at the University of Oxford, Eleanor Eldridge. At the risk of simplifying her much more detailed analysis, Eldridge makes the point that, on a Hohfeldian analysis, powers have special features which can distinguish them from claim-rights, liberties and immunities. In particular, where A has a power, A can exercise that power (or not), and so A can come under a duty to exercise

77. A Televantos, 'Trustees and their Creditors' (2025) 141 LQR 561. For a different analysis of the nature of a trustee's right of indemnity, see J Hudson and C Mitchell, 'Trustee Recoupment: A Power Analysis' (2021) 35 Trust Law International 3.
78. G Jafari, *Rights Appropriated to a Scheme: Trusts, Partnerships and Deceased Estates Compared* (MPhil thesis, University of Oxford 2021).
79. See Jing, 'Concept of Beneficial Ownership' (n). See too J Hudson, 'Mere and Other Discretionary Objects in Australia' in Y Khai Liew and others (eds), *Asia-Pacific Trusts Law: vol 1* (Hart 2021) 23: 'The right to due administration is the central mechanism for control of the trustee in her exercise of powers over trust property.' See too J Hudson, B McFarlane, and C Mitchell, *Hayton, McFarlane and Mitchell on Equity and Trusts* (15th edn, Sweet & Maxwell 2022) 3-143 to 3-192.

that power (or not).[80] The notion, central to View 1, of a duty-burdened right is simple to understand where the right subject to a duty is a power, or includes powers; it is harder to work out what it might mean, for example, to have a claim-right that is subject to a duty. So, in a case such as *Shell*, discussed in Section II.A, where A holds A's registered title to land on trust, it is possible to think of A being under duties in relation to A's 'right to exclude'. In practice, however, this means that A is under duties in relation to the *powers* that A has as a result of having title to land: powers, for example, to license use of the land, or to bring proceedings against a stranger who, without A's consent, deliberately or carelessly damages the land.

This clarification of View 1 is very helpful, and it also fits well with an important point made by James Penner:[81] it is generally the powers of a trustee, such as the powers to make investments or to make dispositions of the trust property, which are most important in securing benefits to a beneficiary. Contrary to Penner's assertion, however, focussing on such powers of the trustee does not mean that the beneficiary should be seen as having an interest in the trust property itself. Rather, consistently with View 1, the trustee is under a duty in relation to those powers which arise as part of the rights held on trust. Further, focussing on the powers of the trustee can help in drawing the key distinction between those third parties who are, and those who are not, liable to come under a duty to give up the trust property or its traceable proceeds. Where A, the trustee, makes a transfer to C, unauthorised by the trust, C's right is acquired as a result of A's exercise of a power (the power to make a transfer) that A held subject to a duty. Where C's conscience is affected,[82] C can be made to give up that right, as C's acquisition of it depended on an unauthorised exercise by A of a duty-burdened power. In contrast, where, as in *Shell*, X directly interferes with the trust property, there has been no exercise of such a power by A, and there is no right of X, acquired as a result of such an exercise of a power, that X can be made to give up. A focus on the powers of the trustee thus helps View 1 to explain why only a specific class of third parties are subject to such a liability; View 2, in contrast, struggles to explain this important aspect of the third party effect of equitable property rights.

The same point helps to explain the nature of liability in knowing receipt. That liability does not arise whenever a third party, C, knowingly benefits from an unauthorised disposition of trust property; rather than simply benefitting, C must specifically acquire particular rights if the liability is to arise. As the members of the Court of Appeal put it in *Byers*, for liability in knowing receipt to arise, '[a] defendant must have received trust assets, not just benefited from them'.[83] This provides a further reason to doubt Lord Burrows' analysis of knowing receipt as an equitable analogue to the tort of conversion: the gist of knowing receipt lies in the receipt of rights from A,[84] not in interference with the rights of B.

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80. It is also possible for A to be under a duty that the power be exercised (or not): see generally E Eldridge, 'Rights That' (2024) 44 OJLS 808.

81. Penner (n 9).

82. See eg *Akers* (n 50) [89].

83.

84. Or from an intermediate party, so that in any case the defendant's acquisition of a right depends on the initial unauthorised exercise of a power by A. See eg *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499 at [89]: 'receipt of trust property is the gist of the action'.

A focus on powers may also assist when understanding claims in relation to traceable proceeds. This is another context in which the courts have been tempted to use proprietary language to justify particular results. In *Foskett v McKeown*, for example, the ability of B to make a claim in relation to traceable proceeds of a right initially held on trust was said to be a matter of 'hard-nosed property rights'.[85] As has been pointed out, however, this involves 'a fiction of persistence':[86] a feature of a property right is precisely that it exists in relation to a specific asset and so, as shown by Anirudh Belle, if a claim is instead made in relation to a *different* asset, the existence of that prior interest is not, in itself, sufficient to explain the claim to the new asset.[87] Moreover, claims to traceable proceeds are not limited to cases where there is a beneficiary: if A holds a right on a charitable trust and acquires a new right through an unauthorised dealing with that initial right, A may also come under a duty in relation to that new right.[88] On View 1, a justification for claims in relation to traceable assets must be linked to the nature of A's initial duty.[89] As that duty relates to A's power to deal with the initial trust assets, and the new right acquired by A is a product of that power, there is a clear case for A's also coming under a duty in relation to that new right. Just as A's exercise of a power in C's favour links C to A's initial duty in relation to that power, so does A's exercise of a power link traceable proceeds of that exercise to A's initial duty in relation to that power.

Further, a focus on powers assists in understanding the nature of equitable property rights that do not arise under trusts. Consider the case, for example, where B has an equitable easement in relation to A's land. On View 1, this is because A is under a duty to B that relates to a particular power A holds as part of A's estate in A's land: the power to grant an easement.[90] That power, an incident of A's estate, is assumed by C if A later transfers A's estate to C. As a result, B can argue that the need to uphold A's duty to exercise the power justifies requiring C to exercise C's power, at least if the circumstances of C's acquisition of the power from A mean that it would be unconscionable for C to refuse to exercise the power. Beyond the land law context, the equitable charge works in a similar way. It gives B more than a merely personal right as it relates to a power that A has as the holder of a right: the power to sell the right and use its proceeds to meet a particular debt. The exception, of course, is the restrictive covenant: an equitable property right that does not relate to a specific power of A but rather prevents the exercise by A of a *liberty* in relation to A's land. As I have discussed at length elsewhere,[91] the difficulty of reconciling the restrictive covenant with View 1 can in fact be seen as a strength of View 1: on any view, the restrictive covenant is an unusual form of equitable property right not least because, exceptionally, it has been allowed to have third party effect not only against successors to A but also against strangers

85.

86. P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 34–37.

87. A Belle, 'Claims with Respect to Pre-Existing Property Rights: A Search for Principle and Coherence' (DPhil thesis, University of Oxford 2024) ch 5.

88. See eg J Hudson, 'Equitable Ownership and Restitution of Misapplied Trust Property' (2017) 11 J Eq 245.

89. See eg B McFarlane and R Stevens, 'What's Special About Equity?' in D Klimchuk and others (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020).

90. See McFarlane (n 2) 370–71.

91. B McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' in S Bright (ed), *Modern Studies in Property Law: vol 6* (Hart 2010).

who independently acquire a right to the relevant land.[92] As Lord Jessel MR once observed,[93] it is, in effect, 'an extension in equity of the doctrine of negative easements' – an example where, exceptionally, equity has added (albeit only in relation to land) to the list of rights that relate to a resource and are prima facie binding on the rest of the world. Put baldly, proponents of View 2 are welcome to the restrictive covenant: the ability to explain such an unusual equitable property right is not a sign of strength in a theory that seeks to explain all such rights.

D. Lessons from history

The final argument that can be used to support View 1 depends on examining the history of the courts' development of the rules governing the operation of trusts. This argument is prominent in the analysis of James Edelman,[94] who notes that the assumption that a beneficiary of a trust has 'beneficial ownership' is inconsistent with earlier commentary which regarded B not as having an independent claim to the trust asset but rather as having, in Edelman's words, 'an interest or encumbrance upon the rights held by the trustee'.[95] David Foster's account of historical conceptions of the express trust notes that, in relation to land, a beneficiary's rights were consistently seen as relating not to the land itself but rather to the estate in land vested in the trustee: 'the core idea was that the trust attached to the estate vested in the trustee and would bind the trustee's successors in title'.[96] The idea, crucial to View 1, that the beneficiary's right relates not to the land itself but rather to the trustee's right to the land is thus a long-standing one.

As noted in Section I.A, there are aspects of the operation of the trust which can be grouped together, on View 2, as showing that a trust beneficiary has a property right in the trust assets themselves. It might then be thought that those aspects arose *because* a beneficiary's rights were regarded by the court as proprietary rights. However, further historical analyses, in addition to that of Foster, show that this was not the case. David Fox,[97] in his examination of the protection of a trust beneficiary in the insolvency of the trustee, clearly shows that such protection evolved gradually, in response to the demands of particular fact patterns, and was not motivated by a classification of a beneficiary's rights as rights directly in or to the trust assets.[98] The same conclusion is drawn in respect of the history of the equitable lien by Mitchell Cleaver;[99] indeed, Cleaver there identifies some early cases in which the eff-

92. See *re Nisbet & Potts Contract* [1906] 1 Ch 386.

93. *London & South Western Rwy Co v Gomm* (1882) 20 Ch D 562 at 583; approved by Vaughan Williams LJ in *Formby v Barker* [1903] 2 Ch 539 at 552–53; and by Cozens-Hardy LJ in *re Nisbet & Potts Contract* [1906] 1 Ch 386 at 402.

94. Edelman (n 20).

95. ibid, 72, referring for example to F Sanders, *An Essay on the Nature and Laws of Uses and Trusts* (1791) and Indian Trusts Act 1882, s 3.

96. D Foster, 'Historical Conceptions of the Express Trust, c 1600-1900' in Degeling and others (eds), *Philosophical Foundations of the Law of Express Trusts* (OUP 2023) 110, 119.

97. D Fox, 'Bankruptcy Protection for Trusts before the Judicature Acts' in B McFarlane and S Elliott (eds), *Equity Today: 150 Years after the Judicature Reforms* (Hart 2023).

98. See too A Reilly, 'The Past, Present, and Future of "Equity's Darling": A Disabling Doctrine?' (2024) 18 J Eq 32.

99. M Cleaver, *The Equitable Lien* (DPhil thesis, University of Oxford 2025).

ect of B's equitable lien on a third party was linked to the idea of that lien binding a right held by the third party.[100]

Such accounts show that, as a matter of history, courts working out the operation of the law of trusts and of equitable property rights, and commentators seeking to explain those rules, did not generally reason from assumptions as to the proprietary status of a party's rights. Rather, the lively debate in the late nineteenth century and beyond as to the nature of a beneficiary's right can be seen to arise from a desire to see whether an Austinian distinction between different types of right can be made, retrospectively, to fit with a set of rules that were developed without paying attention to such a distinction. If that is one reason why the debate has been long-running, it is also a reason why it has been unproductive. It should not be thought that a product of judicial development, and of the split between equity and common law, must necessarily fit neatly into either a proprietary or personal box.

IV. Five final thoughts

By reflecting on some case-law examples of the last fifteen or so years, this article explained in Section II why the choice between View 1 and View 2 matters in practice. By reflecting on some academic contributions over that same period, this article, in Section III, picked out four arguments in support of View 1. This concluding section contains five final reflections, framed as suggestions to the judges, practitioners, commentators and students who will continue to participate in the debate as to the nature of equitable property rights and trusts.

A. Choose your words carefully

It was argued in Section II.B that the decision of the Supreme Court in *Akers* is consistent with View 1 but impossible to reconcile with View 2. Yet the language used in some of the judgments can give unjustified succour to View 2. For example, Lord Sumption stated that:[101]

> An equitable interest possesses the essential hallmark of any right in rem, namely that it is good against third parties into whose hands the property or its traceable proceeds may have come, subject to the rules of equity for the protection of bona fide purchasers for value without notice.[102]

'In rem' more usually refers to rights that are prima facie binding on the rest of the world, and so the use of the term here is consistent with View 2. However, Lord Sumption adopts an idiosyncratic definition of that term, focussed not on the general effect of B's right but on its ability to affect a *specific class* of third parties: those who acquire rights that derive from A's rights. Indeed, Lord Sumption also states

100. See eg *Steed v Cragh* (1722) 9 Mod 42; 88 ER 303; 2 Eq Ca Abr 31; 22 ER 31.
101. *Akers* (n 50) [82].
102. Lord Sumption there cited Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 705.

that, when determining if such third parties are in fact bound by an equitable property right, the question is whether the conscience of those specific third parties is affected.[103] The means used to identify the third parties whom B's equitable property right may affect is thus consistent with View 1, as set out in Section I.A, even if the 'in rem' terminology creates the misleading impression of consistency with View 2. The loose use of such terms is one of the main reasons for the continued prominence of View 2.

B. Salvage the concept of legal property rights

It was noted in Section I above that, on View 2, equity can be seen to have extended not only the list of those rights that relate to a resource and can prima facie be asserted against the rest of the world, but also the list of resources in relation to which such rights can arise. Sarah Worthington has argued that, as a result, equity has played a pivotal role in challenging, and ultimately rendering meaningless, the traditional distinction between personal rights and property rights.[104] To some extent, such an argument is consistent with one of the elements of View 1: the idea that equity, by recognising equitable property rights as rights with a greater third party effect than a purely personal right, but with a different third party effect than legal property rights, has transcended the traditional distinction between personal rights and property rights. However, on View 1, this equitable intervention does not require us to jettison those classifications entirely: it rather means that a further, third type of right must be added, either as a wholly new type of right, or as a distinct sub-category of property rights. A benefit of such a move is that it opens up the possibility of finding a reasonably coherent definition of legal property rights, rather than trying to find a single definition of property rights that is broad enough to include each of legal property rights and equitable property rights, whilst also excluding purely personal rights.

C. Focus on duties that relate to powers

There has been a significant move in some recent scholarship on the nature of the trust: a shift to focussing on the duties of trustees rather than the rights of beneficiaries.[105] Where A holds rights subject to a duty in relation to those rights, the distinctive effects associated with equitable property rights (insolvency protection and the potential liability of third parties to return assets or their value) can apply even if there is no specific party who will necessarily benefit from A's performance of that duty, as other parties can be given standing to enforce both the duties of A and the liabilities of third parties.[106]

Even where there is a party who will necessarily benefit from the performance of A's duty, as where A holds on trust for B, or where B has an equitable easement, it may be that the effects on third parties can still best be understood by focussing on the nature of A's initial duty and the means by which equity will attempt to ensure, as far as possible consistently with other concerns, that the duty is performed. Equity's commitment to the enforcement of that initial duty is such that third parties, in some

103. *Akers* (n 50) [82].
104. Worthington, 'The Disappearing Divide' (n 10).
105. See eg Hudson and Mitchell, 'Standing' (n 15).
106. See Section I.B and Hudson and Mitchell ibid.

circumstances, can be bound, even if there is no party with a right in relation to a resource that is prima facie binding on the rest of the world. As Milsom memorably put it, 'equity has proved that from the materials of obligation you can counterfeit the phenomena of property'.[107]

Further, as noted in Section III.C, the duties of A can best be seen as duties in relation to the powers that A has as a result of holding a particular right. This also helps to explain the particular class of third parties who can come under liabilities where an equitable property right exists: they are third parties who have themselves acquired the relevant power, and have done so as a result, directly or indirectly, of the unauthorised exercise of the power by A.

D. Let equity be supplementary

The analysis in Section IV.C raises the question of why equity treats duties that relate to specific powers of A differently from other duties of A. The answer may be related to the characteristic secondary role of equity, to the fact that it often regulates how a party uses the rights and powers conferred by the law itself. In responding to duties which relate to such powers, the courts must consider the important role of private law, emphasised by Nicholas McBride,[108] in preserving its own legitimacy: there may be something particularly unattractive about allowing a party to exercise a legal power in a way which is inconsistent with a duty related to that power. Further, when the law responds to an unauthorised exercise of power, even if imposing liabilities on initially innocent third parties who acquire rights from such an exercise, it only takes away what it otherwise confers.

Again, though, attention must be paid to the specific form of intervention in equity. As in a case such as *Akers*, where A holds shares on trust and makes an unauthorised transfer of the shares to C, the exercise of the power, even though unauthorised, is still effective: the shares do indeed pass to C.[109] Equity thus does not contradict the rule that, for example, registration determines the ownership of the shares. Equity instead responds to A's lack of authority in a different way, by asking if C, as the new holder of the shares, is themselves under a duty in relation to those shares. As in the case of an unauthorised disposition of shares held on charitable trust, that duty can exist, and be enforceable, even if there is no party with an equitable property right. Similarly, even if there is a beneficiary of the trust, the claim against C need not depend on an assertion of such a right: it instead depends on showing that C, as A did, holds a right subject to a duty. On View 1, then, A's initial duty can have an impact on C without there being any need for equity to contradict the common law position, by holding, for example, that C is bound because it is B, rather than A, who is the 'real owner' of a particular resource. Similarly, where an equitable property right arises in anticipation of the performance of a duty to confer a legal property right, equity does not somehow disregard the requirements imposed on the conferral of such a right, and thus pretend, for example, that A has granted B an easement, or transferred a freehold to B, even before the formalities required for that grant or transfer have occurred. Rather, in those cases, the equit-

107. SF Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1961) 6.

108. N McBride, *The Humanity of Private Law: Part I: Explanation* (Hart 2020) ch 6.

109. See eg *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 (CA) 303–04. See further J Hudson, 'Equity's Gloss on Authority' in B McFarlane and S Elliott (eds), *Equity Today: 150 Years after the Judicature Reforms* (Hart 2023).

able easement, and the constructive trust, arise because A is under a duty to B and that duty relates to a specific power of A, held as part of A's freehold: the power to grant an easement, or to transfer the freehold.

E. Embrace the complexity

It may be useful for this article to finish, as it began, by citing Hohfeld. He argued that analyses of the trust and other equitable interests had failed as they had tended:

> to treat the specific problem as if it were far less complex that it really is; and this commendable effort to treat as simple that which is really complex has, it is believed, furnished a serious obstacle to the clear understanding, the orderly statement, and the correct solution of legal problems. In short, it is submitted that the right kind of simplicity can result only from more searching and more discriminating analysis.[110]

As noted in Section I, View 2 has the intuitive, but dangerous, appeal of the simple solution. Unlike View 1, it does not require the acceptance, alongside purely personal rights and legal property rights, of a third type of legal relation, of the recognition of a class of duties that are given special protection in equity because they relate to powers that a party holds by virtue of having a right. However, View 2 provides the wrong kind of simplicity: one that not only can lead to unsatisfactory outcomes in particular cases but which also, by flattening the distinction between equitable property rights on the one hand and legal property rights on the other, obscures the unique contribution of equity. 'Thinking slow' is certainly harder but, as this article has attempted to show, it may nonetheless be worthwhile.

110. Hohfeld (n 1) 20.