In Depth

Trustee duties versus equity's moral conscience: trust law's inadequate facilitation of socially responsible investment

Luke Broadway*

Abstract

Socially responsible investment (SRI) aims to affect social change whilst delivering financial benefits to investors. This article explores the extent to which trust law facilitates SRI. An analysis of trustee duties will demonstrate that, though in practice SRI is possible, the opportunities to lawfully employ such policies are limited. This insufficient facilitation conflicts with equity's morally normative conscience which, it is argued, should necessitate SRI's availability. This conflict is reconciled through an analysis of equity's wider functions. Following an exploration of attempts at SRI facilitation within charity law, this article concludes by proposing an amendment to the Trustee Act 2000.

Introduction

Investment is traditionally conducted to "maximi[se] the investor's financial interests"[1] by applying "conventional financial theories to the [...] selection of assets".[2] Unfortunately, as identified by McCormack, socially responsible investment (SRI) "is not capable of easy definition partly because social investing may take different [...] forms."[3] A variety of terms have been used since the concept entered mainstream finance, with phrases such as "'social', 'ethical', 'green', 'responsible', 'socially responsible' and 'sustainable'"[4] having been employed to describe similar ideas. Regardless of this variance, it is clear that SRI's general aim is to promote varying "nonfinancial social goals as well"[5] as financial success.

Trust law plays a pivotal role in contemporary investment,[6] and is therefore a key target for the enactment of SRI policies. However, there is significant uncertainty surrounding the extent to which SRI is facilitated. Given the threatening financial ramifications for maladministration of trust funds, any equivocation surrounding the lawfulness of SRI policies will naturally encourage trustees to ignore these in favour of conventional practices. This is particularly undesirable given the financial might of institutional trusts. By way of example, pension

*Luke Broadway, BCL Candidate, Brasenose College, University of Oxford, E-mail: broadway.luke@outlook.com. I am hugely grateful to Dr David Barrett for his invaluable comments on earlier versions of this article. Many thanks also to the anonymous reviewers. All views, and any errors, are my own. For Ann and Ian.

1. John H Langbein and Richard A Posner, 'Social Investing and the Law of Trusts' (1980) 79 Mich L Rev 72.
2. Cary Krosinsky and Nick Robins, *Sustainable Investing* (Earthscan 2008) xxii.
3. Gerard McCormack, 'Sexy but not Sleazy: Trustee Investments and Ethical Considerations' (1998) 19(2) Co Law 39.
4. Krosinsky and Robins (n 2) xxi.
5. Langbein and Posner (n 1) 73.
6. Law Commission, *Fiduciary Duties of Investment Intermediaries* (Law Com No 350, 2014) ch 1.

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trusts in the UK in 2019 held a combined $3.16 trillion in assets.[7] The potential influence of such funds on the progress of SRI is therefore vast, and anything less than complete legal certainty will thwart SRI's implementation.

Practical facilitation of SRI

Contrary to the view of numerous judges and authors, SRI is indeed facilitated within the trustee duties. This is particularly clear when considered alongside portfolio theory, "quiet SRI", and the duty of the trustee to consider the interests of all beneficiaries. However, though this seems encouraging, this facilitation is in fact regrettably inadequate.

Portfolio theory

A trustee may "make any kind of investment that he could make if [. . .] absolutely entitled to the assets of the trust".[8] The trustee must exercise their discretion in accordance with the Trustee Act 2000 and the trust instrument, being strictly obliged to comply with the latter's terms.[9] Thus, if a settlor expressly authorises a trustee to engage in SRI, the trustee will not merely *be able* to do so, but will be required to.[10] This analysis is not concerned with such a situation. Instead, this article focuses on the ability of a trustee under a conventional express trust to invest in a socially responsible manner.

The trustee's right to invest is qualified by the need, under the standard investment criteria, to diversify the "investments of the trust, in so far as is appropriate to the circumstances".[11] This requires consideration of modern portfolio theory, which "emphasises the risk level of the entire portfolio rather than the risk attaching to each investment taken in its isolation".[12] Portfolio theory acknowledges that "there is a risk reduction from holding a portfolio of assets if assets do not move in perfect unison."[13] Sections of the academic community have argued that SRI policies necessarily under-diversify the trust portfolio,[14] thus running contrary to section 4(2) of the Act and resulting in a breach of trust. If the imposition of an SRI policy will necessarily result in a breach of trust for under-diversification, then SRI can never be reconciled with the trustee duties. This position must therefore be rebutted before proceeding.

Langbein and Posner adopt the example of an investment manager who decides that SRI principles oblige her to disregard socially irresponsible stocks, such as those associated with defence, discrimination, tobacco, alcohol and fossil fuels.[15] Such divestment, the authors argue, "would result in a seriously underdiversified portfolio."[16] The primary cause of this under-diversification is that SRI policies are more likely to require divestment in large firms, who "by virtue of being large, [. . .] do more wicked acts or contain more wicked people",[17] and are therefore more likely to be labelled socially irresponsible. The exclusion of large firms is undesirable, the authors continue, because larger firms have a greater weight in the performance of the market as a whole, and "it is that overall performance that one is seeking, through diversification, to track as closely as possible."[18] The result is therefore an under-diversified portfolio.

This conclusion is questionable. Although the authors' *a priori* contention that SRI policies tend to result in large

7. OECD Data, 'Pension Funds' Assets' (*Organisation for Economic Co-operation and Development*, 2020) <https://data.oecd.org/pension/pension-funds-assets.htm> accessed December 2020.
8. Trustee Act 2000, s 3(1).
9. David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton Law Relating to Trusts and Trustees* (17th edn, LexisNexis Butterworths 2006) 614.
10. *Clough v Bond* (1838) 3 My & Cr 490, 496-7.
11. Trustee Act 2000, s 4(2).
12. *Nestlé v National Westminster Bank plc* [1988] (1996) 10(1) Trust Law International 113, 115 ('*Nestlé* EWHC').
13. Edwin Elton et al, *Modern Portfolio Theory and Investment Analysis* (8th edn, Wiley 2011) 44.
14. Rosie Thornton, 'Ethical Investments: A Case of Disjointed Thinking' (2008) 67(2) CLJ 396, 406.
15. Langbein and Posner (n 1) 86.
16. ibid.
17. ibid.
18. ibid.

firm exclusion finds empirical support from the early 1990s,[19] it collapses when viewed through a more contemporary lens. It has been stated that the fundamental tenet of portfolio theory is such that "as nearly as possible *every investment held should be subject to a different external influence*."[20] Langbein and Posner's analysis is based on the notion that, in excluding larger firms, it is not possible to retain a portfolio with a sufficient variety of external influences. Lofthouse notes that "[t]o split up capital [. . .] among any kind of similar securities, all of which are subject to the same external influences, is almost tantamount to putting the money into one stock."[21] Though correct, it cannot be concluded that SRI stocks fall foul here just by virtue of their being socially responsible. Contemporary SRI encompasses such a wide variety of industries, company sizes, and nationalities that every investment may reasonably be subject to different external influences. The MSCI KLD 400 Social Index, the world's oldest SRI index,[22] encapsulates a range of sectors, including information technology, communication, health, industrials, financials, and energy.[23] Further, five of its largest constituent companies are Microsoft, Facebook, Alphabet, Tesla and Mastercard[24]: the 3rd, 7th, 5th, 8th and 17th largest companies on earth by respective market capitalisation.[25]

A simple example helps substantiate this further. A utilities company providing green energy and a company with excellent employment practices[26] are not necessarily subject to the same external influences merely by virtue of both being socially responsible. Indeed, contrary to Langbein and Posner's contention, it has been observed by Hickman, Teets and Kohls that SRI "may have relatively low correlations with the market".[27] This makes not merely for an acceptable policy, but a strong addition to a portfolio in terms of risk minimisation.

Setting aside the authors' analysis of what constitutes a significantly diversified portfolio, Langbein and Posner's US perspective also fails to transpose on a point of law. The authors base their analysis on a higher standard than that found in domestic jurisprudence, suggesting that a trustee who under-diversifies is automatically in breach of trust. On the authorities, however, England and Wales law places less emphasis on the need to diversify. As established in *Nestlé v National Westminster Bank*, it is not necessarily the case that any "failure to diversify [. . .] was a course which no prudent trustee would have followed."[28] The test for sufficient diversification should be balanced with the traditional trustee test of prudency.[29] Even if it were true that large firms are necessarily excluded by virtue of an SRI policy, this will not automatically be imprudent. In fact, smaller firms are often reported "to have larger average returns than large firms even after adjusting for risk".[30] Sufficient diversification is not binary, but a matter of degree,[31] and so long as the level of risk remains prudently managed, there will be no breach.[32]

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Given that a failure to diversify will not automatically trigger a breach of trust, and also that contemporary SRI is sufficiently broad to enable adequate, if not

19. Robert G Luther, John Matatko and Desmond C Corner, 'The Investment Performance of UK "Ethical" Unit Trusts' (1992) 5(4) Accounting, Auditing & Accountability 57, 61.
20. Investment Registry and Stock Exchange Ltd, *How to Protect Capital Invested in Stocks and Shares* (1904) 62.
21. Stephen Lofthouse, '*Nestlé v National Westminster Bank plc*: Flawed Reasoning?' (1997) Private Client Business 232, 235.
22. 'MSCI KLD 400 Social Index' (*MSCI* 2021) <https://www.msci.com/msci-kld-400-social-index> accessed March 2021.
23. 'MSCI KLD 400 Social Index (USD)' (MSCI 2021) <https://www.msci.com/documents/10199/904492e6-527e-4d64-9904-c710bf1533c6> accessed March 2021.
24. ibid.
25. 'Largest Companies by Market Cap' (*Companies Market Cap*, 10 March 2021) <https://companiesmarketcap.com/> accessed 10 March 2021.
26. Howard R Bloch and Thomas J Lareau, 'Should we Invest in "Socially Irresponsible" Firms?' (1985) 11(4) Journal of Portfolio Management 27, 27.
27. Kent A Hickman, Walter R Teets and John J Kohls, 'Social Investing and Modern Portfolio Theory' (1999) 17(1) American Business Review 72, 77.
28. [1992] EWCA Civ 12, [1993] 1 WLR 1260, 1281 ('*Nestlé* EWCA').
29. *Re Whiteley* (1886) 33 Ch D 347.
30. Richard Roll, 'A Possible Explanation of the Small Firm Effect' (1981) 36(4) Journal of Finance 879, 879.
31. Law Commission, *Fiduciary Duties of Investment Intermediaries* (n 6) para 3.80.
32. *Bartlett v Barclays Trust Co (No. 1)* [1980] Ch 515, 531.

exceptional diversification, it can be concluded that portfolio theory does facilitate SRI.

Ex post success and "Quiet SRI"

When analysing an investment's legitimacy, trust law is generally uninterested in its post-investment performance. Instead, it is the decision-making process which is scrutinised. As established in *Martin v City of Edinburgh District Council*, trustees must not "fetter their investment discretion by any *ab ante* decision."[33] Though the mechanisms of the trust are in place to encourage successful investment, a trustee is "not under a duty to achieve results".[34] Nobody can know how financial markets will advance, and consequently all that can be required of a trustee is that they exercise *intra vires* discretion, with *ultra vires* discretion resulting in breach.

正如馬丁訴愛丁堡市區議會案所規定的那樣，受託人不得“透過任何事前決定來約束他們的投資自由裁量權”

Seemingly therefore, it is impossible to align SRI with the trustee's duties, as the ethical considerations inherent in SRI are *ab ante*. However, despite trust law's strict stance, an exception has arisen. In *Cowan v Scargill*, Megarry VC holds that, if a trustee makes a "decision upon wholly wrong grounds, and yet it subsequently appears [. . .] that there are in fact good and sufficient reasons for supporting their decisions, then [. . .] they would [not] incur any liability [. . .]; for the decision itself was right."[35] The result of this *dictum* is that, even if a trustee was to unduly fetter their discretion in making an investment, any future success of this investment would retroactively justify its use, such that the discretion was no longer "*ab ante*".[36]

Thornton argues that this component of Megarry VC's Judgement is flawed, positing that, following *Martin*, "it is still the decision itself [. . .] which constitutes the breach, and not the performance".[37] This line of reasoning has merit when considered alongside the traditional enquiry into trustee behaviour.[38] As set out in *Duchess of Argyll v Beuselinck*, "[t]he standard of care to be expected of a [. . .trustee. . .] must be based on events as they occur, in prospect and not in retrospect."[39] However, this is not the only factor relevant to a court's examination following an alleged breach. Another matter concerns the practical realities of loss identification.

A trustee in breach is obliged "to restore the trust fund to the position it would have been in if the trustee had performed his obligation."[40] If a beneficiary identifies a breach, they will wish to be reimbursed. This must, however, flow both ways. Just as a beneficiary whose equitable interest has been diminished through breach will seek to recoup their losses, a beneficiary who has suffered no loss will generally have no claim. Of course, a profit accrued by a trustee through breach of their fiduciary position will be equated to a loss to the beneficiary.[41] However, in circumstances of *ab ante* investment the fiduciary will seldom have made an unlawful gain claimable by the beneficiary, so this component is irrelevant.

The loss identification requirement finds support within *Nestlé v National Westminster Bank*, in which Lord Justice Leggatt concluded that "[a] breach of duty will not be actionable, and therefore will be immaterial, if it does not cause loss."[42] Further, in *Target Holdings Ltd v Redferns*, Browne-Wilkinson LJ held that there must be "causal connection between the breach [. . .] and the loss to the trust estate for which compensation is recoverable".[43] These *dicta* shift the courts' focus away from an enquiry into mere erroneous discretion and towards a pragmatic, causative search for loss. Further, the Judgements do not merely find that an absence of loss simply bars claims. Megarry VC's holding that *ex post* success renders an initially *ab ante* decision "right"[44] and

33. [1988] SCLR 90, 97 (Emphasis added.).
34. *Nestlé* EWHC (n 12) 113.
35. [1985] Ch 270, 294.
36. *Martin* (n 33) 97 (Emphasis added.).
37. Thornton (n 14) 411.
38. Law Commission, *Fiduciary Duties of Investment Intermediaries* (n 6) para 3.81.
39. [1972] 2 Lloyd's Rep 172, 185.
40. *AIB Group (UK) plc v Redler & Co* [2014] UKSC 48, [2015] AC 1503 [134].
41. *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] WTLR 1573 [165].
42. *Nestlé* EWCA (n 28) 1283.
43. [1996] AC 421, 434.
44. *Cowan* (n 35) 294.

Leggatt LJ's finding that such success leaves a breach "immaterial"[45] both suggest that *ex post* success does not just prevent a breach from being actionable, but retroactively negates the breach entirely.

Though this causative approach has been criticised as a conflation of legal and equitable principle,[46] it is ultimately the only logical approach when considered alongside the practical realities of trust investment. It will not be possible for a beneficiary, having learned of a trustee's fettering of discretion, to backtrack and require the trustee to restore the fund to a position it would be in had they invested in any generic stock. If the socially responsible stock performs well, there will be no loss for the beneficiary to identify. There exists an entire universe of generic stocks which the trustee could have invested in. It is impossible to determine which one the trustee would have selected, and thus what position the trust should be in but for the alleged breach.

Therefore, trust law facilitates SRI in the sense that a beneficiary discovering *ab ante* discretion following *ex post* success will have no claim against the trustee. However, the application of this exception relies on the beneficiary discovering any purported indiscretion a significant time after the investment has been made. It cannot function if the beneficiary discovers *ab ante* discretion at the point of investment, as there will be no *ex post* success to retroactively justify its selection. Therefore, in order for Megarry VC's exception to be practicable, a trustee must also engage in "quiet SRI".[47]

The premise of "quiet SRI" is simple. As *Underhill and Hayton* observes, there exists "scope for trustees quietly to take into account the moral, social and political views of beneficiaries and of themselves, since it will in practice be difficult to prove that at the time a particular investment was made it was not as equally financially meritorious as certain other possible investments."[48] For traditional wealth-maximisation trusts, beneficiaries will often be unable to claim an investment is *ab ante* at the point of investment if such an investment is projected to be financially meritorious. Therefore, if a beneficiary has no evidence of the trustee's SRI motives, they will have no right to intervene. Nobles therefore concludes that, although SRI may be pursued, it cannot influence investment decisions "too much",[49] and trustees are advised to "not make [their] moral and political views known."[50] Views expressed openly will leave a trustee with the onerous task of convincing the beneficiaries, or court, that they had no unlawful SRI policy.[51]

The success of "quiet SRI" clearly depends on the financial merits of SRI. Thornton doubts the value of SRI performance data, arguing the trustee must balance these statistics with all "other available pointers and indices" to reconcile with portfolio theory.[52] Though true, data establishing SRI's past performance serves a useful purpose in assessing the practical feasibility of "quiet SRI". If SRI consistently or necessarily underperforms, it will be harder for trustees, if questioned, to demonstrate the promise of such investments, and thereby hide their SRI policy.

The data in Table 1 below, obtained through a meta-analytical assessment of studies exploring SRI's market performance, suggests that SRI's performance varies, performing both better and worse than conventional investment, though mostly matching non-SRI investment performance. This supports conclusions reached throughout the literature. McCormack, for example, writes that SRI funds "are not the best performers but neither are they the worst".[53] Similarly, Hickman, Teets and Kohls observe that, "in general, there has been no finding of improved economic performance for companies with better social performance, but neither has there been worse economic performance".[54]

45. *Nestlé* EWCA (n 28) 1283.
46. Peter Millet, 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214, 216.
47. Thornton (n 14) 417.
48. Hayton, Matthews and Mitchell (n 9) para 53.64.
49. Richard Nobles, *Pensions, Employment and the Law* (Clarendon 1993) 189.
50. ibid 190.
51. ibid.
52. Thornton (n 14) 411.
53. McCormack (n 3) 48-9.
54. Hickman, Teets and Kohls (n 27) 73.

Table 1 SRI financial performance[55]

	No. of Studies	Percentage
SRI Performance Stronger	12	24
SRI Performance Neutral/Equal	24	48
SRI Performance Weaker	14	28
Total	50	100

"Quiet SRI" may therefore be achieved without necessarily harming the beneficiaries. Given SRI's potential to match traditional investment performance, it will be difficult for the beneficiaries to prove, if deciding to confront the trustees on their policy, "that at the time [the] particular investment was made it was not as equally financially meritorious as certain other possible investments."[56]

Therefore, the *ex post* success and "quiet SRI" exceptions serve as a further route through which the trustee duties facilitate SRI. Despite this, it must be conceded that, as Thornton identifies, a situation in which trustees are only able to invest in a socially responsible manner in private, "keeping their heads down, seems very far from desirable."[57] Indeed, the *ex post* and "quiet SRI" exceptions misunderstand the contemporary nature of SRI. Though in the past SRI arose as a chance for trustees to align their moral compasses, it now exists as a process aimed at openly affecting social change. The *ex post* and "quiet SRI" exceptions are impracticable in this modern context. Thus, though SRI is facilitated, this facilitation is far from sufficient.

Respective interests of beneficiaries

A vital element of a trustee's duties is the requirement to balance the interests of the trust beneficiaries.[58] Trustees must "preserve the money for those entitled [. . .] in remainder" and "produce a reasonable income".[59] There must remain "an equitable balance", and the trustee must not "incli[ne] one way or the other".[60] If the trust instrument insists on unbalanced treatment, this must be complied with.[61] However, if unspecified, "it is the duty of trustees to hold a perfectly even hand between all their cestuis que trust".[62]

When considered alongside this particular duty, SRI is an essential component of contemporary trusteeship. The proposition is simple when using the paradigm trust model of life tenant and remainderman. A trustee, it will be argued, cannot satisfy their duty to balance the interests of the remainder and life beneficiaries unless considering the impact of socially *irresponsible* investment on future economies. An investment focusing heavily on socially irresponsible, short-term returns may indirectly detriment the financial position of the remainderman.

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Beneficiaries are not entitled to identical treatment.[63] Instead, the duty requires a discretionary balance, "holding the scales impartially between different [. . .] beneficiaries."[64] The primary dichotomy employed when assessing the trust's suitability for life tenants and remainders is that of income and capital. A life tenant will wish to receive the highest income possible, whilst a remainderman will wish for preservation of the trust capital.[65] This

職責需要自由裁量權的平衡，“在不同的[. . .]受益人之間公正地保持天平。”

55. This article employs a meta-analytical assessment to obtain a broader understanding of SRI's market performance. This sample ranges from the 1970s to 2010s to achieve a wider, more representative view, excluding any market spikes or fluctuations that may skew the data. This comprises studies from various disciplines, with the following terms being employed to identify appropriate sources: ethical, fund, trust, social responsibility, and divesting. To achieve a more representative sample, the sources related not solely to SRI trusts, but socially responsible finance in a broader context. For reasons of practicability, the sample was limited to 50 sources. The meta-analysis collected data on whether the studies established that SRI outperformed, underperformed or matched conventional market performance. Any study which could not prove stronger or weaker performance was deemed neutral or equal.
56. Hayton, Matthews and Mitchell (n 9) para 53.64.
57. Thornton (n 14) 417.
58. *Nestlé* EWCA (n 28) 1279.
59. *Whiteley* (n 29) 350.
60. *Re Pauling's Settlement Trusts (No. 2)* [1963] Ch 576, 586.
61. *Chirkinian v Larcom Trustees Ltd* [2006] WTLR 1523.
62. *Re Lepine* [1892] 1 Ch 210, 219.
63. *Edge v Pensions Ombudsman* [1998] Ch 512, 533–4.
64. *Cowan* (n 35) 287.
65. *Nestlé* EWCA (n 28) 1279.

duty therefore prohibits a trustee from investing solely in goods retaining their capital or goods providing income—a balance must be struck.

The clear difference between the positions of the life and remainder beneficiaries is chronological in nature. In investing for the life tenant, the trustee is seeking immediate returns. However, in investing for the remainderman, the trustee aims to preserve capital for the future. Although limited in scope by the statutory 125-year perpetuity period,[66] this temporal disparity is sufficiently large to witness significant social, and therefore economic, change. Adopting the paradigm example of global warming, humanity has caused significant "unintended environmental change"[67] since the industrial revolution.[68] This period of little more than 200 years[69] has seen "exponential" environmental shifts,[70] and given the continued rate of change,[71] it must be a duty of the trustee to take this into account when investing for remaindermen.

Trustees cannot predict the future, nor are they expected to.[72] However, a trustee must act with prudence,[73] a quality traditionally denoting foresight.[74] This foresight must incorporate the possibility that economies affecting the financial performance of the remainderman's trust capital are likely to change. Viederman, for example, observes that the financial sector's continued focus on short-term returns will leave near-future economies "disrupted".[75] Focusing on climate change as a tenet of social responsibility, the Intergovernmental Panel on Climate Change estimates that a doubling in greenhouse gases will result in global damages of 1.5–2 percent GDP, with greater global temperature increases potentially pushing the estimate to 20 percent GDP.[76] It is therefore unsurprising that the Charity Commission recently noted that "it is increasingly prudent for trustees to consider the factors affecting the longer-term financial sustainability of their investments."[77] This is not a concern limited to academia. Larry Fink, CEO of BlackRock, the world's largest asset manager, noted that climate change will result in "long-term crisis" even "if only a fraction of the projected impacts is realised".[78] Fink predicted therefore that "sustainability- and climate-integrated portfolios can provide better risk-adjusted returns to investors".[79]

Therefore, socially *irresponsible* investment, despite delivering strong returns for a trust's life tenant, may have detrimental financial consequences for their remainderman. This is impossible to justify, and as such it must be a necessary corollary of the trustee duty that they should invest in a socially responsible manner.

A clear barrier to this proposition's strength is its purported speculation. It may be contended that any potential effects of a socially irresponsible investment on the remainder's beneficial interest could be too remote. This question was explored in the American case of *Withers v Teachers' Retirement System*.[80] In this case, TRS, a New York pension fund, purchased $860 million of unmarketable[81] New York City bonds as part of a

66. Perpetuities and Accumulations Act 2009, s 5(1).
67. Fredrik A Jonsson, 'The Industrial Revolution in the Anthropocene' (2012) 84(3) Journal of Modern History 679, 680.
68. Simon L Lewis and Mark A Maslin, 'Defining the Anthropocene' (2015) 519 Nature 171.
69. Jonsson (n 67) 681.
70. Stephen Viederman, 'Fiduciary Duty' in Cary Krosinsky and Nick Robins (eds), *Sustainable Investing* (Earthscan 2008) 189.
71. Scott R Loarie, 'The Velocity of Climate Change' (2009) 462(24) Nature 1052, 1052.
72. Thornton (n 14) 410.
73. *Learoyd v Whiteley* (1887) 12 App Cas 727, 729.
74. William De Britaine and Herman Mann, *Human Prudence, Or, The Art by which a Man and a Woman May be Advanced to Fortune, to Permanent Honor, and to Real Grandeur* (1806) 174; Viederman (n 70) 192.
75. Viederman (n 70) 192.
76. James P Bruce, Hoesung Lee and Erik F Haites, *Climate Change 1995: Economic and Social Dimensions of Climate Change* (CUP 1996) 207.
77. Sian Hawkrigg, 'How do charities approach investing in line with their purpose and values? We want to know, and we want to help' (*Charity Commission Blog*, 15 January 2020) <https://charitycommission.blog.gov.uk/2020/01/15/how-do-charities-approach-investing-in-line-with-their-purpose-and-values-we-want-to-know-and-we-want-to-help/> accessed January 2021.
78. Richard Henderson, Billy Nauman and Andrew Edgecliffe-Johnson, 'BlackRock shakes up business to focus on sustainable investing' *The Financial Times* (14 January 2020) <https://www.ft.com/content/57db9dc2-3690-11ea-a6d3-9a26f8c3cba4> accessed February 2021.
79. ibid.
80. (1978) 447 FSupp 1248.
81. ibid 1254.

"financial plan to stave off the City's potential bankruptcy."[82] An action was brought against the TRS trustees, claiming they were in breach of trust in purchasing the bonds. Evidence was adduced establishing that if the City's pension contributions were to stop after its bankruptcy, the TRS fund would "be depleted in 8 to 10 years".[83] The Court held that the trustees were therefore not in breach. They had not made their decision with consideration to "the general public welfare",[84] but instead the best interests of the future beneficiaries, it being recognised that "continuing cash contributions from the City were crucial if the fund was to continue to operate for the benefit of all classes of beneficiaries."[85]

Withers was raised in *Cowan* in an attempt to argue that SRI was justified on the basis of protecting the long-term prosperity of the mining industry. Megarry VC rejected this argument, setting out that the mining industry's demise was a "remote possibility fall[ing] far short of the imminent disaster facing the City of New York and T.R.S. in the *Withers case*".[86] Megarry VC accordingly could not "regard any policy designed to ensure the general prosperity of coal mining as being a policy which is directed to obtaining the best possible results for the beneficiaries".[87] The connection, he argued, was "far too remote and insubstantial."[88] It may seem at surface level that Megarry VC was ardently against such arguments. However, on further analysis it becomes apparent that the Court, whether intentionally or not, leaves a window for such policies to succeed.

There are two grounds on which this window is left open: beneficiary proximity, and imminence—these will be considered in turn. Firstly, Megarry VC's *dictum* pivots on the fact that many of the union members would not be "directly affected by the prosperity of the mining industry".[89] This qualification must apply bilaterally. If accepted that when members are not affected, no policy may apply, it must also be accepted that when members may be affected, a policy may be enacted. This arises in the *Withers* case; the City's solvency had a direct, proximate impact on the fund's beneficiaries. When transposed onto the aforementioned example of climate change, one finds a situation in which all beneficiaries are directly affected. This is so by virtue of the fact that all of the world's population is a "*universal owner* of the climate problem".[90] Each human being, and consequently every beneficiary, is a stakeholder.[91] Therefore, adopting Megarry VC's *dictum*, "the beneficiaries will [...] be directly affected".[92]

The second, connected ground concerns the imminence of the future event the trustees are focusing on. Megarry VC held that the possibility of the diminishing of the mining industry was "remote", it "fall[ing] far short of the imminent disaster facing the City of New York and T.R.S. in the *Withers case*".[93] In dismissing counsel's argument on the grounds of imminence, Megarry VC is approving the reasoning of *Withers* against its specific facts. It is therefore apparent that a particularly imminent future event threatening the trust may be justifiable as a ground for imposing a specific policy in favour of the remainder beneficiaries. In *Withers*, the trustees had been informed that the bond purchases were necessary if the City was to avoid imminent bankruptcy.[94] Adopting again the model example of

82. ibid 1250.
83. ibid 1252.
84. ibid 1256.
85. ibid 1258.
86. *Cowan* (n 35) 292.
87. ibid.
88. ibid.
89. ibid.
90. Viederman (n 70) 192.
91. ibid.
92. *Cowan* (n 35) 292.
93. ibid.
94. *Withers* (n 80) 1251.

climate change, the calls for "immediate"[95] action to prevent the "imminence"[96] of "irreversible"[97] damage to the climate, and the economic and social ramifications that flow therefrom, suggest it would pass Megarry VC's test.

This invites parallels with another American case, *re London's Estate.*[98] Here, the trustees were exonerated for investing in war bonds against trust instructions.[99] The country was engaged in war at the time and as such it was held that "[u]nder th[e] circumstances, the Court should not be bound by narrow and restricted rules of law and construction."[100] The climate crisis has at times been likened to war,[101] and therefore this investment approach, imported into England and Wales law through Megarry VC's *dictum*, permits trustees to alter their investments to help maintain the longevity of the trust for the remainder beneficiary in situations of proximate, immediate crisis.[102] SRI is, in this regard, permitted within the trustee framework.

Thornton suggests that such cases are not examples of SRI, but instead standard investment in line with economic legal principle.[103] This may be correct, however if anything this further substantiates the increasingly stark connection between social responsibility and finance. Further, regardless of the label used, this is nonetheless a situation in which the trustee's duties *do* facilitate SRI.

Unfortunately, this facilitation is overly restrictive. Megarry VC's Judgement, despite transposing the American exceptions into domestic jurisprudence, sets two high hurdles that must be cleared in order to benefit. The exceptions are only available when the risks are immediate, which for many social responsibility-related threats may be too late. The Judgements of Megarry VC in *Cowan*, DJ Connor in *Withers* and Surrogate Cohalan[104] in *London* implicitly acknowledge the capacity of trusts to affect economic, and therefore social, change. However, that England and Wales law only permits trusts to be employed in this manner when the risk is immediate and proximate to the beneficiaries is inadequate. Though a contemporary application of this principle may assist in combatting nuclear arms production or climate change, it will unlikely be applicable to resolving global financial inequality, an important yet less immediately proximate matter for most beneficiaries. Therefore, though this rule can be said to facilitate SRI, it does not do so sufficiently.

> *The Judgements of Megarry VC in* Cowan, *DJ Connor in* Withers *and Surrogate Cohalanin* London *implicitly acknowledge the capacity of trusts to affect economic, and therefore social, change. However, that England and Wales law only permits trusts to be employed in this manner when the risk is immediate and proximate to the beneficiaries is inadequate*

As a final excursus, it is necessary to consider whether this line of reasoning, resulting from the trustee's duty to balance the beneficiaries' interests, has application alongside the broader scope of the word "benefit". It has been jurisprudentially observed that benefit "is a word of wide meaning [. . .] not restricted to material benefit."[105] In *Cowan* it was observed *obiter* that "the benefit of the beneficiaries [. . .does not] inevitably and solely mea[n] their financial benefit".[106] These *dicta* may support SRI as a wider element of "benefit".

95. Maria A Chakra et al, 'Immediate Action is the Best Strategy when Facing Uncertain Climate Change' (2018) 9 Nature Communications 1, 6.
96. James Hansen et al, 'Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature' (2013) 8(12) PLOS One 1, 21.
97. ibid 6.
98. (1918) 104 Misc 372, 171 NY Supp 981.
99. Leslie J Bobo, 'Nontraditional Investments of Fiduciaries: Re-Examining the Prudent Investor Rule' (1984) 33(4) Emory LJ 1067, 1091.
100. ibid 983.
101. Joseph Stiglitz, 'The climate crisis is our third world war. It needs a bold response' *The Guardian* (4 June 2010) <https://www.theguardian.com/commentisfree/2019/jun/04/climate-change-world-war-iii-green-new-deal> accessed February 2021.
102. Bobo (n 99) 1091.
103. Thornton (n 14) 412.
104. Louis C Haggerty, 'Some Aspects of the Obligations of New York Fiduciaries with Respect to the Making of Investments, I' (1947) 16(1) Fordham LRev 1, 6.
105. *Re T's Settlement Trusts* [1964] Ch 158, 161.
106. *Cowan* (n 35) 288.

Megarry VC continues that "beneficiaries might well consider that it was far better to receive less than to receive more money from [. . .] evil and tainted sources."[107] On inspection, this is little more than a rephrasing of the fundamental *Saunders v Vautier* principle,[108] allowing beneficiaries to direct trustees on how their property should be dealt with.[109] Beneficiaries may only exercise this control when they hold an "absolute indefeasible interest in the legacy",[110] meaning in trusts with both life tenants and remaindermen it is necessary for all beneficiaries to "combine"[111] in full agreement.[112] In such circumstances, the beneficiaries would be entitled to compel the trustee to operate an SRI policy. In this sense, SRI is facilitated.

In practice, this is an incredibly narrow facilitation. Often, contemporary SRI occurs within institutional trusts, which are not exempt from this need for collective beneficiary consent.[113] In one study of private sector pension trusts, only 35.5% of funds had fewer than 100 members, the remaining 64.5% ranging from 100 to over 10,000 members.[114] Therefore, as recognised by Pollard, the requisite unanimous agreement will often be impossible to obtain in practice.[115] It is therefore difficult to conclude that this component of the trustee's duties sufficiently facilitates SRI. This is especially problematic when considered alongside the trustee's duty to balance the interests of the beneficiaries. Alongside running the risk of financially harming remainder beneficiaries, socially *irresponsible* investment extends to risk potential nonfinancial harm.[116] Given that remainder beneficiaries are more likely to have to pay the future nonfinancial price for current irresponsible investment,[117] it is undesirable that nonfinancial matters may only be considered following the improbable outcome of achieving unanimous beneficial consent.

Conscience and morality

As demonstrated, there exist facilitations of SRI within the trustee duties framework. However, these facilitations are subject to significant qualifications, thwarting the practical deployment of SRI. This section therefore conducts a theoretical examination to establish whether there exists any broader facilitation of SRI within underlying equitable theory. It will be established that equity's conscience, a fundamental constituent of equitable jurisprudence, generates and forces trustees to abide by equitable obligations. The result of this relationship is the import of a moral basis into the trustee duties. The practical consequence of this moral basis is such that, when a trustee engages in immoral conduct contrary to equity's conscience, equity intervenes, finding a breach of trust. As a result, those subject to equitable obligations are compelled to act in a moral manner. These moral duties should permit a trustee to extend their discretion beyond financial criteria and in favour of a broader notion of the beneficiaries' well-being.

Equity's conscience

For centuries, conscience has retained its place as one of the key tenets underlying equitable jurisprudence. The early Courts of Chancery were inherently discretionary, employing conscience to bypass the bite of the common law.[118] This reliance on conscience was, as Klinck notes,

107. ibid.
108. (1941) 4 Beav 115.
109. *Stephenson v Barclays Bank Trust Co Ltd* [1975] 1 WLR 882, 889.
110. *Saunders v Vautier* (n 108) 116.
111. *Anson v Potter* (1879) 13 Ch D 141, 143.
112. *Stephenson v Barclays* (n 109) 889.
113. *Thorpe v Revenue and Customs Commissioners* [2010] EWCA Civ 339, [2010] STC 964 [22].
114. Pension Protection Fund, *The Purple Book: DB Pensions Universe Risk Profile* (PPF 2018) 26.
115. David Pollard, '*Saunders v Vautier* and pension trusts' (2013) 27(3) TLI 131, 132.
116. Andreas G F Hoepner and Stefan Zeume, 'Fiduciary Duty and Sin Stocks: Is Vice Really Nice?' in James P Hawlet et al (eds), *Cambridge Handbook of Institutional Investment and Fiduciary Duty* (CUP 2014) 204.
117. Malcolm Fairbrother et al, 'How Much Do People Value Future Generations? Climate Change, Trust, and Public Support for Future-Oriented Policies' (Institute for Future Studies 2020) 5 <https://static1.squarespace.com/static/5c21090f8f5130d0f2e4dc24/t/5e9d96a0fac4021d8f00e44a/1587386018268/Fairbrother+et+al.+TrustFuture.20-04-17.pdf> accessed March 2021.
118. Alastair Hudson, *Equity & Trusts* (9th edn, Routledge 2017) 37.

the "hallmark of the medieval Chancery",[119] and this period has since been characterised with metaphor such as that of the "Chancellor's foot".[120] In *Earl of Oxford's Case*, the Court set out that the role of the "Office of the Chancellor is to correct [...] Consciences".[121] Though this case was decided over 400 years ago, conscience has retained its position. For example, Lord Browne-Wilkinson established in the 1996 Judgement of *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* that "[e]quity operates on the conscience of the owner of the legal interest."[122] Despite the 381-year gap between *Oxford's* and *Westdeutsche*, conscience has prevailed.

However, the mere existence of conscience within present-day judicial rhetoric does not elucidate upon its operation. The phraseology of conscience is "fluid" and "intangible",[123] and as such conscience is observed to function "in different ways [...] in contemporary equity."[124] Agnew distinguishes the operation of conscience in equitable obligations from its operation in situations of primary liability, such as restitution or estoppel.[125] Given that the trustee duties comprise, at their core, equitable obligations, any analysis of primary liabilities may be dispensed with.

The literature has struggled to agree on the precise relationship between conscience and equitable obligations. Regardless, it is undeniable that a connection exists. In *Westdeutsche*, it is established that "equitable jurisdiction to enforce trusts depends upon the conscience".[126] Regrettably, the wording "depends on" fails to offer sufficient explanation of the nature of the correlation between equitable obligations and conscience. In assessing the jurisprudence, it will be observed that the relationship between conscience and equitable duties is emanatory, with the latter stemming from the former.

A useful *dictum* can be found in *Ayliffe v Murray*, in which it is concluded that equitable obligations serve as "a burden upon the [...] conscience of the person intrusted."[127] Although this begins to suggest an obligatory relationship, it fails to go any further. Stone's phrasing helps shed light on the connection, viewing instead obligations in equity as a consequence of conscience.[128] Indeed, this conception finds contemporary judicial support. In *Re Reynolds*, for example, it is established that trustees are "conscience-bound to hold his or her legal title to the property for the benefit of the beneficiaries".[129] This *dictum* demonstrates not merely conscience's presence, but its ability to bind trustees. Similarly, in *Luke v Bridges and Christy* it is noted that one may be "bound in conscience".[130] The result of these *dicta* is such that equitable obligations stem from equity's conscience, with this "fluid"[131] entity binding the trustee to perform for the beneficiary.

Conscience is fundamentally rooted in morality. Early equity's justification for a focus on conscience stemmed from conscience's import as a measure of divine "universal and natural justice".[132] Although the religious language has disappeared from contemporary jurisprudence, it has been observed that conscience still relies on Acquinas' "external objective moral law".[133] This has also been recognised judicially, with Hoffmann J in *Sekhon v Alissa* stating that "the object of equitable institutions [...] is to give the force of law to moral obligations."[134] Conscience thus serves as a moral standard by which an individual's conduct is assessed.

119. Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Routledge 2010) 13.
120. John Selden, *Table Talk of John Selden* (Selden Society 1927) 25.
121. (1615) 1 Ch Rep 485, 486.
122. [1996] AC 669, 705.
123. Matthew Stone, 'The Contradictions of Conscience: Unravelling the Structure of Obligation in Equity' (2019) 30 Law and Critique 159, 161.
124. Matthew Harding, 'Equity and the Rule of Law' (2016) 132 LQR 278, 285.
125. Sinéad Agnew, 'The Meaning and Significance of Conscience in Private Law' (2018) 77(3) CLJ 479, 492.
126. *Westdeutsche* (n 122) 705.
127. (1740) 2 Atk 58, 60.
128. Stone (n 123) 166.
129. [2008] NZCA 122 [117].
130. (1700) 24 ER 70, 71.
131. Stone (n 123) 161.
132. John McGhee, *Snell's Equity* (31st edn, Thomson Sweet & Maxwell 2005) 7.
133. Klinck (n 119) 32; Agnew (n 125) 481.
134. [1989] 2 FLR 94, 99.

When behaviour is immoral, it fails to meet this standard, thereby "shocking [...] the conscience of the court."[135] Therefore, conscience assists equity in identifying moral behaviour.[136]

> *Conscience thus serves as a moral standard by which an individual's conduct is assessed*

Conscience's moral basis is supported by its objectivity. Birks, in doubting conscience's prolificity, posits that "[o]ur consciences are all loaded differently",[137] rendering conscience "so unspecific that it simply conceals a [judge's] private and intuitive evaluation."[138] This was mirrored in *London Regional Transport v The Mayor of London*, in which it was recognised that "[o]ne recipient may lose sleep a lot more readily than another [...] without either of them having to be considered unreasonable."[139] Though true, Hudson reminds us that conscience exists "outside the conscious mind".[140] Samet, similarly, explains the objectivity of conscience by reference to Kant's internal judge,[141] arguing that "*objective* moral norms converge so as to constitute an inner counterweight".[142] Though, as Birks submits, all consciences are different, courts are not concerned with a defendant's subjective thoughts, but whether their actions offend equity's objective, morally normative conscience. A contemporary judicial statement of such may be taken from *Pitt v Holt*, in which Lord Walker held that "the evaluation of what is or would be unconscionable must be objective."[143] Although the application of equity's conscience, as Walker LJ continues, cannot be determined "by an elaborate set of rules",[144] it remains that conscience "is not the mere caprice of the individual chancellor".[145]

> *Courts are not concerned with a defendant's subjective thoughts, but whether their actions offend equity's objective, morally normative conscience*

Two conclusions have been reached thus far. Firstly, that conscience serves as the source of equitable obligations, and secondly that conscience is rooted in morality. These conclusions, when taken together, must result in the necessity that equitable obligations have a moral basis. When equitable obligations arise, in being "conscience-bound"[146] to fulfil them, the agent's equitable duties become "moral obligations".[147] This explains Agnew's statement that "courts regard the [...] equitable obligation as a moral duty".[148] Similarly, this conclusion substantiates Spry's famous passage, in which he asserts that "equitable principles have above all a distinctive ethical quality".[149] It is now clear that this ethicality stems from equity's morally normative conscience.

Immoral conduct and equitable intervention

Equity will intervene when its conscience has been adversely affected by immoral conduct. These situations are described as "unconscionable", signifying "that the defendant has breached an obligation which has both moral and legal significance."[150] This intervention finds

135. *Jones v Morgan* [2001] EWCA Civ 995 [33].
136. Agnew (n 125) 482.
137. Peter Birks, 'Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment' (1999) 23 Melb UL Rev 1, 21.
138. Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 UWALR 1, 17.
139. [2001] EWCA Civ 1491 [58].
140. Alastair Hudson, 'Conscience as the Organising Concept of Equity' (2016) 2(1) CJCCL 261, 277.
141. Immanuel Kant, *Metaphysics of Morals* (CUP 1996) 189.
142. Irit Samet, 'What Conscience Can Do for Equity' (2012) 3(1) Jurisprudence 13, 14.
143. [2013] UKSC 26, [2013] 2 AC 108 [125].
144. ibid [128].
145. *Johnson v United Rys Co of St Louis* 127 SW 63 (Mo 1910) 71; Dennis R Klinck, 'The Unexamined "Conscience" of Contemporary Canadian Equity' (2001) 46(3) McGill LJ 571, 589.
146. *Reynolds* (n 129) [117].
147. *Sekhon v Alissa* (n 134) 99.
148. Agnew (n 125) 487.
149. Ian Spry, *Equitable Remedies* (3rd edn, Sweet & Maxwell 1984) 1.
150. Agnew (n 125) 490.

support within the case law, the jurisprudence establishing that equity will engage in the presence of "immoral and selfish conduct"[151] and when the behaviour of a given party is "morally culpable"[152] or "morally reprehensible".[153] Conversely, equity will disengage when a trustee's actions are "free from objection on moral grounds."[154] It is a breach of the moral duties that qualifies as conduct contrary to equity's conscience. For a trustee, this will constitute a breach of their equitable obligations.

In *Jones v Morgan*, for example, the Court found that Mr Jones had exploited Mr Morgan's weakness in what was regarded "as a morally culpable manner shocking to the conscience of the court."[155] Jones had attempted to clog the equity of redemption in granting himself the right to purchase mortgaged land. Jones' immoral activity, contrary to the Court's conscience, obliged equity to intervene. This is not a case concerning an express trustee, however the explicit language of the *dictum* serves as a clear example of equity judges making a "moral value judgemen[t]"[156] in accordance with the Court's conscience.

An implicit link between morality and trustee duties is observed in *Armitage v Nurse*.[157] Though acknowledged by Millett LJ that there is no general duty of "skill and care" underlying the trustee's obligations,[158] his Lordship recognises the presence of an "irreducible core of obligations owed [...] to the beneficiaries".[159] This core requires the trustee to always act "honestly and in good faith for the benefit of the beneficiaries".[160] Though the Court avoids any discussion of the moral basis of this core, the parallels are irrefutable. Indeed, this has been noted by Colombo, who observes that "[h]onesty, like good faith, is a moral category".[161] Therefore, though the *Armitage* Court refuses to *explicitly* reach its conclusion through an analysis of equity's conscience, it still finds that trustees, at their core, are bound by underlying, unyielding moral duties. These "fundamental"[162] duties are observed to be "necessary to give substance to [...] trusts",[163] and a failure to meet them, by way of immoral conduct, renders a breach of trust.[164]

These "fundamental" duties are observed to be "necessary to give substance to [...] trusts", and a failure to meet them, by way of immoral conduct, renders a breach of trust

This recognition of a nexus between morality and equitable intervention finds difficulties in instances where it appears, *prima facie*, that an investment fiduciary has been found in breach despite being morally innocent. For example, in *Boardman v Phipps*, it was recognised that it was possible for a fiduciary to be in breach of their equitable obligations despite being "completely innocent in every way."[165] In this case the trust solicitor, despite completing a highly successful investment for the fund, was liable to account the profits he had made in doing so. The purported innocence of Boardman in this case seemingly supports Conaglen's denial of a moral basis within the trustee/fiduciary duty.[166] Conaglen writes that equity intervenes "no matter how honest [or moral] the fiduciary may have been".[167]

151. *Blackwell v Blackwell* [1929] AC 318, 334.
152. *Jones v Morgan* (n 135) [32].
153. *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, 110.
154. *G and C Kreglinger v New Patagonia Meat and Cold Storage* [1913] UKHL 1 [1914] AC 25, 36.
155. *Jones v Morgan* (n 135) [33].
156. Agnew (n 125) 503.
157. [1998] Ch 241.
158. ibid 253.
159. ibid.
160. ibid.
161. Sylviane Colombo, 'Good Faith: The Law and Morality' (1993) Denning LJ 23, 23.
162. *Armitage* (n 157) 253.
163. ibid 253–254.
164. ibid 251.
165. [1967] 2 AC 46, 123.
166. Matthew Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) 121 LQR 452, 472.
167. ibid 473.

Though Conaglen's stance has merit, it is ultimately irrelevant within this context. The moral element of the trustee/fiduciary duty as seen in stricter cases, such as *Boardman v Phipps*, exists to prevent investment fiduciaries from "being swayed by interest rather than by duty".[168] The unconscionability, as Hudson observes, arises "in the technical sense".[169] In *Boardman*-type cases, the standard moral duty is heightened such as to protect the beneficiaries' interests; it is heightened by way of prophylaxis.[170] This finds judicial support in *Parker v McKenna*, Lord Cairns reminding that the trustee's duties are "founded upon the highest [...] principles of morality".[171] Conaglen's comments may respectfully be dispensed with, meaning it must be concluded that, due to the moral basis underlying their duties, a trustee's immoral conduct will invariably cause a breach.

Connection with SRI

As has been demonstrated by various authors across various disciplines, successful SRI improves societal conditions, channelling funds into responsible practices and punishing irresponsible behaviour.[172] It is a trite position that trustees owe their duties to the trust and not, as Ali and Gold clarify, to the wider community.[173] The trustee's moral duty is owed to the beneficiary—they are "not [obliged] to act morally in a general sense."[174] However, if engaging in SRI, it may seemingly be that the trustee is investing for society, rather than for their beneficiaries, which is in clear breach of fundamental equitable principle.

Though clear that a successful implementation of SRI will have benefits for society at large, it is not necessarily tantamount to the trustee deferring her duties, owed to the trust, to wider society. As established, the duties owed by a trustee to their beneficiaries have a moral basis. Moral duties, as Williams notes, are concerned with human well-being,[175] and therefore when an SRI policy is introduced, the "decision making process becomes [...] moral in nature."[176] The moral base of the trustee duties must therefore permit a trustee to extend their discretion beyond strict financial concerns and in favour of a broader notion of the beneficiaries' well-being. Thus, it can be seen that SRI may be conducted strictly for the beneficiary, regardless of any incidental benefit to society. Similar phenomena are found in conventional trust investment. A successful investment in a traditional trust with no SRI policy will have benefits for both the beneficiaries and society at large, the latter in the form of increased capital gains[177] or income tax[178] payable on the investment.[179] This increased tax bill is incidental to the successful trust investment. This same logic carries across to SRI.

The trustee, in owing their beneficiaries duties with a moral basis, must be entitled to extend their discretion beyond strict financial criteria and in favour of a broader notion of the beneficiaries' well-being. An example of the importance of such a right is tendered by Hoepner and Zeume, who observe that the purportedly superior returns of so-called "sin stocks" (such as tobacco) may *prima facie* oblige a trustee to invest over-proportionately in cigarette manufacturers. However, this best financial interest

168. *Bray v Ford* [1896] AC 44, 51.
169. Hudson (n 140) 275.
170. Arthur B Laby, 'Juridical and Ethical Aspects of the Fiduciary Obligation' (2005) 13 Annual Review of Law and Ethics 565, 569.
171. (1874–75) LR 10 Ch App 96, 118.
172. Xavier Baraton, 'Opinion: Going green on bonds is best way to change behaviours' *The Financial Times* (28 September 2020) <https://www.ft.com/content/3a4dde53-cf88-4f03-ab9a-83bf093715ed> accessed March 2020; Caroline Flammer, 'Green Bonds: Effectiveness and Implications for Public Policy' (2020) 1 Environmental and Energy Policy and the Economy 95.
173. Paul U Ali and Martin Gold, 'An Appraisal of Socially Responsible Investments and Implications for Trustees and Other Investment Fiduciaries' (2002) University of Wollongong Faculty of Commerce Paper, 16 <https://ro.uow.edu.au/commpapers/794> accessed November 2020.
174. Law Commission, *Fiduciary Duties of Investment Intermediaries* (n 6) para 4.54.
175. Bernard Williams, *Morality: An Introduction to Ethics* (CUP 1993) 74.
176. Helen Mussell, *Values, Morals, Ethics: Corporate Social Responsibility, Care ethics & moral reasoning* (University of Cambridge Institute for Sustainability Leadership 2014) 4.
177. Taxation of Chargeable Gains Act 1992, s. 69(1).
178. Income Tax Act 2007, s. 474(1).
179. Old Mutual Wealth, *A Guide to Investment for Trustees* (OMW 2020) 11.

"is unlikely the best interest of the beneficiary from a wider well-being perspective as [. . .] investments in tobacco companies are unlikely supportive of public health and hence beneficiaries' life expectancy."[180] Though perhaps tenuous, investment in tobacco companies and its consequences for the well-being of the beneficiaries must be deemed contrary to the moral duties of the trustee, and thus should be avoided. A more concrete example is that provided by Monks, who observed that though, of course, "[t]he primary thing workers need for their retirement is money, [. . .] workers also need a safe [. . .] world in which to spend it."[181] An investment policy favouring nuclear weapons manufacturers, in having significant consequences for the well-being of beneficiaries, may be an immoral investment to make, and thus contrary to the moral basis underpinning the trustee's equitable obligations. Though divesting in such a manufacturer will incidentally benefit society at large, it has primary benefits for the beneficiary, and therefore the divestment does not unlawfully defer the beneficiaries' interest to that of society.

> *Though divesting in such a manufacturer will incidentally benefit society at large, it has primary benefits for the beneficiary, and therefore the divestment does not unlawfully defer the beneficiaries' interest to that of society*

Significant debate has surrounded the precise focal point of the trustee's duties and whether above all these exist for the trust purposes or the beneficiaries' benefit/well-being. Lord Nicholls, extra-judicially, writes that "[t]o decide whether a proposed course is for the benefit of the beneficiaries [. . .], it is necessary to decide first what is the purpose of the trust".[182] His Lordship clearly views the best interest of the beneficiary as an inseparable corollary of the trust purpose. Megarry VC, conversely, detaches the two components, indicating one may be pursued independently of the other: "the benefit of the beneficiaries [. . .does not. . .] solely mea[n] their financial benefit, even if the only object of the trust is to provide financial benefits."[183] Though courts have tended towards the former conceptualisation,[184] it is submitted that the moral duties underpinning the trustee's obligations permit a broader focus beyond the strict purpose of the trust, as per Megarry VC's approach. This is recognised in *re CL*.[185] Here, the Court prematurely severed a 78-year-old mental patient's beneficial interest. Cross J could not agree with the first instance Judge that "there must always be some element of financial advantage" within the meaning of 'benefit'.[186] Though the purpose of the trust was strictly for the patient's financial benefit, the Court appreciated that the beneficiary's benefit could extend to encapsulate the "moral"[187] connotations of the word.

Pollard posits that the existence of a wider duty to act for the beneficiaries' well-being is overly objective, arguing it would be impossible to meet, there "always be[ing] more that a trustee could do".[188] As Smith suggests, "it would be impossible to say that [the duty] had been fulfilled".[189] Following this logic, it could well be argued that *all* duties owed by trustees to their beneficiaries are limitless. For example, the duty to act in "the proper purposes" of the trust,[190] a well-established duty, could too be considered infinite, as there could always be more done to align a trust with

180. Hoepner and Zeume (n 116) 204.
181. Robert AG Monks, 'The Right Response to Seattle's Warning' *The Corporate Library* (10 April 2000); Krosinsky and Robins (n 2) 192.
182. Lord Nicholls, 'Trustees and their Broader Community: Where Duty, Morality and Ethics Converge' (1996) 70 ALJ 205, 211.
183. *Cowan* (n 35) 288.
184. *F&C Alternative Investments (Holdings) v Barthelemey* [2011] EWHC 1731 (Ch), [2012] Ch 613 [229].
185. [1969] 1 Ch 587.
186. ibid 559.
187. ibid.
188. David Pollard, *The Shortform 'Best Interests Duty': Mad, Bad and Dangerous to Know* (APL 2017) 61.
189. Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another' (2014) 130 LQR 608, 609.
190. *Re Merchant Navy Ratings Pension Fund* [2015] EWHC 448 (Ch), [2015] PLR 239 [228].

its proper purposes. If a trust is established to achieve financial maximisation, there could always be more a trustee could do to generate wealth. Indeed, Pollard's own example applies, with the duty potentially "requir[ing] a trustee to give all of her money to the trust."[191] These arguments inevitably fail because trustee duties are subject to a standard of care, which limits their scope to the "care and skill as is reasonable in the circumstances".[192] Any duty obliging the trustee to act in the beneficiary's best interest would also be subject to this statutory qualification, thus rendering its scope finite.

It has been established that the consequences of failing to act in a socially responsible manner when investing are potentially tangible, immediate, and severe. A failure to incorporate a socially responsible policy is ostensibly tantamount to socially *irresponsible* investment, the consequences of which being so "morally reprehensible"[193] as to offend equity's conscience, causing equity to intervene and trigger a breach of trust. This conclusion finds support from Smith, who argues that trustees "must stay within the boundaries of the morally contested playing field in society"; they should not act in a manner "that society does not sanction."[194] Although what constitutes unsanctioned societal behaviour shifts over time, equity is socially fluid.[195] As Lord Diplock observes, the lens through which equity assesses behaviour "depends upon the social environment".[196] Society is becoming increasingly intolerant of socially irresponsible investment behaviour.[197] Therefore, given the above analysis, it must be a theoretical component of the trustee duties to invest in a socially responsible manner.

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Equitable theory therefore dictates that trustees are to be permitted to consider the well-being of the beneficiaries when investing, thus permitting SRI. However, as observed when considering the trustee duties in practice, this theoretical facilitation of SRI is inadequately reflected in reality. There is therefore a disconnect between a trustee's duties and the equitable theory underpinning them.

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Remedying the disconnect

This disconnect, significantly thwarting the practical success of SRI, should be remedied. However, the mere fact that the current state of the law prohibits SRI is not, by itself, a sufficient justification for change. Further connection between SRI and the wider functions of equity is required to help substantiate any proposed reform.

Equity's wider roles

Trustee duties do not operate in a vacuum, but against the broader landscape of equity. Though trustees owe no obligations to society at large, equity can rightfully be viewed as a tool for combatting injustice at the collective level. Hence, it is submitted that trust law's current inadequate practical facilitation of SRI operates contrary to the wider aims of equity.

191. Pollard (n 188) 70.
192. Trustee Act 2000, s. 1(1).
193. *Multiservice Bookbinding* (n 153) 110.
194. David H Smith, 'Moral Responsibilities of Trustees: Some First Thoughts' (1992) 2(4) Nonprofit Management & Leadership 351, 358.
195. Stone (n 123) 175.
196. *Pettitt v Pettitt* (1970) AC 777, 824.
197. Simon D Norton, Aris Solomon and Jill Solomon, 'Socially Responsible Investment in the UK: Drivers and Current Issues' (2002) 27(3) Journal of General Management 1, 1.

Aristotle articulated equity as a "rectification of law in so far as law is defective on account of its generality."[198] As established, the role of equity in medieval Britain was as an extension of regal conscience. Contemporary employment of trusts has shifted from these earlier incarnations,[199] and it is sometimes suggested that, "while equity may have been created to thwart injustice, th[is] liberal approach to equity [. . .] is outdated."[200] Mason disagrees, arguing that equity retains its role, acting as a method of "meet[ing] the needs of the type of liberal democratic society [. . .of. . .] the twentieth century."[201] Mason's contention finds support from equity's role in thwarting collective injustice.

Perhaps the most explicit evidence of equity's role in this respect is within charity law. The charitable trust is a conduit through which equity may, as Dunn writes, "relieve vulnerability."[202] The 1601 Charitable Uses Act established aims such as relief for the poor and provision of accessible education.[203] Similar aims are reflected in today's legislation.[204] Equity operates alongside charities to ensure endowments are invested and distributed legitimately,[205] and therefore assists in promoting collective social justice. Indeed, that equity will intervene in a charitable trust's "failure"[206] and apply the trust property *cy-près*[207] to institutions of similar "general charitable intent",[208] rather than holding it on resulting trust for the donor,[209] indicates explicitly equity's overarching desire to counter collective injustice.

Away from charity law, equity still serves a role, even if indirectly, in thwarting collective injustice. Equity, notes Tappenden, helps "uphold standards of conduct in any interaction".[210] This is achieved through equity's conscience, as explored above. The "driving force"[211] of good conscience helps ensure moral behaviour, an absence of which exposes individuals to equitable liability.[212] This operates at the collective level, with equity intervening and imposing constructive trusts where it deems necessary to "revers[e] the unconscionable",[213] not merely where pre-existing trustee–beneficiary relationships or proprietary rights exist[214]; these values therefore permeate all social transactions.[215] As such, in insufficiently facilitating SRI, the trustee duties thwart SRI's progress, and are therefore out of synchronization with equity's wider societal role as a tool for prohibiting collective injustice.

The "driving force" of good conscience helps ensure moral behaviour, an absence of which exposes individuals to equitable liability

However, the need for broader SRI rights by trustees is justified by another wider role of equity: its function within institutional investment. Sparkes, for example, argues that SRI by institutional investment funds can be justified as a reasonable response to these funds' legal privilege of incorporation.[216] A failure to permit sufficient SRI by trustees may even undermine equity's presence within institutional

198. Aristotle, *The Nicomachean Ethics* (Penguin 2004) pt 5, ch 10, para 25, 141.
199. Ruiqiao Zhang, 'The New Role Trusts Play in Modern Financial Markets: the Evolution of Trusts from Guardian to Entrepreneur and the Reasons for the Evolution' (2017) 23(4) T&T 453, 453; Luke Broadway, '*Pars Ram Brothers* and Commercial Certainty: The Future of the Rolling Charge' (2021) 3(1) Cambridge Law Review (De Lege Ferenda) 1, 6.
200. Sue Tappenden, 'The Role of Equity in a Changing Society: from Ancient Greece to Present Day New Zealand' (2015) 21(4) T&T 389, 397.
201. Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 LQR 238, 239.
202. Alison Dunn, "As 'Cold as Charity'?: Poverty, Equity and the Charitable Trust" (2000) 20(2) Legal Studies 222, 227.
203. Charitable Uses Act 1601, appendix D.
204. Charities Act 2011, s. 2(2).
205. ibid s. 177.
206. Dunn (n 202) 229.
207. Charities Act 2011, s. 67.
208. *Re Satterthwaite's Will Trust* [1966] 1 WLR 277, 279.
209. *Air Jamaica Ltd v Charlton* [1999] UKPC 20, [1999] 1 WLR 1399, 1411.
210. Tappenden (n 200) 394.
211. Mason (n 201) 258.
212. *Westdeutsche* (n 122) 705.
213. *Powell v Thompson* [1991] 1 NZLR 597, 605.
214. *Eves v Eves* [1975] 1 WLR 1338.
215. Tappenden (n 200) 394.
216. Russell Sparkes, *Socially Responsible Investment* (Wiley 2002) 40.

investment. As Bobo notes, much of trust law developed in private trust contexts, meaning "today's professional fiduciaries are forced to defend their actions against" severely outdated principles.[217] There has already been a marked decline in the use of the trust model since the early 2000s.[218] If the trust is to retain its institutional prevalence, trustee duties must "adap[t] to current economic conditions and contemporary understanding of markets"[219] and permit SRI. If not, there is little reason why fiduciaries will continue to subject themselves to outdated principles at the risk of severe personal liability.[220]

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Reform

Despite being insufficiently facilitated in practice, there is strong theoretical justification for SRI's explicit incorporation within the trustee duties framework. It is submitted that reform is needed to bring the trustee duties in line with equitable theory, as well as equity's wider roles and aims.

This article therefore advocates for the imposition of SRI within the trustee framework. The reform's fundamental aim should be to grant trustees the power to conduct SRI. However, this must be qualified. Although the stance of this article has been such that SRI is reconcilable with the trustee duties, it remains possible that a negligently managed SRI policy may be financially detrimental to the beneficiaries. Indeed, it must be recalled that the aim of SRI is to affect social change whilst ensuring financial benefit—this latter element cannot be neglected.[221] As such, the reform should ensure that trustees do not unduly under-diversify the trust portfolio, and that investments do not financially harm the beneficiaries. Further, there must be scope for a trustee to consider potential financial and nonfinancial detriments to the beneficiaries, particularly those entitled in remainder.

Viederman recommends an entire reconceptualization of the fiduciary's duties. The "new and more meaningful" fiduciary duty should, he argues, "accep[t] that the financial world and the social and environmental worlds are one and the same."[222] Though admirable, such a fundamental alteration would be immensely challenging to implement in practice, and may not be appropriate in all circumstances. Much of Viederman's proposal can be realised without a mass overhaul, and instead through a simple statutory provision.

Care must still be taken however to ensure any statutory reform does indeed sufficiently facilitate SRI. The Charities (Protection and Social Investment) Act 2016[223] introduced part 14A of the Charities Act 2011,[224] granting charitable trustees the power to make social investments.[225] Social investing is statutorily defined as a financial act[226] carried out with a view of "directly furthering the charity's purposes" and "achieving a financial return".[227] The decision to implement part 14A followed the Law Commission's consultation on charity social investment, which concluded that "application of the Trustee Act 2000 to social

217. Bobo (n 99) 1097.
218. Office for National Statistics, *Trusts Statistics: September 2019 National Statistics* (HMRC 2019) 2.
219. *Nestlé* EWHC (n 12) 115.
220. *Ex P Lacey* (1802) 6 Ves 625, 626.
221. Sparkes (n 216) 22.
222. Viederman (n 70) 192.
223. The Charities (Protection and Social Investment) Act 2016, s. 15; The Charities (Protection and Social Investment) Act 2016 (Commencement No. 1 and Transitional Provision) Regulations 2016, SI 2016/815, reg.2(k).
224. Charities Act 2011, ss. 292A-292C.
225. ibid s. 292B(1).
226. ibid s. 292B(4)(a)–(b).
227. ibid s. 292A(2)(a)–(b).

investment decisions is unclear and confusing".[228] The charitable trustees' duties in this respect were traditionally governed by *Harries v Church Commissioners*.[229] Following Nicholls VC's Judgement, the only opportunity for a charitable trustee to divest under a socially responsible policy was the "comparatively rare"[230] scenario in which the "trustees were satisfied that investing in a company engaged in a particular type of business would conflict with the very objects their charity is seeking to achieve".[231] This was an unnecessarily restrictive approach. As Nobles observed, charitable trustees are permitted moral freedom when donating property, so the fact they could not make moral decisions when investing was unjustifiable.[232] The Judgment also left the duties of charitable trustees uncertain, providing no guidance as to when a proposed investment is sufficiently inconsistent with the charitable objectives. These observations highlight similar concerns to those raised by both the Law Commission and,[233] recently, a consortium of charities who described it as "profoundly unsatisfactory for charity trustees not to know where the line is drawn".[234] In many ways, this position invites parallels to the current inadequacy of SRI within private trust law.

One would therefore hope that part 14 A would have resolved this inadequacy. Part 14 A does extend beyond *Harries*, permitting trustees to actively seek and invest in accordance with the charity's aims rather than being limited to the reactionary duty to avoid conflicting investments. However, the Act's definition of social investment as conduct which (alongside achieving financial returns)[235] directly furthers the charity's purposes[236] leaves unavailable a wide spectrum of SRI. Charities for the advancement of education[237] may only engage in social investment when it too advances education, and not, for example, when it helps combat the weapons trade.[238] In a joint letter from law firm Bates Wells Braithwaite to the Charities Commission, a consortium of charities expressed their views that the contemporary calls for SRI, particularly as regards climate change, bring the need for a wider ambit of SRI within the charitable trustee framework.[239] Permission to bring proceedings surrounding the scope of charitable social investment was recently allowed in *Butler-Sloss v Charity Commission*.[240] Though this litigation may provide further clarification on part 14A's scope, it is clear that the reform proposed by this article must avoid the same fate as the Charities Act 2011, ensuring the rights it grants are not so restrictive as to further thwart the facilitation of SRI.

This article therefore submits that primary legislation should be introduced to append an alteration to the trustee's primary duties of investment, perhaps in the form of a hypothetical section 4 A Trustee Act 2000, entitled *socially responsible investment*. Although the intricacies of the wording should ultimately be left to statutory drafters, section 4 A could appear as follows:

4A Socially responsible investment.

(1) A trustee has the general power to make socially responsible investments.

(2) This power to make socially responsible investments does not arise where-

(a) to exercise the power would unduly under-diversify the trust portfolio; or

228. Law Commission, *Social Investment by Charities* (Law Com CP No 216, 2014) para 3.81.
229. [1992] 1 WLR 1241.
230. ibid 1246.
231. ibid.
232. Richard Nobles, 'Charities and Ethical Investment' (1992) Conv 115, 118.
233. Law Commission, *Social Investment by Charities* (n 228).
234. Letter from Bates Wells Braithwaite to the Charity Commission (4 March 2019) para 3.5, 4 <https://bateswells.co.uk/2019/03/call-for-new-landmark-judgment-on-responsible-investment-join-the-coalition-and-sign-up/> accessed January 2021.
235. Charities Act 2011, s. 292A(2)(b).
236. ibid s. 292A(2)(a).
237. *Re Hopkins' Will Trust* [1965] Ch 669.
238. See Eleanor Burt and Samuel Mansell, 'Moral Agency in Charities and Business Corporations: Exploring the Constraints of Law and Regulation' (2019) 159 J Bus Ethics 59, 66.
239. Letter from Bates Wells Braithwaite to The Charity Commission (n 234) para 3.6, 4.
240. [2021] EWHC 1104 (Ch).

(b) the proposed socially responsible investment, at the time of investment, can be proven to be less financially meritorious than other general investment opportunities.

(3) The restriction in subsection (2) does not apply where a trustee can demonstrate that a failure to conduct the proposed socially responsible investment would leave the trust's future beneficiaries vulnerable to some foreseeable financial or nonfinancial detriment.

(4) The power conferred by this section may be restricted or excluded by the trust instrument.

One could argue that this alone is adequate, and that the common law could dictate the provision's future trajectory. Although judicial input will be valuable in clarifying components of the provision,[241] leaving the decision of what constitutes SRI solely to the courts is unacceptable. As Nobles notes, this will result in the only standard available to the courts being the "purely subjective one of whether they agree with the morals or politics of the trustees."[242] An additional layer of regulation is needed.

The subjectivity identified by Nobles is rife in SRI screens, which often include "idiosyncratic biases that differ dramatically in [...] implementation".[243] This conceptual looseness has resulted in a "greenwashing" epidemic, wherein organisations disseminate "false or incomplete information [...] to present a [...] responsible public image."[244] The Ford Motor Company, for example, in launching a new hybrid SUV, marketed themselves as environmentally friendly, reminding consumers that *It Isn't Easy Being Green*.[245] In reality, the manufacturer had "the absolute worst heat-trapping gas emission performance of all the Big Six automakers."[246]

These dissonances between rhetoric and reality have spurred sector leaders to pressure lawmakers into regulating the "smorgasbord" of SRI ratings.[247] These pressures, despite industry retaliation,[248] have culminated in recent legislative intervention at the European Union (EU) level[249] in the form of an ESG (environmental, social and governance) framework, aimed at quantifying the "sustainability of activities and investments".[250] Although similar frameworks are in the domestic pipeline,[251] they remain in the Financial Conduct Authority's proposal stage.[252] Though the United Kingdom's departure from the EU may undermine the immediate value of this legislative advancement, the development nonetheless helps further evidence the trend of lawmakers' legitimisation of SRI within contemporary finance. Indeed, though the EU legislation is focused predominantly on the environmental aspect of SRI, the Union has indicated willingness to extend the framework to general social objectives.[253] This article's reforms should therefore provide a flexible reference to available ESG taxonomies. A hypothetical section 4A(5) could appear as follows:

4A Socially responsible investment.

(5) For the purposes of providing practical guidance with respect to the meaning of socially responsible investment, the Secretary of State may approve,

241. Patrick S Atiyah, 'Common Law and Statute Law' (1985) 48(1) MLR 1, 3.
242. Nobles (n 232) 117–118.
243. Jon Entine, 'The Myth of Social Investing' (2003) 16(3) Organization & Environment 352, 359 (Emphasis removed.).
244. Nancy E Furlow, 'Greenwashing in the New Millennium' (2010) 10(6) The Journal of Applied Business and Economics 22, 22.
245. ibid.
246. David Friedman and Don MacKenzie, *Automaker Rankings 2004* (UCS Publications 2004) 4; Furlow (n 244) 23.
247. Neil Hume and Henry Sanderson, 'Gold chief calls for common ESG reporting standard' *The Financial Times* (20 October 2020) <https://www.ft.com/content/e5518f78-0371-4946-b4a6-17addf7143ae> accessed December 2020.
248. Siobhan Riding, 'Asset managers lobby Brussels to delay sustainable investing rules' *The Financial Times* (31 August 2020) <https://www.ft.com/content/38fe86c2-a194-46d6-b93a-68185f5b0519> accessed December 2020.
249. Council Regulation (EC) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L198/13 ('framework to facilitate sustainable investment').
250. ibid para 6.
251. Simon Clarke, 'Climate-related Disclosures: the New Frontier?' (2020) 9 JIBFL 615, 616.
252. Financial Conduct Authority, *Proposals to enhance climate-related disclosures by listed issuers and clarification of existing disclosure obligations* (PS20/17, FCA December 2020).
253. Framework to facilitate sustainable investment (n 249) para 6.

reference, or issue any document deemed necessary.

Conclusion

This article identified several tenets of the trustee duties that facilitated SRI. However, all were subject to overwhelming qualifications. Adopting a theoretical lens, it was observed that equity's conscience, in importing a moral basis into equitable obligations, permits SRI. This resultant conflict between the theory and the insufficient practical facilitation was resolved by exploration of wider equity, it being concluded that the law cannot permit a trustee's duties to operate contrary to equity's broader aims.

One of Nicholls LJ's primary extra-judicial arguments against SRI within trust law concerned the difficulties posed by "moral issues on which there is no consensus".[254] The availability of objective ESG frameworks remedies this concern. When considered alongside the hypothetical section 4A, what is observed is a legislative framework permitting trustees to operate a wide yet controlled right to engage in SRI. This reform resolves the conflict between a trustee's practical and doctrinal duties and underlying equitable theory, synchronizing them with equity's overarching aims. Simply, the reform achieves the sufficient facilitation of SRI within the trustee duties.

Luke Broadway *is an LLB graduate from the University of Exeter and incoming BCL candidate at the University of Oxford. Luke's main interests centre around trust, property, company, commercial and employment law. E-mail: broadway.luke@outlook.com*

254. Nicholls (n 182) 211.