RIGHTS APPROPRIATED TO A SCHEME: TRUSTS, PARTNERSHIPS AND DECEASED ESTATES COMPARED

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ABSTRACT

Rights Appropriated to a Scheme: Trusts, Partnerships and Deceased Estates Compared

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This thesis focusses on English standard fixed trusts, English partnerships and English deceased estates. It examines some similarities and differences. These three institutions share at least two important features. The first is that they all involve rights being appropriated, in the totality of the jural relations to which those rights give rise, to a scheme. The second is that the scheme defines the rights of the beneficiaries in all three cases as subject to the priority claims of the scheme's managers and the scheme's creditors. If those claims exceed the assets of the fund, both during the scheme's existence and at its end, then the beneficiaries will be left with nothing. In this sense, the rights of trust beneficiaries, partners and legatees are residual. They are residual because the scheme beneficiaries' interests are vindicated after those of the scheme's manager and the scheme's creditors. At its core, the interest held by the scheme beneficiaries in these three cases is the same: a right to due administration of the scheme. That right exists because the scheme's beneficiaries have a practical interest in seeking the scheme's enforcement. Although the core interest held by trust beneficiaries, partners and legatees is the same, there are important conceptual differences in the nature of these three institutions, which may justify their separate treatment in certain contexts. With partnerships, the doctrine of ostensible authority provides an important difference with the standard fixed trust, whereas the fact that a legatee's interest is subject to the priority claims of both the deceased's general creditors and the executor's scheme creditors offers a valid criterion of distinction with the interest of a standard trust beneficiary.

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TABLE OF ABBREVIATIONS

CJEU – Court of Justice of the European Union

HCA – High Court of Australia

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United Kingdom

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Chapter I

Assets, Liabilities and their Unification

This thesis defends the following Core Claim:

Trusts, partnerships and deceased estates involve rights being appropriated, in the totality of the jural relations to which those rights give rise, to a scheme. The scheme, in all three cases, defines the rights of its beneficiaries as subject to the priority claims of the scheme's manager and the scheme's creditors. In this specific sense, the rights of the scheme's beneficiaries in these three cases are residual.

The Core Claim therefore contains two distinct propositions. First, trusts, partnerships and deceased estates entail rights being appropriated, in the totality of the jural relations to which those rights give rise, to a scheme. Second, the scheme in all three cases vindicates the interests of scheme managers and scheme creditors before those of the scheme beneficiaries.

Although the three schemes share important similarities, there are also important differences. The most meaningful difference between the standard fixed trust and partnerships resides in the doctrine of ostensible authority, which renders the residual interest

of partners more vulnerable – because subject to the priority claims of creditors whose rights arose in the usual course of the firm's business, even if not expressly authorised by the partnership deed – than those of standard fixed trust beneficiaries, whose residual interest is vulnerable only to the priority claims of creditors whose rights arose compatibly with the terms of the trust deed, as well as the priority claims of the scheme's manager. The most meaningful difference, meanwhile, between the rights of trust beneficiaries and legatees is that the former's residual interest is vulnerable only to the priority claims of the scheme's manager and the scheme's creditors, whereas the latter's residual interest is vulnerable to the priority claims not only of the scheme's creditors (i.e. those to whom the executor incurs authorised debts) but also of the deceased's general creditors.

This thesis argues for a model of trusts, partnerships and deceased estates, which views the scheme to which rights have been appropriated as the explanatory basis for the law's key features. In trust law, a competing model – which takes as its starting point, the "equitable ownership" or "equitable property rights" of the beneficiaries – will be challenged.[1] The rights of beneficiaries, on the view of this thesis, are part of the scheme, as are the rights of trustees and trust creditors. These rights are defined at the same primary level: by the scheme itself.

The thesis is structured as follows: Chapter I provides a definition of key terms; Chapter II analyses the fundamental structure of an English trust and its basic principles; Chapter III assesses a trust's asset partitioning features; Chapter IV compares partnerships and deceased estates with trusts; Chapter V concludes.

[1] *Ayerst v C & K Construction Ltd* [1976] AC 167, 177, *per* Lord Diplock. Nolan 'Equitable Property' (2006) 122 LQR 232; Penner, 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust' (2014) 27 Can J L & Juris 473.

This chapter will argue:

1. Titles or rights can be vested in at least two forms: beneficially or in order to promote a scheme.
2. A title or right entails a bundle of Hohfeldian jural relations.
3. An asset is any title or right of economic realisability.
4. Where a right is vested beneficially, it forms the common pledge of its holder's general creditors. Where a right is vested in order to promote a scheme, English law provides rules for ensuring that the right is the common pledge of the scheme's creditors.

I. Basic Terminology

We will draw throughout this chapter on the following example (*Marco's Case*):

Marco is vested with legal title in a Ferrari beneficially. He is not, *prima facie*, under a duty to anyone concerning the Ferrari's use. Marco can do whatever he wants with his Ferrari. His only obligation is to respect the background rules of his jurisdiction and the bundle of jural relations being vested with legal title in the Ferrari entails. Marco can use the Ferrari in his own interests. He is also free to be irrational and anti-social. That is the prerogative of being vested with a right beneficially. Harris has captured this idea in the language of "self-seekingness".[2]

[2] JW Harris, *Property and Justice* (OUP 1996) 31.

Marco may be under specific duties to others concerning his use of the Ferrari. However, that is not incompatible with the legal title being vested beneficially. For example, Marco makes a contract with Gigi. Gigi can use the Ferrari on weekends, in return for £10,000 a month. The decision Marco made in giving Gigi this licence was done in his self-interest. Marco saw an opportunity to make money. He was not under any duty to make that decision. Furthermore, the £10,000 he receives from Gigi each month can, *prima facie*, be invested as Marco wants. It is only when – as we will see – the entire legal title in the Ferrari – in the totality of its jural relations – has been burdened by a duty of full accountability, that Marco is no longer vested with the legal title beneficially.

A. Hohfeld

i. Table of Jural Relations

This thesis draws on Hohfeld's account of rights. Hohfeld saw a right as having four distinct manifestations: claim-right, liberty, power and immunity.[3] In saying that A has a right, it is important to specify the kind of right A possesses and its jural correlative.

For Hohfeld, when understanding the role of law in our lives, we should specify the jural relations to which it gives rise. We can then translate any action or omission in a clear legal vocabulary. A jural relation always involves two persons and one action or omission[4]. Rights do not exist in the abstract. A right is always against one specific person. A right is incorporeal. It cannot be seen, touched or felt. The law is a construct of the human mind. It

[3] WN Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16.
[4] John M. Finnis, 'Some Professorial Fallacies About Rights', 4 Adel. L. Rev. 377 (1971-1972).

regulates the interaction between members of society. However, unlike the physical objects of the world, the law is intangible.

Hohfeld provides a table of jural relations. It explains how the four distinct manifestations of a right function. Each kind of right has a correlative and an opposite.

Jural Correlatives	Claim-right	Liberty	Power	Immunity
	Duty	No-right	Liability	Disability
Jural Opposites	Claim-right	Liberty	Power	Immunity
	No-right	Duty	Disability	Liability

ii. Examples of the Jural Relations

a. Claim-Right – Duty

Alessandro has a claim-right against Francesca that she pays him £10. This means Francesca is under the correlative duty to Alessandro to pay Alessandro £10. We have two parties: Alessandro and Francesca. We have one action: the payment of £10. If Alessandro has a claim-right against Francesca that she pays him £10, then it follows that Francesca does not have a liberty against Alessandro not to pay him £10.

b. Liberty – No-right

Alessandro has a liberty against Francesca to win Wimbledon. This means that Francesca has the correlative no-right against Alessandro that Alessandro does not win Wimbledon. This means that Alessandro is not under a duty to Francesca not to win Wimbledon. However, just because Alessandro has a liberty against Francesca to win Wimbledon, this does not mean that Francesca is under a duty to Alessandro to let Alessandro win Wimbledon. Quite the opposite: Francesca has a liberty against Alessandro not to let Alessandro win Wimbledon.

c. Power – Liability

Alessandro invites Francesca for dinner at his home. Alessandro exercised a power against Francesca. Francesca was under the correlative liability to have that power exercised against her by Alessandro. A power, according to Hohfeld, is the ability to change another person's jural relations. By inviting Francesca for dinner, Alessandro exercised a power against Francesca to remove Francesca's duty not to enter his home. Before Alessandro's invitation, Francesca was under a duty to Alessandro not to enter his home. By having a power to unilaterally waive Francesca's duty not to enter his home, Alessandro is not under a disability from unilaterally waiving that duty.

d. Immunity – Disability

Alessandro is under an immunity against Francesca, who has the correlative disability, that his claim-right that Francesca not physically assault him not be extinguished by Francesca

singing a song. By singing a song, Francesca does not have a power to remove Alessandro's claim-right that he not be physically assaulted by her. By having this immunity, means that Alessandro is not under a liability from having his claim-right extinguished through Francesca singing a song.

e. Multital and Paucital Jural Relations

In addition to specifying that a right has four distinct manifestations, Hohfeld said that a claim-right, liberty, power and immunity could be either multital or paucital in nature.[5] The same applies for the jural correlatives: duty, no-right, liability and disability. For example, Alessandro's claim-right against Francesca that Francesca pay him £10 is paucital. This is because Alessandro does not enjoy a fundamentally similar yet distinct claim-right against a large class of persons that each of them pay him £10. However, Alessandro's liberty against Francesca to win Wimbledon is multital. This is because Alessandro enjoys fundamentally similar yet distinct liberties against all members of his jurisdiction and those of other jurisdictions too (i.e., a large class of persons).

iii. Interest and Will Theories

One question which Hohfeld did not fully explore is how to determine the basis on which jural relations are vested in particular persons and not others. For example, why does the correlative claim-right to the trustee's duty of full accountability vest in the beneficiary and not a complete stranger to the trust? The interest theory says that rights are vested in those

[5] (n 3) Section II.

who have an interest in having them. The will theory argues that rights are vested in those free to choose whether to enforce them and consent to their waiver[6].

These debates could have interesting implications for doctrine. For example, where the trustee is vested with a freehold title on trust, they have the multital claim-right against physical interference with the land.[7] On one view, this might seem inconsistent with the interest theory. Some might argue that the trustee has no interest in the trust property, because they administer its assets for the benefit of others.[8] However, the view taken in this thesis is that the language of the trustee holding rights for the benefit of another is unhelpful. Not only can a trustee be a beneficiary of the trust they administer, but irrespective of that fact, in an important sense they have an interest in protecting the trust property: their rights of indemnity are satisfied from the trust's assets.

iv. Why Hohfeld?

This thesis employs Hohfeld's model of rights for two reasons. First, it provides a precise juridical language. Second, Hohfeld's analysis recognises that legislators and judges should be sensitive to the policies they want to promote, in deciding which jural relations we should have. Hohfeld does not tell us that Alessandro should or should not have a claim-right against Francesca that Francesca refrain from encouraging Alessandro's customers to shop at her supermarket and not his. What Hohfeld does tell us is that just because Alessandro has a liberty against Francesca to open a supermarket and make a living, does not by definition

[6] Kramer, Simmonds, Steiner,*A Debate Over Rights: Philosophical Enquiries* (Oxford: Oxford University Press, 1998).
[7] See Chapter II. II. A. i.
[8] An argument like this was made and rejected by the majority of the Supreme Court of the United States in *Sprint Communications Co. v. APCC Services Inc.*, 554 U.S. 269 (2008).

mean he also has a claim-right against Francesca that she refrain from doing things which hinder his ability to make a profit.

v. Totality of the Jural Relations

Being vested with legal title in a Ferrari entails a bundle of jural relations e.g. a multital claim-right against each other member of the world at large that each of them refrain from interfering with the Ferrari and a multital power to convey legal title in the Ferrari to another person. Marco's multital liberty to use the Ferrari existed prior to his being vested with legal title[9].

The totality of the jural relations to which legal title in the Ferrari gives rise and any *a priori* liberties relating thereto, may, *prima facie*, be exercised in Marco's self-interest. He may mobilise those jural relations to pursue his life goals. We said earlier, that Marco can enter into legal transactions which subject him to duties in his use of the Ferrari. We saw that Marco can give Gigi permission to drive the Ferrari on weekends. Necessarily, given that Marco made a contract with Gigi, Marco owes Gigi a paucital duty not to break his promise contained in their binding agreement. Marco would be in breach of duty to Gigi by driving the Ferrari on weekends. However, it is important to emphasise that the very act of exercising a multital power to give Gigi permission to use the Ferrari, a power which is entailed by being vested with legal title therein, was exercised in Marco's self-interest.

[9] Douglas and McFarlane, 'Defining Property Rights', in Penner & Smith (eds), Philosophical Foundations in Property Law (2013).

It is true that the contract with Gigi does place limited restrictions on the totality of the jural relations entailed by legal title in the Ferrari and any *a priori* liberties relating thereto. As well as no longer enjoying a liberty against Gigi to drive the Ferrari on weekends, if the contract stated that Marco could not convey legal title to the Ferrari for as long as the contract subsisted, then Marco no longer enjoys a liberty against Gigi to exercise that power. Marco would still have the multital power against Gigi. It is just that by exercising it he would be in breach of duty to Gigi. However, for as long as the legal title in the Ferrari has not been fully burdened – in the totality of its jural relations – by a scheme, the legal title continues to be vested beneficially.

Furthermore, although Marco no longer enjoys a liberty against Gigi to exercise his multital power to transfer title, it is in Marco's self-interest not to exercise that power. By honouring his contract with Gigi, Marco will receive £10,000 each month. Therefore, the test for whether one is vested with title beneficially is perhaps most accurately described as follows: can its holder exercise the totality of its jural relations and any *a priori* liberties relating thereto according to their self-interest and are any self-imposed restrictions on their ability to exercise those jural relations fully, restrictions created in their self-interest and will non-exercise of those jural relations be to their advantage?

If there is a statute which imposes a non-voluntary limit on Marco, as in a rule which prevents the sale of the Ferrari for two years after its acquisition, that restriction forms part of the general law defining the nature of the bundle of jural relations entailed by the title. These specific limits on particular aspects of the totality of the jural relations – some from the background laws prohibiting anti-social uses of the Ferrari, others from the general law

defining the nature of the bundle of jural relations the legal title entails – do not detract from the general, *prima facie*, freedom to use the totality of the jural relations as he wishes.

B. The Definition of an Asset

This thesis argues that an asset is a title or a right, with certain characteristics.

Marco has legal title in the Ferrari. As we have seen, being vested with legal title entails a bundle of jural relations. Marco's legal title is an asset because it is capable of economic realisation. Marco can sell the title. He can create an equitable charge, a mortgage, a licence and so on. Even if the state prohibited the sale of sportscars, that would not stop the legal title in the Ferrari being an asset. There are many ways, other than outright transfer of legal title, for realising the economic value of a right. If the state prohibited all forms of third-party dealings with sportscars (so banning equitable charges, mortgages, licences etc) and stating that sportscars could not be taken away for debts, then the legal title in the Ferrari would begin not to look like an asset.

This thesis takes the view that there are central and non-central cases of an asset. The paradigm case of an asset is that of a title or right which can be fully realised in economic terms. It can be transferred outright, it can be the subject of an equitable charge, a mortgage, a licence and so on. It can be taken away for debts.

Some rights are either non-marginal instances of an asset, or not an asset at all. A non-assignable contractual right for payment of £10 million, which cannot be the object of a

mortgage, charge, licence etc but can be taken away for debts, is a non-marginal case of an asset. It is inherently of economic value.

Marco's right to freedom of movement is not an asset[10]. Where the right is violated, Marco can receive a sum of money i.e. an asset. However, if the only means of realising the economic value of a right (in this case the right to freedom of movement) is in bringing a claim for its breach, then that right is not helpfully described as an asset. An asset must be a right whose economic realisation is not premised on remedies for its breach.

II. Assets, Liabilities and their Unification

A. Assets and Liabilities: Rights Vested Beneficially

A feature of the standard case of an asset is that it can be taken away to satisfy a debt[11]. Where an individual is vested with an asset beneficially, then that asset will be available to meet their personal debts. This includes debts incurred in pursuit of one's life goals.

Marco is vested with legal title in the Ferrari beneficially. He can, *prima facie*, enliven the totality of the jural relations to which that legal title gives rise in his own interests. Therefore, as Honoré says, Marco's title will be liable to execution for his personal debts[12]. If Marco becomes balance sheet insolvent, his creditors can make him a bankrupt. All of Marco's

[10] *Sunbolf v Alford* (1838) 3 M & W 248; cf *Robinson v Balmain New Ferry Company Ltd* [1910] AC 295; (1909) 79 LJPC 84; 26 TLR 143. See further K Tan, 'Misconceived Issue in the Tort of False Imprisonment' (1981) 44 MLR 166.
[11] Honoré, 'Ownership' in *Oxford Essays in Jurisprudence* (ed Guest, 1961) 123, republished in *Making Law Bind* (1987), ch 8.
[12] Ibid 123.

rights, with which he is vested beneficially will be liquidated by his trustee in bankruptcy and, *prima facie*, the proceeds distributed *pari passu* amongst his creditors.

B. Assets and Liabilities: Rights Appropriated to a Scheme

This thesis contends that titles or rights can be held in at least two ways in English law: beneficially or in order to promote a scheme. When one is vested with a right in order to promote a scheme, one is under a duty to exercise the totality of the jural relations to which that right gives rise – and any *a priori* liberties relating thereto – compatibly with that scheme. One no longer holds a right with the freedom to enliven the totality of its jural relations according to their subjective preferences; the scheme manager's subjective preferences can only be considered if authorised by the scheme itself. Even where the initiative in creating the scheme came from a private actor, as with an express trust, that scheme's terms will not be solely based on the wishes of its author. There are also mandatory rules relating to the governance of the scheme. One important mandatory feature is the protection of scheme creditors through the rights of indemnity of the scheme manager.[13]

Where Marco is a scheme manager, he would be in breach of duty to the scheme's beneficiaries (and arguably also to the scheme's creditors)[14] if he exercises any of the jural relations to which the right he holds as scheme manager gives rise, inconsistently with the scheme. The scheme may provide that Marco's preferences are relevant in making some decisions. However, in considering his own preferences in making that decision, he derives his authority from the scheme. He owes a duty of full accountability.

[13] See Chapter IV Section I. C iv. a.
[14] See Chapter III Section I. B vii.

Rights vested in one's capacity as scheme manager have asset-partitioning effects.[15] This means that the assets Marco holds as scheme manager do not respond to the payment of his personal debts. In other words, debts incurred in his self-interest and not in promotion of a scheme. In English law, assets can be partitioned into separate pools available to different classes of creditor. It is important to note that one person can have two capacities in the sense of being a scheme manager but also being someone who can benefit under the scheme. This is particularly relevant in the partnership context and it means that the personal creditors of the scheme manager will have some access to the assets, but only to the extent that the scheme manager is also a beneficiary under the terms of the scheme or they have powers of recoupment available to their personal creditors.

This thesis argues that the general rule in English law is that rights vested beneficially are available to meet the personal debts of their holder. Trusts, partnerships and deceased estates are then seen as an application of, rather than a departure from, the general rule.

Conclusion

This chapter has made the following points:

1. Rights can be vested in English law in at least two ways: either beneficially or in order to promote a scheme.

[15] H Hansmann, R Kraakman and R Squire, 'Law and the Rise of the Firm' (2006) 119 Harv Law Rev 1333; H Hansmann, R Kraakman and R Squire, 'The New Business Entities in Evolutionary Perspective' (2007) 8 European Business Organization Law Review 59; H Hansmann & U Mattei, 'The Functions of Trust Law: A Comparative Legal and Economic Analysis' (1998) 73 NYUL Rev 434; R Sitkoff, 'Trust Law as Fiduciary Governance Plus Asset Partitioning' in L. Smith (ed) *The Worlds of the Trust* (Cambridge: CUP, 2013).

2. A right vested beneficially entails the totality of its jural relations being *prima facie* exercisable in one's self-interest. A right appropriated to a scheme entails the totality of its jural relations being anchored to a scheme.
3. An asset is a right or title of economic realisability.

Chapter II

Some Fundamental Principles of the Law of Trusts

In Section I, we will examine what the trust means for the trustee and her beneficiaries: in other words, its internal effects. In Section II, we will examine the trust's external effects on third parties who damage the trust property and on successors in title. The trust's impact on creditors will be the subject of Chapter III.

This chapter will argue that numerous features of trust law fundamentals are better explained on a scheme-based analysis, rather than one focussed on the "equitable property rights" or "equitable ownership" of trust beneficiaries.

I. Internal Effects

We will draw throughout on the following example (*Agostina's Case*):

Santiago is registered as the legal proprietor of a large estate and has the legal title to all the chattels on the land. The estate contains a mansion, a garden, five tennis courts, a swimming

pool and various other amenities. He transfers the freehold and his legal title to the chattels to Agostina to hold on trust for himself, his wife Jessica and their children Kit, Tiger and Jambo. Agostina is also made a beneficiary of the trust. Each beneficiary is entitled to £10,000 a month. Agostina does not hold a separate capital sum on trust. She is expected to raise the income through her management of the estate.

A. Basic Ideas

i. The Position Pre-Declaration of Trust

To understand the basic nature of the trust, it is important to begin by examining the position of Santiago before he transferred the legal freehold to Agostina.

Being vested with the freehold entails a bundle of multital and paucital jural relations. Santiago enjoyed a multital claim-right against deliberate or negligent physical interference with the land[16]. He enjoyed multital powers to transfer his title, create a mortgage, a lease, an equitable charge, a licence and so on. He enjoyed a multital immunity against divestiture of title.[17] Santiago also owed a paucital duty to the state to pay taxes incumbent on landowners. These jural relations existed only because Santiago was vested with the legal freehold.

Other jural relations, which relate to the estate, obtained independently of Santiago's title. Santiago's multital liberties to use the estate, to sleep in the mansion, to paint its walls, to play on the tennis courts and so on were not multital liberties generated by his legal

[16] (n 9); *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Development) Ltd* [1987] 2 EGLR 173 (Ch); *Bocardo SA v Star Energy UK Onshore Ltd* [2010] UKSC 35; [2011] 1 AC 380.
[17] Honoré, 'Rights of Exclusion and Immunities Against Divesting' (1960) 34 Tulane LR 453.

freehold.[18] Bubu and Martin, two complete strangers to the estate, with no title therein, enjoy multital liberties to use the land and its amenities. Bubu enjoys such a multital liberty against Martin and fundamentally similar yet distinct liberties against Peter, Susan, Jasmine, Ted, Giorgio and so on. The only person against whom, *prima facie*, Bubu did not enjoy such a liberty was Santiago, because Santiago had a multital claim-right against physical interference.

Being vested with the legal freehold placed Santiago under certain duties. For example, Santiago owed a multital duty to keep his premises safe, so that visitors and trespassers would not be hurt[19]. Furthermore, Santiago was under a paucital liability to have his title to the estate expropriated in certain tightly circumscribed situations[20].

ii. The Position Post-Declaration of Trust

When Santiago transfers the legal freehold to Agostina, Agostina now possesses the bundle of jural relations which that right entails. The general rules of land law determine the bundle of jural relations held by the party vested with the legal freehold.[21]

Whereas Santiago was vested with the legal freehold beneficially, Agostina is vested with the freehold in order to promote a scheme. Santiago could, *prima facie*, enliven the totality of the jural relations consequent to legal proprietorship of the freehold and any *a priori* liberties relating thereto, according to his subjective preferences. Santiago could freely exercise the

[18] (n 9).
[19] Occupiers Liability Acts 1957 and 1984.
[20] *Sporrong and Lönnroth v. Sweden*, App. Nos. 7151/75 and 7152/75, Judgment of 23 September 1982, Series A No. 5.
[21] Simon Douglas, 'The Content of a Freehold: A "Right to Use" Land?' in Nicholas Hopkins (ed), *Modern Studies in Property Law*, *Volume 7* (Hart 2013).

jural relations entailed by his freehold in his self-interest. He would not thereby have been, *prima facie*, breaching any duties. One of the jural relations Santiago could enliven was the multital power to create a trust over the freehold and therefore appropriate it to a scheme.

iii. Contractual Restrictions vs A Trust

If Santiago had placed on himself contractual restrictions relating to the exercise of the jural relations consequent to the freehold, or contractual restrictions relating to the exercise of any *a priori* liberties concerning use of the estate, then he would have circumscribed his ability to freely deal with the estate and the jural relations to which it gives rise. For example, if Santiago had made a contract with Scott, whereby in return for £1000 a month, Santiago promised Scott he could use one of Santiago's tennis courts to teach lessons on weekends, thereby narrowing the scope of Santiago's *a priori* liberties (for Santiago no longer enjoyed a liberty against Scott to use all the tennis courts on weekends) there are two reasons for which this contractual restriction does not mirror the legal consequences of Agostina holding the freehold on trust.

First, by exercising his multital power to temporarily suspend Scott's duty not to enter the land on weekends, Santiago acted in his self-interest. Agostina, as trustee, only enjoys a liberty against her beneficiaries to exercise a jural relation consequent to her being vested with legal title in the estate and any *a priori* liberties relating thereto, compatibly with the scheme she agreed to promote. If she made the same contract with Scott, that decision must have been authorised by the trust deed. Although Agostina does have a power to enter into the contract with Scott – the contract being valid between her and Scott – she would breach her duty of full accountability to the beneficiaries of the trust if the contract were inconsistent

with the terms of the trust. Therefore, the important point is that Agostina – as trustee – is under a duty that Santiago was not, not that Santiago had a power which Agostina does not.

Secondly, by making the contract with Scott, Santiago did not burden the totality of the jural relations entailed by his legal proprietorship nor did he burden the totality of the *a priori* multital liberties relating to use of the estate. He came under a duty to Scott not to use his multital liberty to use all the tennis courts on weekends, because Scott enjoyed a claim-right against him that Santiago let him use one tennis court on the weekend to teach classes. That was the extent of the restriction placed by the contract. The contractual limitation is not such as to create a scheme that relates to and binds the totality of the jural relations entailed by Santiago's freehold. Therefore, the contractual restriction does not amount to a trust of that freehold.

iv. What Makes the Trust Different: Contractual Licences and Equitable Charges

A trust is different from cases where a title is held beneficially, but is subject to certain restrictions. The trust is different because it burdens the totality of the jural relations entailed by the vesting of a particular right, which has therefore been appropriated to a scheme.

a. Equitable Charge

Carolina agrees to loan Anna £300,000. As security, Carolina asks for an equitable charge over Anna's silver cutlery. This means that if Anna fails to repay Carolina on time, Carolina can force the sale of the silver cutlery and have a priority claim – to the extent of Anna's debt

– over its proceeds. If Anna goes bankrupt before Carolina's claim has been satisfied, because the trustee in bankruptcy receives legal title to the cutlery, which was burdened by the equitable charge, the trustee in bankruptcy will have to pay Carolina in priority to Anna's unsecured creditors.

There is an important difference between the equitable charge and the trust. Although Carolina's right is capable of binding Anna's trustee in bankruptcy, she is not a trust beneficiary. This is because she does not enjoy a claim-right against Anna that she exercise the totality of the jural relations to which her legal title to the silver cutlery gives rise and any *a priori* liberties relating to its use, according to a pre-defined scheme. Anna is under no duty of full accountability to Carolina.

Anna – to the extent that the contract does not provide otherwise (and if it did, it would have created a trust rather than an equitable charge) – can use the cutlery in her self-interest. She can invite guests for dinner, serving them food on the silver dishes. She can license use of the cutlery to a museum, in return for money. She can then use the money as she wishes. If Carolina forces a sale of the cutlery, Anna gets to keep whatever is left after Carolina has satisfied her claim.

Indeed, the very fact that Anna's trustee in bankruptcy will get legal title to the cutlery proves the point that the legal title was vested in her beneficially. If Anna held the cutlery on trust for Carolina, the cutlery would not have vested in Anna's trustee in bankruptcy.[22] The justifications for the insolvency effects of the trust and equitable charge are therefore

[22] Bankrupts Act 1571 (13 Eliz 1, c 7); Insolvency Act 1986, s. 283; *Caillaud v Estwick* (1794) 2 Anst 318 [*Caillaud*].

different. In the former, it is because Anna is simply unable to use the cutlery incompatibly with a scheme. In the latter, it is because the law wants to facilitate the giving of loans and knows that by providing security on the bankruptcy of the debtor, it can better achieve this aim.

b. Contractual Licence

The contractual licence to use land is not a trust, because the licensor's fee simple is not burdened in the totality of the jural relations to which it gives rise and any *a priori* liberties relating thereto, according to a pre-defined scheme. The licensor does not owe the licensee a duty of full accountability. If Giovanna gives Silvia exclusive use of her badminton court every Friday, in return for a monthly fee, Giovanna no longer enjoys a liberty against Silvia to use the badminton court on Fridays. However, that is more or less the extent of the restriction on the legal title to the badminton court – imposed by the contract. Giovanna can, for example, use the badminton court as she wishes on all other days. Any money she receives from use of the land can be invested in her self-interest.

v. Unfettered Freedom

The only limitation to Santiago's unfettered ability to do with the freehold what he wished, was a duty to respect the background laws of his jurisdiction, the nature of the bundle of jural relations the freehold conferred, alongside any contractual or other restrictions he may have agreed to in his self-interest. Although Santiago could not use the mansion to torture people or shoot pedestrians from the vantage-point of his terrace, Santiago could shut out the entire world from his estate. He could have let it fall into a state of disrepair. He was, *prima facie*, at

a liberty not to let anyone in, or enjoy any of the amenities the estate has to offer. As Ripstein explains, the basic norm of property law is that non-owners keep off[23]. The way the owner decides to manage their asset is entirely up to them. An owner's conduct is not unlawful because it is anti-social, or unreasonable or against the owner's interests.

vi. Agostina's Position

Agostina is vested with the bundle of jural relations consequent to proprietorship of the legal freehold. Agostina is not vested with the freehold beneficially. This is because she owes a duty to the trust beneficiaries to use the freehold compatibly with the terms of the trust deed. In other words, the scheme she agreed to promote. Because her duty to the beneficiaries encumbers the totality of the jural relations to which the freehold gives rise and any *a priori* liberties relating to use of the estate, Agostina is not vested with the legal title beneficially. It is the reason for which she is a trustee and not a party vested with a right beneficially, subject to contractual restrictions. It is only when the party vested with the right owes a duty of full accountability – in other words, that they are charged with the task of exercising all the jural relations consequent to the vesting of a right according to a pre-defined scheme – that they can properly be called a trustee. If a contract has that effect, on the proper interpretation of its terms, then it should be read as having created a trust.[24]

Agostina's duty of full accountability is owed to her beneficiaries. Agostina does not owe that duty to anyone else. In English law, Agostina does not owe that duty to Santiago, the settlor of the trust, unless Santiago is also a beneficiary[25]. Agostina enjoys a multital liberty to

[23] A Ripstein, 'Property and Sovereignty: How to Tell the Difference' (2017) 18 Theoretical Inquiries L 243.
[24] *Barclays Bank Ltd v Quistclose Investments Ltd* [1968] UKHL 4.
[25] *Bradshaw v University College of Wales* [1988] 1 WLR 190, *per* Hoffmann J.

use the freehold as she wishes. However, the fact that Agostina owes a duty of full accountability to her beneficiaries is one reason for which some writers might argue that Agostina is not the owner of the freehold.

Rostill, for example, takes the view that the holder of an inferior fee simple, acquired through possession, should not be seen as owner of the land, alongside the party with the best legal title[26]. Although the possessor acquires a multital claim-right against physical interference with the land, alongside other jural relations, because the possessor would be in breach of duty to the party with the best legal title in making free use of the land, he argues it is wrong to describe the possessor as owner. He acknowledges that on a Hohfeldian account, it is important to emphasise a jural relation exists between two people and concerns one action or omission. Therefore, it is correct to state that the possessor, who acquires an inferior fee simple, does have multital claim-rights against physical interference with the land. It is also true that the possessor, before acquiring the inferior fee simple, enjoyed multital liberties to use the land as they wished. Agostina also has multital liberties to use the estate she holds on trust as she wants. However, Agostina would breach a duty in making free use of the freehold, a duty owed to her beneficiaries, and this can justifiably lead some authors to question whether Agostina is owner of the land. It is not necessary for this thesis to explore the implications of that question (for example, the issue of who owns the land, where held on trust). However, it could form part of the DPhil. This thesis does not take a view as to the helpfulness of the concept of ownership. It focusses instead on the vesting of titles or rights.

[26] Luke Rostill, *Possession, Relative Title and Ownership in English Law* (OUP 2021), chapter 7.

vii. The Scheme is What Matters

Although a trust might be defined as a right being held for the exclusive benefit of another, the view taken in this thesis is that it is better to focus on the scheme to which the right has been appropriated. This recognises the fact that it is the scheme which is central and which the trustee must promote. Furthermore, the trustee might herself, as in *Agostina's Case*, be a beneficiary, so a trustee may hold trust property for her benefit as well as the benefit of other people. The scheme is crucial because it demarcates the boundaries within which Agostina must operate in exercising the bundle of jural relations entailed by the freehold.

Although Agostina is under a duty to use the freehold to raise income for the beneficiaries and to allow them enjoyment of its various amenities, the scheme entitles her to pay her own costs as scheme manager first as well as authorised debts incurred to trust creditors, before any income is distributed to the beneficiaries[27]. The scheme defines the beneficiaries' rights as subject to these priority claims. Therefore, saying that the trustee holds property in the exclusive interests of her beneficiaries misses these important features of the trust. The scheme managers and scheme creditors also benefit from the assets held on trust and their interests are to be vindicated in priority to those of the beneficiaries.[28] A model of trust law which focusses on the "equitable property rights" or "equitable ownership" of trust beneficiaries fails to account for the fact that the interests of all the relevant parties of a trust structure – trustee, trust creditors and beneficiaries – are defined by the scheme itself.

[27] See Chapter III.
[28] *CPT Custodian v Commissioner of State Revenue* [2005] HCA 53 [*CPT Custodian*] at [41] to [52].

viii. Good Faith and Stewardship: A Trustee's Lack of Equitable Fullness

There are some basic features which are common to all trusts. Even if party autonomy plays an important role in shaping the terms of each individual trust[29], it would be inconsistent with its irreducible core to see a trust which authorised the trustee to act in bad faith or be lazy in their management of the trust property.[30] The idea that the trustee is the steward of rights[31], which have been appropriated to a scheme, seems entrenched. A reason Smith is concerned with the development of massively discretionary trusts can be tied to this idea of stewardship[32]. If there are no beneficiaries with a practical interest in enforcing the terms of the trust, then the trustee's incentive to honour the scheme they have agreed to promote, may be weakened.

The notion that the trustee is a steward of property and not the unfettered *dominus* of rights, is reflected in an example given by Lepaulle.[33] He imagines a village wherein all the titles to the houses are vested beneficially. Weeds might be growing in all directions. The roofs leaky. The gates rusty. Some houses might be abandoned. As Lepaulle calls it, this may be a consequence of "individual ownership".[34] Given that a party vested with a right beneficially is under no duty to use it wisely, intelligently or in good faith, the land to which that right relates risks being poorly managed and in disrepair.

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[29] Dagan and Samet, Express Trust as the Missing Piece in the Liberal Property Regime Jigsaw https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3753282 (accessed: 08 August 2021).
[30] *Libertarian Investments Ltd v Hall* [2014] 1 HKC 368, [2013] HKCFA 93, [167] (Lord Millett); *Armitage v Nurse* [1998] Ch 241, 251-4 per Millett LJ; and see Trustee Act 2000 s 1(1) and Schedule 1.
[31] C Mitchell, 'Good Faith, Self-Denial and Mandatory Trustee Duties' (2018) 32 *Trust Law International* 92; Charles Mitchell, 'Stewardship of Property and Liability to Account' (2014) CPL 215.
[32] Smith, 'Massively Discretionary Trusts' (2017) 70 CLP 17.
[33] Lepaulle, 'An Outsider's View Point of the Nature of Trusts' (1928) 14 Cornell LQ 52, 58.
[34] Ibid, 58.

Where all the titles to the houses are held on trust and the beneficiaries are active in enforcing their rights, the village will take on a different complexion, assuming the trustees have the necessary resources. The weeds will have been replaced by well pruned trees and carefully cultivated gardens. The roofs will no longer be leaky. The gates will have been varnished. The houses will be put to their best use. Lepaulle described the trust as giving rise to a form of social ownership.[35] Santiago could be anti-social in his use of the estate, cynically doing his best to prevent any enjoyment being derived from it. Agostina has no such freedom (against her beneficiaries). As Lupoi says, Agostina's title lacks "equitable fullness".[36] Although she is vested with the same right – the legal freehold – as Santiago and all its jural relations, equity controls her exercise of that right. Equity ensures that Agostina uses her common law rights compatibly with the scheme she agreed to promote[37].

ix. *Webb v Webb*

Webb v Webb illustrates Lupoi's point that the trustee lacks "equitable fullness" in their holding of a right[38]. A father bought land in France in the name of his son. The two later fell out. The father brought proceedings in England seeking a declaration that the son held the title to the land in France on resulting trust. The son argued that England was not the proper forum to hear the dispute. He said that – under what is now Article 24(1) of the Recast Brussels Regulation – the object of the proceedings was a right *in rem* in immoveable property[39]. Therefore, only France could hear the claim, the country in which the land was located.

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[35] Ibid, 58
[36] Maurizio Lupoi, *Trusts: a comparative study*; translated by Simon Dix (CUP) 2000, 3.
[37] Maitland, *Lectures on Equity* (1929) chs 9-11.
[38] *Webb v Webb* [1991] 1 WLR 1410; [1994] ECR I-1717, [1994] QB 696.
[39] Regulation (EU) 1215/2012.

Both the CJEU and Judge Paul Baker QC disagreed. By bringing his claim in England, the father did not deny that the son had legal title to the land in France. Therefore, the court was not called upon to determine the location of a legal property right. All parties agreed that right was vested in the son, with all its jural relations. Rather, the father claimed that the son held that right on trust for him. An English court would not – by declaring that the title was held on resulting trust – be contradicting the position of French law that legal title was in the son.[40] However, as we will see in relation to *Akers v Samba*[41], this does not necessarily mean that by recognising the location of a legal property right as determined by a foreign law, comity is thereby achieved.

The relationship between common law and equity is that equity does not deny the answer given by the common law to the question "who holds legal title"? Rather, equity controls the trustee's exercise of their common law rights[42]: the trustee lacks "equitable fullness".

x. The Duty of Accountability and Charitable Purpose Trusts

With most trusts, it is relatively straightforward to identify a beneficiary, endowed with legal personality, who enjoys the correlative claim-right to the trustee's duty of full accountability. That beneficiary stands to be potentially enriched through the due administration of the scheme. With charitable purpose trusts, it is harder to locate the correlative claim-right. It might be said that it resides in the Attorney-General. However, given that this thesis does not take a view on which account best describes the basis for the

[40] Sinéad Agnew and Ben McFarlane, The Nature of Trusts and the Conflict of Laws (2021) LQR 405.
[41] *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424 [*Akers*]; Section II. B. v. b of this chapter.
[42] McFarlane & Stevens, 'The Nature of Equitable Property' (2010) 4 J of Equity 1, 20.

vesting of jural relations, it prefers not to adopt a position which would be difficult to reconcile with the interest theory. It is problematic to argue that the Attorney-General has an interest in seeing that the trust is properly administered. A provisional suggestion – which can be explored in the DPhil – is that the correlative claim-right to the trustee's duty of full accountability is held by all persons who are interested in seeing that the trust's assets are appropriated to its purpose. For example, parents and their children of Region A have an interest in seeing that a charitable purpose trust established for the educational nourishment of students from Region A be properly administered. Because the class of persons who belong to this category is large, the Attorney-General can then be seen to vindicate those persons' claim-rights. For reasons of practicality, the law does not give the parents and children enforcement powers.

xi. Trust Property

Agostina's Case involves freehold to land and legal title to chattels being held on trust. However, any asset can be the subject-matter of a trust.[43] If the right is capable of economic realisability, it can be appropriated to a scheme. Examples:

Lucia has a right against Tom to be paid £1 million. This right can be held on trust. This is the case even if the right is non-assignable[44]. By declaring a trust over their right against Tom, Lucia is not thereby undermining the anti-assignment clause. Tom continues owing

[43] c.f. C von Bar et al (Eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, Interim Outline Edition*, Sellier, Munich, 2008, Book X 3:202.
[44] *Don King Productions Inc v Warren* [2000] Ch 291; [1999] 2 All ER 218; [1999] 3 WLR 276; [1999] 1 Lloyd's Rep 588; *Barbados Trust Co Ltd v Bank of Zambia* [*Barbados Trust*] [2007] 2 All ER (Comm) 445; [2007] 1 Lloyd's Rep 495; [2007] EWCA Civ 148.

their duty to Lucia. Lucia is now under a duty to her beneficiaries to use her right against Tom in accordance with the trust scheme.

Lucia is the beneficiary of a fixed trust. She can hold her beneficial interest on trust for Carmen and Denise. In other words, a beneficial interest under a trust can be vested non-beneficially. Denise could then declare that she holds her rights against Lucia on trust for her sisters. Sub-trusts are both conceptually unproblematic and commercially useful[45].

xii. General Powers and Liberties under the Trust

It is important to distinguish between Agostina's powers according to the general law and Agostina's liberties under the trust[46]. This will also be useful when we explain in chapter III the nature of a trustee's right of indemnity.

We saw that Agostina acquired freehold title to the estate from Santiago. We emphasised that the first step in understanding *Agostina's Case* was in identifying the bundle of jural relations which being vested with that freehold entails. The nature of that bundle is determined by general rules of property law. The trust deed places Agostina under a duty to use that bundle compatibly with its terms. However, just because the trust deed says that Agostina cannot sell any antiquities located in the estate's garden to third parties, does not mean that Agostina no longer has the multital power to transfer title to such goods to third

[45] *Neville v Wilson* [1997] Ch 144; [1996] 3 All ER 171; [1996] 3 WLR 460; 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 Issues, Hart Publishing, Oxford, 2010.
[46] Jessica Hudson and Charles Mitchell, Legal Consequences of the Flawed Exercise of Scheme Powers in *Pensions, Law, Policy and Practice*, Sinéad Agnew, Paul S Davies and Charles Mitchell (eds).

parties. Agostina has a multital power to transfer title to those goods. If incompatible with the terms of the trust, that means she does not have a liberty against her beneficiaries to transfer the title.

xiii. The Trust is a Fund

Agostina was vested with a freehold to land and legal title to chattels to be held on trust. The trust deed empowers her to transform the mansion into a five-star hotel and to use the money raised (which is paid into a trust account) through administration of the estate in various ways. For example, by investing in the stock market. Agostina receives £200,000 in the first six months of her proper administration of the trust. Agostina then makes an authorised investment of £200,000 in shares which pay a dividend of £2 million. Agostina – again compatibly with the trust – buys a Van Gogh for £1 million.

At the beginning of the trust journey, Agostina held a freehold and legal title to chattels with a duty of full accountability. Now, Agostina holds not just the freehold and legal title to the chattels, but also her right against the bank and a Van Gogh painting with a duty of full accountability. The beneficiaries of the trust have a claim-right against Agostina that she exercises the totality of the jural relations consequent to her being vested with the right against the bank and with title to the shares and the totality of the jural relations consequent to her being vested with legal title to the Van Gogh, including any *a priori* liberties relating to these assets, compatibly with the trust scheme.

In other words, their basic claim-right against Agostina is that she uses the freehold, the chattels, and all their authorised traceable proceeds compatibly with the trust scheme. The

beneficiary's core interest is that the trustee honours the trust scheme, which means that authorised traceable proceeds of trust property should be used compatibly with the trustee's duty of full accountability. Although the mere existence of a scheme does not imply that tracing must logically follow, there is a case to be made that the totality of the jural relations entailed by being vested with the freehold title includes the power to transfer and acquire new rights, such that the duty of full accountability extends to authorised trust substitutes.

The reason, then, that property acquired compatibly with the terms of the trust is held burdened by the trustee's duty of full accountability is consistent with our Core Claim. What matters is the scheme. The scheme authorises Agostina to use the freehold in certain ways and to make investments. Therefore, by requiring Agostina to hold title on trust to the assets she acquired in her authorised management of the trust estate is a vindication of the scheme. The trust is a fund, then, in that the duty of full accountability extends to authorised trust substitutes.

Where Agostina uses trust property incompatibly with the trust deed, the beneficiaries of the trust can elect to have Agostina hold the unauthorised trust substitute according to the trust scheme.[47] Or they could elect to have a charge over the trust substitute to secure Agostina's liability for breach of trust.[48] What they choose to do will usually depend on the value of the trust substitute. For example, if Agostina is authorised to invest in English companies but makes an unauthorised investment in a French company, if that investment produces a lucrative dividend, it is in the beneficiaries' interest to have the dividend held on

[47] *Attorney-General (Hong Kong) v Reid* [1994] 1 AC 324; [1994] 1 All ER 1; [1994] 1 NZLR 1; [1993] 3 WLR 1143; *FHR European Ventures LLP and others (Respondents) v Cedar Capital Partners LLC* (Appellant) [2014] UKSC 45.
[48] *Foskett v McKeown* [2001] 1 AC 102, 130.

the terms of the original trust. This feature of the law – that the beneficiary can have a trust over unauthorised substitutions – might seem inconsistent with the scheme analysis and more favourable to the idea that the beneficiaries' interests are paramount. If the scheme is central, why can the duty of full accountability extend to rights that had never been appropriated to the scheme and were never envisaged to be appropriated to the scheme?

Arguably, this feature of the law is consistent with the scheme analysis. In order to incentivise the trustee to honour the scheme, we strip them of the possibility of holding beneficially any rights they acquire in breach of trust, by giving the beneficiaries the possibility of demanding that the unauthorised trust substitute is held according to the terms of the original scheme. The fact that the beneficiaries can have a charge over that unauthorised trust substitute is a way of securing the liability of the trustee and another means of incentivising the trustee to honour the terms of the scheme. Furthermore, because the consent of the beneficiaries is necessary for the full creation of the scheme, it would therefore be unfair to the beneficiaries not to give them a choice about the interest they acquire in the unauthorised substitute, where they agreed that their correlative claim-right to the trustee's duty of full accountability would only be in relation to the scheme's assets and its authorised substitutions.

Both in relation to authorised and unauthorised trust substitutes, the process by which the beneficiary can claim that the substitute is held according to the terms of the original trust is called tracing[49]. It has been argued in the context of trusts that the tracing process is based on the idea that a right represents the proceeds of an initial right held on trust[50]. However, in

[49] L Smith, *The Law of Tracing*, OUP, 1997; A Nair, *Claims to Traceable Proceeds*, OUP, 2018.
[50] (n 42) 20.

relation to some rights at least, a different explanation might be required. For example, we saw that Agostina, after being made a trustee, opened a trust account with her bank. The right she acquires against the bank is held on trust. However, she did not exercise a jural relation entailed by any title she held on trust in order to acquire the right against the bank. Agostina was vested with a freehold and legal title to chattels on trust. It is not that freehold which empowers Agostina to open bank accounts. Therefore, the opening of the bank account, with the communication to her bank that she holds that account on trust, might be seen as entailing a declaration of trust on the part of Agostina that she will appropriate her right against the bank to the scheme she agreed with Santiago to promote.

Agostina is authorised by the trust to transform the mansion into a five-star hotel. In what sense does the money she receives from her guests depend on the exercise of a jural relation Agostina holds on trust? The answer depends on the nature of the contract she made with her guests. The guests likely bargained for a room and occupation of that room in accordance with the law. In other words, the guests did not bargain for a room whose occupation would entail them breaching a duty to another. The person against whom they would be *prima facie* breaching a duty by occupying the rooms is Agostina, the party vested with freehold title. However, by exercising a multital power to temporarily suspend the guests' duty not to use the rooms, Agostina exercised a jural relation entailed by the freehold she holds on trust, whose exercise was part of the consideration given to the guests in return for their payment of money. The payment of the money would not be due, arguably, unless that multital power were exercised. However, the contract might not require Agostina to exercise that multital power. The contract might simply state that Agostina will receive payment if the guests are undisturbed for the duration of their stay. They might well remain undisturbed even if Agostina had conveyed her freehold to a friend for tax reasons, but continues managing the

estate. The friend might know nothing of the contract and the guests. She could not therefore have exercised a multital power to remove the guests' duty not to enter the estate. In this variation on our example, then, Agostina receives money without having exercised a jural relation consequent to a title she holds on trust.

Tracing is a topic which might be explored in depth in the DPhil.

xiv. The Trust is not a Legal Person

Agostina is the party vested with the freehold. Although we might come across expressions like "the trust owns this estate" or the "trust has many beneficiaries", these are not to be taken literally.[51] By the phrase "the trust owns this estate", we mean that the trustee – Agostina – is vested with the legal freehold with a duty to her beneficiaries to hold it compatibly with the trust scheme. By the phrase the "trust has many beneficiaries" we mean that Agostina owes her duty of full accountability to several parties.

The trust is not a legal person because it does not have the aptitude to hold rights and be subject to obligations. A trust signifies the existence of a relationship between a property-holder and her beneficiaries. A party has been entrusted with an asset. They owe a duty of full accountability concerning its use.

Smith has warned against the tendency towards entifying the trust.[52] Some statutory business trusts, for example, are not orthodox trusts at all. They give the trust legal

[51] *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7 [2018] 2 WLR 1465 [*Investec*], [59(i)]; Smith, 'Mistaking the Trust' (2011) 40 Hong Kong Law J 747.
[52] Ibid.

personality, such that it is no longer Agostina who is vested with the freehold, but rather the trust. Agostina then becomes like the director of a company, charged with managing the company's rights. The danger in entifying the trust is that the fundamental nature of the trust is lost sight of. As Smith says[53], the trust is a fundamental juridical category because it cannot be understood (exclusively at least) with reference to other legal concepts (like contract or persons).

xv. Unbundling the jural relations?

Before turning to a summary of the trust's internal effects, one final point should be made. Although Santiago can ask Agostina to hold the entire legal freehold on trust, it is not possible for him to unbundle the freehold's separate jural relations and ask for only distinct claim-rights, liberties, powers or immunities to be appropriated to a scheme. The freehold and its jural relations come as a package. Agostina either holds the entire freehold on trust, in all its jural relations, or nothing at all. As McFarlane says, a legal title to a book can be held on trust. However, one's liberty to read a book cannot be appropriated to a scheme.[54]

xvi. Internal Effects: Summary

This section has argued that the trust entails rights being appropriated to a scheme, the scheme's beneficiaries enjoying the correlative claim-right to the trustee's duty of full accountability. The scheme-based analysis focusses on the bundle of jural relations entailed by the holding of a particular right. That bundle is defined by the general law. This model of

[53] Smith, 'Trust and Patrimony' (2008) 38 Revue générale de droit 379, 398.
[54] McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land' in *Modern Studies in Property Law* (ed Bright, vol 6, 2011) 323.

trust law then focusses on the duty owed by the trustee to appropriate that bundle to a scheme. The scheme is central in demarcating the legitimate uses the trustee can make of the bundle.

II. Third-Party Effects

The basic premise in understanding a trust's third-party effects is in identifying the nature of the bundle of jural relations which the right held on trust entails. That nature will be defined by the general law governing that right. In *Agostina's Case*, to understand the third-party effect of the trust, we begin by identifying the fact that Agostina was entrusted with a freehold and legal title to chattels. The bundle of jural relations which the freehold and chattels entail are determined by general rules of property law.

A. Trespassory Liability

i. Orthodoxy: The Beneficiary has no Right Against Physical Interferences with Trust Property

Agostina is vested with the freehold to land and the legal title to any chattels located thereon. This means that she holds a multital claim-right against physical interference with the land and the chattels. The world at large owes her a duty not to physically interfere with the land and chattels. For example, if a visitor to the estate – Alfredo – negligently knocks

over one of the vases in the garden, thereby damaging it, Alfredo has breached a duty owed to Agostina. Alfredo has not breached a duty owed to Agostina's beneficiaries[55].

ii. The *Vandepitte* Procedure

The claim-right against physical interference which Agostina holds is a jural relation entailed by her being vested with the legal title to the vase. She holds that legal title on trust. She therefore owes her beneficiaries a duty of full accountability. The totality of the jural relations to which the legal title gives rise is burdened by the trust deed. She therefore owes a duty to her beneficiaries to enliven her claim-right against Alfredo by demanding payment for the damage caused.

It would, *prima facie*, be contrary to the basic idea of stewardship inherent in the trust for Agostina to refuse to demand payment from Alfredo. It is, *prima facie*, in the scheme's best interests for the claim-right to be enlivened. The money which Alfredo pays Agostina will be held on the terms of the original trust. The money is an asset which represents the enforcement of a claim-right appropriated to the scheme.

If Agostina refuses to demand payment from Alfredo or to bring legal proceedings against him, the beneficiaries can initiate an action against Alfredo, joining Agostina as co-defendant. Although the beneficiaries run the proceedings in such a *Vandepitte* scenario, they seek the enforcement not of a duty owed to them by Alfredo, but rather of the duty Alfredo

[55] *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675; *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785 at 812 *per* Lord Brandon; [1986] 2 All ER 145; [1986] 2 WLR 902; [1986] 2 Lloyd's Rep 1; *The Lord Compton's Case* (1587) 3 Leo 197.

owed to Agostina.[56] Orthodoxy says that Alfredo has a liberty against the beneficiaries to physically damage the trust property. It is Agostina's claim-right which the beneficiaries base the proceedings on. This means that any limitations on Agostina's ability to claim from Alfredo will be reflected in the *Vandepitte* procedure. For example, if Agostina had – in breach of trust – authorised Alfredo to play football in the gardens, reassuring him that nothing would happen if he broke a few antiquities, then by damaging one of the vases, Alredo did not breach a duty owed to Agostina, because Agostina had temporarily waived her correlative claim-right. Therefore, the beneficiaries would have no means of obtaining redress from Alfredo for the damage caused to the trust property. For these reasons, it is problematic to describe, as Penner does, the beneficiary as having an "indirect right *in rem*".[57]

iii. Why the Orthodox Position?

The feature of trespassory liability that third parties continue owing their duty of physical non-interference to the trustee, if the trustee is vested with a legal property right, is based on the idea that the trustee is endowed with all the jural relations which the right they hold on trust entails. Those jural relations are not then replicated in the hands of the beneficiaries. The beneficiaries are given a different bundle of jural relations, founded on the basic idea that Agostina honour the scheme she agreed to promote.

Furthermore, this feature is founded on sound policy. As McFarlane and Televantos explain, a trust's relative ease of creation, alongside the flexibility accorded to private parties in deciding its precise content, are justified given a beneficial interest's limited enforceability

[56] *Barbados Trust* (n 44) per Waller LJ.
[57] J Penner, '*The Structure of Property Law* (Book Review)' [2009] RLR 250 at 254; (n 42) 3 – 4.

against third parties.[58] In *Agostina's Case*, we saw that the trust beneficiaries are six. A trust can have many more beneficiaries. One of the justifications for the *numerus clausus* principle, as applied in providing a closed list of legal property rights, is in reducing information costs and the trespassory liability of third parties.[59] Were a beneficial interest to ground a claim-right against physical interference with land and chattels, a third party, wanting to acquire property from a trustee, would have to ask for the consent of all trust beneficiaries, to avoid committing the tort of trespass. That would take considerable time and effort. Furthermore, were a beneficial interest to ground a claim-right against physical interference, then by one act of negligence, a third party would potentially be in breach of duty to many different parties, depending on the number of trust beneficiaries.

iv. *Shell v Total*

For these reasons, *Shell v Total* is surprising.[60] T held legal title to land on which an oil processing facility was located on trust for C and others. D negligently caused an explosion. C brought a claim against D, arguing that D owed them a duty of care not to physically damage the trust property. At first instance, C's claim failed.[61] The judge found that C had suffered purely economic loss. In other words, loss not consequent to the violation of a legal property right. The judge said that C's claim did not fall under any of the recognised exceptions allowing recovery for such loss. C appealed and succeeded. The Court of Appeal held that although C had suffered purely economic loss, thereby not elevating a beneficial interest to the status of a legal property right, it would be "a triumph of form over substance"

[58] McFarlane & Televantos, 'Third Party Effects in Private Law: Form and Function' in P Miller & J Oberdiek (eds) *Oxford Studies in Private Law Theory: vol 1* (2020).
[59] Merrill and Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 Yale LJ 1; (n 51).
[60] *Shell (UK) Ltd v Total (UK) Ltd* [2011] QB 86 [*Shell*].
[61] *Colour Quest v Total Downstream Ltd* [2009] EWHC 540 (Comm).

for C's claim to be denied.[62] It seems the judges would not have allowed a claim to succeed if a party with a mere contractual right to use the land had sought damages from D. However, for the Court of Appeal, the reality was that C owned the land and that their relationship to it was therefore far stronger than that of the contractual licensee.[63]

The implication of the Court's judgment seems to be that the beneficiary of a trust enjoys a multital claim-right against physical interference with the trust property. The Court said that the trustee must be joined in the action against the negligent defendant.[64] It is not clear why this requirement is necessary, given that the Court agreed with C that D owed them an independent duty of care not to carelessly damage the property, to which C enjoyed the correlative claim-right. We saw earlier that the importance of joinder is that the beneficiary enlivens the claim-right held by their trustee. The beneficiary does not invoke the existence of a separate duty owed by the defendant to them.

Shell v Total is inconsistent with precedent and has been strongly criticised.[65] Its implications stand in tension with the reasons for having a *numerus clausus* principle governing the content of legal property rights. It makes it harder to justify the informality with which trusts can be created and the number of beneficiaries for which they can be set up. Its basic premise, that third parties owe independent duties to beneficiaries not to cause physical damage to the trust property, is fundamentally inconsistent with the structure of a trust: the trustee holding a right, with all the jural relations it entails, to promote a scheme. The trustee has the right and its jural relations. Not the beneficiaries.

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[62] *Shell* (n 60) at para [143].
[63] Ibid at para [136]
[64] Ibid at para [144]
[65] (n 52); W Swadling, 'In Defence of Formalism' and B McFarlane, 'Form and Substance in Equity' in A Robertson & J Goudkamp (eds) *Form and Substance in the Law of Obligations* at 103-110 and 203-210; Edelman, 'Two Fundamental Questions for the Law of Trusts' (2013) 129 LQR 66, 66-75.

B. Successor Liability

i. Persistence vs Universal Exigibility

Where Alfredo negligently damages the trust property, he does not receive a right which depends on the exercise of a jural relation held on trust. McFarlane and Stevens argue that the defining feature of an equitable property right – of which the beneficial interest is the paradigmatic example – is that of persistence, rather than universal exigibility.[66] Agostina's multital claim-right against physical interference with the land held on trust binds all third parties, irrespective of whether they have received a right that depends on the exercise of a jural relation held on trust. The beneficiaries in *Agostina's Case* do not – pace *Shell v Total* – possess a claim-right of that kind.

A beneficial interest is a persistent right – in the language of McFarlane and Stevens – because any party who receives a right that depends on the exercise of a jural relation held on trust – and does not have a defence – can be affected by the trust structure. It is interesting to note that Lord Sumption in *Akers v Samba* said that a beneficial interest possesses the essential features of a right *in rem*. However, he then defines the right *in rem* in a limited way, such that it binds only the successors in title to the trust property.[67]

[66] (n 42) 1.
[67] *Akers* (n 41) [82].

ii. The Core Trust Duty

The first point to note is that Agostina was chosen by Santiago to be the steward of the trust property. Santiago gave Agostina powers under the terms of the trust to invest and deal with her legal title to the freehold in certain ways. Santiago did not give those powers to third parties. The second point to note is that although a third party who receives a right which depends on the exercise of a jural relation held on trust does not acquire all the duties under the trust instrument, to invest the trust property and so forth, they may come under a duty not to deal with the right they receive in their self-interest. The "core trust duty" – in the language of Agnew and McFarlane – may bind third party recipients.[68] The core trust duty is the requirement not to deal with a right (in the sense of the totality of jural relations it entails) according to one's subjective preferences.

It would be helpful to use some examples:

iii. Innocent Volunteers

a. The Importance of Knowledge of The Breach of Trust

Agostina, in breach of trust, conveys legal title to the freehold to Greg, an innocent volunteer. In other words, Greg gave no value for the right he received from Agostina and had no knowledge of Agostina's breach of trust. Greg is now the party who appears on the Land Register as legal proprietor. Until Greg has sufficient knowledge of Agostina's

[68] Agnew & McFarlane, 'The Paradox of the Equitable Proprietary Claim' in McFarlane & Agnew (eds) *Modern Studies in Property Law, vol X* (Hart, 2019).

unauthorised conveyance, he enjoys a liberty against the beneficiaries to use the freehold in his own interests.[69]

This seems fair. He had no knowledge of Agostina's breach when he received the legal title and had no way of knowing. When Greg is made aware of Agostina's breach of trust, either because one of the beneficiaries tells him, or his knowledge is acquired through independent means, Greg then comes under a fully-fledged duty to the beneficiaries not to use the freehold in his self-interest.[70]

On the view of this thesis, the basis of the claim that the beneficiaries can bring against Greg, asking him to re-convey legal title to Agostina or to a newly appointed trustee, is that the freehold had been appropriated to a scheme. The law will ensure – as far as possible consistently with other countervailing concerns as represented in, for example the good faith purchaser for value defence – that the appropriation is successful. Therefore, initially innocent recipients of trust property conveyed in breach, may be required to return that property to the trust fund. The idea of rights being appropriated, in the totality of the jural relations to which those rights give rise to a scheme explains, on the view of this thesis, the feature of persistence entailed by the trust. The fact that the duty of the trustee relates to the entire bundle of jural relations with which they are vested, provides a reason for treating that duty differently from other duties. For example, if Agostina, rather than being a trustee of the freehold, was vested with title beneficially and granted Anna-Rita a licence to use the freehold, where Agostina conveys the freehold to Gian Lorenzo, Gian Lorenzo does not come

[69] *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91 [*ITS*], [76]; *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 290-291 (Millett J); *Re Montagu's Settlement Trusts* [1987] Ch 264.
[70] Ibid *ITS* [81] – [84].

under a conditional duty not to use the freehold incompatibly with the licence. Agostina's duty as licensor never burdened the totality of her jural relations.

b. Conditional Duties

An innocent volunteer, when they receive a right conveyed in breach of trust, is under a conditional duty to return that right or its traceable proceeds to the original trustee or to a newly appointed one. Greg's duty is fully effected when he acquires the necessary knowledge of the prior breach of trust. Furthermore, when Greg received the freehold from Agostina, he came under a conditional duty not to use that right for his own benefit. The condition precedent for the full force of that duty to apply to Greg, is his sufficient knowledge of the prior breach of trust.

This idea of Greg being under a conditional duty explains the following situation. If Greg is made bankrupt, the freehold will not vest in his trustee in bankruptcy.[71] This is because Greg is under a conditional duty not to use the freehold in his self-interest.

Mitchell and Liew explain how a trust's asset partitioning effects can obtain even where the party to whom a right has been conveyed has not yet agreed that they will honour the full terms of the scheme the settlor wants them to promote.[72] Even if the transferee will not come under a duty to fully appropriate the right they receive to the terms of the scheme, until they

[71] *A-G v Lady Downing* (1766) Amb 550, 552; 27 ER 353, 353; *Re Smirthwaite's Trusts* (1871) LR 11 Eq 251; *A-G v Stephens* (1834) 3 My & K 347, 352; 40 ER 132, 134; *Sonley v The Clock-Makers' Co* (1780) 1 Bro CC 81, 81; 28 ER 998, 999.
[72] Liew and C Mitchell, 'The Creation of Express Trusts' (2017) 11 J Eq 133.

accept the office they have been offered, because the transferee knows that the right was not conveyed as a gift, they cannot use it for their own benefit.

Even where they had no knowledge until after the right was conveyed that the transferor intended it to be held on trust, then they are under a conditional duty not to use that right for their own benefit, the putative beneficiary holding the correlative claim-right.[73] That duty arises at the moment of receipt and will be fully effected when they acquire knowledge of the fact that the transferor intended them to appropriate that right to a scheme. This conditional duty means that the transferee's trustee in bankruptcy will not receive the right conveyed by the putative settlor.

These features of the law favour a scheme analysis of trusts: a scheme can exist and be given some legal effect even if the conscience of the holder of the property has not yet been affected. Where A conveys property to T to be held on trust for B and T is unaware that the property was intended to be held on trust, A has a multital power to appropriate that property to a scheme, even if the scheme is not fully created until T accepts office. The fact that T, at the moment of receipt is under a conditional duty not to freely use the assets, shows that the law will recognise the scheme's asset partitioning effects and the settlor's intention to partition rights into separate pools, even where there is no scheme manager until the putative trustee accepts their office. In other words, a right can be appropriated to a scheme without there being a fully-fledged scheme manager owing duties of full accountability. The law therefore protects the nascent scheme, at the same time as ensuring that knowledge is necessary before finding that parties have breached a duty by freely using an asset.

[73] (n 71).

c. Innocent Volunteers and Change of Position

Although the law will not find that Greg is liable to the beneficiaries for having used the freehold in his self-interest before acquiring sufficient knowledge of Agostina's breach of trust, Greg is not absolutely protected even when in good faith. For example, if Greg, before having acquired knowledge of the breach of trust, spent money he would usually never invest on a luxury holiday, thinking himself to be rich, by virtue of the freehold, he will have no change of position defence when asked to return the trust property.[74] The change of position defence seems to apply when D is only under a duty to return the value of property received, the burden of that duty being reducible to the extent that D in good faith relied on the fact that they were entitled to the value of the property transferred.[75]

For example, if Niccolò pays £50 to Edoardo that he mistakenly believes he owes to Edoardo and Edoardo, in reliance on the payment, eats at a restaurant he would never have visited unless he had the extra £50, Edoardo will have a change of position defence against Niccolò, even if Edoardo did not spend the exact £50 he received and still has that bank note in his pocket. The nature of the claim that the beneficiaries bring against Greg is different. They are not seeking the return of the value of trust property conveyed in breach. Rather, they seek the return of the very right – i.e. the freehold – that Greg received. It might be arguable that the law should provide a mechanism whereby Greg is protected in this situation.

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[74] *Foskett* (n 48) 129.
[75] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, *per* Lord Goff; Chambers, R. (2016). Proprietary Restitution and Change of Position. In A. Dyson, J. Goudkamp & F. Wilmot-Smith (Eds.). *Defences in Unjust Enrichment* (Hart Studies in Private Law, pp. 115–132).

For instance, although Greg will be required to return the freehold, that duty could be conditional on him having first been paid a sum of money by the beneficiaries representing his detrimental reliance.[76]

iv. Good Faith Purchasers of the Legal Estate for Value

Agostina, in breach of trust, conveys the freehold to Greg, a good faith purchaser for value. Greg now has an immunity from ever coming under a duty to the beneficiaries not to use the freehold in his self-interest.[77] Even if Greg later discovers Agostina's breach of trust, he can continue using the freehold as he likes and will come under no duty to return the freehold. The *bona fide* purchaser for value rule allows purchasers to deal confidently in the market.[78] They know that if they have paid for the legal title they receive, with no reasonable means of knowing of any internal breach of trust, their title will be unimpeachable.

v. Akers v Samba

a. Disposition of the Beneficiary's Property?

Knowledge of the trust is an important feature of the rules governing the liability of successors in title to trust property. As with all areas of the law of trusts, the most important premise is that it is the trustee who is vested with a right, that has been appropriated to the realisation of a scheme. It is the trustee who has the right and all its jural relations. The

[76] Chambers Ibid 116.
[77] *Pilcher v Rawlins* (1872) 7 Ch App 259.
[78] Samet & Nair, 'What Can Equity's Darling' Tell Us about Equity?' in Klimchuk, Samet, and Smith (Eds) *Philosophical Foundations of the Law of Equity* (OUP 2020).

beneficiaries then have a claim-right against their trustee that the property they hold is devoted to the scheme. Whether third party successors in title to Agostina will be affected by the trust scheme, will usually depend on the state of their knowledge.[79]

Akers v Samba provides recent authority for this proposition.[80] T held shares on trust for B. T, without authority under the trust, transferred the shares to X. The question for the Supreme Court was whether T's transfer of shares to X involved a disposition of B's property. The Court unanimously found that even if B was unable to assert the beneficial interest against X, no disposition of B's property had occurred. The transaction between T and X was not therefore rendered void by section 127 of the Insolvency Act 1986. X received their right from T. Whether X comes under a duty to B not to use the right for their own benefit is a separate question. It depends, as Lord Sumption said, on X's knowledge of a breach of trust.[81] In other words, X's conscience must be affected.

b. Private International Law and Comity

In *Akers*, the shares were in Saudi Arabia. Saudi Arabia does not recognise the institution of the trust.[82] It might be argued that an English court, by finding that T holds a right for the benefit of B or subject to some other equitable obligation, that right being located in a jurisdiction which does not recognise trusts, is not contradicting the law of that state. It is true that the English court is not denying that the right is vested in T according to the foreign law. However, by finding that the right is held on trust, the English court is arguably undermining

[79] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 705.
[80] *Akers* (n 41).
[81] Ibid at para [89].
[82] Ibid at para [5].

the legal regime of another country. Perhaps the foreign jurisdiction does not recognise trusts because it does not endorse the idea of rights being vested in any way other than beneficially. Hohfeld argued that, although not contradicting the common law (because equity recognised the location of a right determined by the common law), equity did change a person's jural relations.[83] For example, T had a right at common law to do what he wanted with the land, but no right at equity. In other words, if equity did not exist, T would not be in breach of duty by using their common law right as they wished. Therefore, equity does recognise different jural relations to those at law. It is just that formally, there is no contradiction between common law and equity because the two answer different questions.[84] However, in relation to private international law, a state that does not recognise trusts might not want an English court to ask "is that right burdened by a duty to use it for the benefit of a scheme"? *Akers v Samba* does not recognise these points as clearly as it could have. The Court's reasoning, on this comity issue, could have been more transparent.[85]

vi. External Effects: Summary

The scheme analysis provides a useful way of understanding the external effects of a trust. In relation to trespassory liability, a third party is liable to the trustee for damaging trust property, if the right with which the trustee is vested is recognised by the general law as giving rise to a multital claim-right against physical interference. If the trustee does have that multital claim-right, because it is part of a bundle which has been appropriated, in the totality of its jural relations, to a scheme, they owe a duty to their beneficiaries to enliven that right.

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[83] Hohfeld, The Relations between Equity and Law, (1913) 11 Mich L R 537.
[84] McFarlane, B. (2019). Avoiding Anarchy?: Common Law v. Equity and Maitland v. Hohfeld. In J. Goldberg, H. Smith, & P. Turner (Eds.), *Equity and Law: Fusion and Fission* (pp. 331-352).
[85] Note also the possible tension with *Byers & Ors v. Samba Financial Group* [2021] EWHC 60 (Ch) where the *lex situs* was used to protect a third party from a knowing receipt claim; (n 40).

The scheme model of trusts also provides an explanation of a trust's effect on successors in title to trust property. The scheme analysis recognises that a right can be appropriated to a scheme, in the totality of its jural relations, thereby engendering asset partitioning effects, without the conscience of the holder of the right having been affected. However, sufficient knowledge of the appropriation is necessary for the holder of a right to be liable for using that right for their own benefit.

Conclusion

This chapter has argued that an analysis of trusts which sees the scheme as paramount is useful in explaining a number of different areas of the law. Although some features of the law might seem intuitively less consistent with a scheme analysis, there are arguments which can be made to show that those features are explicable on the model of trusts advanced in this thesis.

Our analysis has made the following points:

1. A trust is where a right of economic realisability has been appropriated – in the totality of the jural relations to which it gives rise – to a scheme. The right is vested in the trustee who is charged with ensuring its devotion to the scheme. The beneficiaries enjoy the correlative claim-right to the trustee's duty of full accountability.
2. A trust's third-party effects are determined, in the first place, by the nature of the right the trustee holds on trust and the jural relations to which it gives rise. Therefore, if a trustee holds a legal property right on trust, then it is to the trustee that third parties owe their duty of physical non-interference.

3. It is usually a requirement that successors in title to the trust property will only come under a fully-fledged duty to the beneficiaries if they have knowledge of the breach of trust. Although knowledge is necessary before a fully-fledged duty arises, the scheme can be protected (for example in insolvency) even if the conscience of the holder of the right has not been affected.

Chapter III

Trust Law Asset Partitioning Rules

Although we emphasised that successors in title to the trust property will usually only come under fully-fledged duties to the beneficiaries where they have knowledge of any breach of trust, the main asset partitioning feature of the trust – that the personal creditors of the trustee and of successors in title with no defence cannot lay claim to the trust property – obtains independently of the knowledge of third parties. This section will focus on the doctrinal equilibrium governing the claims of trustees, trust creditors and trust beneficiaries to the trust assets. We will see this that this doctrinal equilibrium is consistent with our Core Claim: trusts, partnerships and deceased estates vindicate the interests of scheme managers and scheme creditors before those of the scheme beneficiaries.

In *Agostina's Case*, we saw that Agostina holds a freehold and legal title to chattels on trust. She did not receive a separate capital sum from Santiago. It is through her management of the estate that she will be able to pay the beneficiaries their fixed income under the trust terms and ensure that they can enjoy the land's various amenities. This means that she will have to enter into transactions with third parties to ensure the upkeep of the estate. The mansion must be cleaned. The swimming pool must be maintained. And so forth.

The rules governing the doctrinal equilibrium are based, at least in part, on the idea that Agostina is not to pay for the authorised upkeep of the estate from her personal funds[86].

I. Key Principles

A. Basic Picture

This doctrinal equilibrium can be stated quite succinctly:

1. The trust is not a legal person. It is not endowed with legal personality.[87] Agostina does have legal personality. She holds the freehold title.
2. Agostina makes contracts with third parties concerning the upkeep of the estate. She comes under the duty to honour the contracts. Third parties owe her the duty of performance under the contracts.[88]
3. Agostina is not to suffer a loss for debts incurred in the authorised pursuit of trust business.
4. She therefore has a right of indemnity to recover her costs.[89]
5. The right of indemnity takes two forms: a power of recoupment and a power of exoneration.[90]
6. Third parties, including trust creditors, have no direct claim on the trust assets.

[86] *Re Grimthorpe* [1958] Ch. 615 at 623, *per* Danckwerts J. See too *Worrall v Harford* (1802) 8 Ves. Jr. 4 at 8, *per* Lord Eldon L.C.; *Att.-Gen. v Mayor of Norwich* (1837) 2 Myl. & Cr. 406.
[87] Investec (n 51) [59(i)].
[88] Ibid [59(iii)].
[89] Ibid [59(v)].
[90] *Carter Holt Harvey v Commonwealth* [2019] HCA 20 [*Carter*] at paras [29] – [31].

7. Trust creditors have an indirect access to the trust fund through subrogation to Agostina's rights of indemnity.[91]
8. Their ability to claim the assets of the trust fund will mirror any limitations on Agostina's rights of indemnity.[92]

All these propositions were recently confirmed in both *Investec* and *Carter Holt*.[93]

i. Stefano the Gardener

a. The Contract is Authorised

Agostina makes an authorised contract with Stefano to manage the upkeep of the estate's gardens. The contract states that Stefano will be entitled to £50,000 a year, payment to be made by the end of December. The contract is between Agostina and Stefano. Agostina has the claim-right against Stefano that he manages the upkeep of the gardens. Stefano has the claim-right against Agostina that she pays him £50,000 a year.

Because Agostina is authorised to make the contract with Stefano, she can directly pay his claim from the trust funds (power of exoneration). If Agostina pays Stefano from her personal funds first, she can then draw on the trust funds to reimburse herself (power of recoupment).

[91] *Investec* (n 51) [59 (vi)].
[92] Ibid [59 (vii)].
[93] *Investec* (n 51); *Carter* (n 90).

If Agostina fails to pay Stefano by the end of December, Stefano has at least two options, both premised on bringing a claim against Agostina, the party who owes him the debt. Stefano can sue Agostina and levy judgment against her personal assets. If this path has been barred by the terms of the contract[94], or Agostina's personal assets are insufficient, Stefano can ask to be subrogated to Agostina's power of exoneration. This means that Stefano can force Agostina to draw on the trust funds, to the extent of her power of exoneration and then pay him.

b. Stefano's Access to the Trust Fund is Vulnerable

Stefano's indirect access to the trust fund – through Agostina's power of exoneration – is vulnerable. It depends on Agostina having in the first place a good right to draw on the trust assets. In this case, the contract with Stefano was authorised by the trust terms. Therefore, Agostina *prima facie* has a power of exoneration, to the extent of £50,000. However, if Agostina had committed some unrelated breach of trust, for which she had not yet accounted to her beneficiaries, her power of exoneration would be weakened to the extent of the breach.

For example, if Agostina had spent £30,000 of trust funds to host a ball for her friends, then Agostina would only be able to claim £20,000 of the trust funds to pay Stefano. Stefano, because he claims through Agostina, would also only be able to claim £20,000 of the trust funds. If Agostina had spent £50,000 of trust funds on a luxury holiday, then she would not

[94] *Lumsden v Buchanan* (1865) 3 M (HL) 89, (1865) 2 Paterson 1357 [*Lumsden*]; *Gordon v Campbell* (1842) 1 Bell 428 [*Gordon*]; *Muir v City of Glasgow Bank* 16 SLR 483 [*Muir*].

be able to draw on the trust funds at all to pay Stefano's debt, until such time as she had made good her breach. Until she has, Stefano will have no indirect means of accessing the trust.

Stefano's indirect access to the trust funds shares the logic of the *Vandepitte* procedure. We saw that where Agostina refuses or is unable to enliven a claim-right she has against a third party who negligently damages trust property, the beneficiary's ability to claim against the third party will be vulnerable to any limitations on Agostina's rights.[95] For example, we saw that if Agostina had waived her claim-right against the third-party, then the beneficiaries would be left with their claim against Agostina. But the third-party would be protected. The same kind of logic applies with subrogation to a trustee's right of indemnity.

It can be argued that Stefano's inability to access the trust funds to the extent of Agostina's breach of trust, vindicates the scheme. Agostina's priority claim to the trust assets over the rights of her beneficiaries exists to ensure that she will not suffer personal losses from her authorised management of the trust estate. However, where her management has not been compatible with the terms of the trust, her rights of indemnity are weakened, to the extent of the breach. It would not be a vindication of the scheme for the trustee to have rights of indemnity to the extent that they have breached its terms. The priority claims of scheme managers and scheme creditors presuppose that the scheme has been properly administered.

[95] Chapter II, Section II.A.ii

ii. Terminology

The courts talk of Agostina having a right of indemnity. They say that the right of indemnity takes two forms: a power of exoneration and a power of recoupment. What do these terms mean?

We have emphasised throughout this thesis that it is important to remember that Agostina is the party vested with the freehold and consequently holds the entire bundle of jural relations to which that freehold gives rise. We saw that Agostina opened a trust account. In other words, she has a right against the bank and she holds that right on trust. The right against the bank comes with its own bundle of jural relations. For example, Agostina has an inherent power from her being vested with the right against the bank to direct funds from that account. In the same way, Agostina has an inherent power, because of her legal proprietorship of the freehold, to grant a lease, mortgage the land or transfer it outright to another. It is not trust law which gives Agostina the power to direct funds from the bank account, or to mortgage the freehold. She has those powers as her result of title.

We saw that it is important to distinguish Agostina's powers under the general law and Agostina's liberties under the trust. In other words, Agostina might be unauthorised by the trust terms to convey legal title in the freehold, but she is empowered by the general law to do so. When we say that Agostina is disempowered under the terms of the trust from transferring title to the freehold, what we mean is that Agostina would thereby be breaching a duty owed to her beneficiaries. However, her Hohfeldian power to convey title exists and is not taken away by the trust. She will successfully convey title to the freehold if she exercises her multital power under the general law to do so. In other words, she has a right (a multital

power) to commit a wrong (breach a duty owed to her beneficiaries). Powers of exoneration and recoupment do not give Agostina the power to direct funds from the trust account. She has that power as a result of her right against the bank.[96]

Identifying with precision the jural relations to which the right of indemnity gives rise is important in avoiding judges making mistakes with practical consequences. As Hudson and Mitchell say, judges have been led astray in failing to understand the precise type of jural relation to which the right of indemnity is referring.[97] Cases have been misguided in thinking of the trustee as having a lien over the trust property to the extent of her right of indemnity.[98] How can Agostina enjoy a security interest over a right with which she is already vested?

One area which has confused courts is a trustee's right of indemnity upon retirement. Because some judges have thought of the right of indemnity as giving the trustee a lien over the trust assets, they ask whether that lien has priority over the creditors of the new trustee. This reasoning is flawed. Imagine Agostina retires as trustee. A new trustee – Hermione – is appointed in her place. Agostina, when trustee, incurred a debt of £50,000 a year to Stefano. Agostina will continue owing Stefano the duty to pay him £50,000 a year, even when she ceases to be trustee and is no longer vested with the trust property. Agostina will only be freed of that duty if Stefano and Hermione agree that Stefano's right will be against Hermione and no longer against Agostina. We have seen that Agostina's ability to direct the trust funds to discharge her liability to Stefano is an inherent feature of being vested with the right against the bank. When Agostina transfers the trust property to Hermione (including

[96] *Carter* (n 90) at para [83].
[97] J Hudson and C Mitchell, Trustee Recoupment: A Power Analysis 2021 Trust Law International, 15.
[98] *Dimos v Dikeakos Nominees Ltd* (1996) 68 FCR 39 [35]; *Meritus Trust Co Ltd v Butterfield Trust (Bermuda) Ltd* [2017] SC (Bda) 82 Civ [13]–[14]; *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* [2008] NSWSC 1344 [45]–[50].

assignment of her right against the bank), Agostina loses the entire bundle of jural relations to which the trust property gave rise. Hermione now has that bundle. Therefore, Agostina no longer possesses any inherent mechanism for directing the trust funds to satisfy Stefano's claim. Agostina never had a security interest over the trust funds. One cannot have a power (the power to force the sale of an asset to access its value for the satisfaction of a debt) against oneself. Given that Agostina never had a security interest over the trust assets, it does not make sense to ask whether the new trust creditors are bound by that prior right. The best approach for Agostina would be to pay Stefano from the trust property before transferring title in the trust assets to Hermione.

Agostina then has a liberty against her beneficiaries to use £50,000 of trust funds to pay Stefano (assuming no unrelated breaches of trust). If Agostina had paid Stefano from her personal estate, she enjoys a liberty against her beneficiaries to do what she wants with £50,000 of the trust funds. She could use £50,000 of the trust funds to buy herself a Porsche.

A right of indemnity then, is really a liberty against the beneficiaries of the trust to use the trust funds in certain ways.

The scheme analysis provides a straightforward explanation of a trustee's rights of indemnity. It recognises that the trustee holds the entire bundle of jural relations entailed by the vesting of a right, that bundle being defined by the general law. The model of trusts advanced in this thesis then says that the right has been appropriated to a scheme, which allows the trustee to make certain uses of her inherent powers to pay trust creditors and to reimburse herself for her proper management of the trust estate. A competing view – premised on a proprietary understanding of the beneficiary's rights – sees the beneficiary as

having an interest and the trustee as enjoying a lien over that interest. Our Core Claim argues that this view is wrong. It sees the beneficiary's right and the trustee's right as distinct and the trustee's right as secondary, whereas they are both part of the overall scheme and so take effect at the same primary level.

iii. Agostina's Bankruptcy

The freehold and the legal title to chattels and all their (authorised) traceable proceeds will not vest in Agostina's trustee in bankruptcy, Angela.[99] This is because they have been appropriated to the trust scheme. She was unable to bring to bear her subjective preferences, unless authorised by the scheme, in her use of the trust assets.

It might be tempting to describe Angela as receiving any rights of indemnity from Agostina. This is because they were rights with which she was vested beneficially (although in relation to the power of exoneration this idea will be challenged in Chapter IV[100]) and therefore vest in Angela. However, this temptation should be resisted.

Angela does not receive any right which had been appropriated to the trust scheme. That is a basic feature of a trust's asset partitioning effects. Therefore, given that Agostina continues being vested with the freehold and its traceable proceeds and the right against the bank and its traceable proceeds on her bankruptcy, in what sense does Angela receive Agostina's rights of indemnity? We saw that the ability to convey title in the freehold or to direct the transfer of funds from the trust account is an inherent feature of being vested with these rights. These

[99] *Caillud* (n 22).
[100] Section I. C. iv. a.

powers are one element of the bundle of jural relations to which those rights give rise. Given that Angela does not receive that bundle from Agostina, she has no inherent means of conveying title in the freehold or directing funds from the trust account. Those powers remain with Agostina because she continues to be vested with the freehold and the right against the bank.

In *Carter Holt*, the trustee of a trading trust went insolvent. The HCA said that whereas powers of recoupment could be used for the benefit of the trustee's general creditors, her powers of exoneration could not. We saw that where Agostina had already paid Stefano from her personal assets, she could, to the extent of her power of recoupment, do with the trust funds as she wished. As we said, she could have taken £50,000 from the trust account and bought herself a Porsche. However, if the debt with Stefano remained outstanding, she could only use the £50,000 to satisfy Stefano's claim. Otherwise, she would have been in breach of duty to her beneficiaries. *Carter Holt* tells us that if Agostina goes bankrupt and her debt with Stefano remains outstanding, Angela will only be able to use Agostina's power of exoneration for the benefit of Stefano and not treat it as an asset available to her general creditors. Conversely, if Agostina goes bankrupt, having already discharged her debt to Stefano by drawing on her personal estate, then her power of recoupment can be used by Angela for the benefit of Agostina's general creditors.

We saw that Angela does not have any inherent power to direct the trust funds in these ways because she does not receive the trust property from Agostina. It is therefore better to see the trustee in bankruptcy as being conferred by the law on bankruptcy a *sui generis* power to direct use of the trust funds. That *sui generis* power reflects any limitations on the liberties which Agostina enjoyed against her beneficiaries. For example, if Agostina is made bankrupt

still owing her debt to Stefano, then the law of bankruptcy will confer on Angela a *sui generis* power to direct £50,000 of trust funds to Stefano but not a *sui generis* power to direct £50,000 of trust funds to Agostina's general creditors.

The rules applicable on Agostina's bankruptcy can be explained by the scheme analysis. Stefano is protected on Agostina's bankruptcy as his debt was incurred as part of the scheme. It would be contrary to the scheme to allow a general creditor of Agostina to access the scheme's assets through her power of exoneration, which arose because of her contract with Stefano.

iv. Hudson and Mitchell: A Power Analysis

Hudson and Mitchell have proposed a general theory for understanding a trustee's powers of recoupment. This thesis has focussed on one kind of recoupment power: namely the ability of Agostina to draw on the trust funds for the payment of the costs incurred in her proper administration of the trust estate.

There are other examples, however, of recoupment, which Hudson and Mitchell discuss, which involve the trustee changing their beneficiaries' jural relations through the exercise of a power. However, Hudson and Mitchell recognise that Agostina's power of reimbursement is different from the other types of recoupment they discuss.[101] This is because it is not immediately apparent that describing Agostina as having a power to change her beneficiary's legal relations in the context of Agostina's reimbursement rights is the best way of understanding them.

[101] (n 97) 13.

Instead of saying that Santiago and the other trust beneficiaries are entitled to £10,000 a month from Agostina, that entitlement being the subject of reduction through Agostina's exercise of a power, this thesis takes the view that the beneficiaries' entitlement to £10,000 was always subject to the possibility of Agostina paying her costs first and there not being enough in the trust fund to pay the beneficiaries in full. In other words, the nature of the beneficiaries claim-right was the following: a claim-right against Agostina that once she has fully reimbursed herself for her lawfully incurred costs and once she has fully paid trust creditors, she distributes the residue and up to £10,000 a month to each of her beneficiaries. This is consistent with our Core Claim. It is the scheme which is paramount and it is arguably a mandatory feature of trusts, which cannot be changed by the settlor, that the trustee has these rights of indemnity. The scheme always recognised the possibility of the trust beneficiaries not receiving £10,000 a month because Agostina's power of reimbursement as well as her powers of exoneration were interests to be vindicated in priority to those of the beneficiaries. In other words, Agostina does not exercise a power against her beneficiaries to change the nature of their jural relations in drawing on the trust funds to reimburse her lawfully incurred costs. Her liberty to do so was always recognised by the scheme and her beneficiaries' rights always took subject to that liberty and were defined with reference to it.

B. Features of the Doctrinal Equilibrium

In the discussion that follows, we shall identify some further features of the doctrinal equilibrium governing the claims of trustees, trust creditors and the trust beneficiaries to the assets held on trust. They are consistent with our Core Claim: the interests of scheme managers and scheme creditors are vindicated prior to those of the scheme beneficiaries.

These features reveal the strength of the law's resolve to avoid the scheme manager's personal estate having to suffer any personal loss from the administration of the trust fund.

i. Power to Sell Trust Assets

Agostina has a liberty against her beneficiaries to sell the trust property in order to pay her lawfully incurred costs and any trust liabilities from its proceeds.[102]

ii. *Saunders v Vautier* Power

The beneficiaries may ask for the underlying assets of the trust fund to be transferred to them.[103] This power exists where all the beneficiaries agree and are vested with the entire beneficial interest. However, Agostina is only under a duty to transfer what remain of the trust assets once her rights of indemnity have been fully satisfied.[104] This is consistent with our Core Claim. The trust beneficiaries' rights are defined with reference to the priority claims of the trustee and the trust creditors. If Agostina's lawfully incurred liabilities and the debts owed to trust creditors exceed the value of the scheme's assets, the scheme beneficiaries will end up with nothing.

It might be argued that *Saunders v Vautier* undermines the scheme analysis. If property has been devoted to a scheme, why can the beneficiaries terminate the scheme? This feature of the law might be seen as an area where the logic of the scheme gives way to countervailing

[102] *Re Pumfrey* (1882) 22 Ch.D. 255 at 262; *Apostolou v VA Corp. of Aust Pty Ltd* [2010] FCA 64; (2010) 77 A.C.S.R. 84 at [37]–[46].
[103] *Saunders v Vautier* (1841) 4 Beavan 115, 49 ER 282 (MR); C&P 240, 41 ER 482 (LC).
[104] *CPT Custodian* (n 28) [41] to [52].

concerns. For example, the autonomy of the beneficiaries in their ability to waive the duties imposed under the scheme. However, it is possible, arguably, to explain the *Saunders v Vautier* power on the scheme analysis. First, the power is defined as subject to the priority claims of trustees and trust creditors. Second, the settlor can easily exclude the power through particular drafting techniques. Therefore, if the settlor has chosen not to do so, he can be taken to have intended the *Saunders v Vautier* power to be available. In other words, he can be intended to have wanted it to be part of the scheme. An analogy can be drawn with contract law. A termination clause in a contract does not mean that the terms of the contract are not paramount in understanding the parties' rights and obligations. Thirdly, the *Saunders v Vautier* power is not a recognised feature of the law of trusts in all common law jurisdictions.

iii. Tort Liabilities

In running the estate, Agostina may become liable in tort through her own acts or the acts of her employees and agents. Where Agostina acted reasonably and in accordance with her powers under the trust, she will have a right of indemnity.[105]

iv. The Trustee can Shield her Personal Estate

We saw that the *prima facie* position of English law is that Agostina exposes her personal estate through her administration of the trust. Agostina is the party against whom, for

[105] *Re Raybould* [1900] 1 Ch. 199; *Att.-Gen. v Pearson* (1846) 2 Coll. 581; *Flower v Prechtel* (1934) 159 L.T. 491, CA.

example, Stefano enjoys his claim-right that she pay him £50,000. Stefano can *prima facie* levy judgment against Agostina's personal assets.

The *prima facie* position is justifiable. Stefano might not have known that Agostina had agreed to pay him £50,000 a year in proper administration of a trust fund. A trust involves rights being appropriated to a scheme. However, that scheme can be informally created.[106] There is usually no requirement of public registration. Third parties, therefore, might be unaware of the scheme's existence. Stefano's *prima facie* ability to levy his judgment against Agostina's personal assets can be seen as justifying the informality with which trusts can be created.

However, if Agostina tells Stefano that the contract has been made to benefit the trust scheme, it seems fair that she can thereby shield her personal estate from any claims brought by Stefano, a trust creditor. English law allows Agostina to protect her personal estate through express provision in her contract with Stefano.[107] Although Stefano obtains judgment against Agostina, the party who owes him the duty to pay him £50,000, he will be unable to levy judgment against Agostina's personal assets.

We will see – in our discussion of the Scottish trust – that this feature of English law is an important indicator that at a certain level English law does vindicate the idea of separate patrimonies. Although the doctrinal equilibrium governing the claims of trustees, trust creditors and beneficiaries is different in English law, by allowing the trustee to expressly shield their personal estate from the claims of trust creditors and in giving the trustee rights of

[106] F Maitland, 'Trust and Corporation': see D. Runciman and M. Ryan (eds) *Maitland: State, Trust and Corporation* (Cambridge: CUP, 2003) 75, 94.
[107] *Lumsden*, *Gordon*, *Muir* (n 94).

indemnity to ensure that trust creditors are paid from the trust assets and no loss is thereby inflicted on the trustee's personal estate, the English trust does –indirectly perhaps – create two distinct patrimonies or universalities of law. English law gives the trustee the necessary resources for this thesis to argue that its legal system unites assets and liabilities either with reference to the idea of their holder's life projects or with reference to a scheme to which rights have been appropriated. Therefore, the notion of rights being appropriated to a scheme is arguably very similar to the idea of appropriation of assets to a patrimony. The DPhil can explore further the links between rights being appropriated to a scheme and rights being appropriated to a patrimony.

Article 32 of the Jersey Trusts Law, discussed in *Investec*, shields Agostina's personal estate whenever the other party knew that the transaction was made for the benefit of the scheme. In other words, Agostina does not have to expressly stipulate for that protection in a contract. This seems sensible. It strengthens the law's commitment to uniting assets and liabilities with reference to a right's link to the life goals of its holder or with reference to its appropriation to a scheme, at the same time as protecting third parties, who will only be unable to levy judgment against Agostina's personal estate where they had knowledge she was acting in her capacity as trustee.

v. Personal Indemnity

The law has recognised that in certain circumstances Agostina has a claim-right against her beneficiaries to be paid the remainder of her lawfully incurred costs and liabilities which the

trust fund is unable to fully satisfy.[108] Although this feature of a trust has been criticised[109] and is not universally acknowledged[110], the fact that it has operated in the past and continues to function in some jurisdictions, shows the extent to which the law is committed to shielding the trustee from any personal losses in properly running the trust estate. The rule in *Hardoon v Belilios* is explicable on the scheme analysis; on the other hand, a view which sees the interest of the beneficiaries as paramount struggles to account for such a rule. Indeed, *Hardoon v Belilios* shows that in some cases the beneficiaries themselves are seen as having some responsibility for the running of the trust and to ensure that the right is appropriated to the scheme, which defines the beneficiaries' rights as subject to those of the trustee, the scheme being premised on avoiding any loss being inflicted on the trustee in the proper management of the trust estate.

vi. A Scheme-Defined Right from Start to Finish

The beneficiaries – because of the trustee's rights of indemnity – may end up with nothing both when the scheme is running and when it has been ended. Their rights are always subject to the priority interests of scheme managers and scheme creditors. The beneficiaries in *Agostina's Case* can get up to £10,000 a month. The actual figure they receive will depend entirely on the value of Agostina's lawfully incurred costs and liabilities. When the scheme is ended, the beneficiaries will only get whatever is left of the trust estate after Agostina's lawfully incurred costs and liabilities have been satisfied. The beneficiaries' rights therefore arise as part of the scheme and it would be a mistake – which the "equitable ownership" view

[108] *Hardoon v Belilios* [1901] AC 118*; Buchan v Ayre* [1915] 2 Ch 474.
[109] JC Campbell, 'The Undesirability of the Rule in *Hardoon v Belilios*' (2020) 34 TLI 13.
[110] Trustee Act 1925 (NSW), s 100A.

can cause one to make – to see them as somehow primary and the trustee and trust creditors' rights as secondary.

vii. Trust Creditors and the Duty of Full Accountability

Interestingly, trust creditors do not – it seems – enjoy a correlative claim-right to a trustee's duty of full accountability. The trustee would breach a duty owed to her beneficiaries by using the trust assets incompatibly with the trust scheme. However, it is not generally recognised that a trust creditor enjoys a similar claim-right, even though they stand to benefit from the trustee properly administering the scheme. That said, it is arguable that the trustee should be recognised as being in breach of duty to the trust creditors as well as to her beneficiaries in using the trust assets incompatibly with the trust scheme.

For example, there is some authority from the US to suggest that where the trustee pays income to her beneficiaries, knowing that there will thereby be insufficient funds for trust creditors or whose mismanagement leaves insufficient assets for the trust creditors, the trustee has breached a duty to the scheme's creditors.[111] In other words, the trustee has breached a duty in not respecting the priorities established by the scheme: trust creditors are to have their claims paid in full before the beneficiaries derive any benefit from the trust structure.

[111] See *Scott and Ascher on Trusts* (5th edn), Vol.4, § 26.2.3; *James Stewart & Co. v National Shawmut Bank* (1934) 69 2Fd 694 (1st Cir.).

II. Comparative Trust Law

A. Civilian Models: The Patrimony

i. Scotland

Aubry and Rau – writing in the French civil law tradition – argued that all one's assets are equally available to meet all of one's debts.[112] On this view, all titles or rights with which Agostina is vested and that count as an asset, can be taken away for her debts. They said that each person has one and only one patrimony, which is the common pledge of one's creditors. The patrimony is indivisible and inalienable, being intrinsically tied to one's legal personality. The patrimony is a metaphorical bag, containing all the assets from time to time acquired and all the debts a person incurs throughout their life. In this it is different from the English estate, which is used to resolve specific problems, such as those which arise at a person's bankruptcy or death. Once a person's debts are discharged on bankruptcy by payment *pari passu* to their creditors, those creditors are unable to levy judgment against new assets acquired by the bankrupt after their bankruptcy, even where creditors were not paid in full. The patrimony is seen as different. It is an ongoing idea, tied to legal personality. Creditors can levy judgment against all the assets from time to time acquired by their debtor. Bankruptcy does not – on the classic model – have the effect of discharging debts unless they are paid in full.[113] Agostina was endowed with legal personality at birth. That is, the aptitude to hold rights and be the subject of obligations. Her endowment with legal personality

[112] Kasirer, 'Translating Part of France's Legal Heritage: Aubry and Rau on the *Patrimoine'* (2008) 38 *Revue générale de droit* 453.
[113] Paul Matthews '"Square Peg Round Hole" Patrimony and the Common Law Trust' in R Valsan (ed) *Trusts and Patrimonies* (Edinburgh, Edinburgh University Press, 2015).

simultaneously entailed – on the Aubry & Rau view – the creation of a patrimony, whose content is intrinsically tied to Agostina's life projects.

Some civil law countries now recognise the possibility of one person having more than a single patrimony. It is no longer the case that all the rights with which one is vested respond to all the debts that person incurs. In Scotland – whose property law regime is civilian – the trustee holds two patrimonies.[114] The first is the trustee's personal patrimony. It contains all the assets vested in the trustee beneficially. The second is the trustee's trust patrimony. It contains all the assets vested in the trustee in their fiduciary capacity. Imagine *Agostina's Case* were governed by Scottish law. The freehold title and the legal title to chattels and all their traceable proceeds – ascertainable through real subrogation, the civilian equivalent of tracing – would form part of Agostina's trust patrimony, whereas the assets with which she is vested beneficially are held in her personal patrimony. Stefano's access to the assets of the trust operates differently in Scotland, as compared to English law. Stefano continues to enjoy a claim-right against Agostina that she pay him £50,000. The contract was made between Agostina and Stefano. Stefano brings legal proceedings against Agostina for payment of the debt she owes him. However, unlike in England, Stefano will levy judgment directly against Agostina's trust patrimony. Stefano does not claim through Agostina's rights of indemnity. Furthermore, unlike in England, Stefano has no *prima facie* mechanism for levying judgment against Agostina's personal patrimony.[115] Because she incurred the debt in her proper administration of the trust fund, Stefano's recourse – in execution of his judgment against Agostina – is limited to those assets.

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[114] Kenneth Reid 'Patrimony not Equity: The Trust in Scotland' in R Valsan (n 97); Gretton 'Trusts without Equity' (2000) 49 ICLQ 599; *Royal Insurance (UK) Ltd v AMEC Construction Scotland Ltd* [2007] CSOH 179, 2008 SC 201 at para 12(b) *per* Lord Emslie; *Ted Jacob Engineering Group Inc v Matthew* [2014] CSIH 18; 2014 SC 579 at para 90 *per* Lord Drummond Young; *Glasgow City Council v The Board of Managers of Springboig St John's School* [2014] CSOH 76 at paras 16-20 *per* Lord Malcolm.
[115] (Ibid).

These differences have important practical consequences. In Scotland, where Stefano does not claim the trust assets through Agostina's rights of indemnity, he need not be concerned with the state of the account between Agostina and her beneficiaries.

Although civil law countries may recognise the possibility of one person holding more than a single patrimony, a patrimony is still thought of as entailing a universality of law, where assets and liabilities are united either by a person's life goals or with reference to a scheme they are administering. A true universality of law means that the assets of that universality fully respond to its debts and only to those debts. It also means that the debts of that universality cannot be enforced against other patrimonies. The Scottish trust reflects this idea. As we have seen, Agostina's trust creditors levy judgment against Agostina's trust patrimony and only against that patrimony. Furthermore, Agostina's personal creditors levy judgment against Agostina's personal patrimony and only against that patrimony. Her trust and personal patrimonies, therefore, are true universalities of law.

An English trust – Smith has argued[116] – does not fully vindicate the idea of a universality of law, because trust assets do not directly respond to trust debts and personal assets do not exclusively respond to the claims of the trustee's general creditors.

However, this thesis argues that the notion of assets and debts being united by a person's life goals or by their promotion of a scheme is not incompatible with the workings of English law. Although the precise doctrinal means through which trust liabilities are governed in English law are different from other jurisdictions, the basic idea is arguably the same. This is

[116] (n 53).

because if the running of the trust scheme is properly undertaken and certain measures are enforced, the trustee's personal assets do not respond to the trust liabilities. This is because the trustee can pay those trust liabilities from the trust assets. Her ability to do so cannot be excluded by the trust deed. In other words, her rights of indemnity are mandatory features of the trust settlement.[117] Furthermore, although *prima facie* at least, trust creditors can claim against the trustee's personal assets, the trustee can expressly provide – as we have seen – that her personal estate is protected.

For these reasons, English law provides the necessary resources to the trustee for this thesis to argue that in English law assets and liabilities are united either by the life goals of a person or by their administration of a scheme. Indeed, one reason for which trust assets do not form part of the pool available to a trustee's creditors on their bankruptcy and are not the subject of execution for judgments obtained by the trustee's general creditors, might be seen in the idea that those assets are not tied to the trustee's subjective preferences, unless permitted by the scheme itself. In other words, the trustee cannot bring to bear their life projects in their management of those assets, unless the scheme itself gives them this authority.

ii. Quebec

The Quebec model of trusts, which says that the trust constitutes a patrimony by appropriation[118], shares a feature of our Core Claim: it is the scheme which is paramount in understanding the trust.

[117] Trustee Act 2000 Section 31(1).
[118] Civil Code of Québec Article 1261.

However, Quebec law says that the trust assets do not form part of any person's patrimony: the settlor's, the trustee's or the beneficiary's.[119] It further states that no party has real rights in any of the trust assets.[120]

Cantin-Cumyn argues that Quebec civil law endows the trust itself with limited legal personality.[121] The trust, on this view, is a new *sujet de droit*, alongside the natural and the legal person. It can hold rights and be subject to obligations. The trust property, then, is vested in the trust, whose rights the trustee manages. Emerich questions the persuasiveness of this argument.[122] She draws on Smith in her response. If the trust is endowed with legal personality, it is no longer a fundamental legal institution, one that cannot be understood (exclusively at least) with reference to other juridical categories.

Emerich argues that the Scottish model is perhaps the most successful civilian instantiation of the trust.[123] This is because it preserves the idea that a patrimony must be tied to personhood. It is the trustee who holds both their personal and the trust assets. Furthermore, it safeguards the trust as a fundamental legal institution: the Scottish trust involves rights, held by the trustee, being appropriated to a scheme, whose terms the beneficiaries enforce.

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[119] Ibid.
[120] Ibid.
[121] Madeleine Cantin Cumyn, "La fiducie, un nouveau sujet de droit?", in Jacques Beaulne (ed.), Mélanges Ernest Caparros, Montreal, Wilson & Lafleur, 2002, pp. 138–139.
[122] Emerich, *Conceptualising Property Law: Integrating Common Law and Civil Law Traditions* (Edward Elgar Publishing 2018), Chapter 8, 251.
[123] Ibid 267.

B. Common Law Jurisdictions

i. *Investec* and Jersey Trusts

The nature of the Jersey trust was discussed in *Investec*.[124]

T1 was the trustee of a Jersey trust. In Guernsey proceedings, the question was whether T1 could rely on a provision of Jersey law, limiting their liability for debts incurred as trustee.

Article 32 of the Trusts (Jersey) Law [TJL] provides:

"32. Trustee's liability to third parties

(1) Where a trustee is a party to any transaction or matter affecting the trust

- (a) if the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property;

(b) if the other party does not know that the trustee is acting as trustee, any claim by the other party may be made against the trustee personally (though, without prejudice to his or her personal liability, the trustee shall have a right of recourse to the trust property by way of indemnity).

[124] *Investec* (n 51).

(2) Paragraph (1) shall not affect any liability the trustee may have for breach of trust."

It was agreed that the contracts between T1 and their trust creditors were not governed by Jersey law. The question was whether the private international law of Guernsey should apply Article 32 of the TJL. The majority of the Privy Council answered in the affirmative. For the majority, the proper characterisation of the issue went to the status of the trustee. That status was determined by Jersey Law as the law governing the trust. Article 32 effects a dual capacity in the status of the trustee: the Jersey trustee has both a fiduciary and personal capacity.[125] Where the trust creditor knows that the trustee was acting as trustee, they can only levy judgment against the trust property.[126] If the other party did not know, then the standard *prima facie* position of English law would apply: the trust creditor could levy judgment against the trustee's personal assets.

For Lord Mance, in contrast, the proper characterisation of the issue was whether the contract between T1 and the trust creditor contained a term shielding their personal estate from any claims brought by trust creditors. That was to be decided with reference to the proper law of the contract.[127] On Lord Mance's view, the TJL simply departs from the general rule in English law that a trustee must expressly stipulate in their contract that their personal estate will be shielded from the execution of judgments made by trust creditors. That was the extent, according to Lord Mance, to which the Jersey trust differs from the English trust. It does not effect a dual status of the trustee.

[125] Ibid [91]
[126] Ibid [79]
[127] Ibid [210]

Both the majority and Lord Mance agreed that the Jersey trust does not give the trust separate legal personality. They also agreed that a trust creditor's access to the trust assets remained derivative through subrogation to the trustee's rights of indemnity.[128]

a. *Investec*: Commentary

It is important to emphasise that characterisation of an issue for the purposes of private international law does not employ the same subtlety of distinctions which is appropriate when understanding the nature of institutions at the municipal level. Therefore, the majority's reasoning cannot be criticised for having taken a functional approach to the characterisation of the issue. Although there are important differences between companies and trusts, the principal one residing in the fact that the former entails the creation of a new legal person whereas the latter does not, at a more abstract level, the two can be seen to achieve similar functions, principally in their asset partitioning features and the idea of assets having been appropriated to a scheme. Where S gives an asset to T to be held on trust for B, this thesis has argued that T can be seen – at a higher-order level – to hold two pools of assets, one beneficially and the other in order to promote a scheme. Where S creates a company, he can also be seen to have dedicated assets to a scheme: a company incurs debts for particular purposes, as defined by their articles of association. Although at the domestic level it is important to understand that a trust has asset partitioning features without the creation of a new entity, for the purposes of characterising an issue as a matter of private international law, it is important – on the comity view – to take an approach which can be shared by other legal systems, such that identifying broad aims served by trusts is an appropriate logic to adopt.

[128] Ibid [56]–[63].

Furthermore, the majority's judgment brought the law in line with partnerships, which are also characterised at the international law level as entities.[129]

The majority's interpretation of the TJL is consistent with the scheme analysis. It recognises that a trustee has – at least at a higher-order level – two distinct capacities. A trustee has rights vested beneficially and rights appropriated to a scheme.

[129] Ibid [83].

Chapter IV

Partnerships and Deceased Estates: A Comparison with Trusts

Chapter II was dedicated to fundamental principles of the law of trusts. In the last chapter we examined a trust's asset partitioning features. The ideas we explored in the previous two chapters will be important in understanding partnerships and deceased estates.

Consistently with our Core Claim, in this chapter we will argue that partnerships and deceased estates are to be understood with reference to the scheme to which assets have been devoted. Both schemes, like with trusts, make scheme beneficiaries residual claimants to the fund's property, both during the scheme's existence and at its end, in the specific sense that the rights of scheme managers and scheme creditors are satisfied prior to those of the beneficiaries.

I. Partnerships

We will draw on the following example: *Lemon Lovers (A Firm)*:

Debora, Brenda and Dolores agree to start a lemon producing business. They do not set up a company. Instead, a partnership deed is created. It states that the partners will be entitled to an equal share of the firm's profits during its existence. Upon dissolution, each will receive a one third share of the assets of the business. Debora, Brenda and Dolores are jointly vested with the freehold in the land on which the produce is grown. Furthermore, they are jointly vested with the legal title in ten partnership trucks used to deliver the fruit across the country.

A. Fundamental Principles

i. Rights Appropriated to a Scheme

The freehold to land and the legal title to the trucks have been devoted to the partnership business, in the totality of their jural relations.[130] These rights have been appropriated to a scheme. The content of that scheme is determined by the partnership deed and mandatory rules of partnership law.

[130] Partnership Act 1890 section 20.

ii. A Partnership is not an Entity

Like with trusts, it is important to appreciate that the partnership is not endowed with legal personality.[131] It does not enjoy the aptitude to hold rights and be the subject of obligations. Debora, Brenda and Dolores do have legal personality. They are jointly vested with the freehold and the legal title to the trucks. They are then under a duty to each other to use those rights, in the totality of their jural relations, compatibly with the partnership deed.[132]

The Partnership Act 1890 does at times refer to the "firm" as if it could hold assets or be subject to obligations. However, the statute employs this language in a non-technical sense. Just as people might say, "that trust owns a lot of property", or "that trust is having cash flow difficulties". We saw that these expressions represent the fact that the trustee is vested with a number of rights which have been appropriated to the trust scheme or that the trustee has incurred many debts in their fiduciary capacity and the assets that the trustee holds in that capacity are insufficient to discharge them.

iii. Partner as Manager and Partner as Beneficiary

With partnerships, scheme managers are scheme beneficiaries as well, whereas that is a contingent feature of the standard trust. It is therefore important to carefully distinguish the rights that partners have as scheme managers from those they have as beneficiaries of the scheme.

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[131] Ibid section 1.

[132] *Fox v Hanbury* (1776) 2 Cowp 445; 98 ER 1179; *Hope v Cust* (1774) 1 East 48, 53; 102 ER 19, 21 (per Lord Mansfield C.J.K.B.); *Sandilands v Marsh* (1819) 2 B&A 673, 106 ER 511; *Airey v Borham* (1861) 29 Beavan 620, 54 ER 768 (Ch).

iv. Partners are Agents for Each Other

The land on which the lemons are grown has to be watched at night, to avoid rival firms damaging the produce. The partnership deed authorises the firm to employ a security guard from Protection Ltd. Brenda, compatibly with the terms of the partnership, enters into a contract with Marino, a security guard from Protection Ltd. The contract states that Marino will be entitled to £50,000/year in return for his services. Because Debora, Brenda and Dolores are agents for each other, Marino enjoys a claim-right to be paid in full against each of the partners.[133]

Even if the contract with Marino had not been expressly authorised by the partnership deed, because Marino, instead of working for Protection Ltd, was affiliated to WatchDog Ltd, Marino will enjoy a claim-right to be paid in full against each of the partners if the contract was made within the scope of Brenda's ostensible authority.[134] In other words, if Marino had no reason to believe that the contract was unauthorised by the partnership deed and that it was the sort of contract Lemon Lovers Ltd would make in the usual course of its business, he can demand payment in full from any of the partners.

[133] Partnership Act 1890 section 9.
[134] Ibid section 5; *Dubai Aluminium v Salaam* [2002] UKHL 48, [2003] 2 A.C. 366 at [28] to [31] per Lord Nicholls.

v. Third-party Effects

The freehold to land and the legal title to the trucks have been appropriated to the partnership deed. As with trusts, there is no requirement that the creation of the partnership be formally registered or communicated to the public.

As with trusts, the first step in understanding partnerships is in identifying the bundle of jural relations entailed by being jointly vested with title to the land and title to the trucks. That bundle is determined by general rules of property law. In our example, by the rules of co-ownership. That bundle has been appropriated to the partnership scheme.[135]

It is not partnership law which gives Debora, Brenda and Dolores the multital claim-right against physical interference with the freehold. That claim-right is an inherent feature of being vested with the freehold title. If Filippo negligently burns a tree on the land, he will have breached a duty to Debora, Brenda and Dolores who are vested with the correlative claim-right. In order to bring legal proceedings against Filippo, the names of all the co-owners must be joined to the action.[136]

As with trusts, the devotion of assets to the partnership scheme can affect third parties independently of their state of knowledge. This is seen most clearly in its asset partitioning features.

[135] *IRC v Grey* 1994 WL 1060771 (Unreported, CA); *In re Fuller's Contract* [1933] Ch 652, 656.
[136] *Addison v Overend* (1796) 6 TR 766 – but note *Baker v Barclays Bank Ltd* [1955] 1 WLR 822, 827: the court has a procedural power to allow the claim to proceed even if the objection is made that not all the co-owners have been joined.

B. Asset Partitioning Features

The doctrinal equilibrium governing the claims of partners and partnership creditors to the assets of the firm is similar to that described in Chapter III in relation to trusts.[137] This follows from the fact that partnership property is held on trust.

i. General Creditors vs Partnership Creditors

As with trusts, then, it is important to distinguish between a partner's general creditors and partnership/trust creditors.

Debora, when she's not growing lemons, enjoys composing music. She is delivered a £60,000 grand piano. The seller – Wolfgang – is one of Debora's general creditors. The contract was not made to benefit the partnership. It was made entirely in Debora's personal and non-fiduciary capacity.

Marino, on the other hand, is a partnership creditor. The contract was made in the proper administration of the partnership business. Even where the contract was not expressly contemplated by the partnership deed, Marino is still a partnership creditor: the contract was made in the ordinary course of Lemon Lovers' business. The freehold and the legal title to the trucks and any property acquired on account of the partnership will not devolve to any of the partners' trustees in bankruptcy.

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[137] *West v Skipp* (1749) 1 Ves Sen 239; 27 ER 1006 (Ch); *Doddington v Hallett* (1750) 1 Ves Sen 497, 499; 27 ER 1165, 1166 (Ch); *Fox v Habury* (1776) 2 Cowp 445, 98 ER 1179 (KB); *Smith v De Silva* (1776) 2 Cowp 469, 98 ER 1191 (KB); *Taylor v Fields* (1799) 4 Ves Jun 396, 31 ER 201 (Ex); *Ex p Ruffin* (1801) 6 Ves Jun 119, 31 ER 970 (Ch); *Ex p Williams* (1805) 11 Ves Jun 3, 4-5; 32 ER 988-989; *Kendall v Hamilton* (1879) 4 App Cas 504, 517-518 (HL); *Re Ritson* [1898] 1 Ch 667 (Ch), [1899] 1 Ch 128 (CA).

Because partnership property is held on trust, Wolfgang, being a general creditor of one of the partners, will not be able to levy judgment against the freehold or the title to the trucks.[138] Marino, although, like a trust creditor, has no direct access to the assets of the partnership, can, through the partners' rights of indemnity, claim its funds.

ii. Rights of Indemnity

Brenda made a contract with Marino which was authorised by the terms of the partnership deed. As with trustees, the law protects a partner's personal estate for debts and liabilities incurred in pursuit of the firm's business.[139]

If any of the partners pays Marino £50,000 from their personal funds, they enjoy a liberty against the others to reimburse themselves from the partnership assets. Similarly, any of the partners can draw directly from the partnership fund to satisfy Marino's claim in full.

Marino's claim-right is against the partners. If he is not paid, he can bring proceedings against any one of them. He then has two options. The first is to levy judgment against the partner's personal assets. However, that might have been expressly excluded by contract. Furthermore, the partner's personal estate might be insufficient to pay his claim. Second, Marino can force the partner to draw on the partnership assets. In other words, Marino can be subrogated to their right of indemnity.

[138] Partnership Act 1890 section 23.
[139] Ibid section 24 (2).

The discussion in Chapter III concerning terminology and rights of indemnity is mostly applicable to partnership law. However, it is important to note that there could be a partner who does not hold legal title to the partnership assets but who does have a right of indemnity. In that case, the right of indemnity is not just a liberty against the other partners to use the partnership assets in a certain way. This is because the partner has no inherent power – derived from title to the partnership assets – to convey title in those assets, mortgage those assets or perform any other act which flows from being vested with the bundle of jural relations entailed by title. In such a case, the partner can be seen to have a *sui generis* security right over the partnership assets, to ensure that they are directed towards the payment of trade creditors.

iii. Partnership Creditors are Better Protected than Trust Creditors

Unlike in the standard trust case, a partner will acquire a right of indemnity even where the liability incurred was not expressly contemplated by the partnership deed, if it was within the partner's ostensible authority.

Where Brenda makes a contract with Marino and Marino, instead of being affiliated to Protection Ltd, works for WatchDog Ltd, because the contract was made within her ostensible authority, it gives her rights of indemnity against the other partners. Although she will be subject to personal claims by her co-partners, she can still draw on the partnership assets to pay Marino's claim in full. This means that Marino can be subrogated to that right of indemnity. Because the partners hold each other out as having authority to bind all the partners, it is justifiable to extend the rights of indemnity in this fashion. Beneficiaries are

seen as the passive recipients of the income produced by the trust property. They do not hold their trustee out as having authority to bind them.[140]

iv. Residuary Claimants

Partners are residuary claimants to the scheme's assets. Their rights are subject to the priority claims of the scheme managers and trade creditors. This is true both during the scheme's existence and at its end.

a. Scheme's Existence

Debora, Brenda and Dolores are jointly vested with the freehold on which the lemons are grown and with legal title to the trucks. By growing the lemons and delivering them to clients, the firm produces income. That income is paid into a partnership account. The partnership deed states that each partner will be entitled to £5,000 a month.

Once the partnership creditors and the scheme managers have been paid in full, if there are sufficient assets remaining, the partners will be given £5,000 by the end of the month.

b. Scheme's End

The partnership deed provides that after ten years of business, the firm will be dissolved. Debora, Brenda and Dolores – like trust beneficiaries – will only receive the residue of the

[140] A. Televantos, *Trusteeship, Ostensible Authority, and Land Registration* (2016) 80 Conv 182 – 183; *Ali v Dinc* [2020] EWHC 3055 (Ch).

assets remaining after the partnership creditors have been paid in full.[141] If, on the date of dissolution, the partnership's assets are worth £30 million and its debts are £40 million, the partners will get nothing.

When we said that partners are residuary claimants to the scheme's assets, both during its existence and upon its dissolution, we mean the partners in their capacity as scheme beneficiaries. Because in their capacity as scheme managers, the partners, alongside scheme creditors, have priority access to the assets of the business.

For example, if Brenda had paid £50,000 to Marino from her personal funds, she will recover that sum from the partnership assets before any of the partners receives £5,000 for the month or before any of the partners receives their share of the residue upon dissolution.

C. Comparison with Trusts

Consistently with our Core Claim, this chapter has made the following points so far:

1. A partnership involves rights being appropriated, in the totality of their jural relations, to a scheme.
2. Scheme beneficiaries, in the context of partnerships, are residuary claimants to the assets of the fund, in the specific sense that their rights are subject to the priority claims of scheme managers and scheme creditors.

Partnerships, therefore, share two important features with trusts.

[141] Partnership Act 1890 section 44.

One feature which the standard trust does not share with partnerships is that of ostensible authority. Partnership creditors are usually better protected than the standard trust creditor because they can be subrogated to a partner's right of indemnity, even where the liability was not expressly contemplated by the terms of the partnership deed.

It is against this background, that we can discuss *Rojoda*.[142]

i. *Rojoda*: Facts and Decision

Freehold titles were vested in partners for the benefit of their business. After dissolution of the partnership, but before full winding up, the freehold titles were transferred to Rojoda to be held on fixed trust for all the partners according to their shares under the previous partnership agreement.

The Duties Act 2008 provides that duty will be levied for any dutiable transaction, which includes the creation of a new trust.[143]

The question for the HCA was whether the conveyance of the freehold titles to Rojoda entailed the creation of a new trust and was therefore liable to duty.

The majority answered in the affirmative.

[142] *Commissioner of State Revenue v Rojoda* [2020] HCA 7 [*Rojoda*].
[143] Duties Act 2008 (WA), ss 11(1)(c), 78.

ii. *Rojoda*: The Majority's Reasoning

The reasons the majority gave for their conclusion are unconvincing.[144] They seem to categorically distinguish the rights of partners and fixed trust beneficiaries on the basis that the interests of the former are liable to be defeated by the payment to trade creditors. It is correct, as we have seen, to describe partners as enjoying rights which are defined as subject to the priority claims of scheme managers and scheme creditors. In other words, a right that once the business' debts have been discharged, they will receive whatever is due to them under the partnership agreement, both during the scheme's existence and at its end. The error in the majority's argument is in suggesting that the interest of the beneficiaries in *Agostina's Case* is somehow less scheme-defined and subject to the priority claims of trust creditors. We saw that the beneficiaries in *Agostina's Case* are also in a sense residuary claimants to the assets of the trust fund, both during the scheme's existence and at its end. Indeed, one of the possible reasons for which the majority's reasoning is flawed is because they failed to mention, at any point in their judgment, a trustee's rights of indemnity. There is therefore some inconsistency between *Rojoda* and previous HCA judgments, where a trustee's rights of indemnity were extensively discussed.[145]

iii. *Rojoda*: Gageler J's Dissent

Gageler J argued that no duty was payable. This was because upon dissolution of the partnership, the current assets were sufficient to discharge the partnership liabilities, without having to sell the freehold titles.[146] According to Gageler J, therefore, the declaration of fixed

[144] *Rojoda* (n 142) [27] – [40].
[145] *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226; [47]–[48]; *CPT Custodian* (n 28) [51]; *Carter* (n 90) [80].
[146] *Rojoda* (n 142) [94].

trust did not give the partners any new rights with additional benefits, which they did not have from the moment of dissolution.

iv. *Rojoda*: Comment

It is arguable that the majority's decision is correct even if its reasoning is wrong.

Our Core Claim is that trust beneficiaries, partners and legatees ultimately possess the same core interest: a right to due administration of a scheme, of which they are the residual claimants. Therefore, it is not tenable to argue that standard fixed trusts are different from partnerships because the latter make trade creditors priority claimants to the assets of the business.

However, there is room to suggest that a new trust does arise when assets are transferred from Scheme A (a partnership trust) to Scheme B (a standard fixed trust). This is because the interest of a standard fixed trust beneficiary is better protected than that of a partner. With a standard fixed trust, only those trust creditors whose debts were incurred compatibly with the terms of the settlement will enjoy priority access to its assets. As we have seen, trade creditors of a partnership enjoy priority access to its assets even where their claims were not expressly contemplated by the partnership deed, as long as they arose within the partners' ostensible authority. On this view, then, a new trust does arise where assets are transferred from a partnership to a standard fixed trust: the standard fixed trust beneficiary occupies a more advantageous position than that of a partner.

On the view of this thesis, then, where a partnership is created on 01 August 2021 and is dissolved on 01 September 2021 without having incurred any trade liabilities and the business' assets are transferred to a trustee to hold on a standard fixed trust for all the partners, tax is arguably due under the terms of the Duties Act 2008. This is because the

partner's interest was weaker than their interest under the fixed trust: when the partnership was running, it was liable to be defeated by the priority claims of trade creditors whose rights arose under the doctrine of ostensible authority. Under the standard fixed trust, their interest is not similarly vulnerable.

a. Can Rights of Indemnity be Waived?

A question which *Rojoda* did not discuss was whether rights of indemnity can be waived unilaterally by the trustee/partner. One response might be yes. This is because – on one view – powers of recoupment and exoneration are assets vested beneficially in the trustee, that they therefore devolve to their trustee in bankruptcy and should be treated like any other asset with which the trustee is vested beneficially: assets can usually be given away.

However, there is an important difference between a right vested beneficially and a trustee's power of exoneration. A power of recoupment can be straightforwardly seen as beneficially vested. To the extent that it exists, the trustee can do with the trust funds what they want. However, that is not the case with the power of exoneration. The trustee is under a duty to their beneficiaries to use the trust funds to pay trust creditors and make other payments authorised by the scheme. The freedom of the trustee is therefore limited when exercising powers of exoneration. This thesis takes the view that a power of exoneration is a right appropriated to a scheme. This is because that power can only be exercised compatibly with the scheme the trustee agreed to promote. This thesis therefore argues that powers of exoneration cannot be unilaterally waived by trustees. Those powers of exoneration exist as much for the benefit of trust creditors as they do for the trustee. They are part of the scheme to which the trust property has been appropriated. We can therefore see the mandatory nature of rights of indemnity as resting on the importance of protecting scheme creditors as much as scheme managers. A power of exoneration over a particular asset of the scheme can only be

waived by the scheme manager if there remain sufficient other assets in the scheme to pay scheme creditors in full. There is authority for the position that these powers of exoneration continue encumbering the rights received by scheme beneficiaries of a trust and partnership deed and any third-party transferee of rights held on trust who is not a *bona fide* purchaser for value.[147] This encumbrance is a new form of security right which the law automatically gives the trustee where trust creditors remain unpaid. This security interest is not a power of exoneration, which as we saw is an inherent feature of being vested with title to trust property and so no longer exists where the trustee divests themselves of that title.

This thesis takes the view then that powers of exoneration can only be unilaterally waived by trustees over assets of Scheme A where there remains sufficient other property of the scheme for the full payment of Scheme A's creditors. Where an asset of Scheme A is given to a party who is not a *bona fide* purchaser for value, like a beneficiary and that asset is necessary to pay Scheme A's creditors, a new security interest should be generated in favour of the trustee, to which the trustee's creditors can be subrogated.

What are the implications of this argument for the decision in *Rojoda*? It might be contended that no duty should be payable where Scheme A (a partnership) was insolvent when its assets were transferred to Scheme B (a standard fixed trust) because the trustees of Scheme A could not waive their rights of indemnity such that they continue – in this new security interest form – encumbering the assets of Scheme B, such that the beneficiaries of Scheme B did not acquire "new" rights with additional benefits, unencumbered by powers of exoneration. In other words, although assets have been conveyed from Scheme A (a partnership) to Scheme B (a standard trust), because the creditors of Scheme A can continue to lay claim to the assets of Scheme B, the beneficiaries of Scheme B do not acquire a better

[147] *Re Langmead's Trust* (1855) 20 Beavan 20, 52 ER 209.

interest that they had under Scheme A. However, even in this situation a "new" trust has arisen, because the interest of the fixed trust beneficiaries is better protected than what it was under Scheme A. For example, the trustee of Scheme B might decide to pay the trust creditors from their own pocket and waive their power of recoupment – which, because vested beneficially, is subject to the general principle that it can be unilaterally extinguished by its holder. In that case, the assets transferred from insolvent Scheme A to Scheme B will no longer be subject to the claims of Scheme A's creditors and the beneficiaries of Scheme B will enjoy an interest in Scheme B's assets that was stronger than their interest in Scheme A's assets. Therefore, the possibility of this better interest arising justifies the conclusion that a new trust was created when assets were transferred from Scheme A to Scheme B.

On the facts of *Rojoda* itself, duty was arguably payable because the former partners acquired a better interest than they ever had under the partnership trust.

II. Deceased Estates

We will draw on the following example (*In Re Paolo*):

Matilde is appointed in Paolo's will as the executor of his estate. Paolo died with the following assets: a mansion worth £60 million, an Aston Martin, a Picasso, a yacht and £400 million in a bank account. However, he speculated heavily in the stock market and left £300 million in debts. Under the terms of Paolo's will, Cecilia will receive the mansion and the Picasso, Darius the Aston Martin, whereas the residue of his estate will go to Camila.

A. Fundamentals and Asset Partitioning Rules

i. The Deceased Estate is not a Person

When we come across expressions like "the estate is full of assets" or "the estate is insolvent", what we mean is that Matilde is vested with numerous rights which she holds in order to promote a scheme, or that the rights Matilde holds in her capacity as executor are insufficient to pay the debts Paolo owed at his death.

ii. Assets vs non-Assets

Matilde is vested with all those rights of inherent economic realisability which Paolo enjoyed beneficially. Civilians use the distinction between patrimonial and extra-patrimonial rights to express this dichotomy.[148]

iii. Rights Appropriated to a Scheme

As with trusts and partnerships, it is important to identify the bundle of jural relations entailed by the vesting of a particular right. The nature of that bundle is determined by the general law, not by trusts law, partnership law or succession law. Matilde is vested with Paolo's former assets in order to promote a scheme. She owes a duty of full accountability to the parties interested in the proper administration of Paolo's estate.[149] The scheme is represented by the terms of Paolo's will and by mandatory rules governing the administration of a deceased's estate.

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[148] (n 112).
[149] *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694 707 [*Livingston*].

iv. Asset Partitioning Features

Trusts, partnerships and deceased estates share the following key asset partitioning feature: the scheme manager's general creditors have no access to the scheme's assets. This also means that the scheme's assets will not vest in the scheme manager's trustee in bankruptcy.

However, there are important differences between deceased estates on the one hand and trusts and partnerships on the other.

We saw that Matilde is the party vested with Paolo's former assets. Furthermore, she is the party now burdened by the duty to pay Paolo's former creditors. There are three types of creditor in the deceased estate scenario:

1. The deceased's creditors.
2. The executor's scheme creditors.
3. The executor's general creditors.

a. The Deceased's Creditors

Paolo's former creditors have no way of levying judgment against Matilde's personal estate, even a *prima facie* ability. This is why Smith likens the English deceased estate to the Scottish trust.[150] Because their claim did not arise in the administration of a scheme, the law does not allow for indirect access to scheme assets, or subrogation to a scheme manager's rights of indemnity. The deceased's creditors have a direct claim on the estate's assets.

[150] Smith, 'Scottish Trusts in the Common Law' (2013) 17 Edinburgh LRev 283.

b. The Executor's Scheme Creditors

With the executor's scheme creditors, the same rules governing indirect access to scheme assets applying to trust creditors and partnership creditors govern their claim.

If the debt was incurred compatibly with the scheme, they can be subrogated to Matilde's right of indemnity.[151] Given that Matilde, like trustees and partners, is not expected to bear any personal loss from her administration of Paolo's estate, she can pay their scheme creditors directly from the estate's property.

If the debt was unauthorised by the scheme, the scheme creditor has no right of indemnity.[152] The scheme creditor therefore has no indirect access to the assets of the scheme. They will be left to any claim they might have against Matilde. Furthermore, the doctrine of ostensible authority has no role, in principle, in the management of estates. The executor's general creditors have no claim on the estate's assets.[153]

c. Legatees are residual claimants

In Re Paolo, the legatees of the estate – Cecilia, Darius and Camila – enjoy a right which is defined by the priority claims of the deceased's general creditors and the executor's scheme creditors.

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[151] *Ex p. Garland (1804) 10 Ves. 110*; *Ex p. Edmonds* (1862) 4 De G.F. & J. 488.
[152] *Cutbush v Cutbush (1839) 1 Beav. 184*; *Thompson v Andrews (1832) 1 M. & K. 116*.
[153] *Farr v Newman* (1792) 4 TR 620, 629; 100 ER 1209 (KB) 1213; *Howard v Jemmet* (1768) 3 Burr 1368, 1369; 97 ER 878 (KB); *Kinderley v Jervis* (1856) 22 Beav 1, 23; 52 ER 1007 (Ch) 1016; *Re Morgan* (1881) 18 Ch D 93 (CA) 101.

B. Comparison with Trusts

Mitchell has compared the rights of trust beneficiaries and legatees.[154] This thesis draws on his findings to advance its Core Claim.

Although judges have often expressed the rights of legatees and partners so as to distinguish them from the "beneficial interest" enjoyed by trust beneficiaries, this thesis argues that those very descriptions may also be apt to define – at least in part – the rights of trust beneficiaries.[155] However, this thesis also recognises that there are important differences between the standard fixed trust on the one hand and partnerships and deceased estates on the other.

i. *Livingston*: Facts and Decision

In *Livingston*, the Privy Council had the opportunity to discuss the nature of a residuary legatee's interest in the assets of a deceased's estate.

Mrs Coulson was a residuary legatee of her husband's estate. She died before administration of that estate had been completed. Her husband's estate included land in Queensland. The question for the Privy Council was whether at the time of her death, Mrs Coulson possessed a "beneficial interest" in the land in Queensland, thereby making her estate liable to Queensland succession duty.

[154] C Mitchell, '*Commissioner of Stamp Duties v Livingston*' in B Sloan (ed) *Landmark Cases in Succession Law* (Hart, 2019).
[155] See *Danvest Pty Ltd & anor v Commissioner of State Revenue* [2017] VSCA 382 for examples of these descriptions.

The Privy Council answered in the negative. They found that a residuary legatee does not have a beneficial interest in the assets of an unadministered estate. Later authority has extended the scope of the *Livingston* decision to general and specific legatees.[156]

ii. *Livingston*: Problems

Viscount Radcliffe described the residuary legatee's core interest as being one to due administration of a scheme. The residuary legatee enjoys the claim-right correlative to the executor's duty of full accountability. *In Re Paolo*, Camila, our residuary legatee, as well as the specific legatees and the deceased's creditors, enjoy a right against Matilda that she devote Paolo's former assets to the scheme she agreed to promote. Legatees and the deceased's creditors have a right to due administration because they stand to benefit from the due administration of the estate.

As in their analysis of the rights of partners, judges provide relatively accurate descriptions of the nature of a legatee's interest in the assets of an unadministered estate. In both cases, they focus on the residual nature of that interest, giving rise to a right to the due administration of a scheme where scheme creditors and scheme managers are to be paid first. Where judges have been less persuasive, is in distinguishing those descriptions from the rights held by trust beneficiaries. They seem to think that the residual feature of a partner and legatee's interest, in the specific sense that those rights are subject to the priority claims of the scheme managers and the scheme creditors is an inappropriate way to describe a trust beneficiary's interest. We see this error both in *Rojoda* and in *Livingston*. Viscount Radcliffe implicitly suggests that although the residuary legatee has no "beneficial interest" for the purposes of Queensland succession duty, a trust beneficiary does and his reason seems to be

[156] *Re Leigh's WT* [1970] Ch 277, 281–82.

based on the residual nature of the former but not the latter. It is true, as Viscount Radcliffe points out[157] and with whom Mitchell agrees[158] (dismissing a criticism made by Smith of His Lordship's denial that estate assets are held on trust[159]), that with deceased estates, there are usually creditors from the moment the scheme is created, whose priority claims to the deceased's assets have been already noted. With the standard fixed trust, at the moment of its creation, there are no creditors. However, this does not alter the fact that the fixed trust beneficiary's interest is also residual in the specific sense that it is defined as subject to the potential claims of a trustee and trust creditors.

These failures to grasp the fundamental similarity in the core interest held by trust beneficiaries, partners and legatees – a right to due administration – has important practical consequences. By using the wrong criterion for distinguishing the rights of partners and trust beneficiaries – that of residuarity – the HCA in *Rojoda* required the payment of a tax without giving convincing reasons for its decision. Furthermore, the implication of the Privy Council's reasoning is that if Mrs Coulson had died as a fixed trust beneficiary of freehold title located in Queensland, her estate would have been liable to pay succession duty. However, the residual aspect of the residuary legatee's claim does not in itself justify treating the legatee differently from the beneficiary of a standard fixed trust.

Mitchell's article – although it addresses a number of features which liken trusts to deceased estates – does not expressly address the rights of indemnity held by the scheme managers in these two cases. This thesis does explore this area, with the finding that it

[157] *Livingston* (n 149) 707 – 708.
[158] (n 154) 272.
[159] (n 150) 134.

justifies concluding that trust beneficiaries and the legatees of a deceased's estate possess the same core right.

iii. *Livingston*: Solution

Although using the criterion that the residuary legatee's interest is defined as subject to the priority claims of creditors is not a valid reason to distinguish that interest from the right of a standard trust beneficiary, there is an important conceptual difference between the right of legatees and that of a beneficiary under a standard trust, which may justify treating the latter's interest differently from the former's in certain contexts, as in taxation cases. The most pertinent difference between trusts and deceased estates is that a legatee's residuary interest is defined with reference to the priority claims not only of the executor's scheme creditors but also the general creditors of the deceased, whereas a beneficiary's residuary interest is defined with reference only to the trustee's trust creditors' priority claims, as well as the priority claims of the trustee.

Conclusion

This chapter has argued that – ironically – the very descriptions judges have used to convey the nature of partners' and legatees' rights, could be equally well used to highlight the residuary nature of a standard fixed trust beneficiary's rights. This does not mean that there are no relevant differences between the strength of the rights held by the scheme beneficiaries in these three cases. However, this chapter's findings are compatible with our Core Claim: that the scheme beneficiaries of a trust, partnership and deceased estate each enjoy an interest which arises as part of a scheme and is subject to the claims of the scheme manager and scheme creditors, and is in that sense residual.

Chapter V

Conclusion

We have defended the Core Claim that trusts, partnerships and deceased estates entail rights being appropriated, in the totality of the jural relations to which those rights give rise, to a scheme. In each case, the rights of the scheme's beneficiaries are defined as subject to the priority claims of the scheme's manager and the scheme's creditors. In this specific sense, the interest of the scheme's beneficiaries is residual. The fact that the scheme's beneficiaries stand to profit from the due administration of the scheme gives them the correlative claim-right to the scheme manager's duty of full accountability. This thesis has argued that the idea of rights appropriated to a scheme can explain important features of the law. It arguably provides a better understanding of the law's key features than an account based on the property rights or ownership of beneficiaries.

I. The Scheme Analysis

i. Strengths of Scheme Analysis

The scheme analysis provides an effective explanation of the residual nature of the beneficiary's rights. Their interest is defined by the scheme and is just one consideration

which the scheme manager takes into account when administering the scheme. The rights of scheme managers, creditors and beneficiaries are defined by the scheme. The scheme analysis provides a straightforward explanation of the trust's main asset partitioning feature: that general creditors of the scheme manager are unable to access the scheme's assets. The reason is that the scheme manager is simply unable to bring to bear their subjective preferences in directing use of the scheme's assets, unless given authority under the scheme's terms.

The scheme analysis can explain why a trust's insolvency effect obtains where trust assets are conveyed to innocent recipients. The law ensures – compatibly with countervailing concerns as seen in the good faith purchaser for value defence – that the trust property is appropriated to the scheme. The conscience of the innocent recipient does not have to be affected for the trust's insolvency effect to exist. Rather, it is because the right conveyed had been appropriated to a scheme, alongside the law's commitment to ensuring – compatibly with countervailing concerns – that the appropriation is successful, that explains the trust's insolvency effect where no defence has been successfully invoked by the recipient. The fact that the scheme manager's duty relates to the totality of the jural relations entailed by a right explains why a trust is different from contractual licences and equitable charges.

The scheme analysis can also justify claims brought against third-party recipients of scheme assets even where the law has not defined the claimant as having a beneficial interest in the scheme's assets. The reason that scheme beneficiaries can ask for scheme assets to be returned to the fund is, again, that they stand to profit from rights being appropriated to the scheme.

It can also be argued that the scheme analysis provides an explanation for tracing in the context of trusts. Because a right has been appropriated in the totality of the jural relations to which it gives rise, that totality includes the power to transfer and acquire new rights, such that the duty of full accountability extends to authorised substitutions.

The scheme analysis provides an explanation of rights of indemnity and the rule in *Hardoon v Belilios*. The scheme analysis provides a better analysis of the trustee's right of indemnity than a model which sees the indemnity as secondary to the beneficiary's ownership. This is consistent with the Hudson and Mitchell argument.

ii. Difficulties for Scheme Analysis

This thesis has challenged an account of trusts that is based on the interest of the beneficiaries and ignores the fact that the interest is defined by the scheme and is subject to the priority claims of scheme managers and scheme creditors. However, there are some areas of the law which might be intuitively easier to reconcile with a model of trusts which takes as its starting point the interest of the beneficiaries.

For example, it might be said that if the scheme is paramount, why can the beneficiaries in some circumstances collapse it? A number of reasons might be given, to suggest that a *Saunders v Vautier* power is not inconsistent with the scheme analysis. First, the scheme's assets will only be transferred to the beneficiaries once the trustee and the trust creditors have been paid in full. In other words, the *Saunders v Vautier* power does not detract from the claim that the interest of the beneficiary is subject to the priority claims of the trustee and trust creditors at all moments of the scheme's existence. Secondly, the settlor can – through

simple drafting techniques – ensure that the scheme cannot be collapsed by the beneficiaries. In other words, if the settlor allows for the possibility of the scheme being collapsed, then that can be taken to be compatible with their intentions and the *Saunders v Vautier* power can be seen as part of the scheme. By analogy, a termination clause in a contract is not incompatible with the idea that the terms of the contract are paramount in contract law. Thirdly, the *Saunders v Vautier* power, whilst part of English law, is not a universally recognised feature of trusts law in all jurisdictions.

Another feature of the law which might seem inconsistent with the scheme analysis and more favourable to the idea that the beneficiary's interests are paramount is that of claims over unauthorised trust substitutes. If the scheme is paramount, why can the duty of full accountability extend to rights that had never been appropriated to the scheme and were never envisaged to be appropriated to the scheme? Arguably, this feature of the law is consistent with the scheme analysis. In order to incentivise the trustee to honour the scheme, we strip them of the possibility of holding beneficially any rights they acquire in breach of trust, by giving the beneficiaries the possibility of demanding that the unauthorised trust substitute is held according to the terms of the original scheme. The fact that the beneficiaries can have a charge over that unauthorised trust substitute is a way of securing the liability of the trustee and another means of incentivising the trustee to honour the terms of the scheme. Furthermore, because the consent of the beneficiaries is necessary for the full creation of the scheme, it would therefore be unfair to the beneficiaries not to give them a choice about the interest they acquire in the unauthorised substitute, where they agreed that their correlative claim-right to the trustee's duty of full accountability would only be in relation to the scheme's assets and its authorised substitutions.

iii. Trusts, Partnerships, Deceased Estates: Similarities

Our Core Claim identifies two key features which are shared across these three institutions. First, rights being appropriated, in the totality of their jural relations, to a scheme. Second, the interests of scheme managers and scheme creditors being vindicated prior to those of the beneficiaries. As we have argued, the scheme analysis offers a useful account of many features of the law in these three cases, in particular, the protection of the rights within the scheme from general creditors of the scheme manager.

iv. Trusts, Partnerships, Deceased Estates: Differences

It is wrong to use as a criterion of distinction between trusts, partnerships and deceased estates, the fact that partners and legatees' interests are subject to those of scheme managers and scheme creditors, as that is just as true with trusts. However, there are important variances which may justify treating trusts differently from partnerships or deceased estates in particular contexts, as in *Rojoda* and *Livington*. The most pertinent difference between the standard trust and partnerships resides in the doctrine of ostensible authority, which gives the former's beneficiaries a better protected residuary interest as compared to the latter's, whose residuary interest is subject to the priority claims of trade creditors whose rights arose in the firm's usual course of business, even if not expressly contemplated by the partnership deed. The most pertinent difference, meanwhile, between trusts and deceased estates is that a legatee's residuary interest is defined with reference to the priority claims not only of the executor's scheme creditors but also the general creditors of the deceased, whereas a beneficiary's residuary interest is defined with reference only to the trustee's trust creditors' priority claims, as well as the priority claims of the trustee.

II. The Future

Exploring these three institutions side by side has allowed us to see some possible differences in the treatment of the three schemes which are not justified. One important example is in the context of third-party claims. Currently, it seems that in English law only the beneficiary enjoys the correlative claim-right to the trustee's duty of full accountability to appropriate assets to a scheme. This means that only the beneficiary can ask a third-party to return property to the scheme and bring a claim against the trustee for having misappropriated trust assets or committed some other breach of trust. Lessons from deceased estates, however, show that not only scheme beneficiaries can bring claims against the scheme manager and third-party recipients: creditors who are interested in the due administration of the scheme also have claims. It is strongly arguable that trust creditors should also have the correlative claim-right to the trustee's duty of full accountability, in that the scheme is properly run, because they stand to benefit from the scheme being honoured. Indeed, in some cases, where the trust debts far exceed the trust assets only trust creditors have a practical interest in ensuring that the scheme is honoured.

Where estate assets are conveyed in breach of the scheme's terms to third parties, estate creditors[160] and legatees[161] can ask for those assets to be returned to the estate. Mitchell discusses scholars who have argued that these claims show that a party need not be vested with an equitable property right or beneficial interest in an asset (as *Livingston* shows), in

[160] *Noble v Brett* (1858) 24 Beav 499, 510; 53 ER 450 (Ch) 455; *Hooper v Smart* (1875) 1 Ch D 90, 98; *cf Haynes v Forshaw* (1853) 11 Hare 93, 105; 68 ER 1201 (Ch) 1206.
[161] *Hill v Simpson* (1802) 7 Ves Jun 152, 32 ER 63 (Ch); approvingly noted by Lord Brougham in *Wilson v Moore* (1834) 1 My & K 337, 357; 39 ER 709 (Ch) 716. See also *M'Leod v Drummond* (1810) 17 Ves Jun 152, 169–70; 34 ER 59 (Ch) 65–66; and note the Administration of Estates Act 1925, s 38.

order to bring claims against third party recipients of those assets disbursed in breach of the terms of a scheme.[162] Mitchell's analysis seems sympathetic to the argument that estate creditors and legatees can bring claims against third-party recipients of estate assets in order to ensure those assets' appropriation to a scheme.[163] Estate creditors and legatees are given the claim because they have an interest in the due administration of the scheme. On the view of this thesis, the basis of this type of claim against third-party recipients of scheme assets disbursed in breach, is the same across trusts, partnerships and deceased estates. The claims do not rest on the "beneficial interest" or "equitable proprietary rights" of the scheme beneficiaries. Rather, they are premised on the law's commitment to ensuring that assets are appropriated to their purpose. Scheme beneficiaries are then given the ability to assure the appropriation is successful, because they have an interest in the due administration of the scheme.

[162] P Parkinson, 'Reconceptualising the Express Trust' [2002] *CLJ* 657.
[163] (n 154) Section X.

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